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BOWMAN LIVES: THE EXTRATERRITORIAL APPLICATION OF U.S. CRIMINAL LAW AFTER *MORRISON V. NATIONAL AUSTRALIA BANK*

*ZACHARY D. CLOPTON**

Julio Leija-Sanchez, the kingpin of a document-forgery ring in Illinois, arranged for the murder of his rival in Mexico by Mexican assassins.[1] Floridian Kent Frank paid minor girls in Cambodia to engage in sexual conduct and took their photographs.[2] Pablo Aguilar impersonated an INS agent in Mexico, reconnoitered a prospective visa-applicant, and accepted cash and jewelry in exchange for the promise of visas for her children, a job for her son, and INS-confiscated property.[3] A group of Japanese companies conspired in Japan to fix the price of facsimile paper in North America.[4] Three men conspired to transport 140 aliens into the United States from Central America, getting only as far north as the outskirts of Monterrey, Mexico, before being apprehended by Mexican authorities.[5] Members of the Guadalajara Narcotics Cartel tortured and killed an American novelist and his friend in Mexico, mistaking them for American DEA agents.[6] Members of Jim Jones's Peoples Temple

* Assistant United States Attorney, Civil Division, Northern District of Illinois. The views expressed in this Article are those of the author alone. They do not represent the views of the United States government or the United States Attorney. I am grateful for the assistance of the Honorable Diane P. Wood, Christopher J. Borgen, Victor D. Quintanilla, and Katherine D. Kinzler.

1. United States v. Leija-Sanchez, 602 F.3d 797, 798 (7th Cir. 2010) (violent crimes in aid of racketeering activity, 18 U.S.C. § 1959).

2. United States v. Frank, 599 F.3d 1221, 1227 (11th Cir. 2010) (obtaining custody of a minor with the intent to produce child pornography, 18 U.S.C. § 2251A(b)(2)(A)).

3. United States v. Aguilar, 756 F.2d 1418, 1420 (9th Cir. 1985) (impersonation of government official, 18 U.S.C. § 912).

4. United States v. Nippon Paper Indus. Co., 109 F.3d 1, 1 (1st Cir. 1997) (price-fixing, 15 U.S.C. §§ 1–7).

5. United States v. Villanueva, 408 F.3d 193, 196 (5th Cir. 2005) (conspiracy to bring undocumented aliens into the United States, 8 U.S.C. § 1324(a)(2)(B)(ii)).

6. United States v. Vasquez-Velasco, 15 F.3d 833, 838 (9th Cir. 1994) (violent crimes in aid of racketeering activity, 18 U.S.C. § 1959).

ambushed U.S. Representative Leo Ryan and his party in Guyana, resulting in the death of Congressman Ryan and others.[7]

Each of these descriptions corresponds to the allegations of the U.S. government in criminal prosecutions in U.S. courts for violations of U.S. laws. In each case, the defendants were charged based on conduct that occurred outside the territorial borders of the United States, even though none of the statutes at issue specify an extraterritorial application. And in each case, attorneys for the United States convinced a court of appeals that the ambiguous statute should be read to apply to extraterritorial conduct based on a broad reading of the Supreme Court's 1922 decision in *United States v. Bowman*.[8]

The Supreme Court has not placed any constitutional restraints on Congress's ability to enact statutes regulating conduct outside of U.S. borders.[9] Nevertheless, U.S. courts still must determine when Congress has intended to exercise this power. For some statutes, the answer is clear from the text; the law prohibiting war crimes, for example, criminalizes "[w]hoever, whether inside or outside the United States, commits a war crime."[10] But Congress tends to legislate without reference to geographic limitations.[11] This question of statutory interpretation—whether Congress intended an ambiguous criminal statute to apply extraterritorially—is the subject of the Article.

The Supreme Court has resolutely defended a canon of interpretation by which courts presume that ambiguous statutes do not apply extraterritorially unless Congress indicated an extraterritorial intent. Over the last two decades, the Supreme Court's decisions on this "presumption against extraterritoriality" have seemed to limit the situations in which ambiguous civil statutes apply outside of the United States. The Rehnquist Court made it more difficult for litigants to show that Congress intended a law to apply extraterritorially in *EEOC v. Arabian American Oil Co.* (*Aramco*) and other decisions in the 1990s,[12] and the Roberts Court made it more difficult to establish territorial connections necessary to avoid the pre-

7. United States v. Layton, 855 F.2d 1388, 1394 (9th Cir. 1988) (conspiracy to kill a member of Congress and aiding and abetting that killing, 18 U.S.C. § 351).

8. 260 U.S. 94 (1922).

9. *See infra* note 16. R

10. 18 U.S.C. § 2441(a) (2006); *see infra* note 17. R

11. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571, 576–77 (1953) (discussing the "literal catholicity" (universality) of the scope of the Jones Act).

12. 499 U.S. 244 (1991); *see* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); Smith v. United States, 507 U.S. 197 (1993); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

sumption against extraterritoriality in *Morrison v. National Australia Bank* in 2010.[13]

On the criminal side, the Supreme Court has not spoken to the issue since *Bowman* in 1922.[14] In that case, the Court opened the door a crack, seemingly creating an exception to the presumption for prosecutions based on fraud against the U.S. government. In criminal cases since *Bowman*, like those described above, courts of appeals routinely use *Bowman* to support the extraterritorial application of criminal laws. Yet the reasoning and types of laws applied extraterritorially in these decisions tend to go beyond *Bowman*'s express holding. Moreover, while these courts of appeals have not expressly forsaken the civil precedents or their relevance to criminal law—and in fact frequently cite the civil precedents in their criminal decisions—the *outcomes* of these cases suggest that criminal law is treated differently: these courts have tended to expand the extraterritorial application of U.S. criminal law, in contrast to the trend of Supreme Court decisions in civil cases. However, the Supreme Court's recent decision in *Morrison,* which seemingly narrowed the situations to which U.S. law applies, actually permits a new approach that the Supreme Court could follow in affirming much of the criminal law trend. If adopted, this approach could be justified by the same factors that the Supreme Court invokes to justify its criminal and civil law pronouncements on the presumption.

Part I of this Article discusses the twin canons of statutory interpretation that are relevant to the extraterritoriality inquiry: the *Charming Betsy* canon and the presumption against extraterritoriality. These canons are most fully developed in the civil context, although the relevant case law arises from both civil and criminal cases. Part II looks specifically at the presumption against extraterritoriality in criminal law in *Bowman*, the leading Supreme Court decision on the topic. Part II also includes a comprehensive survey of decisions by courts of appeals applying *Bowman*, which reveals that the courts of appeals have stretched *Bowman* to shoehorn extraterritorial applications of criminal laws into the stream of Supreme Court jurisprudence. Part III turns to the Court's 2010 decision in *Morrison* (a civil case). Although *Morrison* purports to be a straightforward application of the presumption against extraterritoriality, the "real motor" of the decision is a rule that explains when the

13. 130 S. Ct. 2869 (2010).

14. United States v. Bowman, 260 U.S. 94 (1922).

presumption applies—and when it does not.[15] Part IV then asks what *Morrison* suggests about how the Supreme Court could handle an extraterritorial criminal case. *Morrison*'s rule appeared to limit the extraterritorial reach of U.S. law—keeping with the Supreme Court's trend in civil cases but running counter to the criminal law trend in the courts of appeals. This Article suggests that the new "focus" rule announced in *Morrison* may help to reconcile those seemingly contradictory trends, while still maintaining an allegiance to the Supreme Court's stated justifications of the presumption. Part V concludes with some brief remarks about extraterritorial criminal law.

I.
BACKGROUND

Does a particular law apply to a set of facts that include elements outside the territory of the United States? Putting aside constitutional constraints[16] and those statutes that are expressly

15. The appellation "real motor" comes from Justice Stevens's opinion concurring in the judgment in *Morrison*. 130 S. Ct. at 2894 (Stevens, J., concurring in the judgment).

16. Congress has the constitutional authority to enact extraterritorial legislation. *See, e.g.*, *Aramco*, 499 U.S. at 248; *Lauritzen*, 345 U.S. at 579 n.7. According to a leading textbook, "no reported federal court decision has held an extraterritorial application of substantive U.S. law unconstitutional." GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 579 (4th ed. 2007); *see also* Charles Doyle, *Extraterritorial Application of American Criminal Law*, Congressional Research Service Report, Mar. 26, 2010, *available at* http://opencrs.com/document/94-16/2010-03-26/; Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121 (2007); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992). That said, various courts have discussed potential substantive due process constraints on the extraterritorial application of U.S. law. *See, e.g.*, United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990) ("[A]s a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment."); Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103, 1107 n.11 (7th Cir. 1984) ("Were Congress to enact a rule beyond the scope of [foreign relations law] principles, the statute could be challenged as violating the due process clause on the ground that Congress lacked the power to prescribe the rule."); *see also* Blackmer v. United States, 284 U.S. 421, 438 (1932) (discussing the personal jurisdictional limits set by the Due Process Clause). The scope of the Foreign Commerce Clause, U.S. CONST. art. I, §8, cl. 3, may constrain congressional action in this area as well. *See, e.g.*, Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949 (2010). The states also have at least some authority to regulate conduct outside of the United States. *See* Skiriotes v. Florida, 313 U.S. 69, 77 (1941) ("If the United States may

extraterritorial[17] (or expressly not[18]), courts are left to apply traditional tools of statutory interpretation. Two canons of interpretation are relevant to this inquiry. First, U.S. courts have incorporated the international law concept of legislative jurisdiction into U.S. law through the *Charming Betsy* canon, which calls on courts to avoid unnecessary conflict with the law of nations.[19] Second, U.S. courts have developed a presumption that ambiguous statutes do not ap-

control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress."); *see also* Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960).

17. *See, e.g.*, 18 U.S.C. § 1119 (2006) (providing for the punishment of "[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country"); 18 U.S.C. § 2332 (2006) (criminalizing homicide, attempted homicide, conspiracy to commit homicide, or certain assaults of "a national of the United States, while such national is outside the United States," upon certification of the Attorney General); 18 U.S.C. § 2339B(d) (2006) (defining the constraints on extraterritorial jurisdiction for the statute criminalizing material support to designated foreign terrorist organizations); 18 U.S.C. § 3261 (2006) (punishing individuals for commission of certain felonies "while employed by or accompanying the Armed Forces outside the United States"); Alien Tort Statute, 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); *cf.* 18 U.S.C. § 1111 (2006) (providing for the punishment for murder only "[w]ithin the special maritime and territorial jurisdiction of the United States," defined in 18 U.S.C. § 7 (2006)); *see also* Doyle, *supra* note 16, at 37–60 (cataloging U.S. laws). R

For example, Viktor Bout, the so-called "Merchant of Death," has been charged with violations of 18 U.S.C. § 2339B, providing material support or resources to designated foreign terrorist organizations, based on extraterritorial conduct. *See* Complaint, United States v. Bout, No. 08 MAG 0386 (S.D.N.Y. Feb. 27, 2008), *available at* http://www.justice.gov/opa/pr/2008/March/bout-complaint.pdf. *See also* STEPHEN BRAUN & DOUGLAS FARAH, MERCHANT OF DEATH: MONEY, GUNS, PLANES, AND THE MAN WHO MAKES WAR (2007). Section 2339B, however, explicitly applies to certain extraterritorial activities. 18 U.S.C. § 2339B(d) (2006). In late 2010, Thailand agreed to extradite Bout to the United States. Seth Mydans, *Thailand Extradites Russian Arms Suspect to U.S. to Face Arms Charges*, N.Y. TIMES, Nov. 17, 2010, at A6. Pursuant to 18 U.S.C. § 3238, Bout will be arrested and tried in the Southern District of New York—the district where the offender is first brought.

18. *See, e.g.*, 28 U.S.C. § 2680(k) (2006) (excepting "any claim arising in a foreign country" from the Federal Tort Claims Act).

19. *See infra* Part I.A. As discussed in greater detail below, legislative jurisdiction is not, as its name suggests, a true jurisdictional issue. That said, this Article will use the term legislative jurisdiction in keeping with the literature on the subject.

ply extraterritorially.[20] The twin canons are tools of statutory interpretation and thus are tools to determine the intent of Congress.[21]

Although both canons help answer the question whether a statute applies extraterritorially, the Supreme Court has said that these two presumptions are distinct and not always coextensive.[22] With respect to the concept of "extraterritoriality," the *Charming Betsy* canon invokes the international law of legislative jurisdiction, in which the concept of territoriality merely plays a role and is not always dispositive of the outcome. In contrast, the presumption against extraterritoriality treats extraterritoriality as the *only* relevant factor, and it does not rely upon the distillation of any other body of law. While both canons can help courts answer questions about the extraterritorial reach of U.S. law, for clarity, this Article will reserve the term "extraterritoriality" for the presumption against extraterritoriality.[23]

A. Legislative Jurisdiction and the Charming Betsy *Canon*

Under international law, the legal power of a state is constrained by three types of jurisdiction: (1) legislative jurisdiction: "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation,

20. *See infra* Parts I.B, I.C.

21. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) ("[Canons] are designed to help judges determine the Legislature's intent as embodied in particular statutory language.").

22. *See infra* note 83 (discussing the Supreme Court's distinction between the two canons and presenting scenarios in which the two canons would support different outcomes). R

23. To differentiate between the subjects of the twin canons, at least one scholar has applied the term "extrajurisdictionality" to the former and "extraterritoriality" to the latter. *See* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AMER. J. INT'L L. 351, 351–52 (2010). This term exacerbates the naming problem—i.e. that legislative jurisdiction is not a jurisdictional issue. For that reason, this Article will not adopt this nomenclature. Similarly, Erez Reuveni rightly notes that "jurisdiction" is an improper term for the issues addressed by the presumption against extraterritoriality, but he stumbles into an analogous problem by calling the issue "statutory standing." Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071 (2010). Although this term may be technically accurate, the reference to "standing" also may lead courts down the wrong path. *See, e.g.*, Arreola v. Godinez, 546 F.3d 788, 794–95 (7th Cir. 2008) ("Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing. Standing is a prerequisite to *filing suit*, while the underlying merits of a claim (and the laws governing its resolution) determine whether the plaintiff is *entitled to relief*."). For this reason, this Article will eschew the term "statutory standing" as well.

or by determination of a court"; (2) adjudicatory jurisdiction: "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings"; and (3) enforcement jurisdiction: "to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."[24] Self-evidently, legislative jurisdiction is the power to legislate, adjudicatory jurisdiction is the power to subject people to the judicial process, and enforcement jurisdiction is the power to enforce the laws.

The reach of a civil or criminal statute is a question of legislative jurisdiction. Under accepted principles of international law, there are five bases of legislative jurisdiction.[25] The first and most straightforward is territoriality. There is little dispute that states have the authority to apply their laws to persons and conduct within their borders.[26] The second basis is similarly easy to comprehend—

24. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS LAW].

25. *Id.* §§ 402 & 404; *see* MALCOLM N. SHAW, INTERNATIONAL LAW 572–622 (5th ed. 2003); ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW TO USE IT 56–77 (1994); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 37–38 (1992). Legislative-jurisdictional limits also appear in the text of international treaty law. *See, e.g.*, SHAW, *supra* note 25, at 597–604; Roger Alford, *Extraterritorial Regulation of Human Rights and the Environment Under the WTO General Exceptions*, OPINIO JURIS (Nov. 2, 2010, 10:42 AM), http://opiniojuris.org/2010/11/02/extraterritorial-regulation-of-human-rights-and-the-environment-under-the-wto-general-exceptions (discussing the bases for extraterritorial legislation under the General Agreement on Tariffs and Trade). R

26. *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402(1) ("[A] state has jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory . . . ."); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19 (Boston, Hilliard, Gray & Co. 1834) ("[E]very nation possesses an exclusive sovereignty and jurisdiction with its own territory."); The Apollon, 22 U.S. (9 Wheat.) 362 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction."); SHAW, *supra* note 25, at 579–84. R

Indeed, some scholars have suggested that, prior to the Twentieth Century, the territoriality principle provided the exclusive basis. Not so. For example, Joseph Story's canonical COMMENTARIES ON THE CONFLICT OF LAWS and the oft-cited United States Supreme Court decision in *The Apollon* case articulate the impor-

jurisdiction based on nationality. Under this basis, a state may regulate the conduct of its nationals, even if they are outside of the state's territorial borders.[27]

The third basis of jurisdiction is of a more modern vintage. Gaining strength around the turn of the Twentieth Century was the notion that a state should be able to regulate conduct outside its borders that has effects inside its borders.[28] This principle, often referred to as objective territoriality or passive personality, greatly expands a state's legal reach beyond the bounds countenanced by the principles of territoriality and nationality.[29]

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tance of territorial jurisdiction, but also remark on the propriety of nationality jurisdiction. *See* STORY, *supra* note 26, at 22 ("[A]lthough the laws of a nation have no direct, binding force, or effect, except upon persons within its territories; yet every nation has a right to bind its own subjects by its own laws in every other place . . . ."); *The Apollon*, 22 U.S. (9 Wheat.) at 370 ("The laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens*.") (emphasis added). R

27. *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402(2) ("[A] state has jurisdiction to prescribe law with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory . . . ."); SHAW, *supra* note 25, at 584–89. R R

28. *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402(1) ("[A] state has jurisdiction to prescribe law with respect to . . . (c) conduct outside its territory that has or is intended to have substantial effect within its territory . . . ."); Cutting's Case, 2 Moore DIGEST § 201, at 228; SHAW, *supra* note 25, at 589–91. R R

29. The Permanent Court of International Justice, the precursor to the International Court of Justice, gave voice to the objective territoriality principle in the famed Lotus Case. Case of the SS Lotus (Fr. v. Turk.), 1927 P.C.I.J., (ser. A) No. 10 (Sept. 7). In that decision, the PCIJ held that Turkey was not forbidden from applying its criminal laws to a French officer's conduct on a French vessel that collided with a Turkish ship on the high seas. Since flagged ships were understood to be extensions of national territory, the Turkish government argued that its laws should reach the conduct of the French officer because that conduct had a direct effect within the scope of Turkey's sovereignty, i.e. the Turkish ship. The PCIJ agreed. "[O]nce it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting [the French officer] because of the fact that the author of the offence was on board the French ship." *Id.* at 23. Summarizing this approach, the court observed that "the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if . . . its effects, have taken place there." *Id.* Following the Lotus Case, the First Restatement of the Conflict of Laws recognized this basis of jurisdiction as well. *See* RESTATEMENT (FIRST) OF THE CONFLICT OF LAWS § 65 (1934) ("If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or

The fourth basis of jurisdiction is the protective principle, under which a state can regulate conduct directed against the state or its vital interests.[30] This basis would pull in laws aimed at conduct such as espionage and counterfeiting, even if it occurs overseas and was not intended to have a direct effect on the territory of the state. Finally, states have long recognized universal jurisdiction for certain conduct considered to be of "universal concern," such as piracy and genocide.[31]

For our purposes, the inquiry into legislative jurisdiction is relevant to statutory interpretation. The case of *Hartford Fire Insurance Co. v. California* illustrates two different approaches to legislative jurisdiction in U.S. law: one in Justice Souter's majority opinion, and one in Justice Scalia's dissent.[32] Although Souter's view won the battle for judgment in the case, Scalia's view seems to have won the war, as later Supreme Court decisions confirm.[33]

Hartford Fire asked the Court to determine whether the Sherman Antitrust Act could apply to a London-based reinsurance company, even though the United Kingdom had an extensive regulatory scheme for the insurance industry. Treating the case as

other interests as a result thereof."); *see also Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435, 480 (Supp. 1935) (Harvard Research in International Law study); Strassheim v. Daily, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."); United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 443 (2d Cir. 1945) (citing the Restatement).

30. *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402(2) ("[A] state has jurisdiction to prescribe law with respect to . . . (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."); SHAW, *supra* note 25, at 591–92. R R

31. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 404 ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present."); *see* SHAW, *supra* note 25, at 592–97. The hotly contested debate about the extent of universal jurisdiction is beyond the scope of this Article. R R

32. 509 U.S. 764 (1993).

33. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); *see also* Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L. L. 53 (1995); John A. Trenor, *Jurisdiction and the Extraterritorial Application of Antitrust Laws after* Hartford Fire, 62 U. CHI. L. REV. 1583 (1995).

raising an issue of "prescriptive comity,"[34] the ephemeral majority held that U.S. courts have no jurisdiction over extraterritorial conduct if there is a "true conflict" between U.S. and foreign law; a true conflict, the Court held, occurred when a party could not possibly comply with both sets of requirements.[35]

Justice Scalia's dissent rejected this approach on two levels. First, Justice Scalia rightly suggested that this was not an issue of the court's jurisdiction, but a question of whether a particular law applies to the particular conduct at issue.[36] The Court has since adopted Justice Scalia's approach to the meaning of "jurisdiction."[37] Second, framing the issue as a question of statutory interpretation, Justice Scalia used international law limits on legislative jurisdiction as a tool to divine congressional meaning, relying on the so-called *Charming Betsy* canon.[38] As Justice Scalia wrote:

34. *Hartford Fire*, 509 U.S. at 794–99. Justice Scalia used the term "prescriptive comity" to clarify the majority's reference to "comity":

> The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted.

Id. at 817 (Scalia, J., dissenting).

35. Justice Souter's use of the term "true conflict" does not accord with the traditional use of that term in conflict of laws. Under Professor Brainerd Currie's interest analysis, a "true conflict" exists where two or more states have an interest in the application of their laws to given facts; it says nothing of the ability of a party to comply with those laws. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182–89 (1963).

36. *Hartford Fire*, 509 U.S. at 812–13 (Scalia, J., dissenting) ("It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). Respondents asserted nonfrivolous claims under the Sherman Act, and 28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases 'arising under' federal statutes. . . . The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.").

37. In particular, the *Empagran* decision later confirmed that the Court has left behind the notion that legislative-jurisdictional issues raise questions of subject-matter jurisdiction. 542 U.S. at 163–75.

38. *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting). The *Charming Betsy* canon finds its roots in the 1804 Supreme Court decision *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). This case asked whether Jared Shattuck,

"Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international law limits on jurisdiction to prescribe."[39] As this comment suggests, this rule of interpretation is not a limit on the authority of Congress, as the traditional notion of legislative jurisdiction would be. Justice Scalia's bank shot limits Congress not by reference to its authority under international law per se, but by holding that courts should presume that Congress was aware of these "limits" and would have said so if it intended to exceed them. Again, the Court has since adopted the *Hartford Fire* dissent's approach.[40]

Justice Scalia's dual criticisms of the *Hartford Fire* majority appear to have won the day, and in so doing revealed the term "legislative jurisdiction" to be a misnomer in U.S. law. Like the Holy Roman Empire,[41] legislative jurisdiction is neither a restriction on the legislature nor a question of jurisdiction.[42] U.S. courts do not treat legislative jurisdiction as a per se limitation on the power of the legislature, but rather the courts have incorporated the notion of legislative jurisdiction into U.S. law through statutory interpretation. Further, the Supreme Court repeatedly reminds litigants that

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who was born an American citizen but became a Danish subject, and his schooner flying under the Danish flag, would fall within the scope of the Nonintercourse Act, which restricted trade with France and its dependencies. *See* Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801). Chief Justice Marshall concluded that the law did not apply. Citing the principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," Marshall held that the Nonintercourse Act could not apply to Shattuck because his capture would violate international norms prohibiting the capture of the citizens of neutral nations during war. 6 U.S. (2 Cranch) at 118.

39. *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting). Unambiguous text, however, can overcome this presumption. *See supra* note 17 (discussing statutes with explicitly extraterritorial reach). R

40. In *Empagran*, the Supreme Court again avoided relying on the *Hartford Fire* majority opinion and endorsed the dissent's approach on this issue. 542 U.S. at 163–75.

41. *See* Michael Myers (Linda Richman), Coffee Talk, *Saturday Night Live* (NBC television broadcast) ("The Holy Roman Empire was neither holy nor Roman nor an empire. Discuss.") (invoking Voltaire, ESSAI SUR L'HISTOIRE GÉNÉRALE ET SUR LES MŒURS ET L'ESPRIT DES NATIONS ch. 70 (1756) ("Ce corps qui s'appelait, et qui s'appelle encore le saint empire romain, n'était en aucune manière ni saint, ni romain, ni empire.")).

42. Legislative jurisdiction is actually a misnomer for a third reason: the rules of "legislative jurisdiction" apply not only to legislation but also to regulations, executive orders, and other rules, which explains why many jurists and scholars prefer the term "prescriptive jurisdiction" or "jurisdiction to prescribe." *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 401(a); *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting). R

jurisdiction has a particular meaning; the concept that we call legislative jurisdiction says nothing about the court's ability to hear a case.[43]

In any event, the *Charming Betsy* canon is now "beyond debate,"[44] and limits on legislative jurisdiction are part of the international law that informs that canon.[45] As a result, the *Charming Betsy* canon and principles of legislative jurisdiction play a role in the courts's assessment of the extraterritorial application of statutes. At the same time, the Supreme Court has been clear that the *Charming Betsy* canon is distinct from the presumption against extraterritoriality,[46] a different canon of interpretation to which this Article now turns.

B. The Presumption against Extraterritoriality

The presumption against extraterritoriality is aptly named: it calls for courts to presume that U.S. law does not apply extraterritorially. The presumption is not simply the logical extension of the recognition of territorial jurisdiction, although its early invocations can be found in cases discussing legislative-jurisdictional limits.[47] The presumption against extraterritoriality is a stand-alone tool of statutory interpretation, designed by courts to create a stable rule against which congressional intent may be evaluated without inquir-

43. *See, e.g.*, Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243–44 (2010) ("'Jurisdiction' refers to a court's adjudicatory authority. Accordingly, the term 'jurisdictional' properly applies only to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority. While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice. . . . Our recent cases evince a marked desire to curtail such drive-by jurisdictional rulings . . . .") (internal citations and quotation marks omitted).

44. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr., 485 U.S. 568, 575 (1988). For the rare exceptions that prove the rule, see Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 262–70 (1993) (calling for "decanonization"); Note, *The* Charming Betsy *Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1231–36 (2008) (offering alternatives to the canon).

45. *See, e.g.*, *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting); McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 21–22 (1963).

46. Justice Scalia's dissent in *Hartford Fire* called these canons "wholly independent." 509 U.S. at 815 (Scalia, J., dissenting) (quoting EEOC v. Arabian Amer. Oil Co., 499 U.S. 244, 264 (1991) (Marshall, J., dissenting)); *see infra* note 83 (discussing the differences between the twin canons). R

47. *See, e.g.*, BORN & RUTLEDGE, *supra* note 16, at 614–19. *See infra* note 83 (discussing the differences between the twin canons). R

ing into legislative jurisdiction.[48] This Section covers the history of and justifications for the presumption against extraterritoriality, as expressed in a series of Supreme Court decisions throughout the Twentieth Century.

The first key case is *American Banana Co. v. United Fruit Co.*[49] Interpreting the reach of the Sherman Antitrust Act, Justice Holmes assumed that "[a]ll legislation is prima facie territorial."[50] Holmes pressed further, concluding that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[51] On this basis, he concluded that the Sherman Antitrust Act did not apply extraterritorially.[52] Holmes's formulation of the presumption may sound like previous articulations of the territorial limits of legislative jurisdiction or conflict of laws, but it has been understood as staking out a separate rule of interpretation. Indeed, the Supreme Court expressed this understanding throughout the first half of the Twentieth Century,[53] culminating in *Foley Brothers, Inc. v. Filardo*: "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . .

48. *See, e.g.*, United States v. Bowman, 260 U.S. 94, 97 (1922) ("We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress . . . ."). Admittedly, the *Charming Betsy* canon imports notions of legislative jurisdiction into the question of congressional intent as well, but as suggested earlier, extraterritoriality has a different relationship to congressional intent in the two canons.

49. 213 U.S. 347 (1909). In this case, United Fruit ordered the Costa Rican militia to invade Panama and seize American Banana's assets. *Id.* at 354. American Banana sued United Fruit in federal court for anticompetitive behavior made unlawful by the Sherman Antitrust Act, 15 U.S.C. §§ 1–7.

50. 213 U.S. at 357 (quoting *Ex parte* Blain, 12 Ch. Div. 522, 528 (1879) (Brett, L.J.) (U.K.) and citing State v. Carter, 27 N.J.L. 499 (1859)).

51. 213 U.S. at 356.

52. While *American Banana*'s formulation of the presumption against extraterritoriality has endured, its interpretation of the Sherman Antitrust Act has been overcome by amendment, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-920, § 402, 96 Stat. 1246 (codified at 15 U.S.C. § 6a (2006)), and subsequent case law. *See, e.g.*, *Hartford Fire*, 509 U.S. at 764.

53. *See, e.g.*, Blackmer v. United States, 284 U.S. 421, 437 (1932) ("[T]he legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States . . . ."); Sandberg v. McDonald, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial . . . .").

is a valid approach whereby unexpressed congressional intent may be ascertained."[54]

Following *Foley Brothers's* reaffirmation of the presumption in 1949, the Supreme Court remained largely quiet on the issue for 40 years.[55] That is, until the Rehnquist Court resurrected the presumption in the 1990s, most clearly in *Aramco*.[56] Aramco, a Delaware corporation, discharged Ali Boureslan, a naturalized United States citizen born in Lebanon and employed by Aramco in Saudi Arabia. Boureslan argued that Title VII of the Civil Rights Act of 1964 prohibited his removal.[57] Recalling the cases from the first half of the century, Chief Justice Rehnquist construed the statute (and congressional intent) with reference to the presumption: "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."[58] Quoting *Foley Brothers*, Rehnquist reaffirmed the principle "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdic-

54. 336 U.S. 281, 285 (1949) (internal citation omitted). In *Foley Brothers*, the Supreme Court rejected the application of the Eight Hour Law to a U.S. citizen working abroad. The Act provided that "[e]very contract made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work . . . ." Eight Hour Law, ch. 174, 37 Stat. 137 (1912) (codified at 40 U.S.C. § 324 (1946)). The case asked the court to determine the geographic scope of "every" contract. 336 U.S. at 287.

During this period, some decisions espoused a broad view of territoriality, including understanding territoriality to include conduct that had effects in the United States. *E.g.*, Strassheim v. Daily, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."); United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 443 (2d Cir. 1945) (articulating the "effects test" that provided the basis for much of the jurisprudence on questions of extraterritoriality, stating that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends"). *See also infra* notes 88–94 and accompanying text (discussing the various "tests" for triggering the presumption). R

55. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 91 (1998).

56. 499 U.S. 244 (1991).

57. Boureslan sought relief under Title VII, 42 U.S.C. § 2000e-1–17 (2006), arguing that he was subject to harassment and was discharged on account of his race, religion, and national origin. 499 U.S. at 247. Boureslan was a U.S. citizen and was hired by Aramco in the United States to work in Saudi Arabia. *Id.*

58. 499 U.S. at 248.

tion of the United States."[59] Finding no such contrary intent, the Court concluded that Title VII did not apply. Later in the decade, the Court reaffirmed the presumption with reference to the Federal Tort Claims Act,[60] the Immigration and Nationality Act,[61] and the Endangered Species Act.[62]

Courts and scholars have justified the presumption in various ways. In his significant article on the presumption against extraterritoriality, Professor William Dodge articulated six potential justifications for the presumption.[63] This Article takes Dodge's list as the starting point and returns to it with the discussion of *Morrison* below.

Dodge raises the first two justifications and then dismisses them as out of date. First is the international law on legislative jurisdiction.[64] Professor Dodge eschews this justification because, in his view, international law no longer includes strict territorial limits on

59. *Id.* (quoting *Foley Bros.*, 336 U.S. at 285). The dissenters had no quarrel with the idea of the presumption, only objecting to the majority's seeming creation of a presumption that may only be overcome with *express* language, i.e. a "clear statement" rule. *Id.* at 260–61 (Marshall, J., dissenting) ("As the majority recognizes, our inquiry into congressional intent in this setting is informed by the traditional canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. But contrary to what one would conclude from the majority's analysis, this canon is not a clear statement rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will. . . . [A] court may properly rely on this presumption only after exhausting all of the traditional tools whereby unexpressed congressional intent may be ascertained.") (internal citations and quotations marks omitted). Rehnquist's majority opinion demanded "the affirmative intention of the Congress clearly expressed" to overcome the presumption. *Id.* at 248.

60. Smith v. United States, 507 U.S. 197 (1993).

61. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158–59 (1993).

62. Lujan v. Defenders of Wildlife, 504 U.S. 555, 581–89 (1992) (Stevens, J., concurring in the judgment).

63. Dodge, *supra* note 55, at 112–23; *see* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2891–92, nn.7–8 (2010) (Stevens, J., concurring) (citing Dodge's article). In *A Reappraisal of the Extraterritorial Reach of U.S. Law*, Born notes that the earlier incarnation of the territoriality presumption was supported by three related justifications: public international law, conflict of laws analysis, and international comity. *See* Born, *supra* note 25, at 9–21. Professor Dodge's list draws its first five reasons from another significant article by Professor Curtis Bradley. *See* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997). The sixth justification is derived from the work of Professor William Eskridge. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 275 (1994). R R

64. *See* Dodge, *supra* note 55, at 113–14 (citing *The Apollon*, the *Charming Betsy* canon, and international law scholarship)*; see also* Born, *supra* note 25, at 61–71. R R

jurisdiction.[65] The Court has given us another reason to ignore this justification: the *Charming Betsy* canon—which incorporates the international law on legislative jurisdiction—is distinct from the presumption against extraterritoriality. Second, Professor Dodge observes that Justice Holmes's opinion in *American Banana* relied on the "vested rights" theory of conflict of laws.[66] The vested rights theory proclaimed: "[T]he character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[67] Dodge observed that, like international law, conflict of laws theory would no longer support the presumption as articulated in *American Banana*.[68]

Turning to more robust justifications, Dodge suggests that the desire to avoid conflicts with foreign law could justify the presumption.[69] Chief Justice Rehnquist expressed this view in *Aramco*, noting that the canon "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[70] Dodge suggests that the Supreme Court has not been vigilant in protecting this interest, even in cases since *Aramco*,[71] but this does not render it inapplicable. Further, al-

65. Dodge, *supra* note 55, at 113–14 (citing the *Lotus* Case, 1927 P.C.I.J., (ser. A) No. 10 (Sept. 7), and the RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, §§ 402 & 404). R R

66. *Id.* at 114–15 (citing *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), and Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945), discussing the vested rights theory).

67. Am. Banana Co., 213 U.S. at 356.

68. Dodge, *supra* note 55, at 115 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971)*; see also* Born, *supra* note 25, at 71–74. R R

69. Dodge, *supra* note 55, at 115–17*; see also* Born, *supra* note 25, at 76–79 (arguing that the desire to avoid conflicts with foreign law is an insufficient basis for the territoriality presumption). R

70. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 20–22 (1963)).

71. Dodge, *supra* note 55, at 116 (citing Smith v. United States, 507 U.S. 197 (1993) (applying the presumption without risk of conflict with foreign law), Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (same), and *Hartford Fire*, 509 U.S. 764 (not applying the presumption when there was a risk of conflict with foreign law)). *Smith* is a straightforward example of Dodge's point. In *Smith*, the Court determined that the Federal Tort Claims Act did not provide a cause of action for torts against the federal government arising out of conduct in Antarctica. The Court applied the presumption even though there was no risk of conflict with foreign law. 507 U.S. 197. R

Sale is a different, and more interesting, matter. Justice Stevens opened the opinion for the Court with this concise description of the case: "The President has directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees." 509 U.S. at 158. The Court

though one could argue that the *Charming Betsy* canon protects this interest by applying legislative-jurisdictional limits through statutory interpretation, the two canons are not coextensive.[72]

This foreign conflict concern dovetails with another one of Dodge's justifications: separation of powers.[73] The desire to avoid conflicts with foreign law reflects a concern with upsetting a foreign government; this justification reflects the view that if the United States is going to ruffle foreign feathers, it should be the legislature—rather than the judiciary—doing the ruffling.[74] Dodge articulates this concern with reference to institutional competence, although democratic legitimacy could also support this proposi-

concluded that Section 243(h)(1) of the Immigration and Nationality Act—which prevents the United States from "deport[ing] or return[ing] any alien" to a country where that alien's freedom or life would be threatened on account of his membership in certain groups—did not apply extraterritorially, and thus did not apply to the Coast Guard's actions on the High Seas. Justice Stevens suggested that this outcome did not conflict with foreign law, but applied the presumption anyway. *Id.* at 173–74. In dissent, Justice Blackmun noted that this conduct violated the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968. Invoking the *Charming Betsy* canon, the dissent noted that the Coast Guard's actions would violate international law—here, the substantive international law in the Protocol rather than the customary international law of legislative jurisdiction discussed elsewhere in this Article. Justice Blackmun argued, on this basis and on others, that the statute should grant rights to the Haitians. Justice Blackmun believed that the presumption caused, rather than prevented, international conflicts in this case, since it led the Court to reach a conclusion that "flies in the face of the international obligation . . . ." *Id.* at 207. Note, however, that Justice Blackmun's opinion expressed concern about a conflict with *international* law, while Justice Stevens's majority opinion referred to potential conflict with *foreign* law, which *Aramco* said undergirded the presumption. *See id.* at 173–74 ("The Court of Appeals held that the presumption against extraterritoriality had 'no relevance in the present context' because there was no risk that § 243(h), which can be enforced only in United States courts against the United States Attorney General, would conflict with the laws of *other* nations.") (emphasis added); *Aramco*, 499 U.S. at 248 (discussing "unintended clashes between our laws and those of *other* nations") (emphasis added). *See also* Dodge, *supra* note 55, at 97 ("[T]he Court downplayed the risk of conflict with *foreign* law [in *Sale*] as a reason for the presumption against extraterritoriality because there was no such risk.") (emphasis added). R

72. *See infra* note 83. R

73. Dodge, *supra* note 55, at 120–22. R

74. *Aramco* and Title VII are a perfect example. The Court was cautious about extending Title VII extraterritorially as originally drafted, but shortly after the decision Congress amended the statute to make explicit its intent for extraterritorial application. *See* 42 U.S.C. § 2000e(f) (2006). *Morrison* and the Securities Exchange Act tell the same story. *See infra* note 178. R

tion.[75] Either way, this view suggests a more cautious posture for courts, deferring to the legislature (and the executive) on these questions.[76]

The next justification reflects the sentiment that "Congress is primarily concerned with domestic conditions."[77] In short, the Court assumes a domestic intent. From that assumption, the presumption against extraterritoriality logically follows. The Court has not been clear about the source of this assumption, nor is it self-evident, given the increasingly globalized world and Congress's not-infrequent attention to international affairs.[78] That being said, the repetition of this justification in Supreme Court opinions demands that it too must be taken into account.[79]

The final justification is that the Court should provide stable background rules against which Congress can legislate. Dodge relies on the work of Professor Eskridge for the proposition that the Court chooses clear presumptions in order to give Congress guidance on how the Court thinks (and thus how the Court will interpret future statutes).[80] In this view, the Court is the first mover, establishing a background rule against which Congress operates—and against which its statutes will be judged. Although courts may

75. Dodge, *supra* note 55, at 120 (citing *inter alia* Bradley, *supra* note 63, at 552 (discussing "judicial activism"); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 145 (1998) (discussing institutional competence in discerning congressional intent); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1690–93 (1997) (discussing courts's "unguided intuitive judgment")). R

76. The Court in *Sale* suggested a slightly different separation of powers argument, noting that the presumption "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Sale*, 509 U.S. at 188. Professor Knox, for example, rejects this justification. Knox, *supra* note 23, at 387–88. R

77. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

78. *See, e.g.*, Knox, *supra* note 23, at 383–84 (explaining and then questioning the justification that Congress is concerned only with domestic conditions); Born, *supra* note 25, at 74–75 (rejecting this justification). *But see* Dodge, *supra* note 55, at 117–23 (arguing that this is the only proper justification for the presumption). R R

79. *See supra* note 77; Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010); *id.* at 2892 (Stevens, J., concurring in the judgment); Smith v. United States, 507 U.S. 197, 204 n.5 (1993); Lujan v. Defenders of Wildlife, 504 U.S. 555, 585 (1992) (Stevens, J., concurring in the judgment). R

80. ESKRIDGE, *supra* note 63, at 277. Eskridge ultimately rejects this view as applied to *Aramco*. His approach requires three conditions to be met in order to justify the presumption on this basis: (1) Congress is capable of knowing and working with an interpretative regime; (2) the application of the regime must be transparent to Congress; and (3) the regime should not change unpredictably. Eskridge concluded that *Aramco* failed the second and third elements of this test. *Id.* at 278. R

prefer straightforward rules, this justification does not animate any particular background rule. Rather, the more natural justifications of conflicts with foreign law, separation of powers, and congressional intent relate directly to the court's adoption of this presumption. What *Morrison* has to say on this issue, and what this tells us about the extraterritorial application of criminal statutes, is taken up again below.

In any event, despite its roots in earlier times, the presumption against extraterritoriality—as distinct from considerations of legislative jurisdiction, comity, or the *Charming Betsy* canon—found its voice in the Twentieth Century. The line of cases starting with *American Banana* focused on the question whether Congress intended a U.S. law to apply outside the territory of the United States. And the Supreme Court reaffirmed the presumption in a series of cases in the 1990s, beginning with *Aramco*. Admittedly, courts have not always been consistent in the application of the presumption, occasionally failing to distinguish it from legislative jurisdiction or relying on these twin lines of cases interchangeably.[81] Indeed, commentators such as Professors John Knox and Jeffrey Meyer have argued that these presumptions should be collapsed into one rule—a "presumption against extrajurisidictionality" or a "dual illegality" rule, respectively.[82] But particularly in the age of *Aramco*, the Court

81. *See, e.g.*, McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10 (1963) (citing the territoriality presumption but relying on legislative-jurisdictional considerations to reject the extraterritorial application of the statute); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) (same); *see also* Brief of Law Professors as Amici Curiae in Support of Petition for Writ of Certiorari, British Am. Tobacco (Investments) Ltd. v. United States, 130 S. Ct. 3502 (2010) (No. 09-980), 2010 WL 1186417, at *6–12 (collecting cases and scholarship). *Compare* Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) (discussing the application of a statute to a U.S. military base overseas without reference to the presumption), *with* United States v. Spelar, 338 U.S. 217 (1949) (answering the same question about a different statute, one year later, with reference to the presumption).

82. *See* Knox, *supra* note 23 (advocating a three-tiered presumption against extrajurisdictionality: (1) rejecting application of U.S. law where there is no basis for legislative jurisdiction; (2) presuming that U.S. law extends to situations where the United States has the "primary" legislative jurisdiction; and (3) allowing evidence of congressional intent to overcome a soft presumption against the application of U.S. law in situations where the United States has less-than-primary legislative jurisdiction); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 119 (2010) (proposing a "dual illegality rule" under which courts decline to apply U.S. law to extraterritorial conduct unless that conduct would be illegal or similarly regulated in the territorial state). R

has been clear about the independence of the twin canons.[83] The Supreme Court seems invested in a distinct rule that presumes that legislation should not be extended extraterritorially without the indication of congressional intent to the contrary—the presumption against extraterritoriality.

C. The Operation of the Presumption

The previous Section outlined the history and justification of the presumption against extraterritoriality. This Section pauses to address two aspects of its operation. When presented a case with some extraterritorial aspects, a court must answer two central questions with respect to the presumption. One is explicit in the articulation of the presumption: courts presume statutes do not apply extraterritorially unless a contrary intent appears, so a court must determine whether there is such a contrary intent. If such intent is uncovered, the case "overcomes" the presumption and may pro-

83. *See, e.g.*, *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 207 (1993) (Blackmun, J., dissenting); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 264 (1991) (Marshall, J., dissenting). The twin canons are not coextensive. For example, the facts of *Aramco* are ones that could pass the *Charming Betsy* canon—relying on nationality for legislative jurisdiction—but fail the presumption against extraterritoriality. One can also imagine cases that fail the *Charming Betsy* canon but pass the presumption. For example, in his *Hartford Fire* dissent, Justice Scalia points to two Jones Act cases where the presumption of extraterritoriality would not apply (since the conduct occurred in American waters), but principles of international law countenanced against extending legislative jurisdiction to the claims of foreign sailors against foreign employers. 509 U.S. at 815–16 (Scalia, J., dissenting) (citing Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 383 (1959) and Lauritzen v. Larsen, 345 U.S. 571 (1953)). Indeed, in this connection, Justice Scalia imagines that the presumption against extraterritoriality precedes, rather than follows, the *Charming Betsy* canon. *Id.* at 814–15. International law's reasonableness limit on the exercise of legislative jurisdiction provides another way to achieve this result. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 403(1) ("Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."). Assume that a court has used the *Charming Betsy* canon to incorporate this reasonableness check. One could imagine a court finding that the presumption permits the application of U.S. law based on "weakly" territorial conduct—the creation of a website viewed in the United States; a single telephone call to a foreign cell phone using a U.S. cell phone tower or satellite—but holding the application of the statute to the facts would be an unreasonable extension of legislative jurisdiction, and thus ruling that the *Charming Betsy* canon precludes the court from applying the ambiguous statute. *See, e.g.*, *In re* Hijazi, 589 F.3d 401 (7th Cir. 2009) (discussing indictment of foreign national for conduct abroad that included sending emails to email addresses with American domain names, e.g., @Halliburton.com). R

ceed. The other question is implicit in the presumption and antecedent to its application. The presumption is only relevant where the court is asked to apply U.S. law extraterritorially. While it appears straightforward on its surface, whether a case may be characterized as "extraterritorial" in the first place has been the subject of intense scholarly and judicial debate. If the case is not "extraterritorial," then the presumption does not apply (or can be "avoided") and the case moves ahead. This Section briefly surveys the background on these two operational issues: when the presumption can be overcome, and when it applies or is avoided.

1. Overcoming the Presumption

The classic statement of the presumption is that statutes do not apply extraterritorially *unless a contrary intent appears*. Such a formulation means that courts will only reject the extraterritorial application of a U.S. law after concluding that there is no contrary intent. This Article will refer to this act as "overcoming" the presumption: in a situation where the presumption could apply, legislative intent may allow a court to *overcome* the presumption.

For explicitly extraterritorial statutes, this job is easy—where Congress says that a law should apply extraterritorially, that expression of intent overcomes the presumption. However, there are many statutes for which there is an argument that an extraterritorial intent could be inferred. Can the presumption be overcome by implication? One option is to treat the presumption as a clear-statement rule—unless Congress expressly calls for the extraterritorial application of a law, the presumption directs courts to apply the ambiguous law only within the territory of the United States. Alternatively, courts could have the latitude to read an extraterritorial intent into ambiguous statutes. If the presumption can be overcome by implication, then a number of additional interpretative challenges arise: What sources can be consulted to determine congressional intent? How easily must the intent be ascertained? What rules of interpretation should guide that inquiry?

In *Aramco*, the majority appeared to make it more difficult to overcome the presumption, making multiple references to a "clear expression" of congressional intent and once explicitly mentioning the need for a "clear statement."[84] In a dissent joined by Justices Blackmun and Stevens, Justice Thurgood Marshall rejected the ma-

84. 499 U.S. at 248 ("[U]nless there is the affirmative intention of the Congress *clearly expressed*, we must presume it is primarily concerned with domestic conditions.") (emphasis added) (internal citations and quotation marks omitted); *id.* at 258 ("Congress's awareness of the need to make a clear statement that a statute

jority's clear-statement rule, noting that this approach was contrary to decisions like *Foley Brothers*.[85] Marshall observed that the presumption was a tool of ascertaining congressional intent and that "[c]lear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them."[86] Inferring congressional intent for the extraterritorial application of Title VII, the dissent concluded that the suit could go forward.[87]

This Article will not venture to resolve these disputes or determine which tools of interpretation should be used to divine congressional intent, but it will again consider how courts can overcome the presumption in the discussions of *Bowman* and *Morrison*. For the moment, it suffices to say that the general trend in Supreme Court decisions has been to make it more difficult to overcome the presumption.

2. Applying or Avoiding the Presumption

So far, the discussion of the presumption has addressed whether a law may apply extraterritorially. But courts considering the presumption against extraterritoriality must also answer a threshold question: In which cases does the presumption apply? How do we know if a particular case should be treated as "territorial" or "extraterritorial"? Or, in other words, what territorial connections are necessary to avoid the presumption altogether?

While this seems like a simple question on the surface, in fact it has comprised the central fight with respect to extraterritoriality for decades—although it is not always phrased in this way. In his article, Professor Dodge identifies three theories, which he associates with Justice Holmes, Judge Bork, and Judge Mikva, that respond to this question.[88] The Holmes view, exemplified by *American Banana*, looks at the location of the relevant *conduct*: courts should presume

applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").

85. *Id.* at 261–66 (Marshall, J., dissenting). The dissent notes that cases such as *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), and *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), which appear to support a clear-statement rule, represent situations in which the extraterritorial application of the statute would violate international law, i.e., the *Charming Betsy* canon. *Id.* at 264–65 (Marshall, J., dissenting).

86. *Id.* at 262 (Marshall, J., dissenting).

87. *Id.* at 278 (Marshall, J., dissenting).

88. *See* Dodge, *supra* note 55, at 101–10. R

that statues do not apply to extraterritorial conduct.[89] The Bork view, expressed in *Zoelsch v. Arthur Anderson & Co.*, ignores the location of the conduct in favor of the location of its *effects*: are the relevant effects within the United States?[90] Finally, the Mikva view, articulated in *Environmental Defense Fund v. Massey*, is most willing to avoid the presumption.[91] Mikva presumes that Congress intended its statutes to apply to *conduct* within the United States and to conduct with *effects* in the United States—meaning that the presumption applies (and the law would be inapplicable) where neither the conduct or effects are inside the territory of the United States.[92] For this reason, Judge Mikva's view may also be called the conduct-and-effects test. Prior to *Morrison*, the conduct-and-effects test represented the dominant view of the lower courts and the scholarly community.[93] In the particularly significant areas of securities law—which Professor Dodge refers to as the "$64,000 question" of extraterritorially—and antitrust law, the conduct-and-effects approach has been considered the starting point for this analysis.[94]

The commonality among these three approaches to extraterritoriality is revealing. Each test seeks to establish a universal rule that directs courts when to apply the presumption against extraterritoriality—when the conduct is extraterritorial, when the effects are extraterritorial, or when both are extraterritorial. While there is merit to selecting a trigger that would apply to all statutes (as these three proposals do), courts are not necessarily bound to domain-general approaches. An alternative not discussed by Dodge or most other

89. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909); *see also* Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088 (9th Cir. 1994) (en banc) (adopting this view after *Aramco*).

90. 824 F.2d 27, 30 (D.C. Cir. 1987); *see also* Robinson v. TCI/US West Commc'ns, 117 F.3d 900, 905–07 (5th Cir. 1997) (adopting this view after *Aramco*).

91. 986 F.2d 528, 530–32 (D.C. Cir. 1993).

92. *Id.* at 531.

93. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878–80 (collecting cases); *id.* at 2888–95 (Stevens, J., concurring in the judgment) (defending this approach); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 402; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965); Dodge, *supra* note 55, at 101–05 (collecting cases). **R**

94. *See, e.g.*, United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945); Dodge, *supra* note 55, at 101–05; Born, *supra* note 25, at 29–39, 45–48; BORN & RUTLEDGE, *supra* note 16, at 640–58; JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 6.05–6.08 (2d ed. 1981); *infra* notes 160–162 and accompanying text (discussing the Second Circuit's approach to securities cases leading up to *Morrison*). As Justice Stevens wrote in his separate opinion in *Morrison*, "The Second Circuit's test became the 'north star' of [Securities Exchange Act] jurisprudence, not just regionally but nationally as well." 130 S. Ct. at 2889 (Stevens, J., concurring in the judgment) (internal citation omitted). **R** **R** **R**

commentators on this issue is an approach that asks the *statute* to determine the subject of the extraterritoriality inquiry.[95] In other words, courts could engage in a statute-specific inquiry about what Congress intended to cover before asking whether the territorial elements fit that description. Sometimes Congress cares about the conduct; sometimes it cares about the effects; and sometimes it may care about some wholly different consideration. Moreover, sometimes Congress may care only about a certain type of conduct or effect, not any conduct or effect that would be sufficient to provide a nominally territorial basis for the action. Why not look to the statute (and its context) to determine what Congress intended?

Although commentators typically do not talk about the presumption in this way, there is support for this approach in (among others) the Supreme Court's most recent opinion on the presumption, *Morrison v. National Australia Bank*. In *Morrison*, the Court announced that the test of territoriality applied to the "focus" of the statute, and, in the process, assigned to courts the task of divining Congress's "focus." In short, only territorial connections related to the statute's focus can save a case from the presumption.[96]

In sum, cases like *Aramco* have made it harder to overcome the presumption, and as described later in Part III, *Morrison* seems to have made it harder to avoid the presumption with claims of territoriality. Before turning to that inquiry, Part II looks at the application of the presumption in criminal cases before *Morrison*.

II.
EXTRATERRITORIAL CRIMINAL LAW: *UNITED STATES V. BOWMAN*

Foley Brothers, *Aramco*, and *Morrison* expounded on the presumption against extraterritoriality in the civil context. For criminal cases, the Supreme Court's 1922 decision in *United States v. Bowman* remains the governing precedent.[97] Like the civil cases described

95. *See, e.g.*, Dolan v. United States Postal Serv., 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the *purpose and context of the statute*, and consulting any precedents or authorities that inform the analysis.") (emphasis added).

96. *See Morrison*, 130 S. Ct. at 2883–86; *infra* notes 164–167 and accompanying text (discussing *Morrison*'s focus test). R

97. United States v. Bowman, 260 U.S. 94 (1922). *Bowman* recognized the importance of civil precedent in criminal cases, but also, by its terms, drew a distinction between criminal and civil law with respect to the presumption. Therefore we cannot presume that civil decisions since *Bowman* have overruled it. *See, e.g.*, United States v. Leija-Sanchez, 602 F.3d 797, 798–99 (7th Cir. 2010) (making this argument in a prosecution under 18 U.S.C. § 1959).

above, *Bowman* and its progeny do not question the power of Congress to enact extraterritorial criminal laws. Instead, these cases ask whether a court should apply an ambiguous criminal statute extraterritorially.

For centuries, the answer to that question was flatly "no." Strict territoriality was the rule for criminal cases. As Chief Justice John Marshall wrote:

> No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.[98]

The reverence for territoriality was particularly strong in the criminal context because it involved a state seeking to directly enforce its laws abroad.[99] Courts and scholars have looked back to the Nineteenth Century as an era of strict territoriality in criminal cases,[100] though many of these early criminal decisions focused on legislative-jurisdictional concerns, rather than relying on a separate presumption.[101] *Bowman* is a criminal case that articulates a stand-alone presumption against extraterritoriality distinct from any legislative-jurisdictional analysis.[102]

The facts of *Bowman* arise out of the United States's defense preparations leading up to its entry into World War I. In 1917, the

98. The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825); *see* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §§ 4.2(d), 4.4 (2d ed. 2003).

99. *See* Born, *supra* note 25, at 51. *But see infra* notes 208–209 and accompanying text (discussing civil-enforcement actions brought by the government). R

100. *See, e.g.*, Small v. United States, 544 U.S. 385, 388–89 (2005) (citing United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818)); Born, *supra* note 25, at 51. R

101. *See* Knox, *supra* note 23, at 362–66. Three early piracy cases are often cited in this connection: *Palmer*, 16 U.S. (3 Wheat.) at 620; United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820); and United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820). But Knox correctly observes that these early piracy cases do not tell us much about the presumption since the statute was expressly extraterritorial. *See* Act of April 30, 1790 § 8, 1 Stat. 112, 113–14. R

102. 260 U.S. 94. Other important cases from the era include *Ford v. United States*, 273 U.S. 593 (1927) (permitting the prosecution for conspiracy to smuggle liquor into the United States where defendant acted on the high seas but intended the effects to occur in the United States and conspired with others within the United States); *Lamar v. United States*, 240 U.S. 60 (1916) (permitting the prosecution for fraudulent impersonation carried out by telephone originating out of state); and *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.").

United States established the United States Shipping Board Emergency Fleet Corporation to acquire, maintain, and operate a fleet of merchant ships for commerce and national defense.[103] The United States was the sole stockholder in the Fleet Corporation. The Fleet Corporation, in turn, owned and operated the steamship *Dio*.[104] The *Dio* was supposed to acquire one thousand tons of oil in Rio de Janeiro and deliver it to the United States. A Standard Oil agent, a merchant in Rio, and four men on the ship (including Raymond Bowman) hatched a plan to defraud the U.S. government: the schemers planned to buy and deliver only 600 tons of fuel and keep the funds earmarked for the remaining 400 tons for themselves. The U.S. government uncovered the plan and charged the four men from the *Dio* with conspiracy to defraud the Fleet Corporation in which the United States was a stockholder.[105] Three of the four men, all American citizens, appeared in federal court in the Southern District of New York and requested that the district court dismiss the indictment for lack of jurisdiction. The district court conceded that the United States had the power to "regulate the ships under its flag and the conduct of its citizens on those ships" (i.e. legislative jurisdiction), but the court rejected the indictment based on its interpretation of the criminal statute.[106] "Congress had always expressly indicated it when it intended that its laws should be operative on the high seas"; because there was no such express indication in the statute at issue, the district court concluded that it did not apply to Bowman and his compatriots.[107]

The Supreme Court agreed on the focus of the inquiry: "We have in this case a question of statutory construction."[108] Legislative jurisdiction was not an issue. The Court also concurred with the district court on the background rule: "If punishment of [certain offenses] is to be extended to include those committed outside of

103. *See* Shipping Act, ch. 451, 39 Stat. 728 (1916) (creating the Shipping Board, which subsequently established the Emergency Fleet Corporation in 1917). *See also Records of the United States Shipping Board*, NATIONAL ARCHIVES, http://www.archives.gov/research/guide-fed-records/groups/032.html (last visited Sept. 21, 2011).

104. *Bowman*, 260 U.S. at 95. The remainder of the factual description comes from the Supreme Court opinion.

105. The *Bowman* decision provides the full text of the criminal provision at issue in the indictment. *Id.* at 100 n.1 (quoting Section 35 of the Criminal Code, as amended by Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015). Suffice it to say, the statute is ambiguous as to its extraterritorial application.

106. 260 U.S. at 97. *See* United States v. Bowman, 287 F. 588 (S.D.N.Y. 1921).

107. *Bowman,* 260 U.S. at 97.

108. *Id.*

the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard."[109] This is the presumption against extraterritoriality applied in a criminal case. The Court articulated this rule with a citation to *American Banana*, noting that "[*American Banana*] was a civil case, but as the statute is criminal as well as civil, it presents an analogy."[110]

From there, however, the Supreme Court broke from the district court. The Court described different classes of criminal statutes. "Crimes against private individuals or their property," the first category, are presumed to apply territorially unless Congress indicates otherwise.[111] But not all crimes fit this description; the Court identified a second category of crimes "which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents."[112] For such offenses, to avoid "curtail[ing] the scope and usefulness of the statute and leav[ing] open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home," a court must conclude that the statute applies extraterritorially, even if Congress does not so expressly provide.[113] "In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."[114]

Turning to the statute in question, the Court inferred an extraterritorial intent from the nature of the offense:

> [The statute] is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval service or to any de-

109. *Id.* at 98.

110. *Id.*

111. *Id.* ("Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and fraud of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.").

112. *Id.*

113. *Id.*

114. *Id. See also id.* at 98–99 (describing other similar offenses from which an extraterritorial intent may be inferred).

> partment thereof, or any corporation in which the United States is a stockholder, or whoever connives at the same by the use of any cheating device, or whoever enters a conspiracy to do these things. The section was amended in 1918 to include a corporation in which the United States owns stock. This was evidently intended to protect the Emergency Fleet Corporation in which the United States was the sole stockholder, from fraud of this character. That Corporation was expected to engage in, and did engage in, a most extensive ocean transportation business and its ships were seen in every great port of the world open during the war. The same section of the statute protects the arms, ammunition, stores and property of the army and navy from fraudulent devices of a similar character. We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section.[115]

For these reasons, the Court held that the statute applied to Bowman and his co-conspirators.[116]

The Court summarized its rule as follows: "The necessary locus, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."[117] This summary fits nicely into the Court's current twin-presumption approach. The last portion's reference to the "jurisdiction of a government to punish crime under the law of nations" evokes legislative-

115. *Id.* at 101–02.

116. *Id.* In addition, the Court appeared to reject a rule of lenity argument. *Id.* at 102 (quoting United States v. Lacher, 134 U.S. 624, 629 (1890)). *See infra* note 214 and accompanying text. R

Contemporaneous accounts suggested an additional reason to allow the extraterritorial application of certain statutes—the fear that individuals would intentionally leave a jurisdiction in order to commit crimes within it. *See* Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 SAN DIEGO L. REV. 585, 593 (2007) (quoting *Laws Apply at Sea, Supreme Court Rules*, WASH. POST, Nov. 14, 1922, at 5 ("[U]nless the ruling of the lower court was set aside the criminal statutes of the United States could be violated with impunity by persons going outside the 3-mile limit.")).

117. *Bowman*, 260 U.S. at 97–98.

(or personal-) jurisdictional limits.[118] The earlier requirement looks to the purpose of Congress as part of a canon of interpretation that starts with a presumption against extraterritoriality.

In the years since, U.S. courts of appeals have relied on *Bowman* and civil precedents to apply U.S. criminal laws extraterritorially.[119] These cases reveal two important trends: courts of appeals have cited *Bowman* alongside the civil cases, and these courts have repeatedly stretched the substantive reasoning of *Bowman* to apply more and more criminal statutes extraterritorially.

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118. This was not the Court's only reference to legislative or personal jurisdiction. The Court also observed:

> Section 41 of the Judicial Code provides that 'the trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.' The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance. The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial.

Id. at 102–03. Whether this latter statement's reference to "jurisdiction" means legislative jurisdiction or personal jurisdiction, it appears to be separate from the rule of statutory construction described in the text of this Article. *See, e.g.*, *In re* Hijazi, 589 F.3d 401, 410 (7th Cir. 2009) (arguing that the excerpt quoted in this footnote refers to personal jurisdiction).

119. This Section relies on a comprehensive survey of all courts of appeals decisions citing the *Bowman* decision. Since this Article is concerned with the presumption against extraterritoriality, this Section ignores the many cases in which *Bowman* is used to address other topics, including (often) the "special territorial" or "maritime" jurisdiction of the United States. *See, e.g.*, United States v. Neil, 312 F.3d 419, 421 (9th Cir. 2002) (discussing the passive personality principle); United States v. Corey, 232 F.3d 1166, 1169–70 (9th Cir. 2000) (addressing the special maritime and territorial jurisdiction of the United States); Kollias v. D & G Marine Maint., 29 F.3d 67, 68 (2d Cir. 1994) (application of statute to "injuries sustained on the high seas"); United States v. Smith, 680 F.2d 255 (1st Cir. 1982) (addressing maritime jurisdiction of the United States); Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980) (addressing revocation of American passport based upon citizen's conduct abroad); United States v. Erdos, 474 F.2d 157 (4th Cir. 1973) (addressing the murder of an American citizen on an American diplomatic compound); United States v. Townsend, 474 F.2d 209 (5th Cir. 1973) (addressing theft from a military base). This Article also excludes the most infamous defendant invoking *Bowman* because there was no extraterritorial issue in that case. *See* Capone v. United States, 51 F.2d 609, 614 (7th Cir. 1931) (rejecting the appellant's argument, which was based on *Bowman* and others, that the false claims statute did not apply to the territorial facts of Scarface Al's case).

Courts applying *Bowman* have taken the opportunity to explain its relationship to civil precedents. Some of these decisions suggested that *Bowman* merely restated the *American Banana* rule that statutes are presumed to apply territorially unless Congress has indicated otherwise.[120] Others suggested that *Bowman* created a limited exception to the presumption.[121] Either way, despite the outcomes described below, the courts of appeals say that *Bowman* and the civil law precedents live in harmony.[122]

Turning to the reach of *Bowman*, it is important to recall that *Bowman* was a case about fraud against the U.S. government, and its reasoning (as quoted above) expressly applied to those criminal laws that "are enacted because of the right of the Government to

120. *See, e.g.*, United States v. Nippon Paper Indus. Co., 109 F.3d 1, 6–7 (1st Cir. 1997) (taking this position and rejecting the district court's view that the presumption is stronger in the criminal context). This approach has been adopted by other circuits. *See, e.g.*, United States v. Belfast, 611 F.3d 783, 810–15 (11th Cir. 2010); United States v. Leija-Sanchez, 602 F.3d 797, 798–800 (7th Cir. 2010); United States v. Villanueva, 408 F.3d 193, 197 (5th Cir. 2005); United States v. Delgado-Garcia, 374 F.3d 1337, 1345–47 (D.C. Cir. 2004); United States v. Harvey, 2 F.3d 1318, 1327–30 (3d Cir. 1993); United States v. Larsen, 952 F.2d 1099, 1100 (9th Cir. 1991).

121. *See, e.g.*, United States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010); United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Dawn, 129 F.3d 878 (7th Cir. 1997); United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994); United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977); *see also* Meyer, *supra* note 82, at 135 (referring to *Bowman* as an exception to the strict territoriality rule). The "exceptions" track the substantive categories described below, e.g., crimes against the interests of government or crimes where the "nature of the offense" implies an extraterritorial application. Further, many courts have applied the presumption in concert with some limit on legislative jurisdiction, for example, *United States v. Vasquez-Velasco*, 15 F.3d 833, 839–41 (9th Cir. 1994); *United States v. Wright-Barker*, 784 F.2d 161, 167–70 (3d Cir. 1986), although some have muddled the two inquiries. *See, e.g.*, United States v. Columba-Colella, 604 F.2d 356 (5th Cir. 1979); United States v. Birch, 470 F.2d 808 (4th Cir. 1972); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968). Indeed, the Supreme Court may be partially responsible, since its decision in *Skiriotes v. Florida* connected *Bowman* and the nationality basis of legislative jurisdiction: "[A] criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect." 313 U.S. 69, 73–74 (1941). R

122. For example, numerous decisions cite favorably to *Bowman* and *Aramco*. *See, e.g.*, United States v. Weingarten, 632 F.3d 60, 66–67 (2d Cir. 2011); *Leija-Sanchez*, 602 F.3d at 799; United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. MacAllister, 160 F.3d 1304 (11th Cir. 1998). Others cite favorably to *Bowman* and *American Banana*. *See supra* note 120. And none of these cases suggests that the Supreme Court's recent civil law decisions overrule *Bowman*. *See, e.g.*, *Leija-Sanchez*, 602 F.3d at 798 (expressly rejecting this position). R

defend itself against obstruction, or fraud wherever perpetrated . . . ."[123] The fairest reading—or at least the narrowest one—would provide that a court can overcome the presumption and infer congressional intent to apply extraterritorially those statutes that protect government contracts from fraud and obstruction. The outcomes of courts of appeals cases show that these courts do not always hew to this narrow reading; instead, these courts routinely reconstruct *Bowman* to overcome the presumption and apply a U.S. criminal law abroad.[124] Such cases can be categorized into four groups ranging from the narrowest to widest readings of the *Bowman* holding.[125]

123. United States v. Bowman, 260 U.S. 94, 98 (1922).

124. Scholars observing this trend include Podgor & Filler, *supra* note 116, at 592 and Born, *supra* note 25, at 53. R R

125. The courts of appeals cases that have dealt with extraterritoriality of criminal statutes since *Bowman* are: *Leija-Sanchez*, 602 F.3d 797 (7th Cir.) (violent crimes (here, murder) in furtherance of a racketeering enterprise, 18 U.S.C. § 1959); *Frank*, 599 F.3d at 1227 (11th Cir.) (obtaining custody of a minor with the intent to produce child pornography, 18 U.S.C. § 2251A(b)(2)(A)); United States v. Dasilva, 271 Fed. App'x 856 (11th Cir. 2008) (per curiam) (attempted reentry into the United States, 8 U.S.C. § 1326(a)); United States v. Strevell, 185 Fed. App'x 841 (11th Cir. 2006) (per curiam) (sex tourism, 18 U.S.C. § 2423(c), and attempting to obtain or induce a minor to engage in prostitution, 18 U.S.C. §§ 1591(a), 1594(a), 2422(b)); *Villanueva*, 408 F.3d 193 (5th Cir.) (conspiracy to bring undocumented aliens into the United States, 8 U.S.C. § 1324(a)(2)(B)(ii)); United States v. Delgado-Garcia, 374 F.3d 1337, 1345–47 (D.C. Cir. 2004) (conspiracy to induce aliens to enter the United States illegally or to attempt to bring illegal aliens into the United States, 8 U.S.C. § 1324(a)); United States v. Plummer, 221 F.3d 1298 (11th Cir. 2000) (conspiracy to smuggle drugs into the United States, 18 U.S.C. § 545); *MacAllister*, 160 F.3d 1304 (11th Cir.) (conspiracy to export narcotics from the United States, 18 U.S.C. §§ 953, 963); *Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir) (price-fixing, 15 U.S.C. §§ 1–7); *Vasquez-Velasco*, 15 F.3d 833 (9th Cir.) (violent crimes in aid of racketeering, 18 U.S.C. § 1959); *Larsen*, 952 F.2d at 1100 (9th Cir.) (possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1)); United States v. Felix-Gutierrez, 940 F.2d 1200 (9th Cir. 1991) (accessory after the fact to the commission of an offense against the United States, 18 U.S.C. § 3); United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (inducing aliens to enter the United States, 18 U.S.C. § 1324(a)(4)); United States v. Layton, 855 F.2d 1388 (9th Cir. 1988) (conspiracy to kill a Congressperson and aiding and abetting that act, 18 U.S.C. § 351); United States v. Goldberg, 830 F.2d 459 (3d Cir. 1987) (transportation of fraudulently obtained money in interstate or foreign commerce, 18 U.S.C. § 2314, and wire fraud, 18 U.S.C. § 1343); United States v. Walczak, 783 F.2d 852 (9th Cir. 1986) (false statements (here on a Customs form), 18 U.S.C. § 1001); United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986) (conspiracy to import contraband, 21 U.S.C. §§ 952(a) & 960(a)(1), and possession of contraband with intent to distribute, 21 U.S.C. § 841(a)(1)); United States v. Aguilar, 756 F.2d 1418 (9th Cir. 1985) (impersonation of government official, 18 U.S.C. § 912); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984) (conspiring to murder DEA agents, 18 U.S.C. §§ 1114, 1117, assaulting DEA agents, 18 U.S.C.

The first group extends *Bowman* only slightly beyond government-fraud cases by characterizing *Bowman* as allowing the extraterritorial application of laws punishing all crimes against the United States government.[126] Claiming a direct analogy to the facts of *Bow-*

§§ 111, 2, and stealing government property, 18 U.S.C. §§ 2112, 2); United States v. Perez-Herrera, 610 F.2d 289 (5th Cir. 1980) (forbidding the manufacture or distribution of drugs for the purposes of importation, 21 U.S.C. § 959); United States v. Baker, 609 F.2d 134 (5th Cir. 1980) (possession of marijuana with the intent to distribute, 21 U.S.C. § 841(a)(1)); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978) (conspiracy to import controlled substances into the United States, 21 U.S.C. §§ 952, 963); United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976) (reproduction of citizenship papers, 18 U.S.C. § 1426(a), and encouraging and inducing unlawful entry into the United States, 8 U.S.C. § 1324(a)(4)); United States v. Cotten, 471 F.2d 744 (9th Cir. 1973) (theft of government property, 18 U.S.C. § 641, and conspiracy, 18 U.S.C. § 371); United States v. Birch, 470 F.2d 808 (4th Cir. 1972) (forging military documents, 18 U.S.C. § 499); Stegeman v. United States, 425 F.2d 984 (9th Cir. 1970) (fraudulent transfers and concealment of assets in contemplation of bankruptcy, 18 U.S.C. § 152); Brulay v. United States, 383 F.2d 345 (9th Cir. 1967) (conspiracy to smuggle controlled substances into the United States, 18 U.S.C. §§ 371, 545); *see also* United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) (applying 18 U.S.C. §§ 32(a)(1), 371, conspiracy to bomb United States aircraft, extraterritorially based on *Bowman* and the "special aircraft jurisdiction"). *But see* United States v. Lopez-Vanegas, 493 F.3d 1305 (11th Cir. 2007) (holding that 21 U.S.C. §§ 841(a)(1), 846, which make it unlawful for any person to conspire to possess with the intent to distribute a controlled substance, do not apply extraterritorially based on *Bowman*); United States v. Reeves, 62 M.J. 88 (C.A.A.F. 2005) (rejecting the extraterritorial application of the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251, 2252, 2252A, 2260(b), based on *Bowman*); United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005) (same); *Mitchell*, 553 F.2d 996 (5th Cir.) (holding that the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407, does not apply extraterritorially based on *Bowman*). For a discussion of the cases excluded from this comprehensive survey, see *supra* note 119. R

126. United States v. Gatlin, 216 F.3d 207, 211 n.5 (2d Cir. 2000) ("Statutes prohibiting crimes *against the United States government* may be applied extraterritorially even in the absence of 'clear evidence' that Congress so intended."); *Vasquez-Velasco,* 15 F.3d at 839 ("Where the locus of the conduct is not relevant to the end sought by the enactment of the statute, and the statute prohibits conduct that obstructs the functioning of the United States government, it is reasonable to infer congressional intent to reach crimes committed abroad."); *Felix-Gutierrez*, 940 F.2d 1200; *Goldberg*, 830 F.2d at 462 (finding that *Bowman* "held that in case of offenses against the operations of the Government of the United States, Congress need not have specified that extraterritorial jurisdiction existed before there could be prosecution in our courts"); *Aguilar*, 756 F.2d at 1424; *Benitez*, 741 F.2d at 1316–17 (finding that theft of government property as well as assault and attempted murder of U.S. government agents are "exactly the type of crime[s] that Congress must have intended to apply extraterritorially"); *Cotten*, 471 F.2d at 751 ("It is not reasonable to imagine that Congress intended, by Section 641, to punish this type of offense against the United States when committed domestically but to leave it unpunished when committed abroad. Section 641 is not susceptible to that construction. It

man, these cases include prosecutions for the theft of government property[127] and for crimes against government agents.[128]

The second group stretches *Bowman* to those criminal laws that can be characterized as protecting the "interests of government."[129] Again drawing a line to *Bowman*, these decisions remark on, for example, the interests of the United States in maintaining its borders[130] and operating a functional bankruptcy system.[131] Notably, immigration-related offenses appeared frequently in the review of cases applying *Bowman*, relying on the "interests of government" logic or some of the additional interpretations described below.[132]

In the third group of cases, some courts have drawn on *Bowman*'s reference to the "nature" of the offense as creating an exception for certain classes of criminal laws—but have done so without limiting the exception to crimes with a direct effect on the United States government, as was the case in *Bowman*.[133] For example,

prohibits conduct which is obstructive of the functions of government. The locus of the conduct is not relevant to the end sought by the enactment. The effective operation of government cannot condone the hiatus in the law that a contrary construction would cause. The only reasonable construction of Section 641 is that it prohibits theft of government property wherever located."). *See Delgado-Garcia*, 374 F.3d at 1354–55 (Rogers, J., dissenting); *see also Layton*, 855 F.2d at 1395 (applying 18 U.S.C. § 351, conspiracy to kill a Congressperson and aiding and abetting that killing, extraterritorially based on the "nature of the offense").

127. *Cotten*, 471 F.2d at 751.

128. *Felix-Gutierrez*, 940 F.2d 1200.

129. *Stegeman*, 425 F.2d at 986 (arguing that the prohibition on fraudulent transfers and concealment of assets in contemplation of bankruptcy "was enacted to serve important interests of government, not merely to protect individuals who might be harmed by the prohibited conduct"); *see* United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (applying *Bowman* to extraterritorial crimes that "negatively affect the United States"); *see also Castillo-Felix*, 539 F.2d 9 (applying 18 U.S.C. § 1426(a), reproduction of citizenship papers, and 8 U.S.C. § 1324(a)(4), encouraging and inducing unlawful entry into the United States, extraterritorially based on the "nature of the offense," *infra* notes 133–138); United States v. Birch, 470 F.2d 808 (4th Cir. 1972) (applying 18 U.S.C. § 499, forging military documents, extraterritorially based on *Bowman*). R

130. United States v. Aguilar, 756 F.2d 1418 (9th Cir. 1985).

131. *Stegeman*, 425 F.2d at 986.

132. *E.g.*, United States v. Dasilva, 271 Fed. App'x 856 (11th Cir. 2008) (per curiam); United States v. Villanueva, 408 F.3d 193, 199 (5th Cir. 2005); *Delgado-Garcia*, 374 F.3d 1337; *Aguilar*, 883 F.2d 662; *Castillo-Felix*, 539 F.2d at 13.

133. *See* United States v. Belfast, 611 F.3d 783 (11th Cir. 2010) (using and carrying a firearm in relation to a crime of violence (here, a violation of the Torture Act)); United States v. Leija-Sanchez, 602 F.3d 797 (7th Cir. 2010) (murder in furtherance of a racketeering enterprise); United States v. Frank, 599 F.3d 1221 (11th Cir. 2010) (sex tourism); *Dasilva*, 271 Fed. App'x 856 (attempted reentry into the United States); *Villanueva*, 408 F.3d at 199 (conspiracy to bring undocumented aliens into the United States); *Delgado-Garcia*, 374 F.3d at 1356 (same);

courts have claimed that the "nature" of smuggling offenses implies an extraterritorial intent because "smuggling by its very nature involves foreign countries."[134] The "nature of the offense" approach is commonly applied to crimes that frequently manifest in transborder conduct or effects: immigration (as mentioned above),[135] sex tourism and human trafficking,[136] and drug trafficking.[137] Courts also have applied RICO laws extraterritorially, citing both the nature of the offense and the interests of the government.[138]

Finally, courts have stepped beyond the core holding of *Bowman* to consider policy justifications for the extraterritorial applica-

United States v. MacAllister, 160 F.3d 1304 (11th Cir. 1998) (conspiracy to export drugs from the United States); United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997) (price fixing); United States v. Larsen, 952 F.2d 1099 (9th Cir. 1991) (drug possession with the intent to distribute; collecting cases); United States v. Baker, 609 F.2d 134 (5th Cir. 1980) (same); United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976) (counterfeiting citizenship papers and encouraging illegal entry into the United States). *But see* United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977) (holding that the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361 et seq., does not apply extraterritorially based on the nature of the offense).

134. Brulay v. United States, 383 F.2d 345, 350 (9th Cir. 1967) ("Since smuggling by its very nature involves foreign countries, and since the accomplishment of the crime always requires some action in a foreign country, we have no difficulty inferring that Congress did intend that the provisions of 18 U.S.C. § 545 [criminalizing the smuggling of goods into the United States] should extend to foreign countries at least as to citizens of the United States, and that 18 U.S.C. § 371, the conspiracy section, is extended along with it."); *see* United States v. Plummer, 221 F.3d 1298 (11th Cir. 2000) (adopting *Brulay* on this point). With respect to conspiracy, the Supreme Court said in *Ford v. United States* that the government may prosecute for conspiracy when the defendant was abroad but the conspiracy was, in whole or in part, within the United States. 273 U.S. 593, 624 (1927).

135. *Supra* note 132; *see also* United States v. Walczak, 783 F.2d 852 (9th Cir. 1986) (applying 18 U.S.C. § 1001 to false statements on a Customs form). R

136. *E.g.*, *Frank*, 599 F.3d 1221; United States v. Strevell, 185 Fed. App'x 841 (11th Cir. 2006) (per curiam).

137. *E.g.*, *Plummer*, 221 F.3d 1298; *MacAllister*, 160 F.3d 1304; *Larsen*, 952 F.2d 1099; United States v. Perez-Herrera, 610 F.2d 289 (5th Cir. 1980); *Baker*, 609 F.2d 134; United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978); *Brulay*, 383 F.2d 345; *see* United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986) (relying on policy justifications, *infra* note 139). *But see* United States v. Lopez-Vanegas, 493 F.3d 1305 (11th Cir. 2007) (holding that 21 U.S.C. §§ 841(a)(1), 846, which make it unlawful for any person to conspire to possess with the intent to distribute a controlled substance, do not apply extraterritorially under *Bowman*). R

138. United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010) (relying on the "language and function of the prohibition"); United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994) (applying the racketeering laws in light of the murder of a government agent).

tion of U.S. law[139] and to rely on the existence of a comprehensive statutory scheme to find congressional intent for extraterritorial application, often mixing in policy justifications along the way.[140]

The Supreme Court's decision in *Bowman* permitted the extraterritorial application of one statute that protected the United States government from fraud. As this Section has shown, courts of appeals have taken the *Bowman* decision and extended it to apply U.S. laws extraterritorially to protect the government, to protect the interests of the government, in response to the nature of the offense, and to effectuate policy goals. All of these readings appear to

139. *E.g.*, *Wright-Barker*, 784 F.2d at 167 ("Congress undoubtedly intended to prohibit conspiracies to import controlled substances into the United States, and intentions to distribute such contraband there, as part of its continuing effort to contain the evils caused on American soil by foreign as well as domestic suppliers of illegal narcotics. Application of these laws to smugglers on the high seas is necessary to accomplish this purpose, such that extraterritorial application may be readily implied. To deny such use of the criminal provisions would be greatly to curtail the scope and usefulness of the statutes.") (internal quotation marks omitted). *See also Perez-Herrera*, 610 F.2d 289 (discussing the effectiveness of the statute and its legislative history in light of the extraterritoriality question).

140. *E.g.*, *Frank*, 599 F.3d at 1231 ("Furthermore, extraterritorial application is supported by the nature of § 2251A and Congress's other efforts to combat child pornography. Section 2251A is part of a comprehensive scheme created by Congress to eradicate the sexual exploitation of children and eliminate child pornography, and therefore warrants a broad sweep."); United States v. Harvey, 2 F.3d 1318, 1327–30 (3d Cir. 1993) (expressing concern that the failure to apply the statute extraterritorially would greatly curtail the effectiveness of the statutory scheme); United States v. Thomas, 893 F.2d 1066, 1068–69 (9th Cir. 1990) ("Congress has created a comprehensive statutory scheme to eradicate sexual exploitation of children. As part of that scheme, Congress has proscribed the transportation, mailing, and receipt of child pornography. Punishing the creation of child pornography outside the United States that is actually, is intended to be, or may reasonably be expected to be transported in interstate or foreign commerce is an important enforcement tool. We, therefore, believe it likely that under section 2251(a) Congress intended to reach extraterritorial acts that otherwise satisfy the statutory elements.") (internal citation omitted); *Baker*, 609 F.2d at 136–37 ("Absent an express intention on the face of the statutes to do so, the exercise of that power may be inferred from the nature of the offenses and Congress's other legislative efforts to eliminate the type of crime involved. . . . [These] statutes are part of a comprehensive legislative scheme designed to halt drug abuse in the United States by exercising effective control over the various domestic and foreign sources of illegal drugs."). *But see Lopez-Vanegas*, 493 F.3d at 1312–13 (relying on the nature of the offense and the statutory scheme to reject the extraterritorial application of 21 U.S.C. §§ 841(a)(1), 846, which make it unlawful for any person to conspire to possess with the intent to distribute a controlled substance). Professors Podgor and Filler observe that the *Baker* decision appeared to flip the presumption, assuming extraterritorial application without contrary evidence. *See* Podgor & Filler, *supra* note 116, at 592. R

fit in the category of decisions that "overcome" the presumption. Yet on the civil side, the Supreme Court has been clear throughout this period that the bar for overcoming the presumption is quite high. *Aramco* goes so far as to suggest that the presumption against extraterritoriality is a clear-statement rule. Even though the Court has not always required a clear statement, its civil law decisions consistently reflect disinclination to overcoming the presumption by implication. Though these decisions are from the civil area, *Bowman* itself (and many of the court of appeals decisions cited in this Section) acknowledged that the civil law decisions should not be wholly ignored in criminal cases.[141]

In any event, it is clear that courts have extended the holding of *Bowman* to apply numerous ambiguous statutes extraterritorially, and continued to do so as late as weeks before the Supreme Court's most recent reaffirmation of the presumption in *Morrison*,[142] a case to which this Article now turns.

III.
MORRISON V. NATIONAL AUSTRALIA BANK

The housing bubble increased the profits of myriad businesses related to the real estate industry, including Florida-based HomeSide Lending, Inc. (HomeSide). Attempting to cash in on the bubble, National Australia Bank (National)—the largest bank in Australia—purchased HomeSide in February 1998.[143] HomeSide was a mortgage servicing company, so National was purchasing the right to the income stream that arose from that business.[144] Over the next few years, National reported the value of HomeSide's business through formal and informal channels, touting the success of the venture. Twice in 2001, however, National announced that it was writing down the value of HomeSide's assets. National's stock price plummeted. Believing that this was the result of misconduct, stockholders (including Robert Morrison) sued National, Home-

141. *See infra* notes 110, 120–122 and accompanying text (discussing the view of civil precedent in *Bowman* and its progeny). R

142. *See* United States v. Leija-Sanchez, 602 F.3d 797 (7th Cir. 2010) (decided April 8, 2010).

143. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2875 (2010).

144. Mortgage servicing is, essentially, the set of administrative tasks that are necessary to collect mortgage payments. *Id.* (citing JERRY ROSENBERG, DICTIONARY OF BANKING AND FINANCIAL SERVICES 600 (2d ed. 1985)).

Side, and various executives in federal court under U.S. securities laws.[145]

The suit in *Morrison v. National Australia Bank* was a so-called "foreign cubed" action. Although it was filed in an American court under American law, the case featured *foreign* plaintiffs suing a *foreign* issuer of stock based on securities transactions in a *foreign* country.[146] As Justice Stevens wrote, "this case has Australia written all over it."[147] That may be true, but note that the case was not entirely divorced from the United States. The shareholders, for example, contended that there was a territorial basis for the suit because HomeSide was a Florida company and the inflated projections were created in Florida.[148]

The securities laws at issue are ambiguous with respect to their geographic scope. The district court and Second Circuit, applying well-settled circuit precedent, concluded that they did not have jurisdiction to hear the case because these laws did not apply extrater-

145. *Id.* at 2875–76. The shareholders alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a) (2006), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2009). The named defendants are National Australia Bank, Ltd., HomeSide Lending, Inc., Frank Cicutto (managing director and CEO of National), Hugh R. Harris (CEO of HomeSide), Kevin Race (COO of HomeSide), and W. Blake Wilson (CFO of HomeSide). Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167 (2d Cir. 2008).

146. *Morrison*, 130 S. Ct. at 2894 n.11 (Stevens, J., concurring in the judgment) (citing *Morrison*, 547 F.3d at 172).

147. *Morrison*, 130 S. Ct. at 2895 (Stevens, J., concurring in the judgment); *see Morrison*, 547 F.3d at 175–76 (noting that the acts performed in the United States did not "comprise[ ] the heart of the alleged fraud"); *In re* Nat'l Austl. Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006) (noting that the acts in the United States were, "at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad," and observing "(i) [National's] allegedly knowing incorporation of HomeSide's false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad"); Brief for Respondents at 1–18, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 665167 ("Petitioners's allegations of fraud stem entirely from disclosures NAB made in Australia about HomeSide Lending . . . .").

148. *See* Brief for Petitioners at 7–10, *Morrison*, 130 S. Ct. 2869 (No. 08-1191) ("The central allegation of Petitioners's claims is that the fraudulent scheme occurred in Florida. HomeSide and the individual defendants engaged in a deceptive act and scheme whose principal purpose and effect was to create a false appearance of financial strength. In addition, every false statement made by NAB concerning HomeSide's operations, results and value was an exact repetition of the false financial information that HomeSide concocted in Florida for the very purpose of misleading NAB's shareholders about HomeSide's value and financial results.") (internal citation omitted).

ritorially.[149] Although the Supreme Court reached a similar disposition, it rejected both the notion that extraterritoriality was a matter of subject-matter jurisdiction,[150] as well as the Second Circuit's conduct-and-effects test.

On the merits, all members of the Court concluded that the interpretation of the securities laws depended on the presumption against extraterritoriality and that the U.S. securities laws did not apply to this case as alleged.[151] The majority opinion was not shy in its dedication to the presumption. Justice Scalia, writing for the majority, started his analysis with *Aramco* quoting *Foley Brothers* for the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[152] According to the opinion, the presumption is based on "the perception that Congress ordinarily legislates with respect to domestic, not foreign matters."[153] The opinion continued, noting that the risk of a conflict with foreign law is not a necessary or sufficient condition for the presumption to apply.[154]

Turning to the text of the statute at issue, the majority found that Congress did not express an intent for the law to apply extra-

149. *Morrison*, 547 F.3d 167; *In re Nat'l Austl. Bank Sec. Litig.*, 2006 WL 3844465, at *3–5.

150. *Morrison*, 130 S. Ct. at 2877. Since the same arguments applied to a motion to dismiss for the failure to state a claim under Rule 12(b)(6), the court proceeded to the merits: "a remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion." *Id.* Despite the Court's clear statement on this point, at least one district court has since remarked that it lacked *subject-matter jurisdiction* over Exchange Act claims based on transactions on foreign exchanges, citing *Morrison* for this proposition. *See In re* Celestica Inc. Sec. Litig., No. 07 CV 312, 2010 WL 4159587, at *1 n.1 (S.D.N.Y. Oct. 14, 2010).

151. *Morrison*, 130 S. Ct. at 2888; *id.* (Breyer, J., concurring in part and concurring in the judgment); *id.* at 2895 (Stevens, J., concurring in the judgment). Legislative jurisdiction was not an issue. As Justice Breyer remarked during oral argument: "[I]n my mind the difficult issue in this case is not the jurisdictional issue under principles of international law. It's the question of the scope of the statute." Transcript of Oral Argument at 13, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).

152. *Morrison*, 130 S. Ct. at 2877 (internal citations omitted).

153. *Id.* (citing Smith v. United States, 507 U.S. 197, 204 n.5 (1993)). Justice Stevens's concurring opinion, discussed in more detail below, agrees with the presumption and this justification. *See Morrison*, 130 S. Ct., at 2892 (Stevens, J., concurring in the judgment) (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

154. *Morrison*, 130 S. Ct. at 2877–78 (citing Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173–74 (1993)).

territorially.[155] Without a clear indication, the majority would summon the presumption and reject an extraterritorial application.[156] "In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not."[157] Although Justice Scalia seems to step back from *Aramco*'s clear-statement rule,[158] the requirement of an "affirmative indication" or a "clearly expressed" congressional intent nonetheless creates a high bar to overcoming the presumption.[159]

Seems simple enough—a straightforward rule (presumption against extraterritoriality) applied in a straightforward way (applies without indication otherwise). But Justice Scalia said more. First, he recounted and rejected the Second Circuit's longstanding analysis of extraterritoriality questions, the so-called conduct-and-effects test.[160] As noted above, this test represented the dominant approach in lower courts to questions of extraterritoriality as applied to securities laws (if not to all civil laws).[161] Justice Scalia argued that the test addressed questions of policy—would it be good policy for the law to apply to the conduct at issue?[162] In the majority's

155. *Morrison*, 130 S. Ct. at 2881–83. In his quest to identify "the most faithful reading" of a statute, Justice Scalia concedes that "[a]ssuredly context can be consulted as well." *Id.* at 2883.

156. *Id.*

157. *Id.*

158. *Id.* at 2883 ("But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a 'clear statement rule,' if by that is meant a requirement that a statute say 'this law applies abroad.' Assuredly context can be consulted as well. But whatever sources of statutory meaning one consults to give the most faithful reading of the text, there is no clear indication of extraterritoriality here.") (internal quotation marks and citations omitted).

159. *E.g.*, *id.* at 2877 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)). Justice Stevens, for his part, accuses the majority of establishing a clear-statement rule in contrast to previous decisions. *Morrison*, 130 S. Ct. at 2891 (Stevens, J., concurring in the judgment) (objecting to what he believes was the Court's decision "to transform the presumption from a flexible rule of thumb into something more like a clear statement rule").

160. The opinion traces the conduct test to *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206–10 (2d Cir.), *aff'd en banc*, 405 F.2d 215, 217 (2d Cir. 1968) (finding Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), granted the court subject matter jurisdiction) and the effects test to *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). *See* SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003) (outlining the conduct and the effects tests, then finding jurisdiction under the conduct test). Professor Dodge associates the conduct-and-effects test with Judge Mikva and *Environmental Defense Fund v. Massey*. *See supra* note 92 and accompanying text. R

161. *See supra* note 93 and accompanying text. R

162. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878–81 (2010) (citing *Schoenbaum*, 405 F.2d at 206 (finding that the application of Section 10(b) was

view, the difficulty in answering these questions and the inappropriateness of the judiciary as the policy arbiter underscored the importance of the presumption. "Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."[163]

Justice Scalia then turned to the threshold question of whether the presumption applies, i.e. whether a case is extraterritorial. On this point, his opinion began with a concession: "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[164] This concession implies that the presumption is not, in fact, a mechanical answer to a question of statutory interpretation.

Justice Scalia's opinion also offered a new mechanism to answer this threshold question. Reading his approach into existing precedent, Justice Scalia first observed that in *Aramco* the Court applied the presumption to a plaintiff *employed* abroad. As he saw it, Title VII "focuses" on the plaintiff's employment (which occurred abroad), rather than his hiring (which occurred in the United States) or his nationality (which was American).[165] Turning to the case at hand, Scalia concluded that the "focus" of the Exchange Act was the purchase and sale of securities, since Section 10(b) punishes only deceptive conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered."[166] According to the opinion, a close reading of the statute's text—and the text of the companion 1933

"necessary to protect American investors")); *Leasco*, 468 F.2d at 1337 ("[W]e must ask ourselves whether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad . . . ."); *see also* Grunenthal GmbH v. Hotz, 712 F.2d 421, 424–25 (9th Cir. 1983); Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998); Cont'l Grain (Austl.) PTY. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421–22 (8th Cir. 1979) ("frankly admit[ting] that the finding of subject matter jurisdiction in the present case is largely a policy decision"); SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977) ("recogniz[ing] that this case in a large measure calls for a policy decision").

163. *Morrison*, 130 S. Ct. at 2881.

164. *Id.* at 2884.

165. *Id.*

166. *Id.* (quoting 15 U.S.C. § 78j(b)). Justice Stevens referred to this approach as the "transactional test"—in contradistinction to the conduct-and-effects test. *Morrison*, 130 S. Ct. at 2888 (Stevens, J., concurring in the judgment).

Act—confirmed this assessment.[167] As applied to Section 10(b), the focus inquiry functions as what Justice Stevens called a "transactional test," holding that Section 10(b) applied only when the securities transaction occurred in the United States.[168] Relying on this test, the Court concluded that the plaintiffs failed to state a claim within the scope of the Act.

So, when facts comprising the focus of the statute are territorial, the law applies without concern for the presumption. But when the facts comprising the focus are extraterritorial, the presumption blocks the suits, and no amount of territorial connections can save it.[169] Contrary to fact-specific triggers like conduct and effects,

167. *Morrison*, 130 S. Ct. at 2884–86. It is the text of the statute that also permits Justice Scalia to distinguish this case from *Pasquantino v. United States*, 544 U.S. 349 (2005), which held that the wire-fraud statute, 18 U.S.C. § 1343, applied to defendants who ordered liquor by telephone in the United States with the intent to smuggle it into Canada (to the detriment of Canadian tax revenues). Justice Scalia noted that the wire-fraud statute applied to any fraud, not only frauds "in connection with" any particular transaction or event; Section 10(b), however, included such a connection requirement, thus changing the "focus" for the purpose of the presumption. *Morrison*, 130 S. Ct. at 2886–87.

It is noteworthy in this connection that Justice Breyer, concurring in part and concurring in the judgment, remarked that state law or other federal fraud statutes may apply to the domestic conduct in this case. *Id.* at 2888 (Breyer, J., concurring in part and concurring in the judgment). Using the parlance of the majority, these statutes may "focus" on deceptive conduct that allegedly occurred in the United States.

168. *Id.* at 2888 (Stevens, J., concurring in the judgment); *see, e.g.*, Elliott Assocs. v. Porsche Automobil Holding SE, Nos. 10 Civ. 0532(HB) & 10 Civ. 4155(HB), 2010 WL 5463846, at *5 (S.D.N.Y. Dec. 30, 2010) (collecting cases holding that the "transactional test" does not permit suits based on U.S. "buy orders" for securities listed on foreign exchanges); *In re* Nat'l Century Fin. Enters., Inc., Inv. Litig., No. 2:03-md-1565, 2010 WL 5174585, at *22–28 (S.D. Ohio Dec. 13, 2010) (applying this test to the Ohio Securities Act); Stackhouse v. Toyota Motor Co., No. CV 10-0922 DSF (AJWx), 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010) (debating whether this rule looks at the location of the exchange or the location of the purchaser or seller). The "transactional test" is an application of the "focus test"—the focus of Section 10(b) is the transaction, but presumably other statutes will beget other focus tests.

169. Justice Stevens provided the following hypothetical case to show how the majority opinion's new rule strengthened the presumption:

> Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's

therefore, the focus test calls for courts to establish a *statute-specific* method to determine whether the case is "extraterritorial"—a question antecedent to the question of whether the presumption against extraterritoriality has been overcome by congressional intent.[170] And by concluding that certain territorial connections were insufficient to avoid the presumption, a straightforward application of the focus test seemingly would strengthen the presumption, i.e. would require courts to reject more suits as improperly extraterritorial, at least as compared to the prevailing conduct-and-effects test. In this way, the *Morrison* decision continued the trend described in Part I, in which the Supreme Court has constrained the extraterritorial application of U.S. civil law.

The bases for this focus inquiry are reminiscent of the arguments in favor of the presumption itself. Self evidently, Justice Scalia is looking at the intent of Congress as expressed in the statute's focus. Additionally, Justice Scalia explicitly justified his approach with reference to "[t]he probability of incompatibility with the applicable laws of other countries."[171] While the majority did not need conflicts with foreign law to justify the presumption,[172] here Justice Scalia used that concern to support his attention to the statute's "focus."[173]

Justice Stevens took aim at the majority in his concurring opinion. Justice Stevens rightly observed that "[t]he real motor of the Court's opinion, it seems, is not the presumption against extraterritoriality but rather the Court's belief that transactions on domestic exchanges are 'the focus of the Exchange Act' and 'the objects of

doomed securities. Both of these investors would, under the Court's new test, be barred from seeking relief under § 10(b).

The oddity of that result should give pause. For in walling off such individuals from § 10(b), the Court narrows the provision's reach to a degree that would surprise and alarm generations of American investors—and, I am convinced, the Congress that passed the Exchange Act. Indeed, the Court's rule turns § 10(b) jurisprudence (and the presumption against extraterritoriality) on its head, by withdrawing the statute's application from cases in which there is *both* substantial wrongful conduct that occurred in the United States *and* a substantial injurious effect on United States markets and citizens.

Id. at 2895 (Stevens, J., concurring in the judgment).

170. *Morrison*, 130 S. Ct. at 2876–77.

171. *Id.* at 2885.

172. *Id.* at 2877–78 ("The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law.").

173. *Id.* at 2885–86.

[its] solicitude.'"[174] In other words, Justice Stevens focused on the focus test. And on this question, he believed that the majority improperly expanded the situations in which the presumption could be used to reject the application of U.S. law. In his view, the conduct-and-effects test was the best method to determine Congress's intent and thus to identify the proper focus of the presumption. He argued that using the conduct-and-effects test to identify the focus was faithful to the statute[175] and justified by congressional intent, "limiting conflict with foreign law," and policy considerations.[176]

To summarize, Justices Scalia and Stevens agreed that there is a presumption against extraterritoriality, justified by (at a minimum) Congress's focus on domestic conditions. The Justices agreed that there is a statute-specific trigger for the presumption. And they agreed that the trigger should be derived from the statute's text and context, and with an eye to potential conflicts with foreign law. While they differed on the best test for Section 10(b)—looking only to the location of the transaction versus considering any relevant conduct or effects—this difference was built on the foundation of substantial agreement.[177]

Before asking where this decision would lead the Court in a criminal case, one comment from Justice Stevens may prove instructive. When criticizing the majority's "transactional test," Justice Stevens lamented that certain fraudulent acts will not be amenable to private action under the majority's approach. But in a footnote, Justice Stevens suggested to readers that all was not lost:

174. *Id.* at 2894 (Stevens, J., concurring in the judgment) (quoting *id.* at 2884). Justice Stevens's objection to a "clear statement" interpretation of the presumption covers well-worn territory and this Article need not rehearse it here. *See id.* at 2889–92 (Stevens, J., concurring in the judgment).

175. *Id.* at 2892–93 (Stevens, J., concurring in the judgment) ("In developing its conduct-and-effects test, the Second Circuit endeavored to derive a solution from the Exchange Act's text, structure, history, and purpose. . . . The Second Circuit draws the line as follows: § 10(b) extends to transnational frauds only when substantial acts in furtherance of the fraud were committed within the United States, or when the fraud was intended to produce and did produce detrimental effects within the United States.") (internal citations and quotation marks omitted).

176. *Id.* at 2893–94 (Stevens, J., concurring in the judgment). With respect to policy, Justice Stevens notes that his reading addresses "the goals of 'preventing the export of fraud from America,' protecting shareholders, enhancing investor confidence, and deterring corporate misconduct." *Id.* (quoting Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 175 (2d Cir. 2008)).

177. Finally, on the facts of this case, the Justices agree on the outcome—all eight Justices participating in this case signed on to opinions concluding that dismissal for the failure to state a claim upon which relief can be granted was the proper disposition.

> The Court's opinion does not, however, foreclose the [Securities and Exchange] Commission from bringing enforcement actions in additional circumstances, as no issue concerning the Commission's authority is presented by this case. The Commission's enforcement proceedings not only differ from private § 10(b) actions in numerous potentially relevant respects, but they also pose a lesser threat to international comity.[178]

For the final point, Justice Stevens offered a telling quotation from *Empagran*: "[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government."[179] Justice Stevens did not explain how the Court would reach that conclusion for a statutory provision that applies to both private plaintiffs and the government. But, at least in the mind of Justice Stevens, the reduced potential for foreign conflicts augured in favor of some lenience to extraterritorial actions initiated by the executive branch.[180]

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178. *Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J., concurring in the judgment) (internal citations omitted). However, it is noteworthy that *Aramco* was a case brought by the EEOC, and the Court did not seem to grant that executive agency any deference vis-à-vis private plaintiffs. EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

With respect to the Securities Exchange Acts, this issue may now be moot: the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Acts to expressly provide for the extraterritorial enforcement of certain securities laws by the SEC. Dodd-Frank Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (2010) (adding 15 U.S.C. § 77v(c) and 15 U.S.C. § 78aa(b)); *cf. supra* note 74 (discussing the amendments to Title VII following *Aramco*). Interestingly, the Dodd-Frank Act also called upon the SEC to conduct a study on extraterritorial private rights of action under the U.S. securities laws. Dodd-Frank Act, § 929Y, 124 Stat. at 1871. R

179. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2894 n.12 (2010) (quoting F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 171 (2004) (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999)).

180. Notably, this was not the first time that Justice Stevens revealed an approach to the presumption that deferred to the executive. Here, Justice Stevens suggested a narrower presumption with respect to executive actions on securities fraud cases; in *Sale v. Haitian Ctrs. Council, Inc.*, he broadened the presumption to reject statutorily-imposed constraints on executive action, concluding that the executive was free to interdict Haitian refugees and return them to Haiti without the process required by the INA. 509 U.S. 155, 188 (1993) ("Th[e] presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.").

That said, the Supreme Court turned down the opportunity to completely defer to the executive branch, declining to adopt the rules proposed by the United

IV.
MORRISON AND EXTRATERRITORIAL CRIMINAL LAW

With *Morrison* on the books, what should we surmise about the Supreme Court's attitude toward the presumption against extraterritoriality in the criminal context? And how (if at all) will courts reconcile *Morrison* with *Bowman*? This Section suggests that some of the criminal law decisions that have followed *Bowman* may find support in the logic of *Morrison*.

Not all courts may see things this way. The central holding of *Morrison* is a forceful articulation of the presumption against extraterritoriality. A court looking at an ambiguous criminal statute may treat *Morrison* as the straw that broke *Bowman*'s back, requiring a stringent presumption in criminal as well as civil cases. This would require revisiting many of the pre-*Morrison* criminal decisions described in Part II. The Second Circuit recently rejected a civil RICO action because *Morrison* "wholeheartedly embrace[d]" the presumption against extraterritoriality.[181] Although this decision addressed a civil complaint, it is notable that RICO includes both criminal and civil provisions.[182] It would not be outrageous for a court to conclude that *Morrison*'s wholehearted embrace carries the day in criminal cases as well.

Alternatively, but still taking *Morrison* to stand for a strong presumption against extraterritoriality, courts could declare that *Bowman* represents an exception to *Morrison*'s presumption.[183] The presumption against extraterritoriality would remain the default rule, but the class of statutes identified in *Bowman* would be applied extraterritorially even without explicit congressional authorization—allowing courts to overcome the presumption by implication

States as amicus curiae. *See* Brief for the United States as Amicus Curiae Supporting Respondents, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).

181. Norex Petroleum Ltd. v. Access Indus., 631 F.3d 29, 32 (2d Cir. 2010). Since Second Circuit precedent conceded that "RICO is silent as to any extraterritorial application," the court held that *Morrison* compelled it to conclude that the civil RICO statute did not apply extraterritorially. *Id.* (quoting N. S. Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996)). Notably, at least one judge found *Morrison*'s emphatic support of the presumption to be grounds to reject the extraterritorial application of the Alien Tort Statute. Sarei v. Rio Tinto, PLC, 625 F.3d 561, 562–63 (9th Cir. 2010) (Kleinfeld, J., dissenting from an order referring the case for mediation).

182. *Compare* 18 U.S.C. § 1963 (2006) (criminal penalties), *with* 18 U.S.C. § 1964 (2006) (civil remedies).

183. *See supra* note 121 (collecting cases that refer to *Bowman* as an exception to the presumption). R

for criminal statutes in this class, but requiring something closer to a clear statement for other statutes.

In the months following *Morrison*, the District of Hawaii adopted something akin to this approach in *United States v. Finch*.[184] Finch and his co-defendants were charged with, *inter alia*, conspiracy to defraud the United States through bribery and money laundering in connection with U.S. military operations in Afghanistan.[185] The defense argued that under *Morrison* the criminal statutes did not apply because they were not explicitly extraterritorial. The district court rejected this argument based on *Bowman*; the court held that *Morrison* did not overrule *Bowman* and that the anti-bribery statutes were exactly the sort of laws from which the *Bowman* court said an extraterritorial intent could be inferred.[186]

184. United States v. Finch, No. 10-00333, 2010 WL 3938176, at *3–4 (D. Haw. Sept. 30, 2010). The Eastern District of Virginia reached a similar result in *U.S. v. Ayesh*, applying the prohibitions on conversion of government property, 18 U.S.C. § 641, and bribery of government officials, 18 U.S.C. § 208, extraterritorially based on *Bowman*. No. 1:10cr388, 2011 WL 325903, at *14 (E.D. Va. Jan. 28, 2011). This decision was issued after *Morrison* but did not cite it. *Id. See also* United States v. Jack, No. 2:07-cr-00266 FCD DAD, 2010 WL 4718613 (E.D. Cal. Nov. 12, 2010) (holding that 18 U.S.C. § 922(o), transfer or possession of a machinegun, does not apply extraterritorially based on *Bowman* without discussion of *Morrison*); United States v. Hasan, No. 2:10cr56, 2010 WL 4282015, at *28 (E.D. Va. Oct. 29, 2010) (applying 18 U.S.C. § 924, use of a firearm in relation to a crime of violence (here, piracy), extraterritorially based on *Bowman* without discussion of *Morrison*). In addition, at least two courts of appeals have addressed *Bowman* since *Morrison*, although the treatment was in *dicta* and was not deep. *See* United States v. Weingarten, 632 F.3d 60, 66 (2d Cir. 2011) (holding that the prohibition on sex tourism, 18 U.S.C. § 2423, applies extraterritorially based on *Morrison* and *Bowman* because the statute explicitly applies to travel in foreign commerce and congressional intent for extraterritorial application may be inferred); United States v. Belfast, 611 F.3d 783, 810–16 (11th Cir. 2010) (noting *Morrison*'s affirmation of the presumption; applying the Torture Act, 18 U.S.C. § 2340, extraterritorially based on its explicit language; and applying 18 U.S.C. § 924(c), using and carrying a firearm in relation to a crime of violence (here, the Torture Act violation), extraterritorially based on *Bowman*).

185. *Finch*, 2010 WL 3938176, at *1–2. *See* 18 U.S.C. § 371 (2006) (conspiracy to defraud the United States); 18 U.S.C. § 201(b)(2)(A), (B) (2006) (bribery of public officials).

186. *Finch*, 2010 WL 3938176, at *3–4. Indeed, the *Bowman* decision specifically referred to bribery statutes in this connection. As the court wrote in *Finch*,

> Reviewing examples of statutes that implicitly intended to cover acts occurring outside the United States, the *Bowman* Court referred to laws against the bribing of a United States officer. The Court noted that such crimes could be tried in the United States, even if the acts of bribery occurred overseas, stating, 'It is hardly reasonable to construe this [statute] not to include such offenses when the bribe is offered to a[n] . . . army or a naval officer in a foreign country or

Although the court did not call *Bowman* an exception, its reasoning suggests such a conclusion.[187]

For a number of reasons, *Finch* is not a complete response to many of the cases reviewed in Part II: because the statute in *Finch* was close to the heartland of *Bowman* (fraud upon the United States government), the court did not have to tread as far as the aforementioned court of appeals decisions. In other words, the *Finch* court did not face the challenge of affirming both *Morrison* and, in the same breath, those cases that stretched *Bowman* beyond this narrow category. Moreover, nothing in *Morrison*—or any Supreme Court case since *Bowman*—suggests that the Court would countenance an exception with respect to the evidence required to show congressional intent.

More to the point, neither the wholehearted embrace nor *Finch*'s exception sufficiently engages the reasoning of *Morrison*. Although *Bowman* did not rely exclusively on *American Banana* for its conclusion, it used that civil case to arrive at its decision; any court

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on the high seas, whose duties are being performed there, and when his connivance at such fraud must occur *there*.'

Id. (emphasis added).

187. The court stated:

> *Morrison* does not, however, hold that all federal statutes lacking express language authorizing extraterritorial application must necessarily apply only to acts occurring entirely in the United States. . . . . [T]he language of the conspiracy and bribery laws in this case are broader in scope than the Securities Exchange Act provision in *Morrison*. The statute at issue in *Morrison* concerned "transactions in securities listed on domestic exchanges and domestic transactions in other securities." *Morrison* neither explicitly nor implicitly overrules *Bowman*, which counsels courts to examine statutes with an eye toward whether Congress intended to protect the Government from crimes wherever perpetrated.

Id. at *4 (internal citation omitted). The Eleventh Circuit made a similar point in *dicta*, arguing that the Torture Act would apply extraterritorially after *Morrison* even if it was not explicitly extraterritorial because congressional intent may be inferred. United States v. Belfast, 611 F.3d 783, 811 (11th Cir. 2010) ("[E]ven if the language of the Torture Act were not so remarkably clear, the intent to apply the statute to acts occurring outside United States territory could be inferred . . . . First, the nature of the harm to which the [Convention Against Torture] and the Torture Act are directed—'torture and other cruel, inhuman or degrading treatment or punishment throughout the world,'—is quintessentially international in scope. Second, and relatedly, the international focus of the statute is 'self-evident': Congress's concern was not to prevent official torture within the borders of the United States, but in nations where the rule of law has broken down and the ruling government has become the enemy, rather than the protector, of its citizens. Finally, limiting the prohibitions of the Torture Act to conduct occurring in the United States would dramatically, if not entirely, reduce their efficacy." (internal citations omitted)).

looking at an extraterritorial criminal case today should use *Morrison* as an analog for its reasoning. Such an analysis must take into account the "real motor" of *Morrison*—the threshold inquiry into the focus of the statute—which distinguishes *Morrison*, at least on its face, from the Supreme Court's previous civil decisions applying the presumption. So far, courts applying the presumption in criminal cases have eschewed this threshold question.[188] And yet, this analysis may offer courts a natural way to reconcile the leading case on the reasoning of the presumption against extraterritoriality (*Morrison*) with the leading case on criminal extraterritoriality (*Bowman*), and also provides new support for some of the lower court criminal decisions that took liberties with the *Bowman* holding.

Turning first to the reasoning of *Morrison*, the key is the focus test. Some cases with *bona fide* territorial connections may still be treated as extraterritorial if those connections are outside the focus of the statute. It is the duty of courts to assess which locations matter to which statutes before choosing to apply the presumption (or not). Combine this with the Court's recognition of a separate canon based on legislative jurisdiction, and the Court's recent opinions create a two-part inquiry for extraterritoriality cases—a determination of what Congress deemed the focus (to which the presumption applies) and the *Charming Betsy* canon. *Bowman*, it turns out, reached the same conclusion almost 90 years earlier: "The necessary locus, when not specifically defined, depends upon the purpose of Congress as evidenced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."[189] Under both *Bowman* and *Morrison*, a finding of extraterritoriality "depends" on two considerations: "the purpose of the statute" (i.e. the presumption and the focus) and "the power and jurisdiction of a government to punish crime under the law of nations" (i.e. the *Charming Betsy* canon).[190] *Bowman* lives!

This union of the civil and criminal precedents would have required jurisprudential acrobatics prior to Justice Scalia's explicit endorsement of the focus test—trying to define an exceptional class

188. *See supra* note 184 (collecting cases since *Morrison*). R

189. United States v. Bowman, 260 U.S. 94, 97–98 (1922).

190. As noted earlier, it is possible that this latter quotation from *Bowman* refers to personal-jurisdictional limits. *See supra* note 118. That may be so—and R there is no denying that there are at least theoretical limits to the personal jurisdiction of the federal courts in this area, *see supra* note 16—but it is also clear that the R Supreme Court recognizes that the "law of nations" is relevant to the interpretation of a statute via the *Charming Betsy* canon. *See supra* note 45. R

of statutes for which congressional intent may be inferred while also recognizing that the Supreme Court has all but required a clear statement. With the new theoretical overlap in place, however, courts can move the action to the antecedent question about whether the presumption applies, which is now guided by the focus of the statute.

What, then, is the "focus" of a criminal statute? This Article will not delve into the classic gun-across-the-border hypothetical or the debates between conduct and results theories of criminal law.[191] However, among the decisions surveyed in Part II, two classes of statutes stand out as leading candidates to take advantage of *Morrison*'s focus test.

First, as described above, some lower court decisions applied *Bowman* to crimes against the government.[192] This class of decisions could be seen as one manifestation of the focus rule. Laws about defrauding the U.S. government, stealing its property, and harming its representatives *focus* on the United States; the application of those criminal laws would not be "extraterritorial," because their focus is always the United States itself. In this view, the presumption would never apply to prosecutions based on these statutes. This interpretation would amount to a reaffirmation of the core holding of *Bowman* on *Morrison*'s terms.[193]

A second category represents a subset of those decisions that stretched *Bowman* beyond the government-focused reading. Recall that lower courts have extended *Bowman* to crimes such as drug smuggling, human trafficking, and racketeering.[194] These courts have treated *Bowman* as an exception or suggested that the nature of the crime allows them to infer congressional intent for extraterritoriality, thus "overcoming" the presumption. *Morrison* permits a different approach: recognize a presumption without exception and eschew any implied congressional intent, but use the lever of congressional focus to conclude that the presumption does not ap-

191. *See, e.g.*, Strassheim v. Daily, 221 U.S. 280 (1911); Laker Airways Ltd. v. Sabena, Belg. World Airlines, 731 F.2d 909, 922 (D.C. Cir. 1984); Simpson v. State, 17 S.E. 984 (Ga. 1893) (defendant, standing in South Carolina, shot at victim in Georgia); Bradley, *supra* note 63, at 575 n.341; Adelheid Puttler, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 103, 106–08 (Karl M. Meessen ed., 1996). R

192. *See supra* note 126 (collecting cases). R

193. *See* Podgor & Filler, *supra* note 116, at 595 (suggesting prior to *Morrison* that *Bowman* should be read to stand for a distinction between individual-focused and government-focused crimes). R

194. *See supra* notes 133–138 (collecting cases). R

ply. One could argue, for example, that statutes addressing any sort of "organized" crime focus on the criminal organization, not the individual act.[195] A court could deduce this focus from the broader statutory scheme: *Bowman* looked to other parts of the act at issue to determine the intent of Congress,[196] and Justice Scalia determined the focus of the provision in *Morrison* by reading the balance of the Securities Acts.[197] For many "organized" criminal cases, therefore, courts would not need to overcome the presumption if they found that the criminal organization—the "focus" of the statute—was territorial. And as such, many of the aforementioned lower court decisions that seemed out of step with Supreme Court precedent may find support in the logic of *Morrison*.

The Supreme Court's stated logic for the presumption also could be harnessed by an approach that is more amenable to "extraterritoriality" in the criminal context (potentially tracking these

195. Perhaps the prohibition on traveling for the purpose of engaging in sexual conduct with a minor would not apply extraterritorially, but the prohibition on traveling for the purpose of engaging a minor in the production of child pornography would. *See* United States v. Frank, 599 F.3d 1221 (11th Cir. 2010) (18 U.S.C. § 2251A(b)(2)(A)). Perhaps murder laws would not apply extraterritorially, but the law against murder in furtherance of a domestic RICO enterprise would. *See* United States v. Leija-Sanchez, 602 F.3d 797 (7th Cir. 2010) (18 U.S.C. § 1959). Perhaps the law prohibiting the purchase of drugs does not apply extraterritorially, but the laws against participating in a drug-trafficking conspiracy would. *See* United States v. Plummer, 221 F.3d 1298 (11th Cir. 2000) (18 U.S.C. § 545). *But see* Gonzales v. Raich, 545 U.S. 1 (2005) (concluding that Congress had a rational basis to conclude that possessing, obtaining, or manufacturing marijuana for personal medical use affected *interstate* commerce).

A recent decision in the Southern District of New York adopted a version of this approach for civil RICO; because the RICO statute "focused" on the enterprise, the law did not cover conduct related to a foreign enterprise. Cedeno v. Intech Group, Inc., No. 09 Civ. 9716, 2010 WL 3359468, at *2 (S.D.N.Y. Aug. 25, 2010) ("So far as RICO is concerned, it is plain on the face of the statute that the statute is focused on how a pattern of racketeering affects an enterprise: it is these that the statute labels the 'Prohibited activities,' 18 U.S.C. § 1962. But nowhere does the statute evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality. . . . Thus, the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity. If, as noted above, RICO evidences no concern with foreign enterprises, RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.") (internal footnotes omitted).

196. 260 U.S. 94, 98–100 (1922).

197. 130 S. Ct 2869, 2884–86 (2010). Courts interpreting *Bowman* have similarly considered the statutory schemes to infer extraterritorial intent. *See, e.g.*, *Frank*, 599 F.3d at 1231 (sexual exploitation of children and child pornography); United States v. Thomas, 893 F.2d 1066, 1068–69 (9th Cir. 1990) (same); United States v. Baker, 609 F.2d 134, 136–37 (5th Cir. 1980) (drug laws).

two categories of lower court decisions). Recall that the primary justifications for the canon are potential conflicts with foreign laws and Congress's default attention to domestic matters. Concern with international conflicts predicts more deference to extraterritorial criminal prosecutions. To the extent that this consideration evinces a concern with international relations, the courts may rely on the executive branch to pay due deference to potential conflicts in criminal cases.[198] The executive is, after all, constitutionally and practically the primary actor in international affairs.[199] Even if courts worry only about conflicts with foreign *laws*, the executive branch is likely to be more cognizant of these potential conflicts than the average civil plaintiff. As Justice Stevens recognized in *Morrison*, enforcement proceedings "pose a lesser threat to international comity" than private actions.[200] The congressional-attention prong also could favor a softer presumption in criminal cases. In a civil case, the court must decide congressional focus without the input of other government actors. In a criminal case, however, the executive branch has already weighed in—the decision to file an indictment is an expression of its view of the statute's scope.

The idea of applying *Chevron*-type deference to the executive branch in foreign affairs and national security law has received significant scholarly attention in recent years.[201] And history shows

198. *See, e.g.*, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 171 (2004) ("'[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.'") (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999)).

199. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (noting "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"); David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19 (David Gray Adler & Larry N. George eds., 1996); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (finding textual bases for presidential power); H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1473 n.7 (1999) (collecting cases articulating executive authority in foreign affairs).

200. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2894, n.12 (Stevens, J., concurring in the judgment).

201. *See, e.g.*, Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005); *see also* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011) (rejecting the *Chevron* framework for foreign relations law).

that courts have tended to defer to the executive branch on foreign affairs.[202] *Chevron* itself recognized a gap in institutional competence between the courts and executive agencies on "technical and complex" matters.[203] Perhaps courts will conclude that international relations represent sufficiently technical and complex calculations to justify deference. *Chevron* also suggested that political responsiveness supported deference.[204] Similar logic could support the conclusion that the executive is in a better position to effectuate congressional intent since those two branches should be responsive to the same political (and electoral) forces. This is not to say that courts should delegate statutory-interpretation issues to federal prosecutors, even where foreign relations may be affected; rather, these claims merely suggest that a court could adopt such an outlook in keeping with the stated bases of the presumption.[205]

There are at least two countervailing considerations, however, that courts may grapple with when applying the presumption to criminal cases. First, some statutes include both civil and criminal provisions.[206] Any preference for flexibility in criminal cases would have to be weighed against the desire to give a consistent meaning

202. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (holding that the President may suspend claims pending in U.S. courts by executive order); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) (offering an expansive reading of Congress's war powers); *Curtiss-Wright*, 299 U.S. at 319 ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

203. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that the agency was working in a "technical and complex" area while "[j]udges are not experts in the field"). A classic formulation of this view comes from *Board of Trade v. United States*, in which the Court remarked that "[w]e certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the [government]." 314 U.S. 534, 548 (1942).

204. *Chevron*, 467 U.S. at 865–66 ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."). *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 137 (2008) ("[C]onforming judicial policies to democratic preferences can be regarded as a good thing in a society that prides itself on being the world's leading democracy.").

205. *See infra* note 224 (discussing "litigation positions"). R

206. *See, e.g.*, 15 U.S.C. §§ 1–3 (criminal penalties under the Sherman Antitrust Act), 15 (civil suits under the Sherman Antitrust Act), 15a (civil actions by the

to the same statutory text.[207] That said, such statutes are the exception, rather than the rule.

Notably, many of the statutes with civil and criminal provisions provide for civil-enforcement actions brought by the U.S. government. To the extent that a court is inclined to defer to the executive, this deference may be granted to criminal and civil-enforcement actions alike—both types of actions reflect the judgment of the executive branch.[208] Indeed, in the footnote to his

United States under the Sherman Antitrust Act); 18 U.S.C. §§ 1963 (criminal RICO), 1964 (civil RICO).

207. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one.").

208. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (case brought by the EEOC); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) (discussing the growth in state-invoked civil punitive sanctions). Following *Morrison*, the Supreme Court declined to explore the extraterritorial application of just such a statute. In 1999, the United States brought a civil action against nine cigarette manufacturers and two trade organizations for violations of the RICO statute. The D.C. District Court found the defendants liable, and the D.C. Circuit affirmed the judgment. United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1105 (D.C. Cir. 2009) (per curiam); United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006). *See also* 18 U.S.C. §§ 1961–68 (RICO). One of the defendants, British American Tobacco (Investments) Ltd. (BATCo), argued that its relevant conduct occurred outside the United States, and, because the RICO statute should not be construed to apply extraterritorially, it should not be liable. The district court applied the "effects test," and concluded that RICO should apply because BATCo's conduct had substantial effects within the United States. *Phillip Morris USA*, 449 F. Supp. 2d at 873. The D.C. Circuit agreed, holding that the decision was "not an extraterritorial assertion of jurisdiction" because BATCo's conduct had direct effects within the United States. *Phillip Morris USA*, 566 F.3d at 1130 (quoting Laker Airways Ltd. v. Sabena, Belg. World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984) (emphasis omitted)).

BATCo petitioned for a writ of certiorari (prior to *Morrison*). Petition for a Writ of Certiorari, British American Tobacco (Investments) Ltd. v. United States, 130 S. Ct. 3502 (2010) (No. 09-980), 2010 WL 619538. BATCo argued that a conflict exists with respect to civil RICO, although it cited only cases addressing private causes of action. *Id.* (contrasting the D.C. Circuit decision with *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051–52 (2d Cir. 1996) (casting doubt on the applicability of the conduct-and-effects test for civil RICO); Jose v. M/V Fir Grove, 801 F. Supp. 349, 357 (D. Or. 1991) (applying civil RICO only to conduct within the United States); Doe v. Israel, 400 F. Supp. 2d 86, 115–16 (D.D.C. 2005) (rejecting the extraterritorial application of civil RICO)). Amici curiae also argued that the D.C. Circuit erroneously concluded that the foreign conduct was "not extraterritorial." The International Association of Defense Counsel argued that, to the extent that the court wanted to apply an "effects test," it should be a factor in

opinion in *Morrison* quoted above, Justice Stevens conceded that he might have permitted a civil-enforcement action by the SEC where a private action failed.[209]

Second, courts also may tangle with the rule of lenity, which "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."[210] The rule of lenity and its justifications—protecting citizens from ambiguity and requiring clarity from the legislature[211]—suggest that the Court may think twice about applying an ambiguous criminal statute extraterritorially.[212]

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assessing congressional intent (i.e. overcoming the presumption). Brief of the International Association of Defense Counsel as Amicus Curiae Supporting Petitioner at 4–6, British American Tobacco (Investments) Ltd. v. United States of America, 130 S. Ct. 3502 (2010) (No. 09-980), 2010 WL 1186418; A group of law professors asserted that the "effects test" is best understood as a limit on legislative jurisdiction. Brief of Law Professors as Amici Curiae in Support of Petition for Writ of Certiorari, British American Tobacco (Investments) Ltd. v. United States of America, 130 S. Ct. 3502 (2010) (No. 09-980), 2010 WL 1186417. For its part, the United States asserted that BATCo engaged in conduct in the United States and conspired with U.S. actors in furtherance of a territorial-based conspiracy. *See* Brief for the United States in Opposition at 62–70, Philip Morris USA, Inc. v. United States of America, 130 S. Ct. 3501 (2010) (Nos. 09-1012, 09-976, 09-977, 09-979, 09-980, 09-1012), 2010 WL 2132056. Despite these problems, the Supreme Court denied the petition after *Morrison*, British American Tobacco (Investments) Ltd. v. United States, 130 S. Ct. 3502 (2010), and denied BATCo's petition for rehearing, which expressly invoked the *Morrison* decision. Petition for Rehearing, British American Tobacco (Investments) Ltd. v. United States, 131 S. Ct. 57 (2010) (No. 09-980), 2010 WL 2895480. This story is ongoing: in March 2011, the federal district court charged with enforcing the injunction in this case granted BATCo's motion to reconsider, holding that *Morrison* applies to the RICO statute and that the government did not establish a domestic basis for RICO liability. United States v. Philip Morris USA, Inc., No. 99-2496, slip op. at 7–12 (D.D.C. Mar. 28, 2011).

209. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2894 n.12 (Stevens, J., concurring in the judgment) (finding "[t]he Court's opinion does not, however, foreclose the [SEC] from bringing enforcement actions" since the question of the SEC's authority was not presented, and noting important differences between civil-enforcement proceedings and private Section 10(b) actions); *see* 15 U.S.C. § 78u(d)(3) (2006) (providing the SEC authority to bring civil actions to enforce the Act or associated regulations).

210. United States v. Santos, 553 U.S. 507, 514 (2008) (citing United States v. Gradwell, 243 U.S. 476, 485 (1917); McBoyle v. United States, 283 U.S. 25, 27 (1931); United States v. Bass, 404 U.S. 336, 347–49 (1971)).

211. "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

212. Indeed, in her dissenting opinion in *Pasquantino v. United States*, Justice Ginsburg argued that this rule countenanced against applying the wire-fraud stat-

That said, the Court has constructed a high standard for the rule of lenity.[213] Indeed, in *Bowman* itself, the Court *expressly* set aside these considerations to apply a criminal statute extraterritorially.[214] So at least as far as *Bowman* goes, the rule of lenity is no obstacle.

V.
CONCLUDING REMARKS

Part IV explored how the Supreme Court could find that the justifications of the presumption—Congress's primary focus on domestic affairs and concern with the conflict with foreign laws—dovetail with *Bowman* and its progeny.[215] Some might view this reconciliation as an academic exercise. Numerous scholars have suggested that the stated justifications do not hold water: in many

ute to frauds against foreign governments. 544 U.S. 349, 383 (2005) (Ginsburg, J., dissenting) ("It is a 'close question' whether the wire fraud statute's prohibition of 'any scheme . . . to defraud' includes schemes directed solely at defrauding foreign governments of tax revenues. We have long held that, when confronted with two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.") (internal citation omitted).

213. *E.g.*, Barber v. Thomas, 130 S. Ct. 2499, 2508–09 (2010) (requiring a "grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended") (internal citations and quotation marks omitted) (citing Muscarello v. United States, 524 U.S. 125, 139 (1998); Bifulco v. United States, 447 U.S. 381, 387 (1980); United States v. Hayes, 55 U.S. 415 (2009); United States v. R. L. C., 503 U.S. 291, 305–06 (1992) (plurality opinion)).

214. 260 U.S. 94, 102 (1922) ("Nor can the much quoted rule that criminal statutes are to be strictly construed avail. . . . '[P]enal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment.' They are not to be strained either way. It needs no forced construction to interpret § 35 as we have done.") (quoting United States v. Lacher, 134 U.S. 624, 629 (1890)). *See also* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 7–8 (1st Cir. 1997) (rejecting the rule of lenity and applying the criminal provisions of the Sherman Antitrust Act extraterritorially).

215. Indeed, the Court's recent decisions friendly to executive authority suggest that a more deferential approach to criminal cases may be in the cards. Consider *United States v. Comstock*, upholding the authority of the executive to civilly commit a mentally ill, sexually dangerous federal prisoner beyond the term of his sentence. 130 S. Ct. 1949 (2010). Not only does *Comstock* reflect a deference to the executive branch's choice, it also—at least as far as some commentators are concerned—suggests that the Court may have one eye on national-security cases even when considering cases on other topics. *See, e.g.*, Kenneth Anderson, Comstock *and National Security Implications for Detention?*, THE VOLOKH CONSPIRACY (Jan. 12, 2010, 6:59 PM), http://www.volokh.com/2010/01/12/comstock-and-national-security-implications-for-detention; Dahlia Lithwick, *Detention Slip*, SLATE (May 18, 2010), http://www.slate.com/id/2254223. It would not take a significant leap to suggest that these considerations might influence a decision about the propriety of an extraterritorial criminal prosecution.

situations, Congress may be concerned with international issues[216] and, at the same time, may be unmoved by technical conflicts with foreign laws.[217]

Whether real or imagined, the use of the focus inquiry in criminal cases would serve to further these justifications. With respect to Congress's attention, a softer presumption for criminal cases will help to sweep in crimes that are likely within the focus of Congress: those harming the United States government directly or connected to a domestic criminal enterprise. Further, pulling back on the presumption in criminal cases has the concomitant effect of treating ambiguous statutes as a delegation to the executive, which may effectuate policy closer to congressional intent because it is accountable to the same (or at least a similar) political process.

With respect to conflicts, at least one court was persuaded by the intuitive position that U.S. criminal law presents fewer or less significant conflicts with foreign laws than U.S. civil law presents.[218] Even if this were not the case, the executive, unlike the private plaintiff, is in a position to take international comity into account. While some may say that prosecutors will seek the clearest path to a conviction—consider all of the prosecutions under the woefully vague "honest services" statute prior to the Supreme Court's recent decisions on that law[219]—the executive branch, as compared to the

216. *See, e.g.*, Dodge, *supra* note 55, at 115–19; Born, *supra* note 25, at 74–79 (explaining, for example, that Congress must often regulate conduct occurring outside the United States "[i]n order to regulate adequately 'domestic conditions's in today's world"). R

217. *See, e.g.*, Born, *supra* note 25, at 76 (arguing that legislators are more concerned with the "desire[ ] to assist local constituencies, to further legislative programs and interests" than "to avoid conflicts with foreign laws"). R

218. United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010) ("Nations differ in the way they treat the role of religion in employment [*Aramco*]; they do not differ to the same extent in the way they treat murder. They may use different approaches to defenses, burdens of proof and persuasion, the role of premeditation, and punishment, but none of these is at stake here. It is not as if murder were forbidden by U.S. law but required (or even tolerated) by Mexican law."). This assertion, if true, could also cut the other way. Presumably an individual committing a murder abroad would have violated the laws of the territorial state. So even if U.S. criminal law does not apply, he could be prosecuted. Not so for civil law. Suppose courts applied a pure "conduct" test, and an individual traveled to outside the borders of the United States and committed an act which would have been against U.S. civil law. Even if that act had effects within the United States, such an individual technically did not violate U.S. law. And, if the Seventh Circuit is correct, then it is quite possible that he could not be reached by an action in a foreign court either.

219. Skilling v. United States, 130 S. Ct. 2896 (2010) (discussing 18 U.S.C. § 1346); Black v. United States, 130 S. Ct. 2963 (2010) (same); Weyhrauch v.

courts, is well-placed to weigh those interests against international comity. And, importantly, deference to the executive with respect to the application of the presumption says nothing of the *Charming Betsy* canon[220] and those limitations ensconced in extradition treaties,[221] which will provide significant protection against executive overreach in this area. Indeed, to the extent that courts adopt a deferential approach to the presumption, they should be encouraged to look even more strongly at those international legal constraints on executive action derived from the international law of jurisdiction and other public international law rules.[222]

Flipping the orientation of the branches, while the twin canons are tools of judicial interpretation of congressional (and executive) acts, they are not wholly irrelevant to the work of Congress and the executive. In particular, the rules of legislative jurisdiction could serve as a useful guide for legislative decisions about extraterritoriality. International law suggests certain limits on the scope of national laws. Congress could expressly adopt those limits in criminal (or civil) statutes. The same idea holds true for the executive branch. In the face of an ambiguous statute—or, for that matter, an unambiguously extraterritorial one—the Department of Justice could consider international law limits on legislative jurisdiction as a guide for charging decisions in criminal and civil enforcement cases.[223] Moreover, to the extent that courts will defer to executive judgments, ex ante policy statements should be looked at more fa-

United States, 130 S. Ct. 2971 (2010) (same); *see also* United States v. Giffen, 326 F. Supp. 2d 497 (S.D.N.Y. 2004) (rejecting the extraterritorial application of the honest-services statute).

220. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815–21 (1993) (Scalia, J., dissenting); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 403(2)(h) (considering the reasonableness of the exercise of legislative jurisdiction with reference to "the likelihood of conflict with regulation by another state"). R

221. *See, e.g.*, Meyer, *supra* note 82, at 167–69 (discussing the "dual criminality" rule in extradition treaties and international law enforcement cooperation) (citing William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 VA. J. INT'L L. 813, 829 (1989); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441 (1988); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 24, § 476(1)(c)). R R

222. *See, e.g.*, Born, *supra* note 25, at 79–100 (arguing that an "international law presumption" is a suitable replacement for what he believes to be an outmoded presumption against extraterritoriality). Moreover, this is to say nothing of the Constitutional or procedural protections afforded to criminal defendants that are not available to their civil counterparts. R

223. Indeed, the law criminalizing homicide and assault against U.S. nationals outside the United States, 18 U.S.C. § 2332 (2006), expressly requires the certification of the Attorney General.

vorably than mere litigation positions.[224] Such an approach may encourage the executive to lay out those positions independent of any given criminal case, and any such positions should be informed by international legal rules.

It goes without saying that Congress could—and should—resolve all doubt by writing unambiguous statutes. The twin canons are not constraints on the power of Congress, and ultimately Congress must decide how broadly its laws should apply. Still, until Congress stops writing ambiguous statues, the presumption against extraterritoriality appears here to stay. And, if stare decisis has any pull on the judiciary, the presumption may survive in concert with *Bowman*. Justice Scalia reaffirmed the presumption in *Morrison* in part to "preserv[e] a stable background against which Congress can legislate with predictable effects."[225] To the extent that the courts prefer to create a durable legal environment, this Article demonstrates that *Bowman* remains an attractive precedent that can be maintained consistently with the Court's decision in *Morrison*.

224. *Chevron* deference does not apply to "litigation position[s]," Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988), and the Supreme Court expressly declined to adopt the EEOC's litigation position in *EEOC v. Arabian Am. Oil Co.* 499 U.S. 244, 257–58 (1991). Some scholars have called for a *Chevron*-like approach that includes deference to litigation positions. *See, e.g.*, Posner & Sunstein, *supra* note 201, at 1203. Even without this deference, in administrative law, agency policy statements are typically entitled to some deference under *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). R

225. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct 2869, 2881 (2010).

"ABATEMENT MEANS WHAT IT SAYS": THE QUIET RECASTING OF ABATEMENT

*ALEXANDER F. MINDLIN**

INTRODUCTION

On May 25, 2006, Kenneth Lay, the former CEO of Enron, was convicted on ten counts of securities fraud and related offenses for misleading investors about the company's tottering finances.[1] The four-month trial was notable for its complexity and expense: fifty-six witnesses had been called, and twenty-seven boxes of documents were submitted into evidence.[2] The evidence was "like a puzzle with 25,000 pieces dumped on the table," one juror told the *Los Angeles Times*. "As you g[o]t closer to the end, the pieces started to come together."[3]

The guilty verdict was widely applauded.[4] For individual investors who lost money in Enron's crash, Lay's conviction was a step toward financial restitution and a judgment in civil court. But the verdict was also satisfying to many who lacked a financial stake in the case. For these people, the guilty verdict provided a sense that society had registered its disapproval of Lay's actions. "To me, God has spoken to [Lay] with this verdict," one Houstonian told the *Times*. Another remarked that "Lay and [codefendant Jeffrey] Skill-

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1. *See* United States v. Lay, 456 F. Supp. 2d 869, 870 (S.D. Tex. 2006) (stating, in abating order, that Lay was found guilty of all counts charged).

2. Vikas Bajaj & Kyle Whitmire, *"I Didn't Know" Did Not Sway Houston Jury*, N.Y. TIMES, May 26, 2006, at A1.

3. Lianne Hart, *The Enron Verdicts: "How Could They Not See It?"*, L.A. TIMES, (May 26, 2006), http://articles.latimes.com/2006/may/26/business/fi-jury26.

4. *See, e.g.*, Simon Romero, *A Lingering Resentment and a Desire to Move Beyond Rueful Memories*, N.Y. TIMES, May 26, 2006, http://www.nytimes.com/2006/05/26/business/businessspecial3/26houston.html (reporting that "as news of the guilty verdict against Enron's former chief executives raced through the city on Thursday, many Houstonians expressed relief, satisfaction and even joy"); Letters to the Editor, *Justice is served in Enron case*, L.A. TIMES, May 27, 2006, http://articles.latimes.com/2006/may/27/opinion/le-saturday27.2; Adam Shell, *Enron Verdicts Good for Investors*, USA TODAY, May 29, 2006, http://www.usatoday.com/money/markets/us/2006-05-29-enron-mart-usat_x.htm?loc=interstitialskip (quoting financial experts who expressed belief that the guilty verdict strengthened investor confidence in the integrity of the markets).

ing lived their fancy lives in the public and now they're living their humiliation in public, and that's what they deserve."[5]

This satisfaction was to be short-lived. Lay died in his vacation home six weeks after the verdict, and just under four months before he was to be sentenced.[6] In short order, District Judge Simeon Lake of the Southern District of Texas vacated Lay's conviction, dismissed the indictment, and denied a motion for restitution filed by former Enron employees.[7] In so doing, Judge Lake acted in accordance with a well-established doctrine known as abatement ab initio, which requires that a defendant's conviction be formally extinguished when he dies before the conviction can be reviewed.[8]

The abatement of Lay's conviction touched off a debate between those who felt that he had slipped through a convenient loophole, and those who defended abatement as a vital procedural protection. The *Sacramento Bee* groused that "[t]he dead man's estate should not simply be handed the fruits of Lay's wrongdoing . . . ."[9] Similarly, one commentator called abatement "the sort of legal principle that may look good on paper, but seems ridiculous in real life."[10] But others responded that the abatement doctrine safeguarded an important legal principle. Abatement "speaks to the foundation of integrity that we demand from our legal system," explained Loren Steffy, a columnist for the *Houston Chronicle*.[11] "The appeals process is a key safeguard to that system, a review to which every citizen is entitled. It's so important . . . that convictions can't be allowed to stand without it."[12]

In claiming that abatement compensates for the defendant's forfeited right of appeal, Steffy was offering the standard justifica-

5. Lianne Hart & Abigail Goldman, *The Enron Verdicts: No Hometown Heroes*, L.A. TIMES, May 26, 2006, http://articles.latimes.com/2006/may/26/business/fi-houston26.

6. *See Kenneth L. Lay, Ex-Chairman of Enron, Dies*, N.Y. TIMES, July 5, 2006, http://www.nytimes.com/2006/07/05/business/05cnd-lay.html; Jeremy Peters & Simon Romero, *Enron Founder Dies Before Sentencing*, L.A. TIMES, July 5, 2006, http://www.nytimes.com/2006/07/05/business/05cnd-lay.html.

7. United States v. Lay, 456 F. Supp. 2d 870, 870 (S.D. Tex. 2006).

8. *Id.* at 872.

9. Editorial, *Dead Man's Justice: Appeal Ruling that Erased Lay Verdict*, SACRAMENTO BEE, Nov. 30, 2006, at B8.

10. Ann Woolner, *How Kenneth Lay Died an Innocent Man*, OTTAWA CITIZEN, July 8, 2006, at D1.

11. Loren Steffy, *Even Though Lay Is Dead, Prosecutors Can't Let Go*, HOUSTON CHRON., Sept. 8, 2006, http://www.chron.com/disp/story.mpl/business/steffy/4171624.html.

12. *Id.*

tion for the doctrine.[13] Yet for many, that argument is no longer convincing. A growing number of legal commentators have called for the abolition or modification of the abatement rule.[14] Some opponents of the practice echo the language—and adopt the positions—of the "victims' rights" movement, a highly successful three-decade-old effort to change the way the judicial system responds to victims of crime.[15]

Both sides in this debate assume that the abatement doctrine is deeply embedded in our common law. To opponents of abatement, the practice stems from an outmoded penal philosophy with little regard for the well-being of crime victims. In the eyes of abatement's defenders, it reflects ancient truths about the rights of criminal defendants.[16] *USA Today* captured this assumption of antiquity when, following Lay's death, it reported that the doctrine "reflects centuries of legal principles going back to the Middle Ages in Europe."[17]

In this Note, I show that the practice we know as abatement is in fact very new, having only arisen in the federal courts in the 1970s. Until that period, abatement was seen as a way to recognize that the courts' penal role ended with death, rather than as a measure to protect the defendant's rights. The transformation of abate-

13. *See, e.g.*, United States v. Estate of Parsons, 367 F.3d 409, 413 (5th Cir. 2004) (en banc) ("[T]he state should not label one as guilty until he has exhausted his opportunity to appeal.").

14. *See* Douglas A. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1158–63 (2007) (criticizing abatement ab initio from a victims' rights perspective and describing opposition to abatement in some courts); Timothy A. Razel, Note, *Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice—And What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2224–26 (2007) (proposing a multi-factor test for when abatement should be applied); Tim E. Staggs, Note, *Legacy of a Scandal: How John Geoghan's Death May Serve as an Impetus to Bring Abatement Ab Initio In Line with the Victims' Rights Movement*, 38 IND. L. REV. 507, 528–32 (2005) (proposing that courts abolish abatement and instead let the defendant's estate appeal his conviction posthumously).

15. *See* Beloof, *supra* note 14, at 1158–63 (taking a victims'-rights approach to abatement); Staggs, *supra* note 14, at 526–28 (describing the "friction" between abatement and victims' rights). R R

16. *See* Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 954 (2002) (detecting, underlying abatement, a "larger premise: a conviction that cannot be tested by appellate review is both unreliable and illegitimate").

17. Edward Iwata, *Legal Doctrine Stacks Up to Erase Lay's Conviction*, USA TODAY, July 7, 2006, http://www.usatoday.com/money/industries/energy/2006-07-06-parsons-lay-usat_x.htm. The quote comes from the attorney who represented Parsons in *Parsons*, 367 F.3d 409. *Id.*

ment into a rights-protective measure has generated the features that today make the doctrine unique, such as its ability to exonerate the defendant, and to block quasi-civil remedies such as restitution.

My aim in narrating the rise of abatement is to dispel the air of historical immutability that surrounds the current version of the doctrine, and to display the connection between abatement's shifting justifications and its resultant shifting forms. My hope is that this knowledge will make courts and scholars more comfortable with discussing changes to abatement. By dispensing with the myth of abatement's antiquity, I hope to encourage courts and commentators to "enter the sanctum" of abatement—to tinker unabashedly with the shape of the doctrine, free from the illusion that abatement represents an ancient and unchanging practice.

Ultimately, I concur with the scholarly consensus that the modern features of abatement are largely undesirable, and I recommend a return to the earlier conception of abatement.

In Part I, I describe the modern contours of the abatement doctrine, and sketch the objections of its critics. In Part II, I discuss the traditional practice of abatement: Parts IIA and IIB describe the "punishment rationale" that underlies traditional abatement, and Part IIC discusses the contours of traditional abatement in practice. In Part III, I recount the emergence of the modern "appellate" rationale for abatement in the state and federal systems. Finally, in Part IV, I recommend that the appellate rationale be rejected, and that courts return to the punishment rationale instead.

I.
ABATEMENT TODAY: ITS FEATURES AND CRITICS

Abatement's defenders in the academy today cite a single principle to justify the doctrine, as do courts in nine federal circuits.[18] Abatement, they say, is the guardian of the appellate right.[19] It reflects the fact that a conviction untested—and untestable—by appeal is not truly final, so that an injustice is visited on the defendant if such a conviction is allowed to stand. In the words of Rosanna Cavallaro—the most prominent scholar to have defended abatement—the doctrine springs from "a larger premise [that] a convic-

18. *See infra* notes 125–36 and accompanying text. R

19. *See*, *e.g.*, United States v. DeMichael, 461 F.3d 414, 416 (3d Cir. 2006) ("The abatement rule is grounded in procedural due process concerns."); United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) (calling the appellate rationale "a fundamental principle of our jurisprudence from which the abatement principle is derived"); *infra* note 140 (collecting cases and law review articles likewise positing this theory). R

tion that cannot be tested by appellate review is both unreliable and illegitimate."[20] This argument for abatement will be referred to hereinafter as the "appellate" rationale.[21]

Modern-day abatement has two defining characteristics, both products of the rights-protective appellate rationale. The first of these characteristics is abatement's ability to elicit judicial proclamations of the defendant's legal innocence. In other words, modern-day abatement does not merely reverse a conviction or suspend a judgment, but it is taken by courts as entitling a defendant to the statement that he is innocent in the eyes of the law. This property will be referred to below as the "exonerative" effect of abatement.

In a classic exonerative opinion, *United States v. Estate of Parsons*, the Fifth Circuit, sitting en banc, abated the deceased defendant's convictions for arson, fraud, and money laundering, canceling a $75,000 fine and an order to pay about $1.3 million in restitution.[22] Parsons' death, the court said, meant that "in the eyes of the criminal court, the defendant is no longer a wrongdoer and has not defrauded or damaged anyone."[23]

The court of appeals' reasoning was firmly grounded in the appellate rationale. In an early portion of the opinion, the court contrasted that rationale, which it described as the principle that "the state should not label one as guilty until he has exhausted his opportunity to appeal,"[24] with the more prosaic rule (dubbed the "punishment principle") that a dead person simply should not be punished.[25]

The government's argument that the victims should be made whole, the court said,

> [H]as little force if the concern is finality [of conviction] and the right of the defendant to contest his appeal at least once.

20. Cavallaro, *supra* note 16, at 954. *See also Parsons*, 367 F.3d at 413 (endorsing this rationale); Rosanna Cavallaro, *Why, Legally, Geoghan Is Now "Innocent,"* BOSTON GLOBE, Aug. 29, 2003, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2003/08/29/why_legally_geoghan_is_now_innocent/ (commenting in op-ed article, after the death and abated conviction of child-molesting priest John Geoghan, that "the rule of abatement is built upon the premise that the judgment of a trial court is not valid unless reviewed by an appellate court"). R

21. The court in *Parsons*, following Cavallaro, calls this the "finality rationale," since it turns on the non-finality of unreviewed convictions. *Parsons*, 367 F.3d at 413.

22. *Id.* at 411, 415.

23. *Id.* at 416.

24. *Id.* at 414.

25. *Id.* at 413.

> Any references to the wrongful nature of the defendant and his actions are conditioned on an appellate court's upholding the conviction, assuming the defendant pursues an appeal. The defendant's death during the pendency of appeal pushes a court to nullify all prior proceedings. Despite what may have been proven at trial, the trial is deemed not to have taken place.[26]

In other words, according to the court of appeals, the only way to rectify the injustice of a defendant's unappealable conviction is to speak and act as if the defendant were innocent—as if he had never been charged or convicted.[27]

But the exonerative effect is not the only defining property of modern-day abatement. The other such characteristic will be referred to in this Note as the "restitution-blocking" effect: abatement blocks or complicates the various routes by which victims of crime can seek compensatory payments from defendants. In many federal circuits, orders of restitution are abated along with the conviction.[28] And a victim suing the defendant's estate—who would normally be able to use the conviction to estop the defendant from relitigating the facts at issue—will find the conviction unavailable for this purpose.[29]

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26. *Id.* at 415–16.

27. For another classic statement of the exonerative effect, see United States v. Pauline, 625 F.2d 684, 684–85 (5th Cir. 1980) (stating that, with abatement, "the family is comforted by restoration of the decedent's 'good name' "); *see also* United States v. Logal, 106 F.3d 1547, 1551–52 ("[I]t is as if the defendant had never been indicted and convicted."); United States v. Schumann, 861 F.2d 1234, 1237 (11th Cir. 1988) (holding that the defendant "stands as if he never had been indicted or convicted"); Bagley v. State, 122 So. 2d 789, 791 (Fla. Dist. Ct. App. 1960) ("The obliterative effect of abatement ab initio necessarily leaves undetermined the question of the appellant's guilt. For whatever comfort or benefit derivable therefrom, the legal presumption of innocence of the crime with which she was charged abides now in no less degree than before the criminal proceedings were instituted. Jurisdiction to determine the issue of guilt or innocence is now assumed by the ultimate arbiter of human affairs. The decision we undertook to render is a nullity.").

28. *See* United States v. Rich, 603 F.3d 722, 729 (9th Cir. 2010); *Parsons*, 367 F.3d at 415; United States v. Wright, 160 F.3d 905, 909 (2d Cir. 1998); *Logal*, 106 F.3d at 1552.

29. Beginning with a string of decisions in the 1980s, seven courts of appeals have held that plaintiffs cannot use an abated conviction to estop relitigation of the facts underlying the conviction, because, in the eyes of the law, the defendant has never been convicted. *See Rich*, 603 F.3d at 724; *Parsons*, 367 F.3d at 417; United States v. Asset, 990 F.2d 208, 211 (5th Cir. 1993); *Schumann*, 861 F.2d at 1236–37; United States v. Dudley, 739 F.2d 175, 176 (4th Cir. 1984); United States v. Oberlin, 718 F.2d 894, 895 (9th Cir. 1983); *Pauline*, 625 F.2d at 684.

The restitution-blocking effect of modern-day abatement typically follows logically from its exonerative effect. If abatement leaves the defendant innocent—so the reasoning goes—then surely he cannot be required to "compensate" his "victims."

The Ninth Circuit displayed this line of reasoning in *United States v. Rich*, an appeal by the estate of the Ponzi schemer Michael Rich, who had been convicted of fraud-related offenses.[30] The court affirmed the connection between abatement and the right to an appeal, intoning that a "fundamental principle of our jurisprudence from which the abatement principle is derived is that a criminal conviction is not final until resolution of the defendant's appeal as a matter of right."[31] Accordingly, it argued, the unappealable conviction was fundamentally illegitimate, and could not be the basis for an order of restitution:

> The Restitution Order must be abated because "the defendant is no longer a wrongdoer" once his conviction has abated. Just as it is inappropriate to impose restitution on a living individual who was never indicted or convicted, so it is inappropriate to impose restitution on the estate of a deceased individual who, in the eyes of the law, was never indicted or convicted. Abatement *ab initio* means what it says.[32]

The argument that abatement restores innocence, and innocence forecloses compensatory judgments, has been a powerful one. Not only has it been used to cancel orders of restitution, but courts have also deployed it to nullify the issue-preclusive effect of criminal convictions in subsequent lawsuits by crime victims or the government. Such courts' reasoning is typically the same as that of the court in *Rich*: the crime never happened in the eyes of the law, so it cannot form a basis for collateral estoppel.[33]

30. 603 F.3d at 722, 724.

31. *Id.* at 729 (internal citations omitted).

32. *Id.* (internal citations omitted). *See also Parsons*, 367 F.3d at 415 & n.15 (declaring that the appellate rationale "mandates that all vestiges of the criminal proceeding should disappear," and concluding that "[b]ecause [the defendant] now is deemed never to have been convicted or even charged, the order of restitution abates *ab initio*"); United States v. Sheehan, 874 F. Supp. 31, 34 (D. Mass. 1994) ("By choosing to make vacatur of the underlying judgment a concomitant of abatement of a prosecution, the courts have effectively treated the relevant judicial directives in the judgment to be without force and effect.").

33. *See Pauline,* 625 F.2d at 684 ("[T]he abated conviction cannot be used in any related civil litigation against the estate."); *Schumann*, 861 F.2d at 1237 (denying preclusive effect to conviction of deceased defendant in civil forfeiture suit because "[t]he defendant's death pending his appeal serves to abate the conviction *ab initio* as pointed out earlier. In essence, [the defendant] stands as if he never had been indicted or convicted."); State Farm Fire & Cas. Co. v. Estate of

To abatement's many critics, the benefits claimed for the practice are wholly disproportionate to the harm that it wreaks. Douglas E. Beloof, a leading voice in the victims' rights movement, has succinctly summarized the harms that opponents of abatement see in the exonerative and restitution-blocking effects:

> For crime victims, validation that they were wronged comes from the conviction and sentencing of the criminal defendant. Furthermore, some financial redress for the wrong may come in the form of restitution. Abatement ab initio eliminates both the conviction and the opportunity for restitution. In the language of victims' interests, with abatement ab initio victims are denied justice and a secondary harm is inflicted upon them.[34]

In the courts, much criticism of abatement has centered on the doctrine's air of exoneration—its purported ability to retract the accusation leveled by the government at trial and confirmed by the jury's verdict. For example, in 1998, the Illinois Appellate Court refused to abate the convictions of three defendants who had been convicted of horrifying crimes: a man who had shot and killed his wife, a woman who had hung her toddler son, and a man who had sexually abused his six-year-old niece.[35] The court's analysis focused on the exonerative effect of abatement:

> Abating the proceedings *ab initio* . . . creates an unacceptable and ultimately painful legal fiction for the surviving victims which implies that the defendants have somehow been exonerated. We will not exacerbate the loss suffered by the victims of these crimes and add to their tragedy by entering a judgment that appears to absolve the defendants of their violent criminal acts.
>
> Speaking directly, to wipe out the convictions of defendants . . . on the legal technicality suggested by defense counsel would serve only to increase the misery of victims who have endured enough suffering. In our view, the law should serve as

Caton, 540 F.Supp. 673, 683 (N.D. Ind. 1982) (denying issue-preclusive effect of abated conviction in subsequent civil suit because "no underlying previous decision now exists on which to apply the *Parklane* criteria. Abatement *ab initio* in a criminal setting wipes the slate clean."), *overruled on other grounds by* Ashlan Oil, Inc. v. Arnett, 656 F. Supp. 950 (N.D. Ind. 1987).

34. Beloof, *supra* note 14, at 1159. *See also* Razel, *supra* note 14, at 2217 ("[A] conviction for a heinous crime is in itself justice, and the loss of that conviction is a massive injustice . . . ."). R

35. People v. Robinson, 699 N.E.2d 1086 (Ill. App. Ct. 1998), *vacated*, 719 N.E.2d 662 (Ill. 1999). Note that the refusal to abate was vacated by the Illinois Supreme Court.

> a salve to help heal those whose rights and dignity have been violated, not as a source of additional emotional turmoil.[36]

For all their vehemence, opponents of abatement seldom question the historical foundation of the practice. Abatement's critics tend to assume that the doctrine's rationale and form are deeply rooted in history. Thus, one student Note argues abatement has the potential to "thwart justice," nonetheless identifies it as a product of the Enlightenment, shaped by the American "commitment to the rights of the accused."[37] Another Note opposing abatement sees the finality principle as the most "sophisticated" and "accurate" explanation for the practice.[38] Professor Cavallaro, a defender of abatement, has similarly fostered the impression that abatement is a timeless, unchanging practice. She notes the "vigorous rhetoric that has sustained [abatement] for so long"[39] and declares that:

> Since the creation of a statutory regime for appellate review of federal criminal convictions, there has been an unreflecting and—until quite recently—unanimous approach by the United States Supreme Court and federal circuits to determining the status of a defendant-appellant who dies.[40]

Yet this version of abatement—and this understanding of its foundations—does not truly constitute, as claimed, a time-honored legacy dating back to the dawn of criminal appellate review. To the contrary, abatement as we know it today is a novelty. The principal features of modern abatement are of recent vintage, and so is the

36. *Robinson*, 699 N.E.2d at 1092. *See also* State v. Devins, 142 P.3d 559, 605 (Wash. 2006) (stating that the victim "was shocked and distressed when Devin's record was wiped clean . . . . These impacts alone, as described in her declaration, make the abatement rule 'harmful' as applied here."); State v. Korsen, 111 P.3d 130, 135 (Idaho 2005) (rejecting abatement because "abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide"); Bevel v. Commonwealth, No. 2373-09-4, 2010 WL 3540067, at *4 (Va. App. Sept. 14, 2010) (refusing to abate because of "the adverse impact that abatement of the proceedings *ab initio* would have on the victim, A.M., who had reached closure and validation of her story only after a 'long . . . painful and emotional process,' to bring her father's wrongful conduct to light").

37. Razel, *supra* note 14, at 2201. R

38. Staggs, *supra* note 14, at 526. R

39. Cavallaro, *supra* note 16, at 947. R

40. *Id.* at 949–50. *See also* United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) (calling the appellate rationale "a fundamental principle of our jurisprudence from which the abatement principle is derived"); United States v. Rich, 603 F.3d 722, 729 (9th Cir. 2010) (quoting *Logal*, 106 F.3d at 1552).

supposedly ancient "appellate rationale" that underlies it for modern proponents and critics of the doctrine alike.[41]

II.
THE TRADITIONAL PRACTICE OF ABATEMENT

In the previous Part, I showed that abating courts today display two characteristic tendencies: a tendency to describe themselves as exonerating the defendant, and a consequent tendency to cancel restitutive measures premised on the now-vanished conviction. Both features derive from the underlying belief that a conviction which cannot be appealed is not truly final and cannot with justice be relied upon.

In this Part, I will show that this was not always the case and sketch the contours of the more traditional form of abatement that prevailed for most of the twentieth century. This Part will begin by describing the rationale which underpinned traditional abatement, and then will demonstrate that, for traditional abating courts, this rationale required neither the defendant's exoneration nor the cancellation of quasi-civil remedies.

Below, I use the phrase "traditional abatement" to describe a rationale and a set of practices that remained roughly typical of abatement from the late nineteenth century until the onset of the appellate rationale, which the federal circuits have adopted over the last three decades.[42] This traditional understanding of abatement persists to the present day in many state courts.

Moreover, although my aim in this Note is to describe the practice of federal courts, I illustrate my argument with some state decisions, because state courts were virtually the sole locus of criminal jurisprudence until the Progressive Era, and thereafter continued to hear the vast majority of criminal cases until the passage of RICO and the Controlled Substances Act in 1970.[43] In using state cases, I

41. *See infra* Part III.A.

42. *See infra* Part III.A.

43. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2006); Controlled Substances Act, 21 U.S.C. §§ 801–971 (2006). *See, e.g.*, Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 1993–99 (2008) (noting that, in the nineteenth century, criminal law was "not a significant concern of the federal government," and describing the two great expansions of federal criminal law in the Progressive Era and in the 1970s); Roger A. Hanson & David B. Rottman, *United States: So Many States, So Many Reforms*, 20 JUST. SYS. J. 121, 122 (1999) (noting that, on average, general-jurisdiction state trial judges "resolve 416 criminal cases each year (more than five times the number of criminal cases handled by their federal counterparts)").

echo the practice of the federal courts themselves, which often drew heavily on state precedents in their earliest abating decisions.[44] Where state and federal practice diverge, the split is noted.[45]

A. The Punishment Rationale for Abatement

Whereas modern abatement decisions treat abatement as a remedy for the defendant's forfeited right of appeal, traditional abatement reflected the principle that death ended any possibility of punishing the accused, rendering further action on the court's part superfluous. This line of reasoning has been called the "punishment rationale."[46]

Thus, the Circuit Court of Oregon, affirming in 1908 the abatement of a fine against disgraced U.S. Senator John H. Mitchell, explained that "no further proceedings can be had against a dead person. He cannot appear, either in person or by counsel; nor can he be required to obey the orders and judgments of the court touching his person . . . for his day of temporal punishment has passed."[47]

For the *Mitchell* court, abatement of the Senator's fine was not a way to recognize his innocence, or to send a metaphysical message about the importance of the right of appeal. It was, rather, a matter of housekeeping, a procedural recognition of the brute fact that the defendant no longer existed. Mitchell, the court said, "could not be pecuniarily mulcted or punished in person after he had ceased to exist."[48]

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44. *See, e.g.*, United States v. Pomeroy, 152 F. 279, 281 (C.C.S.D.N.Y. 1907) (citing seven state cases); United States v. Mitchell, 163 F. 1014, 1015 (C.C. Or. 1908) (citing four state cases).

45. *See infra* Part II.B.1 (discussing the practice, common in state courts but rare in the federal system, of abating the appeal and leaving the prosecution below intact).

46. United States v. Estate of Parsons, 367 F.3d 409, 413–14 (5th Cir. 2004) (en banc); *see also* Cavallaro, *supra* note 16, at 956 n.40 (collecting state cases). **R**

47. *Mitchell*, 163 F. at 1015–17. *See also* United States v. Dunne, 173 F. 254, 257 (9th Cir. 1909) ("The judgment is against the person of John H. Mitchell; but no further proceeding can be had against him. The power of the court to enforce its judgment against him is at an end."); 17 C.J. *Criminal Law* § 3361 n.41 (1914) (giving as "reason for rule" that "a judgment can not [sic] be enforced when the only subject matter upon which it can operate has ceased to exist," and making no mention of the appellate rational for abatement).

48. *Mitchell*, 163 F. at 1016. Of course, it has not always been the case historically that a criminal's death forecloses the punishment of his body. Foucault vividly describes, in the opening pages of *Discipline and Punish*, the 1757 burning of the

Early state decisions follow similar lines of reasoning. In a typical state case from 1907 invoking the punishment rationale, the Colorado Supreme Court remarked that "a judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist."[49] A Montana Supreme Court opinion from 1874 cited the statutory requirement that a defendant pending appeal "shall appear in the court in which the judgment was rendered, at such time and place as the Supreme Court shall direct, and that he will render himself in execution, and obey every order and judgment which shall be made in the premises." These rules were absurd in the present case, the court said: "When the party is dead it is impossible for him to comply with the stipulations of the bond, or obey the mandate of the court."[50] As a result, the punishment had to be abated.

The punishment rationale persisted in courts throughout much of the Twentieth Century. As late as 1984, the Fourth Circuit would justify its abatement of a fine, not by pointing to the rights of the defendant, but by noting the court's inability to impose any sort of punishment on a dead person: "[a] decedent can hardly serve a prison sentence."[51] And in 1993, the Fifth Circuit would state that "the purposes of criminal proceedings are primarily penal—the indictment, conviction and sentence are charges against and punishment of the defendant—such that the death of the defendant eliminates that purpose."[52]

In summary, traditional abating courts were driven, not by the need to make up for a vanished right of appeal, but by an intuition that punishment after death was fruitless—indeed, impossible. In the next Section, I will show that this conception of abatement's purposes drove a quite different practice—one that spoke of the

quartered body of the would-be regicide Robert Damiens. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 5 (Alan Sheridan trans., Vintage Books, 2d ed. 1995) (1977).

49. Overland Cotton Mill Co. v. People, 75 P. 924, 925 (Colo.1904).

50. State v. Perrine, 56 Mo. 602, 602 (1874); *see also* O'Sullivan v. People, 32 N.E. 192, 194 (Ill. 1892) (calling it "vain and useless" to inflict punishment on a dead defendant); Holmes v. State, 163 P. 1112, 1112 (Okla. Crim. App. 1917) (abating because "[i]n a criminal action the purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death"); State v. Furth, 144 P. 907, 908 (Wash. 1914) (abating because "[t]he underlying principle is that the object of all criminal punishment is to punish the one who committed the crime or offense").

51. United States v. Dudley, 739 F.2d 175, 176 n.2 (4th Cir. 1984).

52. United States v. Asset, 990 F.2d 208, 211 (5th Cir.1993) (citing United States v. Morton, 635 F.2d 723, 725 (8th Cir. 1980)).

defendant differently, and treated money judgments against him very differently.

This observation occasionally even took on a religious tinge, as courts reflected on the judgment that the accused would face in the afterlife. For example, in *Mitchell*, the Circuit Court of Oregon said of the accused in 1908 that "his day of temporal punishment has passed."[53] Fifty-eight years later, in 1966, the Tennessee Supreme Court would declare that:

> One of the cardinal principles and reasons for the existence of criminal law is to punish the guilty for acts contrary to the laws adopted by society. The defendant in this case having died is relieved of all punishment by human hands and the determination of his guilt or innocence is now assumed by the ultimate arbiter of all human affairs.[54]

B. Traditional Abatement in Practice

Having described in Section A the punishment rationale behind traditional abatement, I proceed in this Section to show the kind of legal practice which that rationale drove. I will draw on this picture of traditional abatement practice in Part IV, where I argue for a return to the traditional underpinnings of abatement.

Abatement as traditionally practiced looked very different from the modern sort. Underlying these differences of practice, of course, was a basic difference in approach: because traditional abating courts did not believe in the nonfinality of unreviewed convictions, they did not treat the defendant's death without appeal as throwing his guilt into question.

Traditional courts abated in several different ways, none of which connoted the erasure of the defendant's guilt. Some courts abated the appeal alone, leaving intact the conviction below. Other courts abated the punishment below, much as a modern court would—but did so in a way that made clear that the underlying conviction had not been wiped from the record. These approaches are described, respectively, in Sub-Sections 1 and 2 below.

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53. *Mitchell*, 163 F. at 1017.

54. Carver v. State, 398 S.W.2d 719, 720 (Tenn. 1966); *see also* Blackwell v. State, 113 N.E. 723, 723 (Ind. 1916) ("A fine is imposed for the purpose of punishing the offender, and when an offender dies, he passes beyond the power of human punishment."); State v. McDonald, 424 N.W.2d 411, 420 (Wis. 1988) (Day, J., dissenting) ("There is nothing we can do for the deceased. A wise man long ago said of the dead: 'Their love and their hate and their envy have already perished, and they have no more for ever any share in all that is done under the sun.' *Ecclesiastes,* 9:6 (RSV).").

Finally, whichever approach they took, traditional courts did not, as would a modern court, automatically cancel restitutionary measures upon abatement of the defendant's conviction. Rather, they analyzed such measures to see whether they were essentially penal (in which case they abated with the conviction) or essentially compensatory (in which case they were allowed to stand). This analysis is described in Sub-Section 3 below.

1. Abating the Appeal, but Leaving the Punishment and the Conviction Intact

As noted above, one of the prominent features of modern abatement is its exonerative quality—the tendency of courts to reverse the defendant's conviction both symbolically and legally, so that, "in the eyes of the criminal court, the defendant is no longer a wrongdoer and has not defrauded or damaged anyone."[55] But for traditional abating courts, abatement did not speak to the question of the defendant's guilt; it served instead to recognize the court's limitations. As a consequence, traditional abatement had no exonerative, guilt-removing consequences.

The most striking evidence of this quality is the fact that, for many state courts, abatement has always meant dismissing the appeal but leaving the punishment intact—precisely the opposite of abatement's modern-day effect in the federal courts.[56] As many courts acknowledged, the result of this disposition was that the judgment below stayed in place.[57]

The practice of leaving judgments intact is, of course, incompatible with the modern form of abatement, whose hallmark is the

55. United States v. Estate of Parsons, 367 F.3d 409, 416 (5th Cir. 2004) (en banc).

56. For modern state courts that still engage in the practice of abating the appeal alone, see *infra* note 62. For traditional statements of this practice, see 17 C.J. *Criminal Law* § 3361 (1914) ("Inasmuch as it is provided by the organic law that no conviction shall work corruption of blood or forfeiture of estate, where an accused dies pending his appeal, the appeal is abated."); Whitley v. Murphy, 5 Or. 328, 331 (1874) ("[W]henever that appeal abated, it left the judgment in the Court below in full force."); O'Sullivan v. People, 32 N.E. 192, 194 (Ill. 1892) ("The writ of error is abated."); State v. Ellvin, 33 P. 547, 548 (Kan. 1893) ("The judgment was stayed, and, in a certain sense, suspended by the appeal, but a dismissal of the same ordinarily leaves the judgment unimpaired and in full force."); State v. Martin, 47 P. 196 (Or. 1896) (abating "the appeal," on motion of the prosecution, and denying motion of the defense to block abatement). R

57. *See, e.g.*, United States v. Mitchell, 163 F. 1014, 1015–16 (C.C. Or. 1908) ("Ordinarily . . . the abatement or dismissal of the appeal or writ of error for any cause will leave the judgment below as it was prior to the removal of the cause to the higher court; that is, in full force and effect.")

suspension of punishment.[58] The prevalence of this practice suggests a different attitude to abatement on the part of traditional courts. If, as I have suggested, traditional courts viewed abatement not as an acknowledgment of the defendant's restored innocence, but as a response to his having moved beyond the scope of criminal law, then they would have seen nothing strange in dismissing the action before the court and leaving in place the judgment below.

In the legal parlance of the writ system, traditional appellate courts carrying out this procedural move described themselves as abating the "writ of error"—the order requiring remittance of the trial record to the appellate court— rather than abating the "cause" or "suit" below.[59]

The structure of review under the writ system may have encouraged the practice of abating the writ. As David Rossman has written, a writ of error "was, unlike an appeal, an original action, not a continuation of the case that had been litigated in the trial court."[60] In a formal sense, the reviewing court did not have before it the parties to the action below; it was quite literally trying the record, rather than trying the defendant.[61] Thus, courts ruling on a writ of error had only an indirect power to change the outcome of proceedings below. They could do so only by finding legal error in the record. In conceptual terms, with abatement of the writ, the reviewing court's grip on that record vanished, and the "parties" before it disappeared. In such an institutional structure, a post-abatement reviewing court might logically have responded to the evaporation of its authority by dismissing the action before it and leaving untouched the prosecution below. For such a court, abating the judgment below would constitute an extraordinary act of judicial authority, at precisely the moment when the court's authority was formally weakest.

58. *See supra* notes 23–27 and accompanying text. R

59. *See Mitchell*, 163 F. at 1015–16; *see also O'Sullivan*, 32 N.E. at 194 ("The writ of error is abated."); Durham v. United States, 401 U.S. 481, 482 (1971) (describing variance in the Court's earlier outcomes, and implicitly distinguishing abatement of the appeal from abatement of the cause, with the remark that "in an earlier case the Court announced the appeal had abated, while in another the Court stated the cause had abated") (internal citations omitted).

60. David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 525 (1990); *see also* BLACK'S LAW DICTIONARY 1610 (6th ed. 1990) ("[A writ of error] is commencement of new suit to set aside judgment, and is not continuation of suit to which it relates.").

61. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 410 (1821) ("[T]he effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties, it acts only on the record.").

A substantial minority of state courts still abate the appeal while leaving the conviction intact.[62] By contrast, in the federal courts, the practice of abating appeals alone has always been far rarer, leading some to mistakenly conclude that abatement of the appeal alone has never taken place in the federal courts.[63] In fact, federal courts *have* practiced appeal-alone abatement.[64] Unfortunately, their pronouncements on the subject have been so murky as to cause considerable confusion to later courts trying to glean the meaning of their own precedents. Federal judges have struggled since the turn of the Twentieth Century to determine whether pre-

62. *See* Tim A. Thomas, *Annotation, Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R.4TH 189 § 5[b] (collecting modern state cases for the proposition that "where an accused dies during the pendency of his appeal, the proceedings against him are not abated from the beginning and the appeal may not proceed"); Surland v. State, 895 A.2d 1034, 1036 (Md. 2006) ("About twelve State courts have adopted the . . . option, of either expressly leaving the judgment of conviction intact or dismissing the appeal and saying nothing about that judgment."); People v. Ekinici, 743 N.Y.S.2d 651, 657 (Sup. Ct. 2002) ("Approximately half of the states either dismiss the appeal without vacating the conviction or permit it to continue by the appointment of a representative.") (citation omitted); People v. Robinson, 699 N.E.2d 1086, 1091 nn.2–4 (Ill. App. Ct. 1998) (listing twenty-two states that abate the conviction, fourteen that dismiss the appeal alone, and eight that allow the appeal to continue by substitution), *vacated*, 719 N.E. 2d 662 (Ill. 1999).

63. For the claim that abatement of the appeal alone has never taken place in the federal courts, see Crooker v. United States, 325 F.2d 318, 320 (8th Cir. 1963) (finding a "unanimous[ ]" rule among the federal circuit courts that "the death of a defendant produces an abatement of the 'cause', the 'action', the 'judgment', and the 'penalty', and not simply of the status or stage which has been reached in the case at the time of the death"); *Durham*, 401 U.S. at 482–83 (relying on *Crooker* for the proposition that "the lower federal courts [are] unanimous on the rule to be applied: death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception").

64. *See* John H. Derrick, Annotation, *Abatement Effects of Accused's Death before Appellate Review of Federal Criminal Conviction*, 80 A.L.R. FED. 446 § 7 (2009) (collecting federal cases which abate the appeal alone); United States v. Mook, 125 F.2d 706, 706 (2d Cir. 1942) ("The authorities give us no alternative but to dismiss the appeal. Nevertheless, we think it may not be amiss to say that it seems to us that the next-of-kin of a convicted person who dies pending an appeal have an interest in clearing his good name, which Congress might well believe would justify a change in the law."); Baldwin v. United States, 72 F.2d 810, 812 (9th Cir. 1934) (dismissing the appeal, where defendant dies after perfecting appeal). Some Supreme Court opinions have abated the appeal and left the disposition of the fine to the courts of appeals, a practice that suggests a doctrine varying by circuit. *See* Singer v. United States, 323 U.S. 338, 346 (1945) ("The writ is accordingly dismissed as to [defendant] and the cause is remanded to the District Court for such disposition as law and justice require."); United States v. Johnson, 319 U.S. 503, 520 n.1 (1943) ("[W]e dismiss the writ as to [the defendant] and leave the disposition of the fine that was imposed on him to the Circuit Court of Appeals.").

cedent opinions abated the penalty or the appeal. In 1907, the court in *Pomeroy* fretted that:

> The counsel for the executrix cites several western [state] cases in which courts have held that an appeal from a judgment for a fine is abated by the death of the defendant . . . [but] [t]he district attorney argues that these cases are simply authorities for the proposition that, after the defendant's death, the proceedings on appeal abate, leaving the judgment appealed from in full force.[65]

Sixty-four years later, in *Durham v. United States*, the United States Supreme Court would evince similar confusion, observing dryly that it was nearly impossible to glean from its prior decisions whether abatement operated on the punishment or the appeal:

> Our cases where a petitioner dies while a review is pending are not free of ambiguity. In a recent mandamus action the petitioner died and we granted certiorari, vacated the judgment below, and ordered the complaint dismissed. In a state habeas corpus case we granted certiorari and vacated the judgment so that the state court could take whatever action it deemed proper. Our practice in cases on direct review from state convictions has been to dismiss the proceedings. In an earlier case the Court announced the appeal had abated, while in another the Court stated the cause had abated.[66]

The opacity of the precedential opinions examined by these courts suggests that traditional abating courts were curiously silent on what, to modern ears, are the crucial questions: What happens to the defendant? Fine or no fine? Conviction or absolution? Abating opinions that rely on the punishment rationale have typically said little or nothing about the defendant's fate, because that fate is simply *not the point*. Traditional abatement, as I have argued, was an administrative procedure, not a guarantee of rights.

In summary, the practice of abating the appeal while leaving the conviction intact was widespread in the state courts,[67] and there is reason to believe it was prevalent in the federal courts as well.[68] That history is at odds with any account of abatement which associ-

65. United States v. Pomeroy, 152 F. 279, 281 (C.C.S.D.N.Y. 1907) (internal citations omitted).

66. 401 U.S. 481, 482 (1971) (internal citations omitted). *See also* Bagley v. State, 122 So. 2d 789, 791 (Fla. Dist. Ct. App. 1960) ("In a large majority of the cases reviewed the decisions do not indicate whether the criminal prosecution was abated ab initio, or only the appeal.").

67. *See supra* note 56. **R**

68. *See supra* note 64. **R**

ates the practice historically with the exoneration of defendants who have forfeited their right of appeal. In the next Sub-Section, I discuss a practice by traditional abating courts which seems superficially to support the exonerative, modern-day account of abatement, but which in fact diverges sharply from it.

2. Abating the Punishment but Leaving the Conviction Intact

In contrast to courts that abated the appeal alone, many traditional courts abated the punishment below[69]—a practice which, on its surface, closely resembled modern abatement. Yet the different rationale underlying traditional abatement still made itself felt in the non-exonerative quality of this act. Because abatement had no connection to the supposed guilt or innocence of the defendant—but served instead to recognize the court's limitations—traditional abating courts distinguished between the defendant's *penalty* and his *conviction*. Only the former was lifted; the latter remained intact. As the Illinois Supreme Court remarked in 1892, "[w]hen the defendant ordered to be punished is dead, *the execution of that order* is absolutely arrested . . . ."[70]

We can see evidence of this approach, with its focus on penalties rather than underlying guilt, in the way that turn-of-the-century judges handled the novel legal question of whether a defendant's estate should have to pay his fines. A modern court might begin by noting the disappearance of the conviction underlying the fine and then reason that, when the conviction had been extinguished, the fine became formally improper or even unjust.[71] By contrast, earlier abating courts were likely to emphasize the absence of the offender, ignoring entirely the question whether the underlying conviction was sound. Many fine-abating opinions thus begin with the observation that the defendant's body is unavailable for punishment.[72]

69. *See* Thomas, *supra* note 68, at § 2 ("[T]he most frequently stated rule is that under such circumstances, the prosecution abates from the inception of the case."); *id.* at § 3 (collecting cases).

70. O'Sullivan v. People, 32 N.E. 192, 193 (Ill. 1892) (emphasis added).

71. *See, e.g.*, United States v. Oberlin, 718 F.2d 894, 895–96 (9th Cir. 1983) (holding that abatement prevents the recovery of a fine because the defendant has been "denied the resolution of the merits of the case on appeal").

72. *See* United States v. Mitchell, 163 F. 1014, 1016 (C.C. Or. 1908); Blackwell v. State, 113 N.E. 723, 723 (Ind. 1916) ("A fine is imposed for the purpose of punishing the offender, and when an offender dies, he passes beyond the power of human punishment."); Boyd v. State, 108 P. 431, 431 (Okla. Crim. App. 1910) (abating fine because "a judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist . . . . In a criminal action, the purpose of the proceeding [is] to punish the defendant in person.")

Having established that corporal punishment is impossible, the court then works laterally by analogy to the case of fines. Thus, the Ninth Circuit in *Mitchell* remarked that:

> Imprisonment, in its general sense, is the restraint of one's liberty . . . and is personal to the accused. It is a thing self-evident, therefore, that the death of a person upon whom such a judgment is imposed would put an end to an infliction or enforcement of the punishment. A fine being a pecuniary punishment imposed upon the person, it would seem that a like result would follow.[73]

Similarly, a commentator in 1921, explaining the principle of abatement, pointed out that "[u]pon the death of a defendant convicted of a crime in the Federal Court, the penalty is abated with death. In the case of sentence to corporal punishment *this is self-evident*. It also holds in cases of fines."[74] The operative metaphor for abatement, then, was not that of someone being symbolically cleansed; it was that of an inmate dying in his cell and being buried in the prison cemetery.

A last testament to the absence of the exonerative effect in traditional abatement is the existence of cases in which families of decedents have *resisted* abatement because they wanted the chance to clear their relatives' names through appeal; abatement evidently would not have this effect. In 1967, for example, counsel for one Robert Hartwell—who was convicted of incest and then died pending appeal—asked the court not to abate his conviction, because "his reputation while alive is important to his three remaining children."[75] We can contrast such language with the statement of a fi-

73. *Mitchell*, 163 F. at 1016.

74. 1 ELIJAH N. ZOLINE, FEDERAL CRIMINAL LAW AND PROCEDURE 183 (1921) (emphasis added).

75. Hartwell v. State, 423 P.2d 282, 283 n.2 (Alaska 1967); *see also* United States v. Mook, 125 F.2d 706, 706 (2d Cir. 1942) (abating conviction, but commenting that "we think it may not be amiss to say that it seems to us that the next-of-kin of a convicted person who dies pending an appeal have an interest in clearing his good name, which Congress might well believe would justify a change in the law"); State v. Carter, 299 A.2d 891, 892 (Me. 1973) (abating because "interests of the surviving family to preserve, unstained, the memory of the deceased defendant or his reputation while alive are held of insufficient legal consequence to require decision of the issues raised by the appeal"). The courts in *Hartwell* and *Carter* acknowledged the impracticality of such a scheme. *See Hartwell*, 423 P.2d at 284 ("There is no party to prosecute in this criminal proceeding. Death has removed the appellant from the jurisdiction of this court. The court cannot enforce the judgment and sentence pertaining to the appellant in the administration of its criminal laws."); *Carter*, 299 A.2d at 894 ("Often, the appeal results only in a new trial, or other disposition, for which the defendant as a live human being is a pre-

nality-rationale court, which declared thirteen years later that, with abatement, "the family is comforted by restoration of the decedent's 'good name.'"[76]

In summary, even when traditional abating courts followed procedures identical to those of their modern counterparts, they omitted one of modern abatement's hallmarks: its exoneration of the defendant.

In the following section, I will note a further respect in which traditional abatement differed from the modern practice: its treatment of compensatory measures, such as orders of restitution and civil suits relying on the criminal judgment.

3. Leaving Compensatory Measures Intact

Part I noted the distinctive power of modern abatement to cancel compensatory remedies such as restitution.[77] For modern abating courts, this practice reflects the fact that the restitution order stems from a legally vanished conviction. As the Ninth Circuit has reasoned, "[a] [r]estitution [o]rder must be abated because 'the defendant is no longer a wrongdoer' once his conviction has abated."[78]

In this respect, traditional abatement once again diverges from its modern descendant. Because traditional abatement operated on the defendant's punishment—rather than his conviction—it left the estate liable for non-punitive obligations stemming from that conviction. Courts thus approached cost and restitution orders by asking whether they constituted punishment or compensation. If they were punitive, they abated; if compensatory, they could stand.[79]

The notion that compensatory measures could survive, even where penal measures abated, had actually taken hold decades before the first abatement decisions, in the mid-nineteenth century. In that period, state legislatures, with the support of legal scholars, tore down the longstanding common law rule that tort judgments,

requisite, a condition compliance with which the death of the defendant makes impossible.").

76. United States v. Pauline, 625 F.2d 684, 684–85 (5th Cir. 1980).

77. *See supra* notes 28–33 and accompanying text. **R**

78. United States v. Rich, 603 F.3d 722, 729 (9th Cir. 2010) (internal citations omitted) (citing United States v. Estate of Parsons, 367 F.3d 409, 416 (5th Cir. 2004)).

79. *See infra notes 85–98 and accompanying text.* **R**

like criminal penalties, abated with death.[80] Legislators and commentators distinguished tort judgments from criminal sanctions with the observation that a tortfeasor's death leaves behind an injured party with an interest beyond the physical punishment of the tortfeasor—an interest that can legitimately be satisfied by the estate, as inheritor of the defendant's obligations.[81] The Supreme Court of Illinois articulated this distinction in 1892:

80. At the beginning of the nineteenth century, the common law rule on the survival of civil judgments was embodied in the Latin maxim *actio personalis moritur cum persona*, or "a person's act dies with him." *See, e.g.*, FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS IN OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 71 (F.H. Thomas Law Book Co. 1984) (1887) ("The common law maxim is *actio personalis moritur cum persona*, or the right of action for tort is put an end to by the death of either party . . . ."); Schreiber v. Sharpless, 110 U.S. 76, 80 (1884) ("At common law, actions on penal statutes do not survive . . . ."); Henshaw v. Miller, 58 U.S. 212, 219–24 (1854) (tracing the evolution and contours of the doctrine). In practice, the *actio personalis* rule dictated that tort judgments and fines were extinguished when the defendant died, in contrast to debts and contract liability, which survived against the debtor's estate. *See Henshaw*, 58 U.S. at 219 ("It has been expounded to exclude all torts when the action is in the form ex delicto . . . ."); T.A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 607 (1960). The reason for extinguishing civil judgments with death, as commentators made clear, was that to do otherwise would punish the inheritors for the testator's offense. As Blackstone put it, actions *ex delicto* (that is, actions "for wrongs actually done or committed by the defendant, as trespass, battery, and slander") died with the offender, and could not be revived, because "neither the executors of the plaintiff have received, nor those of the defendant committed, in their own personal capacity, any manner of wrong or injury." 2 WILLIAM BLACKSTONE, COMMENTARIES *302. Nineteenth-century commentaries typically attributed the non-survival of civil actions at common law to a confusion between the aims of compensation and punishment, perhaps owing to the relatively late emergence of tort law. Thus, in a Texas court in 1870, looking back after the *actio personalis* doctrine had been abrogated by state statute, the appellant counsel noted that "[a]t common law, [tort] actions . . . were in the nature of criminal prosecutions, in which the courts held that the representative could not be punished for the crimes of the dead." Wright's Administratrix v. Donnell, 34 Tex. 291 (1871). Similarly, in 1886, after *actio personalis* had fallen into discredit, a commentator summed up thus the rationale of the common law approach: "If . . . the ancient idea of liability was punishment, then why should the executor and the estate of [the defendant] be punished for a wrong they never committed," Sydney G. Fisher, *Survival of Actions*, 20 AM. L. REV. 48, 54 (1886). *See also* Moyer v. Phillips, 341 A.2d 441, 442–43 (Pa. 1975) (observing that "in the early nineteenth century survival statutes were enacted, along with wrongful death acts, to modify what was considered the harsh and unjust rule of the common law").

81. *See* United States v. Pomeroy, 152 F. 279, 280 (C.C.S.D.N.Y. 1907) ("[T]his rule of law in actions of tort, permitting judgments recovered before the defendant's death to be enforced against his estate after his death, is based on the idea of compensation to a particular plaintiff injured, while the imposition of a fine as a punishment for a crime is based on the idea of punishment for a public offense.");

> Judgments in civil cases, whether in actions upon contracts or upon torts, are for the recovery or the denial of something . . . . But in criminal cases . . . the sole purpose of the action is not to give the people anything, but to punish the defendant in his person . . . . It is therefore apparent that, in judgments in civil cases, property rights are more or less directly affected; and such rights, under statute, are made to descend to and be obligatory upon the representatives, after death, of either or all of the parties to the judgment. But in criminal cases . . . the people acquire no property rights.[82]

When it came time to decide whether quasi-civil measures accompanying the conviction should stand, state courts analyzed this question through the lens of the doctrine they had already developed to distinguish surviving from non-surviving civil judgments.[83] They needed only to ask whether the measure in question was essentially compensatory or essentially penal. In essence, having split off tort judgments from criminal sanctions in obedience to the principle that only penal judgments should abate, these courts now further decomposed criminal sanctions into compensatory (surviving) components and penal (non-surviving) components. The first quasi-civil measure to undergo this analysis was the judgment for costs.[84] For example, in refusing to abate such a judgment, the Su-

Wasserman v. United States, 161 F. 722, 724 (8th Cir. 1908) (holding that contempt order survives against the estate because it is civil, not criminal); O'Sullivan v. People, 32 N.E. 192, 192 (Ill. 1892).

82. *O'Sullivan*, 32 N.E. at 192.

83. *See* Town of Carrollton v. Rhomberg, 78 Mo. 547, 549 (1883) (saying of a fine that "[i]t has been held by this court that a prosecution of this character is a civil action in form, although *quasi* criminal in its nature," and observing that "[i]f it is a civil suit it is neither an action *ex contractu* nor an action for [property crimes] within the meaning of our laws so as to survive against the representative of the wrongdoer"); People v. St. Maurice, 135 P. 952, 952 (Cal. 1913) (in analysis of criminal fine, noting that "a judgment that a defendant pay a fine with or without the alternative of imprisonment, constitutes a lien in like manner as a judgment for money rendered in a civil action," and therefore must abate); Blackwell v. State, 113 N.E. 723, 723 (Ind. 1916) (abating fine because "[a] judgment for a fine differs from a judgment based on a tort or contract . . . . In case [sic] where a fine is imposed as a punishment, no principle of compensation is involved. A fine is imposed for the purpose of punishing the offender, and when an offender dies, he passes beyond the power of human punishment.").

84. *See* State v. Ellvin, 51 Kan. 78433 P. 547, 548 (Kan. 1893). *See also* People of Detroit v. Smith, 597 N.W.2d 247, 250 (Mich. Ct. App. 1999) ("[D]efendant Smith died during the pendency of these appeals. Accordingly, the assessment of costs against her should stand, but the purely penal aspect of her sentence should be abated ab initio because it no longer serves a purpose."); State v. Keifer, 24 Ohio Dec. 321, 326–27 (Com. Pl. 1913) (following *Ellvin* in refusing to abate judg-

preme Court of Kansas remarked in 1893 that "the costs adjudged against one convicted of crime do not constitute a part of the punishment inflicted upon him . . .[but] a separate civil liability in favor of the parties to whom they are due . . . ."[85] With the passage of restitution statutes in the late twentieth century, state courts began to apply the same punitive-compensatory analysis to restitution that they had used in analyzing judgments for costs.[86]

As the state courts went, so went—at first—the federal courts. After Congress gave the federal courts power to order restitution in 1982,[87] it seemed at first as if the punitive-compensatory analysis of money judgments, with its underlying conception of abatement as operating on the punishment alone, would become settled doctrine. In 1983 William Dudley was convicted of misusing food stamps, sentenced to a fine and a prison term, and ordered to pay $4,807.50 to the United States Department of Agriculture.[88] He died while his appeal was pending, and the fine and prison term were duly abated.[89] That left the order of restitution, which the Fourth Circuit refused to abate, on the grounds that the order was compensatory rather than penal:

> The argument that impositions of penalties in criminal cases have heretofore always been abated on death of the accused . . . grows out of the consideration that punishment, incarceration, or rehabilitation have heretofore largely been the exclusive purposes of sentences and so ordinarily should be abated upon death for shuffling off the mortal coil completely forecloses punishment, incarceration, or rehabilitation, this side of the grave at any rate . . . . [But] an order of restitution, even if in some respects penal, also, has the predominantly

ment for costs); Whitley v. Murphy, 5 Or. 328, 331–32 (1874) (denying that costs are "the mere incidents of the judgment of conviction," and asserting that "[the defendant's] dying as [sic] completely satisfied the sentence of the law as if he had lived and served out his time in the penitentiary; but it did not satisfy the judgment for costs and disbursements, any more than his serving out his time in the penitentiary would have done").

85. *Ellvin*, 33 P. at 548.

86. *See* People v. Ekinici, 743 N.Y.S.2d 651, 660 (Sup. Ct. 2002) (holding that restitution is compensatory and therefore does not abate); State v. Christensen, 843 P.2d 1043, 1043 (Utah Ct. App. 1992) (holding that "restitution is partly punitive" since it allows double damages, and therefore abates); State v. Christensen, 866 P.2d 533, 536–37 (Utah 1993) (overruling the Court of Appeals and holding that restitution does not abate, because order did not involve punitive fines and hence was merely compensatory).

87. Victim Witness Protection Act, 18 U.S.C. § 3663 (2006).

88. United States v. Dudley, 739 F.2d 175, 176 (4th Cir. 1984).

89. *Id.*

compensatory purpose of reducing the adverse impact on the victim.[90]

The punitive-compensatory approach to abatement of restitution orders made headway in the courts during the early 1990s. By 1993, three more courts of appeals had adopted *Dudley*'s analysis, to be followed later by another in 2001.[91]

At the same time, however, the courts were absorbing the appellate rationale for abatement, which first appeared in the federal courts in the remarkable 1977 Seventh Circuit opinion, *United States v. Moehlenkamp*.[92] With the spread of that rationale,[93] a different treatment of restitution would come to the fore.[94] In the 1990s, two previously undecided courts of appeal would adopt an approach to restitution orders dictated by the appellate rationale.[95] And between 2004 and 2010, two of the courts that had applied the punitive-compensatory analysis would repudiate their earlier positions, implicitly or explicitly, in favor of that approach.[96]

In summary, the federal courts have displayed a similar trajectory with respect to each of abatement's two modern hallmarks. At first, under the influence of the punishment rationale for abatement, courts adopted a practice that neither exonerated the defendant nor required the automatic cancellation of restitutionary payments. Then, as they came under the sway of the appellate rationale, the courts took up a form of abatement in line with the mod-

90. *Id.* at 177.

91. *See* United States v. Christopher, 273 F.3d 294, 298 (3d Cir. 2001) ("The question whether an order of restitution should abate depends essentially on its categorization as penal or compensatory."); United States v. Asset, 990 F.2d 208, 213–14 (5th Cir. 1993) (distinguishing between penal and compensatory orders of restitution); United States v. Johnson, Nos. 91-3287, 91-3382, 1991 WL 131892, at *1 (6th Cir. July 18, 1991) ("To the extent that the deceased appellant has been ordered to make restitution as a consequence of his conviction, such restitution is not affected hereby."); United States v. Cloud, 921 F.2d 225, 226–27 (9th Cir. 1990) (refusing to abate restitution, on grounds that this would violate the compensatory purposes of the Victim Witness Protection Act); *see also In re* One 1985 Nissan, 889 F.2d 1317, 1319 (4th Cir. 1989) (holding that forfeiture proceeding is primarily remedial and therefore does not abate with death of the property owner).

92. United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977).

93. See *infra* notes 125–37 and accompanying text. R

94. *See infra* Part III.

95. United States v. Wright, 160 F.3d 905 (2d Cir. 1998); United States v. Logal, 106 F.3d 1547 (11th Cir. 1997).

96. United States v. Rich, 603 F.3d 722, 729 (9th Cir. 2010); United States v. Estate of Parsons, 367 F.3d 409, 414–15 (5th Cir. 2004) (en banc).

ern conception—one that exonerated the defendant and canceled restitutionary measures as unjust.

In the next Part, I narrate the process by which courts moved from the older to the newer conception of abatement. I trace the spread of the appellate rationale in the states, where it gained momentum over forty years through a trio of influential cases. Then, I pinpoint the seminal moment in federal jurisprudence where a single case, *Moehlenkamp*, enabled the adoption of that rationale among the federal circuits.

III.
THE SPREAD OF THE APPELLATE RATIONALE

In Part I, I described the principal characteristics of modern-day abatement, summarized the scholarly and popular attacks on the practice, and suggested that abatement has managed to resist those attacks until now because of the widespread notion that it has deep historical roots and protects a firmly-embedded right.

In Part II, I described what I loosely called the "traditional" version of abatement—a set of practices, prevailing in the federal courts until the 1980s and in some state courts until today—that shared none of modern abatement's most objectionable and vilified characteristics.

Now, in Part III, I will show how the newer conception of abatement took hold of the federal system. Because the appellate rationale originated in the states and percolated there for a century before its adoption in the federal circuits, I will first trace its gradual beginnings. The centerpiece of my discussion, however, will be an account of modern abatement's sudden and unacknowledged rise in the federal system.

As stated in the Introduction, my aim in narrating this rise is to dispel the air of immutability that surrounds the current conception of abatement applied by courts, and to make clearer the connection between abatement's shifting justifications and its concomitantly shifting forms.

A. The Appellate Rationale in the State System

The appellate rationale got an early start in the state courts. In 1879, the Texas Court of Appeals articulated a novel justification for abatement:

> [I]n a purely criminal prosecution, the case is pending so long as the question of the guilt or innocence of the accused remains undetermined . . . . [T]he proceedings are not definitely

> settled when the law gives the right of appeal, and the party has availed himself of that right . . . until the appeal shall have been decided.[97]

In suggesting that abatement reflects the non-final character of an unreviewed conviction, the *March* court was at least fifty years ahead of its time. This idea would not reappear in state criminal jurisprudence until 1934, when the Iowa Supreme Court, in *State v. Kriechbaum*, gave it lasting voice, declaring that "[t]he judgment below could not become a verity until the appellate court made it so by an affirmance . . . . The question of the defendant's guilt was therefore necessarily undetermined at the time of his death."[98]

The language in *Kriechbaum*, in turn, became the classic statement of the appellate rationale for abatement and would often be cited as that rationale spread slowly throughout the states. In 1960, *Kriechbaum* was the sole precedent for the decision of Florida's District Court of Appeal in *Bagley v. State*, where the court firmly adopted the exonerative view of abatement, declaring that "[t]he obliterative effect of abatement *ab initio* necessarily leaves undetermined the question of the appellant's guilt."[99] And thirteen years later, in 1973, *Kriechbaum* and *Bagley* were together cited by the Supreme Court of Maine for the proposition that "a judgment of conviction, in fact left under a cloud as to its validity or correctness when the defendant's death causes a pending appeal to be dismissed, should not be permitted to become a final and definitive judgment of record . . . ."[100] Three years later, those three decisions would in turn together justify the Supreme Court of Louisiana in issuing *State v. Morris*,[101] a ringing endorsement of the exonerative view of abatement. Conceding that the defendant might have lost on appeal had he lived to pursue review, that court said that nevertheless:

> The surviving family has an interest in preserving, unstained, the memory of the deceased defendant or his reputation. This interest is of sufficient legal significance to require that a judgment of conviction not be permitted to become a final and definitive judgment of record when its validity or correctness has not been finally determined because the defendant's death has caused a pending appeal to be dismissed.[102]

97. March v. State, 5 Tex. App. 450, 453–54 (Ct. App. 1879).
98. 258 N.W. 110, 113 (Iowa 1934).
99. Bagley v. State, 122 So. 2d 789, 791 (Fla. Dist. Ct. App. 1960).
100. State v. Carter, 299 A.2d 891, 894 (Me. 1973).
101. State v. Morris, 328 So. 2d 65, 67 (La. 1976).
102. *Id.* at 67.

Morris, *Bagley*, and *Kriechbaum* are today among the most cited precedents for the rule of abatement in state courts.[103] They have been taken to justify abatement in a wide variety of factual circumstances, so long as the defendant dies after perfecting his appeal.

The appellate rationale's spread seems to have accelerated in the 1980s, as state courts drew on new federal decisions endorsing the rationale. Yet state courts continue to cite the punishment rationale, both alone and in tandem with the appellate rationale.[104]

B. The Appellate Rationale in the Federal System

In the federal courts, the onset of the appellate rationale was at once later and more sweeping than it had been in the state courts. The first federal appellate opinion to cite this rationale for abatement was the 1977 decision of the Seventh Circuit Court of Appeals in *United States v. Moehlenkamp*;[105] by 2001, seven courts of appeals would embrace the rationale, and district courts in two other circuits would do so as well.[106] Most of these courts would cite *Moehlenkamp*.[107]

The *Moehlenkamp* opinion was effective because of the way in which it recast existing Supreme Court precedents and used them to its tactical advantage. Where the Supreme Court had denied a constitutional right to appellate review in *Griffin v. Illinois*,[108] the *Moehlenkamp* court effectively cited the Court as affirming some form of right to such review.[109] Then, the *Moehlenkamp* court used

103. Information deduced from performing a Westlaw Custom Digest for headnote "110K303.50 Abatement" across all states. *Custom Digest*, WESTLAW, http://www.westlaw.com (Click on "Key Numbers"; then follow "West Key Number Digest Online" hyperlink; then select "110 CRIMINAL LAW"; then select "XVI. NOLLE PROSEQUI OR DISCONTINUANCE, k.303.5-k303.50"; then select "k303.50 Abatement"; then click "Search Selected"; then select database "State: All"; then select "Most Recent Cases"; then follow "Search" hyperlink.) (last visited June 8, 2011).

104. *See* State v. Hoxsie, 570 N.W.2d 379, 380 (S.D. 1997) (collecting rationales for abatement offered in state court opinions); State v. Fanalous, 106 P.2d 163, 163 (Utah 1940) (citing both rationales).

105. 557 F.2d 126 (7th Cir. 1977).

106. *See infra* notes 134–35 and accompanying text.

107. United States v. Christopher, 273 F.3d 294, 296–97 (3d Cir. 2001); United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997); United States v. Pogue, 19 F.3d 663, 665 (D.C. Cir. 1994); United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983); United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980).

108. 351 U.S. 12, 18 (1956).

109. *See Moehlenkamp*, 557 F.2d at 128 (reading *Griffin* to mean that "when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice

its newly theorized right to explain a cryptic year-old Supreme Court precedent, *Dove v. United States*,[110] in a way that cemented the authority of the courts of appeal to abate cases after the defendant died.[111]

The first case which *Moehlenkamp* took up was a 21-year-old Supreme Court decision, *Griffin v. Illinois*,[112] in which the Court had held that an indigent criminal appellant had the right to a free transcript of his trial. The *Griffin* Court had pointed out that all fifty states granted some form of criminal appellate review, and that appeals had "now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant."[113] Where appellate review of convictions existed, the Court held, it was sufficiently bound up with the business of trial that it had to be equitably administered—which meant providing indigent defendants with the minimum means necessary to mount an appeal.[114]

In reaching this holding, the *Griffin* Court did not announce a constitutional right to appellate review; quite to the contrary, it explicitly conceded that no such right existed, saying that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."[115] Rather than turning on the vital importance of appeal, *Griffin* turned on the necessity of providing appeal equitably where it existed at all—a logical extension of the principle that everyone, rich or poor, should have access to the basic machinery of the courts.

Yet the *Moehlenkamp* court did not read *Griffin* as a decision about the importance of equity in access to courts. Rather, it read *Griffin* for the quite different proposition that justice was denied wherever appeal was unavailable.[116] Partially quoting *Griffin*, the *Moehlenkamp* court declared that when a defendant dies pending appeal, "the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an

ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an 'integral part of (our) system for finally adjudicating (his) guilt or innocence'") (citations omitted).

110. 423 U.S. 325 (1976).

111. *Moehlenkamp*, 557 F.2d at 128.

112. *Griffin*, 351 U.S. at 12.

113. *Id*. at 18.

114. *See id*. at 19 (stating that denial of transcripts to indigent criminal appellants is "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law").

115. *Id*. at 18.

116. *Moehlenkamp*, 557 F.2d at 128.

'integral part of (our) system for finally adjudicating (his) guilt or innocence.'"[117]

In other words, the *Moehlenkamp* court subtly recast *Griffin*. The Supreme Court wrote *Griffin* as a decision about the distributive unfairness of allowing some defendants—and not others—access to the full panoply of procedural rights afforded by any given state's criminal justice system. But the *Moehlenkamp* court read *Griffin* as a statement about the minimum level of process making up a constitutional baseline—the very statement that the *Griffin* court had denied it was making.

The measure of *Moehlenkamp*'s success can be seen in the way it has distorted subsequent understandings of *Griffin v. Illinois*. Courts have cited *Griffin* for the proposition that there exists a right (whether constitutional or otherwise) to appellate review.[118] In 1997 and 2010, two circuit courts cited *Griffin* for the principle that "a fundamental principle of our jurisprudence from which the abatement principle is derived is that a criminal conviction is not final until resolution of the defendant's appeal as a matter of right."[119] Neither court attributed this understanding of *Griffin* to the mediating influence of *Moehlenkamp*.

Having made appeals a quasi-due process right and abatement the guarantor of that right, the court in *Moehlenkamp* next had to justify the restriction of abatement's remedy to the first appeal. Such a restriction did not seem to follow directly from *Griffin*, which made no distinction between the first appeal and later appeals. Yet the Supreme Court, in *Dove v. United States*, a cryptic one-paragraph *per curiam* opinion, had recently foreclosed abatement for defendants who died while awaiting a writ of certiorari.[120] While it did not explicitly say as much, *Dove* appeared to leave open the

117. *Id.*

118. United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997); United States v. Rich, 603 F.3d 722, 729 (9th Cir. 2010) (citing *Logal* as citing *Griffin* for the proposition). Nothing was especially striking about the facts in these cases: both were fraud actions, involving a Ponzi schemer in *Rich,* and management who gave out inflated revenue figures in *Logal*. 106 F.3d at 1552. The origin of the miscitation seems to have been carelessness in *Logal*. In *Rich*, the court cited *Griffin* (via *Logal*) among a blizzard of other citations, offered with little context. 603 F.3d at 729.

119. *See infra* note 126.

120. 423 U.S. 325, 325 (1976) ("The Court is advised that the petitioner died at New Bern, N. C., on November 14, 1975. The petition for certiorari is therefore dismissed.").

possibility of abatement on appeal to the circuit courts.[121] If abatement was a compensation for the forfeited appeal, why was it triggered only on the first appeal?

It was part of *Moehlenkamp*'s genius that the opinion offered a satisfactory explanation for the *Dove* Court's unexplained distinction between first appeals (where abatement was still apparently permitted) and appeals to the Supreme Court (where death would no longer trigger abatement).[122] Moreover, this explanation conveniently bolstered the new, rights-protective rationale for abatement. *Moehlenkamp* explained the *Dove* distinction by attributing near-constitutional importance to the fact that first appeals are statutorily guaranteed, while appeals to the Supreme Court are discretionary.[123] From *Dove's* bare 61 words, *Moehlenkamp* inferred a soaring paean to the rights guaranteed by abatement:

> The Supreme Court may dismiss the petition without prejudicing the rights of a deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right. In contrast, when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an "integral part of (our) system for finally adjudicating (his) guilt or innocence."[124]

The *Moehlenkamp* court did not offer to explain why "the interests of justice" dictated a single appeal, but not a second appeal. Yet its reasoning was nonetheless widely followed in other circuits.[125]

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121. *See id.* (overruling, "to the extent that [it] . . . may be inconsistent with this ruling," *Durham v. United States*, 401 U.S. 481 (1971), which had established abatement for all appeals in the federal courts).

122. *See supra* notes 120–121. **R**

123. United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977).

124. *Id.*

125. *See* United States v. Christopher, 273 F.3d 294, 296–97 (3d Cir. 2001) (explaining the *Durham-Dove* sequence with the observation that "[i]n most criminal cases, proceedings in the Supreme Court differ from those in the Courts of Appeals in one fundamental respect: appeals to the Courts of Appeals are of right, but writs of certiorari are granted at the discretion of the Supreme Court," and then quoting *Moehlenkamp*'s language on the "interests of justice" and the right to an appeal); Clarke v. United States, 915 F. 2d 699, 714 (D.C. Cir. 1990) (citing *Moehlenkamp*, and stating that "the reason for the different dispositions [in *Durham* and *Dove*] is that a criminal defendant's interest in not standing convicted without appellate review is deemed to be exhausted once he has availed himself of his appeal as of right to the court of appeals"); United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980) (quoting *Moehlenkamp*, 557 F.2d at 128).

By uniting these two disparate strands of doctrine, the *Moehlenkamp* court crafted a persuasive new rationale for the federal practice of abatement. Through creative reading of Supreme Court precedents, it backed this argument with apparently incontrovertible authority. The *Moehlenkamp* court's appellate rationale for abatement was swiftly adopted by other courts of appeals.[126]

No single factor explains the outcome in *Moehlenkamp*. The facts of the case were unremarkable; Charles E. Moehlenkamp had been convicted below on several counts of distributing controlled substances.[127] The appellate opinion hints at no irregularity in his trial that would have inspired the circuit court to effect a doctrinal breakthrough. The only slightly unusual factor was the presence of Tom C. Clark, a retired associate justice of the United States Supreme Court, on the Seventh Circuit panel that decided *Moehlenkamp*.[128] Justice Clark sat by designation on the Seventh Cir-

126. By the end of the 1980s, two more courts of appeals had embraced the appellate rationale, each citing *Moehlenkamp*. United States v. Oberlin, 718 F.2d 894, 895–96 (9th Cir. 1983); *Pauline*, 625 F.2d at 685 (5th Cir.). Three did so in the 1990s. United States v. Wright, 160 F.3d 905, 909 (2d Cir. 1998); United States v. Logal, 106 F.3d 1547 (11th Cir. 1997); United States v. Pogue, 19 F.3d 663 (D.C. Cir. 1994). And in 2001, the Third Circuit became the seventh federal court of appeals to apply the rationale in *United States v. Christopher*, 273 F.3d 294 (3d Cir. 2001). While the First and Fourth Circuits have not yet explicitly endorsed the appellate rationale, district courts in both circuits have rendered decisions premised on that rationale. *See* United States v. Sheehan, 874 F. Supp. 31 (D. Mass 1994); United States v. Chin (*Chin I*), 633 F. Supp. 624, 625–26 (E.D. Va. 1986), *rev'd sub nom.* United States v. Chin (*Chin II*), 848 F.2d 55 (4th Cir. 1988). In *Sheehan*, the District Court ordered the return of a fine that had been partially paid before the defendant's death, reasoning that, for abatement purposes, "[t]he legally relevant distinction is not between punishing individuals and punishing their families or estates; it is between judgments which have become final following appeal and those which have not." 874 F. Supp. at 34. In *Chin I*, the District Court endorsed the appellate rationale for abatement as expressed in *Moehlenkamp*, but declined to abate the conviction of a defendant who had committed suicide in jail after expressing, in a letter to his wife, his intention not to appeal his conviction. 633 F. Supp at 626. The court reasoned that the facts of Chin's case were unrelated to the purposes of the appellate rationale: "It seems contrary to our system of justice to allow, as defense counsel has asked, Chin to be absolved of all criminal liability because he intentionally took his own life at a time when he had not been afforded a right to appeal." *Id.* at 627. The Court of Appeals reversed and remanded in *Chin II* because the motion to abate had not been made by the defendant's wife, the only party with standing. 848 F.2d at 57–58. The Court of Appeals' order also stressed the need for "findings of facts by the district court on the contested issues of whether Chin committed suicide and whether he intended to abandon his right of appeal." *Id.* at 58.

127. *Moehlenkamp*, 557 F.2d at 127.

128. *Id.* (noting Justice Clark's presence on the panel).

cuit over one hundred times[129] over two years, and this sitting would be among his last; he died after participating in conference on the case, but before the opinion was submitted to him for approval.[130] Clark, the author of *Mapp v. Ohio*,[131] had been a notable liberal on matters of criminal justice and civil rights,[132] and it is conceivable that his presence on the *Moehlenkamp* panel influenced the opinion (even though he was not the author).

In the federal system, the ascendancy of the appellate rationale has been helped along by the refusal of courts to examine abatement's history. Extensive research has unearthed only two modern opinions in federal courts, one a dissent, that demonstrate a recognition of the way in which abatement has evolved, or the novelty of its exonerative and restitution-blocking qualities.[133] A Ninth Circuit panel exemplified the more typical bland incuriosity in 2010, when, justifying its abatement of a restitution order, it proclaimed: "Abatement *ab initio* means what it says."[134] As I have shown, of course, the content of abatement—what it "says"—has shifted throughout history, rather than having a fixed quantum of meaning.

For modern courts, the appellate rationale has come to seem like the obvious justification for abatement, as it alone can justify what these courts see as the immutable characteristics of abatement: its exonerative and restitution-blocking effects. Modern descriptions of the punishment rationale seldom treat it as an older rationale justifying a bygone form of abatement; rather, they treat it as a puzzling non sequitur, curiously unable to explain the practice which they believe it purports to justify.[135] Thus, the *Parsons* court

129. Information deduced from Westlaw search results for Seventh Circuit appellate cases with Justice Clark. WESTLAWNEXT, https://a.next.westlaw.com (Click on "Cases"; then follow "7th Circuit" hyperlink; then follow "Seventh Circuit Court of Appeals" hyperlink; then type "advanced: (JU,PA(clark)) AND "sitting by designation" /8 "supreme court")" in the search bar) (last visited Jun. 8, 2011).

130. *Moehlenkamp*, 557 F.2d at 127 n.* (noting Clark's death).

131. 367 U.S. 643 (1961).

132. *See* Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COLUM. L. REV. 175, 178–79 (1947) (lamenting the whittling-away of federal authority to protect civil rights); Tom C. Clark, *Criminal Justice in America*, 46 TEX. L. REV. 742, 743–45 (1968) (defending the Court's decisions to expand the rights of the accused in *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

133. *See infra* note 135. R

134. United States v. Rich, 603 F.3d 722, 729 (9th Cir. 2010).

135. Only one majority opinion in a federal court has ever recognized the recency of the appellate rationale, or the age of the punishment rationale, and that in a ten-word aside. *See* United States v. Oberlin, 718 F.2d 894, 896 (9th Cir.

asserts that the appellate rationale "provides a better explanation" for the exonerative effects of abatement, and concludes that "[t]he primary justification for the abatement doctrine arguably is that it prevents a wrongly-accused defendant from standing convicted."[136] Similarly, Professor Cavallaro tells us that the punishment rationale "fails to explain the extent of the relief afforded"[137] when courts exonerate a defendant, and that abatement must therefore "rel[y] significantly on a larger premise"—the finality principle. One student Note declines to even consider the punishment rationale, declaring that it "does not hold up well to a legal analysis"[138] and concluding that the appellate rationale is "[a] more sophisticated, indeed, probably [a] more accurate argument[ ] for abatement."[139] For many other courts, the punishment rationale does not even seem to exist.[140]

In sum, a single judicial sleight-of-hand ushered out the punishment rationale—which had long underpinned abatement[141]—and ushered the appellate rationale into the federal courts. As shown, that move has gone largely unrecognized because of the skill with which it was accomplished. Still, the courts' new rationale for abatement—however convincing it appears—has had controver-

1983) (identifying punishment rationale as the "early rule," and then introducing appellate rationale with the explanation that "[m]ore recently, the rationale has been expressed as follows"). But in a remarkable dissent from the en banc opinion in United States v. Estate of Parsons, 367 F.3d 409, 419 n.1 (5th Cir. 2004), six judges decried the appellate rationale as "a completely novel judicial creation which has not been embraced or even suggested by the other courts," and declared that "the majority was apparently inspired to create the 'appellate rationale' by a single law review article"—Professor Cavallaro's *Better off Dead*. *See generally* Cavallaro, *supra* note 16. R

136. *Parsons*, 367 F.3d at 415.

137. Cavallaro, *supra* note 16, at 954. R

138. Staggs, *supra* note 14, at 515. R

139. *Id.* at 526.

140. *See* United States v. DeMichael, 461 F.3d 414, 416 (3d Cir. 2006) ("The abatement rule is grounded in procedural due process concerns."); United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) (calling the appellate rationale "a fundamental principle of our jurisprudence from which the abatement principle is derived"); *see also* Barry A. Bostrom, Chad Bungard & Richard J. Seron, *John Salvi III's Revenge from the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence*, 5 N.Y. CITY L. REV. 141, 161 (2002) ("The basic public policy behind [abatement] is to protect the rights of persons who have been convicted, but whose right to appeal has not been fully exercised."); James M. Rose, *Death of a Lay Man: Is There Guilt After Death?*, 34 WESTCHESTER B.J. 81, 81 (2007) ("The doctrine is based upon the fact that the (dead) defendant has no ability to pursue an appeal, and has not had the opportunity to do so . . . .").

141. *See supra* Part II.

sial ramifications. The new rationale dictated a new form for the practice, and that form has attracted much criticism, as discussed in Part I. Moreover, since the novelty of abatement's rationale and form are unrecognized, some scholars have assumed that the only "fix" for abatement is to ban the practice entirely.[142]

But this is not necessarily so. One little-considered option is a return to the traditional rationale for abatement, and to the practice that it entailed. In essence, the federal courts could revert to the world before *Moehlenkamp*. That world is described in the following Part.

IV.
THE FUTURE OF ABATEMENT

In the following Part, I consider the effectiveness of the modern doctrine of abatement, and then describe the practical results of a return to the traditional form of the practice.

The standard defense of modern abatement asserts that the practice exists to protect a right to appellate review.[143] Implicit in this argument is the normative premise that rights demand uncompromising defense, regardless of whether their enforcement has a desirable or attractive result. Thus, say abatement's defenders, we should not cavil at the seeming ugliness of abatement's results: such is the cost of justice.[144] After all, as with the exclusionary rule[145] or

142. *See* Beloof, *supra* note 14, at 1159–61 (describing with approval the decisions of state courts declining to use the abatement doctrine). R

143. *See supra* notes 19–21 and accompanying text. R

144. *See, e.g.*, Cavallaro, *Why, Legally, Geoghan Is Now "Innocent," supra* note 20 (commenting in op-ed article, after the death and abated conviction of child-molesting priest John Geoghan, that "[t]he many victims of Geoghan's abuse are understandably angered and perhaps even traumatized by the symbolism of a legal declaration that he is innocent. There will undoubtedly be an outcry . . . and an effort to change a rule that compels such a declaration. But the right of appeal that is the basis for the remedy is a right that we should all insist upon in a legal system that has the power to jail and execute its citizens.")

145. The exclusionary rule, of course, suppresses evidence that was unconstitutionally acquired, regardless of its centrality to the prosecution's case, or its bearing on the defendant's guilt. The justification for the rule lies not in any purported efficacy at ensuring that the truth is discovered, but in the rule's deterrence of police misconduct. *See* Weeks v. United States, 232 U.S. 383, 393 (1914) ("The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established be years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."); Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("The criminal goes free, if he must, but it is the law that sets him free.

the speech protections of the First Amendment,[146] an unhappy result in the short term is often the price of defending an important principle in the long term.

This argument must founder, however, on the attempt to demonstrate that there exists a fundamental entitlement to appellate review—one strong enough to overcome the powerful arguments against abatement. As discussed in Part III, the Supreme Court has often denied that there exists a due process right to appellate review.[147] Moreover, the broader landscape of criminal procedure confirms that appellate review is an entitlement of relatively low dignity. The presumption of innocence falls after conviction.[148] Living defendants have no constitutional or absolute right to bail pending appeal,[149] and prosecutors may impeach their credibility with a prior conviction that is still pending appeal.[150]

Against this background, abatement seems a triply incongruous doctrine. It represents a pocket of the law in which appellate review takes on a uniquely dignified, quasi-constitutional status. Moreover, in the name of guaranteeing such review, abatement offers not review itself, but something far more radical: actual exoneration, regardless of factual guilt. And this extraordinary remedy is

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Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

146. It is a truism of First Amendment doctrine that, in the service of protecting the Amendment's freedoms, we must look beyond the demands of the moment and "be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

147. *See, e.g.,* Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."); Pennsylvania v. Finley, 481 U.S. 551, 556 (1987) ("[I]t is clear that the State need not provide any appeal at all."); McKane v. Durston, 153 U.S. 684, 687 (1894) (holding that review of criminal convictions "was not at common law and is not now a necessary element of due process of law"). However, the right to an appeal is guaranteed by statute in the federal courts and in almost every state. *See* Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 n.2 (1985) (noting that Virginia and West Virginia are the sole exceptions to this rule, but that Virginia offers a procedure which is "difficult to distinguish from the full scale review available in other states"); *see also* 18 U.S.C. § 3742 (2006) (providing for review of criminal convictions).

148. *See* Cavallaro, *supra* note 16, at 959 n.48 (collecting cases). **R**

149. *See* 18 U.S.C. § 3143(b)(1)(B)(i), (ii) (requiring detention of a convicted and sentenced defendant unless there is clear and convincing evidence that the person is unlikely to flee or pose a danger to public safety and the appeal "is not for the purpose of delay and raises a substantial question of law or fact likely to result in (a) reversal [or] (b) an order for a new trial").

150. *See* FED. R. EVID. 609(e) ("The pendency of an appeal therefrom does not render evidence of a conviction inadmissible.").

available only to a tiny population—the deceased—that is unable to enjoy the benefit that it confers. Abatement is a gold-plated remedy for a nonexistent right, offered to a perversely small proportion of the supposed right's holders.

If modern-day abatement makes only a crabwise and halting progress toward its supposed goals, it is terrifically effective at inflicting collateral damage. More specifically, as abatement's opponents have often said, modern-day abatement strips crime victims of compensation for the losses they have suffered at defendants' hands.[151] Moreover, it triggers a powerful symbolic process, by which the appellate court cleanses the defendant of the guilt conferred at trial. That cleansing flies in the face of adjudged facts and callously re-injures victims of crime.

For this state of affairs, we have the appellate rationale to blame—a judicial innovation that turned abatement into a right, rather than a mere judicial practice. It is time for this experiment to end. Courts could achieve a form of abatement less offensive to crime victims, and more in keeping with the rest of our criminal procedure, if they returned to the punishment rationale for the practice. In considering whether to abate a sanction or an order of restitution, courts should not ask whether the defendant has had his conviction reviewed, but whether the measure constitutes punishment. Penal measures should abate; compensatory or restitutive measures should not.

Such a change in the basis for abatement would have several practical implications. First, a change in abatement's rationale would exchange the current patterns of practice for posthumous fines and posthumous quasi-civil judgments. Non-punitive compensatory measures, such as most orders of restitution and orders to pay costs, would always be enforced against the estate.[152] By contrast, fines would not be imposed on defendants' estates, since only

151. *See supra* notes 34–36 and accompanying text. R

152. There will be exceptions. Some courts have found restitution orders to be penal. United States v. Johnson, 983 F.2d 216, 220 (11th Cir. 1993) (holding that, "though restitution resembles a judgment 'for the benefit of' a victim, it is penal rather than compensatory"); *see also* Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2745–49 (2005) (collecting cases); Razel, *supra* note 14, at 2215 (referring to the principle that restitution orders are compensatory as "controversial"). Courts operating under a traditional abatement approach will be free to make this judgment. What matters is that they will ask whether the orders are punitive or compensatory, not whether the defendant's conviction has been finalized by appeal. R R

the accused, and not his inheritors, should be punished for his wrongdoing.[153]

I acknowledge two bases on which some would argue for fining the defendant's estate. First, one might argue that, through fining, the deceased defendant loses the ability to transmit some of his wealth to his inheritors, an act which would have been satisfying to him in life. But since the deceased defendant is oblivious to the sanction at the time of imposition, I cannot see how it operates as a punishment. It can neither incapacitate him, nor reform him, nor impose retribution. It amounts to the punishment of an insensate being.

As another argument for fining the defendant's estate, some might deny that such a fine truly punishes the defendant's inheritors. On this argument, the fine does not deprive the inheritors of something that is "theirs," because their rights of inheritance are defined by legal rules of property, and because those rules may be altered to deny a defendant's inheritors the amount of his adjudged fine. But this argument conflates formal legality with justice; it reduces to the contention that, as government has the power to create rules of property, no procedurally legitimate change in those rules can be unjust.

A change in abatement's underlying rationale would affect not only the way in which courts exact money from defendants, but also the language and symbolism of abatement orders. Abating courts would refrain from speaking and acting as if abatement exonerated the defendant. At the level of phrasing, courts would not suggest that a defendant, following abatement, ceases to be "a wrongdoer in the eyes of the court." At the level of legal formality, abatement would no longer result in the vacatur of the defendant's conviction, or the dismissal of his indictment. While abatement would still suspend the defendant's punishment, this would be accomplished without erasing the formal indicia of conviction.[154]

153. *See supra* Part II.B.1.

154. Some courts have recognized the symbolic importance of a court's formally recognizing the conviction below, even as it grants abatement. Thus, the Alabama Supreme Court has held that, when a defendant dies pending appeal, "the Court of Criminal Appeals shall instruct the trial court to place in the record a notation stating that the fact of the defendant's conviction removed the presumption of the defendant's innocence, but that the conviction was appealed and it was neither affirmed nor reversed on appeal because the defendant died while the appeal of the conviction was pending and the appeal was dismissed." Wheat v. State, 907 So. 2d 461, 464 (Ala. 2005).

There are four major alternatives to abatement which have been proposed by scholars or implemented by courts, but none possesses all three of the advantages described above.[155]

First, some states have abandoned abatement entirely.[156] Such a course would entail the payment of fines—punitive, noncompensatory judgments—by defendants' estates, which violates the principle that only the accused himself should be punished for his crimes.

Second, some state courts[157] have allowed a "substitute defendant" to pursue the appeal in place of the deceased.[158] This approach seeks to satisfy the victim's interest in seeing the conviction affirmed, while giving the deceased defendant the error-correcting benefit of review. But the substitute-appellant approach is rife with problems. As the student author Timothy Razel has pointed out, "the defendant is not available to make the decision about whether, and how far, to pursue the appeal."[159] Razel notes that a constitutional issue arising from a state criminal trial can be pursued through three levels of appeal.[160] Moreover, the substitute-appellant approach can produce absurd consequences, as when a reviewing court orders a new trial for the deceased defendant, or affirms his prison sentence. Finally, under the substitute-appellant approach, as under the approach of abolishing abatement entirely, a court could impose a fine on the deceased defendant's innocent estate.

Third, the Fourth Circuit Court of Appeals—alone of the appellate courts—has retained an approach to orders of restitution which employs the distinction between punitive and compensatory measures, as outlined in *United States v. Dudley*.[161] While this ap-

155. These approaches are described in Razel, *supra* note 14, at 2211–21. A little-used approach taken by the Alabama courts, but not described in detail here, involves the dismissal of the appeal and retention of the conviction, with a note placed in the record "stating that the fact of the defendant's conviction removed the presumption of the defendant's innocence, but that the conviction was appealed and it was neither affirmed nor reversed on appeal because the defendant died while the appeal of the conviction was pending and the appeal was dismissed." *Wheat*, 907 So. 2d at 464; *see also* Razel, *supra* note 14, at 2220–21. R

156. *See* Staggs, *supra* note 14, at 517 n.60 (collecting cases). R

157. *See id.* at 518–20 (describing this approach and collecting cases); Surland v. State, 895 A.2d 1034, 1036 (Md. 2006) ("Approximately seven States have chosen to proceed with the appeal if a substituted party elects to do so . . . .").

158. *See*, *e.g.*, Staggs, *supra* note 14, at 529–30 (recommending this approach). R

159. Razel, *supra* note 14, at 2218–19. R

160. *Id.*

161. 739 F.2d 175 (4th Cir. 1984); *see supra* notes 87–90. However, at least one district court case within that circuit has signaled a movement toward the appellate R

proach is consistent with the punishment rationale for abatement, the Fourth Circuit's doctrine does not mitigate abatement's exonerative effects, a point that Razel makes.[162]

Fourth, in his student Note, Razel—recognizing that abatement involves warring and incompatible interests—has proposed an "abatement hearing," through which the trial court could balance these interests, and decide whether to abate the conviction or let it stand. The court would apply a four-factor test, considering: the amount of restitution at stake; the "heinousness of the offense"; whether the victims, if any, were involved and "interested" in the trial; and "any negative effect of the conviction on the decedent's family, heirs, and next of kin"—for example, the possibility that indigent relatives of the defendant would be forced onto the welfare rolls.[163]

While Razel's is an original and well-considered approach, it cannot help but violate one or the other of the two principal rationales for abatement. If it is wrong to punish the defendant's family (as traditional abating courts believed), then how does this become less wrong when the family has enough money to pay the fine? On the other hand, if abatement recognizes the defendant's right to an appeal (as modern abating courts believe), then how do the heinousness of the offense, and the grief of the victims, justify denying that right?

In the end, a change in abatement's rationale would have salutary effects far beyond any specific improvements that might be recommended here. By abandoning the notion that abatement guarantees a right, courts would free themselves to amend and improve the doctrine, or to pare it back. A judicial doctrine develops a protective carapace when it is thought to protect a right: the doctrine resists arguments of policy, coming to seem like an inherent good, worthwhile in itself. By stripping off this carapace, we permit ourselves to see abatement afresh—to decide for ourselves what abatement "means" and what it "says."

rationale for abatement. United States v. Chin (*Chin I*), 633 F. Supp. 624 (E.D. Va. 1986), *rev'd sub nom.* United States v. Chin (*Chin II*), 848 F.2d 55 (4th Cir. 1988); *see supra* note 126. R

162. Razel, *supra* note 14, at 2217. R

163. *Id.* at 2223–26.

DEPUTIZING INTERNET SERVICE PROVIDERS: HOW THE GOVERNMENT AVOIDS FOURTH AMENDMENT PROTECTIONS

*ALEXANDRA L. MITTER**

INTRODUCTION

Not until the late 1970s did law enforcement in the United States begin to recognize and address the existence of child pornography.[1] The response was quick and efficient, and over the ensuing four decades, an admirable alliance of federal and state law enforcement has made great strides in eliminating the presence and trafficking of child pornography in the United States. Unfortunately, the rise of the Internet has complicated these law enforcement efforts, providing a new avenue for pedophiles[2] and traffickers to access and trade images in relative anonymity. The Internet's effect on child pornography has provoked an equally swift response, leading to the enactment of several statutes that pro-

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1. *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 219–34 (2001) (noting a dramatic rise in the reported instances of child abuse and highlighting the potential causes: increased incidences, increase in awareness, better reporting, expanded definitions); JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS 171 (1990). The discovery of "battered-child syndrome" in 1962 led to a flurry of child abuse literature, but not until later did the sexual abuse of children supersede violent abuse in importance in the public consciousness. *See generally* Ian Hacking, *The Making and Molding of Child Abuse*, 17 CRITICAL INQUIRY 253 (1991).

2. The American Psychiatry Association's Diagnostic and Statistical Manual IV includes "pedophilia" in its list of sexual and gender identity disorders. Pedophilia is marked by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger)." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 571–72 (4th ed. 2000). The proposed revisions to the Diagnostic and Statistical Manual do not substantively change the characteristics of the disorder. The APA proposes to change the disorder's name from "pedophilia" to "pedohebephilic disorder" and increase the maximum age from 13 to 14. The APA estimates that little to no increase in the number of diagnoses will occur because of the new definition. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 302.2 (proposed revisions), *available at* http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=186.

vide broad investigative and enforcement powers to local and federal law enforcement.[3] However, in attempting to address the proliferation of child pornography on the Internet, Congress and law enforcement agencies have created enormous Fourth Amendment issues for all Internet users. The facilitation of widespread Internet Service Provider (ISP) monitoring programs jeopardizes the rights of all Internet users to be free from unreasonable intrusion.

While the Internet's position in Fourth Amendment jurisprudence has received extensive scholarly attention, the investigation of child pornography on the Internet has not.[4] This is due in part to the lack of a statutory remedy for law enforcement violations of the governing legislation, the Stored Communications Act (the SCA). By explicitly not including a suppression remedy, the Stored Communications Act provides little incentive for a defendant to make a Fourth Amendment challenge.[5] Consequently, the Stored Communications Act has not been subject to the rigorous judicial analysis that it deserves, leaving the "famously complex"[6] law of electronic surveillance without elucidation.[7] This lack of relevant case law in turn contributes to the dearth of academic attention on the interaction of the SCA and the Fourth Amendment.

This Note seeks to address this academic and jurisprudential gap.[8] Its argument is two-fold: first, it explains why private Internet

3. *See, e.g.*, Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485 (codified as amended at 18 U.S.C. § 2251 (2006)); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of Titles 18 and 42 U.S.C.); PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 676–86 (codified in scattered sections of Title 18 U.S.C.).

4. *See, e.g.*, CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT (2007); Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004); Ric Simmons, *From* Katz *to* Kyllo: *A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technology*, 53 HASTINGS L.J. 1303 (2002); Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581 (2011).

5. 18 U.S.C. § 2708.

6. Orin S. Kerr, *Lifting the "Fog" of Internet Surveillance: How a Suppression Remedy Would Change Computer Crime Law*, 54 HASTINGS L.J. 805, 820 (2003).

7. *See id.* at 807; Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1277 (2004).Though largely beyond the scope of this Note, both Professor Kerr and Professor Solove's articles provide an interesting argument in favor of including a suppression remedy in internet surveillance laws.

8. *See* Orin Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1006 (2010) (noting that the jurisprudence and legal scholarship are sparse on the application of the Fourth Amendment to the internet context); Quon v. Arch Wireless Operating Co., 529 F.3d 892, 904 (9th Cir. 2008), *rev'd*, City of Ontario v. Quon, 130 S. Ct. 2619 (2010) ("The recently

activity should always be protected by the warrant and probable cause requirements of the Fourth Amendment; second, it contends that, through statutory enactments and local law enforcement action, ISPs are turned into agents of law enforcement, which should cause their private monitoring programs to trigger Fourth Amendment protections.

In making this argument, the Note will proceed in five parts. Part I traces the rise in awareness of child pornography in the United States and the Internet's unique role in the proliferation of child pornography. Part II analyzes the statutes currently protecting Internet activity, with a special emphasis on the provisions regulating child pornography on the Internet. Part III provides an outline of Fourth Amendment jurisprudence and situates Internet monitoring within it, arguing that private Internet activity merits the protection afforded by the requirement of a warrant supported by probable cause. Part IV then addresses common counterarguments for keeping Internet monitoring outside the scope of the Fourth Amendment. Finally, Part V argues that congressional statutes and state law enforcement agents have deputized ISPs through subtle encouragement and coercion.

I.
CHILD PORNOGRAPHY LAW AND THE INTERNET

Child pornography, as a separately criminalized and distinct phenomenon from pornography featuring adults, is relatively new.[9] Despite its rampant availability, child pornography did not provoke a widespread moralistic response until the late 1970s.[10] However, once discovered and recognized as a unique problem, child pornography was swiftly dealt with through an alliance of federal law enforcement agencies. According to the Child Exploitation and Obscenity Section of the United States Department of Justice, by the 1980s, law enforcement had virtually eliminated the problem of child pornography trafficking.[11] With the advent of the Internet,

minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored.").

9. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (holding that unlike adult pornography, child pornography is not entitled to First Amendment protection).

10. PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 32–33 (2001).

11. U. S. DEP'T OF JUSTICE, CHILD EXPLOITATION AND OBSCENITY SECTION, http://www.justice.gov/criminal/ceos/childporn.html (last visited April. 18 2011) [hereinafter DOJ CHILD EXPLOITATION]; *see also* ATT'Y GEN.'S COMMISSION ON POR-

however, child pornography has reappeared in a more pervasive and virulent form.[12] The Internet has increased the amount of material available to users and drastically improved distribution and accessibility.[13] Now, a single image reproduced on the Internet may be accessed by an increasingly large number of anonymous individuals around the globe.

This Section traces the rise in awareness of child pornography and the federal government's response to this new problem, leaving a more complete discussion of the current law for later in the Note.[14] This Section will then discuss the role of the Internet in shaping the current child pornography landscape and legislation.

A. The "Discovery" of Child Pornography and Legal Response

In 1986, the United States Office of the Attorney General's Commission published a report on pornography.[15] The Commission's discussion of child pornography is premised on a conception of each image as an individual instance of sexual exploitation.[16] This understanding of child pornography placed it within a larger hysteria surrounding child abuse that began in the 1970s.[17] The problem of child pornography, independent from concerns about adult pornography, could not surface until the media (and, subsequently, law enforcement) raised public awareness about the specter of child abuse.[18] While estimates of the prevalence of child pornography at that time varied greatly, rooting out child

NOGRAPHY, FINAL REPORT 408–09 (1986), *available at* http://porn-report.com/contents.htm [hereinafter ATTORNEY GENERAL'S REPORT].

12. DOJ CHILD EXPLOITATION, *supra* note 11.

13. *See, e.g.*, William R. Graham, Jr., *Uncovering and Eliminating Child Pornography Rings on the Internet: Issues Regarding and Avenues Facilitating Law Enforcement's Access to 'Wonderland,'* 2000 L. REV. M.S.U.-D.C.L. 457, 465 (2000) (discussing how the internet enables rapid transfer of files and images, provides relatively high security, and almost complete anonymity for its users); RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., CHILD PORNOGRAPHY ON THE INTERNET PROBLEM-ORIENTED GUIDES FOR POLICE, PROBLEM-SPECIFIC GUIDES SERIES NO. 41, 8 (2006) [hereinafter COPS GUIDE] ("The Internet has escalated the problem of child pornography by increasing the amount of material available, the efficiency of its distribution, and the ease of its accessibility.").

14. *See infra* Parts II–III.

15. ATTORNEY GENERAL'S REPORT, *supra* note 11.

16. *Id.* at 405–6.

17. For a detailed discussion of the discovery of child abuse and child pornography's role within it, see Adler, *supra* note 1, at 214–34.

18. *Id.* at 219–21.

pornographers and pedophiles became an issue at the forefront of law enforcement concerns.[19]

Major legislative and law enforcement efforts began in the late 1970s in response to the growing concern about the proliferation of child abuse and child pornography.[20] Congress passed the Protection of Children Against Sexual Exploitation Act in 1978, criminalizing the use of children in the production of obscene images.[21] Not until *New York v. Ferber*,[22] however, did the Supreme Court recognize child pornography as a category of pornographic material unprotected by the First Amendment for reasons independent of the image's obscenity. By eliminating the requirement that the image fall within the definition of "obscene" established in *California v. Miller*,[23] *Ferber* exposed child pornography to a host of new federal and state regulations. After *Ferber*, virtually every state added sanctions to its criminal law for the production, promotion, sale, distribution, or exhibition of pornographic images involving chil-

19. The Attorney General's 1986 report noted that between January 1, 1978 and February 27, 1986, 255 individuals were prosecuted under federal child pornography statutes. However, the Attorney General estimated that this was an underrepresentation because before 1982 the definition of child pornography still included the obscenity requirement. ATTORNEY GENERAL'S REPORT, *supra* note 11, at 415–16. More recent estimates indicate that there are "more than one million pornographic images of children on the Internet, with 200 new images posted daily." COPS GUIDE, *supra* note 13, at 12. *See also* JENKINS, *supra* note 10, at 33; Khalid Khan, *Child Pornography on the Internet*, 73 POLICE J. 7, 9–10 (2000). The number of child pornography prosecutions has dramatically increased as well, peaking in 2006 with more than 1,500 cases. *Pornography—Child Prosecutions for 2010*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://tracfed.syr.edu/results/9x204db7748fc1.html (last accessed April 25, 2011). Despite attempts to quantify the prevalence of child pornography on the Internet, there is recognized difficulty in making a complete and accurate assessment. *See* EVA J. KLAIN, HEATHER J. DAVIES & MOLLY A. HICKS, AM. BAR ASS'N CTR. ON CHILDREN & THE LAW, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD PORNOGRAPHY: THE CRIMINAL-JUSTICE-SYSTEM RESPONSE 3 (2001) ("Accurate estimates are difficult because no valid and reliable methodology has been devised to measure the amount of child pornography especially on the Internet.").

20. ATTORNEY GENERAL'S REPORT, *supra* note 11, at 408.

21. Protection of Children Against Sexual Exploitation Act of 1978, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251–2253 (2006)).

22. 458 U.S. 747, 774 (1982).

23. 413 U.S. 15, 25 (1973) (setting forth a three-part test for obscenity: (1) contemporary community standards must find that the work as a whole appeals to "prurient interests"; (2) the work must depict sexual conduct in a patently offensive way and; (3) the work must lack serious literary, artistic, political, or scientific value).

dren.[24] Congress responded to *Ferber* by passing the Child Protection Act of 1984, which expanded the reach of federal criminal law to cover non-obscene images of children.[25]

In 1996, Congress once again expanded the reach of child pornography regulation through the Child Pornography Prevention Act (CPPA).[26] The CPPA criminalized "virtual" child pornography by including within its definition of child pornography any image that has been modified or generated by computer to appear to be of a minor engaging in sexual conduct.[27] The Supreme Court, in *Ashcroft v. Free Speech Coalition*,[28] struck this provision as a violation of the First Amendment, rejecting the argument put forward in *Ferber* that child pornography is "'intrinsically related' to the sexual abuse of children."[29] Absent harm to an actual child, virtual child pornography would receive First Amendment protection. In response to the Supreme Court's decision, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the PROTECT Act), the primary tool by which the federal government defines and regulates the production and distribution of child pornography today.[30] The PROTECT Act criminalizes the knowing production, distribution, receipt, or possession of images determined to constitute child pornography.[31]

The PROTECT Act addressed the Supreme Court's concerns in *Ashcroft v. Free Speech Coalition* by defining child pornography as a "visual depiction of any kind, including a drawing, cartoon, sculpture or painting" depicting "a minor engaging in sexually explicit conduct" that "is obscene," or "depicts an image that is, or appears to be, of a minor engaging in . . . sexual intercourse . . . and lacks serious literary, artistic, political, or scientific value."[32] While it maintained the definition of actual, not virtual, child pornography, it brought virtual images falling under the *Miller* definition of "ob-

24. ATTORNEY GENERAL'S REPORT, *supra* note 12 at 415.

25. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–2254, 2256, 2516 (2006)).

26. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of Titles 18 and 42 U.S.C.).

27. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(B)–(C) (2006).

28. 535 U.S. 234 (2002).

29. 535 U.S. at 250 (quoting United States v. Ferber, 458 U.S. 747, 759 (1982)).

30. PROTECT Act of 2003, Pub. L. No. 108-021, 117 Stat. 650 (2003).

31. PROTECT Act of 2003, 18 U.S.C. § 1446A(a)–(b) (2006).

32. *Id.*

scene" back into its purview.[33] Similarly, the PROTECT Act criminalizes the knowing advertisement or distribution of "an obscene visual depiction of a minor engaging in sexually explicit conduct; or a visual depiction of an actual minor engaging in sexually explicit conduct."[34] Additionally, pandering or soliciting material purported to contain such a depiction is a violation even if the actual material does not meet the statute's definition.[35]

The current law creates a mandatory minimum sentence of five years for first time offenders, with discretionary sentences of up to twenty. Repeat offenders can receive sentences ranging from fifteen to forty years.[36]

B. The Internet and the Proliferation of Child Pornography

Before the advent of the Internet, production and reproduction of pornographic images involving children were extremely difficult and expensive, and the sale and distribution of those images were similarly risky endeavors.[37] Child pornographers, producing and dealing in hard copies, were traceable individuals. However, as the Attorney General's Report notes, by 1986 child pornographers were beginning to use computer networks in addition to the mails to exchange photographs.[38] The Attorney General's Commission suggested legislation addressing the use of new technologies, specifically computers, in the production and distribution of child pornography.[39] Today, "[t]he technological ease, lack of expense, and anonymity in obtaining and distributing child pornography has resulted in an explosion in the availability, accessibility, and volume

33. The history of the application of obscenity doctrine to pornographic images is one fraught with difficulty for the Supreme Court and has been often criticized by academics, but obscenity prosecutions have experienced a resurgence after the Court's decision in *Ashcroft*. *See* Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 704–10 (2007).

34. 18 U.S.C. § 2252A(a)(3)(B)(i)–(ii) (2006).

35. *Id.* Although *Ashcroft v. Free Speech Coalition* struck down a provision classifying as child pornography all material that "conveys the impression that it depicts a minor engaging in sexually explicit conduct," 535 U.S. 234, 257–58 (2002), the Court upheld the PROTECT Act's narrower pandering-and-solicitation provision. United States v. Williams, 553 U.S. 285, 286 (2008) ("The constitutional defect in *Free Speech Coalition*'s pandering provision was that it went beyond pandering to prohibit possessing material that could not otherwise be proscribed.").

36. 18 U.S.C. § 2252A(b)(1) (2006).

37. DOJ CHILD EXPLOITATION, *supra* note 12; *see also* JENKINS, *supra* note 11, at 52–58.

38. ATTORNEY GENERAL'S REPORT, *supra* note 12, at 407.

39. *Id.* at 443.

of child pornography."[40] The Department of Justice, having determined that it has virtually eradicated the domestic distribution of child pornography in hard copy, now focuses its efforts on a similar eradication of online materials.[41]

The federal statutory law has largely kept pace with technological advancements,[42] although some have argued that congressional lag time is too long.[43] In 1988 Congress passed the Child Protection and Obscenity Enforcement Act, which for the first time made it illegal to use a computer to depict or advertise child pornography.[44] The current law, the PROTECT Act, also includes computers in every discussion of mailing, transporting, or distributing child pornography through interstate and foreign commerce.[45] Similarly, "visual depiction" includes "data stored on a computer disk or by electronic means[,] . . . digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means."[46]

Law enforcement is also exploring new avenues for policing the production and distribution of child pornography on the Internet.[47] The Department of Justice's Office of Community Oriented Policing Services published a guide to Internet child pornography for local law enforcement discussing the various means by which the Internet facilitates child pornography (e-mail, peer-to-peer networks,[48] private message boards) and problems

40. DOJ CHILD EXPLOITATION, *supra* note 11.

41. *Id.*

42. *See, e.g.*, 18 U.S.C. § 2256(8)(C) (including as child pornography visual depictions that have been "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct"). This section "prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity." Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002).

43. *See, e.g.*, Daniel Solove, Professor, George Washington Univ. Law Sch., Privacy v. Security: Has Fourth Amendment Law Kept up with Current Technology?, Address at the N.Y.U. Hoffinger Criminal Justice Colloquium (Nov. 16, 2009); *see also* United States v. Pineda-Moreno, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting) (noting that the majority's reliance on *United States v. Knotts*, 460 U.S. 276 (1983), is misplaced given the advancement in GPS technology).

44. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485 (codified as amended at 18 U.S.C. § 2252 (2006)).

45. *See* 18 U.S.C. § 1446A(d) (2006); 18 U.S.C. § 2252A(a) (2006).

46. 18 U.S.C. § 1446A(f)(1).

47. *See, e.g.*, COPS GUIDE, *supra* note 13.

48. Peer-to-peer networks are composed of participants that make a portion of their resources (such as processing power, disk storage or network bandwidth) directly available to other network participants, without the need for central coor-

uniquely associated with the investigation of Internet crime (encryption, lack of Internet regulation, volume of Internet activity, jurisdictional questions).[49]

While the need to police child pornography is well recognized by politicians and law enforcement agencies, Fourth Amendment concerns remain: how should these efforts be carried out, and to what extent should ISPs be involved in investigative and regulatory efforts? The remainder of this Note will analyze the statutory framework for regulating and investigating child pornography on the Internet, focusing on Fourth Amendment jurisprudence.

II.
STATUTORY REPORTING REQUIREMENTS FOR INTERNET SERVICE PROVIDERS

The Electronic Communications Privacy Act (ECPA) is the primary statute through which Congress regulates and protects the privacy of Internet activity.[50] It consists of three parts, each of which addresses a particular area of technology: the Wiretap Act,[51] the Pen Register Act,[52] and the Stored Communications Act.[53] The ECPA trilogy is Congress's attempt to protect users of the telephone and Internet from invasions of privacy by service providers, law enforcement officers, and third-party hackers.[54] However, these statutes contain several carve-outs in which a user's activity goes unprotected.

The SCA, passed in 1986, reflected Congress's recognition that the Wiretap Act alone would not provide sufficient protection to the growing group of computer users.[55] The Wiretap Act only protects the communications while they are in transit; information stored on servers used by either the sender or receiver remain un-

dination instances (such as servers or stable hosts). Rüdiger Schollmeier, *A Definition of Peer-to-Peer Networking for the Classification of Peer-to-Peer Architectures and Applications*, 2001 PROC. OF THE FIRST INT'L CONF. ON PEER-TO-PEER COMPUTING 101.

49. *See* COPS GUIDE, *supra* note 14.

50. Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

51. 18 U.S.C. §§ 2510–2522 (2006).

52. 18 U.S.C. §§ 3121–3127 (2006).

53. 18 U.S.C. §§ 2701–2712 (2006).

54. *See* S. REP. No. 99-541, at 1–3 (1986) *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555–58.

55. *See* Solove, *supra* note 8, at 1277 ("[l]egal protection against the unreasonable use of newer surveillance techniques has not kept pace with technology.") (alteration in original) (quoting H.R. REP. NO. 99-647, at 18 (1986)).

protected. The SCA makes it a crime to intentionally access servers storing electronic communications to obtain, alter, or prevent access to said electronic communication.[56] While generally law enforcement officers are required to procure a search warrant supported by probable cause prior to a search, the SCA creates a bifurcated procedure in which information stored for more than 180 days is treated differently from information stored for less time.[57] For information stored for fewer than 180 days, a warrant is required; however, if the information has been stored for more than 180 days, a warrant may be executed without notice.[58] An administrative subpoena, which requires less than probable cause, or court order executed with notice are also sufficient under the SCA for information stored for longer than 180 days.[59] At any time, and without a warrant, law enforcement may request that an ISP turn over subscriber information, including name, address, local and long distance telephone connection records, and records of session times and durations, length of service and types of service utilized, and means and source of payment for such service, including any credit card or bank account numbers of a subscriber.[60]

This Note argues that the SCA and the PROTECT Our Children Act of 2008[61] combine to create a reporting framework that facilitates the deputization of ISPs and violates the Fourth Amendment rights of every Internet user. The SCA allows an ISP to voluntarily turn over contents of a communication to the National Center for Missing and Exploited Children (NCMEC), a private, non-profit organization founded by Congress in 1984, in conjunction with a report submitted regarding anything under § 2258A—the PROTECT Our Children Act.[62] Under the PROTECT Our Children Act, passed in 2008, any ISP that obtains actual knowledge of child pornography or related offenses is required to make a report to NCMEC's CyberTipline.[63] Failure to report triggers fines of up to $150,000 for the first offense and $300,000 for subsequent viola-

56. 18 U.S.C. § 2701(a).

57. This bifurcation reflects an outmoded understanding of stored electronic communications in which communications left on a server for more than 180 days were considered abandoned for Fourth Amendment purposes. *See* Kerr, *supra* note 4, at 1234.

58. 18 U.S.C. § 2703(a).

59. *Id.* § 2703(b)(1)(B)(i)–(ii).

60. *Id.* § 2703(c)(2).

61. Pub. L. No. 110-401, 122 Stat. 4229 (2008) (codified as amended in scattered sections of 18 U.S.C.).

62. 18 U.S.C. § 2702(b)(6).

63. *Id.*. § 2258A(a).

tions.[64] Though there is no duty to affirmatively seek out this information,[65] in order to facilitate discovery, NCMEC may furnish ISPs with "elements relating to any apparent child pornography image" including "hash values or other unique identifiers."[66]

As mentioned above, the lack of an exclusionary remedy under the SCA has led to a dearth of litigation challenging searches carried out by law enforcement or ISPs pursuant to the exceptions provided in the SCA and PROTECT Our Children Act.[67] However, a lack of challenges should not be interpreted as approval of the searches currently authorized by the statutes. Fourth Amendment challenges can and should be brought by those whose private Internet activities were monitored and exposed by an ISP working in conjunction with federal law enforcement.

III.
FOURTH AMENDMENT JURISPRUDENCE AND THE INTERNET

This section provides an outline of the Fourth Amendment framework and seeks to situate ISP monitoring and statutory reporting requirements in this established jurisprudence. The Fourth Amendment protects "persons, houses, papers, and effects, against unreasonable searches and seizures" and declares that "no Warrants shall issue, but upon probable cause."[68] The issues courts have faced since 1791 are, first, how to define "unreasonable" and, second, the tension between the reasonableness and warrant clauses. The requirement of a warrant supported by probable cause inserts a neutral magistrate between the "zealous officer" and his target.[69] While the general rule is that searches performed without a warrant supported by probable cause are per se unreasonable,[70] over time,

64. *Id.* § 2258A(e).

65. *Id.* § 2258A(f).

66. *Id.* § 2258C(a)(1)–(2). "Hashing is the process of taking an input data string (the bits on a hard drive, for example), and using a mathematical function to generate a (usually smaller) output string." Richard P. Salgado, *Fourth Amendment Search and the Power of the Hash*, 119 HARV. L. REV. 38, 39 (2005).

67. *See supra* note 7 and accompanying text.

68. U.S. CONST. amend. IV.

69. *See* Johnson v. United States, 333 U.S. 10, 13–14 (1948) (Fourth Amendment "protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

70. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 390 (1978).

the Court has carved out exceptions.[71] The touchstone of Fourth Amendment jurisprudence is the courts' assessment of a search and seizure's reasonableness.[72]

The Supreme Court has held that some law enforcement actions do not constitute a "search" within the meaning of the Fourth Amendment.[73] Functionally, the Court breaks Fourth Amendment searches into three discrete categories, each with its own requirements and regulations. First, there are those searches that require law enforcement to obtain a warrant supported by probable cause.[74] Second, some searches may be carried out without a warrant, but require the law enforcement officer to articulate a reasonable suspicion and conduct his search narrowly based on the scope of his or her suspicion.[75] Finally, there are those situations in which law enforcement may search with neither a warrant nor any particularized suspicion.[76]

The Supreme Court has often struggled to fit rapidly changing technologies into this framework.[77] The Court often tries to develop unique tests that will allow the Fourth Amendment to keep pace with technological change.[78] At other times, new developments arrive through congressional statute, as in the case of the ECPA.[79] Through the ECPA, Congress expanded the protections afforded private Internet activity; however, the statute creates sev-

71. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398 (2006) (assisting injured persons); Illinois v. McArthur, 531 U.S. 326 (2001) (destruction of evidence); United States v. Santana, 427 U.S. 38 (1976) (hot pursuit); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest).

72. Samson v. California, 547 U.S. 843, 855 n.4 (2006).

73. *See, e.g.*, United States v. Knotts, 460 U.S. 276 (1983) (a beeper device placed in a car will not constitute a search if police could have followed the car unaided by the technology); United States v. Place, 462 U.S. 696, 697–98 (1983) (use of a narcotics-detecting dog will not constitute a search because only the presence or absence of contraband can be detected and there is no reasonable expectation of privacy in the possession of contraband).

74. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Kyllo v. United States, 533 U.S. 27 (2001).

75. *See* Terry v. Ohio, 392 U.S. 1, 19 (1968).

76. *See, e.g.*, Indianapolis v. Edmond, 531 U.S. 32, 37 (2000); Samson, 547 U.S. at 857.

77. *See, e.g.*, *Kyllo*, 533 U.S. 27 (majority and dissenting opinions disagreeing on the implications of new thermal imaging technology).

78. *Id.* at 40 (Courts "must take the long view, from the original meaning of the Fourth Amendment forward."); *see also* United States v. Karo, 468 U.S. 705, 713 (1984).

79. Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

eral gaps allowing governmental and private intrusion.[80] This section argues that, because of the Internet's ubiquitous place in society, private Internet activity merits the highest level of Fourth Amendment protection.

A. The Warrant and Probable Cause Requirement

Though the Court often writes of the warrant requirement as the primary protection provided by the Fourth Amendment, new exceptions are continually carved out of the so-called default.[81] The Supreme Court has repeatedly designated the home a bastion of personal privacy requiring the utmost Fourth Amendment protection while leaving other areas of activity as deeply personal as those that take place in the home unprotected by the warrant requirement.[82] Newly developed technologies pose special problems for the courts determining whether and to what extent their uses should be protected.

Initially, the Court's Fourth Amendment jurisprudence drew heavily on property conceptions of privacy, dividing the world into those physical spaces protected by the Amendment and those left unprotected.[83] However, in *Katz v. United States*,[84] the Court rejected the dichotomy of constitutionally protected areas versus unprotected areas, choosing instead to adopt a more nuanced understanding of the privacy protected by the Fourth Amendment, one particularly relevant in governing the protection of new technologies. Justice Stewart, writing for the majority in *Katz*, explained,

80. *See supra* notes 50–60 and accompanying text.

81. *See* Kerr, *supra* note 8, at 1040 n.139–41 (noting the same and citing to Thompson v. Louisiana, 469 U.S. 17, 20 (1984) (per curiam) ("[W]e have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the 'persons, houses, papers, and effects' of citizens.")); Groh v. Ramirez, 540 U.S. 551, 572–73 (2004) (Thomas, J., dissenting) ("[O]ur cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.")).

82. *See* United States v. Pineda-Moreno, 617 F.3d 1120, 1127 (Reinhardt, J., dissenting) ("These decisions have curtailed the 'right of the people to be secure . . . against unreasonable searches and seizures' not only in our homes and surrounding curtilage, but also in our vehicles, computers, telephones, and bodies—all the way down to our bodily fluids and DNA.").

83. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928) (wiretapping is not a Fourth Amendment violation as there is no physical search or seizure of tangible property); Boyd v. United States, 116 U.S. 616, 622 (1886) (compulsory production of personal property constituted a seizure under the Fourth Amendment unless the property was illegal or stolen).

84. 389 U.S. 347 (1967).

the "Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[85] Justice Harlan's concurrence provides the guiding principle to the present day: if a person has a subjective expectation of privacy and it is one that society is willing to recognize as reasonable, a warrant supported by probable cause will be required to search or seize anything covered by the expectation.[86]

While the Court relies heavily on the "reasonable expectation of privacy" language, many academics assert that it really masks "a normative inquiry into whether a particular law enforcement technique should be regulated by the Fourth Amendment."[87] The Court has recognized that "no single factor invariably will be determinative" of reasonableness.[88] Even so, it is useful to explore the ways in which Internet users express their subjective expectations of privacy in their online activity and how society buttresses the expectations' reasonableness. A court's assessment of reasonableness—whether normative or descriptive—is crucial because police activity that invades a person's unreasonable expectation of privacy will not constitute a search at all.[89] Electronic communications carried out over the Internet have reached an extraordinary level of importance in day-to-day interactions.[90] Everything from business transactions to medical records and love notes travel through the Internet. People would not be as inclined to extensively use the Internet to communicate if they did not have a subjective expectation that these communications would remain private. The knowledge that an ISP could monitor and read the contents of e-mail correspon-

85. *Id.* at 351–52 (citation omitted).

86. *Id.* at 361 (Harlan, J., concurring).

87. *See, e.g.*, Kerr, *supra* note 8, at 1037–38. *See also* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 106–07 (2008) (noting the circularity of the rule's application).

88. Rakas v. Illinois, 439 U.S. 128, 152 (1978) (Powell, J., concurring).

89. *See* Kyllo v. United States, 533 U.S. 27, 32–33 (2001).

90. Data Memorandum from John B. Horrigan, Assoc. Dir., Pew Internet & Am. Life Project, Use of Cloud Computing Applications and Services (Sept. 2008), at 1, *available at* http://www.pewinternet.org/~/media/Files/Reports/2008/PIP_Cloud.Memo.pdf.pdf ("Some 69% of online Americans use webmail services, store data online, or use software programs such as word processing applications whose functionality is located on the web.").

dence might chill the widespread use of the Internet.[91] The fact that an ISP has the ability to access online correspondence is not dispositive; a person loses a reasonable expectation of privacy in information accessed by a third party or its employees only "in the ordinary course of business."[92] Society seems to recognize the expectation of privacy in online activity as a reasonable one.[93] By requiring a warrant for police to access e-mails stored for fewer than 180 days, the SCA lends congressional support to the idea that there is a reasonable expectation of privacy in lawful Internet activity.[94] Congress, recognizing that the courts are often slow to protect the use of new technology, saw fit to provide additional statutory protections to electronic communications in order to comport with the public's reasonable expectation that these communications will be protected.[95]

However, the mere presence of statutory protection does not mean that the courts always assume the protection it provides is sufficient; rather, they pay keen attention to the areas in which the statute may fail to provide adequate protection.[96] In her concurrence in *Florida v. Riley*, Justice O'Connor explained that compliance with regulations is not necessarily sufficient to determine whether a reasonable expectation of privacy exists; rather, the Court should determine whether the means by which the intrusion occurred "is a sufficiently routine part of modern life" such that it would be unreasonable for a person not to expect it.[97] The Supreme Court has also assessed the reasonableness of a person's expectation based on the type of technique or technology used in the

91. S. REP. NO. 99-541, at 5, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3559 (noting that lag time in judicial developments "may unnecessarily discourage potential customers from using innovative communications systems").

92. United States v. Miller, 425 U.S. 435, 442 (1976).

93. *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.").

94. 18 U.S.C. § 2703(a).

95. Shubert v. Metrophone, Inc., 898 F.2d 401, 404 (3d Cir. 1990) (citing H.R. REP. NO. 99-647, at 18 (1986)) (The "legal protection against the unreasonable use of newer surveillance techniques has not kept pace with technology."); *see also* S. REP. NO. 99-541, at 5 (1986) ("[T]he law must advance with the technology to ensure the continued vitality of the fourth amendment. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances. Congress must act to protect the privacy of our citizens.").

96. Indeed, Orin Kerr argues that 18 U.S.C. § 2703(b) of the Stored Communications Act is unconstitutional. *See* Kerr, *supra* note 8, at 1043.

97. Florida v. Riley, 488 U.S. 445, 453 (1989) (O'Connnor, J., concurring).

intrusion.[98] Where the technology employed is widely available and commonly used, the Court has found that a person's subjective expectations of privacy are less likely to be reasonable.[99]

When determining what protections to afford users of a new technology, analogizing the purposes and functions of the new technology to those of older technologies often provides the most satisfying answer. The telephone presents a useful comparison to Internet communications and e-mail: both forms of communication technology require a third-party intermediary to facilitate the communication, and that third party can, to some extent, access the content of the communications.[100] Additionally, e-mail is as ubiquitous as the telephone, if not more so, in our daily communications. In *Katz*, the Court extended Fourth Amendment protection to telephone conversations, requiring law enforcement agents to procure a warrant before invading the caller's reasonable expectation of privacy by searching or seizing the contents of these communications through a wiretapping device.[101] More recently, the Ninth Circuit found a reasonable expectation of privacy in the contents of text messages despite their necessary transmission by a third-party service provider.[102] Private Internet activity, as the technological successor of the telephone, should receive the same protections.

Despite this, the third-party doctrine is often raised as a counter to the argument that there is a reasonable expectation of privacy in electronic communications. The third-party doctrine, as articulated in *United States v. Miller*, is the Fourth Amendment rule that information revealed to a third party will not be protected even if it was revealed on the assumption that "it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[103] Once information is revealed to a third party,

98. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (thermal-imaging scanner); *Riley*, 488 U.S. at 453 (low-flying helicopter).

99. *See* Kyllo, 533 U.S. at 34 (use of sense-enhancing technology not in general public use constitutes a search).

100. The mail also presents an analogous model, although postal workers do not have the same level of access to the contents of letters and packages. *See* United States v. Hernandez, 313 F.3d 1206, 1209–10 (9th Cir. 2002) ("Although a person has a legitimate interest that a mailed package will not be opened and searched en route, there can be no reasonable expectation that postal service employees will not handle the package or that they will not view its exterior." (citations omitted)).

101. Katz v. United States, 389 U.S. 347, 359 (1967).

102. Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008), *rev'd sub nom.* City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010) (not reaching the question of whether there is a reasonable expectation of privacy in text messages).

103. United States v. Miller, 425 U.S. 435, 443 (1976).

the person revealing it loses his or her reasonable expectation of privacy in the contents of the communication.[104]

The analogy to telephone communications provides a useful conceptual tool and demonstrates why the third-party doctrine is an ill-founded challenge to the reasonableness of the expectation of privacy in electronic communications. While the Court in *Katz* did not explicitly analyze the ways in which a person's decision to use a form of technology accessible by the service provider might affect Fourth Amendment protections, it later made an important distinction for Fourth Amendment protections when it returned to telephone technology in *Smith v. Maryland*.[105] In choosing not to overrule *Katz* while leaving the numbers a person dials on their telephone unprotected, the Court recognized that, despite exposing the existence of their conversations to the phone company, people still retain a Fourth Amendment interest in the content of those communications.[106] While the Court in *Katz* held that "electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure,' . . . ."[107] the Court continues to avoid explicitly answering the question of whether a telephone user always has a reasonable expectation of privacy in the contents of his calls or text messages.[108] However, the content/non-content distinction as a barometer of reasonable expectation of privacy tracks the Court's jurisprudence and the idea can be usefully applied to the Internet context.

In *United States v. Warshak*,[109] the Sixth Circuit analogized Internet activity to telephone conversations, finding that the contents of electronic communications, whether carried over telephone lines or across the Internet, deserve Fourth Amendment protections, despite being revealed to the service provider. The district court found that "[t]he distinction between *Katz* and *Miller* makes clear that the reasonable expectation of privacy inquiry in the context of shared communications must necessarily focus on . . . nar-

104. *Id.*

105. 442 U.S. 735 (1979).

106. *Id.* at 741 ("[A] a pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications.").

107. Katz v. United States, 389 U.S. 347, 353 (1967).

108. City of Ontario v. Quon, 130 S.Ct. 2619, 2624 (2010) ("Though the case touches issues of far-reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable.").

109. 490 F.3d 455 (6th Cir. 2007), *vacated en banc*, 532 F.3d 521 (6th Cir. 2008) (vacating on grounds of ripeness).

rower questions than the general fact that the communication was shared with another."[110] While the decision was reversed en banc on procedural grounds, the Sixth Circuit's analysis provides a model for protecting the contents of private electronic communications despite concerns raised by the third-party doctrine. According to the Sixth Circuit, the Supreme Court's jurisprudence:

> recognize[s] a heightened protection for the CONTENT of the communications. Like telephone conversations, simply because the phone company or the ISP COULD access the content of e-mails and phone calls, the privacy expectation in the content of either is not diminished, because there is a societal expectation that the ISP or the phone company will not do so as a matter of course.[111]

The Ninth Circuit also recognized the utility of the analogy to telephone technology, finding that government surveillance techniques that revealed the "to" and "from" addresses of an e-mail were "constitutionally indistinguishable from the use of a pen register that the Court approved in *Smith*."[112] Only two other cases have addressed the Fourth Amendment's application to e-mail communications, and both found in favor of an e-mail user's reasonable expectation of privacy in his electronic communications.[113]

In an e-mail, just as in a telephone conversation, there are three parties: the two people involved in the conversation and the service provider. When a person sends an electronic communication to another person over the Internet, if that other person shares the contents of the communication with law enforcement agents, the communication is not protected by the Fourth Amendment. However, when an ISP or law enforcement agent monitors or intercepts that communication, an analogy should be drawn to the private communications protected in *Katz*.[114] In this scenario, the

110. *Id.* at 470.

111. *Id.* at 471.

112. United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008) (holding that monitoring IP address and to/from information of e-mails did not implicate Fourth Amendment).

113. *See* United States v. Long, 64 M.J. 57, 66–67 (C.A.A.F. 2006) (holding that a member of the Marine Corps may have a reasonable expectation of privacy in e-mails sent and received on a government computer); United States v. Maxwell, 45 M.J. 406, 418 (C.A.A.F. 1996) (holding that an e-mail user "enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant," but suggesting that "Internet e-mail" might receive different protections that the AOL e-mail communications in question).

114. The appellate court cases addressing Internet monitoring relied heavily on analogy to *Katz* and *Smith*. *See supra*, notes 109–12, and accompanying text.

other party to the conversation does not reveal anything or collude with law enforcement prior to receiving the communication. The contents of an e-mail, just like a conversation over the telephone, should be protected from the warrantless intruding eyes and ears of the service provider and law enforcement. Conversely, the non-content electronic information like the telephone pen registers that remain unprotected after *Smith v. Maryland*, should be accessible without warrant or probable cause.[115]

B. Warrantless Searches Bounded by Reasonableness

In the same year that *Katz* was decided, the Supreme Court also handed down *Camara v. Municipal Court*,[116] which redefined the relationship between reasonableness and probable cause. Whereas *Katz* and its progeny designate the warrant as the hallmark of a search's reasonableness, in *Camara* the Court gave reasonableness a foot in the door as an independent Fourth Amendment consideration.[117] The following year, the Court made this second Fourth Amendment strand explicit in *Terry v. Ohio*,[118] authorizing brief warrantless detentions supported only by an officer's reasonable articulable suspicion, and cursory outer garment searches (frisks) if the officer has reason to believe the suspect is armed and dangerous.[119] The reasonableness of a warrantless search depends on a court's balancing of "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree

Academics also argue in favor of this analogy. *See, e.g.*, Kerr, *supra* note 8, at 1038 ("The claim that rights in the contents of communications should be waived under the third-party doctrine does not work because the same argument could be made about telephone calls . . . . *Katz* established that the third-party doctrine does not apply in that setting.").

115. There is a debate over the usefulness of the content/envelope distinction for electronic communications. For an interesting survey of the issue, see Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 WM. & MARY L. REV. 2105 (2009). Ultimately, however, it is outside the scope of this Note to decide whether the content/non-content distinction is a valuable framework for assessing the scope of Fourth Amendment protections because even those rejecting the analogy argue in favor of more, rather than less, protection than is currently provided for internet activity. *See, e.g.*, Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1453–55; Solove, *supra* note 7, at 1286–88.

116. 387 U.S. 523, 538 (1967).

117. *Id.*

118. 392 U.S. 1, 21 (1968).

119. Police may also conduct searches incident to lawful arrest without warrant. *See* Chimel v. California, 395 U.S. 752 (1969). This type of warrantless search is not relevant to the discussion of this Note because, at the time of an ISP's monitoring, no arrest has occurred.

to which it is needed for the promotion of legitimate governmental interests."[120]

In order for warrantless monitoring of private Internet activity to satisfy this Fourth Amendment test, the intrusion on a particular individual's privacy would have to be justified by a reasonable articulable suspicion at the moment the monitoring begins, and be reasonably related in scope to the circumstances which first justified the search.[121] In *Terry*, the initial stop was justified by the particularized suspicion that the appellant, Terry, was casing a store in contemplation of a robbery, and the governmental interest at stake was the potential danger to the law enforcement officer in his interaction with Terry.[122] No such particularized suspicion can be articulated when ISPs broadly monitor all of their subscribers' Internet activity using the tools provided by law enforcement to detect child pornography. Rather, this monitoring is more analogous to the broad programmatic searches discussed in the following section.[123]

Assuming *arguendo* that an ISP articulates a particularized and reasonable suspicion, the types of searches an ISP utilizes will not be reasonably related in scope as required by *Terry*.[124] An ISP can monitor the activity on its server in two ways: through shallow automated monitoring, or through "deep packet inspection."[125] Shallow automated monitoring restricts an ISP's view to network details, allowing it to see that communications are sent and received without access to its contents.[126] By its very nature this automated monitoring cannot be the result of a particularized suspicion. Furthermore, this level of shallow monitoring is unlikely to be of any use in the government's fight against child pornography.[127] Conversely, when a reasonable articulable suspicion is raised and an ISP initiates deep packet inspection directed towards a particular Internet account, the quantity of information accessible will be far beyond the scope of the suspicion that justified initiating the search. Deep packet inspection "refers to devices and technologies that inspect and take action based on the contents of the packet (commonly called the

120. United States v. Knights, 534 U.S. 112, 118–19 (2001) (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

121. *Terry*, 392 U.S at 18.

122. *Id.* at 30.

123. *See infra* notes 130–46 and accompanying text.

124. 392 U.S. at 19 (requiring searches to be reasonably related in scope to the circumstances which justify them).

125. Ohm, *supra* note 116, at 1424–25, 1468.

126. *Id.* at 1468.

127. *See id.* ("Providers routinely argue that 'shallow packet' monitoring is insufficient to accomplish [their] goals.").

'payload') rather than just the packet header."[128] Through deep packet inspection, the entirety of each user's Internet communications is opened and accessible, not simply the "to" and "from" information. Additionally, deep packet inspections will likely be delimited by account information and Internet Protocol address (IP address), rather than by individual Internet user. Multiple people may use a computer that accesses the Internet through a particular service provider with a single IP address, creating further problems with the scope of the search.[129]

C. Warrantless and Suspicionless Searches

The Court is currently grappling with what standards to apply to this last category of searches. Although it appears that a "special need" apart from ordinary criminal law enforcement is required,[130] the methods for determining whether a special need exists are in flux. The searches carried out by ISPs, encouraged and facilitated by local and federal law enforcement, are without warrant and without suspicion. While the Court has created a category in which broad, suspicionless, programmatic searches may take place, sweeping searches of private Internet activity to detect child pornography do not meet the requirements established by the Court, whether carried out by law enforcement agents or ISPs.

In developing this third category, the Court again drew on the "reasonableness" language of the Fourth Amendment to determine when law enforcement agents may search without a warrant or even suspicion of wrongdoing.[131] However, the hallmark of a lawful warrantless and suspicionless search is that it must be motivated by a

128. DPACKET.ORG, *Introduction to Deep Packet Inspection/Processing*, https://www.dpacket.org/introduction-deep-packet-inspection-processing (last visited Feb. 16, 2011) (analogizing deep packet inspection to a postal worker opening an envelope and reading the letter inside).

129. *See, e.g.*, Kerr, *supra* note 8, at 1045–48 (arguing that the particularity requirement should apply to specific Internet users, rather than Internet accounts).

130. *See* New Jersey v. T.L.O., 469 U.S. 325, 351(1985) (Blackmun, J., concurring) (stating that a reasonableness balancing test should be applied "[only] in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable").

131. *See, e.g.*, Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such suspicion is not an 'irreducible' component of reasonableness, we have recognized only limited circumstances in which the usual rule does not apply.").

primary purpose beyond the normal need for law enforcement.[132] Through this "special needs" doctrine the Court has supported routine border searches[133] and highway checkpoints designed to catch drunk drivers[134] and investigate traffic accidents.[135] When determining if a special need outside of ordinary law enforcement exists, courts will carefully scrutinize the rationale articulated for a particular program. In *Indianapolis v. Edmond,* the Court made it clear that a program designed to "detect evidence of ordinary criminal wrongdoing" does not constitute a special need and therefore falls outside this narrow exception to the Fourth Amendment's requirement of individualized suspicion.[136] A year later in *Ferguson v. City of Charleston*,[137] the Court struck down an alliance between law enforcement and hospital staff to root out cocaine use among pregnant patients. Despite the hospital's statement to the contrary, the Court determined that finding and arresting drug users had supplanted protecting the health of unborn children as the hospital's primary concern.[138]

If a court determines that the primary purpose of a search and seizure is not general law enforcement, it will engage in a balancing test to determine its reasonableness.[139] The reasonableness of a search depends on the "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."[140] The reasonableness of the accompanying seizure requires the court to consider "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[141] Only a search or seizure narrowly tailored to a pressing non-law enforcement need will pass the Court's test.

132. *Compare* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (ensuring roadway safety was the primary purpose of the checkpoint and therefore it did not violate the Fourth Amendment); *with Edmond*, 531 U.S. at 37 (a vehicle checkpoint established to find illegal narcotics is primarily a general law enforcement search and therefore violates the Fourth Amendment).

133. United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (finding that a special need exists in the protection of the integrity of United States borders).

134. *Edmond*, 531 U.S. at 39 (special need is the maintenance of roadway safety for other drivers).

135. Illinois v. Lidster, 540 U.S. 419 (2004).

136. *Edmond*, 531 U.S. at 38, 41–42.

137. 532 U.S. 67 (2001).

138. *Id.* at 81–84.

139. *See* Brown v. Texas, 443 U.S. 47, 50–51 (1979).

140. *Id.* at 50 (quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)) (internal quotations omitted).

141. *Id.* at 51.

In determining the primary purpose of a warrantless programmatic search, the Court has either relied on the purpose as stated by law enforcement or gleaned the primary purpose from the record, as in *Ferguson*.[142] Justice Kennedy's concurrence in *Ferguson* focused on "substantial law enforcement involvement" during the planning and implementation of the program.[143] If asked, law enforcement and ISPs would be hard pressed to put forth a purpose for monitoring for child pornography that did not fall within the ambit of ordinary law enforcement. Unlike highway checkpoints, where the presence of a single drunk driver can compromise the safety of all drivers, the safety of Internet users as a whole is not at issue when monitoring for child pornography.[144] The Court has rejected the argument that the mere presence of child pornography on the Internet compromises its integrity and presents a broad risk to children.[145] When a broad programmatic search appears concerned with detecting unique instances of crime, as in the vehicle checkpoint for narcotics possession at issue in *Edmond*, a broader justification must be presented in order to satisfy the "special needs" requirement.[146] When ISPs or law enforcement agents monitor private Internet activity for evidence of child pornography trafficking, they do so with the primary purpose of rooting out individual child pornographers and pedophiles for arrest, not to protect the safety of the Internet for all users.

Even if a court somehow determined that monitoring the internet for evidence of child pornography fit within the standard of "special needs," the program would likely still fail the balancing test. While finding and prosecuting child pornographers certainly constitutes an issue of high public interest, the accompanying costs to the personal security of every Internet user are also grave. It is important to note that it is not the child pornographer's illegal conduct that this analysis seeks to protect, but rather everyone's right to engage in lawful activity without fear of government interfer-

142. 532 U.S. at 81–82.

143. *Id.* at 88 (Kennedy, J., concurring).

144. *See* Indianapolis v. Edmond, 531 U.S. 32, 39 (2000) (discussing the Court's rationale in *Sitz*: "This checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue.").

145. Ashcroft v. Free Speech Coal., 535 U.S. 234, 250 (2002) ("While the Government asserts that the images can lead to actual instances of child abuse . . . the causal link is contingent and indirect. The harm does not necessarily follow from the speech . . . .").

146. *Edmond*, 531 U.S. at 38.

ence. As Justice Brandeis wrote in his famous dissent in *Olmstead v. United States*, "the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him."[147] The decision to monitor private Internet activity for evidence of child pornography-related crimes implicates the privacy interests of all internet users. Given the pervasiveness of the Internet in all aspects of communication, business, and leisure, the public confidence in this vital technology would be greatly affected by the knowledge that at any point private conversations and Internet activity could be accessible to ISPs and law enforcement. Expectations of privacy and relative anonymity in Internet activity "are breached once ISPs begin monitoring, giving us the impression that we are always watched."[148] Eventually, "[p]ervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream," causing us to lose "the expression of eccentric individuality."[149]

IV.
ADDRESSING ARGUMENTS AGAINST THE WARRANT REQUIREMENT FOR INTERNET SEARCHES

As argued above, the analogy between the monitoring of private Internet activity and the *Terry* stop-and-frisk jurisprudence does not provide useful guidance in regulating ISP monitoring.[150] Similarly, ISP monitoring is unlikely to fit within the limitations imposed by the Supreme Court on special needs searches.[151] Therefore, this Note contends that only a warrant supported by probable cause can adequately protect Internet users' Fourth Amendment rights. While a warrant may be cumbersome, it is precisely this type of intermediate step that the serves to protect a person's private activity from unreasonable intrusion.[152] Congress recognized that a warrant or other protection should insulate private Internet activity from overzealous law enforcement when it enacted the Stored Communications Act.[153] However, as this Note will argue in the following section, law enforcement has circumvented these protections through the enlistment of ISPs, which have access to the

147. 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting).

148. Ohm, *supra* note 115, at 1447.

149. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000).

150. *See supra* Part III.B, "Warrantless Searches Bounded by Reasonableness."

151. *See supra* Part III.C, "Warrantless and Suspicionless Searches."

152. *See* Johnson v. United States, 333 U.S. 10, 13–14 (1948).

153. 18 U.S.C. § 2703.

wealth of business and personal activity that takes place on the Internet, yet are not subject to the warrant requirements of the Fourth Amendment or the SCA. ISPs receive access to highly guarded hash values that they then use to examine every byte of electronic information that passes through their servers, violating people's reasonable expectation of privacy.[154] This section addresses several prevailing counterarguments in favor of keeping ISP monitoring outside the scope of the Fourth Amendment's warrant requirement.

A. Running Hash Values Is Not Sui Generis

As discussed above, there is a fourth category of law enforcement activity that the Supreme Court places outside the scope of the Fourth Amendment by declaring the action not to be a "search."[155] Some arguing against a warrant requirement for internet monitoring contend that the use of hash values, or "hashing,"[156] should not constitute a search at all, analogizing this technology to a dog sniff, something the Court has held is sui generis in its ability to detect only contraband.[157] However, in *United States v. Crist*,[158] the only case to directly address the Fourth Amendment's application to hashing, the court found that deriving the hash values of the defendant's computer and then comparing those values to known and suspected child pornography hash values both constituted searches violating the Fourth Amendment.

In *United States v. Place*[159] and *Illinois v. Caballes*,[160] the Supreme Court held that narcotics-sniffing dogs could be used without implicating the Fourth Amendment, because the dogs can only detect the presence or absence of contraband. The analogous argument for hashing runs as follows: there is no legitimate expectation of privacy in the possession of contraband; government conduct that reveals only the presence of contraband compromises no legitimate interests; a hash value search will only reveal the presence or absence of child pornography files.[161] However, several important

154. For a definition of hash values, see Salgado, *supra* note 67.

155. *See supra* note 73 and accompanying text.

156. *See* Salgado, *supra* note 66, at 44–46.

157. *See* United States v. Place, 462 U.S. 696, 707 (1983); Illinois v. Caballes, 543 U.S. 405, 409 (2005).

158. 627 F. Supp. 2d 575, 585 (M.D. Pa. 2008).

159. 462 U.S. at 697–98.

160. 543 U.S. at 409.

161. Salgado, *supra* note 66, at 44–46; *see also* Orin Kerr, *District Court Holds that Running Hash Values on Computer Is a Search*, THE VOLOKH CONSPIRACY (Oct. 27, 2008, 100:11 AM), http://volokh.com/posts/1225159904.shtml ("If the hash is for

differences between the use of hash values and narcotics-sniffing dogs make this analogy unworkable. When the Supreme Court analyzed the use of narcotics-sniffing dogs, a key factor on which it relied was the idea of a dog as sui generis in its ability to detect only contraband.[162] While, like a drug-sniffing dog, child pornography hash values are designed to detect only contraband, the manner in which searches of Internet activity are carried out is fundamentally different. In running a hash, private electronic files must be opened, accessed, and copied, unlike a dog sniff that can permeate a closed suitcase or car trunk. A hash value program uses an algorithm to create unique identifiers for electronic files.[163] That program first makes a copy of every file on a suspect's computer or, in the case of ISP monitoring, every e-mail attachment and Internet file downloaded, and then creates a hash value for each file in order to compare them with child pornography hash values.[164] While hashing is designed to reveal only contraband files, the investigator running the hash program, unlike a trained canine, must copy and access each file in order to derive its unique hash value, even those in which a reasonable expectation of privacy remains, a process that could potentially reveal information about non-contraband files.[165] The fact that the ISP can choose to impose a limit on the scope of its search results is not sufficient for Fourth Amendment purposes.[166]

Additionally, the "dog sniff" line of cases takes place in the context of automobiles, which are subject to less Fourth Amendment protection.[167] By contrast, computers and Internet activity contain a

a known image of child pornography, then running a hash is a direct analog to a drug-sniffing dog.").

162. *Place*, 462 U.S. at 707; *Caballes*, 543 U.S. at 409.

163. Salgado, *supra* note 67, at 39.

164. Ty E. Howard, *Don't Cache out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet File*s, 19 BERKELEY TECH. L.J. 1227, 1232–34 (2004).

165. Marcia Hofmann, *Arguing for the Suppression of "Hash" Evidence*, CHAMPION MAGAZINE, May, 2009, *available at* http://www.nacdl.org ("[A canine search] does not expose non-contraband items that otherwise would remain hidden from public view . . . . A hash analysis, on the other hand, by its very nature requires the government to access files in order to derive their hash values, whether they are contraband or not, thus exposing data to which a client has a legitimate privacy interest.").

166. Katz v. United States, 389 U.S. 347, 356–57 (1967) ("[T]his Court has never sustained a search upon the sole ground that officers . . . voluntarily confined their activities to the least intrusive means . . . .").

167. Motor vehicles, partially because of their mobility, have become an exception to the warrant requirement of traditional Fourth Amendment jurispru-

record of the most intimate details of peoples' daily lives. People use computers as personal calendars, as well as to run businesses, store family photographs, and communicate with friends and family; in short, people use computers to do all of the things that the courts have determined make the home a special place, deserving the utmost Fourth Amendment protection.[168]

Another fundamental problem with applying the *Caballes* line of cases to hashing values arises from the use of hash values to rooting out child pornography specifically. The discussion in this section is partially premised on the idea that the hash values an ISP uses or receives from NCMEC are in fact hash values for contraband material. However, child pornography is not something that can be categorically determined; there is no chemical formula for child pornography, unlike drug contraband. While Congress has provided a definition of child pornography, it is nothing more than a series of attributes and therefore subject to significant judicial discretion.[169] Looking through an individual's private Internet activity for images that a single judge or jury has decided constitute child pornography is not necessarily a search for something intrinsically illegal to possess. As Richard Salgado explains, "[i]t is one thing to conclude that child pornography is contraband; it is quite another to conclude that a particular image to be included in a hash set is child pornography."[170] An image one court has determined meets the state or federal definition may not constitute child pornography in another jurisdiction, yet the file's hash value will be held in the NCMEC database and compared to private Internet files by ISPs. Determining which files contain known child pornography "requires exercise of discretion that is not required when teaching a dog to detect cocaine or developing a chemical test to react to particular narcotics."[171]

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dence. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 153 (1925) ("[I]t is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.").

168. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 38 (2001) (expressing concern that the thermal imaging technology in question might reveal "at what hour each night the lady of the house takes her daily sauna and bath . . . ."). Interestingly, in the Kyllo opinion, Justice Scalia observes that it does not matter whether or not a particular investigative technology ultimately reveals intimate details of private home life, simply that the technology has the potential to do so. *Id.* at 38–39.

169. *See* 18 U.S.C. § 2256(8) (defining child pornography). For a discussion of the fraught history of legislative and judicial efforts to define the boundaries of child pornography, see *supra* notes 20–36 and accompanying text.

170. Salgado, *supra* note 66, at 45–46.

171. *Id.* at 46.

In *Crist*, the district court found that deriving the hash values of the defendant's computer and then comparing those values to known and suspected child pornography hash values both constituted searches that violated the Fourth Amendment. However, the court's analysis is noticeably sparse and leaves out much of the underlying logic. While the government argued that running the hashing program on Crist's computer did not constitute a search because officers "didn't look at any files, they simply accessed the computer," the district court squarely disagreed.[172] "By subjecting the entire computer to a hash value analysis—every file, internet history, picture, and 'buddy list' became available for Government review. Such examination constitutes a search."[173] The court also held that comparing the hash values derived in the preceding forensic analysis to known or suspected child pornography hash values constituted an additional search entitled to Fourth Amendment limitations.[174]

Other courts have also suggested that hashing may constitute a search in certain contexts.[175] While the Ninth Circuit in *United States v. Borowy* determined that the defendant negated his reasonable expectation of privacy by using a file-sharing program, the court noted that where a person maintained a reasonable expectation of privacy and "the government 'vacuumed' vast quantities of data indiscriminately—we might find a Fourth Amendment violation."[176] In another case, the court similarly noted that hash algorithms and "similar search tools may not be used without specific authorization in the warrant, and such permission may only be given if there is probable cause to believe that such files can be found on the electronic medium to be seized."[177]

Even academics arguing against including hash values within Fourth Amendment protections recognize the ramifications of their position.[178] Academics have noted that, following the dog-sniff sui generis logic, the more tailored to detecting contraband a technology becomes, "the less the public can reasonably expect the law

172. United States v. Crist, 627 F. Supp. 2d 575, 585 (M.D. Pa. 2008).

173. *Id.*

174. *Id.* at 586–87.

175. United States v. Borowy, 595 F.3d 1045 (9th Cir. 2010); United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009).

176. *Borowy*, 595 F.3d at 1048–49 n.2.

177. *Comprehensive Drug Testing*, 579 F.3d at 999.

178. Salgado, *supra* note 66, at 45 ("Certainly we benefit from an aggressive battle against the scourge of child pornography. Yet there would be something very creepy about an expansive and unrestrained search through media, even though properly in the hands of law enforcement, for offending images.").

to protect them against government intrusions."[179] Despite Richard Salgado's view that hashing should not constitute a search, he nevertheless expresses concern that his position might lead to searches for contraband based on warrants for completely unrelated criminal activity.[180] Searches of anyone or anything based on "police hunches, whims, prejudices, or anything at all . . . are beyond the purview of the Fourth Amendment" so long as the technology facilitating the search detects only contraband.[181] Doubtless, this is a level of "Big Brother" interference by which few are willing to abide.[182] Reliance on the "nothing to hide" argument would allow ISPs to initiate hashing programs that cull through each and every file on their server in order to detect contraband material, while in the process exposing those files in which Internet users continue to maintain a reasonable expectation of privacy. Furthermore, this "nothing to hide" retort masks the destruction of what Daniel Solove argues is the social value of privacy, the "protection of the individual based on society's own norms and values."[183] This societal harm is added to the harm experienced by the individual whose Fourth Amendment rights are violated. Privacy exists, not in opposition to society's interests, but rather as an integral expression of them.[184]

B. Internet Users Do Not Meaningfully Consent to Monitoring

Another potential argument against requiring a warrant before the government may request ISP monitoring of their subscribers' Internet activity focuses on the privacy policy that every user must agree to before accessing their internet services. Consent is a fundamental principle in contract law, and there is a presumption of meaningful consent to a contract's terms.[185] While many scholars feel that the existence of a consent form should not be determinative,[186] courts generally accept the enforceability of standard form

179. Hofmann, *supra* note 165.

180. Salgado, *supra* note 66, at 45.

181. Aya Gruber, *Garbage Pails and Puppy Dog Tails: Is That What* Katz *Is Made Of?*, 41 U.C. DAVIS L. REV. 781, 823–24 (2008).

182. Big Brother is a fictional dictator who mandates complete surveillance of all citizens. GEORGE ORWELL, 1984 (1949).

183. Daniel J. Solove, *"I've Got Nothing To Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 763 (2007).

184. *Id.*

185. *See* Brian Bix, *Contracts*, *in* THE ETHICS OF CONSENT 251 (Franklin G. Miller & Alan Wertheimer eds., 2010).

186. *See, e.g.*, E. Allan Farnsworth, CONTRACTS § 4.26, at 296–97 (3d ed. 1999) (discussing how the dangers inherent in standardization are further increased

contracts, or contracts of adhesion, only holding them unenforceable where a particular term is "unconscionable."[187] However, courts enforcing these "take-it-or-leave it" contract terms often rely on the consumer's ability to return the product after disapproving of the contract's terms.[188] Where the consenting party has no reasonable alternatives or choices relating to a particular term among different contractual providers, courts' reliance on a consumer's ability to find a better offer seems misplaced.[189]

Paul Ohm presents what he terms the "proximity principle" as a way to assess the legitimacy of an Internet service subscriber's consent.[190] Ohm looks to the "level of competition for the service provided" and the "nature of the channels of communication between the provider and customer."[191] By assessing whether users have a meaningful choice among ISPs and looking at the mechanisms ISPs use to ask for and receive consent, the nature of the so-called consent becomes clearer.[192] Compared to the variety of e-mail providers, there is relatively little choice between Internet providers. Therefore, a customer is limited in his or her ability to shop around to find the privacy policy that best suits his or her needs. The market has not, and likely will not, solve for this lack of privacy alternatives, because "ISPs have a great motive to pay a little more attention than they have before to their users' secrets. By doing so, they can tap new sources of revenue, which given their precarious situation, may be the only way they can guarantee their survival."[193] Ohm also highlights a problem with the knowledge aspect of in-

when parties are in unequal bargaining positions and terms are take-it-or-leave it); Bix, *supra* note 185, at 253–54 (noting that validity of consent depends on factors such as actual knowledge of terms and reasonable alternatives).

187. Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (1st Dep't 1998); U.C.C. § 2-302 (2005).

188. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452–53 (7th Cir. 1996).

189. *See* Bix, *supra* note 185, at 253–54. For an example of a court recognizing that consumers may lack meaningful alternatives, see *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960).

190. Ohm, *supra* note 115, at 1475–77.

191. *Id.* at 1475.

192. Bix, *supra* note 185, at 252 ("[T]here is a relative lack of consent in the sense that there may be no reasonable alternatives to entering the transaction in question.").

193. Ohm, *supra* note 115, at 1425. *See id.* at 1426 (ISPs monitor Internet activity to track and block overuse that congests the network and provide directed advertising); *see also* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 843 (2006) ("In insufficiently competitive industries, businesses can afford to lose the small cadre of readers and dictate onerous terms to the nonreaders.").

ternet users' consent: the privacy policy rarely receives customer approval before the customer subscribes to the services.[194] Rather, after subscribing—usually over the phone—the user often receives a copy of the privacy policy with the first bill.[195] These factors seem to suggest that the consent ISPs receive to monitor their users' private Internet activity is not meaningful.

Assuming *arguendo* that customers consent to ISP monitoring based on their acceptance of contracts of adhesion, an examination of several major ISPs' contracts reveals little detail about the frequency and depth of monitoring to which a customer must agree. While contracts of adhesion can be supported by meaningful consent, it is less clear that a customer can consent to something not fully detailed in their customer agreement or privacy policy. For example, the Verizon Wireless customer agreement states: "[w]e collect personal information about you. We gather some information through our relationship with you, such as information about the quantity, technical configuration, type, destination and amount of your use of our telecommunications services."[196] While indicating that personal information is collected, the casualness belies the depth and breadth of monitoring that an ISP has the capacity to engage in. Other major ISP privacy notices and customer agreements contain similar generalized descriptions.[197] The Comcast customer privacy notice explains that the company collects its customers' information "at several different points when you initiate and use our services."[198] The policy then goes on to list a series of categories of information that it may collect, but notes that it is not exhaustive, or even typical, of the range of information collected.[199] A customer's consent to ISP actions that are not explicitly included in a contract seems problematic.

194. Ohm, *supra* note 115, at 1477.

195. *Id.*

196. *Verizon Wireless Customer Agreement*, VERIZON WIRELESS, http://www.verizonwireless.com/customer-agreement.shtml (last visited Sept. 19, 2011).

197. *See, e.g.*, *AT&T Privacy Policy*, AT&T, http://www.att.com/Common/about_us/privacy_policy/print_policy_aug2009.html (last visited Feb. 16, 2011); *Time Warner Cable Subscriber Privacy Notice*, TIME WARNER CABLE (July 2010), http://help.twcable.com/html/twc_privacy_notice.html (failing to mention the ability to monitor Internet activity; mentioning only that monitoring may occur for email).

198. *Comcast Customer Privacy Notice*, COMCAST COMMC'NS CORP. (Jan. 1, 2009), https://www.comcast.com/MediaLibrary/1/1/Customers/Customer_Support/Legal/Q3PrivacyPolicyUniLegalStndENG.pdf.

199. *Id.*

V.
DEPUTIZING ISPS

Searches carried out by private citizens do not immediately implicate the Fourth Amendment.[200] However, the Supreme Court has developed a jurisprudence "guided by common law agency principles"[201] in which an individual acts as an agent of the state if "the government knew of and acquiesced in the intrusive conduct, and . . . the party performing the search intended to assist law enforcement efforts . . . ."[202] This section will argue that the SCA and related anti-child pornography statutes effectively deputize ISPs without extending statutory or constitutional protections to their activities.

While the SCA does not require ISPs to monitor and report criminal activity that takes place on their servers, the inquiry does not end there.[203] Law enforcement agents at both the federal and state level have encouraged and facilitated ISP monitoring in such a way that ISPs act as the functional equivalent of a government agent when monitoring subscribers' Internet activity. In authorizing the NCMEC to make highly guarded child pornography hash values available to ISPs, the federal government facilitates the intrusive monitoring of private Internet activity.[204] State law enforcement agents similarly encourage ISPs to monitor broadly in ways that they themselves legally could not.[205] By using these hash values and other monitoring software, ISPs actively assist law enforcement efforts without being subjected to constitutional or statutory limitations.

A. Government Knows of and Acquiesces in Intrusive Conduct

While there is no bright line test that "distinguishes instances of 'government' conduct from instances of 'private' conduct," when deciding whether a government official knows of and acquiesces in a private party's search, courts will look for such indicators as "in-

200. United States v. Jacobson, 466 U.S. 109 (1984).

201. United States v. Richardson, 607 F.3d 357, 364 (4th Cir. 2010).

202. United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982).

203. *See, e.g.*, Skinner v. Railway Labor Execs.'s Ass'n, 489 U.S. 602, 615 (1989) ("The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct.").

204. *See* PROTECT Our Children Act of 2008, Publ. L. No. 110-401, 112 Stat. 4229 (to be codified at 18 U.S.C. § 2258C(a)(1)–(2)).

205. *See infra* notes 211–17 and accompanying text.

stances of police-private citizen contact" and whether the police instigated the search.[206] In *Skinner v. Railway Labor Executives's Association*, the government demonstrated its "encouragement, endorsement, and participation" by "remov[ing] all legal barriers" and exhibiting a "strong preference for testing" and "its desire to share the fruits of such intrusions."[207] The Court explained that a lack of overt compulsion by the government would not be determinative; rather, "specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct."[208] As this section will show, the government has both exhibited a strong preference for Internet monitoring and statutorily mandated that ISPs share the fruits of their searches; and rather than remove legal barriers, the government exploits an area in which few legal barriers exist.

The DOJ's Community Oriented Policing Guide (COPS Guide) on combating Internet child pornography notes, "there is often a lack of specific legislation setting out ISPs' obligations. This makes it especially important for police to establish good working relations with ISPs to elicit their cooperation."[209] Law enforcement recognizes the competition among ISPs fighting to control access to a highly prized commodity, and can effectively manipulate this pressure to their own ends. Failure to comply with law enforcement by monitoring and restricting access to objectionable online material might tarnish the IPS's commercial reputation and lead to loss of business.[210]

Andrew Cuomo, the former Attorney General for the State of New York, is a prime example of how law enforcement may effectively exploit these conflicting interests in order to force ISPs to monitor their users' activity in a way that—without a warrant or other procedural protection—law enforcement cannot. In June 2008, Cuomo convinced three major service providers—Verizon, Sprint, and Time Warner Cable—to block their users from accessing websites that feature pornographic images involving children.[211] The three providers also agreed to contribute a collective

206. *Miller*, 688 F.2d at 656–57.

207. *Skinner*, 489 U.S. at 615–16.

208. *Id.* at 615.

209. COPS GUIDE, *supra* note 13, at 36.

210. *See, e.g.*, *Email ISPs*, N.Y. STATE ATT'Y GEN., http://nystopchildporn.com/email_isp.html (last visited Apr. 20, 2011) (including a list of non-compliant ISPs with form letters for subscribers to send to urge compliance with Andrew Cuomo's monitoring requirements).

211. *See* Press Release, N.Y. State Att'y Gen., Attorney General Announces Deal with Nation's Largest Internet Service Providers (June 10, 2008), http://

$1.125 million to the New York State Office of the Attorney General and NCMEC in their efforts to combat child pornography.[212] Cuomo was able to elicit cooperation from ISPs, who have generally preferred a *laissez-faire* approach to monitoring user content, by threatening the ISPs with charges of fraud and deceptive business practices and maintaining a published list of non-compliant ISPs to shame disobedient providers into compliance.[213] In order to avoid consumer backlash and potential liability in seemingly foundationless lawsuits,[214] ISPs had to sign a code of conduct developed by the Attorney General that outlines their monitoring and website-blocking duties.[215] All of these actions taken together should constitute law enforcement's knowledge of and acquiescence in the ISPs' intrusive searches, if not their outright compulsion. In 2004, a federal Pennsylvania district court struck down the Pennsylvania legislature's attempt to statutorily require ISPs to block access to these same websites.[216] While New York technically does not require ISPs to monitor and restrict their users' access, the result is functionally the same.[217]

Law enforcement encouragement and strong-arm tactics compel ISPs to monitor their subscribers' Internet activity. The release of once highly guarded hash values for child pornography files provides the tools necessary to do so. The PROTECT Our Children Act authorizes NCMEC to provide ISPs with hash values and other unique identifiers so that ISPs can catch those transmitting child pornography and report the activity to law enforcement.[218] The

www.nystopchildporn.com/press_releases/2008/june/10a.html; Danny Hakim, *3 Net Providers to Block Sites With Child Sex*, N.Y. TIMES, June 10, 2008, at A1, *available at* http://www.nytimes.com/2008/06/10/nyregion/10internet.html.

212. Press Release, N.Y. State Att'y Gen., *supra* note 211.

213. Hakim, *supra* note 211.

214. *See* Letter from Att'y Gen. Andrew Cuomo to Comcast Gen. Counsel (July 21, 2008), *available at* http://www.dslreports.com/r0/download/1330518~ac9e421e02d7f4fb5de858f3fa4515ac/CuomoComcast.pdf [hereinafter Cuomo Letter] (threatening "legal action" for failure to sign the code of conduct).

215. *See Shutting Down the Internet Child Pornography Pipeline*, N.Y. STATE ATT'Y GEN., http://www.nystopchildporn.com (last visited Apr. 20, 2011).

216. Ctr. for Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606 (E.D. Pa. 2004) (holding that 18 Pa. Const. Stat. §§ 7621–7630 (2002) violated the First Amendment).

217. Comcast was the only major ISP to balk at Attorney General Cuomo's request to begin monitoring its users' Internet activity. In response, Cuomo threatened the company with a lawsuit for unspecified violations. *See* Cuomo Letter, *supra* note 214. Several minor ISPs have not signed onto Attorney General Cuomo's code of conduct. *See* N.Y. STATE ATT'Y GEN., *supra* note 210.

218. PROTECT Our Children Act of 2008, Publ. L. No. 110-401, 112 Stat. 4229 (to be codified at 18 U.S.C. § 2258C(a)(1)–(2)).

statute does not mandate that ISPs use these hash values to monitor the traffic on their servers; however, as the Court made clear in *Skinner*, this is not required for deputization.[219] Hash values for child pornography files serve no purpose outside of monitoring Internet activity and blocking objectionable material, and the federal government's decision to provide these hash values to ISPs surely constitutes more than "adopt[ing] a passive position."[220] For example, while the COPS Guide does not detail the type of cooperation sought from ISPs, it recognizes that in the fight against Internet child pornography, ISPs occupy a vital position with complete access to the pipeline of information that travels across the Internet. With DOJ support, Microsoft recently released PhotoDNA, a program designed to block access to websites with child pornographic material, designed by utilizing NCMEC hash values.[221] While PhotoDNA's developers insist "they don't want to see it evolve into a filtering system that's mandated by the government," the government's track record in this area should be cause for concern.[222] Because Microsoft has made the program freely available to other service providers, there is little preventing the government from engaging in a Cuomo-like campaign of forced compliance. The federal government first provides ISPs with access to the child pornography hash values stored by NCMEC and Microsoft's PhotoDNA, and after providing ISPs with this "key," any local law enforcement effort to "elicit cooperation" must certainly rise to the level of knowledge and acquiescence in any subsequent ISP monitoring.

Additionally, by criminalizing the failure to report "actual knowledge of any facts or circumstances" related to child pornography,[223] one can see how an ISP might be prosecuted for failure to take advantage of programs that would provide them with actual knowledge.[224] As Congressman Nick Lampson said in support of a

219. *See* Skinner v. Railway Labor Execs.'s Ass'n, 489 U.S. 602, 615 (1989) (finding that railways authorized to perform breath and urine tests on employees were not engaging in private searches, even though they were not mandated to do so).

220. *Id.*

221. Martin Kaste, *A Click Away: Preventing Online Child Porn Viewing*, NPR (Aug. 31, 2010), http://www.npr.org/templates/story/story.php?storyId=129526579.

222. *Id.*

223. PROTECT Our Children Act of 2008, Publ. L. No. 110-401, 112 Stat. 4229 (to be codified at 18 U.S.C. § 2258C(a)(1)–(2)).

224. The Fourth Circuit recently held that fear of punishment alone was not enough to deputize an ISP. United States v. Richardson, 607 F.3d 357, 367 (4th

bill to statutorily ratchet up the penalties for an ISP's failure to report complaints of child pornography on its servers, "[i]f we can encourage—and certainly a fine would be an encouragement—the ISP to be in a position to give the information to law enforcement, we are encouraging them to be on the side of law enforcement . . . ."[225] Others have also noted how this pressure will operate to turn ISPs into virtual "child porn cops."[226]

B. ISPs Search with the Intent to Assist Law Enforcement

Deputization of a private actor involves the convergence of law enforcement intent and the intent of the private actor.[227] It is not enough to encourage a third party to undertake a search beneficial to law enforcement if that third party does not intend to assist law enforcement. A private search will be subject to Fourth Amendment restrictions where the conduct has "as its purpose the intention to elicit a benefit for the government in either its investigative or administrative capacities."[228] ISPs have many reasons outside of law enforcement to monitor the activity of their users, such as to earn money through targeted advertising or trace high-bandwidth users who slow their services;[229] however, the type of monitoring required to be of use to law enforcement in their fight against online child pornography can serve no other purpose.

Courts often face difficulties when dealing with the "intent to assist law enforcement" prong because people rarely operate with a single motivation at any given moment. While some circuits have allowed the intent to assist law enforcement to coexist with a "legitimate independent motivation" without violating the Fourth Amendment, this independent motivation must be closely examined;[230] preventing criminal activity is not a sufficiently indepen-

Cir. 2010) (defendant asserted that America Online's decision to monitor his Internet activity and report the presence of child pornography to NCMEC's Cyber Tip Line constituted government action). However, the court examined the idea of deputization in the pre-PROTECT Our Children Act landscape and AOL detected Richardson's child pornography through its own cache of hash values. *Id.* at 360, 362–63.

225. Hakim, *supra* note 211.

226. Bill Dedman & Bob Sullivan, *ISPs Pressed to Become Child Porn Cops*, MSNBC (Oct. 16, 2008), http://www.msnbc.msn.com/id/27198621.

227. *See* United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982) (government must acquiesce in conduct and private citizen must intend to aid law enforcement).

228. United States v. Attson, 900 F.2d 1427, 1431 (9th Cir. 1990).

229. Ohm, *supra* note 115, at 1422–27, 1462–68.

230. United States v. Reed, 15 F.3d 928, 931–32 (9th Cir. 1994) (rejecting the government's contention that a hotel employee searched the room to ensure that

dent motivation.[231] The Supreme Court has not yet addressed how an actor's motivation should be assessed, and the circuit courts have tackled the issue in different ways.[232] However, ISP monitoring of private internet activity for evidence of child pornography satisfies each test proposed by the circuit courts.

The Sixth and Ninth Circuits take the approach least favorable to the government by requiring that the private actor's intent be "entirely independent of the government's intent to collect evidence for use in a criminal prosecution" to avoid implicating the Fourth Amendment.[233] Where a private actor has a "legitimate independent motivation," the Fourth Amendment will not apply.[234] An ISP that monitors pursuant to Andrew Cuomo's ISP Code of Conduct does so knowing that the information it furnishes to the government will likely be used in a criminal prosecution. Even if the argument could be made that an ISP engaged in deep packet inspection for their own purposes, the knowledge that evidence of child pornography must be turned over to law enforcement prevents the ISP from acting completely independent of the government's desire to collect evidence under the Sixth Circuit test.

The Tenth Circuit collapses the two-prong assessment into a single inquiry by examining the government's role in the search as a means to uncover the private actor's primary purpose. If the government was involved "directly as a participant . . . or indirectly as an encourager," then the private actor likely intended his search to assist law enforcement.[235] While the government does not participate in ISP monitoring, the government certainly can be said to encourage the searches by providing hash values (the means necessary to effectively monitor Internet activity for child pornography). Courts will often examine other possible proxies for the private actor's intent, including "whether the private actor acted at the request of the government and whether the government offered the private actor a reward," as well as whether the private actor contacted the police prior to the search or collected evidence to turn

there was no damage to hotel property). The "legitimate independent motivation" articulation comes from *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981).

231. *Reed*, 15 F.3d at 931–32.

232. *See infra* notes 233–36.

233. United States v. Bowers, 594 F.3d 522, 526 (6th Cir. 2010) (quoting United States v. Hardin, 539 F.3d 404, 418 (6th Cir. 2008)) (internal quotations omitted); *Attson*, 900 F.2d at 1432–33.

234. *Walther*, 652 F.2d at 792; *Attson*, 900 F.2d at 1432–33.

235. United States v. Leffall, 82 F.3d 343, 347 (10th Cir. 1996).

over to law enforcement.[236] Though not offered a reward, ISPs offering their services in New York, for example, must comply with the Attorney General's monitoring program and turn over any evidence found or face public embarrassment.

Ultimately, these different tests reflect the Fourth Amendment value of protecting individuals from unnecessary intrusion by government actors, and therefore focus on "whether the governmental involvement is significant or extensive enough to objectively render an otherwise private individual a mere arm, tool, or instrumentality of the state."[237] Law enforcement needs the cooperation of ISPs in order to effectively tackle the problem of child pornography trafficking and accordingly both encourages and facilitates ISPs' monitoring. This monitoring provides ISPs with no benefit apart from the avoidance of the bad publicity that non-compliance might bring.

The Supreme Court's jurisprudence in determining the "primary purpose" in special needs cases also provides a useful framework to assess private actor motivations. In *Ferguson v. City of Charleston*,[238] the Court determined the purpose of the Medical University of South Carolina's alliance with local law enforcement by examining the program's development and procedural mechanisms.[239] Examining the level of cooperation between ISPs and law enforcement before and during the ISPs' monitoring reveals a coordinated alliance instigated by government intervention. Not until Cuomo engaged in bullying and created incentives did ISPs engage in wholesale monitoring for child pornography. In his concurrence in *Ferguson* Justice Kennedy wrote, "[t]he traditional warrant and probable-cause requirements are waived . . . on the explicit assumption that the evidence obtained in the search is not intended to be

236. United States v. Ginglen, 467 F.3d 1071, 1074 (7th Cir. 2006) (citing United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997)); *see also Walther*, 652 F.2d at 792.

237. State v. Kahoonei, 925 P.2d 294, 300 (Haw. 1996) ("In so doing, we focus on the actions of the government, because . . . the subjective motivation of a private individual is irrelevant.").

238. 532 U.S. 67 (2001).

239. *Id.* at 81–82. While *Ferguson* did not the reach the question of when a private actor becomes a state agent because the hospital, as a public institution, was already considered a state actor, the Court placed enormous emphasis on what Justice Kennedy called "substantial law enforcement involvement" in the planning and implementation of the program. The participation of law enforcement at all stages of the hospital's drug testing program belied the hospital's contention that their primary purpose was the health and safety of their patients. *Id.* at 88 (Kennedy, J., concurring).

used for law enforcement purposes."[240] This is a tenuous position to maintain in the case of ISP monitoring, given that the federal government provides ISP with child pornography hash values and statutorily requires ISPs to turn over any evidence of child pornography.[241] The government freely gives ISPs the tools to Internet monitoring for child pornography, publicly shames ISPs that do not use these tools, and statutorily requires ISPs to turn over anything found as a result.

C. Other Third-Party Statutory Reporting Requirements

This argument is not intended to call into question any other statutory reporting requirements, such as those for doctors,[242] hospitals,[243] or teachers.[244] These other statutory reporting requirements differ from those imposed on ISPs in several important ways. A key factor relied on in the argument that ISPs have been deputized is that the PROTECT Our Children Act provides child pornography hash values to ISPs, thereby enabling the monitoring of its users' private Internet activity for evidence of child pornography.[245] No similar information sharing happens in other statutorily-required reporting schemes. The federal government does not provide doctors with a means to sort through potential patients to identify those who may commit a crime. Hospitals, doctors, and teachers report information gathered in the course of their ordinary business practices. Statutory reporting requirements alone will not deputize these professionals. Rather, the argument is that they, like ISPs, can neither actively seek out the information at congressional or law enforcement's behest nor use tools provided by the government to that end.

240. *Id.* at 88 (Kennedy, J., concurring).

241. *See* 18 U.S.C. § 2258A(a) (2006).

242. *See, e.g.*, Am. Med. Assoc., Council on Ethical and Judicial Affairs, Code of Medical Ethics, Op. E-5.05 (2007), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion505.page? (requiring reporting "when a patient threatens to inflict serious physical harm to another person or to him or herself and there is a reasonable probability that the patients may carry out the threat").

243. *See, e.g.*, ARK. CODE ANN. § 12-12-602 (2010) (requiring reporting of intentionally inflicted knife or gunshot wounds).

244. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3620 (2011) (requires "any . . . person who has responsibility for the care or treatment of [a] minor" to report suspected abuse or neglect to a peace officer or child protection agency).

245. PROTECT Our Children Act of 2008, Publ. L. No. 110-401, 112 Stat. 4229 (to be codified at 18 U.S.C. § 2258C(a)(1)–(2)).

Even if other private actors were somehow turned into government agents by their respective statutory reporting requirements, the third-party doctrine[246] and "special needs" justification for programmatic searches[247] present reasonable challenges to any argument that doctors, teachers, and others violate the Fourth Amendment. In these examples the third-party doctrine becomes a much more reasonable objection. A child who reveals to a teacher that her parents abuse her loses any reasonable expectation of privacy by sharing the information with another. This differs from the communication between two private actors intercepted by an ISP, because the information was never intentionally shared with the ISP.

The existence of a special need outside of law enforcement also appears much more plausible in these other statutory reporting contexts. A hospital reporting an intentional gunshot wound to local police is analogous to a highway traffic stop to gather evidence about a recent car accident. In *Lidster* the Court explained that the law ordinarily allows the police to seek information about a specific crime from members of the public, differentiating between searches with the goal of individualized crime control and those with more generalized crime control goals.[248] A doctor who reports that her patient confessed contemplating harm to another person would not likely be characterized as facilitating generalized crime control, but rather expressing concern about a unique instance of future criminal activity.[249]

CONCLUSION

Congress and law enforcement agents have unfortunately been too zealous in their efforts to address the scourge of child pornography and the ways in which the Internet has allowed its transmission to flourish. The continued existence of child pornography presents very real dangers to minors in the United States and around the world. However, efforts to eradicate this problem should not come at the expense of the privacy interests of all In-

246. United States v. Miller, 425 U.S. 435, 443 (1976). For a description of the third-party doctrine, see *supra* notes 103–04 and accompanying text.

247. Indianapolis v. Edmond, 531 U.S. 32, 36 (2000).

248. Illinois v. Lidster, 540 U.S. 419, 424-425 (2004).

249. This is analogous to the circumstances in which many courts refuse to allow private actions under the Fourth Amendment. *See, e.g.*, United States v. Ginglen, 467 F.3d 1071, 1075 (7th Cir. 2006) (brothers entered a home to protect their father); United States v. Shahid, 117 F.3d 322, 326 (7th Cir. 1997) (mall security guard acted to protect the safety of the mall).

ternet users. The Internet has become a fundamental medium for expression and communication. However, the extent to which private Internet activity must be monitored in order to effectively combat the presence of child pornography has the potential to seriously chill people's willingness to utilize the Internet freely.

Private Internet activity fits squarely within the type of activity that the courts and Congress have sought to protect from unreasonable searches and seizures by law enforcement.[250] The prominence of the Internet in our daily lives suggests that a user's subjective expectation of privacy is in fact reasonable.[251] The Supreme Court's jurisprudence in other technology-based Fourth Amendment questions indicates that an Internet user does not forgo this reasonable expectation of privacy by relying on a third-party provider to facilitate communications.[252] Furthermore, the lack of meaningful choices between ISPs and delayed access to the contents of privacy policies vitiates any consent to closely monitor one's usage that users might give ISPs.

The statutory framework of the SCA and PROTECT Our Children Act creates an environment ripe for law enforcement to coerce ISPs to monitor the activity on their servers for evidence of child pornography without the limitations of the Fourth Amendment or statutory protections. State and federal law enforcement offices have in fact seized these opportunities, and by their actions turned ISPs into governmental agents for purposes of monitoring and reporting child pornography. This argument is not presented in an effort to protect the conduct of pedophiles and child pornographers, but rather to draw attention to the serious undermining of the privacy under the Fourth Amendment every Internet user faces. Since the SCA requires badge-wearing law enforcement officers to procure a warrant or other magisterial document before accessing stored electronic communications,[253] ISPs should be subject to the same requirements when they search to aid law enforcement.

Unfortunately, this problem will likely not receive serious attention in litigation until Congress amends the SCA to incorporate a suppression remedy. The inclusion of a suppression remedy will provide defense attorneys with incentive to protect their clients'

250. *See, e.g.*, Katz v. United States, 389 U.S. 347, 352 (1967) ("To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.").

251. *See supra* note 93 and accompanying text.

252. *See, e.g.*, *Katz*, 389 U.S. 347.

253. 18 U.S.C. § 2703.

Fourth Amendment rights as well as restoring the public's faith in government accountability in Internet "surveillance practices and replace general anxiety about Big Brother online with a more focused attention on actual instances of misconduct."[254] While suppression remedies necessitate the guilty going free in instances of government misconduct or mistake, without a suppression remedy, the contours of appropriate government conduct remain unclear. In the absence of a legislative amendment, attorneys should be encouraged to appeal the decision on constitutional grounds. Because child pornography presents a serious offense to the sensibilities of most Americans, Congress remains under enormous pressure to take a hard line in criminalizing the behavior and fostering prosecution of child pornographers, giving short shrift to potential constitutional problems. This makes a Supreme Court decision on the constitutionality of the SCA and PROTECT Our Children Act all the more pressing. Until this issue receives the judiciary's attention, the legislative and executive branches will continue to subject millions of Internet users to Fourth Amendment violations.

254. Kerr, *supra* note 6, at 840–41; *see also* Solove, *supra* note 7, at 1299.

DETERRING TITLE III MINIMIZATION VIOLATIONS: WHY SUPPRESSION ISN'T ENOUGH

*DANIEL L. PASSESER**

INTRODUCTION

Imagine that you are an FBI agent investigating a large-scale narcotics operation. You have reason to believe that John Smith has narcotics in his home. You could search his home for the drugs, but you do not yet have enough evidence to show probable cause and obtain a warrant; as a result, such a search would violate the Constitution, and the drugs would not be admissible in evidence at trial if you did so.[1] You therefore continue your investigation until you can obtain a warrant, conduct a search with the warrant once you obtain it, and in doing so, comply with the Fourth Amendment's prohibition on unreasonable searches and seizures. The narcotics you

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1. Evidence obtained in violation of the Fourth Amendment is inadmissible in the government's case-in-chief. Weeks v. United States, 232 U.S. 383, 391–92 (1914) (creating the exclusionary rule in federal courts); Mapp v. Ohio, 367 U.S. 643, 654–55 (1961) (applying the exclusionary rule to the states).

find during the legal search are therefore admissible at trial, and Smith gets convicted. By excluding unconstitutionally obtained information from trial, the exclusionary rule disincentivizes illegal searches by depriving law enforcement of evidence they need at trial.

Now imagine you are an FBI agent monitoring a wiretap[2] on John Smith's home phone for evidence of narcotics trafficking. You are aware of your obligation, under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), to minimize the recording of any conversations not relating to the crime for which the warrant was issued,[3] and you are further aware that any such recordings will be suppressed at trial.[4] However, you hear Mr. Smith talking to his friend and describing a physical altercation he had with his wife. You realize that this is not related to narcotics trafficking and will probably not be admissible, but unlike the search of the home, it will not be possible to investigate further and come back later with a warrant to listen for evidence of this crime.[5] Therefore, if this conversation gets suppressed at trial, you would find yourself in exactly the same position as if you had turned off

2. A wiretap is a device that can monitor and record any phone conversation over the tapped line. Wiretaps are legal only if a warrant is issued in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–22 (2006).

3. 18 U.S.C. § 2518(5).

4. The victims of minimization violations can file a motion to suppress any evidence obtained in violation of Title III at trial. 18 U.S.C. § 2518(10)(a). This provides a remedy for the right created by 18 U.S.C. § 2515 (requiring that no evidence obtained in violation of Title III be used in any proceeding). *In re* Evans, 452 F.2d 1239, 1242 (D.C. Cir. 1971). Most courts to decide the issue have held that minimization violations only require the suppression of conversations that were improperly minimized. *See, e.g.*, United States v. Scott, 516 F.2d 751, 760 n.19 (D.C. Cir. 1975); United States v. Cox, 462 F.2d 1293, 1301–02 (8th Cir. 1972); United States v. LaGorga, 336 F. Supp. 190, 196–97 (W.D. Pa. 1971); United States v. King, 335 F. Supp. 523, 543–45 (S.D. Cal. 1971).

5. It is possible for officers to obtain retroactive amendments to the warrant to use these conversations in court in situations such as this if the original communication was intercepted lawfully, i.e., before it was clear that the communication did not relate to narcotics trafficking. 18 U.S.C. § 2517(5). However, in this scenario, the contents were not "intercepted in accordance with the provisions of this chapter" because the officers continued recording this conversation after it was clear it did not relate to narcotics, in violation of 18 U.S.C. § 2518, and therefore a retroactive amendment would not be available. JAMES G. CARR & PATRICIA L. BELLIA, THE LAW OF ELECTRONIC SURVEILLANCE § 5:23 (2004). The fact that assault is not one of the crimes designated for electronic surveillance by Title III should be immaterial based on the legislative history. S. REP. NO. 90-1097, at 98 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2186 [hereinafter Legislative History].

the recorder.[6] On the other hand, there is a possibility this evidence could be admissible to impeach the testimony of a witness who has perjured himself,[7] or against another party,[8] or that a court may find the circumstances sufficiently ambiguous to justify the interception. So you ask yourself: "Why not?"

In order to obtain a warrant to tap a suspect's phone, the government must clear a series of hurdles put in place by Congress to prevent unnecessary intrusions into personal privacy. These hurdles include the exhaustion of less intrusive investigative remedies,[9] probable cause to believe the suspect is using that particular phone in the commission of a crime,[10] and a specificity requirement.[11] To meet the specificity requirement, the warrant authorizing the electronic surveillance must specify the identity, if known, of the person whose communications are to be intercepted,[12] as well as the nature and location of the place where the interception is to occur.[13]

This specificity requirement has been interpreted to provide leniency to the government—only a low degree of specificity is required.[14] Additionally, the order must specify the type of communication to be intercepted, the period during which interception is authorized,[15] and the particular crime to which the interception

6. Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 124–25 (1983) ("Law enforcement thereby loses only that to which it had never been entitled.").

7. *See infra* Part II.A.1.

8. *See infra* Part II.A.2.

9. 18 U.S.C. § 2518(3)(c).

10. *Id.* § 2518(3)(d).

11. *Id.* § 2518(4).

12. *Id.* § 2518(4)(a).

13. *Id.* § 2518(4)(b).

14. *See, e.g.*, 38 GEO. L.J. ANN. R. CRIM. PROC. 152 n.415 (2009) (citing "United States v. Escobar-de Jesus, 187 F.3d 148, 170 (1st Cir. 1999) (specificity requirement met because order identified main location of phone line in one building; order need not specify location of various extensions of telephone line, even if extensions located in separate building than described in order); United States v. Feldman, 606 F.2d 673, 680 (6th Cir. 1979) (specificity requirement met when order authorized taps on all telephones at location because neither Fourth Amendment nor Title III required surveillance order to list numbers of telephone lines tapped); Shell v. United States, 448 F.3d 951, 956 (7th Cir. 2006) (specificity requirement met by warrant authorizing transmitter on badge to intercept conversations in 'Visitor Area' of prison); United States v. Fairchild, 189 F.3d 769, 774–75 (8th Cir. 1999) (specificity requirement met because order described location of monitored phone line used to facilitate drug trafficking, agency authorized to intercept communications, and type of offenses government agents believed wire-tap would uncover); United States v. Carneiro, 861 F.2d 1171, 1179 (9th Cir. 1988) (specificity requirement met because telephone line and offenses identified).").

15. 18 U.S.C. § 2518(4)(e).

relates.[16] This last element is meant to require interception to be limited to the underlying predicate for probable cause.[17] This means that if probable cause has been established that parties *A* and *B* will be discussing illegal transaction *X* on a phone, the description of the conversations to be intercepted should exclude any conversation not between *A* and *B* involving *that specific* illegal transaction.[18] Conversations relating to other crimes may also be intercepted, but only if they are in "plain view" in the sense that the subject matter of the conversation was not yet clear when the recording took place.[19]

Recall the quandary faced by our FBI agent in the opening hypothetical. Even if a defendant could prove that officers intentionally disregarded the minimization order at a suppression hearing[20] on the entire wiretap, the court would still not necessarily be justified in suppressing it. This is because the proper approach for evaluating compliance with the minimization order is to make an objective assessment of actions of the officer or agent conducting surveillance "in light of facts and circumstances confronting him at the time, without regard to his underlying intent or motivation."[21] This creates a situation where there is an incentive for law enforcement officers to intentionally violate the law, which poses a serious threat to privacy.[22] Furthermore, there are negligible disincentives facing officers to dissuade them from committing minimization violations, including an ineffective civil remedy and a rarely applied wholesale suppression remedy. This Note seeks to address this problem.[23] Part I will discuss the prevalence of minimization violations,

16. *Id.* § 2518(4)(c).

17. Goldsmith, *supra* note 6, at 139.

18. *Id.*

19. *Id.* at 140; *see also* 18 U.S.C. § 2517(5).

20. A suppression hearing is a pretrial hearing in which the defendant can argue that evidence should be suppressed at trial because it was illegally obtained. BLACK'S LAW DICTIONARY 739 (8th ed. 2004).

21. Scott v. United States, 436 U.S. 128, 136–37 (1978).

22. Goldsmith, *supra* note 6, at 119–20 ("*Scott*'s willingness to tolerate intentional misconduct in the context of minimization violations poses a serious threat to privacy.").

23. Nothing in this note should be seen as a criticism of the exclusionary rule generally. Excluding evidence obtained in violation of the Fourth, Fifth, and Sixth Amendments can often prevent relevant evidence from being used in court, when that evidence could have been used had police complied with the Constitution. This does provide a disincentive to police for violating the law. When it comes to minimization, however, the evidence will most likely only be excluded if it is irrelevant, in which case it would probably never have been introduced anyway. Furthermore, not recording a conversation places the prosecution in an even worse

the relevant legal standards for considering them, and the harms created by a legal system that encourages them. Encouraging officers to violate the law is problematic from a formalistic perspective, and the knowledge that officers are indiscriminately recording conversations on tapped phones could have a chilling effect on protected speech. Part II will delve into the incentive structure facing officers listening to the wiretap, evaluating when improperly recorded conversations are nonetheless admissible and discussing the standards for wholesale suppression of the wiretap and for holding officers personally liable for civil damages. Improperly minimized conversations can be used against parties who lack standing to challenge the minimization and to impeach testimony offered on direct examination, whereas wholesale suppression of the wiretap and civil remedies will rarely impact officers. Part III will discuss several proposals for reforming this system, such as altering the standing requirements and eliminating the impeachment exception, or increasing the sanctions on officers who disregard the minimization order.

I.
MINIMIZATION VIOLATIONS AND THE REASONS TO AVOID THEM

Despite the prohibition on recording non-pertinent conversations, minimization violations have become a routine part of Title III wiretaps. Reviewing courts have held that law enforcement officers engaged in sufficient minimization even when a surprisingly low percentage of calls were appropriately minimized. For example, the Tenth Circuit found that the government made out a prima facie case of reasonable minimization even though only 25.6% of the calls that should have been minimized were actually minimized.[24] Another court denied a motion to suppress even though it found that, of the 111 conversations the government intercepted, only two were pertinent.[25] The percentage of appropriately mini-

position than recording it and having it suppressed, due to its availability as impeachment evidence and against anyone who was not a party to the recorded conversation. Both of those factors are unique to Title III evidence, so to argue for a supplement to the deterrent effect of the exclusionary rule in this setting is not to argue that one is needed for violations of the Fourth, Fifth, and Sixth Amendments.

24. United States v. Yarbrough, 527 F.3d 1092, 1098 (10th Cir. 2008).

25. United States v. Rastelli, 653 F. Supp. 1034 (E.D.N.Y. 1986) (failing to even examine the minimization issue because minimization violations would have only resulted in suppression of improperly minimized conversations).

mized calls is not and should not be dispositive;[26] however, the fact that the government can fail to minimize 75% of the calls that should be minimized without having the entire wiretap suppressed or any sanction on the officers shows how commonplace minimization violations have become.

Many of these violations are not of the sort described in the introduction. It is entirely possible for minimization violations to occur even if the officers are acting with good faith, because calls may be ambiguous, and the nature and scope of the criminal enterprise under investigation may be uncertain, particularly in the early stages of investigation.[27] While it would not be impossible to deter these violations, for example by suppressing the entire wiretap for any minimization violation, the cost of doing so would be to render the surveillance ineffective by preventing the officer from recording any ambiguous conversation.

This Note is concerned with deterring the bad faith, intentional interception of conversations that should be minimized. To use an example, in *Scott v. United States*,[28] the officers placed a wiretap on the home phone of the defendant and failed to consider minimization at all, turning off the recording device only once when they discovered it had inadvertently been connected to the wrong line.[29] This complete failure to minimize is a clear example of bad faith. The Supreme Court held that there was no need to suppress any of the recorded conversations, because none of the individual conversations was intercepted unreasonably.[30] The court analyzed the individual conversations to see if minimization was reasonable even though the officers did not, because the subjective intent of the officers was considered irrelevant.[31]

In other areas of search and seizure law, the specific intent of officers is not and should not be relevant because the Fourth Amendment rights of citizens would lack meaning if the constitutionality of an officer's action depended on his own subjective understanding of Fourth Amendment rights, as opposed to the understanding of a detached, neutral judge.[32] There is good rea-

26. *Scott*, 436 U.S. at 140 ("[T]here are surely cases . . . where the percentage of nonpertinent calls is relatively high and yet their interception was still reasonable . . . [because] [m]any of the nonpertinent calls may have been very short. Others may have been one-time only calls . . . [or] been ambiguous in nature.").

27. *Id.* at 140–41.

28. 436 U.S. 128.

29. *Id.* at 133 n.6.

30. *Id.* at 141–43.

31. *Id.* at 138.

32. *Id.* at 136–37; Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

son, however, to distinguish wiretap recordings. The application of the exclusionary rule to the Fourth Amendment imposes a very real evidentiary cost because the illegality of the search is not a but-for cause of the later introduction of an item found in the search.[33] For example, suppression of a knife discovered in a warrantless search deprives the prosecution of the knife as evidence; however, the knife could have been legally obtained and therefore introduced.[34] Conversely, there is no evidentiary cost imposed on the State for committing a minimization violation—suppression of an improperly minimized conversation places the officers in the same position as proper minimization. Furthermore, in most cases the only conversations that will be suppressed will be "nonpertinent *innocent* conversations which the prosecution had never intended to use,"[35] because relevant conversations that are useful to the prosecution would have been within the scope of the warrant and therefore would not have needed to be minimized. This creates a barely significant incentive to adhere to the minimization order, and because suppressed conversations may be admissible for impeachment purposes,[36] or against non-parties to the conversation,[37] the prosecution is in a better position if it has suppressed recordings than if it has none. Since the incentive to act in bad faith exists, whether the officer has acted in bad faith should be relevant if we are to deter intentional minimization violations.

The preceding discussion assumes, of course, that it is worthwhile to attempt to deter minimization violations. Some courts have applied a "no harm, no foul" analysis to minimization violations, holding that motions to suppress wiretaps should be denied since the inappropriately monitored conversations were not going to be introduced at trial anyway.[38] Considering that the prosecution will usually be in the same position whether or not the officers minimize, what harms are being caused by these violations? As one court has put it, "the 'evil' to be limited by this requirement is the listening to innocent calls,"[39] but there is little discussion of what harms are inflicted upon the speakers by such listening.

33. *See* Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 793–94 (1994).

34. *Id.*

35. Goldsmith, *supra* note 6, at 125.

36. *See infra* Part II.A.1.

37. *See infra* Part II.A.2.

38. *See, e.g.*, United States v. Mares-Martinez, 240 F. Supp. 2d 803, 816 (N.D. Ill. 2002).

39. United States v. Bynum, 360 F. Supp. 400, 409 (S.D.N.Y. 1973).

Some scholars have expounded on the harms inherent in the intrusion of privacy. Professor Daniel Solove, for example, argues that the notion that there is no reason to fear an intrusion of privacy if one has nothing to hide fails to take into account the fact that privacy encompasses more than simply the right to hide embarrassing or incriminating information.[40] Solove also points out that confidentiality is key to protecting a relationship of trust between people and businesses,[41] which may also be applied to the relationship of trust between the people and the State. It is easy to see how intentional disregard for the laws protecting our private phone conversations can lead to a distrust of government. Even if one focuses only on the more tangible consequences of minimization violations, there are both formal and functional reasons why we should endeavor to avoid them.

Formally speaking, an intentional failure to minimize is an intrusion by the executive branch into personal privacy that is explicitly prohibited by Congress and the Constitution. In *Berger v. New York*,[42] the Court struck down a New York statute that authorized wiretapping partly because it lacked any requirement of particularity or procedures to minimize the intrusion to conversations relating to a specific crime.[43] While Title III purports to solve these constitutional deficiencies, if the incentives for police are structured such that there is an incentive to intentionally fail to minimize the intrusion into conversations, then Title III suffers from the same constitutional deficiencies as did the New York statute at issue in *Berger*. Incentivizing police officers to violate the Constitution and congressional statutes would be problematic even if there were no discrete harm arising from the minimization violations simply because it erodes the rule of law.

Functionally, there is a potential First Amendment chilling issue. The limitations placed on wiretaps by Title III were intended to protect the privacy of communication and encourage "the uninhibited exchange of ideas and information among private parties."[44] Fear that the police are monitoring even innocent telephone con-

40. Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 769 (2007) ("At the end of the day, privacy is not a horror movie, and demanding more palpable harms will be difficult in many cases. Yet there is still a harm worth addressing, even if it is not sensationalistic.").

41. *Id.* at 770.

42. 388 U.S. 41 (1967).

43. *Id.* at 58.

44. Bartnicki v. Vopper, 532 U.S. 514, 532 (2001) (quoting Brief for United States at 27, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 88-1687, 99-1728), 2000 WL 1344079, at *27).

versations "can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas."[45] Plaintiffs do not have standing to raise a constitutional challenge on the basis of such a subjective chilling effect;[46] however, that does not mean it does not occur or that we should not take steps to avoid it. There is a difference between conversations that are evidence of a crime, and conversations that the parties would not want the police to be recording. This difference is what gives rise to the minimization requirement in Title III, and this difference is the reason that the law needs to incentivize law enforcement officers to respect it. The next Section examines whether or not the law does in fact incentivize law enforcement officers to adhere to the minimization requirement.

II.
THE DILEMMA FACING LAW ENFORCEMENT OFFICERS

The law enforcement officer in our introductory hypothetical is faced with the decision to record the conversation. Congress did not intend this officer to perform a cost-benefit analysis here by weighing the risks of civil liability and suppression of the wiretap against the benefit to the prosecution of having the recording; according to Title III, the conversation should not be recorded if it does not pertain to the offense mentioned in the warrant.[47] However, officers will inevitably record the conversation if doing so can help them secure a conviction and there is no realistic possibility of a penalty. The Supreme Court has shown concern that making it too easy to introduce illegally obtained evidence cuts back against the rationale of the exclusionary rule: to remove the incentive for police to violate civil rights.[48] "[P]olice officers and their superiors would recognize that obtaining evidence through illegal means stacks the deck heavily in the prosecution's favor,"[49] greatly increas-

45. *Id.* at 533 (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 202 (1967)); *see also* Sinclair v. Schriber, 916 F.2d 1109, 1115 (6th Cir. 1990) ("Sinclair's affidavit states . . . [t]he chilling effect of FBI wiretaps and other illegal surveillance and interference in my political activities as Chairman of the Rainbow People's [sic] Party was of principal importance in bringing my political activism to an end in 1974.").

46. *Sinclair*, 916 F.2d at 1115 (citing Laird v. Tatum, 408 U.S. 1, 13–14 (1971) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.")).

47. 18 U.S.C. § 2518(4)(c) (2006).

48. James v. Illinois, 493 U.S. 307, 317–18 (1990).

49. *Id.* at 318.

ing the chance of police misconduct.[50] This Section explores the potential costs and benefits from the officer's perspective of intentionally failing to minimize.

A. Incentives to Fail to Minimize: When Evidence Obtained in Violation of Title III Is Admissible

The principle that evidence obtained in violation of the Fourth Amendment cannot be used in court dates back to 1914, when the Supreme Court created the exclusionary rule for federal prosecutions.[51] The Court stated that, "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution."[52] The Court continued, "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[53] The exclusionary rule became broadly enforced at the state level in the landmark case of *Mapp v. Ohio*.[54]

The deterrent power of the exclusionary rule has been eroded by four exceptions:[55] inevitable discovery,[56] exigency,[57] the good faith exception,[58] and the impeachment exception.[59] Furthermore, evidence that would be excluded at trial can be used in grand jury

50. *Id.*

51. Weeks v. United States, 232 U.S. 383 (1914).

52. *Id.* at 393.

53. *Id.* at 394.

54. 367 U.S. 643, 655 (1961).

55. *See, e.g.*, Christopher A. Harkins, Note, *The Pinocchio Defense Witness Impeachment Exception to the Exclusionary Rule: Combating a Defendant's Right to Use with Impunity the Perjurious Testimony of Defense Witnesses*, 1990 U. ILL. L. REV. 375, 396–409 (1990).

56. Nix v. Williams, 467 U.S. 431, 449–50 (1984) (holding that illegally obtained evidence is admissible if other legal police tactics would have inevitably led to the discovery of the evidence).

57. Evidence obtained by warrantless searches is admissible if there was an imminent need to search, seize, or interrogate in order to avoid impending danger to law enforcement officers or destruction of evidence. *See* United States v. Davis, 461 F.2d 1026, 1030 (3d Cir. 1972).

58. Evidence is admissible if law enforcement officers acted in an objectively reasonable manner and in good faith in discovering it. United States v. Leon, 468 U.S. 897, 919–20 (1984); Massachusetts v. Sheppard, 468 U.S. 981, 988 (1984).

59. Otherwise inadmissible evidence becomes admissible to impeach a defendant's perjurious testimony. Walder v. United States, 347 U.S. 62 (1954).

proceedings,[60] civil tax proceedings,[61] civil deportation proceedings,[62] habeas corpus hearings,[63] and parole revocation hearings.[64]

Evidence obtained in violation of Title III may be excluded even if there is no constitutional violation, however, because Title III has its own statutory exclusionary provision and does not rely on the constitutional exclusionary rule.[65] In order to determine the effect of these exceptions to the constitutional exclusionary rule on officers listening to wiretaps, we must examine whether these exceptions have been incorporated into the statutory exclusionary provision of Title III. Inevitable discovery does not apply because there is no way a conversation could be obtained at all absent the wiretap, much less inevitably obtained. Exigency is inapplicable as well because the statute itself allows for exigent circumstances. There is an exigency exception to the warrant requirement of Title III written into the statute,[66] and officers have the ability to listen for evidence of other crimes and obtain a retrospective amendment.[67] Therefore, if a conversation is so irrelevant that officers were not permitted to record it or apply for a retrospective amendment, it is highly unlikely that exigent circumstances would demand that such a conversation be recorded. For example, if officers listening to a wiretap for evidence of narcotics trafficking overheard a conversation about an imminent terrorist attack, there would be an immediate need to record that conversation, much like the immediate need for police to enter a home in search of a fleeing suspect. However, as long as the officers applied for a retroactive amendment under § 2517(5), it would not be a violation of Title III to record that conversation, it would not be suppressed, and no exception to the exclusionary rule would be necessary. The extent to which good faith excuses a minimization violation will be discussed in the section on wholesale suppression. The impeachment exception is the only one of the traditional exceptions to the exclusionary rule that has been incorporated into the statutory exclu-

60. United States v. Calandra, 414 U.S. 338 (1974).

61. United States v. Janis, 428 U.S. 433 (1976).

62. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

63. Stone v. Powell, 428 U.S. 465 (1976).

64. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998).

65. 18 U.S.C. § 2515 (2006).

66. *Id.* § 2518(7) (providing that the attorney general can authorize a wiretap without applying for a warrant if circumstances require the wiretap to be placed before a warrant can be obtained, as long as a warrant is applied for within forty-eight hours).

67. *Id.* § 2517(5); *see also supra* note 5 and accompanying text.

sionary provision of Title III. The reasons for this incorporation are discussed in the following Section on impeachment.

Apart from the exceptions to the exclusionary rule, there is another way the government can use evidence obtained in violation of Title III in court. The question of who has standing to suppress illegally intercepted conversations is extremely complicated. Parties that lack standing to challenge the original recording would not be able to suppress illegally recorded conversations, simply because their rights were not violated. The Title III standing issue and its implications are discussed in the section on standing.

1. Impeachment

The impeachment exception dates back to 1954, when the Court permitted physical evidence that was inadmissible in the case-in-chief to be used to impeach the defendant.[68] In *Walder*, the Court stated that,

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.[69]

In *Harris v. New York*,[70] the Supreme Court "held that otherwise impermissible evidence could be used by the prosecution on rebuttal, stating that no exclusionary rule may permit affirmative perjury . . . ."[71] The *Harris* Court also noted that exclusion from the government's case-in-chief was a sufficient disincentive to officers who would violate the Constitution, and that any marginal deterrent effect from excluding evidence for impeachment purposes was negligible.[72] The exception has been broadened by subsequent cases, so that impeachment with inadmissible evidence "has not been limited to direct contradictions of a defendant's direct examination testimony, but is more generally allowed whenever the sub-

68. Walder v. United States, 347 U.S. 62, 65 (1954).

69. *Id.*

70. 401 U.S. 222 (1971).

71. Jacks v. Duckworth, 651 F.2d 480, 484 (7th Cir. 1981) (citing *Harris*, 401 U.S. at 225); *see also* United States v. Havens, 446 U.S. 620, 626 (1980) ("We rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against him could be 'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.'" (quoting *Harris*, 401 U.S. at 226)).

72. *Harris*, 401 U.S. at 225.

ject matter that encompasses the impeachment was 'reasonably suggested by the defendant's direct examination.' "[73]

The impeachment exception seems to have been explicitly incorporated into Title III by Congress in the legislative history of the statute, though counterarguments could be made. It is worth noting that the impeachment exception as articulated in *Walder* predates the Act by fourteen years, yet Congress chose to make no mention of an impeachment exception in the text of § 2515.[74] Therefore, a court could presume that Congress chose not to include such an exception in the statute, and for judges who interpret statutes based heavily on the text, that would most likely be dispositive.[75] Furthermore, the summary of the legislative record describes the Title III exclusionary rule in simple language: "The contents of wire and oral communications intercepted in accordance with the standards set forth in this act may be used as evidence in judicial proceedings. The contents of illegally intercepted communications may not be used as evidence in any proceeding."[76]

A closer look at the legislative history reveals that Congress did support the incorporation of the impeachment exception. In explaining the purpose of the exclusionary provision, the history provides that "[t]here is, however, no intention to change the attenuation rule . . . . [n]or generally to press the scope of the suppression role beyond present search and seizure law. See *Walder v. United States*, 74 S.Ct. 354, 347 U.S. 62 (1954)."[77] The citation to the case creating the impeachment exception, after the statement that the intent of the statute is not to increase the role of suppression

73. Jeffrey A. Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 871 (2008) (quoting *Havens*, 446 U.S. at 627–28).

74. The full text of the provision reads:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515 (2006).

75. A full discussion of the debate over whether judges should examine legislative history when the text is clear is beyond the scope of this note. For such a discussion, see generally WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

76. S. REP. NO. 90-114, at 73 (1968).

77. Legislative History, *supra* note 5, at 2185.

beyond the current law, indicates that there was no intent to eliminate the impeachment exception.[78]

Courts have been willing to rely on this legislative history to incorporate the impeachment exception into Title III: "While *Harris* and its progeny involved evidence obtained in violation of the Fourth Amendment, the rationale has been extended, and properly so, to cases involving evidence obtained . . . in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968."[79] In total, six circuits have either extended or acknowledged the possibility of extending the impeachment exception to evidence obtained in violation of Title III.[80]

This application of the impeachment exception to Title III, while apparently in line with congressional intent, raises several policy concerns. The first is that wiretap evidence is less valuable as impeachment material than physical evidence obtained in a search. If a defendant says on the stand that he has never possessed narcotics, the suppressed narcotics themselves have high value in impeaching him because he is clearly committing perjury. Evidence that he said in a phone conversation that he possessed narcotics has less value as impeachment material, because he may have been lying on the phone. Therefore, the rationale on which the *Walder* and *Harris* courts relied, that the impeachment exception was necessary to prevent perjury, applies less forcefully to evidence obtained in violation of Title III. In fact, it may serve only to muddle the issue if the testimony in court is truthful and the statements made on the phone are not.

Additionally, a defendant may conceivably have made contradictory statements in different telephone conversations. In this scenario, there is no way for the defendant to avoid being impeached

78. Henson v. State, 790 N.E.2d 524, 531 n.3 (Ind. Ct. App. 2003).

79. Jacks v. Duckworth, 651 F.2d 480, 483–84 (7th Cir. 1981) (citation and footnote omitted) (citing United States v. Caron, 474 F.2d 506, 509–10 (5th Cir. 1973)).

80. *See* United States v. Baftiri, 263 F.3d 856, 857 (8th Cir. 2001); United States v. Echavarria-Olarte, 904 F.2d 1391, 1397 (9th Cir. 1990); United States v. Vest, 813 F.2d 477, 480, 484 (1st Cir. 1987); Anthony v. United States, 667 F.2d 870, 879 (10th Cir. 1981); *Jacks*, 651 F.2d at 483–84 (7th Cir.); *Caron*, 474 F.2d at 509 (5th Cir.); *see also* United States v. Wuliger, 981 F.2d 1497, 1506 (6th Cir. 1992) (refusing to recognize an impeachment exception to § 2515 in civil proceedings but suggesting that such an exception might exist in the criminal context). *But see* United States v. Gray, 521 F.3d 514, 529–30 (6th Cir. 2008) ("[T]here is no convincing reason to create, let alone expand to defendant, an impeachment exception where the illegally obtained conversations were self-suppressed by the government and not available for use by either party at trial.").

with suppressed evidence if he testifies,[81] and since being impeached by a recording is damaging to one's credibility, this may deter defendants from testifying. Currently, approximately half of defendants choose to testify, though that number has been shrinking.[82] It is fundamental to the trial process for the jury to be able to consider defendant testimony, because "the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony."[83] It is not only critical to the defense's case, but also to the jury, as academics and the Supreme Court have both acknowledged: "When the defendant, 'who above all others may be in a position to meet the prosecution's case,' is silent, the jury is deprived of critical factual information."[84] This deprivation is exacerbated when an innocent defendant declines to testify, because "the jury is deprived of testimony of incomparable value—truthful testimony from the witness most knowledgeable about the events in question—that could prevent unjust punishment by the state, and potentially an escape from justice by the guilty party."[85]

81. This assumes that the issue on which the defendant made contradictory statements is "plainly within the scope of the defendant's direct examination." United States v. Havens, 446 U.S. 620, 627 (1980). However, any questions "suggested to a reasonably competent cross-examiner" by direct testimony are permissible, subjecting statements made in response to cross-examination "reasonably suggested" by the direct to impeachment. *Id.* at 626–27. Therefore, depending on the scope of the direct examination and the trial court's definition of reasonable, this scenario or one like it is at least plausible.

82. Bellin, *supra* note 73, at 852 (citing Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 950–51 (2002) (summarizing studies dating back to the 1920s and concluding that "with increasing frequency defendants are not taking the stand at trial as they once did" and "the extent of refusals to testify varies from one-third to well over one-half [of defendants] in some jurisdictions")); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329–30 (1991) (describing study of trials in Philadelphia in the 1980s that revealed that 49% of felony defendants and 57% of misdemeanor defendants chose not to testify); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450, 1459 (2005) (noting that "only half" of the defendants who proceed to trial testify on their own behalf).

83. Rock v. Arkansas, 483 U.S. 44, 52 (1987).

84. Bellin, *supra* note 73, at 854 (quoting Ferguson v. Georgia, 365 U.S. 570, 582 (1961)).

85. *Id.* at 855 (citing Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 666 (1991)). There is also the possibility that by deterring the defendant from testifying, suppressed wiretaps weaken the defense case to the extent that they plead guilty instead of going to trial at all. It is impossible to tell if this is a significant problem

This is not to say that perjury is not a real problem to be avoided. Applying the impeachment exception to Title III prevents defendants from having a license to perjure. However, it is worth noting that there are costs to deterring that perjury: incentivizing law enforcement officers to violate the minimization order and deterring defendants from testifying. Additionally, the benefits to the truth-seeking process are reduced in the Title III context because the statement introduced to impeach the witness may itself be a lie, and the testimony may have been true. Even when this is not the case, the mere possibility is enough for the jury to discount the impeachment evidence in part, which reduces its value. These are all factors that should be taken into account when deciding whether to apply the impeachment exception to minimization violations.

2. Standing

The standing requirement further limits the effectiveness of suppression as a deterrent to minimization violations. Conversations that are suppressed against one party may be admissible against another, giving police another incentive to record conversations outside the scope of the warrant. In the landmark Fourth Amendment case of *Rakas v. Illinois*,[86] the Supreme Court held that to invoke the exclusionary rule for a Fourth Amendment violation, the party seeking to exclude the evidence must have personally had his or her Fourth Amendment rights violated.[87] This means the defendant cannot suppress his drugs when the police found them in an illegal search of his neighbor's house, where he had no expectation of privacy, even if he was the target of the investigation.[88] If this same limitation on suppression applies to Title III, a wiretapped public payphone conversation involving a lower-ranking member of an organized crime organization could be introduced against a higher-ranking member of the organization, even if law enforcement officers blatantly and intentionally disregarded the minimization order with respect to the party using the phone.

Courts have struggled with the question of whether this understanding of the standing requirement applies to violations of Title III. While the exclusionary provision of Title III is found in § 2515, that provision does not explicitly provide a remedy nor give any

because there are a multitude of reasons a defendant may decide against going to trial; most notably a three level reduction in the defendant's guidelines range for acceptance of responsibility. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2010).

86. 439 U.S. 128 (1978).

87. *Id.* at 139.

88. *Id.*

guidance as to who may invoke it.[89] It is § 2518 that provides "aggrieved persons" with a remedy by permitting them to file a motion to suppress the evidence.[90] Congressional intent seems to be that the unequivocal and sweeping language of § 2515 should be limited to those who can invoke its protections.[91] Since Title III was written before *Rakas*, it is possible that Title III was meant to incorporate "target standing," a theory rejected by the *Rakas* Court but which states that the target of a search is the victim of an invasion of privacy and has standing to challenge the search, even though it was not his property that was searched or seized.[92] The text supports the conclusion that the drafters intended target standing to apply. The remedy for "aggrieved persons" described in § 2518(10)(a) defines "aggrieved person" as a "person who was a party to any intercepted wire or oral communication *or a person against whom the interception was directed*."[93]

The Supreme Court has rejected this interpretation. In *Alderman v. United States*,[94] the Court addressed the issue of whether electronic surveillance obtained in violation of one defendant's rights was admissible against a codefendant.[95] The Court declined to expand the exclusionary rule to codefendants in the electronic surveillance context,[96] but this holding was grounded in the Fourth Amendment because Title III was not yet law at the time of the interception. In dicta, however, the *Alderman* Court noted that the legislative history of Title III indicated that only aggrieved persons were eligible to invoke its protections, and went on to define aggrieved persons "in accordance with existent standing rules."[97] The standing doctrine as it existed at the time, according to the *Alderman* opinion, held that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those

89. 18 U.S.C. § 2515 (2006); *see also supra* note 4 and accompanying text.

90. 18 U.S.C. § 2518(10)(a).

91. The committee report recognizes that § 2518(10)(a) is a limitation on who can invoke § 2515. Legislative History, *supra* note 5, at 2185 ("[Section 2515] must, of course, be read in light of section 2518(10)(a) . . . which defines the class entitled to make a motion to suppress."); *id.* at 2195 ("This provision [§ 2518(10)(a)] must be read in connection with sections 2515 and 2517 . . . which it limits.").

92. Jones v. United States, 362 U.S. 257, 261 (1960); *see also* Goldsmith, *supra* note 6, at 58–59.

93. 18 U.S.C. § 2510(11) (emphasis added); *see also* Alderman v. United States, 394 U.S. 165, 171–76 (1969).

94. *Alderman*, 394 U.S. 165.

95. *Id.*

96. *Id.* at 171.

97. *Id.* at 175 n.9.

whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."[98]

The Court's assumption that the Title III drafters did not intend to alter the standing doctrine would make more sense if the doctrine were perfectly clear at the time. It would not, however, have been clear to the Title III drafters that "existent standing doctrine" did not include target standing, especially considering that *Jones* was cited in the legislative history.[99] Justice Fortas, dissenting from the Court's opinion on standing in *Alderman*, argued that the *Jones* decision had liberalized the standing doctrine to include target standing, and therefore target standing should apply to Title III.[100] Commentators have likewise argued that target standing is the only interpretation that "would have made sense to Title III legislators."[101]

Despite solid evidence in both the text and legislative history of Title III to the contrary, as well as the fact that the issue was never briefed in *Alderman* because Title III did not apply,[102] the *Alderman* dicta has become dispositive of the Title III standing issue in many jurisdictions.[103] This presents law enforcement officers with an incentive "to sacrifice the case against a minor criminal—by violating his rights—in the hopes of developing a successful prosecution against a major offender."[104]

In addition to limiting the definition of aggrieved persons to those whose conversations were actually intercepted, there is an additional standing issue that allows for evidence obtained in violation of the minimization order to be used by the prosecution in an investigation. The issue is squarely presented when a witness refuses to testify before a grand jury because he or she was summoned and

98. *Id.* at 171–72.

99. Legislative History, *supra* note 5, at 2179–80.

100. *Alderman*, 394 U.S. at 207, 208 n.10 (Fortas, J., concurring in part and dissenting in part).

101. *See, e.g.*, Goldsmith, *supra* note 6, at 60–61.

102. *Id.* at 57 (citing Brief for Petitioners, Alderman v. United States, 394 U.S. 165 (1968) (Nos. 133, 11, 197) and Brief for United States, Alderman v. United States, 394 U.S. 165 (1968) (Nos. 133, 11, 197)).

103. *Id.* at 122 (citing United States v. Dorfman, 690 F.2d 1217 (7th Cir. 1982); United States v. Williams, 580 F.2d 579, 583 (D.C. Cir. 1978); United States v. Houltin, 525 F.2d 943, 946 (5th Cir. 1976); United States v. Bynum, 513 F.2d 533, 534–35 (2d Cir. 1975)).

104. *Id.* at 61 (citing Welsh S. White & Robert S. Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 351 (1970)). Goldsmith further notes that "it is questionable whether Title III's civil and criminal penalties independently serve as effective deterrents." *Id.* at 61 n.380. It is the contention of this note that they do not.

questioned on the basis of information allegedly obtained from illegal wiretapping.[105] Section 2518(10)(a), which provides the remedy for aggrieved persons, does not include grand jury witnesses as parties who may move to suppress evidence.[106] The Supreme Court, however, held in *Gelbard v. United States* that § 2515 does provide grand jury witnesses with a "just cause" defense to a contempt charge for refusing to answer questions based on evidence obtained in violation of Title III,[107] but it has failed to provide any guidance on how to determine whether the evidence was in fact illegally obtained.[108] This is not an issue when there has been no court order at all, but if the surveillance was conducted pursuant to a warrant and the argument is that the minimization order was violated, then a mechanism for the witness to challenge the interception would be necessary. While the Court did not come up with a workable procedure, it indicated in *Gelbard* that a witness may not be able to assert this defense when the surveillance was conducted pursuant to a court order.[109]

The lower courts have attempted to craft procedures for witnesses who make *Gelbard* challenges to grand jury questions. Unless the unlawfulness of the government's surveillance was established at a prior judicial proceeding,[110] in order to challenge the minimization effort the witnesses would need some form of discovery so that the recorded conversations could be evaluated in context. Several circuit courts held that witnesses were not entitled to any such discovery, but in the event of a *Gelbard* challenge judges should review the surveillance documents *in camera* for facial invalidity.[111] The surveillance documents refer to the documents authorizing the surveillance, such as the warrant application and its supporting affidavits. Transcripts and recordings of the actual conversations are not included, therefore minimization violations cannot be assessed. Other circuits have allowed a limited challenge, requiring disclosure of the application for surveillance, supporting affidavit, court order, and government affidavit indicating the period of eavesdrop-

105. *Id.* at 66–67.

106. 18 U.S.C. § 2518(10)(a) (2006).

107. Gelbard v. United States, 408 U.S. 41, 46–47 (1972).

108. Goldsmith, *supra* note 6, at 69.

109. *Gelbard*, 408 U.S. at 61 n.22.

110. Such a determination would provide a grand jury witness with the *Gelbard* defense. *In re* Persico, 491 F.2d 1156, 1161 (2d Cir. 1974).

111. *Id.* at 1161–62; *In re* Gordon, 534 F.2d 197, 198–99 (9th Cir. 1976); United States v. Worobyzt, 522 F.2d 197, 198 (5th Cir. 1975).

ping so that the witness can mount a facial challenge.[112] These circuits do allow for *in camera* inspection or redaction of sensitive information.[113] This disclosure is also insufficient to allow the witness to challenge the officer's minimization because it does not include the transcripts. There is therefore no effective way for a grand jury witness to challenge a question because it is based on information gained by officers disregarding the minimization order on a court-ordered wiretap.

If the target of an investigation lacks standing to suppress any conversation to which he was not a party, it creates another scenario in which illegally obtained wiretap evidence can conceivably be admissible in court, and therefore another incentive for officers to intentionally fail to minimize.[114] Furthermore, being able to use recorded conversations to inform prosecutors in their questioning of grand jury witnesses who will not be able to prove that the officers disregarded the minimization order is a valuable investigative tool. Even if officers are aware that any recordings will most likely be inadmissible against the parties involved, there is always the chance they will be useful in another prosecution later, and it is therefore better to have the recordings, even suppressed, than not to have them at all.

As the discussion in Part II has made clear, there are two ways in which the government can make use of evidence obtained in violation of Title III in a criminal prosecution: to impeach testimony offered on direct examination, and against parties who lack standing to challenge the interception. It would clearly be in the best interests of law enforcement officers to record every possible conversation if the only potential downside to doing so was the suppression of conversations that should not have been intercepted. There are some measures, however, that can be taken against officers who do so. These measures include depriving the prosecution

112. Goldsmith, *supra* note 6, at 73 nn.441–42 (citing *In re* Grand Jury Proceedings (McElhinney), 677 F.2d 738 (9th Cir. 1982); *In re* Demonte, 667 F.2d 590, 599 (7th Cir. 1981); *In re* Harkins, 624 F.2d 1160, 1166 (3d Cir. 1980); *In re* Grand Jury Proceedings (Katasourous), 613 F.2d 1171, 1175 (D.C. Cir. 1979); Melickian v. United States, 547 F.2d 416, 420 (8th Cir. 1977); *In re* Lochiatto, 497 F.2d 803, 807–08 (1st Cir. 1974)).

113. *In re Lochiatto*, 497 F.2d at 807–08.

114. Goldsmith, *supra* note 6, at 124 ("For example, if police obtain a wiretap for Citizen Small Fry's telephone to intercept conversations of 'Citizen Small Fry and others as yet unknown,' knowledge that virtually all who speak with Citizen Small Fry may not raise minimization claims could prompt a decision to sacrifice the case against Citizen Small Fry and gain the benefit of indiscriminate listening to all of his calls involving 'higher ups.'").

of any evidence obtained from the wiretap in question, even conversations it would otherwise have been entitled to, criminal charges, and civil suits by the recorded parties against the offending officers. The next section discusses these disincentives.

B. The Disincentives to Failing to Minimize

Officers face three potential disincentives to minimization violations: wholesale suppression, civil suits, and criminal penalties. Wholesale suppression means that the minimization violation was so egregious that the court will not allow any of the recorded conversations in the government's case-in-chief, including those which were properly intercepted. Civil suits are suits by the recorded parties against the officers and the government for damages stemming from a violation of Title III. Criminal penalties for violations of Title III also exist;[115] however, these penalties are not relevant for the purposes of this note, because in practice officers are not prosecuted for failing to minimize. No court has ever found an officer guilty of willfully violating this provision due to a failure to minimize.[116] While these disincentives should theoretically work to deter minimization violations, they fail to effectively do so.

1. Wholesale Suppression

Carr's treatise on electronic surveillance states that wholesale suppression is rarely applied, as the prevailing view is that "'total suppression of electronic surveillance is not appropriate unless the moving party shows that there was a taint upon the investigation as a whole . . .' [and] [t]his circumstance [has] only rarely been found to have occurred."[117] Several circuits have held that only the conversations that were improperly intercepted need to be suppressed.[118] Even intentional minimization violations do not necessarily result in wholesale suppression, because the Supreme

115. Section 2511(1) provides that a person who violates the provisions of the act "shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)." 18 U.S.C. § 2511(1) (2006). Section 2511(4) in turn provides that, with exceptions, "whoever violates subsection (1) shall be fined under this title or imprisoned not more than five years, or both." *Id.* § 2511(4). Section 2511(5) reads that courts may issue an injunction for a first offense, and that if the violation is a second offense, "the person shall be subject to a mandatory $500 civil fine." *Id.* § 2511(5)(a)(ii)(A)–(B).

116. As far as the author is aware, no criminal case has ever even been brought under this section against an officer for a willful failure to minimize.

117. CARR & BELLIA, *supra* note 5, § 6:46.

118. *See, e.g.*, United States v. Mansoori, 304 F.3d 635, 648 (7th Cir. 2002); United States v. Charles, 213 F.3d 10, 22 (1st Cir. 2000); United States v. Ozar, 50

Court has adopted a standard of "objective reasonableness" for assessing minimization violations.[119]

The Supreme Court declined to address the appropriate scope of the suppression remedy in *Scott*;[120] however, the First Circuit has developed a test for wholesale suppression: "The critical inquiry is whether the minimization effort was managed reasonably in light of the totality of the circumstances."[121] This standard is hardly exacting: "The government is held to a standard of honest effort; perfection is usually not attainable, and is certainly not legally required."[122] Courts look to three factors as crucial in determining the reasonableness of the government's conduct: the nature and complexity of the suspected crimes, the thoroughness of the government precautions to bring about minimization, and the degree of judicial supervision over the surveillance practices.[123] Wholesale suppression is not required unless the minimization effort over the course of the entire period of interception was not managed reasonably;[124] therefore, even a few flagrant violations would not be enough for a court to suppress properly intercepted conversations if the officers made reasonable efforts to minimize overall.

Construction of this standard has been extremely lenient toward the government. In one First Circuit case, federal agents monitoring a wiretap in a narcotics investigation intercepted twenty-two calls between a suspect's wife and her attorney.[125] The defendants moved to suppress the entire wiretap on the ground that the agents had flagrantly disregarded both federal law[126] and the district court's minimization order.[127] The district court denied the motion, electing instead to suppress only the offending calls.[128] The First Circuit affirmed on the basis that "[t]he minimization effort, assayed in light of the totality of the circumstances, was managed reasonably."[129] In reaching this conclusion, the *Hoffman* court re-

F.3d 1440, 1448 (8th Cir. 1995); United States v. Hoffman, 832 F.2d 1299, 1309 (1st Cir. 1987); *see also* United States v. Baltas, 236 F.3d 27, 32 (1st Cir. 2001).

119. Scott v. United States, 436 U.S. 128, 137–39 (1978).

120. *Id.* at 136 n.10.

121. *Charles*, 213 F.3d at 22.

122. United States v. Uribe, 890 F.2d 554, 557 (1st Cir. 1989).

123. *See* United States v. London, 66 F.3d 1227, 1236 (1st Cir. 1995); *Uribe*, 890 F.2d at 557; United States v. Angiulo, 847 F.2d 956, 979 (1st Cir. 1988).

124. *Charles*, 213 F.3d at 22.

125. United States v. Hoffman, 832 F.2d 1299, 1307 (1st Cir. 1987).

126. S*ee* 18 U.S.C. § 2518(5) (2006).

127. *Hoffman*, 832 F.2d at 1307.

128. *Id.*

129. *Id.* at 1307–08.

jected the "suggestion that total suppression must be ordered to forestall future misconduct," holding that total suppression may be an appropriate remedy only "in a particularly horrendous case"[130] and where there is a "taint upon the investigation as a whole."[131] Courts construing this standard have not defined exactly what they mean by "a particularly horrendous case," because they have not yet held any activity to meet this test.[132]

The First Circuit is not alone in its reluctance to apply wholesale suppression. The Seventh Circuit has explicitly adopted the *Hoffman* standard.[133] In another recent case, only 25.6% of calls subject to minimization were actually minimized, but the Tenth Circuit found that this percentage was sufficient to support the conclusion that the government made out a prima facie case of reasonable minimization in conformity with Title III.[134] The Eighth Circuit has upheld the overall minimization effort as reasonable when the government had minimized 80 out of 1,200 phone calls, when only 400 of those calls were drug-related,[135] and when the government's logs showed 8,552 minimizations in the course of 15,024 minutes intercepted, with a total of only 2,952 minutes of pertinent conversations.[136] No circuit has explicitly rejected *Hoffman* in favor of a more stringent standard.

2. Civil Causes of Action

Aside from the unlikely threat of wholesale suppression, the other main reason a law enforcement officer would refrain from intercepting non-pertinent conversations is the possibility of civil liability. Title III does create a federal cause of action for willful violations of the statute;[137] however, it also provides that a good faith

130. *Id.* at 1309.

131. *Id.* at 1307.

132. *See, e.g.*, United States v. Charles, 213 F.3d 10, 22–23 (1st Cir. 2000).

133. United States v. Mansoori, 304 F.3d 635, 647–48 (7th Cir. 2002).

134. United States v. Yarbrough, 527 F.3d 1092, 1098 (10th Cir. 2008).

135. United States v. Losing, 560 F.2d 906, 909 (8th Cir. 1977).

136. United States v. Ozar, 50 F.3d 1440, 1448 (8th Cir. 1995).

137. 18 U.S.C. § 2520(a) (2006). The willfulness requirement is read into the civil portion because "no civil cause of action arises under Title III *unless* the criminal provisions of the statute have been violated." Citron v. Citron, 539 F. Supp. 621, 622 n.1 (S.D.N.Y. 1982) (emphasis in original) (quoting Kratz v. Kratz, 477 F. Supp. 463, 483 (E.D. Pa. 1979)); Anonymous v. Anonymous, 558 F.2d 677, 677 (2d Cir. 1977) (affirming dismissal of a civil action under Title III with the observation that "the facts alleged here do not rise to the level of criminal conduct intended to be covered by the federal wiretap statutes . . . ."). The criminal provision makes it a felony for anyone to "*willfully* intercept[ ], endeavor[ ] to intercept, or procure[ ]

reliance on a warrant or court order is a complete defense.[138] The statute authorizes compensatory and punitive damages, as well as reasonable attorney's fees.[139] Since compensatory damages for merely intercepting the phone call will be difficult to calculate, the statute sets the floor at $100 per day or $10,000 total, whichever is higher.[140]

The good faith defense is fairly liberally applied when the defendant is an officer acting pursuant to a warrant. For example, an officer who obtained a valid wiretap warrant under Tennessee state law, which did not require exhaustion of less intrusive alternatives to wiretapping and therefore violated Title III, was found to have acted in good faith even though he admitted he was fully aware of Title III and simply believed it did not apply.[141]

The deterrent effect of civil suits is also cut back against by qualified immunity. In claims under *Bivens*,[142] law enforcement officials have qualified immunity, which protects officer defendants from civil liability when a reasonable officer "could have believed" his or her conduct to be lawful.[143] This defense of qualified immunity was judicially created for § 1983 suits because "it is better to risk some error and possible injury from such error than not to decide or act at all."[144] When the Court decided in *Bivens* that a corollary civil action also existed against federal officers,[145] the defense was imported, though the Second Circuit added a subjective element.[146] To defend against a *Bivens* suit, officers would have to prove that they acted "in good faith and with a reasonable belief in

any other person to intercept or endeavor to intercept, any wire or oral communication . . . ." 18 U.S.C. § 2511(1)(a) (emphasis added).

138. 18 U.S.C. § 2520(d)(1).

139. *Id.* § 2520(b).

140. *Id.* § 2520(c)(2)(B).

141. Frierson v. Goetz, 99 F. App'x, 649, 652–53 (6th Cir. 2004).

142. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

143. *See, e.g.*, Hunter v. Bryant, 502 U.S. 224, 227–28 (1991) (per curiam) (holding that Secret Service agents are immune from damages liability for an unlawful arrest "if a reasonable officer could have believed" in the existence of probable cause); Anderson v. Creighton, 483 U.S. 635, 638, 641 (1987) (holding that qualified immunity extends to actions "a reasonable officer could have believed . . . to be lawful").

144. Scheuer v. Rhodes, 416 U.S. 232, 242 (1974).

145. *Bivens*, 403 U.S. at 397.

146. The Court in *Bivens* remanded the question of immunity to the Second Circuit. *Id.* at 397–98. On remand, the Second Circuit held that while there was no "immunity," a defense did exist for law enforcement officers. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972).

the validity of the arrest and search . . . ."[147] This subjective test would have rendered the qualified immunity question irrelevant in the Title III context, because the statute itself provides such a defense to any civil claims against officers.[148] Therefore, the immunity would have been coextensive with the statutory defense and would have indemnified only officers who could not be found liable anyway.

Unfortunately, the Supreme Court rejected the Second Circuit test and opted instead for an objective test for qualified immunity, wherein the only requirement for immunity to attach is that the action be objectively legally reasonable, assessed in light of the legal rules that were clearly established at the time the action was taken.[149] This is problematic in that it creates another barrier to civil plaintiffs recovering against officers. Plaintiffs must overcome both the statutory good faith defense of Title III by arguing that the individual officer was subjectively aware that he should not intercept a given conversation, and qualified immunity by arguing that the conversation was not sufficiently ambiguous for a reasonable officer to have believed the interception was within the minimization order. Qualified immunity would prevent the officer from having to pay any damages as long as a reasonable officer could have thought the conversation was within the scope of the order, even if the particular officer had no intention of minimizing, for example, like the officers in *Scott*.[150]

Of course, to protect officers from suits under Title III, the defense of qualified immunity must apply to actions under Title III in addition to *Bivens*. There is a circuit split as to whether officers have qualified immunity to civil suits for violations of Title III. Unlike in § 1983, Congress did enact a statutory defense to a suit under § 2520(a)—the aforementioned good faith defense.[151] Several courts have used this difference to distinguish the qualified immunity cases and hold them inapplicable to violations of Title III.[152] Others have held that qualified immunity does apply to violations of Title III, reasoning that protecting public officials from personal

147. *Bivens*, 456 F.2d at 1341.

148. 18 U.S.C. § 2520(d) (2006).

149. Anderson v. Creighton, 483 U.S. 635, 638–39 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982)).

150. Scott v. United States, 436 U.S. 128 (1978); *see also supra* notes 29–31 and accompanying text.

151. 18 U.S.C. § 2520(d).

152. *See, e.g.*, Berry v. Funk, 146 F.3d 1003, 1013 (D.C. Cir. 1998); *see also* Davis v. Gracey, 111 F.3d 1472, 1481–84 (10th Cir. 1997) (implying that the good faith defense under Title III is a separate defense from qualified immunity).

liability for violations of constitutional rights that are not clearly established is no different than protecting them when they violate statutory rights that are not clearly established.[153] In these circuits, there is even less of a deterrent effect on individual officers because they would not be liable for damages from civil suits.

Even where qualified immunity does not exist in the Title III context, or in the rare case where it can be overcome, there is an additional barrier to deterrence from civil suits. In *Bivens* actions, officers are almost always indemnified by the government for any civil liability,[154] meaning there is no actual deterrent effect on the officers themselves. Practically speaking, "indemnification is a virtual certainty."[155] Since the officers are not responsible for either litigating the suit or for paying the judgment, they are unlikely to be deterred by the threat of a civil suit. It is unclear whether this indemnification also applies to officers found liable for violations of Title III,[156] but there is no conceivable policy rationale for indemnifying law enforcement officials who are found liable under *Bivens* that would not apply equally to officers found liable for violations of Title III.

Due to these barriers to holding officers personally liable, the threat of civil suits provides a negligible deterrent effect on officers contemplating an intentional minimization violation. For an officer to actually have to pay damages, a court would have to find that he did not act in good faith, which would not happen in every case of actual bad faith. Bad faith is often difficult to prove, and the burden in a civil action is on the plaintiff. Courts would also have to find that qualified immunity did not apply because not only did the officer not act in good faith, but also that no reasonable officer could have intercepted that conversation acting in good faith. Even if that were to happen, the officer may still be indemnified by the govern-

153. *See, e.g.*, Tapley v. Collins, 211 F.3d 1210, 1216 (11th Cir. 2000); Blake v. Wright 179 F.3d 1003, 1013 (6th Cir. 1999); Davis v. Zirkelbach, 149 F.3d 614, 619–20 (7th Cir. 1998); *In re* State Police Litig., 88 F.3d 111, 124–27 (2d Cir. 1996) (acknowledging that qualified immunity may apply in the Title III context depending on the facts).

154. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 76 (1999) (In *Bivens* cases, the federal government "indemnifies its employees against constitutional tort judgments or settlements (in the rare instances in which a *Bivens* claim results in a monetary liability) and takes responsibility for litigating such suits . . . .").

155. *Id.* at 77.

156. Because indemnification happens after a civil judgment is rendered, and since civil judgments against law enforcement officers for violations of Title III are basically nonexistent, there is no precedent for this situation.

ment for any damages he was required to pay.[157] Given how understanding courts generally are when examining minimization violations,[158] these suits are extremely unlikely to get past even the first of these three hurdles. This difficulty is demonstrated by the dearth of plaintiffs attempting to hold law enforcement officers civilly liable for minimization violations (as opposed to holding them liable for placing a wiretap without a warrant). This author was unable to find a single such case.

To briefly summarize the analysis thus far, there are two ways in which improperly minimized recordings, even if suppressed, are useful to the prosecution—to impeach testimony offered on direct examination and against parties who lack standing. On the other side of the coin, there are two disincentives to recording such conversations—wholesale suppression of the wiretap and civil damages. Both of these disincentives are rarely applied in the context of minimization violations and require the aggrieved party to prove that the officer acted in bad faith, which, given the ambiguity of these conversations, is extremely difficult. Therefore, a rational officer would fail to adhere to the minimization order. The next section proposes legal reforms that would fix the incentive structure and encourage a rational officer to follow the law.

III.
THE PROPOSED SOLUTION

The suggestions in this section would solve an aspect of the problem discussed above if used individually, but none of them are mutually exclusive with the others. To fix the incentive structure, it is not necessary to remove all the incentives and increase all the disincentives for failing to minimize; it is only necessary to ensure that the costs outweigh the potential benefits. The reluctance of courts and legislatures to impose harsh sanctions on individual officers is understandable. The holding of *Scott*, while problematic due to its lack of deterrent effect on minimization violations, was consistent with other areas of Fourth Amendment law and relieves lower courts of the burden of determining whether an officer acted in good faith. It is therefore more reasonable to remove the incentives for failing to minimize than to increase the costs. By making

157. It is possible that there would be some internal penalties enforced on the officer if the FBI had to pay civil damages. There is no standard policy on this, and no such penalties are listed in the FBI's Domestic Investigations and Operations Guide. *See* FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 193–200 (2008). This would likely be handled on a case-by-case basis.

158. *See supra* notes 125–36 and accompanying text.

improperly minimized wiretap evidence inadmissible in court, rendering it unusable to prosecutors in grand juries, and expanding the category of people who have standing to challenge the interception, Congress can turn intentional minimization violations from rational to irrational decisions.

The first problem that needs to be solved is the impeachment issue. There are two policy arguments in favor of allowing such evidence to be used for impeachment purposes on which Congress presumably relied when it crafted the legislative history of Title III.[159] The first is that there is a negligible marginal deterrent effect on police officers from suppressing the evidence for impeachment purposes.[160] This is not the case in the Title III context because such conversations cannot be obtained by legal means, so suppressing them in the prosecution's case-in-chief provides no deterrent effect. This also means that suppressing these conversations for impeachment purposes does not create a deterrent effect either; however, such suppression does remove an incentive to violate the minimization order, allowing the true disincentives such as wholesale suppression and civil damages to be more effective.

The more powerful argument against suppression is that the harms inflicted on the fact-finding process by perjury are so severe that courts cannot grant a license to perjure without fear of contradiction.[161] What this argument fails to take into account is that, had officers followed the law, the prosecution would also be unable to contradict the perjury. With physical evidence, an illegal search is not necessarily a but-for cause of the discovery,[162] therefore a mistake by officers that leads to suppression can "give" the defendant a license to perjure himself that he would not have had otherwise. Since improperly minimized conversations should never and could never have been recorded legally, preventing their use in contradicting perjury does not give the defendant a windfall; it merely puts the prosecution in the same position to contradict the perjury that it would have been in had it followed the law.

The second change that needs to be made is to incorporate target standing into Title III. This could be done by courts if they chose not to follow the *Alderman* dicta, or by Congress if it amended the statute to more clearly reflect target standing. This would allow the target of an investigation to move to suppress a recorded conversation to which he was not a party. Eliminating the standing re-

159. *See supra* notes 68–72 and accompanying text.
160. *See* Harris v. New York, 401 U.S. 222, 225 (1971).
161. *See* United States v. Havens, 446 U.S. 620, 626–27 (1980).
162. *See* Amar, *supra* note 33, at 793–94.

quirement entirely is unnecessary, and would "impose a disproportionate penalty upon law enforcement for a single violation and would potentially create insuperable taint problems."[163] It would be a rare situation in which an officer listening to a wiretap made the decision to record a conversation in violation of the minimization order because he thought it could be used against someone who was neither a party to the conversation nor a target of the investigation; therefore, such an interception is unlikely to have been made in bad faith. Both of these solutions expand the scope of the suppression remedy to remove the incentive to violate the minimization provision.

In the alternative, Congress could elect to allow improperly minimized evidence to be used by the prosecution in these circumstances, but increase the sanctions on law enforcement officers for deliberate violations. This could be accomplished by lowering the threshold for plaintiffs to overcome the good faith defense and qualified immunity in civil suits and lowering the standards for criminal prosecution of offending officers, or more liberally applying the standard for wholesale suppression. In addition, state police departments and the FBI could impose internal sanctions on officers they find have failed to minimize.

The standard for invoking wholesale suppression also needs to be changed. Prior to *Scott*, there were multiple approaches to minimization violations: "total suppression of the entire product of wire interception, partial or limited suppression of only those conversations that should not have been intercepted, and a double-standard remedy that turns on the nature of the deviations."[164] The double-standard remedy that turns on whether the interception was an intentional minimization violation is the most narrowly tailored to the problem of intentional failures to minimize. However, it is also the most difficult to enforce because it requires courts to determine the officer's intent. After *Scott*, the subjective intent of the officers conducting the minimization is considered irrelevant[165] and the double-standard remedy is therefore no longer used. Given the incentives to record conversations that are not within the scope of the minimization order discussed in Part II, the double-standard remedy should be employed to deter intentional minimization violations. This could be accomplished either by a legislative amendment to Title III or by the Supreme Court if it elected to

163. Goldsmith, *supra* note 6, at 61.

164. Ronni L. Mann, Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411, 1435 n.116 (1974).

165. Scott v. United States, 436 U.S. 128, 138 (1978).

overrule *Scott*. While this would require courts to determine whether the interceptions were made in good or bad faith, these distinctions are not impossible to make. The relevant factors would be whether the officers properly minimized in other recordings on the same wiretap, whether they can explain to the court's satisfaction why they thought the recorded conversation was relevant, and the scope and nature of the criminal enterprise under investigation.

The most easily implemented and applied solution is internal discipline by law enforcement agencies. Law enforcement organizations could apply penalties such as fines, suspensions, demotions, and removal from the case to officers who violate the minimization orders. This imposes the fewest transaction costs on the legal system and has the additional benefit of being directly applied to the law enforcement officers who violated the minimization order. Critics of the exclusionary rule are quick to point out that its deterrent effect on police misconduct is negligible because it is unclear whether suppression of evidence is even noticed by the law enforcement officers who violated the Constitution, who have most likely moved on to another case.[166] Direct sanctions on the officers have no such feedback problem.

CONCLUSION

Suppressing illegally obtained wiretap evidence in the government's case-in-chief fails to incentivize officers to take care to avoid minimization violations. Therefore, the law must provide some supplemental measure to disincentivize police officers from intentionally violating Title III's minimization requirements. In many jurisdictions, law enforcement officers can blatantly disregard the minimization requirement and still introduce conversations against people who were not parties to the phone call or to impeach a witness, with little concern that their actions might lead to wholesale suppression or personal liability. This is an unacceptable situation for two reasons. It erodes the rule of law to incentivize those who are sworn to enforce our laws to break them in the process, and it results in a violation of privacy and the chilling of protected speech that Congress wrote Title III specifically to avoid.

166. *See, e.g.*, Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 54–56 (1994); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 675 (1998).

To fix the incentive structure, several reforms are needed. Since it is difficult to increase the disincentives to minimization violations on law enforcement officers without severely hindering their investigative efforts, Congress and the courts should attempt to eliminate the scenarios in which improperly minimized conversations are helpful to the prosecution. This can be done with two legislative amendments to Title III. The first should supersede the *Alderman* dicta and grant standing to challenge a minimization violation to the targets of the investigation. The second should supersede the language in the legislative history that implies that evidence obtained in violation of Title III should be admissible for impeachment purposes. Finally, police departments and the FBI should impose direct sanctions such as suspensions and negative performance reviews on law enforcement officers who fail to properly minimize. Without these reforms, the incentive structure will continue to encourage officers to violate the minimization provision of Title III, which is critical to the statute's constitutionality and to preserving the First and Fourth Amendment rights of American citizens.

STATE COURTS AND THE PRESUMPTION AGAINST BANKING PREEMPTION

*JARED P. ROSCOE**

Recent Supreme Court decisions have highlighted the complexity of federal preemption of state banking law. Yet the Court has not answered a core question with which state and federal courts have struggled during at least the previous quarter century: What should be the role of the presumption against preemption in banking law, given the history of dual state and federal regulation of the banking sector? State and federal courts have provided sharply different answers to this important issue of statutory interpretation, raising the concern for litigants that different forums may not only produce different outcomes, but also employ different methods of statutory construction while interpreting the same statutes.

This Note first makes a policy argument for the dual banking system by highlighting the problems of regulatory arbitrage and agency capture, as recently observed during the financial crisis of 2008. I then address the salient differences between banking and other federally regulated industries also subject to preemption, arguing that the presumption against preemption is particularly apt in the banking context.

Next, this Note analyzes the academic literature surrounding the presumption against preemption. I argue that the presumption is best justified as a bulwark against federal intrusion into state regulatory autonomy, particularly state common law—an interest that only a few, relatively powerless interest groups advocate for at the national level.

Given the little-discussed role of state courts in the interpretation of federal statutes, this Note attempts to provide explanations and a theoretical framework for the apparent differences between state and federal court preemption determinations. From an institutional competence and federalism-enhancing viewpoint, state court judges may be the only institutional actor capable of voicing the unique state regulatory interests at stake in preemption determinations, and therefore it is less surprising that they adopt the presumption against preemption more often—and in stronger terms—than their federal counterparts. State judges, who are often former state legislators, frequently sit in common law and may therefore be more comfortable drawing

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upon policy considerations than federal judges. Furthermore, consumer groups are substantial contributors to state judicial elections, which likely increases the pressure on state judges to not preempt state consumer lending suits. While this theory may have explanatory power, the disjunction between state and federal court approaches to banking preemption yields the troubling result that parties may come to expect different outcomes in different venues, thereby increasing pressure for the federalization and harmonization of preemption determinations. Nevertheless, it is precisely federalism and regulatory variety that is at stake in preemption litigation.

INTRODUCTION

We are accustomed to hearing the principle that a law should have the same meaning whether enforced in state or federal court.[1] There appears to be unanimity among the federal circuit courts as to how to interpret state law: they should interpret state law as they anticipate the state's highest court would rule.[2] However, the practice of law suggests that the assumption of parity between state and federal courts may in fact be misguided. In a seminal article, Burt Neuborne claimed that federal courts were actually more likely to secure federal civil rights than state courts.[3] His article sparked a debate with wide-ranging effects on the way we conceptualize the differences between state and federal courts' approaches to constitutional issues.[4] Of course, the stakes were high for Neuborne, a former ACLU lawyer, who was writing when the constitutional footing of civil rights had tenuous purchase. Since the arrival of more conservatives on the Supreme Court, however, today federal civil rights may be more likely to be vindicated in state courts.[5]

Similarly, in Commerce Clause litigation, scholars announced the advent of a states'-rights revolution with the Rehnquist Court, following the *United States v. Lopez*[6] decision.[7] The consensus today, however, is that the picture is more nuanced: in some areas, the Court has protected state autonomy interests vis-à-vis the federal government; in others, the Court has been surprisingly pro-federal

1. *See* Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) ("In essence . . . in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.") (Frankfurter, J.).

2. *See* Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1555 & n.258 (2006) (citing federal circuit court decisions holding that the courts must anticipate how the state supreme court would rule on state law).

3. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119–20 (1977).

4. *See* Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 797–98 (1995) (noting the continuing debate on state and federal constitutional parity).

5. *See, e.g.*, Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 337 (1988)*; see also* Neuborne, *supra* note 4, at 799 (acknowledging arguments that the federal forum is today less attractive to those seeking to validate federal rights, but arguing that federal courts are still the best forum).

6. United States v. Lopez, 514 U.S. 549 (1995).

7. *See, e.g.*, Charles E. Ares, Lopez *and the Future Constitutional Crisis*, 38 ARIZ. L. REV. 825, 825–26 (1996).

government.[8] In contrast to the rollbacks of federal reach under the Commerce Clause,[9] the Rehnquist and Roberts Courts have moved by and large in the opposite direction in their preemption jurisprudence, displacing state substantive law with federal law and thereby restricting state autonomy.[10] The most plausible positive theory for this seeming disparity between the treatment of constitutional and statutory federalism is that the Court is not predominated by conservatives per se, but by business conservatives.[11] Since the Rehnquist Court, the conservative justices on the Court have tended toward preferring business interests over states' rights when forced to choose.[12] These conservatives, such as Justice Thomas, more frequently vote against preemption on the traditional federalist basis of preserving state autonomy.[13] The business

8. *See, e.g.*, Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 23 (2004) ("By and large, the five Justices making up the Rehnquist Court's usual majority on federalism issues . . . have opted for federalism doctrines that aggressively protect state sovereignty. At the same time, they have displayed relatively little sympathy for state autonomy, particularly in cases involving the preemption of state regulatory authority."); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 569–70 (2003).

9. *See, e.g.*, *Lopez*, 514 U.S. 549 (denying the federal government the ability to criminalize gun possession on federal property); United States v. Morrison, 529 U.S. 598 (2000) (ruling that the Commerce Clause does not support the Violence Against Women Act's civil remedy provision).

10. *See* Young, *supra* note 8, at 4 ("The majority's view neglects concerns for state regulatory autonomy and overlooks the potential of 'process' limits on federal authority."); *see also* Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 57 (2006) (finding that slightly over half of the Rehnquist Court preemption cases were decided in favor of preemption); Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612–13 (2007) ("Between the 1983 and 2003 Terms the Supreme Court decided 127 cases involving federal preemption of state law, finding state law preempted approximately half of the time.").

11. By "constitutional federalism," I mean the reach of the federal government's powers under the Commerce Clause to regulate a wide area of American life. By "statutory federalism," I refer to the increasing scope of types of federal law that displace state law.

12. *See* Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 120 (2008) (suggesting that the Rehnquist Court and the Republican party have sacrificed states' rights for pro-business regulation when the two conflict). Thomas may be the lone true states' rights federalist of the conservatives currently on the Court. *See generally* Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. L. & LIBERTY 63 (2010).

13. *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1211–17 (2009) (Thomas, J., concurring) (detailing his opposition to obstacle preemption on federalism grounds).

conservatives—best exemplified by Justice Scalia—often vote to preempt state law on policy grounds favoring a national, unified market.[14]

Preemption, the displacement of state substantive law by federal law, is based in the Supremacy Clause, which states that federal law "shall be the supreme Law of the Land."[15] In making a preemption finding, a court looks at the federal command (whether from an agency regulation, federal statute, or other source) and determines whether this command should control if it conflicts with an existing state command (whether from state or local regulation or statute, or from a state court judgment).[16] This inquiry is difficult because the court must determine the scope of the federal and state commands: What did each issuing authority intend to cover with its language?

The toughest preemption cases are where the facts present situations on the outer edges of the arguably conflicting commands. Given the difficulty of reading the two commands together—particularly with federalism looming in the background—predicting outcomes is difficult because the result is so dependent on the specifics of the case.[17]

Because the facts are so important to the resolution of a preemption inquiry, deciding cases in a factually and legally complex area, such as banking regulation, is especially difficult. Banking law is filled with overlapping statutes and regulations at all levels of

14. *See, e.g.*, *id.* at 1217–18 (Alito, J., dissenting, joined by Scalia, J. and Roberts, C.J.) (dissenting on the grounds that, despite the history of a federalism mix of regulatory power between the states and federal government in the area of pharmaceuticals, pharmaceutical tort claims for failure to warn should be preempted); *see also* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. REV. 1353, 1357 (2006) ("Rather than standing as an ally of state autonomy against the encroachments of the federal behemoth . . . the Court appears to be a willing partner of Congress in providing federal oversight to state interference with the national market.").

15. U.S. CONST. art. VI, cl. 2.

16. *See* Altria Group v. Good, 129 S. Ct. 538, 543 (2008) ("Consistent with that command, we have long recognized that state laws that conflict with federal law are 'without effect.'" (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981))).

17. The contrasting factual narratives of the majority and dissent in *Wyeth v. Levine* are emblematic of the importance of facts in the preemption inquiry. *Compare Wyeth*, 129 S. Ct. at 1190–93 *with Wyeth* 129 S. Ct. at 1219 (Alito, J., dissenting). *See also* Robert Barnes, *Court Says Mazda Can Be Sued Over Seat-Belt Death*, WASH. POST, Feb. 23, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022305856.html ("The contrasting [preemption] decisions [of the Supreme Court] show the difficulty in predicting the court's jurisprudence . . . and underscore the importance of the specifics of each case.").

state and federal government. The banking preemption determination is more difficult than others because it often involves more than two conflicting sources of law. Although the complexity of the determination is daunting, it provides a fertile area for observing the different interpretive approaches between state and federal courts.

Although much attention has been given to federal court preemption analyses, there is a relative dearth of literature about state courts' approaches to preemption analysis.[18] Yet state courts carry out over 90 percent of all judicial business in the United States.[19] A systematic understanding of state court approaches to preemption is therefore crucial, as it has serious implications for many businesses, consumers, and citizens who appear in state court. But more importantly, preemption cases are the battleground where the line between state and federal power is drawn. In the absence of express guidance by Congress, state and federal court judges, as much as any other actor, determine the balance of regulatory power.

This Note examines the deployment of state and federal court preemption analyses in the banking context, particularly the use of the presumption against preemption. The Supreme Court has often applied the presumption against preemption as a sort of heuristic: when Congress legislates in a field "which the States have traditionally occupied," there is a presumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[20] Because the Supreme Court has not definitively addressed

18. Some empirical analysis has been done to date on the differences between state and federal courts in their approaches to products liability preemption, concluding that federal courts are "considerably more likely to find preemption than are state courts." Keith N. Hylton, *Preemption and Products Liability: A Positive Theory*, 16 SUP. CT. ECON. REV. 205, 229 (2008) ("Of the total claims, federal courts found 61 percent preempted while state courts found 42 percent preempted."). Professor Catherine Sharkey recently added to the discussion with an examination of state and federal courts' approaches to product liability preemption. *See* Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013 (2007). A student Note has also recently contributed to the discussion in the medical device context. *See* Samuel Raymond, Note, *Judicial Politics and Device Preemption*, 5 N.Y.U. J. L. & LIBERTY 745, 760–64 (2010) (concluding parity exists between state and federal courts in preemption outcomes in the medical device context after *Riegel*).

19. *See* Shirley S. Abrahamson, Chief Justice, Wis. Supreme Court, The Ballot and the Bench, Address at the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice (Mar. 15, 2000), *in* 76 N.Y.U. L. REV. 973, 976 (2001).

20. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

how the presumption applies to banking,[21] lower federal courts and state courts have broader leeway in how to apply it.

This Note first examines the history of the presumption against preemption and its application to the banking sector. Part II argues that prudential concerns of agency capture and structural deficiencies in the regulatory mix point toward the value of the presumption. Part III reviews recent state and federal court decisions for differences in the applications of the presumption. Part III finds that state courts embrace the presumption against preemption in the banking context more often and in stronger language than federal courts. State courts continue to embrace the presumption even after circuit courts have held the presumption to be inapplicable in the banking context. Finally, Part IV discusses possible explanations for the discrepancy between state and federal courts. Part IV concludes that state court judges are different from their federal counterparts: they have different competencies, weaknesses, and institutional values that both explain and problematize the differences in their approach to interpretation of federal statutes. While the roles that Congress, federal agencies, and federal judges play in the legal conversation on preemption have been analyzed in great detail, this Note aims to recognize the role of state judges. This Note concludes with a review of how the recent banking reform embodied in the Dodd-Frank Act might affect banking preemption analyses in the future.

I.
HISTORICAL ANALYSIS OF BANKING PREEMPTION

A. A Preemption Primer

There are two basic ways that federal law preempts state law. The first is through express preemption, in which Congress declares that the statute supersedes state law on the same subject matter.[22] The second is implied preemption, in which federal law displaces state law even though Congress did not expressly state its intention to do so. There are two types of implied preemption. Implied preemption may arise when Congress's legislation is so extensive as to leave no room for state legislation on the same subject—

21. *See* Cuomo v. Clearinghouse Ass'n, L.L.C., 129 S. Ct. 2710, 2720 (2009) ("We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act."); Watters v. Wachovia Bank, 550 U.S. 1 (2007) (avoiding addressing the presumption against preemption in the banking context).

22. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

or "field preemption."[23] The other form of implied preemption is "obstacle preemption," also known as "conflict preemption," in which a judge finds the state law is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[24] A narrower version of obstacle preemption occurs when compliance with both state and federal law is actually impossible.[25]

Crucially, the Supreme Court has noted that federal regulation can preempt state law as well.[26] This means that even if Congress were silent on the preemption issue in its legislation, rules promulgated by the agency charged with implementing the relevant act may nonetheless preempt the state substantive law, either expressly or impliedly. An agency may also interpret the scope of the relevant act's express preemption clause, although the amount of deference the Supreme Court should grant these agency interpretations is contested.[27]

A court's analysis of the applicability of the presumption against preemption is frequently tied up in questions of agency deference. The key question is whether agency preemption statements should be granted strong *Chevron* deference—under which deference is granted if the agency's interpretation of a statute is reasonable[28]— or *Skidmore* deference,[29] a more searching inquiry into the

23. *Santa Fe Elevator Corp.*, 331 U.S. at 230.

24. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Fid. Fed. Sav. & Loan Ass'n v. Cuesta, 458 U.S. 141, 153 (1982) (Field preemption exists when federal regulation of a subject is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."). Field preemption is particularly notable in the banking sphere, in which the complexity and detail of regulation leads to many claims of field preemption. *But see* Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 717 (1985) ("But merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.").

25. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

26. *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153–54.

27. This is heavily contested in *Cuomo* and is likely an issue to which the Court will return. *See* Cuomo v. Clearinghouse Ass'n, L.L.C., 129 S. Ct. 2710, 2717 (2009) (finding that the agency's interpretation of the statute is unreasonable and not granting Chevron deference); *id.* at 2723 (Thomas, J., concurring in part and dissenting in part) (finding that the OCC's interpretation was reasonable and should be granted Chevron deference); Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009) (not deferring to agency statement under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because preamble to regulation containing statement did not pass notice and comment); *see also* Sharkey, *supra* note 12, at 106 n.230 (interpreting *Cuomo* as a possible *Chevron* Step One case).

28. Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984).

persuasiveness of the agency's position.[30] Many in the academic community have favored the *Skidmore* model as the proper framework for agency deference in the preemption context.[31] Scholars have noted which factors courts should consider in determining whether to grant deference.[32] Although this Note deals with matters of deference to agency preemption statements, a full treatment of state court analysis of agency deference is outside the scope of this Note, but is another area ripe for future research.

The Supreme Court has said that "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case."[33] Accordingly, the Court noted, "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'"[34] The first step in attempting to divine congressional intent is examining the text of the statute.[35] Yet statutory language created ex ante cannot perfectly track the myriad situations in which federal law and state law overlap. As noted above, federal law can preempt not only state statutes (and local ordinances and state regulations) but also state common law. In the products liability context, Food and Drug Administration (FDA) medical device regulatory approval, undertaken pursuant to the Food Drug and Cosmetics Act (FDCA), may preempt state tort suits based on traditional common law negligence principles.[36] In the case of express preemption, where Congress has signaled an at-

29. *Skidmore*, 323 U.S. 134.

30. For articles discussing whether *Chevron* or *Skidmore* deference is appropriate for agency preemption statements, see Nina A. Mendelson, Chevron *and Preemption*, 102 U. MICH. L. REV. 737 (2004); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 491–98 (2008).

31. *See* Mendelson, *supra* note 30, at 797–98; Sharkey, *supra* note 30, at 491–98. *But see* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1938–39, 1949 (2008) (arguing that an improved regulatory process is more important than state regulatory autonomy); Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L. no. 4 (2006), http://www.bepress.com/jtl/vol1/iss1/art4.

32. *See* Sharkey, *supra* note 30, at 457–501 (arguing that courts should consider the agency record and determine whether the agency analyzed the precise risk at issue).

33. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation marks omitted).

34. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166–67 (1989) (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984)).

35. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993).

36. *See, e.g.*, Riegel v. Medtronic, Inc., 552 U.S. 312 (2008).

tempt to preempt at least some state law, courts (and increasingly agencies) must define the limits of both the command to be preempted and the statutory preemptive text, often with little help from legislative history.

Further complicating the interpretive task is the fact that preemption clauses are frequently general and open to interpretation, giving plenty of room for a judge's substantive predispositions. Consider the preemption clause in the Employee Retirement Income Security Act (ERISA), which says the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . . "[37] Courts have struggled to find a consistent interpretation of "relate to" in its ERISA preemption doctrine, and consequently ERISA cases clog the Court's docket.[38] Therefore, decisions rely on policy considerations, such as the cost of complying with 50 state commands, to determine the reach of "relate to."[39] More troubling is that, in ERISA, as in the FDCA,[40] Congress included both a preemption clause and a saving clause, which saves from preemption state law "which regulates insurance, banking, or securities."[41] The cumulative effect of vague statutes is to give courts significant berth in preemption decisions since the range of reasonable interpretations of the statute and Congress's intent is broad. Judges, therefore, allocate power between the states and the national government on a case-by-case basis with little guidance except stare decisis and the input of self-interested agencies.

37. 29 U.S.C. § 1144(a) (2006).

38. *See* Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring) (arguing that the plain meaning of "relates to" is an unacceptable method to resolving cases, as it would amount to massive preemption far beyond what is sensible); *see also* Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105, 182 (2001) ("ERISA preemption issues continue to befuddle attorneys and judges, and continue to clog federal court dockets."); Roderick M. Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 41 (2007) ("The gist of the whole preemption scheme, in short, hinged on a two-word phrase—"relate to"—that the Act otherwise left entirely undefined.").

39. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 149–50 (2001) (finding preemption in part on the grounds that compliance with 50 state standards is too burdensome to be what Congress intended).

40. 21 U.S.C. § 360k(a), (b) (2006).

41. 29 U.S.C. § 1144(b)(2)(A) (2006).

It is no surprise that preemption analysis has been referred to as "a muddle."[42]

Yet as complex and unmoored as the preemption inquiry generally is, the task is even more so in the area of banking regulation because of the long and complicated history of state and federal regulatory presence in which, in addition to common law causes of action, multiple statutes overlap and multiple agencies have jurisdiction of separate aspects of banking and banking-like activities.[43] Trying to map the reach of overlapping regulators and statutes is enough to give even the most competent court a headache.[44] Even though much attention has been paid to medical device and pharmaceutical preemption under the FDCA, the interpretive task is more burdensome under the various banking statutes. While in the medical preemption context there is essentially one federal regulator who regulates medical products, in the world of banking preemption,[45] a number of federal regulators affect the banking industry. Furthermore, the FDA is the sole ex ante pharmaceutical regulator in the country, federal or otherwise; in contrast, all fifty states have state banking departments and insurance departments that regulate state-chartered banks and insurers.[46]

B. The Presumption Against Preemption

The presumption against preemption has existed since the mid-twentieth century, perhaps not coincidentally after the ex-

42. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) ("Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle.").

43. *See generally* Hal S. Scott, *Federalism and Financial Regulation*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 139 (Richard A. Epstein & Michael S. Greve eds., 2007) (describing the history of the dual banking system). "Banking-like activities" include activities by, for example, mutual funds or hedge funds that resemble loan-making, undertaken by institutions that are not banks nor regulated in the same way as banks.

44. *See generally* Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977). For a detailed map, though now outdated, representative of the complexities of overlapping jurisdictions, see *id.* at 7.

45. This is particularly true before the Dodd-Frank Wall Street Reform and Consumer Protection Act, which mandated some regulatory consolidation. Nevertheless, there remains significant regulatory overlap. A graphic representation of the overlapping jurisdictions resulting from the Dodd-Frank reform can be seen at *Dodd-Frank Infographic*, CENTER FOR CAPITAL MARKETS COMPTEITIVENESS, http://www.centerforcapitalmarkets.com/resources/dodd-frank-wall-street-reform-and-consumer-protection-act-of-2010-regulatory-authority/ (last visited Apr. 14, 2011).

46. The plethora of state and federal agencies relevant to banking interpretation make an analysis of *Chevron* deference as performed by state courts a germane area of inquiry; as noted above, it is, outside the scope of this Note.

panded reach of the federal legislative powers post-New Deal. The presumption first appeared in the Supreme Court case *Rice v. Santa Fe Elevator Corp.*,[47] which involved a dispute over the state laws of Illinois in setting unjust grain storage rates. The Court wrote that when Congress legislates in a field "which the States have traditionally occupied" there is a presumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[48]

Courts have at times refused to apply the presumption. For example, the Supreme Court has stated that the presumption should not be applied when the "[s]tate regulates in an area where there has been a history of significant federal presence."[49] Justice Thomas argues that the presumption should only apply to implied preemption cases because Congress has not spoken at all to the issue at hand.[50] It is therefore often claimed that the presumption is used ad hoc, or when a court sees an advantage to invoking it.[51] Even when it is used, commentators have argued, it may not have any real effect on the outcome.[52]

The exact doctrinal standing of the presumption against preemption is unclear.[53] In *Riegel v. Medtronic*, an express preemption

47. 331 U.S. 218, 230 (1947).

48. *Id.*

49. United States v. Locke, 529 U.S. 89, 108 (2000).

50. *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 457 (2005) (Thomas, J., concurring) ("That presumption does not apply . . . when Congress has included within a statute an express pre-emption provision."); *see also* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 545 (1992) (Scalia, J., concurring in judgment in part and dissenting in part) ("[T]hat assumption dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the *scope* of that pre-emption is meant to be."); *see also* Nelson, *supra* note 42, at 291–92, 298–303.

51. Sharkey, *supra* note 12, at 68 (arguing the presumption against preemption is rooted in "political or policy predilections including affinities for regulation writ large and preferences toward bureaucratic versus common law jury enforced norms").

52. *See* Sharkey, *supra* note 30, at 458 ("Here, I join a veritable chorus of scholars pointing out the Court's haphazard application of the presumption. In the realm of products liability preemption, the presumption does yeoman's work in some cases while going AWOL altogether in others."); *see also* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1318–24 (2004) (arguing that the Court may be applying a presumption of preemption instead of a presumption against preemption).

53. Similarly contested is the level of deference a court should give an agency statement of preemption. So far, the Supreme Court has generally granted *Chevron* deference to agency preemption statements that have passed through notice and comment, and the Supreme Court in *Wyeth* rejected the notion that agency preemption statements that have not passed notice and comment procedures should

case in the FDCA context, the Court did not apply the presumption.[54] In 2009, in *Wyeth v. Levine*, an implied preemption case also in the FDCA context, the Court used the presumption,[55] whereas in *Geier*, nine years prior, it did not.[56] In the most recent implied preemption case, *Williamson v. Mazda*, a unanimous Court did not mention—let alone apply—the presumption in an automobile design defect case.[57]

C. The Uniqueness of Banking Preemption: The History of Dual Banking

If the salience of the presumption against preemption is difficult to ascertain in preemption decisions generally, the difficulties are exacerbated in the banking preemption context because there is a history of dual federal and state regulation of the banking industry. In contrast, the regulation of medical devices and pharmaceuticals has been the prerogative of the federal government for over a century. No significant and comprehensive state agency regulation of medical products existed prior to the creation

receive deference. *See* Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009). However, there are arguments that perhaps even agency preemption statements that have passed notice and comment should nonetheless be awarded only *Skidmore* deference. *See, e.g.,* Mendelson, *supra* note 30 (arguing that agencies do not have the institutional competence to decide issues of federalism and therefore should not be granted deference). Justice Scalia in particular may be caught between Scylla and Charybdis: his commitments to textualism and to preemption are at loggerheads in the obstacle preemption category. This is most evident in *Cuomo*, in which he engages in a labored *Chevron* "reasonableness" analysis in determining whether to defer to the OCC's preemption statement. *See* Cuomo v. Clearing House Ass'n, L.L.C., 129 S. Ct. 2710, 2715 (2009)*; see also* Sharkey, *supra* note 12, at 106 n.230. Importantly, Scalia did not sign on to Justice Thomas's concurrence in *Wyeth* in which he denounces the practice of obstacle preemption as against textualism. *See* Wyeth v. Levine, 129 S. Ct. at 1204 (Thomas, J., concurring).

Professor Catherine Sharkey, focusing on institutional competence, has identified an approach that examines the exact risks that the technocratic agency has considered when determining whether the agency's claim of preemption should be granted *Skidmore* deference. *See* Sharkey, *supra* note 30.

54. *See* Riegel v. Medtronic, 552 U.S. 312, 330 (2008). *But see id.* at 334 (Ginsburg, J., dissenting) ("The presumption against preemption is heightened 'where federal law is said to bar state action in fields of traditional state regulation.'" (citations omitted)). *See also* Sharkey, *supra* note 12, at 78 (describing the presumption against preemption as "intellectually bankrupt" in express preemption cases).

55. *See Wyeth*, 129 S. Ct. at 1195 n.3 ("The presumption [against preemption] thus accounts for the historic presence of state law but does not rely on the absence of federal regulation.").

56. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 873–74 (2000).

57. Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011).

of the Food and Drug Administration in 1938, and any attempt to do so after the creation of the FDA would clearly be preempted.[58]

In contrast, the creation of the First Bank of the United States in 1791 established a federal presence in what was previously a state-dominated field.[59] After the charter of the First Bank expired, five years passed until the creation of the Second Bank of the United States in 1816.[60] The Second Bank's charter expired in 1836 because of President Jackson's opposition, which channeled populist resentment due to economic panics.[61] The federal government waded into banking regulation more generally when Congress passed the National Bank Act of 1864, creating a federal banking charter in addition to the already available state charters.[62] In 1913, right before World War I, Congress created the Federal Reserve System.[63] In 1933, Congress created federal agencies with oversight over both federal and state banks,[64] and this system of banking largely persists today.

Under the current system, state-chartered banks are subject to substantive state banking regulation and oversight by a state banking department and the Federal Reserve Board, while federally chartered banks are subject to regulation and oversight by the Office of the Comptroller of the Currency (OCC).[65] Federal thrifts, or savings and loan associations, were, up until recently, regulated by the Office of the Thrift Supervisor (OTS).[66] It bears noting that the state regulators of New York have been in place longer than their federal counterparts.[67] Importantly, these institutions could change

58. *See* Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (establishing the FDA).

59. *See* Scott, *supra* note 44 ("When the national banking system was created during the Civil War, it was expected to replace the state bank system.").

60. Act of Apr. 10, 1816, ch. 44, 3 Stat. 266 (repealed 1836).

61. *See* John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 540–44 (2008).

62. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (repealed 1864).

63. Federal Reserve Act of 1913, Pub. L. No. 43-63, 38 Stat. 251.

64. Banking Act of 1933, ch. 89, 48 Stat. 162.

65. *See* Scott, *supra* note 44, at 3–5.

66. This has changed with the Dodd-Frank legislation, which has eliminated the Office of the Thrift Supervisor and put supervisory and rulemaking powers over federal thrifts and savings associations with the Office of the Comptroller of Currency. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 311–313, 124 Stat. 1376, 1521 (to be codified at 12 U.S.C. § 5412) (2010).

67. *See A Brief History of Financial Regulation in New York State*, STATE OF NEW YORK BANKING DEPARTMENT, http://www.banking.state.ny.us/auhistory.htm (last visited Apr. 14, 2011) ("On April 15, 1851, the legislature created the Banking Department . . . . The New York State Banking Department is the oldest bank

their regulator with relative ease.[68] Beyond the regulations promulgated by the aforementioned agencies under their constituting statutes, a number of other federal statutes regulate lending and other banking activities. The Home Owners Loan Act (HOLA) was implemented by OTS, and HOLA sets limits on mortgage rates charged by thrifts.[69] The Truth in Lending Act (TILA), implemented by the Federal Reserve Board, mandates specific disclosures relating to costs and terms of consumer credit agreements.[70]

Despite the significant federal presence in banking that has evolved over the last two centuries, courts and Congress have recognized an important role for state regulation, even of federally chartered banks. In 1869, the Court in *National Bank v. Commonwealth* held that national banks are

> subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.[71]

Since then, the Court has been willing to uphold state laws affecting federally chartered banks.[72] On the other hand, the Court has unanimously held that "grants of both enumerated and incidental powers to national banks" are "not normally limited by, but rather ordinarily preempt[ ], contrary state law."[73] Even so, the Supreme Court has noted that the applicability of the presumption

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regulatory agency in the nation."); *New York State Insurance Department's Information Center*, NEW YORK STATE INSURANCE DEPARTMENT, http://www.ins.state.ny.us/hp97wel.htm (last visited Apr. 14, 2011) ("The Insurance Department was created in 1859 by the New York State Legislature and assumed the functions of the Comptroller and Secretary of State relating to insurance. The Department began operations in 1860.").

68. *See* Scott, *supra* note 44, at 8 ("Perhaps less evident—but in practice much more important—is the fact that existing banks can change their laws and regulators.").

69. *See* 12 U.S.C. § 1464 (2006).

70. *See* Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended in scattered sections of 15 U.S.C.).

71. Nat'l Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362 (1869).

72. *See* Atherton v. FDIC, 519 U.S. 213, 222–23 (1997) (listing cases surviving preemption analysis) ("[F]ederally chartered banks are subject to state law.").

73. Barnett Bank v. Nelson, 517 U.S. 25, 32 (1996) (citations and internal quotation marks omitted).

against preemption "does not rely on the absence of federal regulation," at least in the pharmaceutical context.[74]

The foregoing might suggests that the presumption is disputed in the courts on doctrinal grounds. In the national bank context in particular, there is legislative evidence to support the presumption. The text of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, which allowed banks to operate across state borders without the use of separate subsidiaries, provides in relevant part,

> The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except . . . when Federal law preempts the application of such State laws to a national bank . . . .[75]

Further, the conference report to the Act asserts states' "legitimate interest in protecting the rights of their consumers, businesses and communities," and their "strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds." Moreover, also in the conference report, "[u]nder well-established judicial principles, national banks are subject to State law in many significant respects."[76]

Yet in 2004 the OCC promulgated a regulation, the preamble of which declares that "there is no presumption against preemption in the banking context."[77] This preamble language contradicts the Riegle-Neale Act legislative history supporting the use of the presumption against preemption in the banking context. The FDA used a similar tactic in 2006 when it snuck its own preemption language into a regulation's preamble.[78] This maneuver enabled both

74. Wyeth v. Levine, 129 S. Ct. 1187, 1195 n.3 (2009).

75. 12 U.S.C. § 36(f)(1)(A) (2006).

76. H.R. REP. NO. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074; *see also* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 230 (2004).

77. Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004) (to be codified at 12 C.F.R. § 7.4000).

78. Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601).

agencies to skirt notice-and-comment rulemaking.[79] In the FDA context, the *Wyeth* majority refused to grant *Chevron* deference to the agency's preemption language in the preamble.[80] Applying the less-deferential *Skidmore* analysis, the Court found the preemption language did not have persuasive value.[81] In contrast, the defect in the preamble to the OCC regulations has gone unchallenged in court.

The OTS, which regulated federally chartered thrift savings institutions before the passage of Dodd-Frank, issued a preemption regulation promulgated a decade before the OCC regulation.[82] It included a non-exhaustive list of the types of state regulation to be preempted and a narrow saving clause.[83] The OTS also included a non-binding preemption-analysis guideline as part of its comments to the final rule, which reverses the presumption against preemption into a presumption of preemption; that is, the OTS recommended that "[a]ny doubt should be resolved in favor of preemption."[84] Again, as in the OCC context, an agency used its regulatory power in an attempt to reverse the presumption against preemption.

79. *See* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007) (unearthing the example of the Department of Transportation preemption by preamble as well).

80. *See* Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009).

81. *See id.* at 1190 ("Under [the *Skidmore*] standard, the FDA's 2006 preamble does not merit deference . . . . [T]he agency finalized the rule and, without offering the States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA's pre-emptive effect in the regulatory preamble. The agency's views on state law are inherently suspect in light of this procedural failure. Further, the preamble is at odds with what evidence we have of Congress' purposes, and it reverses the FDA's own longstanding position without providing a reasoned explanation . . . .").

82. *See* 12 C.F.R. § 560.2 (1999) ("OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or §560.110 of this part.").

83. *See id.* ("State laws . . . are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section.").

84. Lending and Investment, 61 Fed. Reg. 50,951, 50,966–67 (Sept. 30, 1996) (codified at 12 C.F.R. pts. 545, 556, 560, 563, 566, 571, 590); *see also* Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1004 (9th Cir. 2008) (relying on the OTS guidelines).

Perhaps in part because of the tangled history of banking regulation, in the last four years the Supreme Court has punted twice on whether the presumption against preemption applies to the banking context. In *Cuomo v. Clearinghouse Association*, the majority declined to address the presumption in the banking context,[85] and the *Watters* court two years earlier left it unmentioned.[86] Yet at least three Justices have strong feelings on the matter. Justice Thomas, who penned the *Cuomo* dissent and was joined by Justices Roberts, Kennedy, and Alito, argued that "[n]ational banking is the paradigmatic example" of a situation in which the presumption should not apply because the federal government has legislated in this area since the "earliest days of the Republic." Further, the fact that states have "legislated alongside Congress in this area" is not sufficient enough to invoke the presumption.[87]

II.
FOR THE PRESUMPTION AGAINST PREEMPTION

The presumption against preemption has sparked debate among scholars. Some have articulated fierce defenses of the presumption,[88] while others have been less receptive.[89] I argue that the presumption against preemption in the banking context promotes two values. First, dual banking regulation results in sound policy outcomes—that is, vigorous state enforcement of fair lending laws is an important complement to federal regulation. Second, the presumption against preemption acts as a procedural hurdle that can promote underrepresented interests—most prominently, ex post common law regulation of the banking industry.

85. *See* Cuomo v. Clearinghouse Ass'n, L.L.C., 129 S. Ct. 2710, 2720 (2009) ("We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act.").

86. *See generally* Watters v. Wachovia Bank, 550 U.S. 1 (2007).

87. *Cuomo*, 129 S. Ct. at 2732 (2009) (Thomas, J., dissenting) (citations omitted) (noting the majority did not adopt the presumption against preemption in the banking context).

88. *See* Hills, *supra* note 38 (arguing for a strong presumption against preemption to preserve states' rights); Ernest A. Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249 (Richard A. Epstein & Michael S. Greve, eds., 2007) (same).

89. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000) (arguing for a context-specific, constrained presumption against preemption). Often, scholars' opinions on the presumption against preemption reflect their underlying views concerning substantive preemption generally. Professors Hills and Young are seeking to counter the trend of increasing preemption of state law, *see generally* Hills, *supra* note 38; Young, *supra* note 88, whereas Professor Dinh appears to endorse the trend in many contexts. *See generally* Dinh, *supra*.

On the policy side of the ledger, the financial crisis demonstrated that federal banking regulators are prone to regulatory capture by the well-organized and well-funded financial industry.[90] Furthermore, the centrality of the banking system to the country's economy, coupled with the systemic risk it poses to overall financial stability, compels rigorous regulatory oversight that would be unnecessary in other industries.[91] Part of better regulation entails bringing states into the process. Because states are structurally underrepresented in the federal regulatory regime, the presumption against preemption can protect the states' voices. Because of structural deficiencies, the presumption against preemption can stand in as a voice for the structurally underrepresented voice at the federal level: state regulatory autonomy separate from a specific state policy and as embodied in state common law causes of action.

A. Policy Considerations: Regulatory Capture and the Centrality of Banking

In the banking sphere, a number of regulatory and prudential concerns favor the presumption. Most importantly, some evidence suggests that the financial crisis may have been diminished had state banking regulators had a greater voice in the regulation of financial institutions and predatory lending.[92] The lax federal regulation of predatory lending and financial institutions was exacerbated by federal regulatory arbitrage: In a race to the bottom, regulated entities, through the acquisition of subsidiaries, effectively escaped supervision by changing regulators.[93] The presumption would support state law, particularly ex post common law

90. *See generally* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2010) (describing regulatory capture in the financial industry and proposing regulatory changes to address it). *See also* Stephen Davidoff, *The Government's Elite and Regulatory Capture*, N.Y. TIMES DEALBOOK, June 11, 2010, *available at* http://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/ (discussing social capture).

91. For an article describing the importance of legal institutions in dealing with systemic risk, see Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L. J. 193 (2008).

92. *See, e.g.*, CTR. FOR CMTY. CAPITAL, STATE ANTI-PREDATORY LENDING LAWS, at ii (2009).

93. *Systemic Regulation, Prudential Matters, Regulation Authority, and Securitization: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 306-07 (2009) (statement of Governor Daniel K. Tarullo, Board of Governors of the Federal Reserve), *available at* http://www.federalreserve.gov/newsevents/testimony/tarullo20091029a.htm ("The dual banking system and the existence of different federal supervisors create the opportunity for insured depository institutions to change charters or federal supervisors. While institutions may engage in charter conversions for a variety of sound business reasons, conversions that are motivated by a hope of *es-*

causes of action, which would provide a higher baseline of regulation, even in the absence of strict federal oversight.

While it is true that the federal government has legislated in banking since the earliest days of the Republic, there has been a clear intent to keep banks and banking regulation decentralized—there has been a fear in the United States of the centralization of too much fiscal power. For example, a fear of centralized bank-regulatory power led to the unique regional—that is, neither state-based nor national—Federal Reserve System, which includes twelve Federal Reserve Banks situated around the country.[94] Congressman Ron Paul, who wants to abolish the Federal Reserve System,[95] has capitalized on public suspicion of centralized federal banking power to win acceptance of an amendment to Dodd-Frank that increases transparency and decreases independence of the Federal Reserve Board,[96] despite near universal condemnation from academics and economists who believe that threatening the Board's autonomy will impair its ability to effectuate sound monetary policy without political influence.[97] Centralization of fiscal power in the form of consolidation in the banking industry led to the systemic risks that made some banks "too big to fail" and therefore required federal bailouts.[98]

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caping current or prospective supervisory actions by the institution's existing supervisor undermine the efficacy of the prudential supervisory framework.").

94. *See* David Hammes, *Locating Federal Reserve Districts and Headquarters Cities*, THE REGION, BANKING AND POLICY ISSUES MAGAZINE (Federal Reserve Bank of Minneapolis, Sept. 2001) *available at* http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3434#2 ("Distrust of private banking interests and the strength of American populism—embodied in the political power of William Jennings Bryan, President Woodrow Wilson's Secretary of State during the Act's drafting and passage—was counterpoised against the fear, expressed by private financial interests, of the federal government becoming involved in monetary and financial markets. The Act was a compromise between these interests, reflecting the attempt to balance private interests with federal government assistance, protection and oversight."). Even so, conspiracy theories abound. *See, e.g.*, WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY (1989).

95. *See generally* RON PAUL, END THE FED (2009).

96. *See* Victoria McGrane, *Ron Paul gains mainstream steam*, POLITICO (Nov. 30, 2009, 5:19 AM), http://www.politico.com/news/stories/1109/29986.html; *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1103(b), 124 Stat. 1376, 2118 (2010) (to be codified at 12 U.S.C. § 225b).

97. *See* Editorial, *Focus on the Fed*, WASH. POST, July 24, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/23/AR2009072303004.html (calling the amendment "wrongheaded in the extreme").

98. For a recent account addressing the problems of centralization and banking, see Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Con-*

Democratic accountability has often been used to justify federal preemption. For example, in the case of state tort law, federal preemption can be characterized as favoring democratic accountability because it has the effect of substituting congressional or agency decisions with jury verdicts.[99] On the other hand, democratic accountability arguments that favor preemption do not hold up in the banking context, because state banking regulations are generally created by democratically responsive state institutions. In the banking regulation it is frequently state substantive law that is being preempted, often by federal agencies, which have less claim to democratic pedigree.[100] At times, however, common law claims, based on fraud or other similar tort and contract ideas, are brought against banks to vindicate claims of predatory lending. Similarly, consumer protection claims are often brought under color of state statute, passed by responsive and accountable state legislatures.[101] In these cases, the claim is based on judge-made law, and the outcome is determined by a lay jury, not an agency, so it may be that preemption and federal regulation is the more "democratic" form of regulation compared to state common law suits. As mentioned above and explained further below, for all the "democratic" responsiveness of agency regulation and federal law, it is precisely those actors that were captured in the lead up to the financial crisis. Certainly lay juries are less prone to capture by the regulated industry.

The existence of agency capture at the national level might point toward the use of the presumption against preemption to allow a diversity of regulatory forces, including ex post consumer suits.[102] State regulators and state consumer protection laws provide an additional layer of protection in cases of federal underregulation and underenforcement.

glomerates and the Origins of the Subprime Financial Crisis, 41 CONN. L. REV. 965 (2009).

99. It may still be countered that juries themselves are a form of democracy, and in any case, it is the agency—unelected—, not Congress, making the preemption determination in the pharmaceutical context.

100. *See* Young, *supra* note 88, at 256 (noting that presumption against preemption has the benefit of deferring to state legislatures in many cases and not judicial policy, or deference to federal agencies). This in turn means there is a democratic rationale for adopting a presumption against preemption.

101. *See, e.g.*, Smith v. Wells Fargo Bank, 38 Cal. Rptr. 3d 653, 658 (Cal. Ct. App. 2005).

102. *See* Young, *supra* note 88, at 254.

In the decade leading up to the financial crisis, the OTS, the OCC, and state regulators competed for regulatory "clients,"[103] as banks switched to state charters to escape federal regulatory action.[104] On the other side, OCC officials have admitted that preemption was viewed as a "selling point" to convince financial institutions to hold national bank charters.[105] This competition has been exacerbated by the client funding system in place in the national banking sector: the OCC relies on fees paid by chartered banks to fund its operations.[106] The client-funding system under-

103. Arthur E. Wilmarth, Jr., *Cuomo v. Clearing House: The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection* 20 (The George Wash. Univ. Law Sch., Pub. Law & Legal Theory Working Paper No. 479, 2010), *available at* http://ssrn.com/abstract=1499216 ("Amici cited studies showing that the OCC had powerful budgetary incentives to use preemption as a marketing tool to persuade the largest banks to operate under national charters. The OCC's budget is funded almost entirely by assessments paid by national banks, and the biggest banks pay the highest assessments. A former head of the OCC described preemption as 'a significant benefit of the national [bank] charter—a benefit that the OCC has fought hard over the years to preserve.' In response to the OCC's preemption campaign, several large, multistate banks converted from state to national charters, thereby producing a significant increase in the OCC's assessment revenues.").

104. *See* Binyamin Appelbaum, *By Switching Their Charters, Banks Skirt Supervision*, WASH. POST (Jan. 22, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/21/AR2009012104267.html ("At least 30 banks since 2000 have escaped federal regulatory action by walking away from their federal regulators and moving under state supervision . . . ."); *see also Systemic Regulation, Prudential Matters, Regulation Authority, and Securitization: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 306-07 (2009) (statement of Daniel K. Tarullo, Gov., Fed. Reserve Bd.), *available at* http://www.federalreserve.gov/newsevents/testimony/tarullo20091029a.htm ("The dual banking system and the existence of different federal supervisors create the opportunity for insured depository institutions to change charters or federal supervisors. While institutions may engage in charter conversions for a variety of sound business reasons, conversions that are motivated by a hope of *escaping* current or prospective supervisory actions by the institution's existing supervisor undermine the efficacy of the prudential supervisory framework.").

105. Catherine M. Sharkey, Federal Agency Preemption of State Law, at 38 (Dec. 2010) (unpublished report), *available at* http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=61; *see also American International Group: Examining What Went Wrong, Government Intervention, and Implications for Future Regulation: Hearing Before the S. Comm. on Banking, Hous. And Urban Affairs*, 111th Cong. 3–5 (2009) (statement of Eric Dinallo, Superintendent of N.Y. State Ins. Dep't) (arguing that regulatory arbitrage that let AIG have the OTS as its consolidated supervisor led to gaps in supervision); Wilmarth, *supra* note 76, at 282 ("The most likely reason for the disintegration of the state-chartered thrift system is the aggressive preemption campaign that the FHLBB began in the late 1970s and the OTS continued after assuming the FHLBB's functions in 1989.").

106. Wilmarth, *supra* note 103, at 20.

mines the rationale for multiple regulators because regulators compete for limited funding.[107] Severe regulatory capture at the federal level increases the importance of state regulators. Further, suits based on ex post consumer lending laws also help prevent capture, because consumers who have been wronged will certainly not be captured by the banking industry. A vigorous presumption against preemption would, at the margin, allow more state consumer lending suits.

In the decade leading up to the crisis, federal banking regulatory enforcement was lax.[108] Over the same period, state regulators were far more proactive.[109] It may be that state regulators and especially state attorneys general are more responsive to the electorate than federal regulators, who are deep in the national bureaucracy. On the other hand, in the recent debate surrounding whether to eliminate the federal thrift charter—which was the center of regulatory arbitrage in the lead-up to the crisis—many argued that blame rested with one authority rather than many.[110] In the case of a new crisis, we would know who is responsible, which would motivate the

107. *See, e.g.*, Richard J. Rosen, *Is Three a Crowd? Competition Among Regulators in Banking*, 35 J. MONEY, CREDIT, & BANKING 967, 969, 990 (2003) (arguing in an empirical study that multiple banking regulators lead to optimal regulation). *But see* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 507–08 (2000).

108. Wilmarth, *supra* note 103, at 21 ("In addition, studies cited by amici described the OCC's record of enforcing consumer protection laws as a 'long history of inaction,' 'relatively lax,' 'weak' and 'unimpressive.' Publicly available information indicated that, during 1995–2007, the OCC issued only 13 public enforcement orders against national banks for violations of consumer protection laws. Most of those enforcement orders were issued against small national banks, and only one order included a charge that the bank violated state laws. In that one case, the OCC took action only after the public became aware that a California prosecutor was investigating the offending bank." (footnotes omitted)).

109. *Id.* ("The states' record of protecting consumers presented a dramatic contrast with the OCC. Between 1999 and 2006, more than thirty states enacted laws to combat predatory lending. A recent study found that state anti-predatory laws reduced the number of mortgages with unsound or abusive features such as prepayment penalties, balloon payments, and no- and low documentation terms. In addition, state officials vigorously used their enforcement powers to prosecute financial service providers for a wide range of unlawful practices." (footnotes omitted)).

110. *See* Nicholas Bagley, *Subprime Safeguards We Needed*, WASH. POST (Jan. 25, 2008), http://washingtonpost.com/wp-dyn/content/article/2008/01/24/AR2008012402888.html; Brady Dennis, *Born in a Previous Crisis, OTS Faces Extinction*, WASH. POST (June 18, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/06/17/AR2009061703548.html ("[T]he OTS has become synonymous with ineffective and lax regulation, failing to rein in high-risk, destructive practices of some of the largest institutions it monitors. The agency's credibility has suffered

regulator.[111] But this argument only leads to the conclusion that there should be one primary regulator; it is not an argument against having other, overlapping secondary regulators.[112]

Some scholars argue that federal regulatory consolidation is good because state regulators are prone to capture. Indeed, arguments for preemption in the banking context tend to emphasize that federal regulation is done by independent agencies that face little political pressure.[113]

But what looks like capture is actually accountability. Elected attorneys general—the essential state-level enforcers—are more responsive to democratic concerns than insulated bureaucrats at the federal agencies.[114] The objective cost-benefit analysis that is vital in some areas of federal regulation is less important to enforcement, where the focus should be on ensuring that the balance struck by regulatory agencies is not undermined by a lack of enforcement.

Nor does recent history bear out the view that state enforcers are more prone to regulatory capture—indeed, quite the opposite situation provided the grounds for the *Cuomo* case. *Cuomo* arose because then New York Attorney General Eliot Spitzer was investigating several large banks on the basis that, based on data provided by the banks, there appeared to be "a significantly higher percentage of high-interest home mortgage loans issued to African-American and Hispanic borrowers than to white borrowers."[115] Such discrimination could mean the banks were in violation of federal and state

deeply as large companies under its watch . . . have become among the biggest casualties of the financial crisis.").

111. *See Financial Regulatory Reform: Hearing Before the Joint Econ. Comm'n*, 111th Cong. (2009) (written testimony of Timothy F. Geithner, Sec'y of the Treasury) ("The regulation of the largest, most interconnected firms requires tremendous institutional capacity, clear lines of authority and single-point accountability. This is no place for regulation for council or by committee."). The eventual Dodd-Frank Act did not eliminate the federal thrift charter but eliminated the OTS. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 311-313, 124 Stat. 1376, 1520–23 (2010) (to be codified at 12 U.S.C. §§ 5411–13).

112. *See* Shelia C. Bair, *The Case Against a Super-Regulator*, N.Y. TIMES, Sep. 1, 2009, at A29 ("The risk of weak or misdirected regulation would be increased if power was consolidated in a single federal regulator. . . . One advantage of our multiple-regulator system is that it permits diverse viewpoints.").

113. *See* Scott, *supra* note 43, at 156.

114. *See id.* at 156–57 (arguing that because of the political aspirations of attorneys general, independent agencies are in a better position to make objective trade-offs).

115. Clearing House Ass'n, L.L.C. v. Cuomo, 510 F.3d 105, 109 (2d Cir. 2007), *aff'd in part, rev'd in part,* 129 S. Ct. 2710 (2009).

antidiscrimination laws such as the Equal Credit Opportunity Act and the similar state statute, Section 296-a of the New York Executive Law.[116] Even though the OCC and the Clearing House (an organization of banks) had acknowledged that the state law was not preempted,[117] Clearing House filed suit nonetheless alleging that the New York Attorney General's enforcement of the law was preempted by OCC's regulation 12 C.F.R. § 7.4000 because such enforcement would be considered the exercise of a "visitorial power" within the proscription of the regulation.[118]

Supporters of the broad OCC enforcement preemption provision argued that there was no evidence that the OCC was not sufficiently vigilant in enforcing parallel federal law protections.[119] State attorneys general claimed that there had been federal abdication in banking enforcement, and had stepped up to fill the vacuum. The OCC argued that its regulation preempted state enforcement of otherwise non-preempted and valid state or federal law.[120] The Supreme Court, perhaps attentive to the policy considerations at play, rejected the OCC regulation as overbroad: even if not allowed to regulate banking substantively on certain subjects, states should certainly be allowed to enforce federal law.[121]

Unlike the enforcement preemption, the OCC's broad substantive preemption regulation went unchallenged in *Cuomo*. In the crisis postmortem, many fingers have been pointed at the Federal Reserve Board's non-regulation of mortgages in the last decade.[122] Others have noted OTS's supervisory abdication. Under OTS's

116. *Id.*

117. *See* OCC Interpretive Letter No. 998, 2004 WL 3418859 (Dec. 2004) (letter from OCC Chief Counsel Julie L. Williams to Rep. Barney Frank dated Mar. 9, 2004).

118. *See* Brief for the Federal Respondent at 5–9, Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710 (2009) (No. 08-453), 2009 WL 815241.

119. Scott, *supra* note 44, at 147.

120. *See Cuomo*, 129 S. Ct. at 2717–18 (2009) ("No one denies that the National Bank Act leaves in place some state substantive laws affecting banks. But the Comptroller's rule says that the State may not enforce its valid, non-pre-empted laws against national banks . . . [This result is] bizarre." (citations omitted)); *see also* Bank Activities and Operations, 69 Fed. Reg. at 1904 (state authorities do not have "any right to inspect, superintend, direct, regulate, or compel compliance by a national bank respect to any law").

121. *See Cuomo*, 129 S. Ct. at 2717–18.

122. *See* Kat Aaron, *Predatory Lending: A Decade of Warnings: Congress, Fed Fiddled as Subprime Crisis Spread*, THE CENTER FOR PUBLIC INTEGRITY (May 6, 2009), http://www.publicintegrity.org/investigations/economic_meltdown/ (citing Federal Reserve Board failure to regulate subprime mortgages under its authority from the Home Ownership and Equity Protection Act as exacerbating the housing bubble).

watch, some of the financial crisis's key players—IndyMac, Washington Mutual, AIG, and Countrywide Financial—went largely unmonitored as they increased the volume of risky mortgages.[123] State regulators were willing to fill the void, but found that they were preempted by federal regulation. New York had state laws that could have helped address predatory lending and no-down payment loans—but they were found preempted.[124] Similarly, New York had to ultimately abandon a derivatives regulatory proposal that would have provided some regulation and oversight of derivatives due to preemption concerns.[125] Recent empirical research links the explosion in subprime lending and subsequent high defaults to states that did not have anti-predatory lending laws.[126]

> The share of high-cost loans that were preempted in APL states increased from 16 percent in 2004 to 46 percent in 2007. Considering the ever-growing share of subprime mortgages originated by national banks, thrifts, and their subsidiaries that were preempted by federal laws, there is some debate whether such preemption is to blame, at least in part, for the current foreclosure crisis.[127]

123. *See* Dennis, *supra* note 110.

124. *See* Bagley, *supra* note 110; *see also* Eric Dinallo, Former Superintendent of Ins., N.Y. State, Comments at Panel Discussion at N.Y.U. Sch. of Law, "The Future of Regulation and the Capital Markets," (Nov. 5, 2009), *available at* http://www.youtube.com/watch?v=EPMQcectNOU.

125. *See* Sara A. Kelsey, Former Deputy Superintendent and Counsel to the Banking Dep't of N.Y., Panel Discussion at N.Y.U. Sch. of Law: The Future of Regulation and the Capital Markets (Nov. 5, 2009), *available at* http://www.youtube.com/watch?v=EPMQcectNOU.

126. CTR. FOR CMTY. CAPITAL, *supra* note 92, at ii ("Overall, we observe a lower default rate for neighborhoods in APL states, in states requiring verification of borrowers' repayment ability, in states with broader coverage of subprime loans with high points and fees, and in states with more restrictive regulation on prepayment penalties. We believe that these findings are remarkable, since they suggest an important and yet unexplored link between APLs and foreclosures. Moreover, given the wide range of factors influencing foreclosures, including house price declines, rising unemployment, and differences in state foreclosure processes, these descriptive statistics are likely to result in an underestimation of the positive impacts of APLs. These findings also point to the need to understand how federal preemption affected the effectiveness of state APLs."). The authors of the study note that these findings are preliminary and do not presume to address the impact of preemption on state APLs—a topic that will be tackled in the next phase of their research. *See id.* at iii. *See generally* Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641 (2011) (finding that social distance was a main contributor to predatory lending and thus the financial crisis).

127. *See* CTR. FOR CMTY. CAPITAL, *supra* note 92, at 1 (internal citations omitted).

While it is something of a stretch to say preemption was a but-for cause of the crisis, a growing literature suggests preemption exacerbated underlying structural problems.[128] A presumption against preemption might have preserved more consumer lawsuits using state law for their cause of action, and consumers themselves are immune to the regulatory capture that plagued federal agencies.

One objection to giving the states a greater degree of regulatory freedom is the cost associated with complying with many different state regulations.[129] There are, however, significant differences between banking and other industries that lessen the impact of this concern. First, as the recent crisis demonstrates, size is not necessarily a good thing in the banking world as it increases the possibility that a financial firm will become "too big to fail" and will require a government bailout to avoid catastrophic consequences. State regulation, therefore, is a regulatory insurance policy that acts as a tax on size. That is, to the extent that a bank is large enough to operate in multiple jurisdictions, there are compliance costs that correspond to different regulatory regimes.[130] Furthermore, the fact that the banking industry is integral to the health of the greater economy should make us less concerned that regulation is duplicative. Unlike other industries, failures in the banking sector have widespread economic effects.[131]

From a policy perspective, a plurality of regulators—including ex ante state regulation and ex post state consumer suits—is preferable to the broad preemption that existed in the years leading up to the financial crisis. For that reason, the presumption against preemption, acting as a thumb on the scale for greater state regulatory authority, is sound policy. Yet an analysis of the presumption is in-

128. *See, e.g.*, Eric S. Belsky & Ren S. Essene, *Consumer and Mortgage Credit at a Crossroads: Preserving Expanded Access While Informing Choices and Protecting Consumers* (Joint Center for Housing Studies, Paper No. UCC08-1, 2008), *available at* http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08-1_belsky_essene.pdf; Raphael W. Bostic, et al., *State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms*, 60 J. ECON. & BUS. 47 (2008).

129. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 149–50 (2001) (finding preemption in part on the grounds that compliance with 50 state standards is too burdensome to be what Congress intended).

130. On the other hand, this tax may hurt medium-sized banks that serve as the only real competition to large national banks that are truly too big to fail.

131. *See* E. Gerald Corrigan, *Are Banks Special?*, 1982 Fed. Res. Bank of Minneapolis Ann. Rep., *available at* http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=684. A counterexample is the securities industry, which, like the banking industry, plays a central role in the greater economy's well-being.

complete without an examination of the structural elements of federalism that justify it. The next subpart examines a serious of models of the normative underpinnings of the presumption against preemption.

B. Models of the Presumption Against Preemption

As demonstrated, the policy argument for the presumption is strong.[132] Nevertheless, we must also satisfy ourselves that the structural and constitutional reasons for adopting the presumption are sound. This subpart compares normative models for the presumption. I argue that the most justifiable view of the presumption is that the presumption should be deployed to promote federalism in targeted instances of underrepresentation of state interests in the federal regulatory debate. Specifically, the presumption against preemption is an interpretive canon that judges can apply to promote states' underrepresented interests in protecting their regulatory autonomy and common law when the states's interests have not been adequately considered in agency regulation.

1. The Presumption and Spheres of Legislative Power

Traditionally, the states and the federal government have had separate spheres of legislative power:[133] the states controlled the police power and promoted the health and welfare of its citizens, and federal power was limited to those powers enumerated in the Constitution.[134] This comports with the justification the Court nominally employs in its preemption analysis: "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[135] According to this view, Congress is presumed to not preempt state law in areas that states have traditionally had regulatory authority, unless Congress clearly states its intent to do so. This clear statement rule is similar to the canon that legislatures do not alter the common law unless they specifically address it.[136]

132. *See supra* Part II.A.

133. *See* Viet D. Dinh, *Federal Displacement of State Law: The Nineteenth Century View*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 27, 27–31 (Richard A. Epstein & Michael S. Greve eds., 2007).

134. *See* U.S. CONST. amend. X (reserving to the states all powers not delegated to the federal government).

135. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

136. On clear statement rules, see John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

Yet the federalism rationale for the presumption does not map neatly on to banking regulation. As noted in Part I, the states and the federal government have concurrently exercised regulatory and supervisory power over banking in the United States. Since these jurisdictions have long overlapped, the spheres-of-power justification provides little guidance on the fate of the presumption in the banking context.

Moreover, the spheres-of-power formulation of legitimate state authority is stale. At least since the fall of *Lochner* and the start of the New Deal, the Court has moved away from a structure-based constitutional analysis in its Commerce Clause rulings, and toward an intent-driven framework in which states and the national government have concurrent power.[137] The crucial difference has been the expansion of the federal government's regulatory powers—often at the expense of state autonomy—through the reach of the Commerce Clause.[138] The recent contraction of the federal government's power under the Commerce Clause decreases federal power and thereby assures there are areas of state authority that are not subject to concurrent federal jurisdiction.[139] Although it is not the purpose of this Note to investigate why this apparent contradiction exists, as noted in the Introduction, some of the same conservative Justices who support the rollback of federal power are some of the most ardent supporters of federal preemption of state law.[140]

2. The Presumption as Federalism-Enhancing

Professor Young offers a competing view of the presumption against preemption. He argues that the presumption provides a procedural obstacle that helps to preserve the under-enforced vertical separation of powers.[141] One advantage of this view is that it does not rely on an outmoded spheres-of-power framework—it is

137. *See* Dinh, *supra* note 133, at 27 ("Displacement analysis in the nineteenth century focused on the Supremacy Clause and constitutional structure rather than congressional intent."); *see also* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) ("[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis." (citations and internal quotation marks omitted)).

138. United States v. Morrison, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) ("The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests . . . .").

139. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); *see also supra* note 9.

140. For a review of the tensions present in the commitment to states' rights in the preemption context, see generally Sharkey, *supra* note 12.

141. *See* Young, *supra* note 88, at 254–55.

process-based and applies to the areas in which contemporary state and federal regulation overlap. This view of the presumption is more consistent with New Federalism and the rationale underlying *Lopez* and *Morrison*: that the reach of federal government does not depend on whether the federal government is regulating in a sphere it does not traditionally regulate in, but whether the reach of the federal regulatory power exceeds its constitutional mandate.[142] The presumption as procedural hurdle enforces a clear statement rule that may enhance political representation and "focus[ ] the courts' energies where they can do the most good: on protecting the basic regulatory autonomy of the states," as courts are more able than agencies to balance federalism interests.[143] Furthermore, the presumption acts as procedural hurdle and avoids weighing in on subject-matter categories; that is, because the presumption is a procedural not a substantive canon, the presumption may be more easily applied,[144] since it does not rely on an outdated spheres-of-power view of federalism. More generally, the presumption against preemption promotes federalism: states will be more free to be laboratories of democracy,[145] allowing them to compete

142. *See, e.g.*, *Lopez*, 514 U.S. at 556-59; *Morrison*, 529 U.S. at 617; *see also supra* note 9.

Nevertheless, the procedural view also has a constitutional hurdle to jump. Stated provocatively, if the presumption against preemption essentially means deferring to state actors in the face of federal law, doesn't this violate the Supremacy Clause? Caleb Nelson has articulated a view grounded in the text of the Supremacy Clause, claiming that the *Non Obstante* provision militates against the presumption. *See* Nelson, *supra* at note 43. In other words, the presumption is a small breach of originalism in support of a broader principle better suited to contemporary understandings of the Constitution. *See* Young, *supra* note 88, at 266–67. Moreover, as our understanding of the Commerce Clause evolves in ways not imagined by the framers, it is only natural that the non obstante clause should similarly develop. As in many constitutional disputes, the framework chosen to describe the argument is often outcome determinative.

143. *See* Young, *supra* note 88, at 254.

144. *See id.* at 254–57.

145. *See* U.S. CONST. amend. X ("[P]owers not delegated by the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

against the federal government and each other in the quest for efficient regulatory policies.[146]

Unlike the spheres-of-influence conception of the presumption, Young does not depend on a subject-matter trigger to invoke the presumption. However, the ease of application under Young's view robs the presumption of justification. Because there is no focused inquiry as to in what cases the presumption should apply, Young's view would over- and under-protect federalism. It over-protects to the extent the presumption duplicates adequate representation of states' interests in federal regulatory decisionmaking. It under-protects to the extent that the invocation of the presumption waters down its application—judges may simply recite the presumption without a sense as to why and how much it should matter.

3. The Presumption as Debate-Forcing

Another view, espoused by Professor Hills, takes the position that the presumption against preemption can force national legislative action on important but largely unnoticed issues. This is because affected industries, rather than be subjected to fifty sets of state standards, will effectively lobby Congress to obtain a preemptive national policy, engendering public debate and healthy democratic processes.[147] The debate-forcing view of the presumption does not advocate federalism for federalism's sake. Instead, it views federalism as a rhetorical strategy brandished—much like the presumption against preemption—when one side of the debate prefers a particular regulatory outcome.[148]

Under Hills' approach, it is not necessary for state regulations to actually be efficient. Generally speaking, states have the incentive to export the costs of regulation and internalize the benefits. Because states can externalize costs of regulation, they will frequently be overly aggressive from a national efficiency standpoint.[149] The

146. *See* Young, *supra* note 88, at 250–51. *See generally* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

147. *See* Hills, *supra* note 38, at 17 ("[I]f the goal is to mobilize the public to focus its attention on Congress, then it makes sense to choose a default rule that places the burden on the regulated industries to lobby for preemptive legislation, rather than one that places the burden on those anti-preemption interests to lobby for a waiver of preemption.").

148. *See id.* at 36 ("In short, the fundamental (and plausible) premise of this argument is that rhetoric in favor of federalism as such is insincere: Few with influence in the political process care about promoting state power as an end in itself.").

149. *See* Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL

presumption against preemption will encourage state regulation. The resulting over-regulation of an industry will get the attention of that industry, which will then lobby Congress in search of a national regulatory policy.[150] This should lead to good, efficient national policy because benefit-internalizing, cost-exporting states will not support a uniform national standard unless they are compensated for the loss of the state ability to regulate the affected industry; the regulated industry will have to compromise and accept a higher level of regulation than they would otherwise.[151]

The problem with the debate-forcing approach, however, is that it assumes that the opposition to federal regulation—perhaps a combination of state autonomy advocates and pro-consumer groups—will be well organized nationally, or that the conflict in Congress will be highly visible and salient to the general public. As I explain in greater detail in Part IV, the ability of financial institutions to hire lobbying firms and keep members of Congress flush with campaign donations far outstrips that of consumer groups.[152] This means that the financial industry's argument—that the benefits to the economy of decreased compliance costs and lower regulatory standards outweigh the cost to consumers of aggressive preemption leading to lower regulatory standards—goes unchallenged before federal legislators. Recent empirical inquiry has revealed that Congress almost never responds to the Court's preemption rulings, thereby undermining a key component of the explanatory power of the debate-forcing view of the presumption.[153] Nevertheless, the Dodd-Frank Act serves as an important counterexample: it does include rollbacks of the strong preemption

INTERESTS 166, 183–85 (Richard A. Epstein & Michael S. Greve eds., 2007) (arguing in favor of preemption in cases in which states export costs of regulation and retain benefits).

150. *See* Hills, *supra* note 38, at 25 ("However inefficient, state regulation provides the incentive to motivate business and industry groups to place issues on the federal agenda that would otherwise be buried in committee. The argument assumes nothing about the intrinsic benefits of state law.").

151. *See id.*; *see also* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1368–71 (2006) (noting preemption is in part a response to benefit-internalizing, cost-exporting state regulations).

152. *See infra* Part IV. Additionally, Part IV notes that consumer groups, while being outspent at the federal lobbying level by banking interests, are nonetheless a significant force in local judicial elections, which may explain their preference for the presumption against preemption in the banking context, as the presumption against preemption favors state lending laws.

153. *See* Note, *supra* note 10, at 1605 ("The data show that Congress almost never responds to the Court's preemption decisions, so mistaken interpretations for or against preemption are unlikely to be corrected.").

afforded to subsidiaries of national banks in the *Watters* case and would set national consumer financial protection regulation as a floor and not a ceiling for state regulatory action.[154]

The debate-forcing view of the presumption is borne out only when the issue is of integral national importance: it was only after a serious financial crisis generated in part by the lax rules and strong preemption advocated by the banking industry that Congress—and more importantly, the public—took notice and reversed course. More specifically, because there are few issues salient enough to the general public to let Congress know that it is being watched, the well-organized special interests are able to transmute cost-exporting state regulation into a strong argument for federal preemption. The main point remains: the presumption as debate-forcing mechanism, without more, is likely too sanguine about the salience to the voting public of the costs and benefits of a uniform national regulatory policy.

4. Underrepresented Interests: Common Law and State Statutes of General Application

The appropriate model of the presumption against preemption lies between these competing views just discussed. The presumption should be invoked in cases in which federalism values are most threatened—that is, when the court is considering the preemption of underrepresented state interests. A more nuanced view of the presumption, to which Professor Hills also alludes, is that the presumption can stand in for the poorly organized, disparate general good against well-organized special interests.[155] In order to determine when specifically the presumption should be applied, we need to determine what specific interests are underrepresented in the federal regulatory discussion.[156]

154. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1044, 1046, 124 Stat. 1376, 2014–18 (2010) (to be codified at 12 U.S.C. § 25b). For insight into the debate over whether to adopt these provisions, see Brady Dennis, *Finance panel at odds over preemption*, WASH. POST (Oct. 21, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/10/20/AR2009102003591.html; Damian Paletta, *Consumer-Agency Bill Moves in House*, WALL ST. J., Oct. 23, 2009, at A5.

155. *See* Hills, *supra* note 38, at 33–34; *see also* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 717 (2008) ("Possibly more importantly, agencies, unlike Congress and the courts, are specialized institutions that are not set up to consider state autonomy concerns.").

156. *See supra* pp. 22–23 (discussing the over- and under-inclusiveness of Young's procedural model of the presumption).

Professor Sharkey has questioned who are the representatives of state common law interests at stake in tort suits[157] and at the federal level in preemption-regulation promulgation.[158] In the banking regulatory context, it is clear that the relevant state agency can be an appropriate representative for state regulatory authority. However, there are other possible representatives for state regulatory autonomy at the federal level: the Big Seven.[159] For example, the National Association of Attorneys General (NAAG) files amicus briefs in state common law cases, as in *Wyeth v. Levine*.[160] In the banking context, every state joined the amicus brief defending New York's position in *Cuomo*, underlining their unanimous support for state enforcement of federal laws.[161] The Conference of State Bank Supervisors also filed a supporting brief in *Cuomo*.[162] But the influence of amici in cases can only go so far; the Court will only listen to amicus briefs to the extent that they are persuasive.[163]

The lack of representation for state regulatory interests exists beyond the courtroom.[164] Professor Sharkey recently completed a comprehensive survey of federal agency compliance with Executive

157. *See* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2158 (2009) ("A prerequisite to any discussion of effective agency consultation and collaboration with the states is identification of the relevant stakeholders: Who precisely represents state regulatory interests?").

158. Sharkey, *supra* note 105, at 71 n.366.

159. Adoption of Recommendation, 76 Fed. Reg. 81, 82 (Jan. 31, 2011) (adopted Dec. 9, 2010).

160. *See* Brief of Amici Curiae Vermont et al. in Support of Respondent, Wyeth v. Levine, 129 S. Ct. 1187 (2008) (No. 06-1249), 2008 WL 3851613; *see also* Sharkey, *supra* note 157, at 2126 ("NAAG has challenged federal agencies' decisions to preempt state law, often via amicus briefs.").

161. *See* Brief for the States of North Carolina, et al. at 1 n.2, Cuomo v. Clearing House Ass'n, LLC, 126 S. Ct. 469 (2009) (No. 08-453), 2008 WL 4887719 at *2 n.2 ("The States are unanimous in their support for the New York Attorney General's petition for a writ of certiorari: forty-nine States have joined in this amicus brief.").

162. *See* Brief of Conference of State Bank Supervisors as Amicus Curiae in Support of Petitioner, Cuomo v. Clearing House Ass'n, LLC, 126 S. Ct. 469 (2009) (No. 08-453), 2008 WL 4887718. It is interesting to note that in none of the state court cases examined were the views of the state explicitly solicited or considered by the court.

163. *See* Neuborne, *supra* note 3, at 1119 ("When the mandates of the Federal Constitution are clear, most state judges respect the supremacy clause and enforce them. Constitutional litigation is, however, rarely about clear law.").

164. Lack of representation of states outside of the judicial forum may have reprocussions for whether an agency preemption statement is granted deference in a future judicial forum; that is, a judge may be less likely to grant deference to an agency when state viewpoints were not adequately represented in the regulatory process.

Order 13,132, the federalism order that requires agencies to have "an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications."[165] The review of federal regulation—particularly federal regulation on the subject of preemption—finds that "compliance with these provisions has been inconsistent . . . ."[166] This failure suggests that state viewpoints are not adequately considered in the promulgation of regulations that could have preemptive effect.

State regulatory interests have gone unaddressed by federal regulators, whether because of lack of federal contact with the state regulator or because of the lack of state initiative in putting forth its views in notice and comment.[167] For example, a 2005 GAO Report found that "opportunities existed to enhance [OCC's] consultative efforts" in promulgating the regulations disputed in *Watters* and *Cuomo*.[168] The report stated,

> In the face of an executive order specifically calling for state and local consultation on preemption rules, OCC's limited additional effort may have contributed to an impression that it did not genuinely seek or consider input from [states]. Stakeholders representing such diverse interests as consumer protection advocates, state bank regulators, state attorneys general, and some Members of Congress continue to maintain that the agency did not genuinely seek their input.[169]

It is helpful to separate ex ante regulatory interests—those of state regulatory bodies and state legislators—from ex post regulatory interests, by which I mean state common law, and to a lesser extent, state consumer protection law in states where no regulatory

165. Exec. Order No. 13,132 § 6(a), 64 Fed. Reg. 43,255, 43,257 (Aug. 4, 1999).

166. Adoption of Recommendation, 76 Fed. Reg. at 82. *But see* Mendelson, *supra* note 30, at 769 (arguing that "agencies have significant incentives . . . to consider interests articulated by states or state groups").

167. Adoption of Recommendation, 76 Fed. Reg. at 81 ("[T]he consultative process breaks down at both ends; namely, while federal agencies have rightly been criticized for bypassing consultation with the states, at the same time, it appears as though some of the state representatives have not held up their end of the bargain. Most rules with potential preemptive power receive no comments from state or local government officials or their representatives.").

168. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-08, OCC PREEMPTION RULEMAKING: OPPORTUNITIES EXISTED TO ENHANCE THE CONSULTATIVE EFFORTS AND BETTER DOCUMENT THE RULEMAKING PROCESS (2005), *available at* http://www.gao.gov/new.items/d068.pdf; *see also* Sharkey, *supra* note 105, at 37–38.

169. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 168, at 45; *see also* Sharkey, *supra* note 105, at 37–38.

body is in charge of those laws.[170] Going forward, there are identifiable representatives for state ex ante regulatory interest: state regulators themselves and the "Big Seven" federal lobbying groups that represent sub-national interests.[171] Professor Sharkey has identified mechanisms that can be implemented through Executive Order 1312 by the Office of Information and Regulatory Affairs (OIRA) to encourage federal cooperation with states on regulations that could have preemptive effect.[172]

Less clear is who can represent state ex post regulatory interest going forward, namely state common law and consumer-lending suits.[173] There is no body that actively promotes state common law regulatory interests at the federal level. It may be normatively difficult to justify, but state court judges step in on the side of the presumption against preemption in the banking context more often than their federal counterparts.[174] This highlights that, absent an adequate institutional representative, state judges are the institutional actors with the closest ties to common law and ex post regulation; they are therefore the ones who see the need to preserve it.[175] Of course, not all state court judges will agree on preemption policy, but these judges embrace the presumption more frequently and vociferously than their federal counterparts. This suggests that state judges are approving of the presumption as a procedural hurdle that protects otherwise unrepresented common law regulatory interests.

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170. For a general overview of ex ante and ex post regulatory differences, see Catherine M. Sharkey, *Modern Complex Litigation in the United States: The Public-Private Tug of War*, *in* AMERICAN LAW (Japanese-American Society for Legal Studies, forthcoming 2011).

171. Adoption of Recommendation, 76 Fed. Reg. at 82 n.19 ("The Big Seven include the Council of State Governments, the National Governors Association, the National Conference of State Legislatures, the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and the International City/County Management Association.").

172. *See* Sharkey, *supra* note 105, at 63–87 (making recommendations for improved state-federal consultations).

173. *See* Adoption of Recommendation, 76 Fed. Reg. at 82 (discussing difficulty of identifying representatives for state common law interests).

174. *See infra* Part III.

175. *See infra* Part III. This of course is difficult to test, particularly in the banking context in which strong policy and justificatory reasons exist to adopt the presumption against preemption. See *infra* Part II.B. Furthermore, the hypothesis is difficult to test in the banking sphere given the fact that consumer groups are such large contributors to state judge election campaigns. Future research could test more areas of ex post state regulatory power; a cross-subject area study would have greater explanatory value with respect to this hypothesis.

It is tempting to conclude that stricter federal court scrutiny of agency preemption statements would more accurately take into account state regulatory interests;[176] however, this overlooks the underrepresentation of state common law ex post regulatory interests. Indeed, merely asking whether the Big Seven were consulted regarding a preemptive regulation presumes the Big Seven's institutional competency to represent the preempted state's common law interest. Using the presumption as a procedural hurdle evades this inadvertent means of eroding state ex post regulatory authority by creating a speed bump outside of the agency deference analysis.

Some scholars suggest that states are represented in Congress and therefore their views are considered at that level.[177] Perhaps state common law interests can be taken into account via electoral preferences and congressional lobbying by groups that represent state interests. However, this view ignores the immense power of business to curry congressional favor through campaign donations. For example, state attorneys general and other state regulatory interests support increased regulation of derivatives, especially in New York.[178] Yet these policies have little traction among the New York congressional delegation in the debate on financial-industry reform proposals. Indeed, the New York delegation is very protective of its state's financial industry interests. And it is easy to understand why: the financial industry has spent significantly more money on campaign contributions and lobbying than any other industry in the past year and with notable success.[179] State legislators may not be

176. *See generally*, Mendelson, *supra* note 155.

177. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). *But see* Mendelson, *supra* note 30, at 760–69 (finding Congress not as competent to protect states' rights post-Seventeenth Amendment as federal agencies).

178. *See* Leah Campbell & Robin Choi, *State Initiatives To Regulate Credit Default Swaps Deferred Pending Federal Action*, METROPOLITAN CORP. COUNS., Sep. 1, 2009, at 20 ("On September 22, 2008, New York Governor David A. Paterson announced that in January of 2009 the state would begin regulating Covered Swaps as insurance. On November 20, 2008, however, the [New York State Insurance Department] announced that it would 'delay indefinitely its application of New York Insurance Law' to CDS pending action at the federal level." (internal citation omitted)).

179. *See* Gretchen Morgenson & Don Van Natta, Jr., *In Crisis, Banks Dig In for Fight Against Rules*, N.Y. TIMES, May 31, 2009, at A1 ("Through political action committees and their own employees, securities and investment firms gave $152 million in political contributions from 2007 to 2008, according to the most recent Federal Election Commission data. . . . 'The banks run the place,' [Representative] Peterson [D-MN] said. 'I will tell you what the problem is—they give three times

much better on this count.[180] While there are lobbying groups for state ex ante regulatory interests, such as the National Conference of Insurance Legislators and the National Association of Insurance Commissioners, they do not have the financial leverage that the banking industry has because the National Association of Insurance Commissioners and other state-interest groups, do not give campaign contributions.[181]

An example from the Dodd-Frank lobbying efforts on the preemption issue proves the point better than any abstract numbers can:

> [A]n important though unheralded issue in financial reform was the extent to which various provisions governing bank reform would override state laws or regulations on the same questions. If a state has a tougher set of regulations governing, say, bank loans, would those rules be set aside by the new federal regulations? There are good arguments on both sides, with the banks coveting what is called federal pre-emption and consumer groups, backed by the White House, fiercely opposing it. One lobbyist told me of how — using the two essentials of suc-

more money than the next biggest group. It's huge the amount of money they put into politics.'").

180. *See* Walter L. Updegrave Reporter Associates, *How the Insurance Industry Collects an Extra $65 Billion a Year from You by. . .Stacking the Deck*, MONEY MAGAZINE (Aug. 1, 1996), http://money.cnn.com/magazines/moneymag/moneymag_archive/1996/08/01/215477/index.htm ("To a large extent, the insurance industry writes the laws that govern it. Though insurance industry employees make up less than 2% of the American work force, at least 15% of the state lawmakers who serve on committees overseeing insurance legislation are insurance agents or company executives, or are otherwise connected to the industry."). Because of the heterogeneous nature of states, we can expect at least some to prefer benefit-internalizing and cost exporting regulations.

181. *See* M.B. Pell and Joe Eaton, *Five Lobbyists for Each Member of Congress*, CENTER FOR PUBLIC INTEGRITY (May 21, 2010), http://www.publicintegrity.org/articles/entry/2096/ ("The companies and groups that lobbied on financial reform spent a total of $1.3 billion in 2009 and the first quarter of 2010 on their overall lobbying efforts, the data showed. The exact dollar amount they devoted to financial regulation reform remains unclear because lobbyists are not required to itemize how much money in a given contract is spent on a specific issue. But if only 10 percent of that spending was targeted at financial regulation bills, lobbyists would have received $133 million."); Steven Brill, *Government for Sale: How Lobbyists Shaped the Financial Reform Bill*, TIME (July 1, 2010), http://www.time.com/time/politics/article/0,8599,2000880-5,00.html ("[L]obbyists for the banking and financial-services industries simply outgunned lobbyists for consumers. 'We have three lawyers total working on this [entire bill],' says Travis Plunkett, the legislative director for the Consumer Federation of America, a lobbying and education organization representing 280 nonprofit groups. 'They can have three people working on a paragraph.'").

> cessful lobbying, personal relationships and money — he got a boost from two Democrats in the House "who wanted to help us and whom we knew well through prior associations and have helped raise money for." They provided important support for pre-emption even though they vocally backed the overall reform bill. "They said, 'I can't be with you on the bill,'" he continues, "'but show me where I can help you out and then give me some backup'" — which came in the form of a white paper on pre-emption, prepared by the American Bankers Association. The result was a compromise allowing limited federal preemption.[182]

There are consumer advocacy groups in the financial services sector— for example, the Center for Responsible Lending. But the resources of the Center for Responsible Lending are minimal compared to interest groups of broader appeal, such as the Environmental Defense Fund.[183] Groups such as the Center for Responsible Lending would perhaps be content to have a high federal standard preempt state regulation if they thought it would achieve better consumer protection. In any case, state regulatory interests do not necessarily mean pro-consumer interests. State regulatory interests operate in the sense of competitive federalism—they compete for efficient regulation, which is only pro-consumer in a broad sense because the efficient level of regulation may hurt consumers.[184] This leads to the further insight that, while states may have similar interests vis-à-vis vertical federalism, horizontal disagreements among states on the federal government's proper role in banking may impede successful and vociferous lobbying.[185]

182. Brill, *supra* note 181.

183. *See* CTR. FOR RESPONSIBLE LENDING, *CRL Spends Little on Lobbying vs Financial Services Firms* (Sept. 23, 2010), http://www.responsiblelending.org/media-center/center-for-straight-answers/CRL-Spends-Little-on-Lobbying-vs-Financial-Services-Firms.html ("In the first half of 2010, bailed-out banks spent 48 TIMES more on lobbying than CRL, and payday lenders spent 9 TIMES as much as we did."); *see also* Marianne Lavelle, *The Climate Change Lobby Explosion*, THE CTR. FOR PUB. INTEGRITY (Feb. 25, 2009), http://www.publicintegrity.org/investigations/climate_change/articles/entry/1171/ ("The Environmental Defense Fund says it spent about $40 million on direct climate advocacy, both domestically and internationally [in 2008]—about 40 percent of the organization's budget."). Even so, the lobbyists for a climate change bill in 2008 were out lobbied 8 to 1 by industry lobbyists fighting tough congressional action on climate change. *Id.* ("Put the alternative energy and environmental/health lobbyists together, and they are outnumbered by all other interests, more than 8-to-1.").

184. *See generally* THE FEDERALIST NOS. 39, 51 (James Madison).

185. *See generally* THE FEDERALIST NO. 10 (James Madison); *see also* Hills, *supra* note 38, at 10–11 ("Familiar collective action problems might prevent citizens at

A further example is instructive. In 2001, the OCC issued regulations stating that state consumer protection laws are preempted by federal regulation.[186] The OCC then issued specific preemption determinations finding particular state laws preempted.[187] Importantly, there is no state entity charged with promulgation of rules under the state consumer lending protection laws. Therefore, the states' regulatory interest was necessarily underrepresented in the federal preemption determination process. The presumption against preemption could have served as a procedural bulwark to force careful analysis of the underlying statute and the federalism values at stake.[188]

The disparity in lobbying power continues today. The New York Times' Dealbook recently reported on meetings held by the Treasury Department with groups interested in the many regulations to be promulgated under Dodd-Frank.[189] Dealbook reported the banking industry, including "finance industry executives and lobbyists from about three dozen banks, asset management companies and trade groups," has had "dozens" of meetings with Treasury Department officials.[190] Representatives of consumer groups have had two meetings. Treasury officials met with the president and CEO of the National Community Reinvestment Coalition and the director of housing policy for the Consumer Federation of America. Both meetings were about Fannie Mae and Freddie Mae.[191] No meetings with consumer groups on the issue of lending occurred.

Given the centrality of the banking industry to the greater economy, the failure of the federal regulatory system to anticipate the financial crisis, and the long history of the dual banking system,

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any level of government from coalescing on behalf of a common but diffuse interest. However, these difficulties are exacerbated by the fact of heterogeneous preferences in a large republic.").

186. Investment Securities; Bank Activities Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (codified at 12 C.F.R. pts. 1, 7, 23 (2002)).

187. *See, e.g.*, Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,264 (Aug. 5, 2003) (finding Georgia's consumer protection laws are preempted by federal regulation).

188. For a related argument supporting a presumption against agency preemption, see Mendelson, *supra* note 155, at 699. This model is developed further in Part IV.B of this Note in the context of state judge's affinity for the presumption against preemption.

189. Ben Protess, *Wall Street Lobbies Treasury on Dodd-Frank*, N.Y. TIMES (Apr. 5, 2011), http://dealbook.nytimes.com/2011/04/05/wall-street-lobbies-treasury-on-dodd-frank/.

190. *Id.*

191. *Id.*

there are strong policy reasons to adopt the presumption in the banking sphere. Furthermore, there are no actors in the national legislative system that can represent state regulatory autonomy and state common law causes of action separate from any particular policy. The presumption thus stands as a protector of structural interests that would otherwise be underrepresented in the federal process.

III.
STATE AND FEDERAL COURT USE OF THE PRESUMPION AGAINST PREEMPTION IN BANKING

This Part analyzes state and federal decisions in the banking context pre-Dodd Frank. I will show that state courts embrace the presumption in this context more often and in stronger language than federal courts. State courts continue to embrace the presumption even after circuit courts have held the presumption to be inapplicable. Furthermore, state courts rarely analyze the rationale for the presumption, while federal courts often refer to agency statements or legislative intent regarding the applicability of the presumption against preemption. These differences appear to occur irrespective of the governing federal statute and the relevant federal agency. This study reviews cases through 2009—before the debate surrounding Dodd-Frank and its subsequent implementation could impact the courts' decisionmaking process. Part IV considers the possible reasons why this disparity in interpretive approach exists, and Part V speculates as to the possible effects of this difference and the possible impact of Dodd-Frank on banking preemption.

A. Federal Decisions on the Presumption Against Preemption

The Ninth Circuit has decided OTS and OCC cases rejecting the use of the presumption.[192] In *Silvas v. E*Trade Morg. Corp.*, a class action was brought under the state's Unfair Competition Law (UCL)[193] alleging that the defendant should have allowed the re-

192. *See* Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005 (9th Cir. 2008) ("[B]ecause there has been a history of significant federal presence in national banking, the presumption against preemption of state law is inapplicable."); *see also* Wells Fargo Bank v. Boutris, 419 F.3d 949, 956 (9th Cir. 2005) (no presumption against preemption in the OCC context); Bank of America v. City and County of San Francisco, 309 F.3d 551, 559 (9th Cir. 2002) (same); Wilmarth, *supra* note 76, at 288–89 (discussing the Ninth Circuit's refusal to use the presumption against preemption).

193. Cal. Bus. & Prof. Code §§ 17200, 17500 (West 2008); *E*Trade Mortg. Corp.*, 514 F.3d at 1003.

turn of a $400 interest-rate lock-in payment when the mortgage was cancelled within the three-day period allotted by the Truth in Lending Act (TILA) for rescinding mortgages. The district court rejected the presumption[194] and threw the suit out, holding that plaintiff's UCL claims were preempted by TILA.[195] The court went on to find that OTS's regulation 12 C.F.R. § 560.2 preempted the state law claims, accepting the agency's field preemption claim without analysis.[196] It is instructive to compare this quick adoption of the OTS regulation as valid with the Supreme Court's laborious 2009 *Cuomo* decision, in which the Court spent 8 pages analyzing whether to defer to the OCC's overbroad preemptive regulation, ultimately deciding it did not merit deference.[197] By assuming deference, the Ninth Circuit nearly assumes the outcome of the case—field preemption eliminates the plaintiff's state law claim.

The Ninth Circuit casually dismissed the unfair competition and advertising claims as falling directly under the OTS's preemption of disclosures and advertising.[198] More interesting is the court's analysis of the "incidental affect" exception in the regulation, which states that the regulation does not preempt state laws that have only an minimal effect on the federal thrift.[199] The plaintiffs argued that their claim should be preserved because "they are founded on California contract, commercial, and tort law, merely enforcing the private right of action under TILA."[200] The context of the "incidental affect" language is instructive: "State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associa-

194. Silvas v. E*Trade Mortg. Corp., 421 F.Supp.2d 1315, 1318 (S.D. Cal. 2006) ("[N]o presumption against preemption arises when a state law regulates the banking industry.").

195. *Id.* at 1321.

196. *E*Trade Mortg. Corp.*, 514 F.3d at 1004–08; *see also* Camps Newfound/Owatonna, Inc. v. Town of Harisson, 520 U.S. 564, 616 (1997) (holding that "even where Congress has legislated in an area subject to its authority, our pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as preempting state law" (emphasis omitted)); Frank Bros. v. Wis. Dep't of Transp., 409 F.3d 880, 891 (7th Cir. 2005) ("However, silence on the part of Congress alone is not only insufficient to demonstrate field preemption, it actually weighs in favor of holding that it was the intent of Congress *not* to occupy the field.") (citing Hillsborough Cnty. v. Automated Med. Labs., 471 U.S. 707, 718 (1985)).

197. *See* Cuomo v. Clearinghouse Ass'n, L.L.C., 129 S. Ct. 2710, 2715–22 (2009).

198. *E*Trade Mortg. Corp.*, 514 F.3d at 1006; 12 C.F.R. § 560.2(b)(9).

199. 12 C.F.R. § 560.2(c).

200. *E*Trade Mortg. Corp.*, 514 F.3d at 1006–07.

tions."[201] Among those claims listed are "contract and commercial law," "real property law," and "tort law."[202] The court analyzed the claims under the "incidental affect" exception in dicta,[203] despite finding the claims were expressly preempted by the regulation's disclosure and advertising categories.[204] The court's analysis consists of reciting the definition of field preemption, stating that under field preemption a "state may not add a damages remedy unavailable under the federal law," meaning that the plaintiff's suit would be field preempted even if it were not expressly preempted.[205] But by doing this—apart from already assuming its conclusion in part by uncritically adopting the regulation wholesale—the court ignored that the "incidental affect" language was meant to cover state contract, commercial and tort law claims.

Recalling the analysis in Part II.B above, we remember that the presumption against preemption has particular value in cases where state law claims, whether codified into the state code or not, do not have a representative able to advocate for them at the federal agency level. This is true in the *E*Trade* case because California's UCL does not have a correlating agency to represent the state's interest in fair lending before the relevant federal regulator in charge of TILA, which, at the time of the suit, was OTS.

Given the express carveout for some state laws, the plaintiffs' claims merited a more thorough textual analysis, even if such claims were ultimately found preempted, particularly given that the reach of "incidental affect" is debatable. An application of the presumption may have provided a procedural hurdle for the court, focusing it on whether a conflict existed between state and federal laws rather than relying purely on principles of field preemption.[206] Had the court employed this analysis, it might have instead concluded that state common law claims acted as a parallel enforcement measure, not as a remedy inconsistent with federal law.

The district courts have largely followed the Ninth Circuit's lead in rejecting the presumption in the banking context.[207] While

201. 12 C.F.R. § 560.2(c).

202. *Id.*

203. *E*Trade Mortg. Corp.*, 514 F.3d at 1006–07.

204. *Id.* at 1006.

205. *Id.* (citations and internal quotation marks omitted).

206. *See supra* Part II.B.4.

207. *See* Jefferson v. Chase Home Fin., No. C 06-6510 TEH, 2008 WL 1883484, at *9 (N.D. Cal. Apr. 29, 2008) ("However, the presumption does *not* apply when the state regulates in an area where there is history of significant federal presence in the field—such as national banking."); Montgomery v. Bank of Am. Corp., 515 F. Supp. 2d 1106, 1113 (C.D. Cal. 2007) (stating "from the days of *McCulloch v.*

the Third Circuit has held that banking is an area subject to dual federal and state control, it has not specifically held that the presumption should apply,[208] other circuit courts, including the Fourth, Sixth, and Second Circuits, have joined the Ninth in asserting the non-applicability of the presumption in the banking context.[209] Crucially, it is the unrepresented state common law interests that go without rigorous consideration by the federal courts or by the agency in court proceedings.

B. State Decisions on the Presumption Against Preemption

Despite the federal courts' long-standing denial of the applicability of the presumption against preemption in the banking context, a number of state courts have held that the presumption does apply.[210]

Maryland," banking is an area where the presumption should not be used); Augustine v. FIA Card Servs., N.A., 485 F. Supp. 2d 1172, 1175 (E.D. Cal. 2007) (finding that the presumption against preemption is not triggered in area of significant federal presence, including national banking).

208. *See* Nat'l State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981, 985 (3d Cir. 1980). The reasoning seems to imply that the presumption should exist, although the court does not specfically mention the presumption. *See id.* ("Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863. There is little doubt that in the exercise of its commerce power Congress could regulate national banks to the exclusion of state control. And unquestionably, as in other businesses, federal presence in the banking field has grown in recent times. But congressional support remains for dual regulation. In only a few instances has Congress explicitly preempted state regulation of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision." (citations omitted)).

209. *See* Nat'l City Bank v. Turnbaugh, 463 F.3d 325, 330–31 (4th Cir. 2006) (holding the presumption against preemption is not applicable in the national bank context); Wachovia Bank v. Watters, 431 F.3d 556, 558 (6th Cir. 2005), *aff'd*, 550 U.S. 1 (2007) (same); Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 183 (2d Cir. 2005) (same); *see also* WFS Fin., Inc. v. Superior Court, 44 Cal. Rptr. 3d 561, 565 n.3 (Cal. Ct. App. 2006) (stating the presumption against preemption is not necessary to reach its decision, but notes the circuit split).

210. *See* Branick v. Downey Sav. & Loan Ass'n, 24 Cal. Rptr. 3d 406, 412 (Cal. Ct. App. 2005) ("The court in Gibson explained that under the relevant precedents, [w]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of [the preemptive statute or regulation]." (alterations in original) (internal quotation marks omitted) (citing Gibson v. World Sav. & Loan Ass'n, 128 Cal. Rptr. 2d 19, 27 (Cal. Ct. App. 2002)), *aff'd*, 110 P.3d 214 (Cal. 2006); *see also* Gibson v. World Sav. & Loan Ass'n, 128 Cal. Rptr. 2d 19, 26 (Cal. Ct. App. 2002) ("Therefore, there is a strong presumption that [the OTS regulation] does not preempt the claims brought in this action.").

For example, although there is no California Supreme Court decision directly on point, California state appellate courts have held that the presumption against preemption applies, sometimes even noting that "one court"—that is, the Ninth Circuit—has found the presumption does not apply.[211] In *Bronco Wine Co. v. Jolly*, the California Supreme Court reaffirmed its dedication to the presumption generally by applying the presumption and ruling that the state wine labeling regulator was not impliedly preempted by the Department of Agriculture.[212] Lower courts have applied this decision to support employing the presumption against preemption in the banking context, as well as to support their own power to limit the scope of express preemption clauses.[213] One lower California state court has gone so far as to hold that the presumption is powerful enough to save certain areas of state law, even in face of "reasonable" interpretations of express preemption statutes that would otherwise sweep more broadly.[214]

In contrast to the Ninth Circuit *E*Trade* case discussed in Part III.A, the state court in *Smith v. Wells Fargo Bank, N.A.*, correctly noted that "[a]n agency may preempt state law through regulations that are within the scope of its statutory authority and that are not arbitrary."[215] The court in *Smith v. Wells Fargo Bank* was asked to analyze the preemptive effect of Regulation DD, which was promul-

211. *See, e.g.*, Smith v. Wells Fargo Bank, 38 Cal. Rptr. 3d 653, 666 (Cal. Ct. App. 2005) ("Considering the general presumption against preemption, we narrowly construe the precise language of the federal law or regulation to determine whether a particular state law claim is preempted." (citations omitted)).

212. *See* Bronco Wine Co. v. Jolly, 95 P.3d 422, 429 (Cal. 2004) ("After extensively reviewing the history of state regulation of beverage and wine labels prior to Congress's adoption of the FAA Act in 1935—a history that reveals substantial state involvement and very little federal regulation—we conclude that a presumption against preemption does indeed apply in this case.").

213. *See* Miller v. Bank of Am., No. CGC-99-301917, 2004 WL 3153009, at *28 (Cal. App. Dep't Super. Ct. 2004) ("This presumption applies both to the existence of preemption and the scope of preemption . . . and serves the purpose of assuring that the federal state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts."(citations omitted)), *rev'd on other grounds,* 51 Cal. Rptr. 3d 223 (Cal. Ct. App. 2006).

214. *See* Black v. Fin. Freedom Senior Funding, 112 Cal. Rptr. 2d 445, 456 (Cal. Ct. App. 2001) ("However, we need not conclude that this is the only reasonable interpretation of the Parity Act's preemption language in order to reject express preemption in this case. . . . As our analysis has illustrated, the preemption language of the Parity Act does not contain a clear manifestation of congressional intent to preempt all state laws concerning the terms and marketing of alternative mortgage transactions. Absent such clear manifestation, the Parity Act does not expressly preempt claims such as those brought by the Blacks in this action.").

215. *Smith*, 38 Cal. Rptr. 3d at 666 n.6 (citations omitted).

gated by the OCC under the authority granted to it by the Truth in Savings Act (TISA).[216] Similar to the regulation at stake in *E*Trade*, promulgated under TILA, Regulation DD contains a savings clause for preemption of state laws which only "incidentally affect the exercise of national banks' deposit-taking powers."[217] The California Court of Appeals found that the UCL claims based on TISA were not preempted by Regulation DD.[218] By "narrowly construe[ing] the precise language of the federal law or regulation to determine whether a particular state law claim is preempted,"[219] the California state court slowed down its preemption analysis and conducted its own "independent construction of the plain and unambiguous language" of the regulation at stake and found that because the UCL claim essentially incorporated the TISA substantive rules, it was not preempted.[220] Unlike the Ninth Circuit in *E*Trade,* the California court did not rule that the existence of another remedy meant the state cause of action should be preempted because of the complex field of regulation set forth in Regulation DD. The California court protected the interest of state ex post regulatory action through the use of the presumption against preemption.

Courts in Washington and Michigan have gone a step further and applied a "strong presumption" against preemption in the banking context.[221] For example, in *Konynenbelt v. Flagstar Bank*, the Michigan Court of Appeals relied on the presumption against preemption and similar canons of interpretation to limit the reach of express preemption under HOLA.[222] This case is instructive in its

216. *Id.* at 667.

217. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1916 (Jan. 13, 2004) (to be codified at 12 C.F.R. pt. 34).

218. *Smith*, 38 Cal. Rptr. 3d at 671.

219. *Id.* at 666.

220. *Id.* at 671.

221. *See* Bell v. Muller, 129 Wash. App. 177, 193 (Wash. Ct. App. 2005) ("Washington has a strong presumption against finding preemption. We will find preemption only if federal law clearly indicates a congressional intent to preempt state law or if there is a direct conflict between state and federal law that cannot be reconciled.") (citing Hisle v. Todd Pac. Shipyards Corp., 93 P.3d 108 (Wash. 2004) (discussing the presumption in the OCC preemption context)); Konynenbelt v. Flagstar Bank, 617 N.W.2d 706, 710 (Mich. Ct. App. 2000) (strong presumption exists in the HOLA/OTS context); *see also* Pioneer First Fed. Sav. & Loan Ass'n v. Pioneer Nat'l Bank, 659 P.2d 481, 484 (Wash. 1983) (presumption against preemption applies to state unfair competition laws and national banks) ("Moreover, although relevant, a detailed statutory scheme may reflect 'the nature and complexity of the subject' rather than an intent to preempt state law." (quoting De Canas v. Bica, 424 U.S. 351, 359 (1976))).

222. *Konynenbelt*, 617 N.W. 2d at 712.

careful analysis and suspicion of agency preemption. There, plaintiffs argued that the defendant bank must, under Michigan state law, pay the state recording fee upon discharge of a mortgage obligation.[223] The defendant, on the other hand, argued that HOLA expressly or impliedly preempted these state law requirements. Specifically, the defendant argued that state law was preempted because OTS has broad authority to regulate all aspects of federal savings banks and issued a regulation preempting all state laws that "purport[ ] to address the subject of the operations of a Federal savings association."[224] Relying on a California appellate case,[225] the Michigan court held for the plaintiffs, finding that the state statute was not preempted by federal regulation because the state law did not "address the subject of operations of a Federal savings association."[226]

It is important to note that the OTS regulation is broad and vague enough that judges are left with wide berth to impose their substantive preferences in their preemption analyses. In contrast to the Ninth Circuit's *E*Trade* decision, which adopted agency field preemption claims without discussion, the Michigan Court of Appeals in *Flagstar* methodically addressed each preemption claim under a hard look review. The exacting review of the Michigan Court of Appeals may stem in part from the fact that in Michigan "there is a strong presumption against preemption of state law, and preemption will be found only where it is the clear and unequivocal intent of Congress."[227] The Michigan court further required a clear statement from the agency demonstrating its intent to preempt the exact type of state law at issue, stating, "Preemption of state law by federal regulation is not favored. We will not find express preemption unless a regulation clearly so states."[228] This type of "presumption against agency preemption" has not been articulated in federal courts, even though it has been advocated by scholars.[229] If anything, the Supreme Court has made clear that the same rules applying to agency preemption apply to congressional preemption, and

223. *Id.* at 709.

224. *Id.* at 711; *see also* 12 C.F.R. § 545.2 (2010).

225. *Konynenbelt*, 617 N.W.2d at 711 (quoting Siegel v. Am. Sav. & Loan Ass'n, 258 Cal. Rptr. 746, 749–51 (Cal. Ct. App. 1989)).

226. 12 C.F.R. § 545.2; *see Konynenbelt*, 617 N.W.2d at 712.

227. *Konynenbelt*, 617 N.W.2d at 710.

228. *Id.* at 712.

229. *See* Mendelson, *supra* note 155, at 717.

that no additional hurdle exists for agencies above and beyond the standard presumption against preemption.[230]

To further illustrate the differences in approach between the Michigan state court and the Ninth Circuit, consider the fact that the Michigan court even examined the regulation at issue in *E*Trade* and found that the saving clause in that case meant that there was no field preemption even though the title of the section of the regulation was "Occupation of field."[231] The court concluded that the recording fee was merely "incidental" to the bank's lending operation,[232] even though the cost of the fee could be passed on to the consumer in the form of higher rates or higher fees, meaning that the recording fee would have had an effect on lending.[233]

Other state courts have generally used similar approaches to those of California and Michigan detailed above. New Mexico, for example has done so in the Truth in Lending Act context.[234] Maryland has applied the presumption against preemption with the Depository Institutions Deregulation and Monetary Control Act of 1980.[235] Montana has applied it with respect to the National Bank Act's employment discrimination clause.[236] Finally, the Supreme Court of Ohio has ruled that the presumption against preemption limits the reach of the "affects lending" ambiguous preemption clause of the OTS regulation.[237]

230. Hillsborough Cnty. v. Automated Med. Labs., Inc. 471 U.S. 707, 715–16 (1985).

231. *Konynenbelt*, 617 N.W.2d at 713; 12 C.F.R. 560.2(a).

232. *Konynenbelt*, 617 N.W.2d at 713.

233. *But see id.* at 713 (accepting the trial court's finding that the fee would not "affect interest rates and was not an up-front cost of the loan").

234. *See* Azar v. Prudential Ins. Co. of Am., 2003-NMCA-062, 133 N.M. 669, 68 P.3d 909 (N.M. 2003) ("Courts, however, apply a strong presumption against preemption, particularly in areas of law that are traditionally left to state regulation." (citations omitted)).

235. *See* Sweeney v. Sav. First Mortg., LLC, 879 A.2d 1037, 1039, 1041–42 (Md. 2005).

236. *See* Fenno v. Mountain W. Bank, 2008 MT 267, 345 Mont. 161, 192 P.3d 224 (Mont. 2008). *But see* Jefferson v. Chase Home Fin., No. C 06-6510 TEH, 2008 WL 1883484, at *9 (N.D. Cal. Apr. 29, 2008) (holding that, in accordance with recent circuit court decisions, the presumption against preemption does not apply to national banks and employment discrimination).

237. Pinchot v. Charter One Bank, 99 Ohio St. 3d 390, 2003-Ohio-4122, 792 N.E.2d 1105, 1111 (Ohio 2003) ("Under the guideline, these interpretive devices do not come into play unless the court reaches the question of coverage under paragraph (c), that is, after a determination is made that 'the law is not covered by paragraph (b)' and that 'the law affects lending.'" (citations omitted)).

C. Other Considerations and Analysis

At times, the presumption against preemption runs parallel to questions of agency deference. As discussed above in Part I.A[238] and Part III.C, it is an open question the amount of deference that should be granted to agency statements of preemption. The overlap between the presumption against preemption and agency deference is greatest in a regulation in which the OTS has stated in nonbinding guidelines that all close calls in preemption cases "should be resolved in favor of preemption."[239] It has thereby created a presumption of preemption by regulation. This statement, largely ignored by state courts,[240] has been followed in some federal courts.[241] As noted in subpart B, the Michigan court in *Konynenbelt v. Flagstar Bank* did not defer to OTS's statement that it occupied the field in banking, although it did not undertake a traditional deference analysis. In contrast, the Ninth Circuit in *E*Trade* accepted without analysis the OTS's field preemption claim under the same statute. Similarly, in the Truth in Lending Act, which is administered by the Federal Reserve Board, New York's highest court did not defer to the agency's broad interpretation of the Act's preemption clause. The court held that a presumption against preemption applied.[242] Although a full treatment of state court analysis of agency deference is outside the scope of this Note, it suffices to say that state courts are suspicious of the federal banking regulators, and state judges seem to give federal regulations a hard look review consistent with the presumption against preemption and its attendant clear statement rule.

Even after the Supreme Court's non-rulings on the presumption,[243] federal courts have consistently denied its applicability in

238. *See supra* notes 27–32 and accompanying text.

239. Lending and Investment, 61 Fed. Reg. at 50,966–67 (explaining that 12 CFR § 560.2(c) is intended to be "interpreted narrowly" and that any doubt about whether a state law shall be preempted by the federal regulation "should be resolved in favor of preemption").

240. A notable exception is *Pinchot*, 99 Ohio St. 3d at 394–95, 2003-Ohio-4122, 792 N.E.2d at 1110 ("While the OTS guidelines are 'not [to be] treated in the same manner as binding regulations' . . . we find no inconsistency between this guideline and the regulation." (citations omitted)) (holding that the non-binding guidelines reverse the presumption against preemption).

241. *See, e.g.*, State Farm Bank v. Reardon, 539 F.3d 336, 348 (6th Cir. 2008).

242. *See* People v. Applied Card Sys., Inc., 894 N.E.2d 1 (N.Y. 2008); *see also infra* note 255 and accompanying text (discussing the *Applied Card* case).

243. *See supra* Part I.A.

the banking context.[244] This divergence is curious, given *Wyeth*'s statement, though arguably dicta, that "[t]he presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation," which would appear to leave the door open for the presumption, even in cases in which there is a history of a federal regulatory presence in the industry.[245] The California state court cases, though decided prior to *Wyeth*, have used a similar rationale to hold that the presumption against preemption exists in the banking context, arguing that banking, consumer protection, and insurance are all within the ambit of historical state powers, even if the federal government has regulated in the area.[246] Even in the wake of circuit court decisions to the contrary, state courts, in the post-*Watters* era, have continued to find that the presumption exists.[247]

Although the amount of work done by the presumption against preemption is debatable, surely the force and regularity of the invocation of the presumption by state courts, and its countervailing rejection by federal courts, signifies the underlying resistance held by state court judges toward banking preemption.[248]

IV.
EXPLANATIONS FOR THE DIFFERENCES BETWEEN COURTS

Little research has been done on the role state courts play in the interpretation of federal statutes, although it appears to be a

244. *See, e.g.*, Tombers v. F.D.I.C., No. 08 Civ. 5068(NRB), 2009 WL 3170298 (S.D.N.Y. Sep. 30, 2009); State Farm Bank v. District of Columbia, 640 F. Supp. 2d 17 (D.D.C. 2009).

245. Wyeth v. Levine, 129 S. Ct. 1187, 1195 n.3 (2009).

246. *See* Gibson v. World Sav. & Loan Ass'n, 128 Cal. Rptr. 2d 19, 26 (Cal. Ct. App. 2002) ("The states' historic police powers include the regulation of consumer protection in general and of the banking and insurance industries in particular." (citations omitted)); Black v. Fin. Freedom Senior Funding, 112 Cal. Rptr. 2d 445, 452–53 (Cal. Ct. App. 2001) ("Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the states' police power, and are thus subject to this heightened presumption against preemption.") (citing California v. ARC Am. Corp. 490 U.S. 93, 101 (1989) (unfair business practices); Smiley v. Citibank, 900 P.2d 690 (Cal. 1995) (consumer protection), *aff'd*, 517 U.S. 735 (1996)).

247. *See, e.g.*, *Applied Card Sys., Inc.*, 894 N.E.2d at 5; Liceaga v. Debt Recovery Solutions, LLC, 86 Cal. Rptr. 3d 876, 879 (Cal. Ct. App. 2008).

248. *See* Sharkey, *supra* note 18, at 1045 ("While, as of yet, no stark outcome-based distinction between state and federal courts has emerged, there is . . . a discernible difference in flavor in the character of the opinions, which relates to the priority accorded to the FDA's views.").

topic of increasing interest. Recently, Abbe Gluck contributed a defense of "modified textualism" as performed by state courts, explaining that state courts are functioning as laboratories of innovation in textualist methodology.[249] Anthony Bellia pointed to the history of state court interpretation of federal statutes as evidence for the "faithful agent" theory of statutory interpretation, under which state courts "appear to have uniformly understood their role in interpreting federal statutes to be to abide by the directives of Congress, as best they could discern them."[250] The study of state court interpretations of preemption clauses can contribute to this fertile and underdeveloped field by exploring the role state courts play when judges are forced to balance their fidelity to congressional text and agency determinations with the importance of the traditional regulatory autonomy of states. When a state court finds preemption, it diminishes the role the state can play in the regulatory field.

Given the persistent and varied differences between state courts and federal courts in their approaches to analyzing statutory interpretation, I have two explanations for the apparent divergence. First, I offer a theoretical explanation focusing on the unique history of state court judges as common law judges and therefore as policymakers. Second, I provide something more akin to a public choice theory explanation for why state courts take a different approach to statutory interpretation: they are frequently elected and, more often than not, supported by the plaintiff bar.

Finally, I conclude that, to make sense of the state courts' approach to preemption clauses, we need to consider state courts as independent institutional actors in the same way that we analyze Congress, state legislatures to, and state and federal agencies for their particular contributions and competencies in the federal scheme. There may be, particularly in the preemption area—precisely where federalism values are at stake—instances in which state court judges are the institutional actors best poised to defend states' rights. Therefore, state judges provide a valuable check to federalization pressures from Congress, the agencies, and the federal courts. Furthermore, the lack of other competent defenders of state regulatory autonomy—particularly when that regulatory authority arises out of state common law or other state law unenforced by a state regulatory body—may leave state judges as the institutional actor most sympathetic to the value of state common

249. Abbe R. Gluck, *Consensus Textualism: State as Laboratories of Statutory Interpretation*, 119 YALE L.J. 1750 (2010).

250. Bellia, *supra* note 2, at 1507.

law as a regulatory device. Because of this affinity, it is not surprising that state court judges embrace the presumption against preemption more often and in stronger terms than their federal counterparts.

A. Common Law, State Courts, and the Equity of the Statute

A number of explanations have emerged to explain the differences in state court and federal court statutory interpretation. One rationale is that state courts sit at a distance from Supreme Court commands and are relatively insulated because of the rarity of the Supreme Court granting certoriari—the main way that state cases are reviewed by a federal court. This does not have as much explanatory power in the banking sphere because the Court has not ruled on whether the presumption applies.[251] Nevertheless, the distance argument may explain some state court insulation from the *Chevron* deference regime that dominates the circuits. While deference does not always yield preemption, it frequently does.[252]

At a deeper level, one reason for state court recalcitrance regarding preemption doctrine may be that state court judges, as judges who frequently sit in common law, are closer in function to policymakers and are therefore less prone to deference than federal judges. Furthermore, Professor Hershkoff notes that, because state constitutions contain less rigorous provisions regarding separation of powers, state courts have a "willingness to cross the borders that separate the coordinate powers in the federal system."[253] This suggests a fundamental difference as to the roles of state and federal judges.[254]

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251. *See supra* Part I.A.

252. *See* William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

253. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1890 (2001).

254. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 982–83 (2000) (asserting that "state judges—especially those sitting on the highest courts—do frankly generative work in law development, resulting in at least anecdotal accounts by individuals who have held both state and federal judicial positions that they often had more power and more interesting work when they were on the state bench").

It has also been noted that the obstacle preemption analysis bears some resemblance to common-law, balance-of-the-equities determinations. *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 376–90 ("[T]he Justices, when they recognize the importance of a particular federal objective, are alert to the need to assume a more common-law like role to ensure that the objective is not threatened and to harmonize a complex body of federal and state law.").

As a general matter, it may be that state judges see the negative effects of rampant preemption doctrine and are inclined to inject policy grounds into their decisions, even if not intentionally. Indeed, the dissent in a recent Truth in Lending Act case in New York's Court of Appeals leveled an accusation against the majority alleging that the majority is concerned with protecting state regulatory turf and is twisting the language of the statute—even though the majority's decision makes sense on policy grounds.[255]

State court judges often have experience in the legislative branch, which may increase their affection for policy rationales.[256] Because election is a prerequisite in many states for sitting on the bench, many judges are former legislators accustomed to the demands of campaigning. While this feature of American exceptionalism certainly carries some significant negatives that have been detailed in academic literature,[257] some of the benefits perhaps have not been as loudly trumpeted—including the value of judges

The differences in attitudes toward common law and policymaking is related to the longstanding debate about judicial discretion in interpretation of state law and the merits of judicial passitvity. Judge Calabresi, in the former camp, has offered a particularly muscular view of the role of judges, arguing that state courts should be able to effectively overrule old federal statutes using state court judges' common law powers. *See generally* Guido Calabresi, A COMMON LAW FOR THE AGE OF STATUTES (1982). He adds that judges should use their powers of interpretation expansively to deal with statutes that do not adequately address anachronistic laws. *Id.* at 31–41. Similarly, Justice Cardozo thought "judges had an obligation to integrate administrative expertise and social development into common law." Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 553 (2007); *see also* Hershkoff, *supra* note 257, at 1835–37 (citing the inapplicability of Article III's justiciability restraints on state courts as reason for significant differences in practices between state courts and federal courts, including increased policymaking by the former).

255. *See* People v. Applied Card Sys., Inc., 894 N.E.2d 1, 23 (N.Y. 2008) (Read, J., dissenting) ("The majority's desire to maximize our State's regulatory reach in the area of consumer protection is unsurprising. And the Board has arguably been slow to appreciate the value to consumers of at least certain of the specific disclosures at issue in this case. But state pride and good intentions are not enough to justify this lawsuit." (citations omitted)); *see also supra* note 258 and accompanying text.

256. *See, e.g.*, Hershkoff, *supra* note 253, at 1902 ("[State judges] frequently have had legislative experience, participate to some degree in the lawmaking process, and in some states, stand for election."); Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 WM. & MARY L. REV. 1273, 1286 (2005) ("Elective state courts are, however, more likely to have some members with prior legislative experience than the Supreme Court . . . . In the smaller state capitals, if not in California or New York, judges and legislators are more likely to meet informally as well as in official collaborations on law reforms.").

257. Hershkoff, *supra* note 253, at 1891–92.

who are more intimately familiar with policy and the state policymaking process. Because of their personal experience with political horsetrading, for example, state court judges might be less willing to interpret a congressional statute as being read as broadly remedial—and therefore as broadly preemptive—as a federal court judge may. Furthermore, these judges may view state regulatory interests more favorably than their federal counterparts; after all, state judges spent their previous legislative careers working with state regulatory agencies, presumably with a belief in the importance of state regulation and a belief that these state agencies can do their work competently.

B. State Judges as Representatives for State Interests or Just Captured?

Professor Sharkey has argued that the reason that state judges have an affinity for state law in the products liability context cannot simply be that judges are protecting their turf.[258] There are some significant differences between the fields of banking and products liability,[259] such as the inapplicability of a regulatory compliance defense and the presence of a state regulatory body. Yet there are enough similarities to cause us to question why state judges may be partial to state law, whether originating from state regulatory authority or from state common law.[260]

One possible explanation is that there simply are no other actors as well poised to promote state interests as state court judges. Recall from Part II.D that there is a significant underrepresentation of state regulatory interests, particularly ex post regulatory power. To put it somewhat hyperbolically, state judges may be an institutional presumption against preemption. Even if we are troubled from a constitutional and equality-of-forum-selection perspective, state judges, particularly in the case of state common law, are the only institutional actor with an interest in protecting this unique ex post source of regulation. The differences in deployment of the presumption against preemption explored in Part III may simply be explained by noting that no one else can effectively advocate for the values that state court judges appear to be protecting in banking law preemption cases.

258. *See* Sharkey, *supra* note 18, at 1017–18.

259. *See supra* Part I.A.

260. I am not espousing a view so strong as to suggest that state court judges are consciously putting a thumb on the scale for state regulatory interests. I believe this effect, to the extent it occurs, is due to the institutional features of state courts and their situation within the broader governmental framework.

One difficulty in demonstrating state judicial affinity for state common law, independent of outcomes, is the fact that plaintiff bars have considerable influence at the state court level.[261] Business interests, although still powerful at the state level, are less so when measured relative to their power over consumer groups at the federal level.[262] Neither is the federal judicial selection process entirely clean.[263] But the clear link between campaign contributions and the outcome of state judicial proceedings can scarcely be understated. A recent article by Professor Joanna Shepherd highlights this significant connection, suggesting that both retention strategy for currently elected judges and the desire to seek campaign contributions affect judges' decisions.[264] Shepherd notes, "[c]ontributions from lawyers' groups, whose members are mainly plaintiffs' lawyers, are associated with reductions in the probability that judges will vote for those same litigants that are typically defendants."[265] Meanwhile, "[c]ontributions from pro-business groups are associated with increases in the probability that a judge will vote for the business litigant in a business-versus-individual case, in a products liability case, and in tort cases generally."[266] The amount of the donation, therefore, increases the likelihood of an positive outcome for the litigant who has made a donation.[267]

Relevantly, judges are elected in many of the states whose cases are detailed above in Part III.B. For example, Washington and Ore-

261. *See* Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1484–86 (2005).

262. Of course, *Caperton* is a counterexample. *See* Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252 (2009). A meaningful distinction can be made between cases in which a business is a party at suit and therefore has a direct interest in the outcome and cases that only indirectly affect businesses. This distinction makes sense because even if Bank *A* is party to a suit that would also impact Bank *B*'s ability to avoid state predatory lending laws, Bank *B* has countervailing incentives, as whatever is bad for Bank *A* is good for Bank *B*, although the effect of the decision would also be industry-wide. Note this is similar to the model of state action in a federalism system viewed from the public choice theory.

263. *See* Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168 (2006); Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551 (2008).

264. Joanna Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009).

265. *Id.* at 630.

266. *Id.* at 629.

267. *See id.* at 670 ("The results show that the impact of large contributions can be important. For example, a $100,000 contribution would increase the average probability that a judge would vote for a business in a products liability case by 69 percent.").

gon have non-partisan elections for judges, whereas California has a retention election after appointment.[268] The fact that California has a retention election system lead to the conclusion that these elections are necessarily less combative or expensive than directly partisan judicial elections. In 1998 nearly $11 million was spent in contested judicial retention elections of just three members of the California Supreme Court.[269] In any case, the description of a judicial election of any type as "sleepy" is outdated: "As scores upon scores of commentators have observed—and, almost to a person, lamented—we are in a new era of judicial elections. Contributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role; incumbents are facing stiffer competition; [and] salience is at an all-time high."[270]

State judges, while open to accusations of favoritism to those who contribute to their campaigns, also benefit from the fact that they have more democratic legitimacy than their federal counterparts. While the role of judges as a countermajoritarian force has been emphasized in the literature,[271] scholars less frequently note that the "[t]he countermajoritarian objection . . . lacks salience in the state court context, in which many judges are elected, enjoy broad common law lawmaking powers, and are subject to popular revision, reversal, and recall."[272] However, it may simply be a happy coincidence that state judges in the banking context are often both democratically elected and a countermajoritarian force with respect to an industry-captured federal government.[273] To be sure, whatever balance elected state judges provide to federal capture, the decisions reached by state judges are deficient in legitimacy

268. American Bar Ass'n, Fact Sheet on Judicial Selection Methods in the States, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.pdf.

269. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution*, 74 CHI.-KENT L. REV. 133, 136 (1998) (citing American Bar Ass'n, Report and Recommendations of the Task Force on Lawyers' Political Contributions at 6 (1998)).

270. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267–68 (2008) (citations omitted).

271. *See, e.g.,* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (2d ed. 1986); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

272. Hershkoff, *supra* note 253, at 1918.

273. *See supra* Part II (analyzing the extent of agency capture in the banking industry) and Part III (finding that state court judges embrace the presumption against preemption more often and in stronger terms than federal judges).

from the perspective of blind justice.[274] In any case, it is not necessarily likely that the special interests with influence at the federal level will be frequently different from those with influence at the state level.[275]

An important item for future study would be a comparison of state law preemption outcomes in states with judicial elections and those without. This would have the salutary effect of distinguishing to what degree state judge affinity for common law is due to the realities of judicial campaigning as opposed to an institutional difference between state and federal judges.

If we acknowledge the significant differences in institutional pressures of state court judges compared with federal judges, such as elections, we should not be surprised to see that state courts are pursuing statutory interpretation differently than federal courts. From a purely policy perspective, California state court judges got it right—they applied a presumption against preemption in the banking context and gave rigorous scrutiny to the federal agency's broad preemption claims.[276] From an institutional competence perspective, state judges may be the only actor with significant power that can stand up for the unique regulatory interests of states.[277]

The broader implication of the foregoing analysis is that scholars should pay more attention to how the influences specific to state courts contribute to their unique mode of statutory interpretation, beyond measuring differences in outcomes. At least in the area of preemption of state banking law, state courts approach the matter of statutory interpretation differently from their federal counterparts. For the vast majority of litigants who find themselves in state court, a richer understanding of these differences, instead of an assumption of parity, will make more apparent the normative and policy consequences of a state judiciary hostile to federal regulatory overreaching.

274. *See* David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U. L. Rev. 361, 371 (2001).

275. *See supra* Part III. Although it is worth noting that state court judges tend to favor in-state parties over out-of-state parties, *see* Alexander Tabarrock & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999), out-of-state status may be a decent proxy for federal political influence, assuming that the in-state party is frequently the plaintiff.

276. *See supra* Part III.

277. That is, state judges perhaps defend state regulatory interests apart from merely supporting pro-plaintiff outcomes—even if the two happily coincided in the banking preemption context.

V.
THE EFFECTS OF DODD-FRANK & THE FUTURE OF BANKING PREEMPTION

The perceived differences between state and federal courts may have an impact on venue selection and certainly add pressure to some of the mechanisms of "partial federalization" of state law claims.[278] One avenue that is increasingly being tested is removal of suit from state court to federal court on federal question grounds.[279] The Supreme Court has held that a federal defense, such as preemption, is not enough to grant removal to a federal forum.[280] However, if there is complete preemption of an area of law such that the federal law gives the exclusive cause of action, then the claim actually arises under federal law for purposes of removal.[281] The Court has expanded this doctrine into a few carefully conscribed areas, such as ERISA state-enforcement claims.[282] More relevantly, the Court has held that state-law usury claims against national banks are completely preempted and are therefore removable to federal court.[283] Yet a circuit split has developed over whether the same holds true to state-chartered banks and state-law usury claims under the Depository Institutions Deregulation and Monetary Control Act.[284] The results of complete preemption are twofold. In addition to the federalization of venue, there may be a corresponding federalization and homogenization of substantive usury law in the state-chartered bank context, as the salient differ-

278. *See* Issacharoff & Sharkey, *supra* note 151.

279. *See* 28 U.S.C. § 1441 (2006) (removal is eligible for actions "arising under the Constitution, laws, or treaties of the United States.").

280. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454, 461–63 (1894).

281. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003) ("When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.").

282. *See* Aetna Health, Inc. v. Davila, 542 U.S. 200, 209 (2004) ("Thus, the ERISA civil enforcement mechanism is one of those provisions with such extraordinary pre-emptive power that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." (citations and internal quotation marks omitted)).

283. *See Beneficial Nat'l Bank* 539 U.S. at 11 ("Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.").

284. *Compare* Thomas v. U.S. Bank Nat'l Ass'n, 575 F.3d 794, 797 (8th Cir. 2009) (holding there is not complete preemption of state-law usury claims against state-chartered banks), *with* Discover Bank v. Vaden, 489 F.3d 594 (4th Cir. 2007) (holding that there is complete preemption of state-law usury claims against state-chartered banks), *rev'd on other grounds*, 129 S. Ct. 1262 (2009).

ences in preemption analyses between state and federal courts would be swept under the rug.

More recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in 2010 in response to the financial crisis, sets forth a new standard for agency preemption determinations.[285] While the underlying standard from *Barnett Bank* remains in place,[286] the statute declares that courts must make a case-by-case determination as to whether a state's substantive law should be preempted, thereby overturning the broad field preemption standard from the OCC's 2004 regulation.[287] All future preemptive regulations will have to be reviewed under a *Skidmore* standard by reviewing courts,[288] suggesting congressional skepticism of the OCC's methods. This is particularly interesting given that Dodd-Frank makes the OCC an independent agency,[289] meaning it will no longer be subject to EO 13,132, the federalism executive order discussed above;[290] therefore, consultation with state interests is no longer required.[291] Although one might expect independence from the executive would go hand in hand with increased judicial deference due because there would be less political interference with technocratic decisionmaking,[292] Congress appears to have determined otherwise. Perhaps this is due in part to the fact that the independent OCC is no longer required to take state views into consideration when promulgating regulations with preemptive force.

285. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044, 124 Stat. 1376, 2014–17 (2010) (to be codified at 12 U.S.C. § 25b).

286. Dodd-Frank Act, §1044(a) (modifying 12 U.S.C. § 5136C(c)). Furthermore, banks can no longer rely on the National Bank Act or HOLA to shield subsidiaries, affiliates, and agents from state regulation. *Id.*; *see also* Barnett Bank v. Nelson, 517 U.S. 25, 32–33 (1996) (preempting a state law that "prevent[s] or significantly interfere[s] with the national bank's exercise of its power").

287. *See* Dodd-Frank Act, § 1044(a) (modifying 12 U.S.C. § 5136C(c)).

288. *Id.*

289. *Id.* § 314 (modifying 12 U.S.C. 1).

290. *See supra* Part II.B.4.

291. Exec. Order No. 13,132 § 1(c), 64 Fed. Reg. at 43,255 (describing scope of term "agencies").

292. *See* Randolph May, *Defining Deference Down: Independent Agencies and* Chevron *Deference,* 58 ADMIN. L. REV. 429 (2006) (arguing that independence is a reason for increased deference). Note that this view is in tension with the original rationale for *Chevron*, namely, that agencies are more accountable to voters than judges are. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865–66 (1984).

Most pertinent, however, is the fact that courts will be forced to engage in case-by-case, detailed statutory interpretation. Thus, the presumption against preemption may end up playing a larger role in banking preemption cases post-Dodd-Frank Act. Additionally, any other differences between state court and federal court statutory interpretation will become magnified in the banking sector.

Another area of federalization pressure may come from OIRA and the EO 13,132 process. As federal agencies respond to President Obama's May 2009 Presidential Memorandum on Preemption,[293] it may be that state viewpoints will be considered more thoroughly in federal regulation. This could have the potential consequence that more state laws will be preempted.[294] As state views become incorporated into federal regulation, there will be less need for the state regulations themselves. Professor Sharkey's recommendations would have the effect of increasing the frequency of state–federal consultation, and likely increase judicial rates of deference to the federal agency, because judges would be more confident that the agency preemption statement would be a thoroughly considered regulation and not an end-run around state interests. One might also expect a decreasing reliance on the presumption against preemption to be concurrent with a future higher rate of deference as federal agencies account for state regulatory views. Granted, this view of federalization leaves out the state regulatory interest in state common law and ex post regulation through common law suits. One possible answer would be to increase the use of proxy advocates in EO 13,132 consultations with an OIRA-situated common law expert who can provide input to agencies on EO 13,132 statements about the effect on state common law a given regulation would have.[295] This would give the otherwise unrepresented common law, state ex post regulatory interest a voice in the federal regulatory debate.

CONCLUSION

Significant differences between state and federal courts exist in the application of the presumption against preemption in the banking context. State court judges appear reluctant to put a thumb on

293. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693–94 (May 20, 2009).

294. *See supra* Part II.B.4.

295. For more on state proxy advocates in federal proceedings, see Darryl Stein, Note, *Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings*, 67 N.Y.U. ANN. SURV. AM. L. (forthcoming 2012).

the scale for the federal government.[296] They may also be more amenable to policy arguments. Furthermore, state judges' experience with judge-made common law and their distance from the Supreme Court may give them the latitude needed to preserve state laws. These differences may affect the way future litigants approach their choice of forum.

The study of state courts' interpretations of preemption clauses can contribute to the rich and largely unexplored field of their interpretations of federal statutes more generally. In preemption cases, judges are implicitly forced to balance their fidelity to congressional text and federal regulations against principles of federalism—most importantly state regulatory autonomy. The ways in which state court judges reconcile these often opposing forces will shed light on the ways in which, and reasons why, state judges perform statutory interpretation differently than federal court judges. In order to make sense of the state courts' approaches to preemptive clauses, we need to consider state courts as a separate institutional actor in the same way that Congress, state legislatures, and federal and state agencies are analyzed for their contributions to the federal scheme of regulation and the development of legal meaning. There may be, particularly in the preemption area where federalism values are most at stake, instances in which state judges are the only institutional actors poised to defend states' rights. State judges therefore provide a valuable check to pressures in Congress, the agencies, and the federal courts to federalize ever-greater swaths of state authority. Consequently, it is unsurprising that state judges adopt the presumption against preemption, which serves to protect state regulatory autonomy.

While the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act has reshaped the regulatory environment, preemption battles will likely take on elevated importance in the years to come. Notably, the Act rolls back the overbroad preemption claims by the OCC and establishes case-by-case analysis as the standard for preemption determinations, with obstacle preemption as its core. Although the Act phases out the Office of Thrift

296. It is difficult to measure the strength of the presumption in either the state or federal context; however, the frequency of deployment and the strong language with which it is deployed, combined with the difference in outcomes, particularly in the Ninth Circuit and the west coast state courts, suggests this difference does exist. *See supra* Part III. One explanation for this difference, explored *supra* Part III, is that state judges are protecting state law because other actors are not well situated to compete with pro-preemption industry forces at the federal level.

Supervision, incentives to compete for regulatory clients will continue. In the post Dodd-Frank Act era, the differences between state and federal court statutory interpretation in the banking context will be magnified, creating a need for more scholarly attention to the other ways in which state and federal judges differ in their approaches to statutory interpretation. Given the Dodd-Frank rollbacks, the presumption will be utilized by state judges more often until they are satisfied that federalization pressures have thoroughly incorporated states' views in their preemption statements. Because of a lack of a voice for state common law at the federal level, we should expect the state judiciary—a unique institutional actor in the federal regulatory scheme—to raise the presumption against preemption for some time.

CONSUMER-DRIVEN CHANGES TO ONLINE FORM CONTRACTS

*ROBERT BRENDAN TAYLOR**

Consumers have been using widespread negative feedback to make firms change their online standard form contracts. In 2009, for example, backlash against an update to Facebook's terms of service caused the company to rewrite its entire agreement. Such consumer action challenges the view that sellers can take advantage of consumers' inattention to fine print by offering one-sided terms and suggests new directions for contract policy and regulation. This Note looks to the literature on seller reputation to predict what factors are relevant to firms' decisions to capitulate and evaluates the importance of each factor using case studies. It finds that the factors most predictive of when a firm will come under attack and capitulate are how large and old the firm is, whether the product or term is new or has recently changed, what type of term is involved, whether the term directly affects the firm's revenue, and the type of news source that raised the issue.

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INTRODUCTION

Imagine that you are in charge of a popular social networking site. Your site has millions of users and is growing quickly. As the site expands, a problem arises: how should you handle content that one user removes but others still have access to?[1] Your engineers resolve the technical issues, but the legal issues prove harder to address. Eventually your legal team decides to change the terms of service so that the company maintains a license to content that users have removed. Everything seems to go well, and you consider the issue resolved. Suddenly, weeks later, a scathing news story appears claiming your site is using its terms of service to claim ownership of users' content indefinitely. The story becomes very popular, and within days even *The New York Times* has covered the issue. Given the torrent of negative press, you revert to the old terms and reconsider how to approach the legal problems.

Facebook experienced a similar problem in February 2009,[2] and other companies have as well. These incidents suggest the conventional wisdom on standard form contracts may need updating. Many have speculated that firms will offer unfair terms because very few consumers actually read the contracts they agree to.[3] As it turns out, however, the terms are often not as consumer-unfriendly as they could be,[4] and the quality of these terms may be explained in part by the enhanced risk of reputational damages firms face on-

1. For example, personal messages between users.

2. *See infra* notes 157–58 and accompanying text.

3. For studies showing that consumers do not read form contracts, see Shmuel Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 215 (2010) ("Our findings show that the vast majority of consumers do not intend to read the entire [standard form contracts] into which they enter."); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (providing anecdotal evidence in the offline context); Yannis Bakos et al., *Does Anyone Read the Fine Print?: Testing a Law and Economics Approach to Standard Form Contracts* 26–28 (N.Y.U. Sch. of Law, Working Paper No. 09-40, 2009) (finding less than one percent of consumers read software license agreements presented before purchase), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256. For sources suggesting that firms will offer one-sided terms as a result, see *infra* note 11.

4. *See* Florencia Marotta-Wurgler, *What's in a Standard Form Contract?: An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 702–06 (2007) (finding that terms of many license agreements are only slightly less pro-buyer than the consumer-friendly default rules of Article 2 of the Uniform Com-

line. The reduced costs of online communication allow consumers to act more effectively against sellers who offer unpopular terms, encouraging those sellers to offer better ones.[5] For example, suppose a blogger or news writer runs a story on a "bad" term in an online standard form contract that offers little protection of a user's privacy.[6] The story gains momentum virally as it is picked up by other blogs and news outlets and, within hours or days, news about the term is everywhere. The firm then responds to the negative press by modifying or removing the controversial term.

Previous literature has suggested that a variety of factors may affect how a firm values its reputation.[7] This Note uses case studies to evaluate the extent to which these factors affect a firm's decision to capitulate to negative consumer press and change its terms. Based on the cases, this Note finds that the larger the firm is, the more likely it is to capitulate to consumer demand; that the age of the firm is not particularly relevant to capitulation; that new or newly updated products and terms are more likely to lead to capitulation; that certain terms, such as ownership of user content or user privacy are more likely to be attacked by consumers, but if the terms directly impact firm revenue they are unlikely to be changed; and, finally, that the original source of the news may matter at least as much as the number of sites that eventually report on the issue.

Part I discusses existing ways firms are disciplined into offering consumer-friendly terms in order to provide context for the reputation-based mechanism discussed above. It then derives factors potentially relevant to the reputation-based mechanism's success and presents the methodology for collecting case studies used to evaluate these factors. Part II discusses the results of these case studies and explains why some factors are more relevant than others in pre-

mercial Code). This study was limited to software license agreements, but is analogous to online privacy policies or terms of use.

5. *See* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 341–42, 348 (2008) (recognizing online information flows as a way to limit firms' ability to offer one-sided terms); Robert Hillman & Jeffrey Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 470 (2002) (same). For an empirical analysis of whether online information flows via product reviews affect contract terms, see Nishanth V. Chari, Note, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 1618 (2010) (finding a negative relationship between some product ratings and the consumer-friendliness of the contract).

6. Consider, for example, a term that used to be in AOL's terms of use for its instant messenger service: "You waive any right to privacy." *See infra* note 252 and accompanying text.

7. *See infra* note 36. R

dicting reputation-driven changes to terms. Part III explores the policy implications. The Appendix contains the case studies and tabular data used to evaluate the factors from Part I.

I.
BACKGROUND

Standard form contracts come with a number of advantages and disadvantages.[8] On the one hand, sellers can reduce transaction and agency costs by not contracting with individual buyers and the resulting savings can be passed on to the buyers.[9] Sellers can also benefit from using terms in repeated transactions as the terms are cheap to reuse in drafting and the effects of the term become better understood over time.[10] On the other hand, buyer ignorance may lead to one-sided terms. Either sellers will be tempted to take advantage of consumers, or consumers will not shop around for terms, reducing the incentives for firms to offer attractive terms.[11]

8. For a review of the relevant literature on standard form contracts, see generally Clayton P. Gillette, *Standard Form Contracts* (NYU Ctr. for Law, Econ. & Org., Working Paper No. 09-18, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374990. For a history of the various theories and approaches to standard form contracts, see Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 MICH. L. REV. 857, 860–64 (2006).

9. *See* Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 395 (2003); Rakoff, *supra* note 3, at 1220–25. Courts have also used this reasoning to uphold form contracts. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) (upholding a forum selection clause in part because of the savings it passed on to buyers); ProCD, Inc. v. Zeidenberg 86 F.3d 1447 (7th Cir. 1996) (noting that enforcement of a shrinkwrap license reduces the price ProCD charges to consumers). *See also* Robert W. Gomulkiewicz, *The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L.J. 891, 895 n.13 (1998) (collecting cases discussing the benefits of "mass market licensing").

10. *See* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 719–29 (1997) (discussing positive externalities of standard form contracts in the business-to-business context); Hillman & Rachlinski, *supra* note 5, at 439.

11. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1205–06 (2003) (explaining that non-salient terms will be socially inefficient); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600, 606–607 (1990) (discussing the high transaction costs preventing consumers from finding a new seller and sellers' incentives to draft terms unfavorable to consumers); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1389 (1983) (suggesting consumers generally know what effects important terms have,

Buyer ignorance is common because consumers do not read the terms of the standard form contracts they agree to.[12] But even if consumers did read the terms, the average consumer would be unlikely to comprehend their meaning and effect.[13] The high cost of reading and understanding may lead a rational consumer to avoid reading terms altogether.[14] Knowledge of other consumers' reading or lack thereof may also influence the potential reader—if no one else reads, one consumer's reading would be unlikely to discipline sellers.[15] Alternatively, if everyone else reads, there are poten-

even if they do not read them); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 660 (1979) [hereinafter Schwartz & Wilde, *Intervening in Markets*] (arguing that "if enough consumers comparison shop to make it profitable for firms to compete on price and quality, firms also are likely to compete on terms"). *But see* Hillman & Rachlinski, *supra* note 5, at 439 ("Because the best allocation of risks is not likely to vary between businesses within an industry, most businesses will offer terms similar to those offered by their competitors.").

12. Empirical evidence supports the idea that consumers do not read online form contracts. *See* Bakos, *supra* note 3, at 26–28. Though there do not appear to be many empirical studies in the offline context, the assumption that consumers do not read form contracts is commonly applied offline as well. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981); Hillman & Rachlinski, *supra* note 5, at 454 ("In the paper world of standard-form contracting, consumers consistently fail to read their standard terms."). Even if consumers do read the contracts they usually only skim them. *See* Becher & Unger-Avarim, *supra* note 3, at 216 ("[Our] results also indicate that potential consumers report a tendency to read parts of, or skim though [sic], [standard form contracts].").

13. *See* Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899, 903–04 (2006) (reviewing readability issues in form contracts); Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 227 (1998) (suggesting ordinary consumers might not understand "legalistic" language and corporate agents are unlikely to be able to help); Meyerson, *supra* note 11, at 596–600 (discussing the high costs for consumers to understand standard form terms). For various proposals to improve the readability of standard form contracts, see Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 GEO. MASON L. REV. 687, 702–18 (2004). For a study suggesting that actual readability may not be the most important factor in promoting consumer reading, see Becher & Unger-Aviram, *supra* note 3, at 223, 225.

14. Hillman & Rachlinski, *supra* note 5, at 436 n.33; Meyerson, *supra* note 11, at 599 & n.85. The cost of reading to consumers might also be prohibitively expensive, both in terms of time and money. *See* Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 J.L. & POL'Y FOR THE INFO SOC'Y 543, 564 (2008) (estimating the national annual opportunity cost of reading privacy policies to be at least hundreds of billions of dollars); Hillman & Rachlinski, *supra* note 5, at 436 n.30.

15. *See* Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 289–90 (1990); Rakoff, *supra* note 3, at 1228–29. This theory may be weakened to some extent online given

tial free rider issues, as sellers would already be disciplined into offering fair terms.[16] Other commentators suggest that irrationality may explain why consumers do not read or understand terms.[17] Regardless of why reading is a rare phenomenon, if no consumers read contracts then the lack of informed consumers can lead sellers to offer one-sided terms.[18]

A. Existing Disciplinary Mechanisms

Given consumers' inattention to fine print, a variety of other disciplinary mechanisms have been suggested. These mechanisms are not without their own problems, however. This section reviews issues with such disciplinary mechanisms and suggests a place for a reputation-based mechanism utilizing online information flows.

Though it is generally accepted that most consumers do not read standard form contracts, some have suggested that an informed minority of readers who factor the quality of terms into their purchasing decisions will discipline sellers.[19] Assuming all buyers have the same preferences for terms, and assuming sellers cannot discriminate among buyers in the terms they offer, the existence of an informed minority of a certain critical size should cause firms to offer fair terms to all—the cost of losing the group would otherwise be too high. But others have suggested that the costs of searching, reading, and comparison shopping for terms will outweigh the (likely small) risk that the unfair terms will actually be applied against them, and therefore no informed minority will exist.[20] This problem may be mitigated online to the extent that the cost of attaining such information is reduced,[21] but serious questions remain about the existence of an informed minority, espe-

increased information flows but it should largely still hold. *See* Becher & Zarsky, *supra* note 5, at 342.

16. *Cf.* Steven C. Salop, *Information and Monopolistic Competition*, 66 AM. ECON. REV. 240, 241-42 (1976), *available at* http://www.jstor.org/stable/1817228 (imperfect information and pricing).

17. This may be due to an inability to consider all the terms of the contract. *See, e.g.*, Korobkin, *supra* note 11, at 1206. It may also be due to an inability to gauge the risk involved in certain terms and not reading them. *Cf.* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1407 (2004).

18. *See* Schwartz & Wilde, *Intervening in Markets*, *supra* note 11, at 661 (discussing the conditions in which this equilibrium would take place).

19. *Id.* at 660.

20. *See* Meyerson, *supra* note 11, at 601. *But see* Patricia M. Danzon, *Comments on Landes and Posner: A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 569, 571–72 (1985) ("[I]t is not so obvious that the costs of obtaining information so clearly outweigh the benefits.").

21. *See* Becher & Zarsky, *supra* note 5, at 343–44.

cially as it has been shown not to exist in certain online contexts.[22] Further, even if enough potential readers existed, a firm may not sell to buyers who read standard form contracts closely if the firm believes such buyers will be more likely to breach.[23]

Others have suggested that sellers will make salient terms more consumer-friendly in order to attract additional buyers.[24] One method of doing so involves advertising consumer-friendly terms. However, firms may find the money spent advertising certain terms could be better spent elsewhere.[25] Even to the extent that firms do offer such salient terms, the costs of doing so would limit them to a small portion of the contract.[26] Thus, this theory of friendly, salient terms would still allow for a consumer-unfriendly agreement on the whole, especially if salient terms are only a small part of the contract.[27]

Firms may also choose not to enforce unfriendly terms on a case-by-case basis if an issue arises, at least absent opportunistic behavior by a consumer.[28] While doing so may enhance the reputation of the firm, such limited concessionary behavior still leaves the

22. This has been shown empirically in the online context. *See* Bakos, *supra* note 3, at 26–27. Although this study only concerned software license agreements, if users do not read clickwrap agreements they are forced to click through, they probably will not read browse-wrap agreements, which require even less effort to agree to.

23. *Cf.* Russel Korobkin, *The Efficiency of Managed Care "Patient Protection" Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORN. L. REV. 1, 60 (1999). *But see* Marotta-Wurgler, *supra* note 4, at 680 (using empirical evidence to show that software sellers do not discriminate between business and personal use customers); Shmuel Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 728 (2008) ("[B]y employing non-negotiable [standard form contracts], sellers signal their equal treatment of all consumers.").

24. *See* Clayton Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 697–98 (2004).

25. For example, firms may prefer to spend the money advertising more salient product attributes such as price. *Cf.* James P. Nehf, *Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy*, 1 J. LAW, TECH. & POL'Y 1, 35 (2005) (discussing problems with marketing terms in the privacy context).

26. *Cf.* Hillman & Rachlinski, *supra* note 5, at 447 n.100.

27. *See* Korobkin, *supra* note 11, at 1225 ("Decision research does provide a basis, however, for predicting that terms found in form contracts frequently will be non-salient to most buyers.").

28. *See* Lucian Bebchuck & Richard Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827–28 (2006); Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 977 (2005); Gillette, *supra* note 24, at 705. For an observation of this theory in practice, see Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Con-*

vast majority of consumers with one-sided terms ex ante. This behavior also does little for unsophisticated consumers who are unaware of the possibility and therefore will not take advantage of it.[29]

Ex post corrective mechanisms such as unconscionability may alleviate the problem, but these mechanisms present other issues.[30] Litigation is expensive, inconvenient, and unpredictable, providing little incentive for individual consumers to go to court.[31] Court-based resolutions are also slow relative to the speed with which End User License Agreements (EULAs) can change online.[32] Such resolutions may therefore be moot before they are ever rendered.

The advent of the Internet has provided consumers with other means to discipline firms. For example, some have suggested that increased information flow online between buyers and potential buyers regarding contract quality may lead firms in competitive markets to offer better terms.[33] Improved consumer communication and cooperation has little effect on problems with existing ex post mechanisms, but it does allow for the creation of new ex post mechanisms based on reputational sanctions. Such mechanisms often take the form of ratings that users can post online after buying the product. While it has been shown that online ratings for products will not always discipline sellers,[34] a similar system for the

tracts, 104 MICH. L. REV. 953, 963–64 (2004) (offline context); Becher & Zarsky, *supra* note 5, at 341–42 (online context).

29. *Contra* Becher & Zarsky, *supra* note 5, at 342 (suggesting online information flow will reach enough consumers for this to be effective).

30. *See* Becher, *supra* note 23, at 764–73; *see also* Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 71 (2010) (court-based resolution of consumer protection issues); Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 U. ILL. J.L. TECH. & POL'Y 1, 10–19 (2009) (procedural issues with court-based resolution of e-commerce disputes).

31. Becher, *supra* note 23, at 772 n.213, 773; W. Bentley Macleod, *Reputations, Relationships, and Contract Enforcement*, 45 J. ECON. LITERATURE 595, 601 (2007), *available at* http://www.aeaweb.org/articles.php?doi=10.1257/jel.45.3.595.

32. The phenomenon covered by this paper, for example, often takes place over a matter of days, while litigation can take months or years. Consider, for example, a German court that required Google to change its terms of service one year after it had already done so. *See* Richard Koman, *German Court Orders Google to Change TOS - A Little Late*, ZDNET, (Sept. 1, 2009, 6:43 AM), http://government.zdnet.com/?p=5328; *Google Chrome*, *infra* Appendix.

33. *See* Hillman & Rachlinski, *supra* note 5.

34. *See* Chari, *supra* note 5, at 1622.

form contracts themselves could supplement the corrective function of litigation.[35]

This review of the existing disciplinary mechanisms for firms' terms suggests there is room for improvement. The reputational mechanism, discussed below, helps address some of the shortcomings of other mechanisms.

B. Reputation-Based Mechanism

Consumer-based online reputation sanctions can function as a useful disciplinary mechanism against firms. As consumers are unlikely to be aware of the terms of the form contracts they enter into or how such terms are applied, the firm's reputation may serve as a proxy for this information.[36] When a firm's reputation comes under attack due to criticism of the terms it offers, the firm will often choose to preserve its reputation by changing the terms of its standard form contract.[37]

In order for this mechanism to be effective, someone besides the firm must be familiar with the terms,[38] there must be an effective way to communicate that person's experience with others, and the firm must actually care about its reputation.[39] As the case studies will show, news organizations and bloggers often satisfy the first

35. *See generally* Yannis Bakos & Chrysanthos Dellarocas, *Cooperation Without Enforcement?: A Comparative Analysis of Litigation and Online Reputation as Quality Assurance Mechanisms* (MIT Sloan Sch. of Mgmt., Working Paper No. 4295-03, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=393041& (suggesting online reputation may be more efficient disciplinary mechanism than litigation in certain circumstances).

36. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 219–20 (2005) ("Reputational information is crucial to promoting competition among suppliers on non-price terms because consumers must rely upon a firm's reputation for satisfying consumer needs as a proxy for the 'fairness' of the firm's contracts."); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 600 (1982) (suggesting rational buyers might ignore terms in the hope that the seller is sufficiently concerned with its reputation to offer fair ones).

37. See, for example, the Facebook incident, *infra* notes 157–58 and accompanying text.

38. There is an implicit assumption that the contract reader can accurately spot unfair terms and will react against those terms, as opposed to other terms that are actually fair. But given the description of consumer understanding of standard form contracts, this assumption may be difficult to make. *See* Ostas, *supra* note 13; *see also* Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 939 & n.19 (2006) (explaining how terms that seem unfair to a consumer may actually be most efficient overall).

39. *See* Baird, *supra* note 38, at 938.

requirement.[40] As to the second requirement, the Internet provides a relatively easy means of disseminating information about issues with a firm's standard form contract, which may cause the firm's reputation to suffer.[41] It is also presumed that firms tend to care about their reputation.[42] This Note assumes these requirements are met in order to perform an analysis of how exactly the firm's reputation is affected and how the firm responds when consumers protest en masse the terms of the firm's contract.

Whether a firm will come under attack and how it will respond might best be predicted using a set of descriptive factors. Tadelis and Bar-Isaac provide a foundation for such a framework using reputation for products.[43] They suggest that four factors determine whether reputational concerns lead to efficient trade: the extent of uncertainty about the seller, the rate of information diffusion among buyers, the value the seller places on future interactions, and how sensitive buyers are to reputation.[44] Because consumer uncertainty about the seller's characteristics may be important, the analysis should take those characteristics into account. Seller characteristics should also prove relevant as different types of firms may make different decisions about capitulation. The rate of information diffusion among buyers means that the characteristics of the news coverage that accompanied the issue, particularly the size and

40. Such groups may have an incentive to read the terms to create news. They may also be effective to the extent that they are considered trustworthy sources of information, which can be an issue for online news sources. *See* Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flow*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 778–80 (2008) (discussing the difficulties in ensuring accreditation of information and possible solutions); Becher & Zarsky, *supra* note 5, at 333–40.

41. *Compare* Meyerson, *supra* note 11, at 606–07 (noting in the offline context how damages from discovery of inefficient terms are often less than cost of offering more efficient ones, limiting the effectiveness of reputational constraints in this context), *with* Bakos & Dellarocas, *supra* note 35, at 17–18 ("Internet-based online reputation mechanisms provide easily accessible, low cost focal points for previously disjoint groups to pool their experiences with service providers and merchants into a single feedback repository [regarding reputation]."); *see also* Becher & Zarsky, *supra* note 5 and accompanying text. For a review of studies on information sharing-based mechanisms may operate offline, see Macleod, *supra* note 31, at 614–15.

42. *See* Baird, *supra* note 38, at 938 (2006) (suggesting reputational concerns as a limit on use of boilerplate in business-to-consumer contracts).

43. Heski Bar-Isaac & Steven Tadelis, *Seller Reputation*, 4 FOUND. & TRENDS IN MICROECONOMICS 273 (2008).

44. *See id.* at 279.

sources of news, should matter.[45] Buyers' sensitivity to reputation may depend on what is being bought, meaning the characteristics of the product and terms of the contract governing the product should be relevant. Thus, there are four broad categories of factors: (1) the characteristics of the firm, (2) the characteristics of the product or service, (3) the characteristics of the contract term in controversy,[46] and (4) the characteristics of the news coverage the issue receives.

With respect to the first category, firms whose products and contracts are exposed to a large number of people should be more likely to face scrutiny online.[47] Firms that have spent a significant amount of time and effort building and protecting their reputation may also be more sensitive to such attacks when they happen.[48] New companies, by contrast, have generally invested less overall in their reputation, making it cheaper to drop their "brand" and reinvent themselves.[49] Further, new entrants to the software market are frequently acquired by larger, long-term players,[50] which may lead some entrants to discount long-term reputation. Finally, both the size and age of the firm have been shown to be relevant to the types of terms offered in the context of software license agreements.[51] Therefore each firm's revenue, employee count, and age are all potentially useful factors in determining when a firm comes under attack and when it will capitulate.

45. It has been suggested that a certain critical mass is required for any reputation-based mechanism to work. *See* Bakos & Dellarocas, *supra* note 35, at 1.

46. This category of factors is not derived from the literature, but this Note includes it because not all terms will have the same likelihood of being attacked or causing a firm to capitulate.

47. *See generally* Rafael Rob & Arthur Fishman, *Is Bigger Better?: Customer Base Expansion through Word-of-Mouth Reputation*, 113 J. POL. ECON. 1146 (2005) (finding that a firm's investment in quality is positively related to its size, and therefore, a good reputation is more valuable to a larger firm).

48. *See id.* at 1155–58. Note this assumes some correlation between the amount invested in reputation and the value of the reputation.

49. *Cf.* Bar-Isaac & Tadelis, *supra* note 43, at 309.

50. *See* CASEY THORMAHLEN, IBISWORLD, SOFTWARE PUBLISHING IN THE US (July 2010), at *5 ("During the past five years, large software publishers eagerly bought smaller publishers with specialties in growing software niches . . . . As continued technological development drives innovation during the next five years, acquisition activity within this industry will grow more robust."), *available at* http://www.ibisworld.com/reports/reportdownload.aspx?cid=1&rtid=1&e=1239&ft=pdf&beta=y.

51. *See* Marotta-Wurgler, *supra* note 4, at 708; *see also* Bar-Isaac & Tadelis, *supra* note 43, at 312–13 ("[W]hen a firm is bigger, it has a larger buyer base, and so, new buyers . . . are more likely to hear about successful or failed transactions of a large seller than a small seller.").

The second category, the features of the product or service that the contract governs, should be relevant as well. The more users of the product there are, the more likely new consumers are to learn from existing users about reputation.[52] In addition, assuming that the longer a company delivers on a good reputation, the more users it will accumulate, then the cost of losing the reputation (and sales) increases over time and the firm will likewise be increasingly concerned with maintaining that reputation.[53] Flagship products may indirectly reflect this, as they tend to have the most users, and companies are likely more concerned about consumer perception of such products and accompanying terms.[54] The length of time the product has been on the market likely matters as well—products that have been around longer will likely have garnered a greater reputational value that would be more costly to lose. But firms should also be interested in making sure a brand new product does not start with a negative reputation, and thus should be very sensitive to reputation at the product's launch.[55] New or updated products may also attract more attention as consumers have a reason to look at the product (and the contract) in more detail in such circumstances. The revenue model for the product may also matter. There are at least two distinct revenue models in the software industry: in the traditional revenue model, consumers buy a product for a set price; newer models, by contrast, involve free software and services supported by advertisements.[56] Recent trends suggest that free, ad-supported software and services tend to be provided online

52. *See* Bar-Isaac & Tadelis, *supra* note 43, at 312–13; Rob & Fishman, *supra* note 47, at 1147–48 (providing a model).

53. Rob & Fishman, *supra* note 47, at 1149.

54. As defined in the Appendix, *infra*, this paper generally considers a flagship product to be the one that generates the highest revenue for the company.

55. Starting out with a negative reputation could be disastrous—with a negative reputation, no customers will buy the product and change the negative reputation. *Cf.* Bar-Isaac & Tadelis, *supra* note 43, at 284–85. Though the firm could attempt to rebrand the product, note the difference here between new products and new companies. While a new company may find it cost effective to reinvent or rebrand itself, the same would not work as well for a new product—even if the company rebrands a new product with a bad reputation, the company itself has taken a reputational hit as a result of the product.

56. America Online, for example, recently switched to providing its email services for free, supported by advertisements. *See* AOL Inc., Annual Report (Form 10-K) (March 2, 2010) ("Following our strategic shift in 2006 from focusing primarily on generating subscription revenues to focusing primarily on attracting and engaging Internet consumers and generating advertising revenues, we have become increasingly dependent on advertising revenues as our subscription access service revenues continue to decline."), *available at* http://sec.gov/Archives/edgar/data/1468516/000119312510045310/d10k.htm.

more often than non-free software.[57] Free products may also have different reputational values or effects for consumers than products consumers purchased.[58] This Note will therefore consider the number of users of the product, whether the product was recently released or updated, whether the product is a flagship product, and whether the product was offered for free.

The third category, the features of the contract term subject to controversy, should also be relevant. From the company's perspective, terms that directly affect the firm's revenue should be considered most important. A term whose modification or removal would immediately cost the company millions of dollars should be more highly valued by the firm than one with an uncertain financial effect far in the future. Firms may also be more willing to capitulate on terms that are relatively new and have yet to develop strong network effects.[59] In such cases the benefits of using the term are diminished as it is not widely used, and thus the costs of dropping the term would be relatively low as well. From the consumer perspective, more salient terms (those that are easy to understand or that cover particularly sensitive issues, such as privacy or ownership of user-generated content) should generate more interest and backlash than obscure terms that consumers do not understand or do not think will affect them.[60] Finally, consumers may be more inclined to check out a contract when it first becomes available to them or has recently been updated. Thus, the overall type of term,

57. GRAHAM VICKERY & SACHA WUNSCH-VINCENT, ORG. FOR ECON. CO-OP. AND DEV., PARTICIPATIVE WEB AND USER-CREATED CONTENT: WEB 2.0, WIKIS AND SOCIAL NETWORKING 49–50 (2007) ("Advertising is often seen as a more likely source of revenue for [user-created content] and a significant driver for [user-created content] . . . . most of the hopes to monetise [user-created content] are currently placed on purely advertising-related business models."); David Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, 23 J. ECON. PERSP. 37, 37 (2009) ("Fifty-six of the top 100 websites based on page views in February 2008 presented advertising; these 56 accounted for 86 percent of the total page views for these 100 sites. Twenty-six of these 56 sites, accounting for 77 percent of all page views for the top 100 sites, likely earn most of their revenue from selling advertising.").

58. At the very least, consumers choose to read EULAs for free software more often than for paid software. *See* Bakos, *supra* note 3, at 27. One explanation is that consumers are concerned about the hidden costs of free software and services. *Id.* at 34.

59. Network effects are benefits (or detractions) as a result of multiple using the same type of good—for example, the more people that use a social networking site, the more value it has to its users. *See* Kahan & Klausner, *supra* note 10.

60. *See* Korobkin, *supra* note 11, 1229–34.

whether the term has a direct financial impact on the firm, and whether the term is new or was recently changed should all matter.

The fourth category, the quality and quantity of news coverage of the issue, should also matter. The greater the news coverage, the greater the number of informed consumers, and the more the firm's reputation will suffer. The type of news coverage may matter as well (for example, news outlets versus blog posts) due to issues with accreditation and trust.[61] While the type of site covering the issue may matter, the source of the original news story should be even more important (and easier to measure). For example, if the source is not well accredited by the target consumer group or is not frequently visited, it may not create a story that catches on. Thus, the number of news and blog post hits, both before and after capitulation, as well as the amount of traffic the website that started the story normally receives, should all be important.

C. Methodology

This Note collects case studies to evaluate the factors discussed above. The case studies were found by searching for the terms "EULA," "terms of use," and "privacy policy" on Digg[62] and Slashdot,[63] both of which are large online technology-oriented news websites.[64] The timeframe for the searches was January 2000 to December 2009. To be included in the study, an incident had to be an attempt started by American consumers to change all or part of a firm's business-to-consumer EULA, privacy policy, or terms of service for a product or service offered online. The attempt must have started online, have primarily been carried out online, and have had its origins in consumers' concern about or disapproval of a contract or a term in a contract.

61. *See* Zarsky, *supra* note 40.

62. DIGG (Feb. 3, 2011), http://www.digg.com.

63. SLASHDOT (Feb. 3, 2011), http://www.slashdot.org.

64. A previous, more complicated methodology was attempted before this one was chosen. The previous methodology looked at events found by performing limited searches on multiple news websites selected based on Alexa rank and category. This methodology tended to capture large events, biasing the sample. Digg happened to have nearly every event found by the above methodology, and Slashdot also captured many of the events. As a result, this Note employs a methodology consisting of a more thorough search of just those two cites. This methodology is similar to one used for an empirical study of mutual fund scandals. *See* Stephen Choi & Marcel Kahan, *The Market Penalty for Mutual Fund Scandals,* 87 B.U. L. REV. 1021, 1026 (2007) (using Westlaw to search the Wall Street Journal for incidents to be included in an empirical study).

All incidents that matched these criteria were included in the study, resulting in a total of eighteen cases. Each of the incidents is summarized in the Appendix. The Appendix also contains tables giving the value of each variable for each case. The incidents range from very large-scale, successful attempts at change to very small attempts that never took off. Some firms were involved in multiple incidents, permitting an analysis that controlled for company characteristics.

Though the requirement that the incident appear on Digg or Slashdot suggests that the sample may be biased towards larger incidents, a number of cases in the sample are single blog posts, arguably the smallest possible incident. Large companies may also have generated more than one incident, so the analysis in Part III controls for whether a company had multiple incidents. Multiple incidents across a given company also provide an opportunity to study outcomes while controlling for an important variable. The sample may also be biased to the extent that it only covers online products and services. This was done to keep the study manageable; adding incidents for offline products and services would increase the amount of data collection beyond a reasonable scope. Limiting the sample in this way is not intended to suggest that there is not a similar effect offline—there almost certainly is.[65] But it is beyond the scope of this Note.

II.
RESULTS

This section uses the methodology explained in Part I.C to determine how predictive each factor from Part I.B is of a company coming under attack and capitulating. The conclusions in this section are limited by the scope of the data they are drawn from. Though a search methodology is used, the data collected is by no means a comprehensive empirical study, and thus it cannot be used

65. *See* Becher & Zarsky, *supra* note 5, at 348 n.193. This is especially common for firms that provide cell phone service or Internet connectivity. *See, e.g.*, Ken Fisher, *AT&T Relents on Controversial Terms of Service, Announces Changes (Updated)*, ARS TECHNICA http://arstechnica.com/tech-policy/news/2007/10/att-relents-on-controversial-terms-of-service-announces-changes.ars. Then again, it is possible the mechanism has an enhanced effect for online products and services. Consumers are already using the Internet to buy and use the product or service, so it may be a small step to use that same medium to criticize terms that govern them. *See* Hillman & Rachlinski, *supra* note 5, at 471 ("Inasmuch as e-businesses' biggest customers are also most likely to use the Internet to investigate the goods and services, however, the availability of Internet research will have a greater effect on e-businesses than on conventional businesses.").

to make definitive statements about the phenomenon covered in this paper. The number of cases is large enough, however, to at least provide insight into what may be relevant. Overall, the companies in the sample tended to be large (though not necessarily old), and older and larger firms capitulated more often than younger, smaller firms. New and recently updated products tended to attract the most attention, as did products offered for free, and companies tended to capitulate more often for such products. Whether a product was a flagship product, by contrast, did not seem to matter. Terms concerning licensing and ownership of user-generated content tended to be especially prone to consumer attack and firm capitulation, while terms with a clear financial impact on the firm were more resistant to change. Finally, the source of the news about the term tended to matter, while the quantity of press the issue received, as measured by Google News and Google Blog Search, did not matter as much.[66]

The following subsections analyze each category of factors in greater detail and attempt to explain why the factors were or were not relevant in the case studies. Tables in the Appendix provide the data for each of these categories.

A. Company Factors

In order to properly analyze variables such as revenue and age, one must have something to compare them against. As all the companies in the sample provide a product written with software code, this Note looks to the software industry for comparable figures. In doing so, it assumes that all firms in the software industry are susceptible to attack.[67] Estimates of mean revenue for software firms vary, but they tend to be in the range of approximately five to twenty million dollars. First Research, for example, estimates 2010 mean revenue to be $4.4 million for software companies and $14.8 million for Internet publishing companies (such as Google).[68] IBIS

66. For an explanation of how these services were used, see Table 4 *infra* in the Appendix.

67. Data gathered for a forthcoming study shows that the vast majority of software companies do use license agreements and have an online presence; in theory this should be sufficient to make the firm susceptible to reputational attack. Florencia Marotta-Wurgler & Robert Taylor, *The Evolution of Boilerplate* (N.Y. Univ. Sch. of Law Working Paper 2011).

68. *Computer Software Development*, First Research (Dec. 13, 2010), http://nyu.firstresearch-learn.com/industry.aspx?pid=88 [hereinafter First Research I]; *Internet and Publishing Services*, First Research (Jan. 24, 2011), http://nyu.firstresearch-learn.com/industry.aspx?pid=345&chapter=1 [hereinafter First Research II].

estimates 2010 mean revenue for software companies to be $21.8 million.[69] Preliminary U.S. Census data from 2007 estimates mean revenue for software companies to be $16.2 million.[70] These numbers may be slightly skewed upward given the concentration of revenue within certain very large companies in the industry.[71] Given the different estimates, this Note will use $15 million as an approximation of mean revenue for the software and online services industries. The average number of employees per firm also varied, but tended to be around fifty. IBIS estimates mean employees per firm to be forty-nine in 2010.[72] Preliminary U.S. Census data from 2007 estimates mean employees per firm to be forty-five.[73] These numbers may also be slightly skewed upward, as many of the highest revenue companies also tend to have the most employees.[74] This Note will therefore use fifty as an approximation of the mean number of employees for the software and online service industries. Statistics on age were more difficult to come by. A study by Florencia Marotta-Wurgler gathered data on hundreds of software companies listed in the 2005 Software Industry Directory.[75] The average age of these companies was fifteen years.[76]

Most cases in the sample have both a revenue and employee count above the mean, suggesting that larger companies are more prone to consumer attack.[77] The results also show that, where data was available, those companies whose revenue and employee counts

69. *Software Publishing in the U.S.*, IBIS (Oct. 2010) http://www.ibisworld.com/industryus/default.aspx?indid=1239 [hereinafter IBIS].

70. *Sector 51: EC0751I1: Information: Industry Series: Preliminary Summary Statistics for the United States: 2007*, U.S. CENSUS BUREAU, (Oct. 30, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC0751I1&-_lang=en.

71. As of 2010, the fifty largest software companies generate about 70% of the software industry's revenue. FIRST RESEARCH I, *supra* note 68. By another estimate, the top four companies account for half of the industry's revenue. IBIS, *supra* note 69. U.S. Census data for 2002 estimates the four largest firms captured 39% of the industry revenue, and the fifty largest captured two thirds of the industry revenue. *Software Publishers, NAICS 5112, 2002 Economic Census: Information, Industry Series, Bureau of Census* (Oct. 2004), *available at* http://www.census.gov/econ/census02/data/industry/E511210.HTM [hereinafter NAICS].

72. *See* IBIS, *supra* note 69.

73. *See* NAICS, *supra* note 71.

74. See Table 2 *infra* in the Appendix.

75. *See* Marotta-Wurgler, *supra* note 4. R

76. *Id.*

77. At least twelve companies in the sample (there were sixteen unique companies in the sample) were above the mean for revenue, and at least thirteen companies were above the mean number of employees (data was only available for seventeen). Excluding companies that were missing data (which may create a bias

were above the mean capitulated almost every time.[78] Of the incidents involving small-revenue or small-employee companies for which at least some data was available, only once did a company capitulate, and in only one other incident did the company even attempt to address the issue.[79] This supports the idea that larger companies are both more susceptible to attack and more prone to capitulation given their large consumer bases and potentially large investment in developing their products. Smaller companies, by contrast, might feel there is less on the line with such attacks; they may also be less capable of responding to such incidents if they have limited resources.[80]

Age also correlated with capitulation. Though few cases involved companies with an age greater than the average age of fifteen years, in all such cases the company changed its terms.[81] By contrast, companies below the median age capitulated just over half the time.[82] This at least does not contradict the idea that older companies may be more prone to capitulation.

For a given company, the reaction across different incidents tended to be consistent. Microsoft capitulated to public scrutiny of its Passport terms of service and two of three terms for Windows Vista's EULA,[83] and Google capitulated regarding both Chrome and Google Docs.[84] This may suggest company features matter more than other features.[85]

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towards larger companies), twelve of thirteen were above mean revenue and thirteen of fifteen were above the mean number of employees.

78. Eleven of thirteen such incidents resulted in capitulation. None of the companies matching these criteria addressed the issue without changing its terms.

79. Dropbox capitulated; Flagship Studios posted a notice about the disputed terms but did not change them. The other three companies did not do anything. See Appendix *infra*.

80. Such companies may not have the money for legal advice on the issue; they may also not have a large customer relations department with experience dealing with large-scale consumer issues. For example, some companies that were small at the time of the incident, such as Bioware, see *infra* notes 257–62 and accompanying text, or Flagship Studios, see *infra* notes 212–18 and accompanying text, primarily used their own website (either through forums or a news post) to address the issues they faced.

81. In all five cases where data was available and the firm was above the mean age, the company capitulated.

82. In seven of thirteen cases for which data was available and the company was below the mean age, the company capitulated. In the two cases where the company did not, the company at least attempted to address the issue.

83. *See infra* notes 226–237 and accompanying text.

84. *See infra* notes 187–91, 219–25 and accompanying text.

85. At the same time, however, it may be debatable how different some of the incidents across a given company really are. While in Microsoft's case, the differ-

The results suggest that larger, older companies are more likely to come under attack and are more likely to capitulate than smaller, younger companies. That the results tended to be consistent across different incidents for the same company further suggests the importance of these company characteristics.

B. Product Factors

Flagship products were more likely to come under attack than other products in the sample, but firms were less likely to respond to consumer demands in such cases. More than half of the cases involved flagship products, but fewer than half of those cases resulted in capitulation.[86] By contrast, in all seven cases involving a non-flagship product, the firm capitulated. Many of the cases that did not involve flagship products nevertheless involved products that were a significant source of revenue for a company or involved a free version of the flagship product (such as OpenSUSE[87] or Photoshop Express[88]). Some companies could also reasonably be considered to have more than one flagship product.[89] This could explain why the flagship product variable was not particularly predictive of capitulation. Alternatively, perhaps firms adopt the same policy on capitulation across all products. It is also possible that even if the variable does have some relevance, other variables, such as the company characteristics discussed above, are simply more important. For example, many cases involving non-new and non-flagship products that resulted in capitulation also involved companies with characteristics consistent with those that capitulate.

Whether the product was recently released or updated appears to be more relevant. More than half of the cases involved a new or updated product, and in such instances the company nearly always capitulated or at least addressed the issue.[90] For non-new products,

ence between incidents is fairly large (six years, very different terms, different products), in Google's case there was much more similarity (two years, similar terms, but different products). *See* Tables 1 and 2 *infra* in the Appendix.

86. Eleven of eighteen cases involved flagship products. In only five of the incidents did the firm capitulate. In two other cases the firm at least attempted to address the issue.

87. *See infra* notes 192–98.

88. *See infra* notes 205–11.

89. Microsoft, for example, made slightly more money off its Office line of products than its Windows operating systems the year it released Windows Vista, one of the products in the sample. *See infra* note 337.

90. Eleven of eighteen cases involved a new or updated product, and of these eleven, seven resulted in capitulation. In ten of the eleven cases the company at least addressed the issue.

the company capitulated or addressed the issue in just over half of the cases.[91] That over half of the cases involved new products suggests consumers are much more likely to read the contract when a product is released or updated. This may be because consumers have not encountered the license before, there is less knowledge of the product, and its reputation will not have fully formed yet. That nearly all cases with new or updated products resulted in capitulation suggests that firms may be more sensitive to creating a strong reputation for a product that does not yet have one or whose reputation may change since the product recently changed.

As discussed previously, non-free products and free, ad-supported products are two different revenue models in the software industry. The cases were split fairly evenly between these two models,[92] but free software and services resulted in a much higher capitulation rate than non-free software. Capitulation by free software and services companies was nearly universal,[93] while very few non-free cases resulted in capitulation.[94] It is possible the strong online presence of the free software and services makes their characteristics and reputation particularly susceptible to the improved information flow over the Internet.[95] It may also be a result of a latent company characteristic: companies in the sample tended to offer either free software and services (such as Google or Facebook) or non-free products (such as 5th Cell), but generally not a mixture of both.[96]

The number of users of the product at the time of the attack mattered. Almost all of the products that came under attack had over a million users.[97] This result is not surprising, since the more users there are, the more likely it is that one will disagree with some of the terms. The results with the capitulation rate are more interesting. One would expect that the more users a product has, the more press the product will receive, and the more likely the company will be to capitulate. Thus, it is somewhat counterintuitive that cases above the average with respect to the number of users had a

91. Specifically, in four of seven cases. No companies in this category addressed the issue without capitulating.

92. Free software and services comprised eight of the eighteen incidents.

93. Ten of eleven cases.

94. Two of seven cases.

95. *See* Becher & Zarsky, *supra* note 5 and accompanying text.

96. *See* Table 2 *infra*.

97. Thirteen of fifteen, where data was available. Cases where data was not available likely had, if anything, a lower number of users.

lower rate of capitulation than those below the average.[98] While this result is consistent with the flagship product characteristic not being highly correlated with capitulation, it is not obvious why this should be so. It is likely that either ten million users is far more than what is needed to put pressure on a firm to capitulate, or the number of users is only relevant to whether a company gets attacked, but not to whether it capitulates. Since products with fewer than a million users, or for which no user data was available (which likely indicates fewer, not more, users), were much less likely to result in capitulation, perhaps the former is the correct explanation.[99]

Based on the limited dataset, firms appear most concerned when products are new, updated, or offered for free. Whether the product was a flagship product and, at least to some extent, the number of users of the product both appear to be less predictive of capitulation.[100]

C. Term Factors

One would expect that the likelihood of capitulation would be better correlated with contract term characteristics than with product characteristics. Consistent with this hypothesis, certain types of terms were strongly predictive of whether a firm would come under attack and whether it would capitulate.

Close to half of the incidents involved a term about firms' license to user generated content.[101] Of these, all resulted in the firm capitulating or at least addressing the issue.[102] There are a number of possible reasons why such terms are attacked so frequently. Consumers might believe the term requires them to give up something they made, which might be more troublesome to them than giving away something they are less invested in, such as an obscure con-

98. Of the cases for which data was available, seven of fifteen involved more than ten million users, and eight of fifteen involved fewer than ten million users. For incidents with more than ten million users, five of seven resulted in capitulation, but for incidents with fewer than ten million users, six of eight cases resulted in capitulation. The cases where the number of users is missing likely have fewer than ten million users, since these companies tended to be smaller. If we add these in to the count for fewer than ten million users, the result remains essentially even at six of eleven cases resulting in capitulation.

99. In cases with a million users or fewer, or for which user data was not available, only two out of six resulted in capitulation.

100. Some discrepancies between outcomes for a given product characteristic might be explained by company characteristics, as discussed below.

101. Eight of nineteen cases involved such a term.

102. In eight of the nine cases the firm capitulated; in the one non-capitulation case the firm attempted to address the issue without changing the term.

tractual right.[103] News bias and misunderstanding may also contribute to the term's frequent appearance. News outlets may realize that stories on certain terms will resonate more with consumers, or that presenting a story a particular way will do so (such as companies forcing users to give the company a royalty-free license to the users' content versus companies finding ways to promote their users' content without being sued for infringement), which could lead them to focus more on such terms in their stories.[104] It is also possible that consumers simply do not understand how the term is being used—oftentimes, terms have a functional purpose that is lost on consumers (for example, allowing the software or service to operate smoothly without infringing users' rights to their content).

Terms affecting privacy and data collection were relatively common in the case studies.[105] Online privacy has become a hot-button issue,[106] leading news outlets to cover terms related to it more often than other terms.[107] Incidents involving privacy and data collection terms did not frequently result in capitulation.[108] Some of these terms involved data collection for financial gain by firms. Because modifying such a term would adversely impact firms' revenue, firms were more likely to resist changing them. This is discussed in more detail below.

103. Many of the news articles on these terms focused on the idea of ownership, despite the fact that the terms ex ante generally made it clear that consumers retained ownership—for example, *Google Chrome EULA Claims Ownership of Everything You Create on Chrome, From Blog Posts to Emails*, GIZMODO (Sept. 3 2008), http://gizmodo.com/5044871/google-chrome-eula-claims-ownership-of-everything-you-create-on-chrome-from-blog-posts-to-emails. The endowment effect, as applied to user generated content, might help explain the reaction to this particular term. *See generally* Russel Korobkin, *The Endowment Effect and Legal Analysis,* 97 NW. L. REV. 1227 (2003).

104. For additional background on news media bias, see KATHLEEN JAMIESON & KARLYN CAMPBELL, THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE INTERNET 95–103 (6th ed. 2005).

105. Three cases involved terms covering what companies could do with users's data.

106. That there are now law textbooks on information privacy tends to suggest this. *See, e.g.*, MARK ROTENBERG & DANIEL SOLOVE, INFORMATION PRIVACY LAW (1st ed. 2003).

107. Though difficult to prove, privacy terms are surely in the news more often than, for example, those affecting what theories of liability are disclaimed. A quick Google News search of "privacy" yields 23,000 results, while searches for "disclaim liability" (without quotes) yields only around 150 results, many of which are actual legal documents instead of news stories.

108. In only one of three incidents the company capitulated; in another incident the company addressed the issue but did not change the term.

Terms related to a firm's revenue were unlikely to be changed.[109] The term in Hellgate: London, for example, involved in-game advertisements.[110] The firm may have been less inclined to modify the term (and corresponding program functionality) due to the lost revenue the change would entail. Similarly, the penalty clause in School Check IN remained unchanged.[111] Licensing and ownership terms, by contrast, typically disclaim a license for commercial use and exist to ensure the company can actually provide functionality given user submitted content.[112] In such cases, money is not the issue so much as the functionality of the product in the wake of potentially unclear legal standards; firms might be more flexible in modifying the term in such circumstances.

Whether the term was new or recently updated was also important. Many cases involved such terms; of these, almost all resulted in the company capitulating or at least addressing the issue.[113] For non-new terms, the capitulation rate was lower.[114] Much like the introduction of a new product, it would appear that consumers are more likely to read terms when the terms are or appear to be first introduced.[115] In fact, almost every case either involved a new or updated term or product, and the rate of capitulation for this group was much higher than for the group where neither the product nor the terms were new or updated.[116] While this presents additional problems for firms when introducing a new product and

109. Four cases involved such terms, and in each case the firm capitulated.

110. *See infra* notes 212–18 and accompanying text.

111. *See infra* note 170 and accompanying text.

112. For example, the term involved in the Facebook incident. *See infra* note 157.

113. Twelve cases involved updated terms; nine resulted in capitulation, and in another two cases the firm at least addressed the issue. In one case (AOL), a notice was placed saying the terms were updated, even though they had not in fact been; since people thought the terms had been updated, the effect was the same (and AOL eventually capitulated to criticism of its terms). *See infra* notes 250–56 and accompanying text.

114. Three of six cases. Of these six, three involved products were either newly updated or had recently been introduced into a much broader public spotlight (Octoshape), and of those three two resulted in capitulation. *See infra* Appendix.

115. There will of course be some overlap between the data for new products and new terms. But new terms may be more predictive of when a firm comes under attack, to the extent terms can be updated without a product update, and product updates do not always involve updated terms.

116. Fourteen of eighteen cases involved either terms or products that were new or recently updated. Of these fourteen, eleven resulted in capitulation. Of the four cases not in this group, only one (Google Docs) resulted in capitulation. *See infra* notes 219–24 and accompanying text.

corresponding agreement (even if the agreement is being reused from another product) or when publicly updating their terms, it suggests there is significantly less risk once the initial wave of consumer inspection abates. The continued use of the product under the applicable terms may make consumers less wary of them when an issue arises—having used the product with the terms for so long already, consumers are satisfied with the status quo.[117]

Thus, certain terms that resonate with consumers or that consumers can more readily comprehend get more attention. For example, Microsoft, which ended up capitulating on numerous terms, did not capitulate regarding disclosure of benchmarking results,[118] a term that the average user of Windows likely does not care about. Terms with an immediate financial impact are more resistant to change. Such terms are more likely to have been specifically added in (rather than merely being boilerplate),[119] giving the term particular import for the firm. Even if the term is recycled boilerplate, a corporation will be less inclined to change the term when it has a clear negative financial impact. Finally, new or updated terms, like new products, tend to be more prone to attack, and firms frequently capitulate in such instances.

D. News Factors

As discussed in Part I, improved information flow online should increase the effectiveness of the reputational discipline mechanism. One way to test this hypothesis is to estimate the amount of press the incident has received from news outlets and blogs: Are these incidents generating a significant amount of news? Is there any relation between the amount of news and whether a firm capitulates? This section will start by analyzing data gathered using Google News and Google Blog Search. Both of these resources provide a way to measure the amount of press an incident receives by searching for articles with certain keywords over a given timeframe; however, the methods are somewhat imprecise, making the data suitable only for a rough estimate of the size of the reaction.[120]

117. *Cf.* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988) ("[Our] main finding is that decision makers exhibit a significant status quo *bias*.").

118. *See infra* notes 234–37 and accompanying text. R

119. As in the case with Flagship Studios. *See infra* notes 212–18 and accompanying text.

120. Searching these sites for a company's name in combination with its EULA or terms of use can generate significant false positives. Many thousands of

One might expect that some minimum number of websites providing negative press would be necessary to cause a company to capitulate, with the exact number perhaps depending on the size of the company. The results suggest otherwise. While incidents that did not result in capitulation had very little press,[121] in many cases, even if there was a fairly small amount of press, the company capitulated.[122] Thus, after a certain point (usually a handful of small news stories that help get the issue picked up by a bigger outlet), the quantity of press a company receives about an issue is not so important. Rather than suggesting a sliding scale for company size and the number of news sites required for capitulation, then, the results suggest that even large firms cannot tolerate a fairly small amount of negative news coverage if it comes from the right source.[123] For example, Adobe and Microsoft, both relatively large companies, capitulated with regard to Photoshop Express[124] and Passport[125] respectively, despite only receiving a small amount of press. What is more important is where the news was reported.[126]

Assuming this is the case, what makes a particular source's news more effective at causing a firm to capitulate? The quality of the source can be measured objectively or subjectively. This Note

results can be returned for certain incidents (such as Facebook's terms of use), making it impossible to filter through the results manually. Nor does either of these sources necessarily cover every news or blog posting made on the Internet. The results may therefore be under and over inclusive, though in some cases the number of false positives suggest it may be more over inclusive than under inclusive.

121. Out of the six incidents that did not result in capitulation, the most news hits for a given incident was three, and the most blog hits was only seventy-two.

122. Out of the twelve incidents that did result in capitulation, many had only a small number of combined ex ante news and blog hits.

123. This may undermine the assumption that large firms will be induced to greater reputation-protecting efforts merely because the large consumer base means information will spread among them more rapidly. *Cf.* Bar-Isaac & Tadelis, *supra* note 43, at 312–13.

124. *See infra* notes 205–11 and accompanying text.

125. *See infra* note 263–67 and accompanying text.

126. A counterargument could be made given the Facebook case, *infra* notes 157–58 and accompanying text. In that case, as news about the incident grew more or less exponentially, Facebook's response escalated from a statement clarifying the terms to a reversion to prior terms. The decision to revert the terms was made only after there was a very, very large amount of news coverage. At the same time, however, the entire event occurred in a matter of days; Facebook's reaction to the news coverage might have been lagging behind the incredibly fast rate at which news about the issue was spreading. It is also possible that the source of the news, The Consumerist, was a particularly appropriate site to launch the story, creating conditions sufficient to cause Facebook to change its terms.

attempts to measure objective quality by determining how highly trafficked the original website covering the issue was.[127] Cases are divided into two categories: those whose original source has a current Alexa rank above 10,000, and those whose original source has a rank below 10,000. Cases were divided nearly evenly into the two categories.[128] The data show that those cases where the source news site had an Alexa rank above 10,000 were more likely to result in capitulation than those where the site had a rank below.[129] The data, though limited, support the idea that the better trafficked the site is, the more likely the issue is to catch on and potentially result in capitulation. But even low traffic sites can be very important if the traffic is centered on a target consumer group. With Bioware, for example, there was relatively little news coverage of the issue, but it was discussed extensively in the user forums on the company website, reaching a core demand component of the product.[130] This can be contrasted with the Scribblenauts and Grand Theft Auto incidents,[131] which did not generate a large amount of news, were not posted in specialized forums, and did little to influence the firm. News from professional blogs such as ZDNet also seems to carry disproportionate weight.[132] Such sites may, over time, come to be known as reliable sources of such news, and articles posted there may carry more weight than those posted on a personal blog.[133] The evidence regarding watchdog sites also seems to support this. A story from *The Consumerist* led Facebook to change its terms, but stories from lesser-known watchdog sites, in particular those that specifically focus on standard form contracts, tended not to catch

127. One could argue that this measure is simply another indicator of the quantity of news the issue received. In some ways it is. But this Note posits that even if the total number of users is the same whether a hundred small blogs cover an issue or the *New York Times* covers an issue, readers' reaction to the news may be different based on who reports the news.

128. Eight and ten cases respectively. Alexa data was not available for one case.

129. Data were available for seventeen of eighteen cases. Eight of eighteen were above the 10,000 rank, and, of these, six resulted in change and one other at least addressed the issue. Ten of eighteen were below the 10,000 rank, and, of these, only five resulted in change, with one other company at least addressing the issue.

130. *See infra* notes 257–62 and accompanying text.

131. *See infra* notes 152, 199 and accompanying text.

132. For example the Google Docs incident, *infra* note 219 and accompanying text, or the Microsoft incident, *infra* note 226 and accompanying text.

133. Becher & Zarsky, *supra* note 5, at 333–35, 337–38.

on.[134] This may tend to validate concerns others have raised about the effectiveness of watchdog groups in this context.[135] That the quality of press seemed to matter more than the quantity still supports the idea that online information flow enables this mechanism to work: smaller, target groups of consumers can become more be connected and informed using the Internet than they might otherwise. In short, online information flows are helping the most relevant groups become informed as to contract terms.

When firms do respond to such consumer action, they tend to do so very quickly: resolution typically happens one to seven days after the initial incident.[136] For example, in the Google Chrome case, the incident was resolved in a day,[137] while news about the incidents continued for some time after capitulation. Firms may try to deal with such issues quickly to prevent a potentially large public relations problem (with much greater reputational cost) later on. Acting quickly also ensures that the press the issue receives will be more about how the term has changed as opposed to how bad the term is. Capitulating too soon has its own problems, however: if the issue would not have ended up catching on with many consumers, then the firm generated unnecessary additional bad press by changing the term and putting itself back in the spotlight. Compounding the issue is a potential lack of real-time information about how large the issue has become. Balancing these costs can make a decision to capitulate very difficult. In the wake of such information disparities, firms might hedge by capitulating immediately, taking a

134. For example, one watchdog group, The Small Print Project (reasonableagreement.org), did not appear to have any stories catch on and lead to the terms being changed. In fact, the site appears to have published a story on the same terms involved in the Facebook case, two years before The Consumerist picked up the issue, but the story did not catch on until The Consumerist published essentially the same story. *See Are Facebook's Terms of Service Fair?*, THE SMALL PRINT PROJECT (Oct. 29, 2007), http://smallprint.netzoo.net/facebook-terms-of-service/. This is not to say watchdog groups are not effective, only that by themselves they may be insufficient.

135. *See, e.g.*, Becher & Zarsky, *supra* note 5, at 344 n.182.

136. Instances where there is a longer lag time between the initial incident and the firm's response often have an alternate explanation, such as procedural hurdles related to product development. For Vista, Neverwinter Nights, and OpenSuse, for example, each addressed the issue when a new version of the product was released, which took longer than a week. *See infra* notes 229 (Vista), 261 (Neverwinter Nights), 197 (OpenSUSE) and accompanying text. Since the product was not yet necessarily on sale, arguably little in hard economic value was lost due to the delay in rectifying the issue.

137. *See infra* note 191 and accompanying text; *see also* Table 4, *infra*.

(relatively) small upfront reputational hit rather than risking a potentially larger one later on.

III.
IMPLICATIONS

A. Effects on Theory

In theory, the online environment helps consumers to level the playing field for standard form terms. The question is to what extent the reputation-based mechanism can make this so. The effectiveness of the mechanism can be measured by both the quality and the quantity of the changes that online consumers were able to achieve. Quality can be measured by whether the change actually made the term more consumer-friendly. Determining whether this is the case can be difficult. First, consumers might mistake how "bad" the term is on its face.[138] For example, terms involving licensing provisions were often misinterpreted, as they became news. The result is that a term that was not so consumer-unfriendly gets changed, possibly for the worse, when efforts instead could have focused on less friendly terms in the contract. One must also consider the net effects the change has: a firm could, for example, offer any number of friendly terms, but this might make the price of the product prohibitively expensive, creating an inefficient outcome. This determination is particularly difficult, however, since terms other than warranty may be impossible to price and many of the products and services in the cases have no price at all. One alternative would simply be to ask whether the consumers got what they wanted, regardless of whether the term becomes objectively better or worse. In some cases, the consumers did not get what they wanted despite a response by the firm: Bioware and Dropbox both addressed consumer concerns but did so incompletely.[139] In other instances the term was removed, but many aspects of what made the term undesirable to consumers were simply dispersed to other areas of the agreement, as happened in the AOL Instant Messenger case.[140] In such instances, even though a change is registered, the quality of the change is not particularly high, as only the form of the term has changed.

138. *Cf.* Gillette, *supra* note 24, at 713–14 (noting that judges might not be able to make such distinctions; if judges are unable to, consumers may not be able to either).

139. *See infra* notes 179, 262 and accompanying text.

140. *See infra* note 256 and accompanying text.

Even assuming quality changes, however, a certain minimum quantity of changes would be required for this mechanism to have an impact. On the one hand, given the cases found for this Note, the number of successful attempts to change terms appears relatively small. On the other hand, a given change may have effects beyond the standard form contract in question. Smaller companies in the software industry tend to copy form contracts from larger, more established players.[141] Thus if a large, established player's contract changes, newer and smaller firms may follow suit.[142] For example, subsequent to the Facebook incident, Twitter modified a nearly identical term in its agreement.[143] These types of changes suggest the incidents covered by the cases have effects on terms beyond the cases themselves. Apart from traditional ideas of network effects associated with using common terms,[144] such changes by smaller players may reflect a cognitive bias known as the availability heuristic—firms essentially are overreacting to protect themselves from rare but prominent incidents.[145]

Thus, even if there are not too many high profile changes, and even if the changes themselves are not always what consumers wanted, the net effects may be fairly large and favorable to consumers. Though not likely to revolutionize the online business-to-consumer form contracting landscape, these incidents may hold promise as a mechanism for disciplining firms regarding the terms they offer in online business-to-consumer standard form contracts.

141. *Cf.* Hillman & Rachlinski, *supra* note 5, at 439 ("Less experienced businesses simply copy their senior counterparts."). For example, Twitter's terms of service were "inspired" by Flickr's. *See Previous Terms of Service*, TWITTER, https://twitter.com/tos_archive/version_1 (last visited Mar. 2, 2011). Apple also may have followed Microsoft regarding virtualization terms in the EULA for its operating system. *See* Jeremy Reimer, *Apple's Leopard Server EULA moves closer to Microsoft's virtual abilities*, ARS TECHNICA, http://arstechnica.com/apple/news/2007/11/apples-leopard-server-eula-moves-closer-to-microsofts-virtual-abilities.ars (last updated Nov. 4, 2007). It can be argued, however, that smaller players may see large, salient firms get punished for adopting certain terms and attempt to use those same terms to get a competitive advantage—the large, well known company cannot get away with such terms, but perhaps the smaller company can do so unnoticed. That said, any competitive advantage from using the term that the large company cannot is likely outweighed by the risk of being found using the term, especially after the term has already been in the news.

142. *Cf.* Kahan & Klausner, *supra* note 10, at 719–29 (discussing such benefits in the business-to-business context).

143. *See Twitter's New Terms of Service*, TWITTER (Sept. 10, 2009) http://blog.twitter.com/2009/09/twitters-new-terms-of-service.html.

144. See Kahan & Klausner, *supra* note 10, 719–27.

145. *Cf.* Hillman & Rachlinski, *supra* note 5, at 444.

B. Effects on Practice

The results should be useful to both firms and consumer advocates. Understanding what causes a product's standard form contract to come under attack could be invaluable to a firm, given the costs of such reputation attacks. This is particularly true given the apparent frequency with which new products' agreements are subject to attack; preventing such negative consumer feedback can help ensure the success of a major product launch. One lesson in particular appears to be that certain types of terms (or wording of terms) should be avoided. For example, firms should be less inclined to include licensing or ownership terms worded like those from Google Chrome,[146] given the frequency with which they present issues. Making changes proactively and responding to issues quickly are strategies a firm can take to reduce its chances of being attacked and mitigate any attacks that do happen.

From the consumer advocate perspective, the results provide useful information on how to fight a particular type of licensing practice. The cases suggest that the most effective way to change a term would be to target a large, established firm and engage it as it releases a new version of its product or standard form contract. In addition, presenting the controversial term as something lay consumers can readily relate to, such as a story about losing ownership of their work or selling their privacy for money, would be conducive to reaching consumers. Finally, submitting the story to highly trafficked sites such as ZDNet, The Consumerist, or Slashdot helps get the story out to many users. By contrast, attempting to change a term that has been around for some time, or one accompanying a longstanding product, or submitting the story only to a watchdog site, may be less likely to succeed. Taking into account these factors when designing a strategy to force a change in a firm's terms might significantly increase the chances that the effort will succeed.

C. Regulatory Suggestions

Many have called for the regulation of the contents of standard form contracts.[147] But the fast rate of innovation in online products and their contracts (to the extent they address new features of the product) can make effective regulation of online standard form

146. *See, e.g.*, *infra* note 188.

147. Many such suggestions are contained in a 2006 symposium on boilerplate sponsored by Michigan Law Review. For a review of some of these suggestions, see Todd Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1242–46 (2006).

contracts difficult.[148] Some have suggested that there is less need to regulate the terms of online standard form contracts due to improved consumer power.[149] The survey of case studies in this Note does not necessarily contradict this—online communication does help consumers engage firms in ways that they could not before.

But targeted regulation could still be useful to address the imperfections of the mechanism. One issue is getting firms to listen to consumers—while it has been shown that a fairly small amount of news coverage from the right sources can be sufficient, many legitimate complaints undoubtedly go unheard. Further, when firms do listen to consumers, the quality of changes they make are not always ideal—sometimes the firm appears to have changed the contract, but not the term at issue, or the term itself was removed still exists in another form elsewhere in the contract.[150] Both of these issues might be solved if consumers could register complaints about terms with an agency capable of objectively evaluating them. If the terms met a certain threshold of unfairness,[151] the agency could publicly request that the firm review the term. If such requests are highly visible then the agency action could carry more reputational sanctions than mere news articles while still retaining some semblance of a market-based solution.

CONCLUSION

This Note has shown how consumers use the Internet to raise awareness of unfavorable terms in online standard form contracts and pressure firms into changing these terms. Through case studies it finds that older and larger firms are more likely to capitulate, that new or recently updated products or terms are more likely to lead to capitulation, that the type of term involved matters, and that the original source of the news may be at least as important as how much news an issue receives overall. Given these findings, the Note has attempted to gauge the effectiveness of the mechanism, provide

148. *See, e.g.*, Becher & Zarsky, *supra* note 5, at 343 n.176 and accompanying text.

149. *Id.* at 344. *But see* Hillman & Rachlinski, *supra* note 5, at 495 ("Although some may argue that the electronic environment gives consumers more opportunity to protect themselves, as our analysis shows, this new power is easily overstated.").

150. Such as the AOL case, *infra* notes 256.

151. It is beyond the scope of this brief proposal to flesh out a standard in detail, but it may be easiest to model it on unconscionability. *See generally* RICHARD LORD ET AL., WILLISTON ON CONTRACTS § 18 (4th ed. 2010); 15 U.S.C. § 45(n) (2006) (discussing Federal Trade Commission unfair practices jurisdiction).

guidance on how firms and consumers should respond to these effects, and suggest ways to improve the mechanism through regulation.

APPENDIX

A. Case Studies

This section of the Appendix contains brief summaries of each of the case studies in reverse chronological order.

5th Cell Scribblenauts

Scribblenauts is a game for the Nintendo DS that became immensely popular after it was released.[152] The game was developed by 5th Cell, a fairly young game company, on September 15, 2009.[153] Days after the game's release, a blogger on a low-traffic site posted an unfavorable article about the EULA's terms on ownership, copying, and reverse engineering.[154] The primary concern of the blog post was ownership of the game, despite the fact that it is common practice to license, not sell, software, including games.[155] The story did not receive much subsequent attention, however, and the EULA did not change.[156]

Facebook

On February 4, 2009, Facebook updated its terms of service by removing a clause stating that its license for users' content would expire upon the user removing the content from Facebook.[157] The Consumerist, an online consumer-rights website, criticized the

152. *See* Matt Matthews, *NPD: Behind the Numbers, January 2010*, GAMASUTRA (Feb. 15, 2010), http://www.gamasutra.com/view/feature/4273/npd_behind_the_numbers_january_.php?page=3 (Scribblenauts was one of the top five games for its platform the year it was released).

153. *See* Brett Molina, *Release Dates Galore: 'Scribblenauts,' 'Uncharterd 2' and More*, GAMEHUNTERS (July 22, 2009), http://content.usatoday.com/communities/gamehunters/post/2009/07/68495114/1.

154. *You Don't Own Scribblenauts*, THE GREY HOST (Aug. 29, 2010, 7:00 AM), http://thegreyghost.net/2010/08/29/you-dont-own-scribblenauts/.

155. *See, e.g.*, Vernor v. Autodesk, 621 F.3d 1102, 1111 (9th Cir. 2010).

156. *You Don't Own Scribblenauts*, *supra* note 154.

157. *See The Facebook Blog*, FACEBOOK (Feb. 4, 2009), http://blog.facebook.com/blog.php?post=50531412130. Most relevantly, Facebook removed the italicized language from its terms:

> You hereby grant Facebook an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to (a) use, copy, publish, stream, store, retain, publicly perform or display, transmit, scan, reformat, modify, edit, frame, translate, excerpt, adapt, create derivative works and distribute (through multiple tiers), any User Content you (i) Post on or in connection with the Facebook Service or the promotion thereof subject only to your privacy settings or (ii) enable a user to Post . . . . You may remove your User Content from the Site at any time. *If you choose to remove your User Content, the license granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content.*

change on its website two weeks later.[158] The following day, Mark Zuckerberg, CEO of Facebook, wrote an explanation of the term on the company's website.[159] But many other blogs and news sites, including the New York Times, continued to cover the issue, similarly casting a negative light on the change.[160] On February 18, three days after the Consumerist article, Facebook reverted to its previous terms and stated its intention to rewrite the terms entirely.[161]

Octoshape

Octoshape is a small and fairly young software company that helps other companies provide streaming video to online users.[162] CNN used Octoshape to stream the 2009 inauguration of President Obama.[163] A blog post from February 5, 2009, approximately two weeks after the inauguration, mentioned a number of issues with the program, in particular that the EULA purportedly limited

158. Chris Walters, *Facebook's New Terms of Service: "We Can Do Anything We Want with Your Content. Forever."*, THE CONSUMERIST (Feb. 15, 2009, 11:14 PM), http://consumerist.com/5150175/facebooks-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever.

159. Mark Zuckerberg, *On Facebook, People Own and Control Their Information*, *The Facebook Blog*, FACEBOOK (Feb. 16, 2009, 5:09 PM), http://blog.facebook.com/blog.php?post=54434097130.

160. *E.g.*, Matt Asay, *Facebook Changes Terms of Service to Control More User Data*, CNET (Feb. 16, 2009, 8:07 AM), http://news.cnet.com/8301-13505_3-10164909-16.html; Michael Barkoviac, *Facebook's TOS Changes Anger Some Users*, DAILY TECH (Feb. 16, 2009, 5:38 PM), http://www.dailytech.com/Facebooks+TOS+Changes+Anger+Some+Users/article14285.htm; Paul Constant, *All Up In Your Facebook*, SLOG (Feb. 16, 2009, 2:42 PM), http://slog.thestranger.com/slog/archives/2009/02/16/all_up_in_your_facebook. The coverage extended beyond blogs. *E.g.*, Brian Stelter, *Facebook's Users Ask Who Owns Information*, N.Y. TIMES, Feb. 17, 2009, at B3, ***available at*** http://www.nytimes.com/2009/02/17/technology/internet/17facebook.html?_r=1&emc=eta1. Most stories interpreted the terms as decidedly evil; very few reports tried to rationalize the change. *See* Eric Schonfeld, *Zuckerberg on Who Owns User Data on Facebook: It's Complicated*, TECHCRUNCH (Feb. 16, 2009), http://www.techcrunch.com/2009/02/16/zuckerberg-on-who-owns-user-data-on-facebook-its-complicated/).

161. Brian Stone & Brad Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES, Feb. 19, 2009, at B18, *available at* http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html: Mark Zuckerberg, *Update on Terms*, *The Facebook Blog*, FACEBOOK (Feb. 18, 2009, 1:17 AM), http://blog.facebook.com/blog.php?post=54746167130.

162. *See Octoshape Infinite Edge Technology*, OCTOSHAPE, http://www.octoshape.com/?page=services/technology (last visited Feb.21, 2011).

163. JANKO ROETTGERS, *CNN: Inauguration P2P Stream a Success, Despite Backlash*, GigaOM (FEB. 7, 2009, 12:01AM) ,HTTP://GIGAOM.COM/VIDEO/CNN-INAUGURATION-P2P-STREAM-A-SUCCESS-DESPITE-BACKLASH/ (FEB. 7, 2009).

users' access to their own data log files.[164] A few technology-oriented news sites caught on to the story, and a number of people left comments about the term.[165] But many of the stories only covered the way the EULA was presented when viewers used Octoshape through CNN, as opposed to the actual terms of the EULA; others did not even mention the EULA and instead just discussed the invasive nature of the software CNN had chosen to use.[166] Thus, there was relatively little direct coverage of Octoshape and its EULA,[167] and Octoshape did not change its terms.

School Check IN

School Check IN is a small company that makes relatively inexpensive security software for schools.[168] The company has been around since at least 2002.[169] The license agreement for the company's software contains a damages section, which has a two million dollar penalty clause if the licensee breaches the EULA.[170] InfoWorld, a reasonably large and established tech news site, ran an

164. Brian Livingston, *Watch a Live Video, Share Your PC with CNN*, WINDOWS SECRETS (Feb. 5, 2009), http://windowssecrets.com/2009/02/05/01-Watch-a-live-video-share-your-PC-with-CNN/?n=story1.The term in question reads as follows:

> You may not collect any information about communication in the network of computers that are operating the Software or about the other users of the Software by monitoring, interdicting or intercepting any process of the Software. Octoshape recognizes that firewalls and anti-virus applications can collect such information, in which case you not are allowed to use or distribute such information.

Id.

165. *See, e.g.*, David Chartier, *CNN P2P Video Streaming Tech Raises Questions*, ARS TECHNICA (Feb. 10, 2009, 9:45 AM), http://arstechnica.com/web/news/2009/02/cnn-p2p-video-streaming-tech-raises-questions.ars; CmdrTaco, *CNN Uses P2P Video & Adds Terrible EULA*, SLASHDOT (Feb. 5, 2009, 10:43 AM), http://tech.slashdot.org/article.pl?sid=09/02/05/1443206.

166. *E.g.*, Susan Alexander, *CNN Installs Invasive Enhancement*, TECHLIFEPOST (Feb. 6, 2009), http://techlifepost.com/2009/02/06/cnn-installs-invasive-streaming-%E2%80%98enhancement%E2%80%99/

167. *See, e.g.*, http://arstechnica.com/web/news/2009/02/cnn-p2p-video-streaming-tech-raises-questions.ars; http://tech.slashdot.org/article.pl?sid=09/02/05/1443206&from=rss

168. *See* SCHOOL CHECK IN, http://www.schoolcheckin.com/ (last visited Feb. 21, 2011).

169. *See* INTERNET ARCHIVE WAYBACK MACHINE, http://web.archive.org/web/*/http://www.schoolcheckin.com (last visited Mar. 3, 2011); *Schoolcheckin.com*, ALEXA, http://www.alexa.com/siteinfo/schoolcheckin.com (last visited Mar. 3, 2011).

170. *School Check IN End User Agreement*, SCHOOL CHECK IN, http://www.schoolcheckin.com/eula.html (last visited Mar. 3, 2011).

article criticizing the term on December 9th, 2008.[171] The story was picked up by some blogs but did not attract much attention overall.[172] School Check IN was unresponsive to the InfoWorld writer and the blog posts, and the company ended up leaving the term intact.[173]

Dropbox

Dropbox is a startup company that provides free online storage space.[174] Users sign up and, after agreeing to a EULA, can store files and share them with others. The Dropbox EULA gave the company a "non-exclusive, worldwide, royalty-free, sublicensable, perpetual and irrevocable right and license to use and exploit" files stored in users' Public and Shared folders.[175] On September 16th, 2008, approximately one week after Dropbox was released, a Dropbox user made a critical post about the term on a low-traffic blog.[176] The blog post was soon being discussed on the Dropbox forums.[177] By January 2009, the terms were updated with respect to Shared folders but remained the same for Public folders.[178] Users continued to complain, and though Dropbox mentioned it would change the term for Public folders, it had not done so by the time of this writing.[179]

171. Christina Wood, *The $2 Million Penalty Clause*, INFOWORLD (Dec. 9, 2008, 2:27 PM), http://www.infoworld.com/d/adventures-in-it/2-million-penalty-clause-568.

172. *E.g.*, *Severe Penalty Clause*, J-WALK BLOG (Dec. 10, 2008), http://j-walkblog.com/index.php?/weblog/posts/severe_penalty_clause/. No other stories were found.

173. *See* Wood, *supra* note 171; *School Check IN End User Agreement*, *supra* note 170.

174. *See* DROPBOX, http://www.dropbox.com/ (last visited Feb. 21, 2011).

175. *Dropbox Terms of Service*, DROPBOX, https://www.dropbox.com/terms (last visited Feb. 21, 2011). Dropbox launched September 11, 2008. Drew Houston, *Dropbox Launches to the Public!*, DROPBOX BLOG (Sept. 11, 2008), http://blog.dropbox.com/?m=200809.

176. Shantanu Goel, *Dropbox Online Storage Public/Shared Folders: A Word of Caution*, SHANTANU'S TECHNOPHILIC MUSINGS (Sept. 16, 2008), http://tech.shantanugoel.com/2008/09/16/dropbox-online-storage-publicshared-folders-a-word-of-caution.html.

177. Morgan L., *Terms of Use, Etc?*, DROPBOX FORUMS, http://forums.dropbox.com/topic.php?id=4207 (last visited Mar. 3, 2011).

178. *Id.*

179. *Id.*; *Dropbox Terms of Service*, *supra* note 175.

Mozilla Firefox

Mozilla produces a popular open-source web browser called Firefox.[180] Though Mozilla had existed as a branch of Netscape since 1998, it did not begin independently developing Firefox until 2003.[181] In June 2008, Mozilla released Firefox 3.0 for Ubuntu, a Linux-based computer operating system.[182] Shortly thereafter, on September 13, 2008, Mozilla started requiring users of Ubuntu to view a EULA before using Firefox.[183] An Ubuntu user filed a "bug report" about the existence of the EULA, and over the next few days, the story made it to a variety of tech-oriented news outlets.[184] Mozilla stated it would update its license agreement,[185] and the EULA now tracks the less restrictive Mozilla Public License.[186]

Google Chrome

Google Chrome is a web browser that was released on September 2, 2008.[187] The EULA supplied with Chrome contained a clause that gave Google a license to reproduce Chrome users' content submitted over the Internet.[188] Almost immediately after Chrome was

180. *See What is Mozilla?*, MOZILLA, http://www.mozilla.com/en-US/about/whatismozilla.html (last visited Feb. 21, 2011).

181. *See History of the Mozilla Project*, MOZILLA, http://www.mozilla.org/about/history.html (last visited June 6, 2011).

182. *See* http://www.mozilla.com/en-US/firefox/3.0/releasenotes/.

183. William Grant, *An Irrelevant License is Presented to You Free-of-Charge on Startup*, UBUNTU (Sept. 13, 2008), https://bugs.launchpad.net/ubuntu/§ource/firefox-3.0/£ug/269656.

184. *See, e.g.*, Joe Brockmeier, *What's the Big Deal About the Firefox EULA?*, ZDNet (Sept. 15, 2008, 1:53 PM), http://blogs.zdnet.com/community/?p=106; kdawson, *Mozilla Demanding Firefox Display EULA in Ubuntu*, SLASHDOT (Sept. 14, 2008, 4:09 PM), http://tech.slashdot.org/tech/08/09/14/195203.shtml.

185. *Firefox EULA in Linux Distributions*, HJA'S BLOG, http://lockshot.wordpress.com/2008/09/15/firefox-eula-in-linux-distributions/ (last modified Sept. 15, 2008); Mitchell Baker, *Ubuntu, Firefox and License Issues*, LIZARD WRANGLING (Sept. 15, 2008), http://blog.lizardwrangler.com/2008/09/15/ubuntu-firefox-and-license-issues.

186. *Firefox EULA in Linux Distributions*, HJA'S BLOG, http://lockshot.wordpress.com/2008/09/17/licensing-proposal/ (last modified Sept. 15, 2008); *Mozilla Public License*, MOZILLA, http://www.mozilla.org/MPL (last visited Mar. 7, 2011).

187. Ryan Paul, *Google Unveils Chrome Source Code and Linux Port*, ARS TECHNICA (Sept. 2, 2008, 3:54 PM), http://arstechnica.com/open-source/news/2008/09/google-unveils-chrome-source-code-and-linux-port.ars.

188. The term read:

> § 11.1 You retain copyright and any other rights you already hold in Content which you submit, post or display on or through, the Services. By submitting, posting or displaying the content you give Google a perpetual, irrevocable, worldwide, royalty-free, and non-exclusive license to reproduce, adapt, modify, translate, publish, publicly perform, publicly display and distribute any Content which you submit, post or display on or through, the Services. This

released, a writer at CNET and an independent blogger both posted stories about the licensing provision.[189] The stories caught on and received a large amount of attention.[190] Google issued a press release before the end of the next day saying the term would be removed from the license agreement and had been included accidentally.[191]

Novell OpenSUSE

In May 2008 Novell, a large and venerable software company, released a beta version of its open source operating system, OpenSUSE.[192] This new version of the operating system required users to agree to a EULA for the first time.[193] On June 4, 2008, an OpenSUSE user wrote a post that was critical of the EULA on a low-traffic blog.[194] The blog post was picked up by Slashdot[195] as well as at

license is for the sole purpose of enabling Google to display, distribute and promote the Services and may be revoked for certain Services as defined in the Additional Terms of those Services.

Adam Frucci, *Google Chrome EULA Claims Ownership of Everything You Create on Chrome*, GIZMODO (Sept. 3, 2008, 12:00 PM), http://gizmodo.com/5044871/google-chrome-eula-claims-ownership-of-everything-you-create-on-chrome-from-blog-posts-to-emails.

189. Ina Fried, *Be Sure to Read Chrome's Fine Print*, CNET (Sept. 2, 2008, 11:59 AM), http://news.cnet.com/8301-17939_109-10030522-2.html.

190. Early the next day many news outlets had picked up the issue. *See, e.g.*, kdawson, *Reading Google Chrome's Fine Print*, SLASHDOT (Sept. 3, 2008, 4:03 AM), http://yro.slashdot.org/article.pl?sid=08/09/03/0247205; Marshall Kirkpatrick, *Updated: Does Google Have Rights to Everything You Send Through Chrome?*, READWRITEWEB (Sept. 3, 2008, 3:11 PM), http://www.readwriteweb.com/archives/does_google_have_rights_to_all.php. A consumer-rights group even filed a lawsuit over the terms in Germany, though a decision on the issue happened nearly a year later. *See* Richard Koman, *German Court Orders Google to Change TOS—A Little Late*, ZDNET GOVERNMENT (Sept. 1, 2009, 6:43 AM), http://government.zdnet.com/?p=5328&tag=trunk;content.

191. Mike Yang, *Update to Google Chrome's Terms of Service*, THE OFFICIAL GOOGLE BLOG (Sept. 4, 2008, 11:22 AM), http://googleblog.blogspot.com/2008/09/update-to-google-chromes-terms-of.html. *See also* Nate Anderson, *Google on Chrome EULA Controversy: Our Bad, We'll Change It*, ARS TECHNICA (Sept. 2, 2008, 3:56 PM), http://arstechnica.com/tech-policy/news/2008/09/google-on-chrome-eula-controversy-our-bad-well-change-it.ars.

192. The version in question is 11.0 beta 3. *See* Admin, *Announcing openSUSE 11.0 Beta 3*, OPENSUSE NEWS (May 16, 2008), http://news.opensuse.org/2008/05/16/announcing-opensuse-110-beta-3.

193. Roy Schestowitz, *OpenSuse: The EULA from Novell and the Road to Microsoft Hell*, TECHRIGHTS, http://techrights.org/2008/06/04/microsoft-linux-eula/ (last modified Jun. 4, 2008).

194. *See* Dr. Roy Schestowitz, *OpenSUSE: The EULA from Novell and the Road to Microsoft Hell*, TECHRIGHTS (June 4, 2008, 7:22 AM), http://techrights.org/2008/06/04/microsoft-linux-eula.

least one other, smaller news site.[196] Novell removed its new EULA in a later version of the software, about six months after the initial controversy, and replaced it with the EULA for Fedora, another open source operating system.[197] Novell did not require users to agree to the new EULA before installation—it was to be merely a "license notice" to make users "aware of their rights."[198]

Rockstar Games' Grand Theft Auto IV (GTA IV)

Grand Theft Auto is an extremely successful and controversial game franchise produced by Rockstar Games.[199] In April 2008, Rockstar released the latest version of the franchise, Grand Theft Auto IV.[200] The EULA for the game contained a number of standard provisions, including one prohibiting public performance of the game.[201] Notice about the public performance clause appeared each time the user loaded the game.[202] On December 17th, 2008, some eight months after the game was released, a blogger on a low traffic site took issue with the public performance clause.[203] The issue apparently did not generate any other stories, and Rockstar did not change the term in response to the story.[204]

195. Timothy, *OpenSUSE's EULAs vs. Free Software Ideals*, SLASHDOT (June 19, 2008, 2:12 PM), http://linux.slashdot.org/story/08/06/19/1834219/OpenSUSEs-EULAs-vs-Free-Software-Ideals.

196. Schestowitz, *supra* note 193.

197. Zonker, *OpenSUSE Sports a New License (Ding, Dong, the EULA's Dead)*, OPENSUSE (Nov. 26, 2008, 12:52 PM), http://zonker.opensuse.org/2008/11/26/opensuse-sports-a-new-license-ding-dong-the-eulas-dead; kdawson, *OpenSUSE 11.2 License Changes Examined*, SLASHDOT (Dec. 24, 2008, 8:07 AM), http://linux.slashdot.org/story/08/12/24/0221228/OpenSUSE-111-License-Changes-Examined.

198. Zonker, *supra* note 197.

199. Dan Gallagher,*'Grand Theft Auto IV' Shooting to Win*, MARKETWATCH (Apr. 28, 2008, 7:01 PM), http://www.marketwatch.com/story/grand-theft-auto-iv-debuts-to-record-setting-reviews. *See also*, *Rockstar Games Corporate Info*, ROCKSTAR GAMES, http://www.rockstargames.com/#/?lb=/corpinfo (last visited May 16, 2011) (stating that Rockstar Games is wholly owned by Take-Two Interactive Software, Inc.).

200. *Take-Two News Release*, TAKE-TWO INTERACTIVE SOFTWARE (Jan. 24, 2008), http://ir.take2games.com/phoenix.zhtml?c=86428&p=irol-newsArticle_print&ID=1099620 (announcing an April 29, 2008 release date for Grand Theft Auto IV).

201. Regeneration, *GTA IV EULA Forbids Public Performance*, NGOHQ (Dec. 17, 2008, 3:16 AM), http://www.ngohq.com/news/15131-gta-iv-eula-forbids-public-performance.html.

202. *Id.*

203. *Id.*

204. Only one other complaint was found about the issue. *See* Janner51, comment to *Take 2 Removed My Gameplay from YouTube*, GAMEFAQS (Dec. 29, 2008, 3:26 AM), http://www.gamefaqs.com/boards/genmessage.php?board=952150&topic=47362723. The terms *have* changed as of November 2010, but there is no sign that

Adobe Photoshop Express

Adobe is a large software company that develops a very popular line of image editing software called Photoshop.[205] On March 26, 2008, the company released a beta test of Photoshop Express, a free online version of Photoshop.[206] That same day, CNET reviewed the program and noted an issue with the terms of service.[207] The term gave Adobe a license to display the content, likely necessary for functionality of the software, and to use the content in any other format in the future.[208] A representative of Adobe responded in a blog post the next day, promising the terms of service would be changed.[209] In the following days, a number of fairly prominent technology news sites picked up on the issue, including the Washington Post.[210] A week after the initial issue was raised, Adobe officially changed the clause.[211]

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they changed in response to the incident described above. Rockstar and its parent company Take Two did not respond to questions about the EULA.

205. *See Adobe Photoshop Family*, ADOBE, http://www.adobe.com/products/photoshop/family/?promoid=BPDEJ (last visited Mar. 7, 2011).

206. *See* John Nack, *Photoshop Express RIA Arrives*, JOHN NACK ON ADOBE (Mar. 26, 2008, 11:44PM), http://blogs.adobe.com/jnack/2008/03/photoshop_express_ria_arrives.html.

207. Lori Grunin, *Review: Adobe Photoshop Express Beta*, CNET NEWS (Mar. 26, 2008, 9:02 PM), http://news.cnet.com/8301-17939_109-9904311-2.html. The original posting on Adobe's web forum was not readily available, but the term read:

> Use of Your Content. Adobe does not claim ownership of Your Content. However, with respect to Your Content that you submit or make available for inclusion on publicly accessible areas of the Services, you grant Adobe a worldwide, royalty-free, nonexclusive, perpetual, irrevocable, and fully sublicensable license to use, distribute, derive revenue or other remuneration from, reproduce, modify, adapt, publish, translate, publicly perform and publicly display such Content (in whole or in part) and to incorporate such Content into other Materials or works in any format or medium now known or later developed.

David Chartier, *Adobe Joins List of Companies Not Reading Own EULAs*, ARS TECHNICA (Mar. 29, 2008, 12:49 PM), http://arstechnica.com/apple/news/2008/03/adobe-joins-list-of-companies-not-reading-own-eulas.ars

208. *Id.*

209. *See* John Nack, *A Note About PS Express Terms of Use*, JOHN NACK ON ADOBE (Mar. 27, 2008, 6:19 PM), http://blogs.adobe.com/jnack/2008/03/a_note_about_ps_express_terms_of_use.html.

210. *See, e.g.*, Chartier, *supra* note 207; Rob Pegoraro, *Free Photoshop Express Is a Mixed Picture*, WASHINGTON POST, http://www.washingtonpost.com/wp-dyn/content/story/2008/04/03/ST2008040301803.html.

211. *See* Chris Foresman, *Adobe Gives Photoshop Express EULA a Much-Needed Revamp*, ARS TECHNICA (April 7, 2008, 8:20 PM), http://arstechnica.com/old/content/2008/04/adobe-gives-photoshop-express-eula-a-much-needed-revamp.ars

Flagship Studios' Hellgate London

Flagship Studios was a young software company preparing to release its first game, Hellgate London, on October 31, 2007.[212] Shortly before the game's release, Flagship Studios released a demo version that came with a EULA.[213] The EULA contained a data collection policy that would be used in part to provide targeted in-game advertisements.[214] A small blog called Blue's News ran a story criticizing the term,[215] and news about the term spread quickly.[216] But even though the issue was picked up by some news outlets, Flagship Studios did not change the term. The company's only response was to provide an explanation for the term on its website for

212. *See* Maarten Goldstein, *Hellgate: London Demo Released*, SHACK NEWS (Oct. 18, 2007, 10:35 AM), http://www.shacknews.com/onearticle.x/49504; Alistair Wallis, *Q&A: Flagship's Roper Talks* Hellgate *Pricing,* Mythos, GAMASUTRA (June 29, 2007), http://www.gamasutra.com/php-bin/news_index.php?story=14524 (discussing the general background of the company). Flagship Studios "was" a company until it went out of business in July 2008. *See* Owen Good, *Flagship Sunk, Who's in Charge of* Hellgate*?*, KOTAKU (July 12, 2008, 9:00 AM), http://kotaku.com/5024558/flagship-sunk-whos-in-charge-of-hellgate.

213. *See* Maarten Goldstein, *Hellgate: London Demo Released*, SHACK NEWS (Oct. 18, 2007 10:35 AM), http://www.shacknews.com/onearticle.x/49504.

214. The term read:

> You agree that EA, its affiliates, and each Related Party may collect, use, store and transmit technical and related information that identifies your computer, including without limitation your Internet Protocol address, operating system, application software and peripheral hardware, that may be gathered periodically to facilitate the provision of software updates, dynamically served content, product support and other services to you, including online play. EA and/or the Related Parties may also use this information in the aggregate and, in a form which does not personally identify you, to improve our products and services and we may share that aggregate data with our third party service providers.

Hellgate London EULA Ruckus, STROPP'S WORLD (Oct. 19, 2007), http://stroppsworld.com/2007/10/19/hellgate-london-eula-ruckus/. Note EA (Electronic Arts) is mentioned as EA delivers the advertising content.

215. *See Hellgate Adware, Hell of a EULA,* BLUE'S NEWS (Oct. 18, 2007, 9:51 PM), http://www.bluesnews.com/cgi-bin/board.pl?action=viewthread&boardid=1&threadid=81996&id=406556 (noting that users in its forums first brought the issue up).

216. *E.g.*, http://www.onrpg.com/boards/69096.html; STROPP'S WORLD, *supra* note 214; John Callaham, *Adware in Hellgate London*, FIRINGSQUAD (Oct. 19, 2007, 9:20 AM), http://www.firingsquad.com/news/newsarticle.asp?searchid=17938.

a brief period of time.[217] Flagship Studios went out of business the next year.[218]

Google Docs

Google Docs is an online document editing and storage service.[219] On August 28, 2007, nearly a year after Google Docs was made available to the public,[220] ZDNet ran a story about the terms of service.[221] ZDNet focused on a term that gave Google a license to use user-submitted content to "display[ ], distribut[e], and promot[e]" Google services.[222] Google responded by stating that it did not own users' content but needed the terms to ensure the functionality of the service.[223] Users remained concerned despite Google's assertions.[224] Google ended up rewriting the terms to clarify that its license to the content was for the service's functionality.[225]

217. *See* Kaiser, *EULA Explanation*, HELLGATE LONDON (Oct. 27, 2007, 9:45 PM), http://web.archive.org/web/20080118132535/http:/www.hellgatelondon.com/underground/eula-explanation.

218. Andrew Burnes, *Flagship Studios' Closure Confirmed, All Staff Fired, All I.P. Lost, but Now the Studio Is Saved!*, VOODOO EXTREME (Jul. 12, 2008, 2:33 AM), http://ve3d.ign.com/articles/news/39866/Flagship-Studios-Closure-Confirmed-All-Staff-Fired-All-I-P-Lost-But-Now-The-Studio-Is-Saved.

219. *Google Docs – Online Documents with Real-Time Collaboration*, GOOGLE, http://www.google.com/apps/intl/en/business/docs.html (last visited Mar. 8, 2011).

220. Google Docs became available to the public in October 2006. *See Google Announces Google Docs & Spreadsheets*, GOOGLE (Oct. 11, 2006), http://www.google.com/intl/en/press/annc/docsspreadsheets.html (last visited Mar. 8, 2011).

221. Joshua Greenbaum, *The Content in Google Apps Belongs to Google*, ZDNET (Aug. 28, 2007, 3:59 PM), http://blogs.zdnet.com/Greenbaum/?p=130.

222. The term read: "you grant Google a worldwide, non-exclusive, royalty-free license to reproduce, adapt, modify, publish and distribute such Content on Google services for the purpose of displaying, distributing and promoting Google services. . . ." *Id.*

223. Liam Tung, *Google Denies Ownership of Users' Words*, CNET NEWS (September 12, 2007, 9:32 AM), http://news.cnet.com/2100-1030_3-6207535.html.

224. *See, e.g.*, *Section 11: Terms of Service Governing Google Docs Discussion*, GOOGLE GROUPS (Oct. 25, 2007, 11:48 AM), http://groups.google.com/group/Suggestions-and-Ideas-Writely/browse_thread/thread/91305471e6b3caaf/aa8a03f538ef1667?lnk=raot.

225. See Nate Anderson, *After Criticism, Google Confirms that It Doesn't Own Your Spreadsheets*, ARS TECHNICA (Nov. 26, 2007, 10:02 PM), http://arstechnica.com/old/content/2007/11/after-criticism-google-confirms-that-it-doesnt-own-your-fantasy-football-spreadsheets.ars. The terms appear to have changed on October 29, 2007. *See Archive of Google's Additional Terms,* INTERNET ARCHIVE WAYBACK MACHINE, http://wayback.archive.org/web/20070901000000*/http://www.google.com/google-d-s/addlterms.html (last visited Mar. 8, 2011) (noting a change to the web page that displays Google's additional terms on October 29, 2007).

Microsoft Vista

Microsoft was set to release Windows Vista, the latest version of its flagship operating system, in early 2007.[226] On October 11, 2006, while the operating system was available for testing, ZDNet published a story about the EULA's restriction on users' ability to transfer the license to a different computer.[227] A number of other sites picked up on this provision, but consumer feedback may have been limited as only the retail license was involved.[228] Microsoft nonetheless responded weeks later by loosening the restriction, stating its intent had been to combat piracy and calling the change a mere "clarification."[229]

Around the same time, other news and blog writers took issue with a separate clause that prevented "virtualizing" Windows Vista (running the operating system within another operating system).[230] Microsoft came close to removing the restriction in June 2007, but

226. *Microsoft Launches Windows Vista and Microsoft Office 2007 to Consumers Worldwide*, MICROSOFT NEWS CENTER (Jan. 29, 2007), http://www.microsoft.com/presspass/press/2007/jan07/01-29vistalaunchpr.mspx.

227. Ed Bott, *A Sneaky Change in Windows Licensing Terms*, ZDNET (Oct. 11, 2006, 6:03 PM), http://blogs.zdnet.com/Bott/?p=156; *see also Vista Licenses Limit OS Transfers, Ban VM Use*, SLASHDOT (Oct. 12, 2006, 7:39 PM), http://tech.slashdot.org/story/06/10/12/2240214/Vista-Licenses-Limit-OS-Transfers-Ban-VM-Use. The term read:

> Before you use the software under a license, you must assign that license to one device (physical hardware system). That device is the "licensed device." A hardware partition or blade is considered to be a separate device.
>
> a. Licensed Device. You may install one copy of the software on the licensed device. You may use the software on up to two processors on that device at one time. Except as provided . . . below, you may not use the software on any other device. *Id.*

228. Most people do not buy retail version; instead they buy the Original Equipment Manufacturer ("OEM") version. The OEM version comes bundled with the purchase of a new computer. Retail versions of the operating system do not come with the computer; they are typically bought separately from the computer purchase as an upgrade and as a result might intuitively be more transferable. As a result they are far less common. *See* Ken Fisher, *Buying OEM Versions of Windows Vista: The Facts*, ARS TECHNICA (Jan. 30, 2007, 9:39 AM), http://arstechnica.com/hardware/news/2007/01/8730.ars.

229. *See* Ken Fisher, *Microsoft Removes Transfer Limitations From Vista*, ARS TECHNICA (Nov. 2, 2006, 3:24 PM), http://arstechnica.com/business/news/2006/11/8140.ars. Substitute term now reads:

You may uninstall the software and install it on another device for your use. You may not do so to share this license between devices. *Id.*

230. *See, e.g.*, Scott Granneman, *Surprises Inside Microsoft Vista's EULA*, SECURITYFOCUS (Oct. 27, 2006), http://www.securityfocus.com/columnists/420/1; Erica Sadun, *Vista EULA Forbids Virtualization*, TUAW (Feb. 1, 2007, 11:00 PM), http://www.tuaw.com/2007/02/01/vista-eula-forbids-virtualization/.

ended up deciding to maintain the status quo, generating additional bad press.[231] Eventually, more than a year after the original issue arose, Microsoft did change the term.[232] The change coincided with a conference Microsoft held on its virtualization technology.[233]

A third EULA term involving censorship of benchmark results also generated press.[234] Benchmarking allows a user to see how well their computer performs while running a program; in this case, benchmark results for Vista could be compared with other operating systems to see which was fastest. The censorship term in the Vista EULA prevented users from disclosing benchmarking results for the operating system except under certain conditions.[235] The issue received relatively little press, perhaps in part because the term was not too restrictive and may have only been of interest to hardcore PC enthusiasts.[236] The term still exists in the current EULA for Vista.[237]

231. Ken Fisher, *Microsoft Ditches About-Face on Virtualization Restrictions at 11th Hour*, ARS TECHNICA (June 20, 2007, 12:59 PM), http://arstechnica.com/business/news/2007/06/microsofts-ditches-about-face-on-virtualization-in-11th-hour.ars; samzenpus, *Microsoft Flip-flopping on Virtualization License*, SLASHDOT (June 21, 2007, 4:18 AM), http://it.slashdot.org/story/07/06/21/0440232/Microsoft-Flip-flopping-on-Virtualization-License.

232. Ken Fisher, *Microsoft Relents: Vista Consumer Virtualization Ban Lifted*, ARS TECHNICA (Jan. 21, 2008, 1:39 PM), http://arstechnica.com/old/content/2008/01/microsoft-relents-vista-virtualization-ban-lifted.ars.

233. *Id.*

234. *See* Granneman, *supra* note 230.

235. The term reads:

> 9. MICROSOFT.NET BENCHMARK TESTING. The software includes one or more components of the .NET Framework 3.0 (".NET Components"). You may conduct internal benchmark testing of those components. You may disclose the results of any benchmark test of those components, provided that you comply with the conditions set forth at *http://go.microsoft/fwlink/?LinkID=66406*.

Microsoft Software License Terms, MICROSOFT, http://download.microsoft.com/download/A/7/A/A7A7A8F5-9066-41C0-87B8-7DEC628974B8/MSDN_EULA.pdf (last visited Mar. 8, 2011).

236. Subsequent coverage of the issue tended to focus on Scott Granneman's SecurityFocus article, Granneman, *supra* note 230. *See, e.g.*, graben3, Comment to *Vista EULA License: Horrible !*, UBUNTU FORUMS (May 13, 2008), http://ubuntuforums.org/showthread.php?t=793524.

237. *License Terms*, MICROSOFT, http://www.microsoft.com/About/Legal/EN/US/IntellectualProperty/UseTerms/Default.aspx (last visited Mar. 8, 2011) (Use the interface to find the current EULA for Vista).

JaJah Web

JaJah is a relatively small company that sells software for Video-over-IP (VOIP) conferencing.[238] On February 10, 2006, an article appeared on a VOIP-centric news website suggesting JaJah's EULA enabled it to gather data on its users.[239] The terms in question allowed JaJah to collect data on users' demographics, interest, and behavior based on any of their activities while using the software.[240] The story was picked up by other websites, including ZDNet.[241] JaJah emailed ZDNet to say it would be changing the terms,[242] and within a matter of days JaJah had largely removed the sections on data usage.[243] The new terms did not explicitly allow the same kind of data collection, but they did not necessarily prevent JaJah from continuing such policies either.[244]

Telestream's Flip4Mac WMV

Telestream is a relatively small company that produces Flip4MAC WMV, an application for Apple's OS X operating system that allows users to view videos created with the Windows Media Video codec.[245] On January 14, 2006, two days after the product was made free, a blogger pointed out three issues with the EULA: Telestream could audit the licensee's use of the software, the licensee had to accept a non-disclosure agreement, and the licensee had to indemnify the licensor for any illegal use of the software by the li-

238. *See About Us*, JAJAH, http://platform.jajah.com/company/about (last visited Feb. 21, 2011).

239. *See* Mark Hachman, *VOIP Startup Isn't Quite Spyware, but It's Close*, EXTREMEVOIP (Feb. 10, 2006, 10:49 AM), http://web.archive.org/web/20071112190334/http://www.extremevoip.com/print_article/VOIP+Startup+Isnt+Quite+Spyware+But+Its+Close/171283.aspx.

240. *See* Russell Shaw, *VoIP Service Jajah Changes EULA to Ease Spyware Concerns*, ZDNET (Feb. 10, 2006, 12:40 PM), http://www.zdnet.com/blog/ip-telephony/voip-service-jajah-changes-eula-to-ease-spyware-concerns/905.

241. *Id.*; *see also* Robin Good, *JaJah Is Not Spyware: Company Changes EULA and Acknowledges Bad Wording*, KOLABORA (Feb. 15, 2006), http://www.kolabora.com/news/2006/02/15/jajah_is_not_spyware_company.htm.

242. *See* Shaw, *supra* note 240.

243. *Id.*

244. *Id.* As of November 2010 the terms had almost no mention of data collection and retention, stating only that "JAJAH warrants the careful use of your personal data." *See EULA*, JAJAH, http://jajah.com/policy/terms/ (last visited Feb. 21, 2011).

245. *See Flip4Mac WMV*, TELESTREAM, http://origin.telestream.net/flip4mac-wmv/overview.htm (last visited Feb. 21, 2011).

censee.[246] The event received a very small amount of press.[247] Telestream does not appear to have provided an official response to the issue, but they did remove the auditing term.[248] The other terms criticized in the blog post remain.[249]

AOL Instant Messenger

AOL Instant Messenger is a free instant messaging service that was provided by AOL Time Warner.[250] On March 11, 2005, a Friday, a user of the service mistakenly thought AOL had changed the terms of service and wrote a blog post about the "new" terms he did not like.[251] The blogger specifically took issue with two terms: a content licensing clause that allowed AOL to create derivative works from users' content, and a term declaring users "waive[d] any right to privacy."[252] The next day, a Saturday, the story was picked up by a

246. Martin Dittus, *Flip4Mac WMV Has a Very Strange EULA*, DESKTOP: WEBLOG (Jan. 14, 2006), http://dekstop.de/weblog/2006/01/flip4mac_has_a_strange_eula/.

247. Only two stories were found. *See* Peter Hosey, *Watch Your Back*, IDLE TIME (Nov. 1, 2006, 1:26 PM), http://boredzo.org/blog/archives/2006-01-11/watch-your-back; Martin Dittus, *Flip4Mac WMV Has a Very Strange EULA*, DESKTOP: WEBLOG (Jan. 14, 2006), http://dekstop.de/weblog/2006/01/flip4mac_has_a_strange_eula/.

248. *See Flip4Mac WMV End User License Agreement*, TELESTREAM, http://origin.telestream.net/eula/flip4mac/ (last visited Mar. 8, 2011).

249. *Id.*

250. AOL and Time Warner merged in 2000; Time Warner subsequently spun off AOL in 2009. *See* Richard Perez-Pena, *Time Warner Board Backs AOL Spinoff*, N.Y. TIMES (May 29, 2009), http://www.nytimes.com/2009/05/29/business/media/29warner.html.

251. *See* Ben Stanfield, *AOL Eavesdrops, Grants Itself Permission to Steal Your AIM Conversations*, THRASHING THROUGH CYBERSPACE (Mar. 11, 2005, 11:05 AM), http://web.archive.org/web/20070622063420/www.benstanfield.com/thrash/2005/03/aol_eavesdrops_.html. A review of changes in AIM's terms of service using web.archive.org shows the terms in question apparently had not been recently changed, only that AOL had placed a notice about updated terms on its site. THE INTERNET ARCHIVE, http://web.archive.org/web/*/www.aim.com/tos/tos.adp (last visited Mar. 9, 2011). This was later confirmed by news outlets. *See, e.g.*, Charles Jade, *AOL Versus Some Guy on the Internet*, ARS TECHNICA (Mar. 15, 2005, 10:26 PM), http://arstechnica.com/old/content/2005/03/4705.ars.

252. The term in question read:

> Although you or the owner of the Content retain ownership of all right, title and interest in Content that you post to any AIM Product, AOL owns all right, title and interest in any compilation, collective work or other derivative work created by AOL using or incorporating this Content. In addition, by posting Content on an AIM Product, you grant AOL, its parent, affiliates, subsidiaries, assigns, agents and licensees the irrevocable, perpetual, worldwide right to reproduce, display, perform, distribute, adapt and promote this Content in

prominent technology news site.[253] The following Monday, AOL representatives attempted to clarify the meaning of the term,[254] but AOL soon decided it would simply change its terms of service.[255] The new terms removed the "waive any right to privacy" language and modified the language about user content, but the force and effect of the terms were essentially the same as before.[256]

Bioware's Neverwinter Nights

Neverwinter Nights is a game created by Bioware, a company that at the time of the game's release was fairly small.[257] On May 18, 2002, while the game was still in the beta phase of development, Bioware released a program that allowed users to create additional content for the game.[258] The program came with a EULA, and, on the same day that the program was released, users began complaining about the terms of the EULA on Bioware's message boards. Users were particularly concerned with a clause giving Bi-

any medium. You waive any right to privacy. You waive any right to inspect or approve uses of the Content or to be compensated for any such uses.

AIM Terms of Service, AOL INSTANT MESSENGER, http://classic-web.archive.org/web/20050213091348/http://www.aim.com/tos/tos.adp (last visited Mar. 9, 2011).

253. CowboyNeal, *AIM's New Terms of Service*, SLASHDOT (Mar. 12, 2005, 12:11 AM), http://yro.slashdot.org/story/05/03/11/2359226/AIMs-New-Terms-Of-Service.

254. *See, e.g.*, Steve Rubel, *AOL's TOS Change Sparks PR Crisis*, MICRO PERSUASION (Mar. 13, 2005), http://www.micropersuasion.com/2005/03/aols_tos_change.html; Dwight Silverman, *AIM Architect Speaks out on Privay*, HOUSTON CHRONICLE (Mar. 14, 2005, 6:26 PM), http://www.chron.com/disp/story.mpl/business/3084164.html; Dwight Silverman, *AOL Explains Its Privay Policy*, HOUSTON CHRONICLE (Mar. 14, 2005, 2:17 PM), http://www.chron.com/disp/story.mpl/tech/blog/3082956.html.

255. *See* Declan McCullagh, *AOL Clarifies IM Privacy Guarantee*, CNET NEWS (Mar. 14, 2005, 4:54 PM), http://news.cnet.com/2100-1030_3-5616543.html?tag=st.util.print; Ben Stanfield, *Tonight, A Victory*, THRASHING THROUGH CYBERSPACE (Mar. 14, 2005, 8:56 PM), http://web.archive.org/web/20070607155750/www.benstanfield.com/thrash/2005/03/tonight_a_victo.html. *See also AIM Terms of Service*, *supra* note 252 (reflecting changed terms of use).

256. While the "waive any right to privacy" language was completely removed, language about AOL's control and license to user submitted content remained very similar to before. *AIM Terms of Service*, *supra* note 252 (reflecting changed terms of use).

257. *About NWN*, BIOWARE, http://nwn.bioware.com/about/ (last visited Mar. 9, 2011).

258. The date of release of the development version of the program is based on a download provided for it. *See Beta Toolset for Neverwinter Nights*, AUSGAMERS (May 18, 2002), http://www.ausgamers.com/files/details/html/2280.

oware rights to any modules users created with the program.[259] The reaction was relatively large and intense given the relatively small size of the target consumer group.[260] Bioware promised to revise the EULA and directly commented on various news stories on the topic.[261] A month later, on the day of the game's actual release, Bioware published a new EULA, in which the sections on intellectual property rights and user-created work were much longer, but the original terms in controversy remained in almost identical form and with essentially the same effect.[262]

Microsoft Passport

Microsoft Passport is a service that allows users to log on to a number of other services using a single account.[263] In March 2001, Passport was featured prominently in the release of Hailstorm, a set of web-based software development services.[264] On April 3, 2001,

259. For an excerpt of the term, see Sanuj, *Mino EULA Concern for Bioware*, BIOWARE (May 18, 2002, 5:53 PM), http://nwn.bioware.com/forums/viewtopic.html?topic=31518&forum=50&sp=0read. The full term is available by downloading the software at the above footnote. The term reads:

> By distributing or permitting the distribution of any of your Modules, you hereby grant back to INFROGRAMES and BIOWARE an irrevocable royalty-free right to use and distribute them by any means. Infogames or BIOWARE may at any time and in its sole discretion revoke your right to make your Modules publicly available.

Beta Toolset for Neverwinter Nights, *supra* note 258.

260. *See* Brian Carnell, *The Controversy Over Neverwinter Night's EULA*, BRIAN.CARNELL.COM (May 20, 2002), http://brian.carnell.com/articles/2002/the-controversy-over-neverwinter-nights-eula; Hemos, *Bioware Release Neverwinter Nights Beta Tollset* 239, SLASHDOT (May 18, 2002, 9:36 PM), http://games.slashdot.org/article.pl?sid=02/05/18/197220&mode=thread&tid=127.

261. Derek French, *EULA Followup*, BIOWARE (May 19, 2002, 8:22 PM), http://nwn.bioware.com/forums/viewtopic.html?topic=32499&forum=31&sp=0; Derek French, *Greetings From BioWare*, SLASHDOT (May 19, 2002, 1:13 PM), http://slashdot.org/comments.pl?cid=3544901&sid=32834&tid=10.

262. Compare the language found in note 259 with the following:

> If you Distribute, or permit others to Distribute, your Variations [which include modules], you hereby grant back to Infogrames and BioWare an irrevocable royalty-free right to use and distribute such Variations by any means . . . . Infogrames and/or BioWare may at any time and in their sole discretion revoke your right to make your Variations publicly available . . . .

Derek French, *NWN EULA Posted Here for All to See*, BIOWARE (June 18, 2002, 5:26 PM), http://nwn.bioware.com/forums/viewtopic.html?topic=46097&forum=58&sp=0.

263. For more information, see *Microsoft Passport FAQ*, MICROSFOT SUPPORT (Nov. 21, 2006), http://support.microsoft.com/kb/277759.

264. Joe Wilcox, *Microsoft's HailStorm Unleashed*, CNET NEWS (Mar. 19, 2001, 12:25 PM), http://news.cnet.com/2100-1001-254337.html; *Microsoft's Bill Gates Previews New "HailStorm" Technologies to Usher in New Era of More Consistent, Personal-*

Slashdot.org published a story criticizing the Passport terms of service.[265] The author of the story took particular issue with a term granting Microsoft a license to content transmitted through the Passport website.[266] The term was intended to allow the site to function, as is often the case with similar terms, and Microsoft quickly changed the terms of service to better reflect this purpose.[267]

B. Tables

The tables are divided into the four factors discussed in Part I.B: company characteristics, product characteristics, term characteristics, and news characteristics. Each table lists the values for each factor for a given case study. When data was not available, a "." is used. Two additional variables are provided in each table for quick reference to the result of each case:

Addressed Issue: whether the firm attempted to address the issue, either in some sort of announcement or in a partial change in the contract (even if the terms at issue stayed the same). If the company changed the term the way consumers wanted, the company addressed the issue.

Changed: whether the company changed the term at issue in response to consumer action and in the way consumers demanded. Rewordings of a term that kept the overall meaning and effect were not counted as a change. If multiple terms were at issue and at least one changed, this was counted as a change.

Table 1: Company Characteristics

This table contains data for the company-based factors derived in Part I.B. Data for companies were gathered from sources such as SEC filings,[268] Google Finance,[269] D&B,[270] Hoover's,[271] and news reports. Each company-based factor was evaluated as follows:

ized and User-Centric Experiences, MICROSOFT NEWS CENTER (Mar. 19, 2001), http://www.microsoft.com/presspass/press/2001/mar01/03-19hailstormpr.mspx; *see also* Robert Hess, *A Sense of Identity*, MSDN (July 23, 2001), http://msdn.microsoft.com/en-us/library/bb263941(VS.85).aspx.

265. Jamie, *MS Passport: "All Your Bits Are Belong to Us,"* SLASHDOT (Apr. 3, 2001, 11:10 AM), http://yro.slashdot.org/story/01/04/03/1535244/MS-Passport-All-Your-Bits-Are-Belong-To-Us.

266. *Id.*

267. Stefanie Olsen, *Privacy Terms Revised for Microsoft Passport*, CNET NEWS (Apr. 4, 2001, 7:20 PM), http://news.cnet.com/2100-1023-255310.html&tag=mn_hd.

268. U.S. SEC. AND EXCHANGE COMM'N, http://www.sec.gov/edgar/searchedgar/webusers.htm (last visited Mar. 9, 2011) (search using the EDGAR database).

Revenue: the annual revenue for the company the year the incident took place, adjusted for inflation using the Bureau of Labor Statistics's CPI Inflation Calculator.[272] If a subsidiary offered the product or service, then the revenue of the subsidiary is used unless the parent and subsidiary share the same name and have essentially the same reputational identity. For example, Rockstar Games and its parent, Take-Two, would not be considered the same.

Employees: the number of employees for the year the incident took place. If a subsidiary offered the product or service, then the number of employees of the subsidiary is used instead of the parent, subject to the constraints mentioned in the revenue variable.[273]

Age: the age of the company in years. Age is based on how long the company was known by the name it had at the time of the incident.[274] If a company is a subsidiary, its age is used instead of the parent, subject to the constraints mentioned in the revenue variable.

269. GOOGLE FINANCE, http://www.google.com/finance (last visited Mar. 9, 2011) (use search box at top-center to search for a company by name or ticker symbol; financial data is available by following the hyperlinks on the left margin of the resulting page).

270. D&B, http://www.dnb.com (last visited Mar. 9, 2011) (a searchable database for businesses and corporations; subscription required).

271. HOOVERS, http://www.hoovers.com (last visited Mar. 9, 2011) (a searchable database for businesses and corporations; subscription required).

272. U.S. DEP'T OF LABOR, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Mar. 9, 2011) (input an amount in the dialog box at the top of the page and choose the years to compare).

273. An argument can be made that the subsidiary's reputation is highly influenced by that of the parent, but for consistency this paper only considers data for the subsidiary. *Cf.* Ginger Zhe Jin & Phillip Leslie, *Reputational Incentives for Restaurant Hygiene*, 1 AM. ECON. J.: MICROECONOMICS 237 (2009) (finding that restaurant franchise owners tend to free ride on their restaurant chain's overall reputation).

274. As the paper focuses on reputation, it is more concerned with the age of the company's reputation as opposed to the age of the company itself. Thus the figure used is how long the brand has been in existence, which may even survive mergers and acquisitions.

Company Characteristics

Case	Revenue (Millions of Dollars)	Employees	Age	Addressed Issue	Changed
Facebook	$560+[275]	850[276]	5[277]	Yes	Yes
Google (Chrome, 2008)	$22,113[278]	20,123[279]	10[280]	Yes	Yes
Google (Docs, 2007)	$17,482[281]	13,786[282]	8[283]	Yes	Yes
AOL (Instant Messenger)	$9,264[284]	19,000[285]	16[286]	Yes	Yes
Mozilla (Firefox)	$79.14[287]	192[288]	5[289]	Yes	Yes

275. Eric Eldon, *Facebook's Big Advertising Experiment Drives New Revenue*, INSIDE FACEBOOK (Sept. 17, 2009), http://www.insidefacebook.com/2009/09/17/facebooks-big-advertising-experiment-drives-new-revenue/.

276. *Facebook, Inc.*, HOOVER'S, http://www.hoovers.com/company/Facebook_Inc/rcxycci-1-1njg4g.html (last visited Mar. 3, 2011).

277. *Facebook – Info*, FACEBOOK, http://www.facebook.com/facebook?v=info (last visited Mar. 3, 2011).

278. Google Inc., Quarterly Report (Form 10-Q) (Nov. 7, 2008).

279. *Id.*

280. *Google History*, GOOGLE, http://www.google.com/intl/en/corporate/history.html#2008 (last visited Mar. 3, 2011).

281. *2008 Financial Table*, GOOGLE INVESTOR RELATIONS, http://investor.google.com/financial/2008/tables.html (last visited Mar. 5, 2011).

282. Google Inc., Quarterly Report (Form 10-Q) (Nov. 7, 2008).

283. *Google History*, *supra* note 280.

284. Time Warner Inc., Annual Report (Form 10-K) (Feb. 27, 2006). AOL reported revenues of $8.283B in 2005. *Id.*

285. *AOL Says Has Largely Completed Layoffs*, REUTERS (Dec. 13, 2006), http://uk.reuters.com/article/idUKN1123943220061213.

286. *About AOL: Overview*, AOL Corp, http://corp.aol.com/about-aol/overview (last visited Mar. 5, 2011).

287. HOOD & STRONG LLP, MOZILLA FOUNDATION AND SUBSIDIARIES: INDEPENDENT AUDITORS' REPORT AND CONSOLIDATED FINANCIAL STATEMENTS (2009), *available at* http://www.mozilla.org/foundation/documents/mf-2008-audited-financial-statement.pdf.

288. The Lizard, *Exclusive: A Look Inside Mozilla's Financials; Planned Growth in 2009*, THE TRUTH ABOUT MOZILLA (Nov. 27, 2008), http://thetruthaboutmozilla.wordpress.com/2008/11/27/exclusive-a-look-inside-mozilla%E2%80%99s-financials-planned-growth-in-2009/#more-45.

289. *Mozilla.org Announces Launch of the Mozilla Foundation to Lead Open-Source Browser Efforts*, MOZILLA.ORG (July 15, 2003), http://www-archive.mozilla.org/press/mozilla-foundation.html.

Case	Revenue (Millions of Dollars)	Employees	Age	Addressed Issue	Changed
Adobe (Photoshop Express)	$3,630[290]	7,335[291]	25[292]	Yes	Yes
Novell (OpenSUSE)	$970.45[293]	4,000[294]	25[295]	Yes	Yes
Bioware (Neverwinter Nights)	$15.0[296]	116[297]	7[298]	Yes	No
Octoshape (P2P Video)	.	15[299]	5[300]	No	No
Flagship Studios (Hellgate London)	< $22,500,000[301]	28[302]	5[303]	Yes	No

290. *Adobe Reports Record Quarterly and Annual Revenue*, ADOBE (Dec. 16, 2008), http://www.adobe.com/aboutadobe/pressroom/pressreleases/200812/Q408Earnings.html.

291. Adobe Systems Inc., Annual Report (Form 10-K) (Nov. 28, 2008).

292. *Adobe Fast Facts*, ADOBE, http://www.adobe.com/aboutadobe/pressroom/pdfs/fastfacts.pdf (last visited Mar. 5, 2011).

293. Novell, Inc., Annual Report (Form 10-K) (Oct. 31, 2008).

294. *Id.*

295. *Novell Corporate History*, NOVELL, http://www.novell.com/news/press/pressroom/history.html (last visited Mar. 3, 2011).

296. $11.93 for 2003. This was calculated based on revenue of $16.3M CAD in 2003. *See* Rick Westhead, *The Golden Age for Game Developers; Business Booming for Canadian Game Companies*, TORONTO STAR, Nov. 7, 2004, at C03. It was converted to USD using the .732 CAD-USD exchange rate on June 1st, 2003. http://www.oanda.com/currency/historical-rates/ (enter appropriate dates and currencies to see the historical exchange rates). It was then adjusted for inflation in 2011 (rounded up), along with the other revenue figures.

297. Tom Keyser, *The Force Is with These Game Boys*, BUS. EDGE, (Dec. 13, 2001), http://www.businessedge.ca/archives/article.cfm/the-force-is-with-these-game-boys-1260; Rachel Ross, *Not Playing Around Canadian Game Developer Wins Star Wars; At Alberta's Bioware, a Leading Developer of Video Games, It Takes Fun to Get the Job Done. But the Bottom Line Is This Is a Serious Industry at $6 Billion a Year*, TORONTO STAR, Apr. 9, 2001, at C01.

298. *About Bioware*, BIOWARE, http://www.bioware.com/about (last visited Mar. 3, 2011).

299. *Octoshape ApS*, HOOVER'S, http://www.hoovers.com/company/Octoshape_ApS/yfxhyxrkk-1.html (last visited Mar. 5, 2001).

300. *Careers*, OCTOSHAPE, http://www.octoshape.com/?page=company/careers (last visited Mar. 2, 2011).

301. Dean Takahashi, *Reconstructing the Fall of Game Developer Flagship Studios*, VENTUREBEAT (Mar. 26, 2009), http://venturebeat.com/2009/03/26/reconstructing-the-fall-of-game-developer-flagship-studios/.

302. *Flagship Crew*, FLAGSHIP STUDIOS, http://web.archive.org/web/20070222131339/www.flagshipstudios.com/index.php?option=com_content&task=blogcategory&id=18&Itemid=45 (last visited Mar. 2, 2011).

303. *Flagship Studios Launches With a Splash*, BLUE'S NEWS (Sep. 22, 2003), http://www.bluesnews.com/a/686.

Case	Revenue (Millions of Dollars)	Employees	Age	Addressed Issue	Changed
Rockstar Games (Grand Theft Auto)	$723.26[304]	900[305]	10[306]	No	No
Microsoft (Vista, 2007)	$53,847[307]	79,000[308]	31[309]	Yes	Yes
Microsoft (Passport, 2001)	$31,201[310]	47,600[311]	26[312]	Yes	Yes
Jajah (VOIP)	$30.55[313]	70+[314]	<1[315]	Yes	Yes
Telestream (Flip4MAC)	$20+[316]	100[317]	8[318]	Yes	Yes
School Check IN	.	.	6[319]	No	No
Dropbox	.	10[320]	< 1[321]	Yes	Yes

304. Take-Two Interactive Software, Annual Report (Form 10-K) (Dec. 18, 2009).

305. *Asked & Answered - Re: Red Dead Redemption, L.A. Noire, Rockstar San Diego and More*, ROCKSTAR GAMES (Jan. 21, 2010), http://www.rockstargames.com/newswire/article/2821/asked_&_answered_-_re_red_dead_redemption_l.a._noire_rockstar_san_diego_and_more.article.

306. *Rockstar Games, Inc. Private Company Information*, BUSINESSWEEK, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=971622 (last visited Mar. 2, 2011).

307. Microsoft Corp., Annual Report (Form 10-K) (June 30, 2007).

308. *Id.*

309. *The History of Microsoft*, CHANNEL 9, http://channel9.msdn.com/series/history (last visited Mar. 2 2011).

310. $25,296B in 2001. Microsoft Corp., Annual Report (Form 10-K) (June 30, 2001).

311. *Id.*

312. *The History of Microsoft*, *supra* note 309.

313. Guy Grimland & Amitai Ziv, *Giants Vying to Buy Jajah*, HAARETZ.COM (Nov. 11, 2009, 2:02 AM), http://www.haaretz.com/print-edition/business/giants-vying-to-buy-jajah-1.4362.

314. *Id.*

315. JAJAH, *supra* note 238.

316. Melanie Turner, *Bridging the Mac/PC Divide*, SACRAMENTO BUS. J. (July 8, 2007, 9:00 PM), http://sacramento.bizjournals.com/sacramento/stories/2007/07/09/story9.html.

317. *Id.*

318. *About Telestream*, TELESTREAM, http://www.telestream.net/company/overview.htm (last visited Mar. 2, 2011).

319. INTERNET ARCHIVE WAYBACK MACHINE, http://web.archive.org/web/*/http://www.schoolcheckin.com/ (last visited Mar. 2, 2011).

320. *Resolutions*, THE DROPBOX BLOG, http://blog.dropbox.com/?m=200901 (last updated Jan. 5, 2009). Admittedly this is not the most scientific count of the company's size, but it suggests the number of employees was certainly below the average of fifty at the beginning of 2009.

321. *Id.*

Case	Revenue (Millions of Dollars)	Employees	Age	Addressed Issue	Changed
5th Cell (Scribblenauts)	$2.9M[322]	39[323]	6[324]	No	No

Table 2: Product Characteristics

This table contains data for the product-related factors derived in Part I.B. Data about products were primarily gathered from each company's website and SEC filings. Each product-based factor was evaluated as follows:

Users/Sales: the number of users of the product at the time of the incident or, if that information is unavailable, the total sales of the product at the time of the incident. For incidents that happened at or near the product's release, data for as short a time period as possible after the release is used (generally one month). This attempts to compensate for the situation in which only a few users have bought or downloaded the product the day it is released, but there is still massive interest in the product. Though this Note only considers incidents originating in the United States, this figure includes worldwide users or sales.

New/Updated: whether the incident affecting the product in question started when the product was either in pre-release or within a month of release.

Flagship Product: whether the product in question had the highest revenue for the company or, lacking such data, was the one the company considered its most important product during the year of the controversy.[325]

Free: whether the product or service was offered for free.

322. $2.9M estimated for 2010. *5th Cell Media LLC*, HOOVERS, http://www.hoovers.com/company/5th_Cell_Media_LLC/rsjckhsf-1.html (last visited Mar. 2, 2011).

323. *5th Cell Media LLC*, HOOVERS, http://www.hoovers.com/company/5th_Cell_Media_LLC/rsjckhsf-1.html (last visited Mar. 2, 2011).

324. *About 5TH Cell*, 5TH CELL, http://www.5thcell.com/studio/about/ (last visited Mar. 2, 2011).

325. Revenue per product was not always available, but a company's classification of its flagship product almost always was. There is a potential for bias if the company falsely depicts its flagship product to boost sales. Another possible method would have involved a product's sales rank on Amazon, see Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMP. L. STUD. 447, 450 (2008), but unfortunately not every case involved a product sold on Amazon.

Product Characteristics

Product Name	Flagship	New/ Updated	Free	Number of Users	Addressed Issue	Changed
Facebook	Yes	No	Yes	175,000,000[326]	Yes	Yes
Chrome (Google)	No	Yes	Yes	2,000,000[327]	Yes	Yes
Docs (Google)	No	No	Yes	1,250,000[328]	Yes	Yes
Instant Messenger (AOL)	No	No	Yes	53,000,000[329]	Yes	Yes
Firefox (Mozilla)	Yes	No	Yes	180,000,000[330]	Yes	Yes
Photoshop Express (Adobe)	No	Yes	Yes	450,000[331]	Yes	Yes
OpenSUSE (Novell)	No[332]	Yes	Yes	2,000,000[333]	Yes	Yes
Neverwinter Nights (Bioware)	Yes	Yes	No	1,000,000[334]	Yes	No

326. Justin Smith, *Facebook Surpasses 175 Million Users, Continuing to Grow by 600k Users/Day*, INSIDE FACEBOOK (Feb. 14, 2009), http://www.insidefacebook.com/2009/02/14/facebook-surpasses-175-million-users-continuing-to-grow-by-600k-usersday/.

327. Antone Gonsalves, *Google Chrome Reached Nearly 2 Million Downloads in First Week*, INFORMATIONWEEK (Sept. 17, 2008, 6:30 PM), http://www.informationweek.com/news/internet/google/showArticle.jhtml?articleID=210602296.

328. Alex Patriquin, *Happy 2nd Anniversary, Google Docs & Spreadsheets*, COMPETE PULSE (Nov. 13, 2008, 4:49 PM), http://blog.compete.com/2008/11/13/google-docs-spreadsheets-microsoft-office/.

329. *Google Merges E-Mail, Instant Messaging Services*, FOXNEWS.COM (Feb. 8, 2006), http://www.foxnews.com/story/0,2933,184118,00.html; Jeremy Reimer, *Yahoo Messenger and Windows Live Messenger Get Together*, ARS TECHNICA (Sept. 27, 2006, 2:53 PM), http://arstechnica.com/business/news/2006/09/7846.ars; David Strom, *How Instant Messaging Is Transforming the Enterprise Network*, THE INTERNET PROTOCOL J. (June 2006), http://www.cisco.com/web/about/ac123/ac147/archived_issues/ipj_9-2/instant_messaging.html.

330. Mary Colvig, *We're Official!*, MOZILLA BLOG (July 2, 2008), http://www.spreadfirefox.com/en-US/worldrecord/.

331. Dean Takahashi, *Reconstructing the Fall of Game Developer Flagship Studios*, VENTUREBEAT (Mar. 26, 2009), http://venturebeat.com/2009/03/26/reconstructing-the-fall-of-game-developer-flagship-studios/.

332. OpenSUSE is a free of version of the actual flagship product, SUSE. Novell, Inc., Annual Report (Form 10-K) (Dec. 22, 2009).

333. Within the first month of release, about 2,000,000 people were using the new version of OpenSuse. *openSUSE:Staistics*, OPENSUSE, http://en.opensuse.org/openSUSE:Statistics (last visited March 2, 2010).

334. *Infogrames Closes out Fiscal Year With Release of Major Titles Across All Platforms*, INTERNET ARCHIVE WAYBACK MACHINE (June 27, 2002), http://web.archive.org/web/20021214155405/http://www.infogrames.com/corp_pressreleases.php?op=story&sid=287.

Product Name	Flagship	New/ Updated	Free	Number of Users	Addressed Issue	Changed
Octoshape	Yes	No	Yes	27,000,000[335]	No	No
Hellgate: London (Flagship)	Yes	Yes	No	.	Yes	No
Grand Theft Auto IV (Rockstar)	Yes	No	No	15,000,000[336]	No	No
Windows Vista (Microsoft)	Yes[337]	Yes	No	20,000,000[338]	Yes	Yes
Passport (Microsoft)	No	Yes	Yes	7,000,000[339]	Yes	Yes
JaJah	Yes	Yes	No	25,000,000[340]	Yes	Yes
Flip4Mac (Telestream)	No	Yes	Yes	.	Yes	Yes
School Check IN	Yes	No	No	.	No	No
Dropbox	Yes	Yes	Yes	3,000,000[341]	Yes	Yes
Scribblenauts (5th Cell)	Yes	Yes	No	194,000[342]	No	No

335. Number of people that watched the 2009 inauguration on CNN. Not all used Octoshape, but all were presented with the option of using Octoshape. John D. Sutter, *Online Inauguration Videos Set Records*, CNN (Jan. 21, 2009), http://articles.cnn.com/2009-01-21/tech/inauguration.online.video_1_streaming-video-inauguration?_s=PM:TECH.

336. *BioShock 2 Ships 3 Million, GTA VI Sales Top 15 Million*, IGN (Mar. 3, 2010), http://ps3.ign.com/articles/107/1073865p1.html.

337. Windows and Office are the two highest revenue and profit generating products by far for Microsoft; while Office has a slightly higher revenue, Windows is slightly more profitable; 'both should be considered flagship products. Microsoft Co., Annual Report (Form 10-K) (Aug. 3, 2007).

338. *Windows Vista Debuts with Strong Global Sales*, MICROSOFT NEWS CENTER (Mar. 26, 2007), http://www.microsoft.com/presspass/features/2007/mar07/03-26VistaDebut.mspx.

339. *Gartner Survey Shows Consumers Not Willing to Swap Privacy for Ease of Use Online*, GARTNER (Dec. 4, 2001), http://www.gartner.com/5_about/press_releases/2001/pr20011204a.jsp.

340. Guy Grimland & Amatai Ziv, *Giants Vying to Buy Jajah*, HAARETZ.COM (Nov. 11, 2009), http://www.haaretz.com/print-edition/business/giants-vying-to-buy-jajah-1.4362.

341. Doug Osborne, *Dropbox Reaches 3 Million User Milestone*, GEEK.COM (Nov. 26, 2009, 5:32 AM), http://www.geek.com/articles/news/dropbox-reaches-3-million-user-milestone-20091126/.

342. JC Fletcher, *Scribblenauts Achieves Noteworthy 194K Sales in September*, JOYSTIQ (Oct. 20, 2009, 7:30 PM), http://www.joystiq.com/2009/10/20/scribblenauts-achieves-noteworthy-194k-sales-in-september/.

Table 3: Term Characteristics

This table contains data for the term-based factors derived in Part I.B. Most data could be found simply by observing the term. Data on whether the term was new or updated was often found through news sites or by visiting the Wayback Machine.[343] Each term-based factor was evaluated as follows:

Direct Financial Impact on Firm: whether changing or removing the term would have a direct, clear, and immediate effect on the firm's revenue or finances. An example would be a term that is directly tied to in-game advertisements for a computer game.

Type of Term: the subject matter of the term, such as licensing or privacy.

New/Updated: whether the term in question was introduced or changed in the month prior to the incident.

Term Characteristics

Case	New or Updated	Type	Financial Impact	Addressed Issue	Changed
Facebook	Yes	Licensing/ Ownership	No	Yes	Yes
Chrome (Google)	Yes	Licensing/ Ownership	No	Yes	Yes
Docs (Google)	No	Licensing/ Ownership	No	Yes	Yes
Instant Messenger (AOL)	Yes[344]	Licensing/ Ownership	No	Yes	Yes
Firefox (Mozilla)	Yes[345]	General—EULA	No	Yes	Yes
Photoshop Express (Adobe)	Yes	Licensing/ Ownership	No	Yes	Yes
OpenSUSE (Novell)	Yes	General—EULA	No	Yes	Yes
Neverwinter Nights (Bioware)	Yes	Licensing/ Ownership	No	Yes	No
Octoshape	No	Privacy	No	No	No
Hellgate: London (Flagship)	Yes	Privacy/Ads	Yes	Yes	No
Grand Theft Auto IV (Rockstar)	No	Public Performance	No	No	No

343. INTERNET ARCHIVE WAYBACK MACHINE, http://web.archive.org (last visited Feb. 21, 2011). The site takes snapshots of many web pages each time they change. For more information, see http://www.archive.org/about/faqs.php.

344. *See supra* note 252.

345. The EULA had been added to a segment of the market that previously did not have to agree to one. *See supra* note 183. R

Case	New or Updated	Type	Financial Impact	Addressed Issue	Changed
Windows Vista (Microsoft)	Yes	Transfer, Virtualization, NDA	Yes[346]	Yes	Yes
Passport (Microsoft)	No	Licensing/ Ownership	No	Yes	Yes
JaJah	Yes	Privacy	No	Yes	Yes
Flip4Mac (Telestream)	No	NDA, Auditing	No	Yes	Yes
School Check IN	No	Penalty Clause	Yes[347]	No	No
Dropbox	Yes	Licensing/ Ownership	No	Yes	Yes
Scribblenauts (5th Cell)	Yes	Transfer/ Copying, Reverse Engineering	Yes[348]	No	No

Table 4: News Characteristics

This table contains data for the news-based factors discussed in Part I.B. Figures were calculated by performing a search on Google News[349] or Google Blogs[350] from the time of the first news article or blog post on the subject until a day before capitulation, for a search string that included the company name, the product name, and type of agreement (e.g., "Mozilla Firefox EULA"). Values in brackets are the news articles per day, an attempt to normalize values. For instance, if capitulation occurred two days after the first news article, and there were nine news articles total, 9/2 = 4.5, rounded to 5, is the normalized amount. Specifics of each of the term-based factor are as follows:

Ex Ante News Hits: the number of hits on Google News from the time of the first story until capitulation by the firm. If the firm did

346. Transferability of the license will affect aftermarket sales and has a potentially large impact on revenue.

347. Violating the terms would result in direct financial gain for the firm, assuming the terms were upheld in court. *See* School Check IN, Appendix Section A, *supra*.

348. Like the term in Windows Vista, the term regarding transferability of Scribblenauts would have a clear relationship to revenue.

349. Google News aggregates stories from approximately 4,500 news sites that are vetted by Google. *See About Google News,* GOOGLE NEWS, http://news.google.com (last visited Feb. 21, 2011).

350. Google Blogs aggregates blog stories from any blog that has a site feed and uses an updating service to publish stories. *See Blog Search Help*, GOOGLE BLOG SEARCH, http://www.google.com/support/blogsearch/?hl=en (last visited Mar. 2, 2011).

not capitulate, the number of news hits that appeared within a month of the first news article is used.[351]

Ex Ante Blog Search Hits: the number of blog hits on Google Blogs from the time of the first story until capitulation by the firm. If the firm did not capitulate, the number of blog hits that appeared within a month of the first blog post is used.

Ex Post News Hits: the number of news hits on Google News from the day of capitulation until one week later.[352] If there was no capitulation, a "." is used.

Ex Post Blog Search Hits: the number of news hits on Google Blogs from the day of capitulation until one week later. If there was no capitulation, a "." is used.

Alexa Ranking: the current Alexa web traffic ranking of the originating news source in the United States.[353] The current Alexa ranks of websites are used since historical ranks were not always available.

News Characteristics

Case	Ex ante News	Ex post News	Ex ante Blogs	Ex post Blogs	Alexa Ranking	Addressed Issue	Changed
Facebook	16 [8]	75 [11]	153,000 [77,000]	156,000 [22,000]	987[354]	Yes	Yes
Chrome (Google)	7 [7]	56 [8]	89 [89]	3200 [460]	44[355]	Yes	Yes

351. As most incidents of capitulation happened within a month, a month as the cutoff is used.

352. News stories are generated extremely quickly online. *See generally* PHILIP SEIB, GOING LIVE: GETTING THE NEWS RIGHT IN A REAL-TIME, ONLINE WORLD (2002). Given the high rate of speed news is created, news may also tend to disappear quickly. *See* Michael Karlsson, Immediacy of Online News: Journalistic Credo Under Pressure 19 (Jun. 4, 2010) (unpublished manuscript), *available at* http://www.allacademic.com/meta/p169476_index.html. This variable therefore uses a week as its time period, both because of the immediacy and impermanence of online news as well as the observations of when news stories tended to taper off, based on number of hits for certain news incidents over time over on http://news.google.com.

353. Alexa web traffic ranks websites based on a combination of the daily visitors to the site and the daily number of pages viewed on the site, averaged over the previous three months. *Frequently Asked Questions*, ALEXA, http://www.alexa.com/faqs/?p=134 (last visited Mar. 2, 2011).

354. *Facebook.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/facebook.com (last visited Mar. 2. 2011).

355. *Google.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/google.com (last visited Mar. 2, 2011).

Case	Ex ante News	Ex post News	Ex ante Blogs	Ex post Blogs	Alexa Ranking	Addressed Issue	Changed
Docs (Google)	27 [4]	7 [1]	5000 [714]	2300 [330]	670[356]	Yes	Yes
Instant Messenger (AOL)	56 [19]	126 [18]	149 [50]	135 [19]	19,312,203[357]	Yes	Yes
Firefox (Mozilla)	0 [0]	12 [2]	14 [7]	107 [15]	21,731[358]	Yes	Yes
Photoshop Express (Adobe)	0 [0]	7 [1]	7 [7]	30 [4]	44[359]	Yes	Yes
OpenSUSE (Novell)	0 [0]	3 [0]	73 [0]	13 [2]	1,687,018[360]	Yes	Yes
Neverwinter Nights (Bioware)	0 [0]	.	0 [0]	.	4,155[361]	Yes	No
Octoshape	3 [0]	.	72 [2]	.	17,694[362]	No	No
Hellgate: London (Flagship)	2 [0]	.	27 [1]	.	28,686[363]	Yes	No
Grand Theft Auto IV (Rockstar)	0 [0]	.	8 [1]	.	136,047[364]	No	No
Windows Vista (Microsoft)	32 [2]	19 [3]	396 [18]	187 [27]	670[365]	Yes	Yes
Passport (Microsoft)	1 [0]	12 [2]	0 [0]	4 [2]	628[366]	Yes	Yes
JaJah	1 [0]	1 [0]	4 [1]	1 [0]	.[367]	Yes	Yes

356. *Id.*

357. *Aim.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/aim.com (worldwide rank used—not enough data for U.S. regional rank) (last visited Mar. 2, 2011).

358. *Mozilla.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/mozilla.com (last visited Mar. 2, 2011).

359. *Adobe.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/adobe.com (last visited Mar. 2, 2011).

360. *OpenSUSE.org Site Info*, ALEXA, http://www.alexa.com/siteinfo/opensuse.org# (Worldwide rank used—not enough data for U.S. regional rank) (last visited Mar. 2, 2011).

361. *Bioware.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/bioware.com (last visited Mar. 2, 2011).

362. *Octoshape.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/octoshape.com (last visited Mar. 2, 2011).

363. *Hellgatelondon.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/hellgatelondon.de (last visited Mar. 2, 2011).

364. *Gta4.net Site Info*, ALEXA, http://www.alexa.com/siteinfo/gta4.net (last visited Mar. 2, 2011).

365. *ZDnet.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/zdnet.com.

366. *Passport.net Site Info*, ALEXA, http://www.alexa.com/siteinfo/passport.net (last visited Mar. 2, 2011).

367. *Jajah.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/jajah.com (last visited Mar. 2, 2011).

Case	Ex ante News	Ex post News	Ex ante Blogs	Ex post Blogs	Alexa Ranking	Addressed Issue	Changed
Flip4Mac (Telestream)	0 [0]	0 [.]	1 [0]	0 [0]	3,665,842[368]	Yes	Yes
School Check IN	1 [0]	.	1 [0]	.	3821[369]	No	No
Dropbox	0 [0]	0 [0]	15 [0]	3 [0]	206,665[370]	Yes	Yes
Scribblenauts (5th Cell)	0 [0]	.	2[0]	.	3,595,356[371]	No	No

368. *Flip4mac.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/flip4mac.com (worldwide rank used—not enough data for U.S. regional rank) (last visited Mar. 2, 2011).

369. *Schoolcheckin.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/schoolcheckin.com (last visited Mar. 2, 2011).

370. *Getdropbox.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/getdropbox.com (last visited Mar. 2, 2011).

371. *Scribblenauts.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/scribblenauts.com (worldwide rank used—not enough data for U.S. regional rank) (last visited Mar. 2, 2011).