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Robert B. Ahdieh

Texas A&M University School of Law, ahdieh@law.tamu.edu

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The Role of Groups in Norm Transformation: A Dramatic Sketch, in Three Parts

Robert B. Ahdieh*

“[Groups] may surpass—collectively and as a body, although not individually—the quality of the few best [W]hen there are many, each has his share of goodness and practical wisdom [S]ome appreciate one part, some another, and all together appreciate all.”¹

INTRODUCTION

The promise of efficient contracting stands among the conceptual pillars of the freedom of contract. Yet for all the scholarly ink spent on that promise, real-world reliance on form contracts and the use of boilerplate terms even in tailored contracts counsels closer consideration of our vaunted freedom. Even among the highly specialized—and highly compensated—attorneys charged to draft sophisticated sovereign bond contracts, the use of boilerplate is all but universal. Notwithstanding frequently noted inefficiencies—which I outline below—an array of standardized terms has been replicated in contract after contract after contract.

After decades of inefficient lock-in, however, the drafting choices of sovereign debtors are today in the midst of dramatic transformation. Most significantly, recent years have seen a precipitous shift, from the almost invariable inclusion of unanimous consent requirements, that *all* bondholders approve any restructuring of debt obligations, to the similarly universal use of less stringent, *majority* action provisions for debt restructuring. In early 2003, few observers would have predicted any shift in the long-standing drafting convention favoring unanimity. Yet by the end of that year—with no centralized, regulatory mandate—a strong norm favoring the inclusion of collective action rather than unanimous action clauses had emerged.

* Associate Professor of Law, Emory Law School. JD, Yale University; AB, Princeton University. My thanks go to Bill Buzbee, Anna Gelpern, Mitu Gulati, Michael Kang, Marc Miller, Robert Schapiro, and Brad Setser, for their insights and guidance on earlier drafts of this essay.

¹ Aristotle, *The Politics* 108–09 (Oxford 1995) (Ernest Barker, trans).

Notably, a bewildering array of committees, networks, and other collectives of sovereign debt market participants—some formal and others less so—emerged around the shift from unanimous action clauses (“UACs”) to collective action clauses (“CACs”). At every turn, groups of market participants seemed to come together to coordinate the pursuit of common ends.² The abrupt and unexpected change in sovereign debt contracting conventions to favor CACs thus offers an opportunity to consider a potential role for the decentralized yet coordinated action of groups in facilitating norm transformation.

Legal scholars, as well as economists,³ have focused inadequate attention on the role of clearly defined groups of market participants—committees, task forces, and the like—both in social ordering generally and in the adoption and evolution of norms. One might trace this neglect to some presumptive orientation to state actors and autonomous individual actors as the sole parties of interest in social ordering. Yet, alternative stories of social ordering and norm change might also be told. Such stories, by analogy, are a staple of the dramatic literature.

One might thus recall the ill-fated families of *Romeo and Juliet*—a drama defined by collective, and coordinated, action. In Shakespeare’s familiar tale, well-defined groups struggle internally with their defining norms, while simultaneously engaging in recurrent interactions with competing groups, defined by their own, distinct norms. Another illustration might be the jury of *Twelve Angry Men*, charged to offer a collective verdict—one ultimately reached through a slow but inexorable process of internal transformation.

It is to such stories of groups that this brief Essay attempts to call greater scholarly attention. It does so with reference to the no less dramatic (if somewhat less poetic) story of the transformation of sovereign debt contracting norms in recent years.

² The sovereign debt market participants of interest herein include sovereign issuers; debt underwriters; issuer and underwriter counsel; buy- and sell-side creditors of varied character; creditor counsel; official sector institutions such as the International Monetary Fund (“IMF”), and major developed countries.

³ See Alan S. Blinder and John Morgan, *Are Two Heads Better than One?: An Experimental Analysis of Group vs. Individual Decisionmaking 2* (National Bureau of Economic Research Working Paper Series), available online at <<http://www.nber.org/papers/w7909>> (visited Mar 29, 2005):

Do decisions made by groups differ systematically from the decisions of the individuals who comprise them? That is a question infrequently asked by economists, even though economics is often characterized as the science of choice. As a profession, we analyze and glorify the virtues of freely-made, self-interested decisions. But those decisions are almost always individual choices.

Groups do, of course, make some appearance in the legal literature. The study of social norms is inherently an analysis of groups.⁴ Interest group theories—a staple of legal analysis since the percolation of Mancur Olson's work among legal scholars⁵—as well as the analysis of private legal systems⁶ and the related literature of private lawmaking⁷ are likewise about groups.⁸ With a handful of exceptions, however, legal scholars have not focused on groups as concrete, and operational, institutions.⁹ Instead, most legal analysis of groups is

⁴ See, for example, Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J Legal Studies 377, 386 (1997). See also Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 BU L Rev 813, 839 (1998) (referring to groups as entities that adopt norms).

⁵ See Mancur Olson, *The Logic of Collective Action: Public Government and the Theory of Groups* (Harvard 1965); see also Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex L Rev 873, 883–901 (1987).

⁶ Students of private legal systems (hereinafter PLS) have arguably gone furthest among legal scholars to study the dynamics and the roles of groups *qua* groups. Lisa Bernstein offers perhaps the best examples of such efforts. See, for example, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich L Rev 1724 (2001). In the latter study of the nature and operation of the cotton industry, Bernstein considers the organization and structure of two leading trade associations, see *id* at 1726, as well as the social dynamics among their members, see *id* at 1750–51. Other PLS analysis of groups can be found in the work of Gillian Hadfield. See, for example, Gillian K. Hadfield, *Privatizing Commercial Law: Lessons From ICANN*, 6 J Small & Emerging Bus L 257 (2002). This attention to groups is hardly surprising, given the important role that private groups now play across an array of regulatory fields. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U Pa L Rev 311, 369–70 (2002).

⁷ The most widely studied cases of such private lawmaking are the American Law Institute and the National Conference of Commissioners on Uniform State Laws. See, for example, Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U Pa L Rev 595 (1995). Other examples of private lawmaking have also been explored. See, for example, Gillian K. Hadfield, *Privatizing Commercial Law*, Regulation 40 (Spring 2001), available online at <<http://www.cato.org/pubs/regulation/regv24n1/hadfield.pdf>> (visited Mar 29, 2005).

⁸ Sensitivity to groups has also been a central facet of some antitrust analysis. See, for example, Maureen A. O'Rourke, *Striking a Delicate Balance: Intellectual Property, Antitrust, Contract, and Standardization in the Computer Industry*, 12 Harv J L & Tech 1, 5 (1998) (“Antitrust law has always been concerned with group activities, particularly activities among horizontal competitors.”). At the other extreme, quite diffuse forms of group action have also been explored by legal scholars. One might conceive of the incorporation strategy of the Uniform Commercial Code (“UCC”), for example, as creating a formally sanctioned role for groups in the evolution of norms. See Kraus, 26 J Legal Studies 377 (cited in note 4). When commercial norms are enforced under the UCC, norms are effectively being disseminated. This constitutes group *action*, however, only in the vaguest sense.

⁹ Among the notable exceptions are Steve Bainbridge, Eric Posner, Mark Seidenfeld, and Cass Sunstein. See Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 Vand L Rev 1 (2002); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U Chi L Rev 133 (1996); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 Cornell L Rev 486, 526–43 (2002); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L J 71 (2000). Other contributions, somewhat less directed to actual groups, might also be noted. See, for example, Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va L Rev 247

in fact directed to what Eric Posner has termed “categories” of actors—“collection[s] of people who happen to share some characteristic . . . but who do not necessarily cooperate with each other”—rather than “groups”—“collection[s] of people who choose to cooperate.”¹⁰ Perhaps for this reason, much of the study of groups tends to divest them of any independent character. Individual group members remain the relevant agents and appropriate subjects of analysis, rather than the impliedly accidental collectives in which they happen to come together.¹¹

Not surprisingly, given this state of affairs, legal analysts have only rarely focused on the dynamics of change within and among groups: How might the internal dynamics of groups drive norm transformation among their individual members? Might a group amount to something more—or at least different—than the sum of its parts? What are the external functions of groups? We have thus failed to attend to questions of how groups actually work.

Consideration of a dynamic role for groups may be especially appropriate with regard to the transformation of norms. Norms have been observed by numerous scholars to resist efficient change.¹² Sticky norms, locked in by virtue

(1999); Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 Tulane L Rev 605 (2004); Janet T. Landa, *A Theory of the Ethnically Homogenous Middleman Group: An Institutional Alternative to Contract Law*, 10 J Legal Studies 349 (1981); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 Georgetown L J 797 (2001); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 L & Contemp Probs 57 (1991); Gideon Parchomovsky and Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 Cal L Rev 75 (2004). Minimally, this Essay seeks to highlight these relatively disconnected efforts at legal analysis of groups, and encourage their integration in a coherent legal literature of groups.

Outside the legal scholarship, but widely cited within it, relevant group analysis includes the literature of group decision making following from the work of Kenneth Arrow, see Kenneth J. Arrow, *Social Choice and Individual Values* (John Wiley 2d ed 1963), and that part of interest group analysis that looks to the composition and features of distinct interest groups in gauging their likely influence, see Olson, *The Logic of Collective Action* at 33, 48 (cited in note 5). Separately, it bears noting that there has been extensive study of groups in cognitive psychology and management theory. See, for example, Daniel C. Feldman, *The Development and Enforcement of Group Norms*, 9 Academy Mgmt Rev 47 (1984); Jack A. Goncalo, *Past Success and Convergent Thinking in Groups: The Role of Group-Focused Attributions*, 34 Eur J Soc Psych 385 (2004). Finally, the growing attention to social networks—including Robert Putnam’s now proverbial bowling leagues—should also be noted. See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

¹⁰ See Posner, 63 U Chi L Rev at 135 (cited in note 9).

¹¹ Even in the analysis of interest groups, little attention is ordinarily given to the coordinated actions of groups.

¹² See, for example, Robert B. Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S Cal L Rev 277, 297–321 (2003); Gillette, 78 BU L Rev at 832–41 (cited in note 4); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 Vand L Rev 1583 (1998); Michael Klausner,

of a variety of forces—from the microeconomic influence of network effects to cognitive tendencies toward inertia—may thus require intervention to induce efficient change.¹³

This Essay points to groups as potential tools in this pursuit, suggesting they may offer an intermediate path of change between regulatory mandate and decentralized markets. Using the recent change in sovereign debt contracting practices by way of illustration, the Essay calls attention to the nature and potential importance of groups—collectives with some defined membership, which persist over time, exhibit a pattern of recurrent communication, and encourage attention to such communication in the definition and exercise of members' individual preferences. More specifically, it considers the relevance of such collectives to efficient norm change. Where some pattern of private behavior is at once inefficient but resistant to decentralized market change, groups may effectively stand in for the market—relying on private rather than public incentives to define outcomes, but offering an infrastructure of coordination lacking in a pure market dynamic. Building on this conception, the Essay offers a potential framework for the analysis of groups—as market substitutes in their internal dynamics, as market mediating in their external interactions, and, most counterintuitively, as contributing to norm change not only in their strength, but in their failure.

Part I briefly reviews the course of recent change in sovereign debt contracting norms. Drawing on the latter by way of illustration, the balance of the Essay considers *three* potential dimensions of the role of groups in norm change.¹⁴ To begin, Part II explores the internal workings of groups: How might

Corporations, Corporate Law, and Networks of Contracts, 81 Va L Rev 757, 789–815 (1995); Paul G. Mahoney and Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U Pa L Rev 2027 (2001); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U Pa L Rev 1697 (1996).

¹³ An emphasis on norms is also well warranted given their growing importance in legal analysis. See, for example, Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard 1991); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich L Rev 338 (1997). More specifically, attention to norms is appropriate in the sovereign debt markets, given the latter's reliance on actively traded portfolios. Standardization is essential to the efficiency of such secondary trading. See Ahdieh, 76 S Cal L Rev at 288–96 (cited in note 12).

It bears clarifying that the “norms” of interest in the present analysis encompass any regularity of private behavior, even if not grounded in a sense of obligation. In this regard, my analysis attempts to speak to a broader category of what might be termed “conventions,” and not only the narrower universe of “social norms.”

¹⁴ A word is in order regarding the scope of “groups,” as the term is used herein. To begin with, I do not attempt to distinguish among groups composed of public actors, private actors, or both. While the three patterns I outline might vary at the margins, depending on the composition of the group of interest, such deviations are unimportant to this introductory analysis. This is especially likely to be true where the relevant public actors are acting as market participants of a sort. On a

groups contribute to norm transformation among their members? To date, legal scholars have offered little by way of response. Groups remain black boxes in legal analysis, treated as nothing more than aggregations of their individual membership.¹⁵ In this perspective, the collective creates no added value. By contrast, I will suggest a pair of ways in which groups may produce internal norm change: by facilitating coordination and by enhancing the quality of decision making. In serving these functions, groups might be seen to serve as substitutes, or proxies, for the market.

Part III considers the external face of groups, including interactions among groups. While this has been a subject of greater attention among legal scholars, I again suggest the utility of further study. By way of a preliminary effort, I suggest potential roles for groups in facilitating negotiation across categories of market participants, in balancing power across such categories, and in internalizing network externalities. In each of these roles, groups serve a market-mediating function.

Finally, I conclude in Part IV, by briefly considering “group failure” as a third dimension of the role of groups in norm change. I posit that the conventional tendency to conceive norm change as coordination around a new norm overlooks a countervailing story of norm change—the abandonment of an existing norm. In this “loser’s history” of sorts, groups may also have a role to play. The relevant predictor of norm change is no longer the effort of groups to facilitate change, however, but their inability to hang together.

This Essay seeks to sketch the preliminary outlines of a story in which groups matter. Groups are something more than the sum of their parts, I will suggest, or at least something different. Particularly in the *unsticking* of sticky norms—a task for which legal scholars have commonly looked to “expressive law” and individual “norm entrepreneurs”¹⁶—groups might also have a role to play. Such lock-in of inefficient norms is especially likely, moreover, where

separate note, it also bears clarifying that many of the groups operating in the sovereign debt markets are comprised not of individuals, but collective entities. Thus, the banks and investment funds that populate most creditor groups are themselves “groups” of a sort. This wrinkle—though fascinating in its own right, as a question of organizational agency—is beyond the scope of this overview Essay. So long as the relevant “collective” participates in the group with a single voice, and is seen both internally and externally as a unitary actor, this complication can be left aside for purposes of the present review.

¹⁵ See Blinder and Morgan, *Are Two Heads Better than One?* at 2 (cited in note 3) (noting modeling of firms as individual decisionmakers).

¹⁶ On the role of the state in altering norms, see, for example, Lawrence Lessig, *Social Meaning and Social Norms*, 144 U Pa L Rev 2181 (1996); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va L Rev 1649 (2000). On the potential impact of individuals, or “norm entrepreneurs,” see Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum L Rev 903, 929 (1996).

coordination is the dominant strategic imperative.¹⁷ With increasing globalization and a growing role for technology in the modern economy—each of which depends upon patterns of convergence—such coordination is of ever increasing importance. Given the nature of groups as mechanisms of coordination, then, the importance of groups might also be expected to grow in the years ahead.¹⁸

I. STASIS AND CHANGE IN CONTRACTING NORMS

For much of the last century, sovereign bonds contracts issued under New York law—the majority of sovereign debt issuances, particularly by emerging markets—have included a term mandating the unanimous consent of all bondholders to any change in the financial terms of the relevant bond issue.¹⁹ Although such unanimous action clauses were not required in sovereign debt contracts, contracting party deviations from the norm of including them were all but unheard of under New York law.²⁰ For almost as long as they have been included, however, unanimous action requirements have been seen to create

¹⁷ See Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S Cal L Rev 215, 229–45 (2004); see also Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 NYU L Rev 2029, 2094 (2004).

¹⁸ Evidence of the importance of groups can readily be found across the international financial order. One might begin with an example referenced by Anna Gelpern in this volume—the Paris Club of government-to-government creditors. Notwithstanding its lack of formal status, the Paris Club has played a central role in sovereign debt restructuring for nearly fifty years. See Anna Gelpern, *Why Iraq and Argentina Might Learn from Each Other*, 6 Chi J Intl L 391 (2005). The importance of groups is further suggested by the efforts of market participants to secure membership in particular groups, including Russia's only partially successful attempt to join the G-7, producing the sometimes schizophrenic existence of the "G-7/8." Debates about the appropriate design of collective governance in the international financial order are also suggestive. See C. Fred Bergsten, *The G-20 and the World Economy* (Mar 4, 2004), available online at <<http://www.iie.com/publications/papers/bergsten0304-2.htm>> (visited Mar 29, 2005) (arguing for displacement of G-7 with more broadly representative G-20). The recurrent emergence of new groupings—such as the Global Committee of Argentina Bondholders, which emerged to coordinate Argentine creditors—may also point to groups' importance. Finally, if less substantively, one might note the competition over group appellations, as in the joint developed-country/emerging-market G-20 versus the competing developing country G-20, which famously scuttled the WTO Ministerial Meeting in Cancun, Mexico, in September 2003.

¹⁹ See generally Robert B. Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 Emory L J 691, 698–702 (2004).

²⁰ By contrast, bond contracts issued under English law have—for just as long and just as consistently—been drafted with "majority" action clauses, permitting amendment of financial terms by a supermajority of owners of the relevant bond issue. In a handful of cases, moreover, such majority action provisions were included in New York law bonds, though seemingly on account of scrivener's errors. See Anthony J. Richards and Mark Gugliatti, *The Use of Collective Action Clauses in New York Law Bonds of Sovereign Borrowers* (July 11, 2003) (Draft).

inefficient barriers to debt restructuring—an all-too-common occurrence among sovereign debtors.²¹

Such inefficiency arises from the collective action obstacles UACs place on the ability of sovereign debtors to make their own “fresh start.” With UACs, holdout creditors can reasonably be expected to resist participation in any agreed restructuring, absent the inducement of side payments outside the collective agreement.²² This prospect may unduly delay either the decision to pursue needed restructuring, or the completion of that process. In the worst case scenario, it could deter the participation needed for restructuring to occur at all. Stating it differently, UACs and the resulting potential for holdouts may increase transaction costs and reduce predictability in sovereign debt restructuring.²³ Given the foregoing, unanimous action requirements may also increase the moral hazards of sovereign debt finance. By delaying, if not preventing, efficient sovereign debt restructuring, UACs may increase the prospect of international bailouts—a recurrent response to emerging market financial crises in the 1990s. The latter prospect, in turn, encourages the moral hazard of looser restraints both in creditor lending and debtor borrowing, with attendant efficiency losses.²⁴

²¹ See G. Mitu Gulati and Kenneth N. Klee, *Sovereign Piracy*, 56 Bus Law 635, 642–43 (2001); Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 Cornell L Rev 956, 960–61 (2000).

²² See Benjamin Klein and Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J Pol Econ 615 (1981). Sovereign debt restructuring can be modeled as a standard-form Prisoner’s Dilemma game among creditors. In this familiar dynamic, a creditor will secure a higher payoff if he, *and he alone*, defects from an agreed restructuring plan by demanding a side payment for his participation. If all creditors act on this common incentive, however, the ultimate payoff to each creditor is lower than if none had defected. One may minimize defection in Prisoner’s Dilemma games, however, through repeat plays. See Robert Axelrod, *The Evolution of Cooperation* 10–11 (Basic Books 1984); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 NYU L Rev 1100, 1111 (2001). In essence, if a given participant knows that he will participate in the game recurrently, the return on any single defection, even if successfully executed (in other words, even if other players do not respond by altering their strategy), is dwarfed by the losses that follow from the relevant player’s subsequent inability to secure agreements with its counterparts. In repeat Prisoner’s Dilemma games, thus, defection ceases to be a productive strategy.

²³ See Celeste Boeri, Development, *How to Solve Argentina’s Debt Crisis: Will the IMF’s Plan Work?*, 4 Chi J Int L 245, 248 (2003); Lee C. Buchheit and G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 Emory L J 1317, 1351 (2002).

²⁴ On the inefficiencies of UACs, see generally Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off between Individual and Collective Rights*, 77 NYU L Rev 1040, 1054–56 (2002); Schwarcz, 85 Cornell L Rev at 960–62, 980, 1004 n 279 (cited in note 21). But see Nouriel Roubini and Brad Setser, *Bailouts or Bail-ins? Responding to Financial Crises in Emerging Economies* 167–69 (Institute for International Economics 2004) (challenging conventional assumption of UAC barriers to efficient debt restructuring). Notably, the collective action challenges of the sovereign debt market grew in the 1990s, with a shift from repeat-player bank financing to the use of more widely held and readily tradable bonds—a shift driven by the emerging market debt crises of the 1980s. See

Citing these successive inefficiencies of unanimous action requirements, an array of academics and practitioners, developed countries, and official sector institutions, including the International Monetary Fund (“IMF”), began to press for abandoning the practice of including UACs in New York law bonds. The industrialized nations collectively highlighted this need with the G-10’s call for the replacement of UACs with collective action clauses in 1996.²⁵ Encouragement from other international and national organizations and groups, as well as individual attorneys, economists, and others, followed. Yet the contracting parties manifested little interest in change.²⁶ Exhibiting the patterns of network effect lock-in, cognitive inertia, and information failure predicted in the economics and legal scholarship,²⁷ new and restructured sovereign debt contracts issued under New York law continued to include UACs.

Faced with this resistance, in November 2001, the IMF proposed a restructuring of the international financial architecture, by introduction of a far more extensive bankruptcy regime for sovereign states. Specifically, the IMF proposed the creation of a Sovereign Debt Restructuring Mechanism (“SDRM”) to facilitate efficient debt restructuring and thereby minimize the need for the massive international bailouts that had littered the 1990s.²⁸ Not surprisingly, the SDRM was not greeted with open arms. Market participants, from issuers to creditors and beyond, challenged the need for what was seen as a radical reshaping of the sovereign debt regime.

In resisting the SDRM, sovereign debt market participants exhibited a notable tendency to join together in organized networks, committees, and other groups based on their preference for maintenance of the status quo or a shift to one or another type of CAC. These groups, some preexisting and some emerging in direct or indirect response to the SDRM proposal, included nearly every category of sovereign debt market participant. Issuers, underwriters, and both buy-side and sell-side creditors; counsel to each of the latter groups; official

generally William W. Bratton and G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 Vand L Rev 1 (2004); see also Stephen J. Choi and G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 Emory L J 929, 939 (2004); James A. Dorn, *International Financial Crises: What Role for Government?*, 23 Cato J 1, 3 (2003); Ronald J. Silverman and Mark W. Deveno, *Distressed Sovereign Debt: A Creditor’s Perspective*, 11 Am Bankr Inst L Rev 179, 179–80, 183–84 (2003).

²⁵ See Group of Ten, *The Resolution of Sovereign Liquidity Crises: A Report to the Ministers and Governors Prepared under the Auspices of the Deputies* (May 1996), available online at <<http://www.bis.org/publ/gten03.pdf>> (visited Mar 29, 2005); see also Jack Boorman, *Alternative Approaches to Sovereign Debt Restructuring*, 23 Cato J 59, 65 (2003); Anna Gelpern, *How Collective Action Is Changing Sovereign Debt*, 22 Intl Fin L Rev 19 (May 2003).

²⁶ See Brad Setser, *The Political Economy of Sovereign Bankruptcy* 20 (Jan 1, 2005) (Draft).

²⁷ For a sample of this scholarship, see note 12.

²⁸ See Boorman, 23 Cato J at 62 (cited in note 25).

sector institutions; and developed economies such as the United States—all were represented by group or committee.²⁹ Many, in fact, were represented by a multiplicity of sometimes competing groups. Within each group, however, membership was sufficiently constrained, so as to permit active and direct communication.

The “spaghetti bowl” of sovereign debt-related networks, committees, and groups³⁰ began with a number of relatively more formal ones. The Institute for International Finance (“IIF”), an association of major financial institutions, and the Emerging Markets Traders Association (“EMTA”), a varied group of creditors and affiliated institutions, are examples. The sovereign parties, variously collected as the G-7, the G-8, and the G-20, also came together in a relatively formal fashion.³¹ Relevant groups also included less formal networks, however, such as meetings among partners in the major New York law firms with sovereign debt business, the Council on Foreign Relations’ Roundtable on Country Risk Analysis in the Post-Asia Crisis, and the Emerging Markets Eminent Persons Group (“EMEPG”).³² Additionally, certain groups joined together in yet larger arrays. Again, more structured “groups of groups” can be identified, such as the “Gang of Seven,”³³ as can less structured interactions.³⁴

Overall, whether singly or in tandem with other groups, coordinated networks of sovereign debt market participants produced a flurry of discussion and activity focused on the norms of sovereign debt contracting, especially in

²⁹ Some networking of national banks might also be noted. See Daniel K. Tarullo, *Neither Order nor Chaos: The Legal Structure of Sovereign Debt Workouts*, 53 *Emory L.J.* 657, 678 (2004).

³⁰ See Jagdish Bhagwati, *A Stream of Windows: Unsettling Reflections on Trade, Immigration, and Democracy* 290 (MIT 1998) (describing intertwined regional trade agreements as creating a “spaghetti bowl” of trade rules).

³¹ Even among sovereign parties, informal groups emerged, including the developing country-specific G-20, the G-22, and the G-33.

³² Some have even posited the various attorneys and economists, from various institutions and countries, sharing some common connection to Lee Buchheit, one of the leading sovereign debt attorneys in New York, to be a grouping of sorts.

³³ The Gang of Seven—sometimes diminished to the Gang (or Group) of Six, without the Institute for International Finance (“IIF”)—arose from the occasional coordination among seven creditor groups: the Emerging Market Traders Association (“EMTA”); the International Primary Market Association (“IPMA”); the Bond Market Association (“BMA”), the Securities Industry Association (“SIA”); the International Securities Market Association (“ISMA”); the Emerging Markets Creditors Association (“EMCA”), and the IIF. Other groups in the sovereign debt markets included the G-10 and INSOL International, an association of international accountants and lawyers specializing in turnarounds and insolvency.

³⁴ The Global Committee of Argentina Bondholders thus brought together a variety of subgroups, including Task Force Argentina (“TFA”), representing Italian retail investors in Argentine bonds; the Argentina Bondholders Committee (“ABC”), comprised of institutional investors; and the Argentine Bond Restructuring Agency (“ABRA”), representing European retail investors.

the aftermath of the SDRM proposal. Groups convened regularly, engaged in dialogue, exchanged information, and both evaluated and offered arguments in support of competing policies. In particular, CACs gained further support, as a variety of sovereign debt committees and collectives took a position favoring their adoption, offering competing model clauses, and the like.

Yet still, there appeared to be little indication of imminent change. Most significantly, sovereign issuers exhibited little interest in replacing UACs with CACs in their bond issues. In February 2003, however, the sticky norms favoring the use of assertedly inefficient UACs finally came unstuck. Taking the markets by surprise, Mexico announced its intention to offer a \$1 billion bond issue under New York law, using CACs instead of UACs. The new bond contracts, Mexico indicated, would permit amendment of basic terms, including all-important payment and timing terms, upon approval of a mere 75 percent of aggregated debt principal amounts outstanding.³⁵

Even more significant, however, was what came next. With Mexico's decision, a norm that had seemed impervious to change only months before suddenly became a thing of the past. As if on cue (or by regulatory obligation), the tide completely turned toward CACs. Mexico issued a further \$2.5 billion in CAC bonds in April 2003. Uruguay quickly followed, offering an exchange of its existing UAC bonds for new bonds with CACs. Within weeks, Brazil issued \$1 billion in CAC bonds, becoming the first speculative grade issuer to use CACs.³⁶ South Africa and South Korea followed Brazil, and late in the year, Argentina announced that it too would include CACs in its new debt issues.³⁷

By the end of 2003, consequently, the contracting norms under New York law had undergone a wholesale shift, now dictating the incorporation of collective action clauses, where they had demanded unanimous action provisions only months before. This unexpected and abrupt change in norms was decisively affirmed in 2004, with Chile, Venezuela, the Philippines, Panama, Colombia, Costa Rica, Indonesia, and Israel all issuing bonds containing CACs for the first time. By October 2004, CACs were "included in 42 percent of the stock of external sovereign debt issued by emerging markets."³⁸ After nearly a century of

³⁵ See Barry Eichengreen, Kenneth Kletzer, and Ashoka Mody, *Crisis Resolution: Next Steps* 3, 9 (Pacific Basin Working Paper Series, No PB03-05), available online at <<http://www.frbsf.org/publications/economics/pbcpapers/2003/pb03-05.pdf>> (visited Mar 29, 2005).

³⁶ Perhaps as a result, Brazil's CACs deviated from prior precedent, setting an 85 percent threshold for restructuring, rather than the previously utilized 75 percent. See *id.* at 20.

³⁷ Other countries also shifted to CACs in 2003. See Choi and Gulati, 53 *Emory L J* at 945, 949 (cited in note 24). These included South Korea, South Africa, Turkey, Peru, Belize, Guatemala, Italy, and Poland.

³⁸ The Main Wire, *U.S.'s Snow to IMFC: IMF Should Hone Surveillance Role* (Oct 2, 2004). It bears noting that a small number of countries have issued New York law bonds with UACs since

adherence to norms favoring the use of UACs, years of unrequited pressure on New York law issuers to shift from UACs to CACs, and every reasonable expectation that nothing would change anytime soon, it did—overnight.

Given the flurry of group activity in sovereign debt contracting that preceded this unexpected—yet wholesale—shift, coordinated group action may well have played a role.³⁹ The transformation of sovereign debt contracting norms thus allows us to explore the role of groups in norm change generally. In particular, three dimensions of groups' contribution to norm shifts might be considered: First, groups may serve an internal role in norm change, by coordinating and enhancing the decisions of their own members—tasks ordinarily left to decentralized markets, but perhaps alternatively facilitated by groups. Second, groups may have an external-facing role, in the general sense of promoting the policy preferences of their members, but perhaps particularly in facilitating interaction with other groups. Finally, the inability of certain groups to hold together might also contribute to norm change. Each of these roles for groups in norm transformation, as illustrated in the shift from UACs to CACs, will be considered in turn.

II. COORDINATION AND TRANSFORMATION: THE INTERNAL FUNCTIONS OF GROUPS

At the most basic level, groups facilitate norm change among their members. In this internal dynamic, groups are market substitutes of a sort. They offer a type of *structured* market. In the group interactions on the sovereign debt markets, thus, private incentives—rather than public ones—remained at the fore. Yet those incentives played themselves out not on the autonomous and anonymous playing field of the market, but within the more structured, or stylized, framework of groups.⁴⁰

Mexico's announcement. See Stephen J. Choi and G. Mitu Gulati, *What Drives Changes in Boilerplate Contracts?*, 16 (Jan 13, 2005) (Draft).

³⁹ One might posit groups to have played a limited role in the post-Mexico turn to CACs, as opposed to Mexico's own decision to shift. The tipping of the market, thus, might have been a purely market-driven response to the new information offered by Mexico's successful issue. Yet this point should not be overstated. Even before Mexico's shift, the use of English law majority action clauses offered significant information about the viability of CAC issuances, limiting the extent of the new information offered by Mexico's issue. Moreover, the relevant pool of information remained incomplete even after Mexico's issue, given Mexico's relatively strong risk profile. As such, not only Mexico's move, but the ensuing shift, requires more explanation than the market alone can offer.

⁴⁰ In the face of potential shortcomings of both markets and mandate as sources of coordination, see Part II.A, I have previously suggested a constrained role for public authorities in encouraging coordination, through the mechanism of "regulatory cues." See Ahdieh, 77 S Cal L Rev 215 (cited in note 17). Unlike conventional regulation, such cues are noncoercive. In a cueing analysis, thus,

After outlining this conception of groups immediately below, the ensuing subsections consider what it might mean for the role groups play. Specifically, I offer two potential market-substituting functions of groups. First, groups may help to facilitate coordination among their members; second, they may enhance the quality, and hence the efficiency, of collective decision making. While markets are our conventional means to these ends, groups may serve to advance them as well.

A. GROUPS AS MARKET SUBSTITUTES

Norm change, or at least decentralized norm change, is ultimately a process of coordination. At least in some circumstances, however, including particularly where an existing norm must be displaced, decentralized markets may not produce efficient norm change.⁴¹ Transition may be delayed, if it occurs at all; when it does occur, the resulting norms may not be pareto optimal. Norms have thus been posited to be particularly susceptible to lock-in, externalities, and related inefficiencies.⁴²

Yet the displacement of private incentives with public ones—a shift from occasionally ineffective market mechanisms of norm change to the somewhat oxymoronic alternative of state-mandated norm change—may be no more likely to produce desirable results. Doubts have long been raised about regulators' capacity to elect technical standards for the telecommunications industry, for digital technologies, and for the internet. Such doubts would seem equally applicable to the selection of contracting norms, such as those explored herein. In each area, a complex array of factors, subject to rapid change, calls into question the reliance on state action to relieve the shortcomings of the market.

In the face of this dilemma, consideration of intermediate institutional designs is appropriate. Specifically, one might look to an institutional scheme that draws selectively from each pole in the choice of mandate or markets. Such

public intervention milder than ordinary regulation serves as the source of coordination. At the other end of the spectrum, one might conceive of groups as facilitating coordination through something *slightly more structured* than ordinary markets. If cues are a modified form of regulation, groups may be a modified form of the market.

One might also see regulatory cues as tied to an analysis of groups in a slightly different fashion. Specifically, one might construe such cues as being directed to (or at least received by) either of two alternative subjects: Cues might be seen to offer market participants *generally* a focal point for their individualized strategic choices, thereby indirectly increasing the likelihood of coordinated outcomes. See Ahdieh, 77 S Cal L Rev at 247–55 (cited in note 17). In the alternative, however, regulatory cues might also be seen as signals to *groups* to come together to coordinate efficient change.

⁴¹ See Ahdieh, 53 Emory L J at 721–28 (cited in note 19); see also note 12.

⁴² See note 12.

a scheme would offer greater infrastructure for coordination, yet continue to rely on the interplay of private incentives. In this way, it would alleviate the shortcomings of each of the more conventional alternatives.

In technical standard setting, market participants and scholars alike have appreciated this insight, and have increasingly turned to groups of various sorts to shape standards. There has consequently emerged a conception of three ideal-type mechanisms of standardization.⁴³ Standardization through market evolution, or *de facto* standardization, begins with companies' independent development of varied technologies. If "one [technology] 'wins out' in [the] Darwinian competition for survival" of the marketplace, that technology becomes the standard, and other minority technologies die out.⁴⁴ Most significantly for our purposes, this process is characterized by noncooperative behavior, because "[a]ctors in the process do not enter agreements to cooperate but may respond to the actions or expectations of other actors."⁴⁵

The obvious alternative to *de facto* standardization is the top-down imposition of standards by an authoritative entity, whether the government per se or some officially sanctioned standard-setting body.⁴⁶ Unlike *de facto* standards, such *de jure* standards are generally mandatory.

Yet standardization analysis and practice also identify a third mechanism of standard setting, in which "a market coalition cooperates to impose a standard."⁴⁷ This hybrid process turns on cooperative behavior among market participants; it "involves actors using formal procedures of committee participation and voting to develop voluntary standards."⁴⁸ Development of the voluntary DVD standard, through the coordinated efforts of major hardware

⁴³ See M. Joseph Hinshaw, *The Role of Standardization and Interoperability in Copyright Protection of Computer Software*, 4 Comm L & Poly 299, 304–05 (1999); Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 Fordham L Rev 1125, 1135–37 (2002) (standards arise (1) "by promulgation or enactment: top-down imposition by an authoritative entity"; (2) "through market evolution: bottom-up emergence through operation of market forces"; or (3) "in a hybrid manner, through some combination of top-down imposition and bottom-up emergence").

⁴⁴ Radin, 70 Fordham L Rev at 1136 (cited in note 43).

⁴⁵ Hinshaw, 4 Comm L & Poly at 304 (cited in note 43).

⁴⁶ See Marcus Maher, *An Analysis of Internet Standardization*, 3 Va J L & Tech 5 (1998); see also Hinshaw, 4 Comm L & Poly at 305 (cited in note 43); Radin, 70 Fordham L Rev at 1135–36 (cited in note 43).

⁴⁷ Radin, 70 Fordham L Rev at 1136 (cited in note 43).

⁴⁸ Hinshaw, 4 Comm L & Poly at 304–05 (cited in note 43). Such standards may or may not be mandatory for group members upon their adoption. See *id.* See also Joseph Farrell and Garth Saloner, *Coordination through Committees and Markets*, 19 RAND J Econ 235 (1988).

manufacturers and movie studios, is a ready example of this approach.⁴⁹ Internet standards are similarly developed by a bewildering array of groups, from the IETF and IESG, to the W3C and CNRI.⁵⁰ Analysis of such group standard setting has generally found it to be effective, and perhaps even preferable to the alternatives of *de facto* or *de jure* standards.⁵¹

A pattern of technical standard setting by committee is readily extended to a broader universe of group participation in the shaping of norms. Norms are voluntary standards of a sort. This is readily appreciated with reference to the sovereign debt contracting practices of interest herein—voluntary regularities of behavior, undertaken to take advantage of benefits expected to accrue from use of a widespread contract term.⁵² The efforts of groups such as the Emerging Market Creditors Association (“EMCA”), the Gang of Seven, and the G-10 to draft model collective action clauses, as well as EMTA’s founding mission to facilitate sovereign debt contract standardization generally, are thus forms of standard setting.⁵³ They seek to define a standard to be used thereafter by participants in the relevant industry—not unlike the collective design of standards for DVD technology.⁵⁴

Of course, even if shaping sovereign debt contracting practices can be understood as a form of standard setting, any analogy to technical standard setting might nonetheless be questioned, based on the informality of many of the groups involved in sovereign debt contracting. Technical standard-setting

⁴⁹ See Neil Gandal, *Compatibility, Standardization, and Network Effects: Some Policy Implications*, 18 Oxford Rev Econ Poly 80, 84 n 12 (2002).

⁵⁰ See Maher, 3 Va J L & Tech at 53–54 (cited in note 46).

⁵¹ See, for example, Farrell and Saloner, 19 RAND J Econ 235 (cited in note 48).

⁵² See Klausner, 81 Va L Rev at 774–89 (cited in note 12); see also Clayton P. Gillette, *Interpretation and Standardization in Electronic Sales Contracts*, 53 SMU L Rev 1431, 1433–34 (2000) (describing role of groups in facilitating changes in standards).

⁵³ In their standard-setting efforts, certain sovereign debt groups may constitute “epistemic communities” of sorts. In particular, lawyer groups might be seen as offering particular expertise and competence in the standardization of contract terms and related norms. See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 Intl Org 1, 3 (1992) (defining “epistemic community” as “network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain”).

⁵⁴ Kahan and Klausner characterize various groups’ efforts to create model bond terms—a direct analog to the model CACs noted above—as a form of contract standard setting. See Marcel Kahan and Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or “The Economics of Boilerplate”)*, 83 Va L Rev 713, 761–64 (1997) (noting International Swap and Derivative Dealers Association and the Corporate Law Section of the Delaware state bar as groups attempting standard setting for bond contracts). Kahan and Klausner identify the role of these groups as striking an appropriate—and regularly adjusted—balance between standardization and customization of contract terms. See *id.*

groups, by contrast, tend to be more formal in nature. There are formal groups in sovereign debt contracting, including the IIF, EMTA, and INSOL International, yet much of the group activity is looser in nature.

Less formalized groupings, however, may also help to set standards.⁵⁵ In fact, even seriatim communications among market participants will sometimes constitute a form of *group* interaction, if group *members* call the same counterparts, with some regularity, and construe the resulting information as significant inputs into their own standard selection.⁵⁶ The repeat player attorneys in the sovereign debt markets, for example, engage in some recurrent communication with one another.⁵⁷ While quite informal, these interactions—in the form of paired conversations, and perhaps occasional cross-firm partner meetings—may significantly influence the individual choice of standards by participants.⁵⁸

More broadly, even absent recurrent interaction and close attention to the results of such interaction, the simple fact of communication lends the informal patterns of engagement in the sovereign debt and similar markets a group-like character. Such interaction, including among various public and private attorneys, is cooperative, rather than noncooperative, in nature. In a market

⁵⁵ A prime example is the Paris Club of government-to-government creditors, which serves critical functions in the sovereign debt markets, notwithstanding its lack of official status. On the Paris Club, see note 18.

⁵⁶ Given an active revolving door between public institutions in the sovereign debt markets—whether national or supranational—and private institutions, communication among associates who are occasionally situated across institutional lines is quite common. See, for example, Setser, *Political Economy* at 4 (cited in note 26) (describing revolving door between US Treasury's Office of General Counsel and New York law firms); see also note 32. This flags a related, but distinct, characteristic of the sovereign debt markets. As manifest in the SDRM debate and the ensuing transition to CACs, prominent individual actors have played critical, and often unique, roles in the market. From national officials such as Paul O'Neill and John Taylor to IMF officers such as Anne Krueger, and from prominent creditor representatives (including Charles Dallara, Michael M. Chamberlin, and other heads of the creditor groups) to selected emerging market finance ministers, a handful of individuals emerge recurrently in discussions of the sovereign debt market's transition. Given the aforementioned revolving door, they may occasionally change hats, but they continue to play a part.

⁵⁷ This pattern includes not only communications among private practitioners, but also close contact between both the US Treasury's Office of General Counsel and the IMF's legal department, and the New York sovereign debt bar. See Setser, *Political Economy* at 4 (cited in note 26).

⁵⁸ See, for example, Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 6 (Feb 3, 2005) (Draft) (describing feedback from array of market participants in shaping IMF's SDRM proposal). Even the most attenuated communications might be thought of in "group" terms, if they are undertaken with communicative intent and are lent particular attention by relevant market participants. One might think of the decision of Brazil to impose an 85 percent standard for amendment of financial terms in its first post-Mexico bond as an example. When others failed to follow, Brazil backtracked to the 75 percent standard.

dynamic, participants elect choices without opportunity for direct interchange with their counterparts. "Actors in the process do not enter agreements to cooperate but may respond to the actions or expectations of other actors."⁵⁹ The market is the mediator of any interchange.⁶⁰ A dimension of direct coordination—even if only ad hoc—thus constitutes a sea change in the interaction of private actors. The flowering of direct coordination—both in more and less structured fora, and in multipolar and bipolar forms—after the proposed creation of the SDRM is thus properly understood as an explosion in *group* activity.

In some circumstances, then, groups help to structure interactions among individual market participants. This may be especially likely given a certain market structure. Where the relevant market encompasses only a small number of actors, groups may offer little by way of valuable infrastructure. On the other hand, a sufficiently large population of market participants might undermine the capacity of groups to provide effective institutionalization. Groups may be most likely to prosper, then, where we have something less than a dispersed market, yet sufficiently broad participation to make unstructured coordination difficult.

Where the latter conditions arise, I would suggest, groups may serve as market substitutes in at least two respects. Most obviously, groups may facilitate coordination among market participants, where the market does not, or perhaps cannot, adequately do so.⁶¹ Additionally, groups may serve a market efficiency function, by enhancing the quality of aggregate decision making. Each of these market substituting functions of groups will be described in turn.

B. THE COORDINATING FUNCTION OF GROUPS

Groups help to facilitate the coordination necessary for efficient norm transformation. Where coordination is the relevant strategic imperative, groups

⁵⁹ Hinshaw, 4 *Comm L & Poly* at 304 (cited in note 43).

⁶⁰ See Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 *Yale L J* 1238, 1246 (1981) (contrasting legal evolution where "there is a real bargaining game going on," rather than "just various parties' unilateral selections of legal options that are advantageous in market transactions"). To related effect, Farrell and Saloner contrast market versus committee standard setting as respectively characterized by sequential versus simultaneous product choice. See Farrell and Saloner, 19 *RAND J Econ* 235 (cited in note 48); see also Gillette, 52 *SMU L Rev* at 1433–34 (cited in note 52).

⁶¹ See Landa, 10 *J Legal Studies* at 350 (cited in note 9) (offering theory of ethnically homogenous middleman groups as "low-cost club-like institutional arrangement, serving as an alternative to contract law and the vertically integrated firm, which emerged to economize on contract-enforcement and information costs in an environment where the legal infrastructure was not well developed").

provide a structured scheme for its achievement.⁶² They do so in both operational and more fundamental ways, which I consider in turn.

At an operational level, groups may contribute in at least three ways to norm transition. First, they serve as nodes for negotiation. Second, they may help to address collective action obstacles to coordination. Finally, they introduce a dimension of hierarchical ordering valuable for the transition process.

Taking these in order, the role of groups as nodes of interaction and resulting negotiation among market participants is readily illustrated in the sovereign debt markets. Active and direct discussions preceded successive shifts in positions on the introduction of CACs, including meetings of formal groups such as the IIF and EMTA, of the developed countries of the G-10, and, it has been suggested, of the attorneys responsible for sovereign debt contract drafting. Other coordinative groups—such as the Council on Foreign Relations' Roundtable on Country Risk Analysis in the Post-Asia Crisis—also offered meeting places for market participants.

Such intragroup communication can be understood to serve a transaction cost-reducing function.⁶³ Especially given dispersed players, a structure for communication may be necessary to coalesce relevant incentives and preferences. Groups, often with their own subgroups, subcommittees, and the like, can effectively serve this purpose.⁶⁴ But groups may also serve as nodes of negotiation in a deeper sense—not merely physical, but also conceptual. Like focal points—which Thomas Schelling posited to facilitate coordination, by dint

⁶² On the importance of coordination, see Ahdieh, 53 Emory L J at 729–30 (cited in note 19). On the role of groups in coordination, see Kahan and Klausner, 83 Va L Rev at 736 n 57 (cited in note 54) (suggesting sources of standards coordination, including groups).

⁶³ See Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 Mich J Intl L 357, 364 (1997) (noting reduction of transaction costs by “facilitative organizations”); see also Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 Am J Intl L 384, 412 (1996).

⁶⁴ The International Organization for Standardization (hereinafter ISO), for example, draws together standard-setting groups from each participating nation and disperses these representatives into subgroups with varied subject-matter responsibilities. Offering standard-setting expertise across an array of areas, the ISO arose, at least in part, as a response to the emergence of “uncoordinated corporate environmental quality programs and eco-labeling schemes.” See Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 Ecol L Q 479, 491 (1995); see also *id* at 497–99. With its significant number of subject-matter and expertise-oriented subgroups, the ISO has emerged as a leading transnational standard-setting body. See *id* at 489. It has maximized the prospect of effective coordination, furthermore, by demanding that the national standards organizations selected as ISO members be the “most representative” standards organization in the participating country. See *id* at 523. But see *id* at 524–25 (suggesting limits of “balance” in participation).

of their salience among competing equilibrium solutions—groups with some existing set of policy positions may define boundaries for negotiations.⁶⁵ In this way, they may facilitate agreement.

Beyond their service as nodes of negotiation, the second way in which groups may operationally contribute to norm transformation is by helping to overcome collective action barriers to it. Few, if any, sovereign debt market participants may have had the individual incentive to draft and promote potential collective action provisions, given the overwhelming dominance of UACs. On the other side of the debate, individual opponents of change may have been similarly loathe to invest in resistance, given a seemingly widespread sense of dismay with the status quo. Groups may have helped to overcome such barriers to participation.⁶⁶ Groups such as the G-7, the IIF, and EMCA were thus in the forefront of the struggle between the status quo, CACs, and the SDRM.

A final operational contribution of groups to beneficial coordination might arise from the hierarchical design of groups such as the IIF and EMTA, each of which combined a general membership with a dominant set of “principals” or “full members.” Such rank ordering may serve a signaling function in any transformation of the norms of group members. Shifts among group leaders may serve as prompts for broader shifts. Additionally, hierarchy may permit conflict among group members to be minimized, and coordination thereby advanced.⁶⁷

Besides their operational roles as nodes of negotiation, as correctives to collective action problems, and as sources of salutary hierarchy, groups may also facilitate coordination in deeper—and perhaps more dynamic—ways. This role of groups becomes evident in a closer analysis of the coordination game dynamic at work within groups. Although game theory has been widely invoked among legal scholars, applications have largely been limited to the Prisoner’s Dilemma. In Prisoner’s Dilemma games, player incentives favor defection from agreed regimes. Law intervenes to constrain allegedly inefficient exercises of individual preference. By contrast, in so-called “coordination games,” player incentives favor coordination, or agreement. What is lacking are appropriate expectations of the likely behavior of other parties. This is evident in the most basic coordination game pattern—Schelling’s Meeting Place game.

⁶⁵ See Ahdieh, 77 S Cal L Rev at 243–45 (cited in note 17); see also Thomas C. Schelling, *The Strategy of Conflict* 53–75 (Harvard 1960).

⁶⁶ See Olson, *The Logic of Collective Action* at 33, 48 (cited in note 5); see also Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 Vand L Rev 1747, 1750–51 (1998).

⁶⁷ See Seidenfeld, 87 Cornell L Rev at 528 (cited in note 9).

In the Meeting Place game, spouses separated in a department store want to find each other, but cannot communicate. As such, each is left to predict where the other will expect them to go. Schematically, this dynamic is captured as follows:⁶⁸

		Husband	
		Main Entrance	Information Desk
Wife	Main Entrance	10,10	0,0
	Information Desk	0,0	10,10

What players need in this game is accurate information regarding the likely choice of their counterpart—in the relevant parlance, accurate expectations regarding that choice. Absent such expectations, players face the prospect of erroneous choice. Either the wife is alone at the Main Entrance and the husband is alone at the Information Desk, or vice versa.⁶⁹

Groups, of course, provide opportunity for communication. In a simple Meeting Place dynamic, this alone should solve the game. Yet the game of sovereign debt contracting—of norm transformation—is more complex than finding a place to meet. Obviously, the relevant choices are less black and white. More importantly, in addition to the coordinative, or cooperative, dimension at work, there is also an element of competition.⁷⁰ While I explore this balance or

⁶⁸ By way of convention, I characterize payoffs as follows: row player, column player. In this game, the wife's payoff is thus first, and the husband's second. Further, I use cardinal rather than ordinal payoffs in order to distinguish the strength of preferences.

⁶⁹ See Ahdieh, 77 S Cal L Rev at 240 n 102 (cited in note 17). Where the relevant norm transformation is a product of adjusted expectations—as opposed to an alteration in player incentives—one might predict a greater influence for nonstate actors, including groups. Incentives are reasonably understood to be stable. Some significant degree of pressure is likely to be required for their alteration. By contrast, expectations may be more easily altered. Even the noncoercive contributions of groups may produce desired change.

⁷⁰ Especially given a more competitive strategic dynamic, it bears noting that group members need not be equals in a coordination game. Rather, some are likely to be more equal than others. Among issuer counsel, Lee Buchheit of Cleary, Gottlieb, Steen & Hamilton has long held a particularly prominent position. Among issuers themselves, at least in early 2003, Mexico may have been especially well-positioned to lead a shift away from UACs. Mohamed El-Erian may similarly have been a dominant player among creditors, given the volume of emerging market debt under his management. Such hierarchical ordering is hardly surprising. In fact, it is readily incorporated into a coordination game analysis, whether through a first-mover analysis, a repeat-player approach, or an appreciation of certain players' heightened capacity to shape others'

coordination and competition in greater detail in Part III, as it is especially likely to arise in the interaction of groups with nonmembers, it influences the internal workings of groups as well. Thus, while the group comprised of sovereign debtor counsel—attorneys at major firms in New York—desires beneficial coordination, they also are in competition with one another for a scarce pool of business. So long as coordination remains the dominant goal of group members—so long as the utility of a common standard surpasses members' preference for individually optimal standards—the basic coordinative dynamic remains in place.⁷¹ Yet the function of communication is now subtly different.

Given not only the greater complexity of intragroup communication about sovereign debt contracting choices than communication about where to meet, but also a more competitive dynamic behind such communication, internal group interchange may now be as significant for how it shapes members' expectations of future conduct, as for the information it offers on its face.⁷² Direct and indirect communication among sovereign *debtors* may thus have suggested a growing receptivity to CACs. Expectations of an ultimate shift may therefore have grown. With such expectations in place, Mexico's decision to adopt CACs in early 2003 looks to be less of a surprise. Discussions within the IIF, EMCA, the Bond Market Association ("BMA"), and other *creditor* groups in advance of Mexico's decision may likewise have increased their expectations of a shift. With these altered expectations, individual creditors might now express greater receptivity to the use of CACs (or at least a diminished sense of the importance of UACs) and could ultimately embrace Mexico's decision to use CACs in their February 2003 issue.⁷³

expectations of the coordination equilibrium that will ultimately emerge. See Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 *Yale L & Poly Rev* 1, 34–37 (2004).

⁷¹ By contrast with Prisoner's Dilemma games, repeat plays may not directly resolve coordination dilemmas, at least where the relevant questions of coordination are in flux. Even where the coordination games of sovereign debt contracting are iterative in important respects, consequently, coordination failures may persist. Repeat games may indirectly diminish the prospect of coordination failure, however, by improving the accuracy of participants' expectations of the likely moves of repeat players.

⁷² See Ahdieh, 53 *Emory L J* at 747–49 (cited in note 19); Ahdieh, 77 *S Cal L Rev* at 239–41 (cited in note 17).

⁷³ One might also see groups as helping to reduce the perceived risks of moving to a new standard. In essence, if participation in the dominant standard offers significant network benefits, then early movers to a new, even preferable standard, run the risk of moving alone. See Ahdieh, 76 *S Cal L Rev* at 306–11 (cited in note 12). Others may not follow, saddling the first mover with both the costs of transition and the diminished network benefits of a less widespread standard. See *id.*; Gillette, 53 *SMU L Rev* at 1433–34 (cited in note 52); Maher, 3 *Va J L & Tech* at 26, n 36 (cited in note 46).

This brief sketch of the coordination game dynamic of groups points to three substantive ways—beyond the operational contributions outlined above—in which groups may help to facilitate coordination.⁷⁴ First, groups offer their members an improved sense of the prevailing norms among similarly situated market participants.⁷⁵ Through participation in EMCA, for example, individual buy-side investors in the sovereign debt markets acquired a more complete view of buy-side investors' receptivity to CACs.

Second, groups facilitate coordination through their provision of information.⁷⁶ Such information includes relevant factual data, but also potential insights appreciated by some group members, but not others.⁷⁷ Most simply, groups can enhance the quality of information by pooling information collection efforts—and the information produced thereby. This reduces the risk of error, and may even enhance the prospect of achieving pareto efficient results.⁷⁸ Additionally, groups can improve information quality by facilitating specialization among their members.⁷⁹

Lastly, and most broadly, groups enhance coordination by shaping their members' expectations regarding the future strategies of fellow group members. Drawing on the evidence of prevailing norms, the factual information, and the distinct perspectives noted above, among other things, groups allow their members to develop more accurate expectations of future coordination equilibria. With such expectations in hand, one would predict greater willingness to abandon inefficient norms, such as UACs, that might otherwise persist.

⁷⁴ See Geisinger, 78 Tulane L Rev at 618 (cited in note 9); Sunstein, 110 Yale L J at 78 (cited in note 9) (describing analogous patterns as products of “reputational” and “informational” externalities).

⁷⁵ See McAdams, 96 Mich L Rev at 360 (cited in note 13) (noting role of groups in publicizing consensus around a particular norm).

⁷⁶ A significant part of the work of standard-setting organizations involves just such an informational function. See Maher, 3 Va J L & Tech at 26 (cited in note 46). The constituent groups in the cotton industry are similarly oriented to information-provision. See Bernstein, 99 Mich L Rev at 1752–53 (cited in note 6).

⁷⁷ See Seidenfeld, 87 Cornell L Rev at 528 (cited in note 9). The *perspectives* of group members bespeak something distinct from the aforementioned sense of prevailing norms. A sense of prevailing norms may inform standard selection by individual group members. Information regarding the distinct perspectives of varied group members, by contrast, not only informs expectations in the coordination game of standard selection, but may also alter individual preferences.

⁷⁸ See Bainbridge, 55 Vand L Rev at 22 (cited in note 9).

⁷⁹ See Seidenfeld, 87 Cornell L Rev at 532 (cited in note 9).

C. THE TRANSFORMATIVE POWER OF GROUPS

Groups' provision of evidence regarding prevailing norms, of factual information, of member perspectives, and of reasons to alter expectations, then, may enhance coordination. But groups may also do more. In serving these internally directed functions, groups potentially become something more than the sum of their parts, affirmatively altering the values of their members and hence their norms of behavior. Rather than mere coordination, the internal dynamic of groups may induce genuine change in the incentives and preferences of group members, and in the character of the collective that they constitute. In sovereign debt contracting, for example, interactions within the G-10 or among the IIF principals produced a consensus distinct from, and perhaps better than, the autarkic views of their collected members.

Again, it is useful to consider the analogy to technical standard setting organizations. While part of the role of such groups is to encourage coordination around a particular standard, another role is the development and elaboration of *superior* standards. This is readily evident in the work of the International Organization of Standardization, which seeks to define transnational standards in a variety of areas, including environmental protection.⁸⁰ The efforts of EMCA, the Gang of Seven, and the G-10 to draft model CAC clauses can similarly be seen as designed not simply to coordinate group members around a particular standard, but to help develop a better standard.

The transformative capacity of groups has not been given adequate attention in the legal literature. Yet recall the clichéd perception of two heads as better than one.⁸¹ Empirical analysis, particularly among students of management and cognitive psychology, has offered a strong foundation for this view. Support is also found in certain economic analysis, including an important study by Alan Blinder and John Morgan.⁸² In a controlled experiment, Blinder and Morgan sought to test the ability of individuals versus groups to detect a shift in the relative probability of certain observed outcomes. Consistent with the aphorism,

⁸⁰ On the role of the International Organization of Standardization, see note 64.

⁸¹ On the other hand, we should not overlook the contrary notion of groups as simply the sum of their individual parts, see Geisinger, 78 Tulane L Rev at 617 (cited in note 9), and the even harsher disparagement of the camel is a horse designed by committee, see Bainbridge, 55 Vand L Rev at 12 (cited in note 9).

⁸² See Blinder and Morgan, *Are Two Heads Better than One?* (cited in note 3); see also Alan B. Krueger, *A Study Shows Committees Can Be More than the Sum of Their Members*, NY Times C2 (Dec 7, 2000). For other favorable studies, see Seidenfeld, 87 Cornell L Rev at 530 (cited in note 9); see also Gayle W. Hill, *Group Versus Individual Performance: Are N + 1 Heads Better than One?*, 91 Psych Bull 517 (1982). But see Seidenfeld, 87 Cornell L Rev at 532–33 (cited in note 9) (contending that the “literature indicates that pooling [of group members’ thoughts] is, at best, imperfect.”).

they found groups to be more accurate in their decision making than individuals and, contrary to some conventional wisdom, no slower. This was true both with simpler and more complex decision-making tasks. Blinder and Morgan, moreover, seemed to observe a truly collective dynamic in group efforts. The success of their groups was thus unrelated to the prior performance of their individual members, including even their most able members.⁸³

Some legal scholars have, in fact, called attention to a role for groups in enhancing the quality of decision making. Mark Seidenfeld has considered a variety of explanations for groups' improvement of decision making.⁸⁴ In *Why a Board?*, Steve Bainbridge focuses on the particular benefits of corporate boards.⁸⁵ More generally, Jody Kraus has suggested the benefits of "social learning."⁸⁶ The incorporation strategy of the Uniform Commercial Code directs courts to look to commercial norms in addressing ambiguities arising in contractual disputes. This approach is well-justified, Kraus argues, given that social learning, arising through imitation or teaching, is more efficient than individual learning, arising from trial and error or rational calculation.

Groups might help to encourage norm change, then, through their enhancement of the quality of decision making. This hypothesis is hardly surprising, notwithstanding its relative disregard among legal scholars. Groups represent something more than the sum of their parts. Their very existence could therefore be a source of efficient norm change.⁸⁷

⁸³ See Blinder and Morgan, *Are Two Heads Better than One?* (cited in note 3); see also Bainbridge, 55 Vand L Rev at 12, 21 (cited in note 9); Farrell and Saloner, 19 RAND J Econ 235 (cited in note 48) (demonstrating advantages of committee standard setting over decentralized market choice). Seidenfeld points out that rather than actual learning, such studies may be capturing a simple averaging of the knowledge of group members, or, at best, a pooling of their knowledge. See Seidenfeld, 87 Cornell L Rev at 531 (cited in note 9). He acknowledges, however, that if actual interaction is taking place, something stronger may be at work. See *id.* at 532–34; see also Bainbridge, 55 Vand L Rev at 22–23 (cited in note 9) (noting evidence of more than averaging in group decision making). Even if there is not actual improvement in the quality of decision making, however, and all groups offer are the skills of their strongest members, this alone may be quite beneficial. See Bainbridge, 55 Vand L Rev at 26 (cited in note 9).

⁸⁴ See Seidenfeld, 87 Cornell L Rev at 530–35 (cited in note 9).

⁸⁵ See Bainbridge, 55 Vand L Rev 1 (cited in note 9).

⁸⁶ See Kraus, 26 J Legal Studies at 385–86 (cited in note 4). Note that the dynamic evaluated by Kraus is distinct from the pattern of group action explored herein. In Kraus' analysis, there is no functioning "group," as such.

⁸⁷ Although the limitations of the present forum do not permit their close consideration, it bears noting that groups may also negatively impact norm change, including the selection of efficient norms. To begin with, groups may be more prone to inertia, or otherwise slower in their decision making, than individuals. See Seidenfeld, 87 Cornell L Rev at 528 (cited in note 9) (noting costs and delays of group processes). But see Blinder and Morgan, *Are Two Heads Better than One?* at 1 (cited in note 3) (using two laboratory experiments "to test the commonly-believed hypothesis that groups make decisions more slowly than individuals do" and finding that "there is no

* * *

For the range of reasons suggested above, the internal dynamics of groups may have significant implications for norm transformation. To begin with, groups can serve a coordinating role. Operationally, they act as nodes of negotiation, remedies to collective action failures, and sources of hierarchical ordering. They can also facilitate coordination in more fundamental ways, through their provision of evidence of prevailing norms, of information regarding the efficiency of those norms, and of grounds for altered expectations regarding future equilibria. Beyond mere coordination, groups may encourage norm transformation by enhancing the quality of decision making. As groups coalesce into something more than the sum of their parts, they may encourage

significant difference in average decision lags.”). Groups may also be overly cautious. See Krueger, *A Study Shows Committees*, NY Times at C2 (cited in note 82) (quoting Robert MacCoun). To related effect, groups may stymie effective brainstorming. See Bainbridge, 55 Vand L Rev at 29 (cited in note 9); Michael Diehl and Wolfgang Stroebe, *Productivity Loss in Brainstorming Groups: Toward the Solution of a Riddle*, 53 J Person & Soc Psych 497 (1987). A distinct difficulty of group action is the potential for “social loafing,” in which individual effort declines as group size increases. See Bainbridge, 55 Vand L Rev at 11 (cited in note 9); see also William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 Iowa L Rev 1 (2003). Groups may also be too quick to compromise. See Seidenfeld, 87 Cornell L Rev at 528 (cited in note 9). Yet the converse is also possible. As explored by cognitive psychologists, groups may be prone to *polarization*, a tendency to move toward more extreme positions than those of the group’s individual members. See Seidenfeld, 87 Cornell L Rev at 535–38 (cited in note 9); Sunstein, 110 Yale L J at 71 (cited in note 9); see also notes 99–101 and accompanying text (noting Gang of Seven creditor groups’ adoption of relatively extreme position). Polarization is not problematic, of course, so long as the relevant pole represents the efficient result. At least in some cases, however, it may not. See Sunstein, 110 Yale L J at 108 (cited in note 9).

Groups—including those in sovereign debt contracting—may likewise be prone to what Irving Janis termed “groupthink”—“a dynamic in which the desire to be part of the group and to share its values and prestige leads members to feel that the group is morally superior to its opponents, to stifle dissent, and to fail to subject the group consensus to critical consideration.” See Seidenfeld, 87 Cornell L Rev at 541 (cited in note 9). Many groups in the sovereign debt markets exhibit just the homogeneity, the institutional norms and design favoring predetermined outcomes, and the perception of “a crisis situation in which there is high stress and little opportunity for a decision that will improve the status quo,” which portend the emergence of groupthink. See *id.*

Finally, groups may also have some cartel quality to them. See Edward S. Mason, *Economic Concentration and the Monopoly Problem* 73 (Harvard 1957) (“Cartels, in the narrow—and proper—sense, are agreements between firms in the same branch of trade limiting the freedom of these firms with respect to the production and marketing of their products.”); see also Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 Ga L Rev 137 (1999) (suggesting antitrust implications of standardization activities). Thus, groups may act to inappropriately constrain their members, at least sometimes preventing moves to more efficient norms. Even if they impose only soft constraints, as groups grow stronger, these may nonetheless be significant barriers to efficient transition. As groups gain strength, moreover, they may also be expected to seek to exercise their power to constrain nonmembers.

the abandonment of inefficient norms and the identification of pareto efficient ones.

In these paired coordination and learning functions, groups make visible the invisible hand of the market. Groups do not displace private incentives with public ones. Rather, they are driven by individual preference and utility. Instead of leaving private incentives to interact in the open market, however, groups create an infrastructure for a *market-like* interaction. Through such infrastructure, even sticky norms may evolve in a more efficient fashion.

III. GROUPS AND OTHERS

Groups may serve as market surrogates in their internal dynamic. In sovereign debt contracting, however, the evolution in contract practices occurred across categories of market participants, collected in distinct groups.⁸⁸ Legal counsel to sovereign debtors, debtors themselves, both underwriters and their attorneys, and various types of creditors were all party to the transition from UACs to CACs. What might groups contribute to norm transformation across categories of market participants? What of the interaction of groups with those beyond their membership?⁸⁹

In broad terms, groups might be seen to serve a market-mediating function in their external interactions. Groups essentially stand in for their members as the mechanisms of external interchange. In sovereign debt contracting, for example, market participants often acted through the medium of groups, rather than individually. This is illustrated by the active role of the creditor-comprised Gang of Seven, as well as its constituent groups, including the IIF and EMCA. Likewise, the G-7 was the public face of developed countries in the SDRM debate, rather than its constituent members.

⁸⁸ Suggesting the distinct internal and external faces of groups, Fred Bergsten has called on the G-20 to make the move from “discussion forum” to “action committee.” See Bergsten, *The G-20 and the World Economy* (cited in note 18). The cotton industry trade associations studied by Lisa Bernstein—essentially, groups made up of groups—are likewise suggestive of the dual internal and external functions of groups. See Bernstein, 99 *Mich L Rev* at 1726 (cited in note 6).

⁸⁹ One might assume that the interaction of groups with outsiders, including other groups, would parallel the interaction of market participants within groups. Arguably, in fact, much of the distinction between the two forms of interaction is definitional. How we define the relevant unit of analysis may thus be all that distinguishes one form of interaction from the other. To this effect, one might wonder whether the Gang of Seven—comprised of seven independent creditor groups—was a group or some sort of collection of groups? Yet an identity of internal and external group dynamics seems unlikely. To begin with, there is reason to doubt that the external behavior of group tracks the external behavior of individuals. That two heads are better than one may tell us little about whether two groups are better than one. Additionally, at least some of the aforementioned characteristics of interaction within groups are likely to manifest themselves differently in groups’ external interactions.

Combining the internal and external roles of groups in norm transformation that I propose, groups may often face a simultaneous need to coordinate the norms of their members, *and* to advance those norms externally, through a careful mix of coordination and competition. In the latter role, groups aim to advocate their internal norms externally, and perhaps especially to *undecided groups* of market participants. In the sovereign debt markets, for example, various groups directly and indirectly advocated their positions to the critical, but noncommittal, group of emerging market issuers.

Within this internal-external paradigm of groups in norm transformation, one might identify three external-facing functions of groups. First, groups facilitate effective negotiation across categories of market participants. Second, they help to equalize power across such categories. Finally, groups may act to internalize network externalities, and thereby enhance the prospect of efficient outcomes. I take up each of these in turn.

To begin, groups can facilitate negotiation in various ways—including (1) by reducing the number of necessary parties to any negotiation, (2) by categorizing market participants by type, (3) by facilitating collective action, and (4) by effectively binding group members to their commitments. We have already observed the transaction cost-reducing role of groups in facilitating internal negotiation. Interaction of groups with others, including other groups, serves a parallel negotiation function. In their external dynamic, however, groups do not facilitate norm change through the creation of any *place* for negotiation (whether physical or metaphysical). Rather, external interaction of group representatives simply reduces the number of parties to negotiation. As a result, groups permit direct, versus market-mediated, interaction. Market participants can, quite literally, now communicate.

External interactions of groups may thus reduce transaction costs, by enhancing decision speed, and thereby permitting more rapid response to unexpected change. When the IMF's SDRM proposal was tabled, it could not but spark a response. Even among those preferring the status quo, some counterproposal appeared necessary. Such a response, however, might not have been able to await bilateral engagements of a wide universe of relevant market participants. The flurry of committee and group interactions in the sovereign debt markets—especially as things came to a head in late 2002 and early 2003—might thus be seen as an attempt to short cut around potentially slower, market-mediated responses to the SDRM.⁹⁰ The role of groups may therefore be especially significant amidst transition, where demand for expedition is high.

⁹⁰ See Felix Salmon, *Blazing a Trail Down Mexico Way*, 34 *Euromoney* 124 (Apr 2003); see also Emad Mekay, *Private Creditors Turn Up Heat on IMF Debt Plan*, *Inter-Press Service* 1 (Dec 18, 2002) (discussing the downfall of SDRM); Felix Salmon, *Calm after the Storm*, 34 *Euromoney* 100, 102

Beyond reducing the number of parties to an effective negotiation of norm change across categories of market participants, a second way in which groups facilitate external negotiation is through their categorization function. The latter is illustrated by the grouping of sovereign debt market participants into various categories of creditors, as in the large, buy-side firms of EMCA; categories of sovereigns, as in the G-7 and G-10; and other categories as well. While any grouping pattern would reduce the number of negotiating parties, groups' categorization of market participants by type—and perhaps other less visible traits—may serve an important signaling function for negotiating counterparts, regarding the character of particular market participants.⁹¹ One might expect this function to be especially important for smaller scale market participants, who are less able to offer direct signals to potential counterparties.

Groups may also play a role in negotiations across categories of market participants, given their collective action benefits.⁹² In some cases, negotiation across categories—for example, between debtors and creditors—may be necessary, but there may be inadequate incentives for individual entities in one or both categories to participate. Group action may help to get everyone to the table. Stating the point differently, groups may be more willing to invest in an efficient degree of coordination than individuals.

Finally, groups may also facilitate negotiated norm change across categories of market participants through intertwined binding and bonding functions. Given the coercive power of groups over their members—an expressive power, if nothing else—they can help to hold individual members to their policy commitments. Groups thus lend individual assurances a tenor of “credible commitment.”⁹³ By doing so, groups may enhance confidence across categories of market participants, and thereby facilitate negotiation and agreement.⁹⁴

Beyond the four contributions of groups to effective negotiation across categories of market participants, as outlined above, groups' external functions

(May 2003) (same). The longstanding use of representative creditor committees in the sovereign debt markets might be noted as a prime example of the capacity of groups to reduce the necessary parties to negotiation. See Hagan, *Designing a Legal Framework* at 59–62 (cited in note 58).

⁹¹ See Eric A. Posner, *Law and Social Norms* 18–19 (Harvard 2000) (describing function of behavioral signaling). One might appreciate this function with an eye to the desire of market participants to join certain groups, and the constraints on their membership. Russia has thus been incorporated into some aspects of the work of the G-7, but not others. See note 18.

⁹² See note 52 and accompanying text.

⁹³ See Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 *Am Econ Rev* 519 (1983).

⁹⁴ Such group constraint is a product, at least in part, of the aforementioned hierarchy of groups. See note 67 and accompanying text. Such hierarchy may also serve other functions in group interactions across categories of market participants. In particular, it may help to signal other market participants as to who can authoritatively speak for actors in a particular category.

may also include a role in power equalization. Particularly where groups are constituted along relatively homogenous lines—as exemplified by EMCA (large buy-side firms), INSOL International (accountants and lawyers), and the BMA (bond underwriters)—but perhaps even where other categorizations are used (for example, potential members’ geographic origins), groups may help to equalize power among market participants. Acting in concert, even relatively weak market participants may be empowered to participate in norm transformation. In the aggregate, they may be able to hold their own.

Such power equalization becomes important when we analyze the particular coordination dynamic likely to arise across, rather than within, groups. Most simply, unlike within groups, the external interactions of groups do not create any structure of coordination or any sort of collective whole.⁹⁵ Thus, absent the rare combination of groups into “metagroups” of a sort, each retains its prior identity.⁹⁶ Rather than a *structure* of coordination, the external interactions of groups are therefore best understood as ad hoc attempts to facilitate market-like patterns of engagement. Such engagement is simply more *guided* than a true market.

Equally important, the external interactions of groups, and perhaps particularly their engagement with other groups, are likely to be more competitive than interactions within groups. I suggest above the prospect of competition among group members, alongside their pursuit of coordination. Sovereign debtors’ attorneys regularly review each others’ documents, and meet each other both informally and formally; yet they are also competing for business.⁹⁷ So long as coordination remains the dominant preference, however, a coordination dynamic will persist, with competition simply incorporated into the mix.

In game theory terms, this pattern is captured by the paradigmatic Battle of the Sexes, in which the husband and wife introduced above now hope to make plans for an evening together, but have distinct preferences on where to spend it—preferences I invert from the anachronistic original:

⁹⁵ Given this lack of structure, the cartel concerns outlined above become less apposite. See note 83.

⁹⁶ Of course, such “combinations” occasionally occur, as in the case of the Gang of Seven. See note 33.

⁹⁷ See Choi and Gulati, *What Drives Changes* at 23 (cited in note 38); see also notes 55–60 and accompanying text. Notably, this competitive dynamic would appear to be more about individual lawyers—and the committees of which they are a part—than the firms of which they are members.

		Husband	
		Ballet	Baseball Game
Wife	Ballet	5,10	-5,0
	Baseball Game	0,-5	10,5

As suggested above, communication may no longer suffice to “solve” a Battle of the Sexes game, given the suddenly strategic character of any relevant pronouncement.⁹⁸ Rather, each party must attempt to develop their own, surely educated, guesses regarding the likely behavior of their spouse.

With the increased heterogeneity of players *across* categories of market participants—think of creditors versus debtors—the balance of coordination and competition can be expected to shift yet further toward competition. Thus, the gains from coordination, while still determinative, may be more counterbalanced by the losses to the party whose preferred standard is ultimately rejected. Besides greater heterogeneity, the greater aggregate power of groups, as compared with the individual players within them, may also increase competition. Such power may significantly influence group players’ strategic choices—including their willingness to insist on adoption of their preferred norms.

The conflicts among groups in the creation of model CACs readily illustrate this more competitive picture. By late 2002, the relatively hard-line creditors of EMCA were working aggressively to coordinate some emerging market issuer adoption of its own creditor-friendly model CACs. Faced with the prospect of a first move to EMCA’s harsh terms, issuer-friendly groups abruptly stepped to the plate. To everyone’s surprise, Mexico suddenly announced its adoption of a milder set of CACs in February 2003. As an attempt to forestall a shift to EMCA’s terms, Mexico’s decision—and even timing—make perfect sense.⁹⁹

Extrapolating further from this episode, one might see the interactions of sovereign debt creditors as exhibiting just the internal-external dynamic offered above, in which groups seek to build and maintain internal cohesion, while also

⁹⁸ Each spouse can thus be expected to insist on their unwillingness to go anywhere besides their preferred destination, regardless of the true strength of their conviction.

⁹⁹ See Setser, *Political Economy* at 21 (cited in note 26).

influencing outsiders, including neutral groups such as issuers. Over a period of several years, but particularly after the SDRM proposal, creditors sought to coordinate around a common position on reform, and particularly on the use of CACs. In these “internal” efforts to coordinate, an array of potential positions were offered by various creditor groups, from the shrill and confrontational EMCA to the milder IIF. These groups aimed to achieve coordination among themselves, but preferred distinct coordination equilibria, creating a space for internal advocacy and competition. Ultimately, these internal interactions, under the metagroup umbrella of the Gang of Seven, produced a consensus to accept a shift to CACs, but only CACs with exceptional strong creditor protections—the hard-line position pushed by EMCA. When it came time for the second phase of external advocacy, however, this internal dynamic failed to serve creditors’ interests. In the external competition, the creditors’ model clauses were roundly rejected by issuers, attorneys, and developed countries. The internal competition among creditors, thus, ultimately rendered them unable to compete in the external competition across categories of market participants. The latter proved more difficult to navigate.

To capture the more competitive interaction across groups, and in the interaction of groups with outsiders generally, one might move beyond the Battle of the Sexes, to the familiar game of Chicken. In the latter, a coordination dynamic persists, but it is a highly antagonistic one. Two cars thus race toward a cliff, with the loser (or “chicken”) being the first to swerve to avoid a plunge. This strategic dynamic can be captured as follows:

“Buzz”

		Maintain Speed	Turn Off
James Dean	Maintain Speed	-10,-10	5,-2
	Turn Off	-2,5	0,0

Just this dynamic is evident in the external interactions of groups in sovereign debt contracting. In the latter example, competing standards favored by opposed groups—most obviously the sovereign debtor members of the G-20, and the creditors of the IIF, EMCA, and related groups, but also the network of sovereign debt market lawyers and the developed countries of the G-10—faced off. Each group sought to “bluff” its counterpart into an expectation

that it would reject any compromise, and thereby bring that counterparty to accept its preferred standard.¹⁰⁰ The first to blink—in the present case, the opponents of flexible CACs—found themselves stuck with the competing standard.¹⁰¹

If this pattern captures the dynamic at work in groups' interactions with nonmembers, including other groups, the importance of groups in enabling weaker market participants to hold their own is self-evident. In essence, by joining together, some market actors may emerge better able to “win” the game of Chicken. At a minimum, in groups, such market participants may be able to influence other players' expectations that they will (at least) play the game.¹⁰²

Finally, beyond their easing of negotiation and their equalization of power across categories of market participants, a final externally oriented mechanism of group facilitation of norm change is their capacity to internalize the network externalities arising from such transition. Much of the resistance to norm change in sovereign debt contracting, as in other milieu characterized by network effects, arises from the inadequate compensation of first movers for the positive externalities produced by their shift to a superior norm. If the owner of a network, or other dominant market participant, could harness these gains and use them to subsidize transition, such resistance could be overcome.¹⁰³

Large collectives such as the IIF or EMTA stand to gain—across their membership—substantial benefits from the shift to more efficient contracting norms. They might therefore help to facilitate shifts away from a dominant, but inefficient, norm. This holds true in the internal coordination of groups as well, but it is likely to be especially acute in the negotiation of norm change across categories of market participants, for at least two reasons: First, divergent preferences are more likely across categories of market participants; second, any shift is more likely to favor the preferred norms of one category of market

¹⁰⁰ On the various game dynamics explored above, see generally Ahdieh, 77 S Cal L Rev at 233–45 (cited in note 17).

¹⁰¹ Perhaps suggesting a Chicken game dynamic, Choi and Gulati observe a potentially interesting trend among underwriter counsel and debtor counsel in sovereign bond issuances. Contrary to any expectation of zealous—and conflicting—representation, the debtor's attorney would seem to dominate over nominally independent underwriter counsel. See Choi and Gulati, *What Drives Changes* at 26 (cited in note 38). Perhaps to similar effect, Sean Hagan has highlighted the divergence in buy-side and sell-side attitudes towards the IMF's SDRM proposal. See Hagan, *Designing a Legal Framework* at 77 (cited in note 58).

¹⁰² Of course, across cases, the question of who is willing to take the aggressive, or dominant, position in the Chicken game is not random. Rather, as suggested above, some players are consistently more likely to play a dominant role, shaping the expectations of other players as the most likely ultimate outcome. See note 58.

¹⁰³ See Ahdieh, 76 S Cal L Rev at 333–34 (cited in note 12).

participant over the other. In such situations, groups may help to ease—to finance—transition.¹⁰⁴

The external interactions of groups, particularly with other groups, may have significant implications for efficient norm transformation. Such interactions, as evident in the transition from UACs to CACs, may play an integral role in encouraging a shift toward preferred norms. Yet this is likely to be a less predictable—and far more contentious—dynamic than the twin patterns of coordination and learning that were suggested to characterize the interactions within groups.

IV. GROUP FAILURE AND NORM CHANGE

A final dimension of the impact of groups on the evolution of norms arises not from the affirmative action of groups, but from their failure. Even by comparison with the analysis of groups above, this last category of group influence has been especially neglected. With few exceptions, norm change is commonly analyzed as *the adoption of new norms*.¹⁰⁵ In game theoretic terms, norm change has been conceived to arise from affirmative coordination around a new standard. Yet where a norm is already in place, the process of norm transition is, in equal measure, *a shift away from an existing norm*.

This neglect is readily illustrated with reference to the recent shift in sovereign debt contracting norms. While most analysis has spoken of a shift *to* CACs, the transition was equally a shift *away from* UACs.¹⁰⁶ How might we construct this alternative story in sovereign debt contracting? As described above, Mexico announced its intention to issue \$1 billion in bonds with CACs in

¹⁰⁴ See *id.* It bears noting, of course, that external interactions among groups, like interaction within groups, has its costs. Most important is an increase in agency costs. See Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J Fin Econ 305, 308 (1976) (offering theory of agency costs in principal-agent relationships); see also Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L Rev 621, 636–37 (2004). But see Bainbridge, 55 Vand L Rev at 37–38 (cited in note 9) (suggesting ways in which agency costs may be minimized with groups). While agency costs arise even within groups, it is not until we focus on externally directed group action that such costs fully reveal themselves. By using groups as proxies for their members in coordination across categories of market participants, one can predict some necessary disconnect and resulting efficiency losses. In sovereign debt contracting, this pattern might be suggested by the fracturing of certain groups over CACs, as outlined in the following section. Besides heightened agency costs, interaction across groups may also increase the degree of group polarization within each group. This is especially likely if each perceives itself as an “outgroup” vis-à-vis the other. See Sunstein, 110 Yale L J at 98 (cited in note 9).

¹⁰⁵ See, for example, McAdams, 96 Mich L Rev at 338 (cited in note 13); Cass R. Sunstein, *How Law Constructs Preferences*, 86 Georgetown L J 2637 (1998).

¹⁰⁶ See, for example, Salmon, 34 Euromoney at 124 (cited in note 90).

early February 2003.¹⁰⁷ At that moment, an alternative future might have played out. Most significantly, creditors might have effectively coordinated their resistance to any change, by demanding a heightened risk premium from Mexico for its CAC bonds. Consequently, other sovereign debtors might have dismissed Mexico's overture, electing to maintain the UAC norm. In turn, Mexico might likely have backtracked on its use of CACs, ending the abortive "emergence" of CACs. Given a preference of creditors for UACs, or minimally for more restructuring-resistant CACs (including an 85 percent threshold for amendment), this scenario could not have been foreclosed in February 2003.

That it did not come to pass—that the shift from UACs to CACs was ultimately successful—may have turned, at least in part, on the inability of creditor groups to hold together. Notwithstanding creditor distress with Mexico's decision, creditor groups proved unable to maintain a coordinated position in the aftermath of Mexico's announcement. The IIF thus appeared to be somewhat resigned to the shift. By contrast, EMCA expressed far more distress with the prospect of Mexican-style CACs. Yet EMCA could not effectively coordinate its membership around a policy of resistance. Most importantly, Mohamed El-Erian—an influential emerging market portfolio manager, given the massive volume of debt under his management, and a founding member of EMCA—broke with the group, to buy Mexico's CAC debt.¹⁰⁸ With that decision, the prospect of effective resistance came to seem futile. Confirming as much, by early 2004, the once-prominent EMCA had all but disappeared as a player in the sovereign debt markets.

The connection between group failure and norm change is also suggested by the rise and fall of the Global Committee of Argentina Bondholders ("GCAB"). In the aftermath of Argentina's offering of relatively stingy restructuring terms for its significant mass of defaulted debt in September 2003, the GCAB emerged to coordinate the diffuse network of Argentina's foreign

¹⁰⁷ See note 35 and accompanying text.

¹⁰⁸ EMTA's public condemnation of Mexico's use of a 75 percent threshold, see Alinna Arora and Rodrigo Olivares Caminal, *Rethinking the Sovereign Debt Restructuring Approach*, 9 *Nafta L & Bus Rev Am* 629 (2003), but inability to force any collective response from the Gang of Seven, see Elmar B. Koch, *Collective Action Clauses—The Way Forward* (forthcoming Georgetown J Int'l L, 2005), represented a similar group failure in the ultimate transition to CACs. The place of group failure in the transition to CACs arguably manifested itself even earlier, however, when the entire Gang of Seven's newfound receptivity to *some* use of CACs was seemingly triggered by the IIF's shift from strong opposition to grudging support. See Richard Portes, *Resolution of Sovereign Debt Crises: The New Old Framework*, Centre for Economic Policy Research, Discussion Paper, No 4717 (2004), available online at <<http://faculty.london.edu/rportes/DP4717.pdf>> (visited Mar 29, 2005).

creditors.¹⁰⁹ Together with a network of domestic creditors, GCAB issued aggressive demands for a more favorable settlement, even putting forward its own (similarly extreme) counteroffer.

Ultimately, however, the group could not sustain the coordination it initially achieved. A handful, and then a growing number, of institutional creditors began to buy up retail Argentine creditors who were unwilling to hold out for better restructuring terms. Notwithstanding GCAB's assertions of unalterable resistance to Argentina's offer, individual creditors and creditor collectives began to tender their debt in Argentina's proposed exchange, with major moves coming in the very final hours before the exchange closed. With that, almost as quickly as it had emerged as a significant player, GCAB disappeared.¹¹⁰

With the resulting success of Argentina's offering, the norms of debt restructuring were arguably transformed. Argentina's exchange appeared to prove that active negotiation with creditors, let alone accommodation of them, was not a prerequisite to effective restructuring. Contrary to the conventional wisdom, sovereign debtor hardball might—at least on occasion—represent an effective strategy. Had the GCAB and its peer groups held together more successfully, however, future debtors might have been far more willing to negotiate.

That such group failure might be important in norm transformation, and particularly in the displacement of status quo norms, makes perfect sense, notwithstanding the lack of attention it has been given. In coordination games, as well as the network-driven economies I have previously analogized to the latter,¹¹¹ efficient transition is stymied by the lock-in of existing norms or standards. With such lock-in, even inefficient norms become difficult to displace. Yet this is a story of groups.

A prevailing norm is thus locked in by its group of users. The stability of that group therefore goes to the heart of any pattern of lock-in. If the group begins to weaken, and loses its capacity to coordinate, the opportunity emerges for alternative norms to dislodge the existing norm. From this perspective, then,

¹⁰⁹ Analogously, EMCA emerged in response to Ecuador's proposed use of now infamous "exit consents" for its 2000 restructuring.

¹¹⁰ On the GCAB's role in Argentina's restructuring, including its disappearance from the scene, see Anna Gelpern, *What Markets Can Learn from Argentina*, 24 *Intl Fin L Rev* 1 (Apr 2005). Suggesting the implosion of both EMCA and GCAB, compare the website of the EMTA available online at <<http://www.emta.org>> (updated website of EMTA), with the websites of EMCA and GCAB, making no reference to completion of Argentina's exchange, available online at <<http://www.emcreditors.org>> and <<http://www.gcab.org>> (websites of EMCA and GCAB, making no reference to completion of Argentina's exchange).

¹¹¹ See generally Ahdieh, 77 *S Cal L Rev* at 233–38 (cited in note 17).

one might predict norm change not only when groups coordinate internally around a new norm, or when they coordinate amongst one another, but also when they struggle in their efforts to coordinate. In norm change, group failure may sometimes be essential to success.

CONCLUSION

Groups matter. They contribute in vital ways to the coordination of efficient norm transformation. In appropriate circumstances, collections of market participants can produce dynamic patterns of internal change, turning groups into something more than the sum of their parts. Groups can also impact norm change through their interactions with one another, and with other outsiders, by facilitating negotiation, equalizing power, and internalizing network externalities. Finally, groups may even contribute to norm change through their failure. The internal workings and the external impact of groups therefore deserve our attention.

I do not doubt the capacity of various forms of expressive law and individual norm entrepreneurs to drive norm transformation. The foregoing simply highlights a “third way” to norm change. Out of the function and dysfunction of groups, an evolution of norms can be expected to arise.

As coordination becomes an increasingly critical aspect of a globalized world economy—especially one more and more dependent on integrated technologies—variously constituted committees, networks, and groups are likely to play a growing role both domestically and internationally. This is apparent in the recent transformation of sovereign debt contracting norms, in the ongoing role of groups in the evolution of those norms, and in the steady emergence of new committees, networks, and groups in this area. In any credible analysis of norm change, groups should therefore be carefully considered. They may be essential players in an effective transition.