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BEYOND TRANSNATIONAL ADVOCACY: LESSONS FROM ENGAGEMENT OF MYANMAR INDIGENOUS PEOPLES WITH THE UN HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW

Jonathan Liljeblad*

ABSTRACT

On July 21, 2015, the Coalition of Indigenous Peoples in Myanmar/Burma (CIPM), a group representing 24 indigenous rights organizations in Myanmar, announced they were submitting a report to the Universal Periodic Review (UPR) session on Myanmar. The use of the UPR represents an attempt by Myanmar’s indigenous groups to address a variety of issues not traditionally associated with human rights, among them: environmental grievances associated with alleged government seizure of land, deforestation, pollution, and suppression of land-use rights. The use of the UPR also illustrates an indigenous strategy of reaching up to an international level in order to address problems at a local one: the CIPM resorted to the UPR in hopes of mobilizing pressure to change the behavior of the Myanmar government. This article explores the experiences of the CIPM with the UPR to draw lessons for other groups that seek to use the UPR to advance their interests.

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INTRODUCTION

On July 21, 2015, the Coalition of Indigenous Peoples in Myanmar/Burma (CIPM), a group representing 24 indigenous rights organizations in Myanmar, announced they were submitting a report to the Universal Periodic Review (UPR) session on Myanmar.\(^1\) A mechanism of the United Nations (UN) Human Rights Council (HRC), the UPR is a procedure to periodically evaluate the human rights record of each UN member state once every four years.\(^2\) Non-governmental organizations (NGOs) like the CIPM are allowed to submit arguments about alleged human rights violations for the UPR to consider.\(^3\) With respect to the Myanmar government, the CIPM’s submission joins an array of other reports detailing allegations of government behavior that violates the standards set by the UN human rights system.\(^4\)

The use of the UPR represents an attempt by Myanmar’s indigenous groups to address a variety of issues not traditionally associated with human rights, among them: environmental grievances associated with alleged government seizure of land, deforestation, pollution, and suppression of land-use rights.\(^5\) As such, this attempt constitutes a strategy merging local environmental issues with international human rights mechanisms. Such an action is consistent with a trend to combine environmental and human rights issues.\(^6\) Since its inception, the UPR has become an inclusive process

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accommodating human rights issues arising from a broad array of subjects, including environmental problems and indigenous complaints. The use of the UPR to address environmental issues is a valid exercise recognized by the UN Office of the High Commissioner for Human Rights (OHCHR). With respect to Myanmar, some NGOs have raised environmental concerns within a human rights framework in their submissions to the UPR. What is significant about the CIPM submission, however, is that it marks a formal attempt by indigenous people in Myanmar to exercise an

(“Many scholars and legal practitioners have framed the demands of the environmental justice movements nationally and globally in the language of human rights.”).


international human rights mechanism, and so marks an escalation in their attempts to obtain redress for their local environmental grievances.11

As such, the use of the UPR illustrates an indigenous strategy of reaching up to an international level in order to address problems at a local one: the CIPM resorted to the UPR in hopes of mobilizing international pressure to change the behavior of the Myanmar government.12 This is an approach advocated by indigenous supporters, such as the International Work Group on Indigenous Affairs (IWGIA), which observed an increasing trend of indigenous participation in the UPR since its inception—and which encourages indigenous groups to use the UPR as a tool to advance their interests.13 This activity conforms to larger trends of non-state actors exercising more transnational activity14 and expanding their roles at multiple levels of governance.15 Typically, studies of environmental issues and human rights involve cases where the norms about appropriate behavior are conveyed from a universal or international level down to a domestic level.16 Indigenous peoples tend to work in the converse, following a

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11. See Saning, supra note 1 (discussing the CIPM UPR submission, along with local sentiments that indigenous rights “remain up in the air” while the government fails to recognize the full spectrum of indigenous groups and their grievances); see also CIPM 2015, supra note 5, at 3–4, 6, 8–9, 11, 13–14 (formally submitting the CIPM’s environmental concerns to the UPR).

12. See Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics 12 (1998) (stating that domestic actors who cannot engage their own government may find success through the persuasive power of the international community).


14. See, e.g., Alison Brysk, From Tribal Village to Global Village: Indian Rights and International Relations in Latin America 29, 33 (2000) (using an indigenous rights movement in Latin America as an example of transnational activism); Keck & Sikkink, supra note 12, at 10–11 (highlighting the increase in number of international social change NGOs between 1953 and 1993).

15. See, e.g., John Guidry et al., Globalizations and Social Movements, in Globalizations and Social Movements: Culture, Power, and the Transnational Public Sphere 1, 1 (John A. Guidry et al. eds., 2000) (describing how social movements have become more globalized, relying on pressure at the international level to effect change in their home states). See generally Jan Aart Scholte, Civil Society and Democracy in Global Governance, 80 Global Governance 281, 281, 286, 290, 293, 299–300 (2002) (discussing growth in activism at the global level of governance); David Held & Anthony McGrew, Globalization/Anti-Globalization 6–7 (2002) (providing background information on the trend toward globalization in “economic, social and political activities”).

16. See, e.g., Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 Int’l Org. 887, 893, 899 (1998) (noting that norms from the international community can descend to the domestic level in multiple ways, and indicating that environmental or human rights efforts often take shape at an international scale); Audie Klotz, Norms Reconstituting
pattern scholars like Sidney Tarrow describe as “scale shift,” whereby domestic activists seek to take norms held at the grass-roots level upward to an international system that can then be mobilized to aid grass-roots efforts to promote those norms in a domestic context.

This article evaluates the CIPM strategy to use the UPR to advance its environmental grievances against the Myanmar state. The analysis begins with a brief presentation of background information about the challenges of doing research in Myanmar and the opportunities for the CIPM to participate in the UPR. The analysis then applies the concept of Transnational Advocacy Networks (TANs) to better understand the mechanics of the CIPM’s participation in the UPR. Following this, the analysis draws upon TANs to highlight concerns for the CIPM with respect to the UPR, and then comments on the motivations for the CIPM to continue engaging with the UPR. Finally, the analysis draws out lessons for other groups that may seek to adopt the CIPM’s strategy of using the UPR to advance their interests.

I. BACKGROUND

The analysis is based on ethnographic field notes collected in Myanmar under a U.S. Fulbright Scholar grant from 2014–2015, supplemented with unpublished primary source documents obtained in person from CIPM representatives. Additional interviews and documents were gathered

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18. See Pamela Martin & Frankie Wilmer, Transnational Normative Struggles and Globalization: The Case of Indigenous People in Bolivia and Ecuador, 5 GLOBALIZATIONS 583, 585 (2008) (discussing how advocates brought their concerns to the international level, which in turn created domestic change).

19. See infra Part I (providing relevant background on research methods, Myanmar’s multi-dimensional transition, and the UPR mechanism).

20. See infra Part II (explaining how the CIPM fits into the TAN model and works to initiate a “Boomerang Pattern”).

21. See infra Parts III–IV (describing a number of issues inherent in the CIPM’s use of the UPR, and how these limitations square with the CIPM’s goals and expectations for the process).

22. See infra Part V (highlighting various lessons that the CIPM experience provides, and how other groups can use these lessons when pursuing international assistance for human rights issues).

several months after the November 2015 UPR session for Myanmar,\textsuperscript{24} while the Myanmar elections in that time period heralded the arrival of a government led by Daw Aung San Suu Kyi’s National League for Democracy (NLD) political party.\textsuperscript{25} Due to the continuing political sensitivity of Myanmar’s ongoing democratization, this study does not use direct quotes, names, or attributing information unless they were given in publicly available documents.\textsuperscript{26} 

It should be noted that Myanmar’s ongoing transition complicates efforts to study the country, which has seen political, economic, and social changes spurred by engagement with foreign technical assistance, foreign investment, foreign trade, and renewed diplomatic relations.\textsuperscript{27} Examples of these changes include: an array of new laws passed or drafted across a range of areas, particularly in infrastructure, human development, education, energy, and foreign investment;\textsuperscript{28} a continuing peace process to end domestic conflicts with various ethnic groups;\textsuperscript{29} a reform process to promote rule of law, human rights, and independence of the legal and judicial professions;\textsuperscript{30} a growing number of infrastructure and human

\begin{footnotesize}
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\item \textsuperscript{24} Interviews and Materials Gathered from CIPM Representatives (Nov. 6, 2018) (on file with author).
\item \textsuperscript{26} *See The Current Situation in Burma: A USIP Fact Sheet*, U.S. INST. OF PEACE (June 4, 2018), https://www.usip.org/publications/2018/06/current-situation-burma (highlighting political unrest in Myanmar).
\item \textsuperscript{27} *See Mary Callahan, The Opening in Burma: The Generals Loosen Their Grip*, 23 J. DEMOCRACY, Oct. 2012, at 120, 122–24, 126 (exploring the ongoing political, economic, and social changes advocated by various leaders); Neil Englehart, *Two Cheers for Burma’s Rigged Election*, 52 ASIAN SURV. 666, 682 (2012) (discussing changes to transparency and censorship but advising caution in drawing conclusions); Christina Fink, *How Real Are Myanmar’s Reforms?*, 113 CURRENT HIST. 224, 224–25 (2014) (describing recent political and economic shifts, along with openness to foreign investment and aid); N. Ganesan, *Interpreting Recent Developments in Myanmar as an Attempt to Establish Political Legitimacy*, 1 ASIAN J. PEACEBUILDING 253, 257–63 (2013) (summarizing recent changes and detailing increased foreign support).
\item \textsuperscript{28} *See, e.g.*, Fink, *supra* note 27, at 225 (discussing then-president Thein Sein’s efforts to bolster education and infrastructure spending, improve the financial system, and pass new investment laws); Viacheslav Backsheev & James Finch, *Myanmar’s New Electricity Law*, MYAN. BUS. TODAY (Jan. 22, 2015), https://www.mmbiztoday.com/articles/我的an-r-s-new-electricity-law (describing a new law, enacted in 2014, which sought to bring Myanmar’s energy system in line with “international standards”).
\item \textsuperscript{29} *See Fink, *supra* note 27, at 229 (noting the military’s efforts to confiscate weapons); *Myanmar’s Suu Kyi Opens Fresh Round of Peace Talks*, ALJAZEERA (May 24, 2017), https://www.aljazeera.com/news/2017/05/Myanmar-suu-kyi-opens-fresh-peace-talks-170524045940849.html (reporting on the government’s continuing efforts to reach a lasting ceasefire between ethnic groups).
\item \textsuperscript{30} *See generally Kyaw Yin Hlaing, Understanding Recent Political Changes in Myanmar*, 34 CONTEMP. SOUTHEAST ASIA 197, 203–11 (2012) (describing aspects of liberalization and democratization, as well as the development of a constitutional mode of governance based on the rule of}
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development projects; and efforts to promote improved governance, with technical aid to bolster capacity and reduce corruption. Attendant with all this is a continuing process of democratization, with efforts to move the country away from military to civilian rule, even as it works to conduct democratic elections. The sum of all these changes is a dynamic environment with fluid conditions that makes it difficult for analyses to stay timely. To mitigate this, the analysis here focuses primarily on the nature of the UPR as a strategy employed by the CIPM to advance the environmental grievances of Myanmar’s indigenous peoples. This analysis, to the extent it ties into the context of Myanmar’s transition, draws upon conditions in the country as they existed at the time of the November 2015 UPR for Myanmar.

The UPR serves as an HRC mechanism directed at promoting human rights among UN member states. The UPR operates by subjecting each state to a review of its human rights on a continuing periodic basis of roughly four years. For each state, the UPR review process follows a sequence of four steps: (1) the submission of information in the form of reports about a state’s human rights record from UN bodies, UN member states, national human rights institutions (NHRIs), and NGOs; (2) a

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law and countervailing powers); Englehart, supra note 27, at 681–82 (charting the ascendance of new military leadership with greater investment in upholding human rights and resisting corruption).

31. See Fink, supra note 27, at 225 (listing recent efforts to support citizens and develop infrastructure, by increasing spending for public needs and reforming the central bank); Ganesan, supra note 27, at 266 (noting new foreign assistance available for infrastructure development).

32. See Callahan, supra note 27, at 122, 124 (stating that then-president Thein Sein’s administration appeared to be governing rather than ruling, and discussing a shared desire among leaders to create a new, legitimate government); Englehart, supra note 27, at 681 (emphasizing the transition from “rule by decree” to governing through a legislature); Ganesan, supra note 27, at 266 (detailing increased foreign assistance for personnel training and infrastructure); Hlaing, supra note 30, at 198 (noting then-President Thein Sein’s stated goal to reduce corruption); United Against Corruption in Myanmar 2017, U.N. OFF. ON DRUGS AND CRIME (Dec. 8, 2017), https://www.unodc.org/southeastasiaandpacific/en/myanmar/2017/12/anti-corruption-day/story.html (summarizing remarks by officials from the UN and Myanmar, touting Myanmar’s efforts to address corruption—which include passing new laws and adopting the UN Convention Against Corruption).

33. See Callahan, supra note 27, at 126 (explaining that government officials are actively trying to transition in ways that “look more democratic”); Englehart, supra note 27, at 682 (noting a significant, albeit flawed, shift toward democracy); Fink, supra note 27, at 224 (describing the shift toward democracy that took place in 2012); Ganesan, supra note 27, at 268 (stating that military leaders have stepped back, and political reforms have begun).

34. See, e.g., Hlaing, supra note 30, at 208 (emphasizing the surprising pace of political reform after President Thein Sein—who apparently did not expect to win the election—came to power).


Working Group meeting involving discussions based on the submitted reports to evaluate the state’s progress towards the standards of the UN human rights system; (3) the publication of an outcome report at the end of the Working Group meeting containing recommendations to improve the reviewed state’s status on human rights; and (4) subsequent provision of capacity-building and technical aid, along with the exercise monitoring measures, directed at helping the reviewed state fulfill the outcome report recommendations. In this process, NGOs like the CIPM can participate by submitting reports prior to the Working Group meeting, forwarding information to member states during the Working Group meeting, issuing comments during the assembly of the outcome report, and monitoring the performance of a reviewed state in relation to outcome report recommendations. Hence, in submitting a report to the UPR, the CIPM is only taking an initial step within a larger process that is itself part of a greater UN human rights system.

The CIPM’s claims to the 2015 UPR session on Myanmar comprise a range of issues encompassing themes of land, natural resources, development, and self-determination tied to human rights. As presented in the CIPM submission to the UPR, much of this revolved around environmental damage resulting from dam building, road construction, plantation clearing, mining, and timber harvesting. The CIPM asserted that these projects frequently involved confiscating or exploiting indigenous land without compensation; legally required environmental impact assessments; or free, prior, informed consent (FPIC). As a result, these projects violated indigenous collective rights to subsistence, cultural practices, and customary laws related to their land. The projects also violated indigenous rights to self-determination, because the government did not negotiate with indigenous peoples—or notify them—before making decisions about the land.

In addition, many of these projects involved replacing indigenous names with Burmese language terms and destroying sites of cultural significance to indigenous peoples, thereby violating indigenous rights.

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37. See Basic Facts About the UPR, supra note 3 (describing the review process in detail).
38. See id. (noting opportunities for NGO participation within the process).
39. See id. (describing how the broader UPR process evolves after preliminary submissions).
40. CIPM 2015, supra note 5, at 2, 5, 9.
41. Id. at 6, 8–10, 12.
42. Id. at 5, 7.
43. See id. at 12–13 (stating that construction projects and other government initiatives have displaced communities, destroyed sites of cultural significance, and impinged on customary practices).
44. See id. at 2, 5, 8, 13 (advocating for the right of self-determination and lamenting that indigenous rights, including the right to manage indigenous territories, are being violated).
regarding cultural heritage.\textsuperscript{45} Further, the government violated rights of free speech, free assembly, equality under the law, and access to the law, by working to suppress indigenous efforts to organize public protests or access legal protections against such projects.\textsuperscript{46} Last, because many of the large-scale extraction and agriculture projects produced toxic waste, they threatened the right to life.\textsuperscript{47} Thus, for Myanmar’s indigenous peoples, the environmental destruction brought by Myanmar government policies was tied to a slate of collective and individual human rights issues.

II. FORMULATING THE CIPM AS A TRANSNATIONAL ADVOCACY NETWORK

To a degree, the use of UPR by Myanmar’s indigenous peoples conformed to the general features of what are called TANs.\textsuperscript{48} In their most basic components, TANs are defined as “networks of activists, distinguishable largely by the centrality of principled ideas or values in motivating their formation.”\textsuperscript{49} The elements of TANs are “actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”\textsuperscript{50} The actors in TANs operate to “mobilize information strategically to help create new issues and categories and to persuade, pressure, and gain leverage over much more powerful organizations and governments.”\textsuperscript{51} The prevailing understanding of transnational advocacy is tied to a “Boomerang Pattern” originally advanced by Margaret Keck and Kathryn Sikkink.\textsuperscript{52} This model conceives of TANs as involving a recalcitrant state that is unresponsive to the efforts of domestic activists, who reach out to activists in other countries, who in turn push their own states or international organizations to pressure the recalcitrant state to satisfy domestic activists.\textsuperscript{53}

Since their inception, the ideas of TANs and the Boomerang Pattern have been applied in various permutations to a broad array of topics,

\textsuperscript{45} See id. at 12 (discussing efforts to suppress indigenous languages, and the destruction of culturally significant sites).
\textsuperscript{46} See id. at 7–8 (noting actions taken by the government to suppress protests, free speech, and access to legal venues).
\textsuperscript{47} See id. at 8 (highlighting extraction projects and their effects on the health and livelihoods of local communities).
\textsuperscript{48} See Keck & Sikkink, supra note 12, at 1–2 (describing how transnational advocacy networks forge new connections between citizens, nations, and the international community).
\textsuperscript{49} Id. at 1.
\textsuperscript{50} Id. at 2.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 12.
\textsuperscript{53} See id. at 12 (explaining that advocacy groups may seek international assistance when domestic avenues for progress are closed).
including: labor, children’s rights, climate change, corporate conduct, education, environmental protection, human rights, indigenous rights, independence movements, public health, sexual harassment, and women’s rights. Indigenous concerns, alongside human rights and environmental problems, were among the original subjects of TANs, generating the central examples of Boomerang Patterns studied in the seminal work of Keck and Sikkink. Boomerang Patterns can involve combinations of issues, and scholars like Kathryn Hochstetler, Margaret Keck, and Pamela Martin have observed permutations that involved indigenous activism over environmental grievances, with indigenous peoples reaching out to international actors in order to resolve local

56. David Ciplet, Contesting Climate Injustice: Transnational Advocacy Network Struggles for Rights in UN Climate Politics, 14 GLOBAL ENVTL. POL., Nov. 2014, at 75, 76.
66. KECK & SIKKINK, supra note 12, at 2.
environmental disputes.67 Hence, TANs and the Boomerang Pattern provide a means of studying the efforts of Myanmar’s indigenous peoples to use an international mechanism like the UPR to address their environmental concerns.

With respect to the initial components of the definition set by Keck and Sikkink, the CIPM’s use of the UPR is consistent with the idea of TANs.68 Specifically, a number of indigenous groups in Myanmar were frustrated by perceived inadequacy in the Myanmar government’s response to environmental degradation, and the groups argued that the government was responsible, complicit, or negligent with respect to deforestation, pollution, and land seizures that restricted the resources of their habitats.69 Dissatisfied with the lack of government action, these groups worked together as the CIPM to reach out to the HRC and its UPR mechanism as transnational instruments that ostensibly have powers to influence the behavior of the Myanmar state.70 To the extent that the UPR involves UN member states, UN agencies, and NGOs or civil society organizations (CSOs), the CIPM’s use of the UPR involved accessing a network of relationships to exchange information and services with respect to the conduct of the Myanmar government in relation to UN standards of human rights.71 Thus, to the extent that the CIPM was able to frame its environmental grievances within the UN human rights system, it formed a Boomerang Pattern of transnational advocacy on its own behalf.72 An illustration of the CIPM model of the Boomerang Pattern is given in Figure 2 below.

67. See Kathryn Hochstetler & Margaret E. Keck, Greening Brazil: Environmental Activism in State and Society 98–99 (2007) (explaining how Brazilian environmentalists began engaging with the international community in addressing deforestation); Pamela L. Martin, Globalization of Contentious Politics: The Amazonian Indigenous Rights Movement 121 (David Wilkins & Franke Wilmer eds., 2014) (describing ways indigenous peoples have engaged in transnational efforts and collaborated with international entities on domestic environmental issues).

68. See Keck & Sikkink, supra note 12, at 4 (“The networks we describe . . . use [their] resources strategically to affect a world of states and international organizations constructed by states.”).

69. See CIPM 2015, supra note 5, at 3, 6, 8 (assigning blame to the government for enabling these destructive practices through legislation, improper permitting, and military force).

70. See id. at 1 (showing the groups that joined together to address the UN); Mathew Davies, Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations, 35 Alternatives 449, 455–456 (2010) (explaining the potential outcomes and persuasive effects of mechanisms like the HRC).

71. See Basic Facts about the UPR, supra note 3 (describing how the UPR process engages UN member states, NGOs, and the reviewed state in promoting human rights).

72. See Keck & Sikkink, supra note 12, at 12, 17 (explaining that a “boomerang pattern” may form when advocacy groups “bypass their state and directly search out international allies”).
III. ISSUES FOR THE CIPM

Applying TANs to the CIPM’s use of the UPR is useful not just in terms of clarifying the mechanics of the CIPM strategy, but also in terms of identifying issues that may threaten the expected outcomes. The CIPM has expectations that the UPR can aid its efforts to find redress for its grievances with the Myanmar government, and so their assessment of the UPR is tied to its ability to apply pressure upon the Myanmar government to respond to such grievances. Specifically, the CIPM approach to TANs indicates there are two stages that pose potential advocacy issues: the nature of blockage in the context of Myanmar, and the nature of pressure expected from the HRC. These two stages represent critical areas for the CIPM and its supporters: the stages relate to the CIPM’s expectations for the UPR, and

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74. See Saning, supra note 1 (discussing the CIPM’s complaints to the UPR and their request to the UN Special Rapporteur on the Situation of Human Rights in Myanmar to help them create a country-wide dialogue).
75. See infra Parts III.A–B (describing the nature of the blockage facing the CIPM, and the nature of the pressure applied by the UPR).
hence their sense of its effectiveness in meeting those expectations.\textsuperscript{76} This suggests that prognostications regarding the possible outcomes for the CIPM’s use of UPR are best served by looking to the blockages responsible for indigenous grievances and the manner in which the UPR generates pressure upon recalcitrant states.

\textit{A. Nature of Blockage}

To a degree, the UPR can address the blockages facing the CIPM’s efforts to engage the Myanmar government.\textsuperscript{77} This capacity, however, is defined by the reach of the UPR as a mechanism of the HRC within the UN human rights system.\textsuperscript{78} To the extent that the blockage involves issues that fall within this system, it is possible for the CIPM to use the UPR to advance its environmental grievances, but there is a risk that the CIPM’s strategy of using the UPR may not adequately address issues lying outside the UN human rights system.\textsuperscript{79} This suggests a need to identify the nature of blockages facing the CIPM, and assess whether the UPR is the appropriate mechanism to resolve the CIPM’s complaints against the Myanmar government. At the time of the November 2015 UPR, the CIPM faced blockages caused by a number of factors, some of which fell under the purview of the UN human rights system and some which lay outside the focus of the UN human rights system.\textsuperscript{80}

With respect to issues that fall under the purview of the UN human rights system, there are a number currently receiving attention from ongoing UN human rights programs. First is the treatment of the indigenous peoples in Myanmar. The concept of \textit{indigenous} is a relatively recent introduction in Myanmar, with ongoing efforts involving various foreign NGOs and local CSOs to promote understanding of the term.\textsuperscript{81} The UN

\begin{footnotesize}
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\item \textsuperscript{76} See infra text accompanying notes 199–207 (relaying the CIPM’s continued expectations for the UPR process, and the perceived values associated with participation).
\item \textsuperscript{77} See infra notes 81–100 and accompanying text (describing how the UPR can assist in promoting indigenous rights, human rights generally, an end to corruption, and the rule of law); UPR Fact Sheet, \textit{supra} note 2 (indicating that primary responsibility for implementing the UPR recommendations lies with the state in question).
\item \textsuperscript{78} See UPR Fact Sheet, \textit{supra} note 2 (providing that the UN General Assembly established the UPR as a subsidiary of the HRC).
\item \textsuperscript{79} See infra Part III.A (detailing issues facing the CIPM, as well as the scope and limits of the UPR as a mechanism for addressing those issues).
\item \textsuperscript{80} See infra Part III.A (describing recent developments and historical conditions that continued to frustrate the CIPM’s efforts leading up to the 2015 UPR).
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applies various definitions of the term indigenous, which complicates efforts to reach a common understanding.\textsuperscript{82} For its part, the Myanmar government seems to acknowledge the concept in principal: voting in favor of the UN Declaration on the Rights of Indigenous Peoples (UND RIP).\textsuperscript{83} In practice, however, the government eschews the idea, and instead employs the term “National races” articulated in its 2008 Constitution.\textsuperscript{84} This choice is significant, in that it ignores the topics of collective indigenous rights—including self-determination and customary land use practices—recognized under the UNDRIP.\textsuperscript{85}

Second, even though it was among the original signatories to the Universal Declaration of Human Rights, Myanmar suffers from a poor record on human rights.\textsuperscript{86} It has not ratified or acceded to the vast majority of human rights treaties, with the exceptions of the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).\textsuperscript{87} The UN General Assembly continues to express concerns over the status of a wide range of human rights in the country, including: democratic reforms, electoral changes, discrimination against minorities and women, escalating ethnic conflicts, environmental degradation, development inequality, arbitrary arrests and detentions, torture, sexual violence, forced displacement, and continuing restrictions on free expression, free association, and a free and independent media.\textsuperscript{88}

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\textsuperscript{88.} G.A. Res. 28/23, Situation of Human Rights in Myanmar, ¶¶ 1–12 (Apr. 2, 2015) [hereinafter Situation of Human Rights in Myanmar 2015], http://ap.ohchr.org/documents/dpage_e.aspx?m=89; see also Yanghee Lee (Special Rapporteur on the
Third, Myanmar suffers from extensive corruption and weak rule of law. Transparency International’s Corruptions Perceptions Index listed Myanmar 156 out of 175 countries in 2014. Similarly, the World Justice Project, in its Open Government Index assessing the extent of publicized government data, right to information, civic participation, and complaint mechanisms, ranked Myanmar 100 out of 102 measured countries. In its Rule of Law Index, the World Justice Project factored in variables including constraints on government powers, absence of corruption, security, observance of rights, and enforcement, and found Myanmar ranked 92 out of 102 countries.

These issues frustrate the CIPM’s engagement with the Myanmar government. Myanmar’s corruption and weak rule of law subvert political and legal mechanisms that could provide solutions for CIPM complaints, the struggles with human rights indicate a political system unwilling to recognize the legal basis of CIPM concerns, and the avoidance of the concept of indigenous peoples effectively denies the CIPM identity. However, the UPR can address these issues as an extension of a UN human rights system that already has mechanisms in place focused specifically on mitigating the violations within Myanmar. For example, the OHCHR assigned a Special Rapporteur on the Situation of Human Rights in Myanmar (Special Rapporteur) with a mandate to monitor and engage the


93. See supra notes 81–92 and accompanying text (discussing systemic issues which create obstacles to productive interaction with the government).

Myanmar government. The Special Rapporteur has conducted annual visits and reports covering questions of indigenous rights, human rights, corruption, and the rule of law. The OHCHR continues to seek the establishment of an office in Myanmar to advance UN concerns with the Myanmar government. The HRC has also supported and monitored the development of the Myanmar National Human Rights Commission (MNHRC), which is a national human rights institution under the HRC International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) Sub-committee and so has the mission of advancing the UN human rights system within Myanmar. Thus, the UPR is tied to a concurrent set of UN mechanisms that focus specifically on the subject of human rights in Myanmar and recognize a need to promote indigenous and environmental rights. Hence, the UPR functions as a useful strategy for the CIPM in terms of advancing indigenous and environmental rights past the blockages represented by the Myanmar government’s reluctance to accept the concept of indigeneity, advance human rights, remove corruption, or strengthen the rule of law.

Beyond these issues, however, there are factors that lie outside the purview of the UN human rights system but still serve as blockages


96. See Special Rapporteur 2017, supra note 94, ¶¶ 1–2, 7–9, 34, 37 (highlighting the Special Rapporteur’s engagement with the government, and thoughts regarding ongoing issues of human rights, the rule of law, corruption, and ethnic conflict).


99. See generally Mapping Human Rights Obligations, supra note 9, ¶¶ 1–5, 11–13 (discussing human rights concerns in relation to the environment and how the UN has expanded human rights to also include those directly in relation to the environment).

100. See supra notes 81–99 and accompanying text (describing how these blockages manifest in Myanmar, and how they are addressed through the UN human rights framework).
impeding the CIPM’s efforts.\footnote{101} These factors are reflective of the larger context of Myanmar’s current transition, and call the attention of entities distinct from human rights organizations. First among these factors is the scale of underdevelopment, and resulting lack of capacity, throughout Myanmar’s state and society. Under the British, Myanmar was among the wealthiest countries in Southeast Asia.\footnote{102} Since that time, however, the country has become one of the poorest in the region.\footnote{103} While the World Bank provides promising data showing Myanmar’s 2016 Gross Domestic Product (GDP) as roughly $63.3 billion with an annual growth rate of approximately 6%,\footnote{104} the World Bank also reports that the annual per capita Gross National Income in 2015 was $1,190.\footnote{105} The UN Human Development Report for 2016 gives Myanmar a Human Development Index score of 0.556, ranking it 145 out of 188 measured countries.\footnote{106} Within the region, Myanmar is the poorest country in the Association of Southeast Asian Nations (ASEAN).\footnote{107} This is driven in part by the country’s allocation of spending: the government reported a fiscal year budget with 6% spent on education and 3% on healthcare at the time of the 2015 UPR, which respectively represented the lowest education budget and the third lowest healthcare budget in ASEAN.\footnote{108} By contrast, Myanmar devoted 12% to military spending,\footnote{109} which was above an OECD-measured ASEAN average under 10% and second only to Singapore in the ASEAN

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\footnote{101. \textit{See Human Rights, United Nations,} \url{http://www.un.org/en/sections/issues-depth/human-rights/} (last visited Dec. 4, 2018) (indicating that human rights are “cross-cutting,” but that rights involving development, food, labor, gender, and other broad themes may be more directly addressed by other UN organizations); \textit{infra} notes 102–46 (discussing three significant factors that frustrate the CIPM’s efforts, yet largely exist outside the scope of the UN human rights system).}
\footnote{102. \textit{See Michael Schuman,} \textit{Will Burma Become Asia’s Next Economic Tiger?}, \textit{TIME} (Aug. 22, 2012), \url{http://business.time.com/2012/08/22/will-burma-become-asias-next-economic-tiger/} (stating that Myanmar was among the richest countries in the region after World War II).}
\footnote{107. \textit{Chalk, supra} note 103, at 4.}
\footnote{109. \textit{Id.}}
\end{footnotes}
To make matters worse, the Myanmar government has been consistently recognized by both academics and aid agencies as lacking capacity in all areas and at all levels—with weak institutions,\textsuperscript{111} opaque leadership,\textsuperscript{112} dysfunctional civil service,\textsuperscript{113} poor infrastructure,\textsuperscript{114} inadequate resources,\textsuperscript{115} and insufficient skills.\textsuperscript{116} Though development aid and technical assistance from the international community increased in the wake of the country’s 2011 elections and the initiation of political reforms, Myanmar continues to struggle against the scale of development issues.\textsuperscript{117}

Second is the unstable nature of Myanmar’s political environment, which features an array of diverse interests whose fissures run deep enough to fracture the country’s political system into a complex, pluralist landscape of competing perspectives.\textsuperscript{118} The political landscape in Myanmar goes beyond a simple military-versus-civilian dichotomy, encompassing a spectrum of factions with distinct interests converging or diverging at various times in the ongoing transition discourse.\textsuperscript{119} Larry Diamond

\textsuperscript{110} See Org. for Econ. Co-operation and Dev., OECD Development Pathways: Multi-Dimensional Review of Myanmar 182 (2014) (indicating that military spending was, on average, below 10\% of total spending); Zachary Abuza, Analyzing Southeast Asia’s Military Expenditures, COGITASIA (May 7, 2015), https://www.cogitasia.com/analyzing-southeast-asias-military-expenditures/ (showing that Myanmar was second to Singapore in 2014 military spending, measured as a percentage of total government spending).

\textsuperscript{111} Hamish Nixon et al., State and Region Governments in Myanmar 7 (2013), https://asiafoundation.org/resources/pdfs/StateandRegionGovernmentsinMyanmarCESDTAF.PDF.

\textsuperscript{112} See id. at 62 (noting perceptions of opacity in government).

\textsuperscript{113} See id. at vi (describing dysfunctional, ineffective civil services and ministries).

\textsuperscript{114} See Chalk, supra note 103, at 8 (explaining that poor infrastructure hampers Myanmar’s economy).

\textsuperscript{115} See id. at 7 (discussing Myanmar’s low GDP and difficulty funding key services like public health).

\textsuperscript{116} See id. at 9 (identifying lack of skill as one factor reducing Myanmar’s capacity to govern); Richard Horsey, Myanmar’s Political Landscape Following the 2010 Elections, in MYANMAR’S TRANSITION: OPENINGS, OBSTACLES AND OPPORTUNITIES 39, 47 (Nick Cheesman et al. eds., 2012) [hereinafter MYANMAR’S TRANSITION] (noting a lack of competency in Myanmar’s government); Nixon et al., supra note 111, at 38 (quoting a regional leader who noted a lack of technical skills as an impediment to effective governance).

\textsuperscript{117} See Chalk, supra note 103, at 7–8 (describing aspects of Myanmar’s development challenges and the struggle for economic reform); Morten B. Pendersen, Rethinking International Assistance to Myanmar in a Time of Transitions in MYANMAR’S TRANSITION, supra note 116, at 271, 271–72 (indicating that some international aid is forthcoming, but much more is needed); Nixon et al., supra note 111, at 35 (summarizing the inadequacy of resources and organization for the scale of the problem).

\textsuperscript{118} See generally Lex Rieffel, Peace in Myanmar Depends on Settling Centuries-Old Ethnic Conflicts, BROOKINGS INST. (Mar. 20, 2017), https://www.brookings.edu/blog/up-front/2017/03/20/peace-in-myanmar-depends-on-settling-centuries-old-ethnic-conflicts/ (providing an overview of long-running conflicts, diversity in ethnicity and religion, and deep divides among Myanmar’s people).

\textsuperscript{119} See Callahan, supra note 27, at 120 (discussing the “new political fluidity” arising in the transition from military to civilian rule); Brian Joseph, Political Transition in Burma: Four Scenarios in
characterizes this discussion as one that involves questions about the path “from authoritarianism to democracy, from military to civilian rule, from a closed and monopolistic to an open and competitive economy, and from an ethnically fractured state to a more viable and coherent union.”

Compounding such complexity is the involvement of international interests that seek to explore “third views” between the military and pro-democracy forces. Such factors create a pluralist terrain of diverse political actors, who may be unified in their desire for transition, but differ on the manner in which to accomplish it and the ultimate result it is supposed to produce. These complexities are not always benign, and have at times generated tensions significant enough to threaten the country’s stability. In particular, Myanmar has experienced sustained civil war since its independence in 1948: fomented by diverse nationalist movements tied to at least 135 ethnic nationalities seeking various degrees of sovereignty, and fueled by a lucrative drug trade. The government has made multiple attempts at cease-fires and peace talks, with the most recent iteration commencing after the 2011 elections, but regions of the country are still subjected to violence between armed groups struggling for power.

121. See Hans-Bernd Zöllner, After an Election and a Symbolic Re-election in Myanmar – What Next? 42 INTERNATIONALES ASIENFORUM 47, 70 (2011) (noting the emergence of “third forces” in the political landscape, and discussing how international interests may affect Myanmar’s transition).
122. See id. at 70 (indicating that new political interests, situated between the military and opposition leaders, may change the way the transition unfolds).
123. See Rieffel, supra note 118 (describing the complex ethnic conflicts and corresponding interests which destabilize the country—particularly the plight of the Rohingya community).
124. See Derek J. Mitchell, Burma’s Challenge, 37 FLETCHER F. WORLD AFF., no. 3, special edition 2013, at 13, 14–15 (2013) (indicating that Myanmar has at least 135 ethnic nationalities, most of which have been involved in civil conflict).
125. See Patrick Meehan, Drugs, Insurgency and State-Building in Burma: Why the Drugs Trade is Central to Burma’s Changing Political Order, 42 J. SOUTHEAST ASIAN STUD. 376, 396 (2011) (discussing how the government’s approach to the drug trade keeps tensions high and allows them to consolidate power).
126. See Peace Process Overview, MYAN. PEACE MONITOR, http://www.mmpeacemonitor.org/mpm/peace-process-overview (last visited Dec. 4, 2018) (showing that the latest round of peace talks was initiated during the Thein Sein administration in 2011).
Prominent conflicts have continued near the country’s borders with China and India, including the Kokang and Rhakine regions.\textsuperscript{128} Hence, the fractures in Myanmar’s politics create a fluid environment of diverse, interacting interests whose differences frustrate efforts to resolve the country’s other challenges—including issues of indigenous rights or environmental protection.\textsuperscript{129}

Third is the issue of democratization under continued military control. In a January 2015 interview with Channel News Asia, military leader General Min Aung Hlaing stated that the military was reluctant to reduce its role in government so long as it continues to perceive threats to the country’s nascent democracy.\textsuperscript{130} In the interview, he cited stability as a necessary prerequisite to allow democracy to develop, and he did not rule out the resumption of military control over the country.\textsuperscript{131} In reference to the political terrain of the country’s democratic transition, he stated a disinclination to reform the country’s laws and argued that too much change threatens the stability that the military seeks to impose on the

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\item \textsuperscript{129} \textit{See} KRISTIAN STOKKE \textit{ET AL.}, \textit{MYANMAR: A POLITICAL ECONOMY ANALYSIS} 2, 10 (2018), https://brage.bibsys.no/xmlui/bitstream/handle/11250/2483349/NUPI_rapport_Myanmar_Stokke_Vakulchuk_625C3%2598verland.pdf (describing fractures in Myanmar’s government and society, and the difficulties that arise as a result).
\item \textsuperscript{131} \textit{Constitutional Change, supra} note 130; \textit{Military Coup, supra} note 130.
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country. His comments reflect an intention to maintain a dominant role for the military in the process of Myanmar’s democratization, with the military exercising the legislative and executive seats set under the 2008 Constitution to control the pace and direction of reform.

Scholars like Guillermo O’Donnell and Phillippe Schmitter see such a situation as marking a democratic transition, in that it represents an interval between pure authoritarianism and functional democracy. In cases like Myanmar, where a democratic transition is led by a pre-existing regime, Sujian Guo and Gary Stradiotto observe that reforms tend to favor the interests of the incumbents. As a result, Myanmar’s path to democracy is what scholars like Larry Diamond and Francis Fukuyama describe as a negotiated transition: the transfer of power to civilian control in a way acceptable to incumbent military elites.

Myanmar’s form of democratization is not favored purely by the military alone, but also seems to be shared among its people. Brian Joseph finds that a negotiated transition is the preferred strategy among various factions within Myanmar’s political system, when they are given a choice between negotiated transition, regression to military rule, Singapore-style economic reform at the expense of authoritarian government, or fragmentation into polarized conflicts. Both Myanmar’s military-led state and its society seem to desire a negotiated transition to democracy, which

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132. See Constitutional Change, supra note 130 (“It will depend a lot on the country’s unity, its peace and stability. To specify an exact time is difficult. [The military is] still trying to resolve conflicts with armed groups. Currently the process is still ongoing. We are not sure of the results.”).

133. See id. (“The constitution is the main or mother law of a country. . . . It is not suitable to change a law often. A law needs to be strong.”); Myanmar Not Ready, supra note 130 (“We are still a young democracy. When we are moving towards a multi-party democratic system it needs to be a strong system. The military representatives in Parliament only give advice in the legislative process. They can never make decisions.”).

134. See GUILLERMO O’DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 36 (1986) (describing difficulties around the “transition” from military authoritarianism to democracy, including the need for “interim agreements” acceptable to incumbent and civilian leaders).


136. Fink, supra note 27, at 230; Larry Diamond et al., Reconsidering the Transition Paradigm 25 J. DEMOCRACY, Jan. 2014, at 91 (2014) [hereinafter Transition Paradigm]; see also Hlaing, supra note 30, at 203–04 (describing how military leaders crafted early political reforms to their advantage); GRETCHEN CASPER & MICHELLE M. TAYLOR, NEGOTIATING DEMOCRACY: TRANSITIONS FROM AUTHORITARIAN RULE 3, 8–9 (1996) (noting that authoritarian regimes, including Myanmar’s, can be resistant to a true democratic transition); Political Pact, supra note 120, at 139 (arguing that a transition cannot be forced, but needs to be negotiated with authoritarian rulers); Joseph, supra note 119, at 137 (explaining that a negotiated transition to democracy now has support from military leaders).

137. See Joseph, supra note 119, at 139–40, 142–44, 147 (exploring four scenarios for political change, and noting that leaders from diverse backgrounds preferred a negotiated transition).

138. Id.
suggests an environment disposed toward a gradual process of reform dictated by a military.\textsuperscript{139} Diamond and Fukuyama, however, warn that a negotiated transition may be effective in bringing civilian government in a gradual, deliberate manner but it comes at a potential cost: it risks incurring a bargained exchange of conditions in which power is transferred to civilian authority in return for an enshrinement of corruption and dysfunction that benefits the departing military elite.\textsuperscript{140} This means that Myanmar is vulnerable to the fate of other negotiated transitions: a democratic regression in which democratic regimes slide into dysfunction and freedom decreases as a result of continued, ingrained corruption within their political systems.\textsuperscript{141}

Endemic factors such as underdevelopment, political instability, and democratization function as blockages because they restrict the capacity of the Myanmar government to hear or respond to complaints from various factions of Myanmar society—including NGOs like the CIPM.\textsuperscript{142} Underdevelopment means that there are limited government resources to apply to a competing array of social problems, political instability means that it is difficult to focus government will, and a continued military presence means there is a continuing legacy of government iminical to the concerns of indigenous groups seeking to assert their rights.\textsuperscript{143} These issues largely fall outside the UN human rights system.\textsuperscript{144} To the degree that the HRC deals with them, it does so in conjunction with organizations holding more direct mandates—like the United Nations Development Programme (UNDP)—or foreign state entities engaged in bilateral arrangements of assistance, like the United States Agency for International Development (USAID).\textsuperscript{145} As a result, the UPR cannot resolve these problems alone. It

\textsuperscript{139} See\textit{id.} at 137, 139–40 (noting that military leaders and members of the opposition now support Myanmar’s reforms, and that a negotiated transition is the most probable outcome).

\textsuperscript{140} See\textit{Transition Paradigm, supra} note 136, at 89, 91 (stating that incremental reforms can allow regimes to stay largely intact, and raising concerns that the transition in Myanmar could yield similar results); see also\textit{Political Pact, supra} note 120, at 144 (explaining that political transition may require promises to turn a blind eye to past and future corruption in the military regime).

\textsuperscript{141} See, e.g., Larry Diamond,\textit{Democracy’s Third Wave Today}, 110\textit{Current Hist.} 299, 299, 302–03, 306 (2011) (highlighting Afghanistan, South Asia, and Pakistan as places that have fallen into democratic backslides due to corruption and dysfunction).

\textsuperscript{142} See Chalk,\textit{supra} note 103, at 7–9 (highlighting difficulties with Myanmar’s economic development, political landscape, and institutional capacity, which leave reform efforts handicapped).

\textsuperscript{143} See\textit{id.} at 8–9 (discussing the government’s struggle to address infrastructure and healthcare, while the military remains largely in control).

\textsuperscript{144} See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 4 (Dec. 10, 1948) (declining to take up issues of development, political stability, and democratization, with the exception of Article 21 which describes a universal right to democratic government).

must address them by coordinating outside the UN human rights system, with an array of ongoing aid projects in Myanmar. These projects are not necessarily focused on the environmental grievances of indigenous peoples. Hence, it appears that the UPR is not, by itself, an entirely effective strategy for the CIPM with respect to advancing its concerns past the blockages posed by underdevelopment, political instability, and democratization.\(^{146}\)

**B. Nature of Pressure**

For the CIPM, the value of the UPR depends on not only whether it is the appropriate mechanism to address the blockages facing Myanmar’s indigenous peoples, but also whether the UPR recommendations are effective in meeting expectations. The CIPM’s participation in the UPR is predicated on a belief that it offers an alternative to state mechanisms of resolving indigenous problems.\(^{147}\) This implies an assumption that the UPR is able to impose pressure upon the Myanmar government to change its behavior.

Unfortunately, there is a risk that the assumption is flawed; outcomes from the UPR process may disappoint those hoping for prescriptions directing a recalcitrant state to address indigenous grievances.\(^{148}\) The UPR Working Group meetings are conducted by the 47 member states that comprise the HRC, and are led by a troika selected by drawing lots from among the HRC member states.\(^{149}\) Each Working Group meeting involves an interactive discussion based on submitted reports about a reviewed

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\(^{146}\) See supra notes 101–44 and accompanying text (detailing blockages related to underdevelopment, political instability, and democratization, and explaining that these are largely outside the scope of the UN human rights system).


\(^{148}\) See Theodor Rathgeber, *The HRC Universal Periodic Review: A Preliminary Assessment*, 2008 FES BRIEFING PAPER 6, at 6 http://www.fes-globalization.org/geneva/documents/HumanRights/13June08_UPR_English.pdf (stating that the UPR struggles to provide “a genuine and immediate improvement for the situation on the ground”).

\(^{149}\) Basic Facts About the UPR, supra note 3.
state’s compliance with its human rights obligations.\textsuperscript{150} All UN member states are allowed to submit reports and participate in the discussion, while NGOs may only observe the meeting and submit material that is then included in an “other stakeholders” report or referred to a participating state.\textsuperscript{151} At the end of the Working Group meeting, the troika works with the OHCHR and the state under review to generate an “outcome report” that presents the questions, comments, and recommendations made by the states present at the meeting.\textsuperscript{152} The report also includes the responses of the reviewed state, including its decision to either accept or note the recommendation.\textsuperscript{153} The report is then sent to a plenary session of the HRC where all UN member states, their affiliated NHRIs, and NGOs are allowed to make additional questions and comments and the reviewed state is once again allowed to reply.\textsuperscript{154} Once the report is adopted by the HRC, the reviewed state is responsible for implementing the accepted recommendations in time for the next review.\textsuperscript{155} At that time, the state is expected to explain how and why it has satisfied or failed to carry out the recommendations.\textsuperscript{156}

A number of observations should be noted about the UPR process. First, it is a form of peer-review, where each state submits itself to evaluation by the international community.\textsuperscript{157} This means that there is no overarching entity rendering decisions and enforcing remedies upon states.\textsuperscript{158} It also means that the proceedings, and hence the outcomes, of the Working Group meeting are a function of the diligence and attitudes of participating states regarding the behavior of the reviewed state in relation to the UN human rights system.\textsuperscript{159} Second, the outcome of the Working Group meeting is essentially a report of the proceedings, which is less a prescription of judgements or sanctions and more a transcription of findings and recommendations.\textsuperscript{160} Third, to the extent that there is a prescription, the

\textsuperscript{150} UPR Fact Sheet, \textit{supra} note 2.
\textsuperscript{151} \textit{Id.}; Basic Facts About the UPR, \textit{supra} note 3.
\textsuperscript{152} UPR Fact Sheet, \textit{supra} note 2.
\textsuperscript{153} Basic Facts About the UPR, \textit{supra} note 3.
\textsuperscript{154} UPR Fact Sheet, \textit{supra} note 2.
\textsuperscript{155} Basic Facts About the UPR, \textit{supra} note 3.
\textsuperscript{156} See \textit{id.} (explaining that the reviewed state is expected to give a status update at the next review).
\textsuperscript{157} See \textit{id.} (noting that a reviewed state submits information for UN member states to evaluate).
\textsuperscript{158} See \textit{id.} (indicating that there is no authority above the UN member states conducting the review).
\textsuperscript{159} See \textit{id.} (detailing the rigorous and time-sensitive process carried out by states in the UPR Working Group to ensure that the outcome improves human rights conditions).
\textsuperscript{160} See \textit{id.} (describing the report prepared by the troika states after review, which provides a summary with questions, recommendations, and other comments).
focus is not on coercion but instead on cooperation: UN member states will provide capacity-building and technical assistance to help a reviewed state meet UN human rights standards. The underlying philosophy, in short, seems to emphasize positive approaches like constructive measures to improve future state performance in terms of human rights, as opposed to negative approaches like punitive measures that punish states for past violations.

The underlying philosophy implies a mechanism that does not apply pressure capable of forcing a resistant state to change its behavior. What pressure does exist in the UPR arises from its transparent nature: all submissions are available to the public, whether from states or NGOs, and the outcome report is available as well. This facilitates the exercise of naming and shaming strategies that seek to mobilize international public outrage and drive governments to take action against a recalcitrant state—in essence, an extended iteration of the Boomerang Pattern. Such strategies, however, are not goals of the UPR itself, since an ulterior motive for the HRC is that it operates to depoliticize UN human rights processes by eschewing approaches that may antagonize states: the HRC applies constructivist international relations philosophies that favor norm-building through persuasion over coercive confrontation. This is reflected in the alignment of the UPR with what Matthew Davies identifies as mechanisms involving “free and open discussion between participants, who make recourse to the ‘better’ argument wherein “actors are ideally arranged horizontally . . . and all are empowered to contribute and shape discussion.”

Even where states consistently violate human rights standards, fail to meet the recommendations of the UPR Working Group, or refuse to submit to its review, the HRC procedure continues to adhere to such a

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161. See id. (highlighting how the UPR uses technical assistance and capacity-building to support states and promote human rights).
162. Id.
165. KECK & SIKKINK, supra note 12, at 12.
166. See Davies, supra note 70 (describing the constructivist approach and emphasizing the UN’s focus on depoliticization and non-coercive methods).
167. Id. at 455.
philosophy. The HRC responds to these states sequentially by: (1) urging the state in question to fulfil its obligations, (2) discussing the impact of the violations in relation to the UPR during HRC sessions, and (3) recording the state’s behavior as a precedent to be considered in the event of further non-cooperation in the future. In short, the UPR is a constructivist experiment based on persuasion. Its goal is to guide states toward a peer-generated normative sensibility that marks a change in identity and understanding about the appropriateness of altering behavior to meet UN human rights standards. Such persuasion comes with no coercive threat of sanctions, but rather the enticement of capacity-building and technical aid.

This poses a potential problem for Myanmar’s indigenous people, in that an approach based on norm-building through persuasion is not an inherently expeditious process. In particular, for recalcitrant states lacking political will to address indigenous complaints, the process of sustaining discussions to change identity and behavior suggests time frames that may exceed the exigent circumstances of indigenous grievances. Even where states accede to UPR recommendations, the levels of capacity-building and technical aid needed to fulfil them may be on a scale that requires time extending beyond the impending harms alleged by indigenous complaints.


169. See id. (responding to Israel by following these steps).

170. See Davies, supra note 70 (noting characteristics of the constructivist approach, which revolve around persuasion as opposed to coercion).

171. See id. (explaining the goals and presumed effects of a non-coerce system like the HRC).

172. See id. (noting a lack of sanctions); see also Basic Facts about the UPR, supra note 3 (indicating that the UPR uses the promise of technical assistance and capacity-building to persuade states).


174. See CIPM 2015, supra note 5, at 3–5, 7 (discussing the serious and time sensitive nature of the human rights violations against indigenous peoples of Myanmar); Danish Inst., supra note 173, at 66 (showing that the UPR process can take years).

175. This problem is illustrated by the fact that, as of 2015, Myanmar had not successfully implemented the majority of its commitments under the 2011 UPR. Burma: UPR Commitments Remain Largely Unaddressed, INT’L FED’N FOR HUMAN RIGHTS (Mar. 23, 2015), https://www.fidh.org/en/region/asia/burma/burma-upr-commitments-remain-largely-unaddressed [hereinafter Commitments Remain Unaddressed]. The issues raised by the CIPM are pressing, and delay will only create more harm. See CIPM 2015, supra note 5, at 3–5, 7 (discussing the serious and time sensitive nature of the human rights violations against indigenous peoples of Myanmar).
In a case like Myanmar, where the blockage against indigenous grievances involves a government suffering from both lack of political will and lack of capacity, the risk arises that the indigenous peoples of Myanmar will suffer irreversible damage to their environmental resources by the time the government alters its behavior. The reluctant pace of Myanmar’s government is not mere speculation: the International Federation for Human Rights (FIDH) found that during its 2011 UPR, the Myanmar government accepted only 74 out of the 190 recommendations raised during the Working Group meeting. Further, the FIDH found that as of 2015 the Myanmar government still had not achieved the majority of the accepted recommendations from the 2011 UPR, even though it had received assistance from the international community to do so. This, then, is the conundrum for the CIPM: the grievances of Myanmar’s indigenous people are immediate, but the work of the UPR is not. As such, the UPR may fall short of the CIPM’s expectations for an alternative international strategy capable of bypassing the Myanmar state to address indigenous concerns.

IV. ISSUES AND MOTIVATIONS FOR THE CIPM’S ENGAGEMENT WITH THE UPR

The limitations of the UPR suggest that the indigenous peoples of Myanmar need to temper their hopes for its ability to change the Myanmar government’s behavior. Specifically, these limitations point toward a need to consider the UPR against other potential strategies and reflect on ways to apply the process in service of the larger goal: advancing indigenous interests. While it is possible to argue that all strategies involve the goal of changing state identity through a normative transformation, where the state adopts new sensibilities regarding the treatment of indigenous peoples,
The issue with the UPR is one of urgency.\textsuperscript{181} The question is whether the time scale required for such a transformation can fit within the time pressures of ongoing environmental degradation to indigenous lands.\textsuperscript{182}

The past record of indigenous movements utilizing the UPR provides some insight into alternative strategies. The International Work Group for Indigenous Affairs (IWGIA), in its review of the UPR, finds that there has been some success for indigenous groups with the UPR in terms of drawing international attention to their concerns.\textsuperscript{183} However, with respect to actually mobilizing action from the international community, the IWGIA also finds that indigenous groups tend to be more successful if they join wider coalitions tied to the NHRIs in their countries of origin and NGOs involved in more well-known civil and political issues.\textsuperscript{184} This is because such coalitions raise indigenous environmental issues to parity with more popular civil and political concerns, allow advocacy by more established NHRIs and NGOs, enable greater consultation with states prior to review, and thereby increase exposure to a wider array of opportunities for public appeal and advocacy throughout the UPR process.\textsuperscript{185}

Beyond the UPR in particular, there is also the issue of TANs in general. Pamela Martin, in her overview of Amazonian indigenous attempts to engage the global community, finds that TANs do serve to drive procedural change to a larger degree than alternative international strategies.\textsuperscript{186} This is promising for Myanmar’s indigenous peoples, since the ulterior purpose in removing the blockages they face—facilitating greater engagement with the Myanmar government—constitutes an effort at procedural change.\textsuperscript{187} Martin, however, states that while TANs are effective in carrying discussions on issues forward they suffer in cases where such discussion needs to be created.\textsuperscript{188} This does not bode well for the CIPM, because the nascent state of indigeneity as a concept in Myanmar indicates

\textsuperscript{181}. See supra Part III.B (finding that systems like the UPR are slow-moving, while the issues requiring attention may be urgent).
\textsuperscript{182}. See CIPM 2015, supra note 5, at 3, 5, 7–8 (raising issues related to confiscation of land, interference with agriculture and customary land use, and pollution).
\textsuperscript{183}. The Indigenous World, supra note 13, at 516.
\textsuperscript{184}. See id. at 517 (recommending that indigenous groups find creative ways to broaden their reach, including collaborations with their NHRI).
\textsuperscript{185}. See id. at 16, 22, 47–48, 96, 536 (demonstrating how coalitions of indigenous peoples and NGOs effectively worked with UN organizations and states on issues of climate change and the environment).
\textsuperscript{186}. See Martin, supra note 67, at 129 (indicating that TANs drive procedural change to a greater degree than “transnational social movement organizations”).
\textsuperscript{187}. See id. (providing an example of how discussions between parties, including governments, can help broker change).
\textsuperscript{188}. Id.
that the discussion is still forming, and so suggests conditions unsuitable for the work of TANs. In addition, Martin cautions that TANs tend to be episodic and issue-specific by nature, with shifting alliances and evolving targets, and that such inconsistency frequently causes breakdowns in indigenous movements. This is problematic for the CIPM, particularly in association with international mechanisms like the UPR that convene every few years, since it indicates an unstable future with an uncertain outcome for a newly formed coalition of indigenous groups still learning how to navigate international avenues of appeal.

Martin observes that additional use of transnational social movements can mitigate these challenges, since transnational social movements are more suited to creating discussions on indigenous issues and provide sustained efforts based on a common agenda over extended periods of time. Thus, the CIPM might find more success in mobilizing international response by using a combination of TANs and transnational social movements to advance its interests. Martin, however, notes that both TANs and transnational social movements are dependent upon a well-organized domestic base. This calls on the CIPM to focus on organizing and expanding a constituency in Myanmar. A strong constituency is important not just for ensuring the effectiveness of TANs or transnational social movements, but also because the process of mobilizing toward the transnational level invariably incurs deterioration at the local level as organizations direct more of their attention outside the country. In addition, transnational outreach can be divisive at domestic and international levels: members of a coalition can become demarcated along various lines, leading to conflict between (1) those that are transnational

189. Id.; see INDIGENOUS AND NATURE TOGETHER, supra note 81 (noting that advocacy for indigenous peoples is a recent phenomenon in Myanmar).
190. MARTIN, supra note 67, at 122.
191. See UPR Fact Sheet, supra note 2 (stating that the UPR convenes at four-year intervals); MARTIN, supra note 67, at 122 (noting the unpredictable nature of TANs); Morton, supra note 147, at 2 (discussing the CIPM’s first engagement with the international community in 2015).
192. See MARTIN, supra note 67, at 129 (mentioning that transnational social movements are well-suited to starting conversations among groups). See also PAUL WAPNER, ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS 160 (1996) (discussing how modern social movements use creative approaches to garner attention).
193. See MARTIN, supra note 67, at 122 (explaining that transnational social movements may be more stable than TANs).
194. See id. at 129 (indicating that a combination of tactics may be the best approach for creating change).
195. Id. at 132.
196. See id. (indicating the need for a solid foundation before any initiatives will yield success).
197. See id (describing how transnational engagement can lead to competition for resources and create divisions domestically).
and those that are not, or (2) several who go transnational but feel the need to compete amongst themselves for international assistance.\textsuperscript{198} This places a charge upon the CIPM to be mindful of disunity and to promote among its members a shared understanding of coordination under a common agenda.

Despite the issues associated with the CIPM’s experiences with the UPR, the CIPM maintains a number of motivations to continue engaging with the process. Following their return from the November 2015 UPR Working Group meeting, CIPM representatives noted in anonymous interviews with the author that they continued to hold hopes that the UPR could influence the behavior of the Myanmar government.\textsuperscript{199} They also viewed the UPR as valuable in terms of providing a space to meet with a diverse multinational assembly of actors committed to human rights.\textsuperscript{200} CIPM representatives observed that by traveling to the UPR Working Group meeting site in Geneva, Switzerland, they were able to directly interact with an international array of state and non-state actors who were not available in Myanmar.\textsuperscript{201} Moreover, because the large majority of attendees at the meeting were supporters of human rights, the UPR provided an immediately accessible pool of potential international voices sympathetic to the CIPM’s concerns regarding the Myanmar government.\textsuperscript{202} For CIPM representatives, the value of the UPR was not just its directed purpose of influencing state conduct on human rights but also the prospect of building a social network spanning an international audience of sympathetic actors who could serve as agents for the CIPM’s interests.\textsuperscript{203}

The expansion of the CIPM’s transnational social network serves the ulterior purpose of facilitating larger aims: CIPM representatives stated that they maintained ongoing goals to improve organizational capacity and promote organizational messages.\textsuperscript{204} They saw networking as an important way to build relationships with actors who were willing and able to (1) help the CIPM grow its capacity, whether via technical training, provision of information, or investment of financial and material resources, and (2) advocate for CIPM concerns and relay them to a larger public audience.\textsuperscript{205} The UPR, as a vehicle for building a transnational social network, served as a means of furthering both goals. Thus, while it may suffer in its ability to

\textsuperscript{198} See id. (noting the possibility of division, and competition for international aid, between domestic groups or organizations).
\textsuperscript{199} Interview with CIPM representatives (Nov. 6, 2018) (on file with author).
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
directly influence the Myanmar government, the UPR still offers an opportunity to advance the CIPM’s interests. CIPM representatives saw that the 2015 UPR on Myanmar held the potential for networking and garnering support for their goals—building CIPM capacity and promoting CIPM messages—to a degree that was sufficient to justify travel from Myanmar to Geneva to engage the UPR process.

CONCLUSIONS AND LESSONS FROM MYANMAR INDIGENOUS USE OF THE UPR

The CIPM’s use of the November 2015 UPR represented an attempt by Myanmar’s indigenous peoples to advance their environmental grievances through a UN human rights mechanism. The CIPM’s experience offers a number of lessons for other groups seeking to further local environmental interests through international human rights mechanisms. The first lesson is that the nature of the UPR is based not on immediate, coercive punishment but instead upon the long-term cooperative persuasion of states. As a result, any group—that seeks to use the UPR must be cognizant of the philosophy and methods the UPR employs in its mission of promoting the UN human rights system. Hence, in order to avoid disappointment, it would be wise for the CIPM to temper its expectations for the outcomes of the UPR in regard to the Myanmar government. In particular, the orientation of the UPR as a persuasion-based mechanism to promote human rights norms may not match the exigencies of environmental destruction facing the CIPM. Similarly, other groups who seek to follow the CIPM’s strategy should weigh the nature of the UPR proceedings against the urgencies of their environmental concerns before deciding to engage.

Second, the UPR is only one form of TAN which is in turn only one type of strategy among a slate of options to advance CIPM interests, and should be seen as one component of a broader comprehensive approach.

206. See Basic Facts About the UPR, supra note 3 (indicating that the UPR can yield technical assistance and capacity-building); The Indigenous World, supra note 13, at 516 (noting that the UPR can bring indigenous concerns to a wider audience).
207. Interview with CIPM representatives, supra note 199.
208. See CIPM 2015, supra note 5, at 5–9 (submitting detailed environmental complaints to the UPR in 2015).
209. See supra notes 162–75 and accompanying text (explaining that the UPR is deliberate and non-coercive, which can leave imminent problems unresolved).
210. See Rathgeber, supra note 148, at 6 (emphasizing that the UPR is not well-equipped to address pressing concerns).
211. See Davies, supra note 70 (discussing the persuasive, non-coercive nature of the UN human rights system).
integrating a suite of strategies to advance CIPM concerns.\textsuperscript{212} Other approaches available to the CIPM might include coalitions with state and non-state actors across multiple countries and multiple issues, so long as these coalitions can accommodate and support the CIPM’s local environmental grievances as a subset within the larger contexts of domestic and transnational movements to further political and legal reforms.\textsuperscript{213} While CIPM representatives did not explicitly express an awareness of broad comprehensive approaches, their presence at the UPR proceedings in Geneva and attendant efforts at networking do reflect an implicit motivation to reach an international audience of actors that might not have been focused on environmental issues but which were sympathetic to indigenous concerns in Myanmar.\textsuperscript{214} Likewise, other groups who seek to address environmental issues must recognize that the UPR is ostensibly focused on human rights and outreach to actors in other countries with diverse concerns that may bolster efforts to address environmental grievances.

Third, the UPR has value beyond the outcomes of its proceedings in that it is a multinational forum for state and non-state actors to congregate on the topic of human rights.\textsuperscript{215} As a result, in addition to encouraging changes in state conduct, it also provides a space for network formation.\textsuperscript{216} CIPM representatives stated that, as much as they maintained hopes that the UPR could support their efforts to resolve their environmental grievances against the Myanmar government, they also thought the UPR worthwhile as a means of building relationships that could help the CIPM build capacity and promote its message to a global audience.\textsuperscript{217} The CIPM’s approach applies to other groups, particularly those who—like the CIPM—started from local environmental concerns but now seek assistance from an international human rights system.\textsuperscript{218} This escalation in scale is across multiple dimensions: going from local concerns to global institutions.

\begin{itemize}
\item \textsuperscript{212} See supra notes 48–68 and accompanying text (defining TANs, describing how the CIPM’s engagement with the UPR is consistent with that definition, and listing other examples of TANs in action).
\item \textsuperscript{213} See Martin, supra note 67, at 122, 129 (discussing the advantages and drawbacks of transnational social movements, as opposed to TANs).
\item \textsuperscript{214} See supra notes 199–207 and accompanying text (relaying thoughts from CIPM representatives following the 2015 UPR, particularly the value they found in networking and public outreach opportunities).
\item \textsuperscript{215} See generally Basic Facts About the UPR, supra note 3 (indicating that the UPR allows UN member states, national institutions, and NGOs to engage on human rights issues).
\item \textsuperscript{216} See id. (explaining that the UPR allows the opportunity for all member states to participate and is designed to “expand the promotion and protection of human rights on the ground”).
\item \textsuperscript{217} Interview with CIPM representatives, supra note 199.
\item \textsuperscript{218} See, e.g., Saning, supra note 1 (reporting that the CIPM in Myanmar turned to the UPR and the UN Special Rapporteur on the Rights of Indigenous Peoples in the hopes of a remedy for local concerns).
\end{itemize}
reaching both state and non-state actors, and bridging environmental and human rights issues. The UPR is an avenue for groups seeking a similar escalation to increase capacity and broaden public outreach, and such groups should consider the ways in which the UPR can be used to support both goals.

The analysis from preceding sections provides directions for further research. In particular, lessons from the CIPM’s experiences with the UPR may have great utility, and additional case studies are warranted to verify the transferability of the above findings. Suitable case studies would involve other situations where non-state actors are using the international human rights system to address local environmental problems. Indigenous organizations comparable to the CIPM but located in other countries would provide a means of direct comparison, but it would also be insightful to study non-indigenous organizations with local environmental concerns seeking recourse through international human rights bodies. Another direction for future research is longitudinal, because the persuasion-based orientation of the UPR suggests the possibility of state change occurring over multiple years. It would be useful to follow the actions of the CIPM and the Myanmar government in the wake of the November 2015 UPR, conceivably through the next UPR for Myanmar scheduled for 2019. The 2019 UPR would allow comparison against the 2015 UPR, as the 2019 UPR provides another opportunity for the CIPM to participate and constitutes the next opportunity for the HRC to assess whether the Myanmar government altered its conduct in keeping with the 2015 recommendations.

CONCLUSION

In conclusion, the CIPM sought to use the UPR to build pressure upon the Myanmar government to respond to Myanmar indigenous peoples’ grievances. In so doing, the CIPM effectively attempted to improve their chances of resolving local environmental issues facing Myanmar’s indigenous peoples by using an international human rights mechanism.

219. See supra notes 5–18 and accompanying text (describing how the CIPM resorted to the UPR as a means of increasing the scale of their advocacy in many directions).
220. See supra notes 209–18 and accompanying text (listing findings from the CIPM’s engagement in the UPR).
221. See supra notes 162–79 and accompanying text (explaining that the UPR is deliberate and non-coercive, and the people of Myanmar may suffer further harm while the process is ongoing).
222. See generally CIPM 2015, supra note 5 (describing the CIPM’s complaints to the UPR).
223. See supra notes 35–47 and accompanying text (introducing the UPR mechanism and discussing the CIPM’s grievances through the lens of human rights).
The analysis in preceding sections used the theory of TANs to identify challenges that threaten the CIPM’s aspirations and strategy.\textsuperscript{224} Such challenges, however, should not be interpreted as grounds for the CIPM—or other groups seeking to employ the same strategy—to avoid participation in the UPR. When the UPR is understood in light of its nature, its existence as one strategy in a suite of potentially concurrent approaches, and its value beyond proceeding outcomes as a forum for networking and outreach, it remains a useful tool enabling non-state actors to pursue the resolution of local environmental issues through the international human rights system.

\textsuperscript{224} See supra Parts II–IV (analyzing the efficacy of TANs and the UPR to show that the nature of the blockage between CIPM and the Myanmar government may require a multi-faceted advocacy approach).
GOVERNMENT GUARANTIES FOR CORPORATE BANKRUPTCIES

Jonathan C. Gordon

ABSTRACT

The bankruptcy system has a problem. When a business files for Chapter 11 bankruptcy protection, a fundamental theory is that the business remains in control of its operations. This theory, however, has eroded in practice; the business is often forced to relinquish substantial control to the lender that helps finance the bankruptcy.

This Article proposes a solution: the federal government should help finance businesses as they restructure under Chapter 11 by guaranteeing their bankruptcy loans. With these guaranties, lenders would be less aggressive and more flexible with the loan provisions. Most notably, this Article is the first to provide a structural framework for such a government guaranty program.
INTRODUCTION

Operating a business is not easy—especially when the business is financially distressed. At that point, the business may wish to file for Chapter 11 bankruptcy protection under Title 11 of the United States Code (Bankruptcy Code).\(^1\) Chapter 11 bankruptcy provides the business with an opportunity to restructure its debts, reorganize its operations, and

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\(^1\) 11 U.S.C. § 101(32)(A) defines “insolvency” as the “financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation.” 11 U.S.C. § 101(32) (2012). Insolvency, though typically the motivation for bankruptcy, is not a requirement to file for Chapter 11. Section 109(d) lists the eligibility requirements for an entity to file for Chapter 11 relief; it does not list insolvency. See id. § 109(a), (d). Section 109(d) states:

Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or commodity broker) [insolvency is not a requirement for chapter 7 either], and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may [file for a Chapter 11 bankruptcy].

Id. § 109(d).
(hopefully) become solvent. A bankruptcy judge oversees the reorganization, and the court must approve all major decisions. A fundamental theory of Chapter 11 bankruptcy is that the debtor—and not a trustee—continues to control the business. Indeed, the debtor is called a debtor in possession during bankruptcy because the debtor remains in possession of the business.

Chapter 11, however, is expensive—and thus ironic. An insolvent debtor, likely with insufficient cash already, now needs extra cash to take

2. See id. § 1101(1) (authorizing a debtor to be its own trustee in its Chapter 11 case); id. § 1108 (allowing a trustee to operate a debtor’s business); id. § 1121(a) (allowing a debtor to file a plan of reorganization at any time); id. § 1123(a)(5)(A)–(I) (explaining what a plan of reorganization requires); id. § 1129(a)(11) (requiring that a plan of reorganization be confirmed only if it is unlikely to be followed by liquidation or further reorganization); id. § 1141(c) (declaring that upon confirmation of a reorganization plan, the debtor’s property “is free and clear of all claims and interests of creditors” except as provided for in the plan); see also ELIZABETH WARREN, CHAPTER 11: REORGANIZING AMERICAN BUSINESSES: ESSENTIALS 14–15 (2008) [hereinafter WARREN, REORGANIZING AMERICAN BUSINESSES] (explaining how Chapter 11 allows businesses a chance to restructure and possibly make their way out of debt as a functioning business). For a court to confirm a debtor’s reorganization plan, the debtor must show that another reorganization is not likely to follow confirmation. 11 U.S.C. § 1129(a)(11). Nonetheless, some debtors inevitably return to Chapter 11 after a confirmation plan. See, e.g., Taylor Harrison, RadioShack’s Bankruptcy Shows Why ‘Chapter 22’ Is The Hottest 2017 Retail Trend, FORBES (Mar. 17, 2017), https://www.forbes.com/sites/debtwire/2017/03/17/radioshack-bankruptcy-shows-why-chapter-22-is-the-hottest-2017-retail-trend/#4839c724292f (describing a trend of second bankruptcies in the retail industry); see also Jessica DiNapoli, ‘Chapter 22’ Looms Over Some U.S. Oil and Gas Bankruptcy Survivors, REUTERS (Nov. 23, 2016), https://www.reuters.com/article/us-usa-energy-chapter22-analysis/chapter-22-looms-over-some-u-s-oil-and-gas-bankruptcy-survivors-100-uskbn13i0cg (identifying the potential for a similar trend in the oil and gas industry).

3. 11 U.S.C. § 327(a) (requiring court approval to employ professionals); id. § 363 (requiring court approval to sell, use, or lease property); id. § 364 (requiring court approval to obtain credit); id. § 365(a) (requiring court approval to assume or reject contracts and leases); id. § 1129 (requiring court approval of reorganization plan).

4. See infra Part I (discussing why a debtor should remain in control of a business even after filing for Chapter 11 bankruptcy). The court, however, appoints a trustee to control the business in cases of fraud, dishonesty, incompetence, gross mismanagement, or if a trustee would be in the interests of creditors, equity holders, and the estate. 11 U.S.C. § 1104(a).

5. 11 U.S.C. § 1101(1) (defining a “debtor in possession” as a “debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case”).

6. See WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 68 (“For nearly all businesses in Chapter 11, the most pressing need is for operating capital.”). Throughout a Chapter 11 reorganization, creditors (such as suppliers) are more likely to demand cash payments instead of extending lines of credit because the bankruptcy filing makes them worry about repayment. Id. at 69 (“[U]neasy suppliers that once extended credit now demand cash payments, and lines of credit and other financing arrangements quickly dry up . . . .”). Further, the debtor in possession must continue to pay operating expenses such as critical vendors and employees in order to operate effectively. Id. at 68–69; COMM’N TO STUDY THE REFORM OF CHAPTER 11, AM. BANKR. INST., FINAL REPORT AND RECOMMENDATIONS 89, 92 (2014) [hereinafter FINAL REPORT]. The debtor in possession must also pay fees and expenses to its lawyers and other professionals helping with the reorganization. See Lynn M. LoPucki & Joseph W. Doherty, The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases, 1 J. EMPIRICAL LEGAL STUD. 111, 141 (2004) (reporting studies that suggest
advantage of bankruptcy’s benefits. Debtors in possession therefore often must borrow money from lenders such as banks and investment funds to operate throughout Chapter 11 bankruptcies. This need for capital results in a multi-billion-dollar financing industry where debtors in possession borrow money from such lenders. These loans are commonly referred to as DIP loans.

In these DIP loans, the lenders often strip important control rights from the debtors in possession by imposing unfavorable terms in the loan agreements. For example, the lender may require the debtor in possession to file in a certain venue, to hire or fire certain management, or to assume or reject certain contracts. The list goes on. To be clear, it is in the lenders’ best interests to exert control, and there is nothing inherently wrong with doing so. But aggressive loan provisions limit a debtor in possession’s control, which is a fundamental policy of corporate bankruptcy. And as a result, the whole bankruptcy estate suffers.

professional fees and expenses for large public companies range “from about 1 percent to 3 percent of the value of the company’s assets at bankruptcy”).

7. WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 69 (“[T]he need for cash after filing a Chapter 11 petition is often greater than it was beforehand.”).


11. See infra Part II.B (detailing tactics used by DIP lenders to assert control over debtor’s business).

12. See infra Part II.B.1 (discussing why and how DIP lenders control the venue in which debtors file for bankruptcy).

13. See infra Part II.B.2 (discussing ways that DIP lenders influence management decisions in a debtor’s business).

14. See infra Part II.B.3 (explaining DIP lender authority regarding contracts).


16. As the rest of the Article will discuss, the most efficient reorganization occurs when control remains with the debtor, in part because of the management’s familiarity with the debtor’s business. See infra Part I.B.2 (discussing the policy rationale for letting debtors remain in control of business operations). Anything that strips substantial control away from the debtor in possession thus decreases the chances of a successful reorganization, and an unsuccessful reorganization harms the whole bankruptcy estate. See H.R. REP. NO. 95-595, at 233 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6192
The practical consequences of DIP loans thus contradict the theoretical structure of Chapter 11. In theory, the debtor in possession should remain in control of the business and its reorganization.\textsuperscript{17} But in practice, the debtor in possession must often relinquish substantial control to the DIP lender.\textsuperscript{18} The current state of the bankruptcy system is thus problematic.

This Article proposes a solution: the federal government should help finance debtors in possession as they restructure under Chapter 11. Specifically, the government should guarantee the debtor’s DIP loans, just as the government guarantees small business loans through its Small Business Administration (SBA) Loan Program.

Most notably, this Article is the first to provide a comprehensive framework for a federal DIP loan program. Specifically, this Article lays out a ten-element framework that the government could implement to guarantee DIP loans. Such a framework would realign bankruptcy practice with theory, generate economic benefits for the government, and preserve valuable jobs for society.

This Article proceeds in three parts. Part I discusses Chapter 11 and its fundamental theory that the debtor in possession should control the restructuring. Part II examines how today’s practices have diverged from that theory. Part III proposes the solution of government guaranties and examines the government’s SBA Loan Program as a potential framework to mirror.

I. IN THEORY: THE DEBTOR IN POSSESSION SHOULD HAVE CONTROL

“\textit{In fact, very often the creditors will be benefited by continuation of the debtor in possession . . . because . . . the debtor, who is familiar with his business, will be better able to operate it during the reorganization . . . . Thus, a debtor continued in possession may lead to a greater likelihood of success in the reorganization.}”

\textit{- House Report 95-595, Judiciary Committee (1977)}\textsuperscript{19}

\footnotesize{(discussing generally the benefits of a debtor remaining in control of the business). Shifting control to the DIP lender therefore harms the whole estate. \textit{Id.}}

\textsuperscript{17} \textit{See infra} Part I.B.1 (explaining the historical reasons why Congress designed Chapter 11 to allow the debtor to remain in possession of the business).

\textsuperscript{18} \textit{See infra} Part II (explaining how and why DIP lenders have come to exert a high degree of control over debtors’ businesses).

\textsuperscript{19} H.R. REP. NO. 95-595, at 233.
To put this Article and its proposed solution in proper context, I begin with (a) a general overview of corporate bankruptcy and then turn to (b) the fundamental theory that the debtor remains in control of the business.

A. General Overview of Corporate Bankruptcy

Consider a business. Imagine that the business, like most businesses, has debt. The business needs money to fund its operations and growth. So it issues debt. The business might incur debt (voluntarily) by receiving a loan from a bank or raising capital from bondholders. Despite the negative connotation among consumers, voluntarily incurring debt is often a valuable strategy for businesses. The business also, though, might incur debt (involuntarily) from lawsuits. As a result of a lawsuit, the business may owe money to the other party.

Regardless of whether the debt is voluntary or involuntary, the debt must be repaid. Sometimes, this debt becomes excessive and the business cannot afford to repay it. The business may be losing money because of a macroeconomic crisis. Or the business may be losing money because its

21. See id. (explaining that companies must have enough money to ensure that “no strategically important program or policy ever fails for lack of corporate purchasing power”).
23. See Harvey R. Miller & Shai Y. Waisman, Is Chapter 11 Bankrupt?, 47 B.C.L. REV. 129, 132 (2005) (“Credit is an integral part of the economic security and well-being of our society.”); see Piper & Weinhold, supra note 20 (“Empirical studies have, in general, shown that—because of the tax deductibility of interest—debt financing leads on average to an addition to company value equal to some 10 to 17% of the addition to debt.”).
25. See, e.g., id. (reporting that Gawker Media Group went on the auction block to pay the $140 million jury judgment).
27. See WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 1 (“Businesses fail. Sometimes they collapse in a loud crash. Sometimes they drift downward, like a balloon with a slow leak.”).
28. See, e.g., Economy Lost More than 200,000 Small Businesses in Recession, Census Shows, FOX NEWS (July 26, 2012), http://www.foxnews.com/politics/2012/07/26/economy-lost-more-than-200000-small-businesses-in-recession-census-shows.html (pointing to the more than 200,000 small businesses that closed during the Great Recession); Christopher J. Goodman & Steven M. Mance,
industry has been disrupted and is no longer viable. Or the business may be facing a large debt from a litigation judgment. For whatever reason, the business cannot satisfy its debt obligations.

As a result, the business may choose to file for bankruptcy protection under Chapter 7 or Chapter 11. Under Chapter 7, the business ceases operations and its assets are liquidated by a trustee. The trustee then distributes the proceeds among the creditors. Under Chapter 11, the business typically continues operations and either sells all its assets as a going concern or negotiates with its creditors on a reorganization plan. The plan becomes a contract that details how the business will pay its creditors and shareholders.

Critics question whether Chapter 11 reorganizations are worthwhile. Should we give failed companies a chance to reorganize, instead of requiring them to liquidate immediately? The answer is yes, for both moral and economic reasons. From a morally abstract lens, Chapter 11 is “perhaps a predictable creation from a people whose majority religion embraces the idea of life from death and whose central myth is the pioneer making a fresh start on the boundless prairie.” Economically, empirical studies


29. One particular example is the retail industry, which has been disrupted by online commerce. See, e.g., Kim Bhasin, Retailers Are Going Bankrupt at a Record Pace, BLOOMBERG L. (Apr. 24, 2017), https://www.bloomberg.com/news/articles/2017-04-24/retailers-are-going-bankrupt-at-a-record-pace (“Retailers are filing for bankruptcy at a record rate as they try to cope with the rapid acceleration of online shopping.”).

30. See, e.g., Alpert, supra note 24 (explaining that Gawker filed for bankruptcy after a court upheld the $140 million judgment entered against the company).


32. Id. (“In Chapter 7, a trustee liquidates the debtor’s assets and distributes them to creditors.” (citing 11 U.S.C. § 701 (2012))).

33. See, e.g., Christie Smythe, GM, Chrysler Highlight Growing 363 Sale Trend, LAW360 (July 10, 2009), https://www.law360.com/articles/110638/gm-chrysler-highlight-growing-363-sale-trend (noting that a § 363 sale that keeps the company operating as a going concern is an alternative to Chapter 11 reorganizations).

34. Czyzewski, 137 S. Ct. at 978 (“In Chapter 11, debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor’s estate and often keep the business operating as a going concern.” (citing 11 U.S.C. §§ 1121, 1123, 1129, 1141 (2012))).

35. See, e.g., In re MPF Holdings US LLC, 701 F.3d 449, 457 (5th Cir. 2012) (“[C]ourts regularly apply principles of contract interpretation to clarify the meaning of the language in reorganization plans.”); Hillis Motors, Inc., v. Haw. Auto. Dealers’ Ass’n, 997 F.2d 581, 588 (9th Cir. 1993) (“A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract.”).


38. Id. at 604.
confirm that Chapter 11 reorganizations are feasible\textsuperscript{39} and generate more value than Chapter 7 liquidations.\textsuperscript{40}

To illustrate, consider a restaurant.\textsuperscript{41} In a Chapter 7 liquidation, the company’s assets would be sold in a piecemeal fashion.\textsuperscript{42} The ovens may be sold to one bidder, the tables to another, and the forks and spoons possibly to another.\textsuperscript{43} Sold separately, these assets would generate less value than if the company could reorganize and operate (or sell itself) as a functioning restaurant.\textsuperscript{44} The assets, when together, form a synergy that generates extra value; the whole becomes greater than the sum of its parts.\textsuperscript{45} A Chapter 11 reorganization thus typically generates more value for creditors than it otherwise would as a Chapter 7 liquidation.\textsuperscript{46}

As Justice Breyer recently explained, filing for Chapter 11 results in three legal consequences.\textsuperscript{47} One, an estate is created.\textsuperscript{48} Two, an automatic stay is implemented.\textsuperscript{49} And three, with special relevance to this Article, “a fiduciary is installed to manage the estate.”\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{39} See \textit{Warren, Reorganizing American Businesses}, supra note 2, at 18 (noting that debtors get a plan confirmed over 70\% of the time when the debtor “still has some resources and makes a serious effort at reorganization” (citing Warren & Westbrook, supra note 37, at 603)).
\item \textsuperscript{40} Lynn M. LoPucki & Joseph W. Doherty, \textit{Bankruptcy Fire Sales}, 106 Mich. L. Rev. 1, 24 (2007) (“R\textsuperscript{eorganized} companies recover about 75\% of their book value, compared to a 29\% recovery ratio for those that sell.”); Arturo Bris, Ivo Welch & Ning Zhu, \textit{The Costs of Bankruptcy: Chapter 7 Liquidation Versus Chapter 11 Reorganization}, 61 J. Fin. 1252, 1269 (2006) (“The average Chapter 11 case retains value 78\% better than the average Chapter 7 case.”).
\item \textsuperscript{41} See \textit{Warren, Reorganizing American Businesses}, supra note 2, at 11 (“A piecemeal liquidation of a business—a sale on the courthouse steps of the salad spoons, mixing bowls, tables and chairs, double-door refrigerators, and leasehold of a restaurant—is likely to yield much less money than the sale of these items together as a restaurant.”).
\item \textsuperscript{42} Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017).
\item \textsuperscript{43} See \textit{Warren, Reorganizing American Businesses}, supra note 2, at 11 (using a similar analogy).
\item \textit{Id.}
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{See Aristotle, Metaphysics, in The Works of Aristotle, Vol. 1, 1045a (Robert Maynard Hutchins ed., W.D. Ross trans., 1952) (c. 350 B.C.E.) (“T\textsuperscript{he} totality is not, as it were, a mere heap, but the whole is something besides the parts.”).}
\item \textsuperscript{46} Bris, Welch & Zhu, supra note 40.
\item \textsuperscript{47} Czyzewski, 137 S. Ct. at 978–79.
\item \textsuperscript{48} See 11 U.S.C. § 541(a) (2012) (“The commencement of a case . . . creates an estate.”); see \textit{also} \textit{Warren, Reorganizing American Businesses}, supra note 2, at 27 (“B\textsuperscript{oth} the benefits and the burdens of Chapter 11 will belong to the new estate, which will bear the responsibility of maximizing value for the creditors collectively.”).
\item \textsuperscript{49} 11 U.S.C. § 362(a); see \textit{generally} \textit{Warren, Reorganizing American Businesses}, supra note 2, at 27 (discussing the imposition of an automatic stay).
\item \textsuperscript{50} Czyzewski, 137 S. Ct. at 978.
\end{itemize}
B. Chapter 11 Fiduciary: The Debtor in Possession

After a debtor files for Chapter 11 relief, a fiduciary is installed to manage the bankruptcy estate. But who becomes the fiduciary? Should the debtor’s management continue in its managerial role? Or should the court automatically appoint an independent trustee, like in Chapter 7? The simple answer is the former—the debtor’s management may continue operating the business. Such a debtor—one that continues in control—is called a “debtor in possession” because the debtor remains in possession of the business. A proper understanding of this concept, however, requires further discussion of its legislative history and rationale.

1. Legislative History

The U.S. Constitution grants Congress the power to legislate “uniform Laws on the subject of Bankruptcies throughout the United States.” Throughout the 18th and 19th centuries, states differed in their approach to federal bankruptcy law. As a result, Congress struggled to pass a bankruptcy law with any stability; Congress would pass bankruptcy laws during economic downturns and then repeal those laws just a few years later once the economy strengthened. Congress’s efforts were akin to

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52. Id. §§ 1107–08.
53. Id. § 1101(1) (defining a “debtor in possession” as the “debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case”).
54. U.S. CONST. art I, § 8, cl. 4. James Madison expressed the importance of a federal bankruptcy law in The Federalist No. 42, writing:

    The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

THE FEDERALIST NO. 42, at 287 (James Madison).
55. See Miller & Waisman, supra note 23 (“Congress rarely reached consensus throughout the late eighteenth and nineteenth centuries as to bankruptcy legislation.”); DAVID A. SKEEL, JR., DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 23 (2001) [hereinafter SKEEL, DEBT’S DOMINION] (“[B]ankruptcy became one of the great legislative battlegrounds of the nineteenth century.”).
56. WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 6; see Miller & Waisman, supra note 23, at 133 (discussing the relationship between bankruptcy law and the economy); SKEEL, DEBT’S DOMINION, supra note 55 (“Prior to 1898, Congress passed a series of bankruptcy laws, each of which quickly unraveled and led inexorably to repeal.”).
fixing a broken roof with tape to prevent leaks, and then removing the tape when the rain stopped.

Eventually, Congress replaced this unstable patchwork with the Bankruptcy Act of 1898 (1898 Act); Congress bought a new roof. The 1898 Act provided the foundation for a stable federal bankruptcy system and set the tone of American bankruptcy law—one much different from the law across the pond. In Britain, bankruptcy was a creditor-favored system that the government ran with large administrative interference. In contrast, the 1898 Act established that the American bankruptcy system would be a debtor-friendly system driven by the parties in interest and their lawyers. Further, the 1898 Act was more forgiving to debtors than the laws in Britain. Though the 1898 Act did not codify the power of a debtor in possession, it established an overarching, parallel theme—American bankruptcy law was to be (and remains) debtor-friendly with minimal governmental interference.

The 1898 Act was a building block for future legislation. Inspired by the Great Depression in the 1930s, Congress realized it needed a more robust statutory framework to handle the increase in bankruptcies that come during an economic crisis. For guidance, Congress looked to the railroad industry. Remarkably, and organically, the railroad industry had created its own successful bankruptcy system by using receiverships to handle insolvencies. The receivership process contained many recognizable, modern-day features of bankruptcy: a petition, a stay of litigation,


58. WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 6; See SKEEL, DEBT’S DOMINION, supra note 55 (“With the Bankruptcy Act of 1898, the instability suddenly came to an end . . . . [F]ederal bankruptcy has been a permanent fixture ever since.”).

59. See Skeel, Genius, supra note 57, at 328 (describing the character of the British bankruptcy system).

60. Id.

61. Id.

62. Id. at 325–26.

63. See Miller & Waisman, supra note 23, at 133 (describing how the Chandler Act amended the Bankruptcy Act of 1898).

64. Id. at 133–34.

65. Id. at 134; Skeel, Debtor-In-Possession, supra note 10, at 1908 (explaining how “the railroad receivership process . . . eventually led to Chapter 11”).

66. See Skeel, Debtor-In-Possession, supra note 10, at 1908–13 (describing the historical development of the equitable receivership system).

67. See Miller & Waisman, supra note 23, at 135 (“The process generally began with the filing of a ‘creditor’s bill’ . . . .”); Skeel, Debtor-In-Possession, supra note 10, at 1908 (“[A] creditor would first file a ‘creditor’s bill’ asking the court to appoint a receiver to oversee the defaulting railroad’s property.”).
creditor committees, a reorganization plan, and most notably, the retention of the debtor’s management.

Adopting many of these features, Congress passed the Bankruptcy Act of 1938 (1938 Act) and created two separate chapters for business reorganizations: Chapter X for large public companies and Chapter XI for small private companies.

Chapter X provided a statutory framework for how distressed companies should reorganize. Most notably, Chapter X did not permit debtors to remain in possession. Although the railroad industry favored debtors in possession, critics worried that debtors in possession gave Wall Street too much power and would overly compensate attorneys and other professionals to the detriment of creditors. The newly-formed Securities and Exchange Commission (SEC) commissioned a study on the issue and eventually proposed that during Chapter X bankruptcy, a judge would replace the debtor’s management. Congress agreed with the SEC; the management and professionals of the bankruptcy estate should be disinterested. Thus, if a debtor filed for Chapter X, a trustee would

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68. See Miller & Waisman, supra note 23, at 135 (“The filing of a creditor’s bill acted as a modern-day ‘automatic stay.’”); Skeel, Debtor-In-Possession, supra note 10, at 1908 (“If a creditor tried to obtain a lien against railroad property, for instance, the receiver would simply ask the court for an injunction.”).

69. See Miller & Waisman, supra note 23, at 135 (“Multiple protective committees of bondholders and stockholders would be formed to represent respective stakeholders in the bargaining process . . . .”); Skeel, Debtor-In-Possession, supra note 10, at 1909 (describing the use of reorganization committees).

70. See Miller & Waisman, supra note 23, at 135 (“The negotiations would culminate in a reorganization plan that would recapitalize the railroad as a new entity and distribute new securities to the stockholders pursuant to the plan.”); Skeel, Debtor-In-Possession, supra note 10, at 1909 (“Once they had agreed to an overall plan, the committees were combined to form a single super-committee called the ‘Reorganization Committee.’”)

71. See Miller & Waisman, supra note 23, at 135–36 (noting that one of the “central modern bankruptcy concepts [that] emerged from the railroad receivership paradigm” was “the retention and active participation of the railroad’s management in the operations of the railroad and the development of a business plan to support a reorganization”); id. at 136 (discussing the 1884 bankruptcy of Wabash, St. Louis, and Pacific Railway as an example of the debtor-in-possession concept).

72. Warren, Reorganizing American Businesses, supra note 2, at 7; Miller & Waisman, supra note 23, at 137–38.

73. Miller & Waisman, supra note 23, at 138.

74. See id. at 139 (“Management and, in effect, the board of directors were displaced by the mandatory appointment of a reorganization trustee, and there was a significant loss of control by traditional power groups.”).

75. Id. at 137–39.

76. Id.

77. Id. at 139.
automatically replace the management.\textsuperscript{78} Further, Congress granted the SEC the authority to monitor and investigate reorganizations.\textsuperscript{79}

Chapter XI, though, was different. Congress felt that the complex statutory framework of Chapter X and the constant oversight of the SEC were too burdensome for small businesses.\textsuperscript{80} So Congress created Chapter XI and allowed small debtors to remain in possession; a trustee was not automatically appointed in these proceedings.\textsuperscript{81}

Chapter XI thus was much more attractive to a distressed business than Chapter X. Chapter XI allowed the debtor’s management to stay in control, free from SEC oversight, whereas Chapter X required a trustee to replace the management and the SEC to monitor the reorganization.\textsuperscript{82}

Frustrated by the administrative interference and related delays within Chapter X, debtors routinely tried to find ways to fit into the Chapter XI paradigm.\textsuperscript{83} A pattern emerged. A large debtor, of the size required for Chapter X, would file instead for Chapter XI.\textsuperscript{84} The SEC would then try to convert the bankruptcy case to Chapter X.\textsuperscript{85} The debtor and the SEC would then negotiate and often agree to the following settlement: the SEC would leave the case in Chapter XI, as long as the debtor treated bondholders and stockholders to the SEC’s satisfaction.\textsuperscript{86} And with that, the large debtor achieved its goal—a Chapter XI proceeding that allowed its management to stay in control.

After forty years of debtors circumventing Chapter X, Congress overhauled the bankruptcy system by enacting the Bankruptcy Reform Act of 1978 (1978 Reform Act and the current Bankruptcy Code).\textsuperscript{87} Among many other things, the 1978 Reform Act established one chapter for business reorganizations—Chapter 11—that combined the features of the former Chapters X and XI.\textsuperscript{88} The new Chapter 11 contained the structural framework of Chapter X and the debtor in possession concept of Chapter XI.\textsuperscript{89}

\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} \textit{Warren, Reorganizing American Businesses}, supra note 2, at 7.
\textsuperscript{81} Miller & Waisman, supra note 23, at 140.
\textsuperscript{82} Id.
\textsuperscript{83} \textit{Warren, Reorganizing American Businesses}, supra note 2, at 8; Miller & Waisman, supra note 23, at 141.
\textsuperscript{84} \textit{Warren, Reorganizing American Businesses}, supra note 2, at 8.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Miller & Waisman, supra note 23, at 141–42.
\textsuperscript{88} Id. at 142 (“The new Chapter 11 combined the flexibility and debtor control that characterized Chapter XI with many of the public protection features central to Chapter X.”).
\textsuperscript{89} Id.
Chapter 11 of the Bankruptcy Code thus explicitly permits a debtor’s management to remain in control. Section 1107 gives a debtor in possession all the rights and powers of a trustee. Section 1108 gives a trustee the power to operate the debtor’s business. Read together, the two sections form one of the fundamental theories of Chapter 11: the power of a debtor to operate its own business throughout the reorganization. Provided a court does not appoint a trustee under §1104—for, among other things, fraud or gross mismanagement—a Chapter 11 debtor will remain in possession of its business.

2. Rationale

Why, though, should the debtor remain in control? Because the debtor, as opposed to a trustee, is more familiar with its business and is thus better able to manage its operations. The debtor would not require time or money to learn about the business because the debtor is already familiar with it. A trustee, on the other hand, would require valuable time and money from the estate to educate itself. Such time and money must be preserved whenever possible and used efficiently to maximize the value of the estate.

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92. Id. § 1108.
93. See id. § 1107(a) (“[A] debtor in possession shall have all the rights, other than the right to compensation . . ., of a trustee serving in a case under this chapter.”); id. § 1108 (“[T]he trustee may operate the debtor’s business.”).
94. Id. §§ 1104 (a)(1), 1115(b).
95. As the House judiciary committee noted:

    In fact, very often the creditors will be benefited by continuation of the debtor in possession . . . the debtor, who is familiar with his business, will be better able to operate it during the reorganization . . . . Thus, a debtor continued in possession may lead to a greater likelihood of success in the reorganization.

96. Id.
97. See id. (“A trustee frequently has to take time to familiarize himself with the business before the reorganization can get under way.”); see also David A. Skeel, Jr., Markets, Courts, and the Brave New World of Bankruptcy Theory, 1993 WIS. L. REV. 465, 517 n.188 (1993) (“In the nonclosely held firm context, immediate removal of management would create significant indirect costs both before and during bankruptcy.”).
98. Debtors in bankruptcy are often referred to as “melting ice cube[s].” Melissa B. Jacoby & Edward J. Janger, Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy, 123 YALE
Further, allowing the debtor to stay in control encourages the debtor's management to file for bankruptcy because it reassures management that they will not lose their jobs.99 If a trustee automatically replaced management, then management would be hesitant to file for bankruptcy.100 This would encourage management to delay filing as long as possible and cause the debtor to lose more value, making a reorganization improbable.101

Critics, on the other hand, argue that this theory of control is misguided, and that the bankrupt debtor should not remain in control of the business.102 These criticisms come in two flavors: incompetence and exploitation.

First, incompetence.103 Some critics wonder why a failed management should continue to operate a failed business? If the management led the company into bankruptcy, how can we expect the management to lead the company out of bankruptcy? One answer is that the management responsible for the failure has already likely been ousted and replaced with management responsible for turning the company around.104 An increasing

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99. See WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 63 (“If managers know it is virtually certain that they will be replaced in Chapter 11 even if they are doing a good job in trying to turn around a troubled business, they will be disinclined to file even if it would be the wisest course for the business.”). 100. Id. 101. See Miller & Waisman, supra note 23, at 140 (“Management, fearful of being displaced, would delay the commencement of bankruptcy cases. Often, during this process, the deterioration of the debtor’s business would continue unabated and sometimes result in the loss of the ability to reorganize and rehabilitate.” (footnote omitted)). 102. FINAL REPORT, supra note 6, at 22–23 (discussing criticisms of the debtor-in-possession model). 103. See id. at 22 (“Some critics argue that allowing the management team that was in charge during the debtor’s financial decline to remain in control rewards subpar performance and undermines confidence in the reorganization process for the debtor’s stakeholders.”); see WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 60 (“Old management, after all, often comprises the same folks who brought the business to the brink of collapse, which may not be a strong endorsement for their management skills and business acumen.”). 104. A 2009 study showed that 70% of CEOs were replaced within the two years prior to their companies’ bankruptcy petitions. Kenneth M. Ayotte & Edward R. Morrison, Creditor Control and Conflict in Chapter 11, 1 J. LEGAL ANALYSIS 511, 521–22 (2009). Earlier studies from 2006 and 1989 showed that about 50% of CEOs were replaced during similar periods. See Steven N. Kaplan & Bernadette A. Minton, How Has CEO Turnover Changed? Increasingly Performance Sensitive Boards and Increasingly Uneasy CEOs 25 (Nat’l Bureau of Econ. Research, Working Paper No. 12465, 2006),
trend is for the company to hire a Chief Restructuring Officer (CRO): an outsider who assists the company in its reorganizing and becomes responsible for many of the company’s major decisions.\textsuperscript{105} Further, the debtor’s management may not be responsible for the financial distress.\textsuperscript{106} External factors, such as natural disasters, could cause such distress.\textsuperscript{107}

Second, exploitation.\textsuperscript{108} Other critics argue that this fundamental theory increases the potential that the debtor will exploit the bankruptcy estate.\textsuperscript{109} How can we trust the debtor to act in the estate’s best interest, as opposed to its own best interests? There are a variety of protections against this concern. For one, the court must approve substantial decisions.\textsuperscript{110} Parties in interest, such as creditors, can object and voice their displeasures before the

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\item \textsuperscript{105} See generally Shai Y. Waisman & John W. Lucas, \textit{The Role and Retention of the Chief Restructuring Officer}, in \textit{THE AMERICAS RESTRUCTURING AND INSOLVENCY GUIDE 2008/2009}, at 200–05 (2008), https://1pdf.net/the-role-and-retention-of-the-chief-restructuring-officer-d_590b15e7f6065d3f3ef14618 (providing an overview of the CRO’s functions). For example, SunEdison, a renewable energy developer that filed for bankruptcy in April 2016 with $20.7 billion of assets, hired John Dubel as the company’s CRO. Brian Feldt, \textit{SunEdison Brings in Turnaround Expert for Restructuring}, ST. LOUIS BUS. J. (May 2, 2016), http://www.bizjournals.com/stlouis/blog/biznext/2016/05/sunedison-brings-in-turnaround-expert-for.html; \textit{SunEdison Files for Bankruptcy Protection}, CNBC (Apr. 21, 2016), https://www.cnbc.com/2016/04/21/sunedison-files-for-bankruptcy-protection-report.html. Dubel was, among other things, “in charge of the management of all aspects of the financial restructuring of the company.” Feldt, supra. These aspects included the responsibility of “directing the efforts of the company’s management, employees and external professionals in bankruptcy-related matters and transactions, directing the development of a Chapter 11 plan, and managing the obligations owed by the company to its significant creditors.” Id.

\item \textsuperscript{106} See Gregory Hamel, \textit{What are the Causes of Business Bankruptcy?}, CHRON, https://smallbusiness.chron.com/causes-business-bankruptcy-49407.html (last visited Dec. 4, 2018) (“Unforeseen disasters and criminal activity like floods, storms, fires, theft and fraud can also cause hardships that lead to bankruptcy.”).

\item \textsuperscript{107} Id.

\item \textsuperscript{108} \textit{FINAL REPORT}, supra note 6, at 22–23 (“Some critics also worry that prepetition management may be motivated by factors not necessarily aligned with the best interests of the estate, such as retaining their jobs or downplaying prepetition events that may implicate them in the debtor’s financial distress.”); see \textit{WARREN, REORGANIZING AMERICAN BUSINESSES}, supra note 2, at 60–62 (discussing various incentives prepetition management might have to act against the estate’s interests).

\item \textsuperscript{109} See, e.g., \textit{WARREN, REORGANIZING AMERICAN BUSINESSES}, supra note 2, at 61 (“[O]ld management’s primary loyalty may be to the new investors who fund the reorganization, even if that loyalty is not conducive to increasing the value of the estate for distribution to the old creditors.”).

\item \textsuperscript{110} See id. at 65 (“The DIP, for example, can operate the business only in the ordinary course without court approval, and it must negotiate either a consensual plan or a plan that pays all creditors in full before old equity holders retain any ownership.”).  
\end{itemize}
Further, the court may replace the debtor in possession with a Chapter 11 trustee if cause exists (i.e., fraud) or if it is necessary for the well-being of the estate.\textsuperscript{112} The Bankruptcy Code thus provides checks and balances against a manipulative debtor in possession.\textsuperscript{113}

Foreign legislatures, recognizing the benefits of a debtor staying in possession, have started to adopt similar policies. In 2012, Germany changed its insolvency law to closely mirror the U.S. law.\textsuperscript{114} Prior to the new law, a German debtor was allowed to maintain possession of the business only in extremely rare circumstances; possession was not a presumption.\textsuperscript{115} The new German law, however, keeps the debtor in control and free from administrative interference (such as a trustee).\textsuperscript{116}

In 2016, the European Union proposed a directive to its member states for reforming their restructuring/insolvency laws.\textsuperscript{117} The directive, still being considered, has proposed that debtors shall remain in possession, unless a party moves otherwise.\textsuperscript{118} The directive explained that automatically appointing a trustee results in higher costs.\textsuperscript{119} By emulating the American model, these international efforts provide support for its merit.

Nonetheless, the purpose of this Article is not to argue whether the policy is a sound one, though the American Bankruptcy Institute (ABI) believes it is.\textsuperscript{120} In 2014, an ABI-commissioned study concluded that the U.S. should retain the current debtor in possession concept.\textsuperscript{121} Continued debtor control of its business during a Chapter 11 proceeding is a well-established element of the bankruptcy system that the Bankruptcy Code

\begin{thebibliography}{9}
\bibitem{111} Id. at 69.
\bibitem{112} 11 U.S.C. § 1104(a)(1)–(2) (2012); \textit{see also} WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 55–56 (outlining the situations in which a trustee would be appointed).
\bibitem{113} WARREN, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 65 ("The [debtor in possession] is in control of the day-to-day operations, but the Code is replete with specific checks to ensure that creditor interests are appropriately protected.").
\bibitem{115} Id.
\bibitem{116} Id.
\bibitem{118} Id. at 64–66.
\bibitem{119} Id. at 64.
\bibitem{120} FINAL REPORT, supra note 6, at 24 ("Accordingly, the Commission recommended retention of the debtor in possession model.").
\bibitem{121} Id.
\end{thebibliography}
explicitly provides for.122 This fundamental theory of control, however, has eroded in practice.

II. IN PRACTICE: THE DIP LENDER HAS CONTROL

“Given their economic leverage, the pre-chapter 11 lenders or their successors have used the granting of DIP financing as the means to exert substantial control over the debtor and chapter 11 case. . . . Effectively, the debtor in possession is neutered.”

— Harvey Miller, Bankruptcy Expert (2007)123

In name, the debtor remains “in possession” of the business.124 In form, though, the debtor often forfeits significant control rights to the DIP lender.125 Part II looks closer at this phenomenon. Specifically, this Part

122. See 11 U.S.C. § 1107(a) (2012) (granting the debtor in possession all the rights and duties of a trustee except the right to compensation); FINAL REPORT, supra note 6, at 21 (calling the debtor-in-possession concept a “fundamental feature” of the Chapter 11 bankruptcy code).
125. Melissa Jacoby, Corporate Bankruptcy Hybridity, 166 U. Pa. L. REV. 1715, 1730–31 (2018) (explaining that DIP financing terms have become “‘odious’ even [to] restructuring professionals” and that “a perhaps bigger concern is how prepetition lenders use DIP lending to direct the activities of the bankruptcy estate”); Kirshner, supra note 15, at 537 (“DIP lenders have leveraged their position to gain control of the bankruptcy process and maximize their individual recoveries.”); KEY DEVELOPMENTS AND TRENDS IN DIP FINANCING, supra note 9, at 9 (“[O]verall bargaining power still weighs generally in favor of DIP lenders. This has . . . result[ed] in more DIP lender control over the debtor and the Chapter 11 process.”); Paul Leake, The Examiners: Make DIP Financing More Restructuring-Friendly, WALL STREET J. (Dec. 3, 2014), https://blogs.wsj.com/bankruptcy/2014/12/03/the-examiners-make-dip-financing-more-restructuring-friendly/ (arguing that DIP financing needs to be “more readily available on terms that support a more predictable and orderly Chapter 11 process that maximizes the value of the enterprise”); FINAL REPORT, supra note 6, at 77 n.301 (“Regardless of where the debtor gets its DIP financing, the game has dramatically changed . . . . [Lenders often] take control of the debtor, through covenants, deadlines, and default provisions. And these are no mere financial tests to ensure the safety of the lender’s repayment.” (quoting Kathryn Coleman, Has the ‘Fresh Start’ Gone Stale: Written Statement to the Am. Bankr. Inst. Comm’n to Study the Reform of Chapter 11, at 4–5 (Nov. 3, 2012))); see Douglas B. Rosner, Venue Fairness: Written Statement on Behalf of Nat’l Ad Hoc Grp. of Bankr. Practitioners in Support of Venue Fairness to the Am. Bankr. Inst. Comm’n to Study the Reform of Chapter 11, at 15 (Nov. 22, 2013), http://commission.abi.org/sites/default/files/statements/22nov2013/Written-Venue%20Statement-for-ABI-Commission.pdf (“Bankruptcy courts felt compelled to approve more expensive debtor in possession financing and enter orders containing extraordinary terms (e.g., roll ups, quick sales, excessive fees and interest rates, liens on avoidance recoveries, etc.).”); Q&A With Perkins Coie’s David Neff, LAW360 (Apr. 30, 2013) [hereinafter Neff], http://www.law360.com/articles/424470/q-a-with-perkins-coie-s-david-neff (“[T]he balance of power has[sh] [i]ntelligently shifted substantially away from debtors . . . . [T]he changes . . . have greatly restricted debtors’ abilities to reorganize.”); Paul H. Zumbro, An Overview of Debtor-in-Possession Financing, in INSIDE THE MINDS: DEBTORS-IN-POSSESSION AND EXIT FINANCING 10 (Thomson
explains: (a) § 364 of the Bankruptcy Code, which authorizes and governs DIP financing; (b) the DIP loan provisions that lenders often implement to exert control over the debtors in possession; and (c) the impact of the 2008 Great Recession.

A. Section 364: Obtaining Credit

DIP financing provides the debtor in possession with the cash necessary to operate throughout the restructuring. Without it, the debtor in possession would not be able to pay employees or critical vendors and therefore would be forced to cease operations and liquidate. DIP financing thus is often required for a successful Chapter 11 reorganization. Empirical studies confirm that companies with DIP financing are more likely to emerge successfully from bankruptcy.
Section 364 of the Bankruptcy Code authorizes and governs postpetition credit, such as DIP financing. Specifically, § 364 permits three types of priority for postpetition credit. From weakest to strongest, the types of priority are: (i) administrative with no lien; (ii) super-priority administrative with a non-priming lien; and (iii) super-priority administrative with a priming lien. All priorities, unless the debt is incurred in the ordinary course of business, are subject to court approval. I discuss them in turn.

129. As Federick Tung reports:

My data are consistent with findings in the finance literature that the presence of a DIP loan is associated with a higher likelihood of emerging from Chapter 11. Sixty-four percent of all cases in the sample emerged from bankruptcy. Of emerging cases, 77% of debtors with DIP loans emerged, while only 43% of debtors without DIP financing emerged.


131. A creditor’s type of priority is often the difference between being paid in full or being paid cents on the dollar. See Douglas G. Baird, Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy, 165 U. Pa. L. Rev. 785, 786 (2017) (“If one creditor has priority over another, this creditor needs to be paid in full before the other is entitled to receive anything.”). The estate must pay high priorities—such as administrative expenses paid to the bankruptcy professionals, lawyers, accountants, etc.—in full before low priorities—such as general, unsecured creditors. See Richard M. Hynes & Steven D. Walt, Inequality and Equity in Bankruptcy Reorganization, 66 U. Kan. L. Rev. 875, 877 (2018) (“The Code grants priority to administrative expenses over general unsecured claims.”). Further, the estate must pay these unsecured creditors in full before equity holders receive anything. Id.

132. 11 U.S.C. § 364(a)–(b); COLIER ON BANKRUPTCY ¶ 364.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2018) [hereinafter COLIER].

133. 11 U.S.C. § 364(c); COLIER, supra note 132.

134. 11 U.S.C. § 364(d)(1); COLIER, supra note 132.


Specifically, the bankruptcy court noted its role as a negotiator:

[T]he bankruptcy court, . . . as final arbiter of whether the [DIP] financing should be approved, often acts as the last and perhaps most effective negotiator against the secured lender. It is a['] somewhat awkward position for a judge
1. Administrative With No Lien

First and foremost, the debtor in possession may obtain unsecured credit; such credit is given administrative priority. If the credit is obtained outside the ordinary course of business, then the debtor in possession needs the court’s approval. If the credit is obtained within the ordinary course of business, then the debtor does not need court approval. Employee wages and taxes are examples of debt obtained in the ordinary course of business and given administrative priority without any court approval.

Just like other debts, whether a DIP loan qualifies as a debt that the debtor incurs in the ordinary course of business is fact-specific and determined by the court. To make such a determination, courts typically rely on two tests: a vertical test and a horizontal test.

Under the vertical test, courts look at how the credit transaction between the debtor and creditor compares with the parties’ past relationship and past transactions. For a blunt example, consider a lender that loans $1,000 to the debtor on the first day of every month for business purposes.

who is supposed to resolve disputes and not become involved in the administration of the business of the estate, but it perhaps has become essential given the nature of the process.

Id. (quoting COLLIER, supra note 132, ¶ 364.06).


137. 11 U.S.C. § 364(b).

138. Id. § 364(a); see Bagus v. Clark (In re Buyer’s Club Mktg., Inc.), 5 F.3d 455, 457–58 (10th Cir. 1993) (“[i]f a debtor had to seek court approval to pay for every expense incurred during the normal course of its affairs, the debtor would be in court more than in business.”).


140. Id. § 503(b)(1)(B).


142. Id. at 328 n.1.

143. As the Ockerlund court explained:

To prove that an unsecured post-petition loan was obtained in the ordinary course of the debtor’s business, the debtor must pass the “vertical” dimensions test. Under this test, the Court examines the reasonable expectations of creditors in light of their past relationship with the debtor and its incurrence of debt, including the amount, terms, frequency, sources, and timing of pre-petition extensions of credit from various sources.

Id. at 328–29 (footnote omitted).
If the debtor files bankruptcy in the middle of a month, and the lender loans another $1,000 on the first day of the following month, then a court would likely find that the loan was made in the ordinary course of business because the loan was similar to previous loans.\textsuperscript{144}

Some courts apply only the \textit{vertical test}.\textsuperscript{145} Other courts, however, require that the debtor satisfy a \textit{horizontal test} in addition to the \textit{vertical test}.\textsuperscript{146} Under the \textit{horizontal test}, courts look at how the credit transaction compares with the practices of the debtor’s industry.\textsuperscript{147} Refer back to the earlier example of a lender loaning $1,000 every month. To satisfy the \textit{horizontal test}, the parties must show that other businesses in the applicable industry typically incur similar debt.\textsuperscript{148} If no other business in the industry receives a similar loan, then a court would likely find that our example—the $1,000 monthly loan—was not incurred in the ordinary course of business.\textsuperscript{149}

But the fact-specific issue—of whether the debt was obtained in the ordinary course of business—is essentially moot for DIP loans because DIP lenders do not typically seek priority under § 364(a).\textsuperscript{150} Rather, they seek the greater protection that the other subsections of § 364 permit: a super-priority administrative claim with a lien—either priming or not—attached.\textsuperscript{151}

\section*{2. Super-Priority Administrative With A Non-Priming Lien}

If the debtor in possession cannot obtain unsecured credit with administrative priority, the court may provide further protection for the

\begin{footnotesize}
\begin{enumerate}
\item 144. \textit{See id.} at 328 n.1 (explaining how courts examine prepetition debts to determine whether postpetition loans were incurred in the ordinary course of business).
\item 145. \textit{Id.}
\item 146. \textit{Id.}
\item 147. \textit{Id.} (“Other courts have additionally required the debtor to satisfy the ‘horizontal dimensions test’ under which the debtor must show that the terms and circumstances of the extension of credit were consistent with the practices of the debtor’s industry.” (first citing \textit{In re} Dant & Russell, 853 F.2d 700, 704–05 (9th Cir. 1988); then citing \textit{In re} Poff Constr., 141 B.R. 104, 106–07 (W.D. Va. 1991); and then citing \textit{In re} Lodge Am., 259 B.R. 728, 732 (D. Kan. 2001)).
\item 148. \textit{Id.}
\item 149. \textit{Id.}
\item 150. Ayotte & Morrison, \textit{supra} note 104, at 525 (finding that 95\% of DIP lenders received a super-priority administrative claim).
\item 151. \textit{See Zumbro, supra} note 125, at 13 (“In the DIP financing market, as in the market overall, credit has become more difficult and more expensive to obtain, and those willing to provide credit have sought and received greater protections.”).
\end{enumerate}
\end{footnotesize}
lender.\textsuperscript{152} Under § 364(c), the court may authorize any of the following three protections:\textsuperscript{153}

One, the court may grant the lender a super-priority administrative claim.\textsuperscript{154} This type of lien has priority over all other administrative claims.\textsuperscript{155} Two, the court may grant the lender a lien on unencumbered property of the estate.\textsuperscript{156} Unencumbered property is property that is not otherwise subject to a lien.\textsuperscript{157} And three, the court may grant the lender a junior lien on encumbered property of the estate.\textsuperscript{158} This type of lien is subject to the encumbered property’s senior lien.\textsuperscript{159} In sum, § 364(c) protects the DIP lender by permitting, with court approval, a super-priority administrative claim and a \textit{non-priming} lien.\textsuperscript{160}

3. Super-Priority Administrative With A Priming Lien

The lender, though, may still even seek stronger protection. The court may grant the lender a senior or equal lien on encumbered property.\textsuperscript{161} The court may only grant this protection, however, if the debtor in possession can prove that: (i) it is unable to obtain such credit otherwise and (ii) there is adequate protection for the other lien on that encumbered property.\textsuperscript{162}

Section 364(d), therefore, protects the DIP lender by permitting, with court approval, a super-priority administrative claim and a priming lien.\textsuperscript{163} In its entirety, § 364 protects what may otherwise seem to be high-risk behavior—lending money to businesses in bankruptcy.\textsuperscript{164} By granting high

\begin{itemize}
\item \textsuperscript{152} 11 U.S.C. § 364(c) (2012).
\item \textsuperscript{153} \textit{Id}.
\item \textsuperscript{154} \textit{Id.} § 364(c)(1).
\item \textsuperscript{155} \textit{Id}.
\item \textsuperscript{156} \textit{Id.} § 364(c)(2).
\item \textsuperscript{157} See \textit{Unencumbered}, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “unencumbered” as “[w]ithout any burdens or impediments”).
\item \textsuperscript{158} 11 U.S.C. § 364(c)(3).
\item \textsuperscript{159} See \textit{Junior Lien}, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “junior lien” as “[a] lien that is subordinate to one or more other liens on the same property”).
\item \textsuperscript{160} See S. REP. NO. 95-989, at 57–58 (1978), \textit{reprinted in} 1978 U.S.C.C.A.N. 5787, 5843–44 (explaining how subsection (c) protects DIP lenders through super-priority administrative claims and non-priming liens).
\item \textsuperscript{161} 11 U.S.C. § 364(d)(1); \textit{see also} Ayotte & Morrison, \textit{supra} note 104, at 525 (finding that 65% of DIP lenders received a priming lien).
\item \textsuperscript{162} 11 U.S.C. § 364(d)(1)(A)–(B); \textit{id.} § 361 (providing three options to secure the adequate protection § 364 requires).
\end{itemize}
priority and extra security, the Bankruptcy Code encourages lenders to make DIP loans so that debtors in possession have opportunities to restructure.\textsuperscript{165} Perhaps unsatisfied by these statutory protections, however, DIP lenders have started to contractually protect themselves further by negotiating aggressive, control-shifting DIP loan provisions.

\textit{B. DIP Loan Provisions That Shift Control}

DIP lenders traditionally fall into two categories: \textit{offensive} lenders and \textit{defensive} lenders.\textsuperscript{166} Offensive lenders are lenders that \textit{did not} have any claims before the bankruptcy or that acquired a claim in anticipation of becoming a DIP lender during the bankruptcy.\textsuperscript{167} In other words, these lenders typically \textit{are not} prepetition lenders.\textsuperscript{168} If they do have a prepetition claim, they likely bought that claim from another lender anticipating the bankruptcy filing.\textsuperscript{169} Offensive lenders typically include hedge funds and private equity funds.\textsuperscript{170}

Defensive lenders, on the other hand, are lenders that \textit{did} have a claim before the bankruptcy.\textsuperscript{171} In other words, these lenders \textit{are} prepetition lenders.\textsuperscript{172} Defensive lenders typically include commercial or investment banks. For both offensive and defensive lenders, control is important.\textsuperscript{173} Both lenders want control so that they can influence the bankruptcy process to achieve their goals.\textsuperscript{174} Offensive lenders want control to influence sales and equity distributions.\textsuperscript{175} Defensive lenders want control to protect their prepetition claims and collaterals.\textsuperscript{176}

\footnotesize
\begin{itemize}
  \item[165] Cf. Tung, \textit{supra} note 129, at 30 (explaining that lenders are reluctant to lend to firms in “severe financial distress”).
  \item[167] Id.
  \item[168] Id.
  \item[170] Wigness, \textit{supra} note 166.
  \item[171] Id.
  \item[172] Id.
  \item[173] See \textit{supra} Parts II.B.1–5 (explaining the various methods lenders use to exert control over debtors in possession).
  \item[174] Wigness, \textit{supra} note 166.
  \item[175] Id.
  \item[176] Id.
\end{itemize}
To gain control, DIP lenders insert a variety of provisions into the loan agreements. I discuss five of them: (i) forum shopping; (ii) management; (iii) contracts and leases; (iv) asset sales; and (v) a plan of reorganization.

1. Forum Shopping

Venue is important because the court must approve any DIP financing agreement. DIP lenders thus may favor venues that are more accommodating to the lenders’ interests and direct debtors to file in those venues. Such forum shopping has been criticized extensively, but remains an element of bankruptcy practice. Bankruptcy judges, practitioners, and academics have all recognized DIP lenders’ influence over the forum-shopping process.

177. It is difficult for a debtor in possession to negotiate against a DIP lender on these provisions. See Zumbro, supra note 125, at 27 (highlighting that creditors are unlikely to give debtors much leeway). Debtors in possession have little leverage because they desperately need money, and DIP lenders have that money. See Ayotte & Morrison, supra note 104, at 538 (concluding that creditors, lenders, and unsecured creditors control the reorganization process); Jarrod B. Martin et al., Freefalling With a Parachute That May Not Open: Debtor-in-Possession Financing in the Wake of the Great Recession, 63 U. MIAMI L. REV. 1205, 1229 (2009) (“The debtor’s need for funds will also weaken its bargaining position.”). As the Golden Rule explains: “He who has the gold, makes the rules.” G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526, 1532 (11th Cir. 1985).

178. See 11 U.S.C. § 105(a) (2012) (granting bankruptcy courts the power to issue any order necessary to carry out Title 11’s provisions); id. § 105(d)(2)(B)(i)–(vi) (listing the powers of the court in a Chapter 11 proceeding). A debtor can file a bankruptcy case in any district which: (1) contains the debtor’s domicile, residence, principal place of business, or principal assets or (2) contains a pending case of the debtor’s affiliate, general partner, or partnership. 28 U.S.C. § 1408 (2012).

179. See, e.g., Rosner, supra note 125, at 6, 15–16 (explaining that forum shopping has led to an “overwhelming concentration of business cases being filed in Delaware and SDNY” and how judges in these districts repeatedly approve extraordinary terms).

180. See id. at 1 (“The consequences of forum shopping are grave.”); see also Marcus Cole, “Delaware is Not a State”: Are We Witnessing Jurisdictional Competition in Bankruptcy?, 55 VAND. L. REV. 1845, 1847 (2002) (“This rise of Delaware bankruptcy venue, or Delawarization of bankruptcy, has drawn widespread criticism of the current bankruptcy venue provision . . . .”).


182. See Bobby Guy, Choosing a Venue in Chapter 11 Cases: A Practical View, MORRISANDERSON (Jan. 18, 2011), http://www.morrisanderson.com/company-news/entry/choosing-a-venue-in-chapter-11-cases-a-practical-view/ [https://web.archive.org/web/201612220035/http://www.morrisanderson.com/company-news/entry/choosing-a-venue-in-chapter-11-cases-a-practical-view/] (“Because the DIP lender holds the cash, it generally makes the rules about where to file the case. Many are the cases that were prepared for one venue, only to be changed at the last minute to accommodate a newfound DIP lender’s demands.”); Cieri, Fitzgerald & Miller, supra note 181, at 526 (noting that DIP Lenders “are absolutely adamant about where they want a case filed”).

183. Bankruptcy Survival, supra note 129, at 1003 (“DIP lenders may be requiring some borrowers to shop to Delaware or New York as a condition of the loan.”); Baird & Rasmussen, Private Debt and the Missing Lever, supra note 125, at 1240–41 (noting that the DIP lender “has considerable
2. Management

DIP lenders will also require the debtors in possession to hire certain executives or advisers. In particular, a DIP lender may require the debtor in possession to hire a CRO. And if the debtor in possession replaces that CRO, it will be in default on the DIP loan. A DIP lender’s control on management can even extend beyond the executive suites and into the boardroom; the DIP loan may stipulate that if the majority of the board changes, then the debtor in possession is in default on the loan.

3. Contracts and Leases

Section 365 of the Bankruptcy Code permits debtors in possession, subject to court approval, to assume or reject executory contracts and unexpired leases. These contracts and leases can greatly impact a debtor in possession’s business. The decision to assume or reject thus is a significant decision that the debtor in possession should control.
But DIP lenders are often inserting themselves into the decision-making process.\footnote{191} As a condition of the DIP loan, the lender will often require the debtor in possession to assume or reject certain contracts or leases.\footnote{192} Failure to consult with the DIP lender about assuming or rejecting a contract or lease is often classified as an event of default, accelerating the balance of the DIP loan.\footnote{193}

4. Asset Sales

DIP lenders will also require the debtor to quickly sell certain (or all) assets—primarily, the lenders’ collateral—pursuant to § 363.\footnote{194} DIP lenders worry that the collateral’s value will diminish as the bankruptcy proceeds, so they seek to maximize the value as quickly as possible.\footnote{195}

\footnote{190} See id. at 41 (explaining why creditors may want to act in ways that undermine Chapter 11’s policy of maximizing the value of the debtor’s business).

\footnote{191} See id. at 36 (explaining how a DIP lender has the leverage to control a debtor’s contractual decision-making).

\footnote{192} See id. (“Because of its leverage, a DIP lender may have the power to decide which contracts—with suppliers, vendors, dealers, etc.—it wishes the estate to assume and which contracts it wishes the estate to reject.”).

\footnote{193} E.g., In re Wet Seal, Inc., No. 15-10081-CSS, 2015 WL 1372974, at *11 (Bankr. D. Del. Feb. 5, 2015) (explaining that the DIP financing agreement provided that it is an event of default if “the Debtors assume, reject, or assign any executory contract or unexpired lease without the prior consultation with the DIP Lender”); In re MSR Resort Golf Course LLC, No. 11-10372, 2011 WL 2752261, at ¶ 12 (Bankr. D. Del. 2011) (explaining that it is an event of default if the debtors “assume, reject or assign any material executory contract or lease without consulting in advance and in good faith with the DIP Agent”).

\footnote{194} Kirshner, supra note 15, at 538 (“Increasingly, secured creditors have used the control that they have appropriated through the terms of DIP loans to push bankrupt companies into asset sales under Section 363 of the U.S. Bankruptcy Code.”). Kenneth N. Klee and Richard Levin likewise note:

To avoid the risk of diminution in value of their collateral, secured lenders frequently prefer quick sales of substantially all of the debtor’s assets to a prolonged chapter 11 case. Financing Orders increasingly contain deadlines for debtors to conduct section 363 sales of substantially all of their assets, often within a few weeks after the filing of a chapter 11 case.

\footnote{195} Klee & Levin, supra note 194.
But while a quick § 363 sale may benefit the lender, it may hurt the estate for at least three reasons. One, it may lower the possibility of a successful reorganization because the business could have used the lender’s collateral to generate cash flows and improve the plan’s feasibility. The debtor likely needs the lender’s collateral to execute its business plan. But if the debtor is forced to sell those assets, it becomes much harder to operate the business and successfully reorganize.

Two, particularly when the lender is the expected buyer, a quick § 363 sale may discourage competitive bidding by imposing short deadlines that do not give other potential buyers an opportunity to conduct diligence. By discouraging bidding, the lender is lowering the sale price of the assets, and thus, reducing the proceeds other creditors will receive.

And three, a quick § 363 sale circumvents a major policy of the Bankruptcy Code. The Bankruptcy Code gives a debtor breathing room to reorganize as the automatic stay prevents creditors from racing to collect on their claims. But these asset sales encourage creditors to act swiftly and in their own self-interests, instead of giving the debtor an opportunity to reorganize.

196. Id. (“Such forced asset sales may preclude a debtor from formulating alternative business plans.”).
197. Warren, REORGANIZING AMERICAN BUSINESSES, supra note 2, at 68–69.
198. Klee & Levin, supra note 194.
199. Kirshner, supra note 15, at 552 (“Without time or access to gather information to improve the accuracy of their offers, [other potential buyers] underbid the DIP lender or refrain from bidding at all.”); Klee & Levin, supra note 194 (“The estate may also receive lower values from such sales than if the debtor had more time to solicit bids or prospective purchasers had more time to conduct due diligence.”).
200. See Kirshner, supra note 15, at 538, 552 (explaining how DIP lenders strategically manipulate the asset sales process to maximize recovery for themselves at the expense of the DIP’s other creditors).
201. See id. at 538 (“In doing so, they have undermined the cooperative nature of the bankruptcy law and reintroduced the race for assets among creditors. Obstructing the traditional Chapter 11 process has guaranteed their own recoveries but decreased returns to other creditors.”).
202. As the Supreme Court has observed:

Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter ‘the race of diligence’ of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section—that of equality of distribution.

5. Plan of Reorganization

For a debtor in possession to emerge from Chapter 11, the court must approve a plan of reorganization. This plan is a new contract between the debtor in possession and its creditors. The plan dictates, among other things, how and when the debtor will repay its creditors. The Bankruptcy Code gives the debtor in possession an exclusive period of 120 days after its petition to file a proposed plan. The claimholders and shareholders must then accept the plan within 180 days of the petition. The court can extend or shorten either deadline for cause. If either deadline lapses, then any party in interest may file its own proposed plan.

Getting a favorable reorganization plan proposed and accepted is arguably the most important work the debtor in possession will undertake during bankruptcy. If the plan is accepted, then the company lives to see another quarter. If no plan is accepted or feasible, however, then the court will dismiss the proceeding or convert it to Chapter 7, where the company liquidates and ceases operations.

Because the reorganization plan is so important, it should come as no surprise that the DIP lender will control the plan in two major ways: timing

203. 11 U.S.C. § 1141(c) (2012); see, e.g., Press Release, Cenveo, Court Confirms Cenveo’s Plan of Reorganization (Aug. 16, 2018) [hereinafter Press Release, Cenveo], http://cenveo.investorroom.com/2018-08-16-Court-Confirms-Cenveos-Plan-of-Reorganization (discussing how the court’s approval of the company’s reorganization plan will allow it to emerge from bankruptcy).

204. See In re MPF Holdings US LLC, 701 F.3d 449, 457 (5th Cir. 2012) (“[C]ourts regularly apply principles of contract interpretation to clarify the meaning of the language in reorganization plans.”); Hillis Motors, Inc. v. Haw. Auto. Dealers’ Ass’n, 997 F.2d 581, 588 (9th Cir. 1993) (“A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract.”).


206. Id. § 1121(b).

207. Id. § 1121(c)(3). While § 1129(a)(8) states that each class of impaired claims or equity interests must accept the plan, § 1129(b) allows the court to confirm a plan despite a class’s rejection. Compare 11 U.S.C. §§ 1129(a) & (a)(8) (“The court shall confirm a plan only if . . . . With respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan.”), with id. § 1129(b)(1) (allowing approval of the plan if all parts of subsection (a) are met, excluding paragraph 8). Such confirmation—over a rejection—is often referred to as a “cramdown.” See generally Bruce A. Markell, Fair Equivalents and Market Prices: Bankruptcy Cramdown Interest Rates, 33 EMORY BANKR. DEVS. J. 91, 93 (2016) (“Cramdown in the historic sense consists of confirmation over the dissent of an entire class.”).


209. Id. § 1121(c)(2)–(3).

210. See, e.g., Press Release, Cenveo, supra note 203 (“The terms of the Plan will enable the Company to exit Chapter 11 with a substantially deleveraged balance sheet and increased liquidity, allowing the Company to focus on its operations and grow its businesses.”).

211. 11 U.S.C. §§ 704(a)(1), 1112(b).
and substance. The lender will often shorten the proposal and acceptance deadlines to the detriment of the debtor in possession. With these shortened periods, the debtor in possession has less time to negotiate with its creditors. If the debtor in possession cannot propose a plan or get it accepted by the new lender-imposed deadline, then creditors (such as the DIP lender) may propose their own plans. These plans would likely be less favorable to the debtor in possession.

Further, even if the debtor in possession can file a proposed plan within its exclusivity period, the DIP lender will likely control the contents of the plan. The lender may condition its funding on the court’s approval of a plan that the lender endorses.

In sum, DIP lenders are suffocating debtors in possession and stifling their reorganizations. They are influencing which forum the reorganization should occur in and which executives the business should retain. They have the power to assume or reject certain contracts and leases. They are demanding asset sales that benefit themselves, but hurt the rest of the estate. And last, but certainly not least, they are controlling the timing and substance of debtors’ reorganization plans.

The above provisions make you wonder who is actually in charge during the bankruptcy proceeding. A theoretical understanding of the Bankruptcy Code would suggest that the debtor is in control. But a practical

212. See Baird & Rasmussen, Private Debt and the Missing Lever, supra note 125 (“The DIP financer can control both how long the debtor takes to form a plan and the form the plan ultimately takes.”).
213. Id.; e.g., In re Yellowstone Mountain Club, LLC, No. 08-61570-11, 2008 WL 5869859, at *12 (Bankr. D. Mont. Nov. 26, 2008) (requiring the debtor to file a plan within 90 days of the petition).
214. See 11 U.S.C. § 1129(c) (allowing creditors to file a plan if the debtor has not filed a plan and a trustee has been appointed).
215. See Baird & Rasmussen, Private Debt and the Missing Lever, supra note 125, at 1239–40 (highlighting the challenges debtors in possession face when creditors control the planning process).
216. See CONG. OVERSIGHT PANEL, supra note 189, at 36 (noting that the DIP lender “has the power to shape the proposed plan of reorganization”).
217. Tung, supra note 129, at 12 n.29 (“For example, it is not uncommon that a DIP loan agreement will prohibit the debtor from filing a plan not approved by the DIP lender.”).
218. See supra notes 173–76 and accompanying text (explaining that both types of DIP lenders seek control over the debtor’s business).
219. See supra notes 178–87 and accompanying text (explaining DIP lender forum-shopping practices and management control over the debtor).
220. See supra notes 191–93 and accompanying text (explaining that DIP lenders often influence a debtor’s decisions regarding contracts and leases).
221. See supra notes 194–202 and accompanying text (discussing how DIP lenders will make debtors sell assets in ways that hurt the bankruptcy estate).
222. See supra notes 212–17 and accompanying text (explaining how DIP lenders influence the reorganization planning process).
understanding of the industry proves that control has shifted greatly to the lender. What, though, caused this shift? How did we get here?

C. The Great Recession

The Great Recession—the global economic crisis during the late 2000s—greatly impacted the DIP financing industry and, more specifically, the shift in control from debtors to lenders. To explain how, this Section examines how the industry functioned: (1) before the recession, (2) during the recession, and (3) after the recession.

1. Before the Recession

Historically, DIP lenders were typically commercial banks. These lenders were not as aggressive as the current DIP lenders, primarily for two reasons. One, there was a larger market of lenders so DIP lenders had more competition and thus less leverage. If a DIP lender wanted to impose aggressive provisions that stripped control, then the debtor in possession could look elsewhere for a loan. And two, these lenders were simply interested in receiving a return on their loan. Particularly for commercial banks, their core business was lending, a low-risk activity compared to equity investments. In exchange for lending money, lenders would receive a modest return from interest and fees. Lending thus was a small risk that provided small returns, relatively speaking. The traditional lenders appreciated this low-risk, low-return model.

223. KEY DEVELOPMENTS AND TRENDS IN DIP FINANCING, supra note 9, at 2.
224. See Martin et al., supra note 177, at 1207 (noting that, before the Great Recession, DIP loans generally saw competition among lenders).
225. See Emily Chasan & Caroline Humer, Bankruptcy Financing Seen More Costly as Wave Hits, REUTERS (Jan. 12, 2009), https://www.reuters.com/article/as-restructuring-loans/bankruptcy-financing-seen-more-costly-as-wave-hits-idUSTRE50B7KJ20090113 (explaining that securing DIP financing used to be easy for debtors but the financial crisis “changed the rules of the game” by giving lenders the leverage to demand more stringent terms).
226. See FINAL REPORT, supra note 6, at 77 n.301 (explaining that, unlike before the recession, DIP lenders are now no longer satisfied with low-risk returns).
228. BAER ET AL., supra note 126, at 26.
229. Id.
230. Id. at 26 n.122.
To be clear, some DIP loan agreements contained a few aggressive provisions even before the Great Recession. But these provisions were limited in number and not as severe as agreements after the Great Recession. If a DIP lender tried to impose a large number of severely aggressive provisions, the court would likely not allow the agreement.

For example, the court in *In re Tenney Village* rejected an aggressive DIP loan because the loan would have given the lender “numerous rights concerning the Debtor’s operations and the Chapter 11 reorganization.” Such rights provided that:

- the DIP lender “must first approve all specifications for the planned improvements”;
- the DIP lender’s consultant must directly supervise the debtor in possession’s operations and has the “authority to stop the work at any time”;
- the debtor in possession must hire a new lender-approved CEO and cannot fire that CEO without the DIP lender’s consent;
- the debtor in possession must obtain the DIP lender’s approval of its marketing plan and must hire a marketing firm the lender approves;
- the debtor in possession must list the sales price for its condominium units above the minimum threshold the DIP lender establishes; and
- the DIP lender must approve of the debtor in possession’s reorganization plan.

The court rejected the agreement because the agreement circumvented the public policy of reorganization under bankruptcy law. Had the
agreement been approved, the lender “would in effect [have] operate[d] the Debtor’s business.”

242 The debtor should have, and could have, looked for less aggressive lenders.

2. During the Recession

But then the Great Recession began and turned the DIP lending industry on its head. The credit market tightened. 243 All lenders, not just DIP lenders, stopped making loans. 244 One large DIP lender, Lehman Brothers, collapsed and filed for its own bankruptcy. 245 The Lehman Brothers bankruptcy, with over $600 billion in assets, remains the largest bankruptcy filing in U.S. history and is nearly double the next largest (Washington Mutual at $328 billion). 246 The fall of Lehman Brothers sent cautionary shockwaves to other lenders. 247

Because the market was now barren of lenders, debtors in possession had even less leverage to negotiate with. 248 Supply was low; demand was high. This gave DIP lenders the power and leverage to negotiate for aggressive provisions and exert control over the debtors. 249

In re Yellowstone Mountain Club, LLC highlights this substantial shift of control. 250 Yellowstone combines many of the provisions discussed in


242. Id.
244. Id.
247. John Garvey, head of the U.S. financial services practice at PricewaterhouseCoopers, explained that the Lehman bankruptcy “shook market confidence to its core and caused people to believe the whole system could blow up.” Shell, supra note 243.
248. See, e.g., Tung, supra note 129, at 6 (“When credit is plentiful and lenders must compete to make loans, borrowers enjoy more bargaining power to minimize constraints. The opposite is true when credit is scarce.”).
249. Recall the quote at the beginning of this Part. See supra note 123 and accompanying text (providing that Harvey Miller, in a speech at International Institute of Insolvency, articulated that DIP lenders began using “their economic leverage . . . to exert substantial control over the debtor and the chapter 11 case”). Miller’s speech was in 2007, the beginning of the Great Recession. Id.
Part II.251 Most noteworthy, the Yellowstone provisions are similar to the pre-recession Tenney provisions.252 But whereas the Tenney court denied the DIP loan agreement,253 the Yellowstone court approved the financing.254 In Yellowstone, the DIP lender used its economic leverage to negotiate aggressive provisions that stripped the debtor in possession of its control.255 Such provisions included:

- the debtor in possession must satisfy certain benchmarks, such as collecting dues from at least 80% of club members;256
- the debtor in possession must file a proposed reorganization plan within roughly three months of the petition date257 (as opposed to the four months provided by the Bankruptcy Code);258
- the DIP lender must approve of the proposed reorganization plan;259
- the debtor in possession must continue to employ its property manager;260
- the debtor in possession must agree with the DIP lender on a budget;261
- the DIP lender must approve all sales of material assets and related bidding procedures.262

Despite these aggressive provisions, the court approved the financing order because failure to do so would have caused “immediate and irreparable harm to the bankruptcy estates.”263 The court reasoned that the debtors were “unable, despite tremendous effort, to obtain any [other] feasible operating credit . . . that would [have] prevent[ed] the Debtors from closing their doors, either now or in the near future.”264

251. See supra Part II.B (explaining provisions DIP lenders use to exert authority over debtor’s business).
255. Id. at *9.
256. Id. at *11.
257. Id. at *12.
260. Id.
261. Id. at *13.
262. Id. at *16.
263. Id. at *8.
264. Id. at *4.
Thus, and as was common with many DIP financing motions during the Great Recession, the court had its hands tied—which is better, a bad DIP loan or no DIP loan at all? Courts during the Great Recession increasingly answered with the former, approving DIP loans that they otherwise would have considered too aggressive.

On a micro level, the courts may have been right. A bad DIP loan still gives the debtor an opportunity to restructure, whereas the debtor is not afforded that opportunity with no DIP loan. On a macro level, however, by approving bad DIP loans, the courts may have created a standard that prevailed even after the recession.

3. After the Recession

Even after the economy rebounded and the country exited the Great Recession, DIP lenders have continued to impose controlling provisions on debtors in possession. And judges have continued to approve aggressive financing agreements because there are no better alternatives.

Why, though, are there no alternatives? With more credit available in the markets, there should be more competition among lenders. And with

265. See Tung, supra note 129, at 30 (noting how courts became accustomed to “extraordinary provisions such as roll-ups and milestones” during the Great Recession and subsequent years).

266. Id.

267. See id. at 3 (“Individual judges deciding whether to approve extraordinary provisions face a difficult decision . . . . Judges worry that, if the proposed DIP loan is the only one on offer—as debtors and their prospective DIP lenders typically profess—rejection of the DIP loan would spell doom for the debtor.”); see also, e.g., Jamie Santo, Bankrupt Reichhold Gets Grudging Approval For $94M DIP, LAW360 (Oct. 2, 2014), https://www.law360.com/articles/583673/bankrupt-reichhold-gets-grudging-approval-for-94m-dip (discussing how a judge authorized harsh DIP loan terms because she thought the debtor had no better alternative).

268. KEY DEVELOPMENTS AND TRENDS IN DIP FINANCING, supra note 9, at 1 (“[O]verall bargaining power still weighs generally in favor of DIP lenders. This has . . . result[ed] in more DIP lender control over the debtor and the Chapter 11 process.”); Leake, supra note 125 (arguing that DIP financing needs to be “more readily available on terms that support a more predictable and orderly Chapter 11 process that maximizes [the] value of the enterprise”); FINAL REPORT, supra note 6, at 77 n.301 (“Regardless of where the debtor gets its DIP financing, the game has dramatically changed . . . . [Lenders often] take control of the debtor, through covenants, deadlines, and default provisions. And these are no mere financial tests to ensure the safety of the lender’s repayment.” (quoting Coleman, supra note 125, at 11)); Neff, supra note 125 (“[T]he balance of power [has] shift[ed] substantially away from debtors . . . . [T]he changes . . . have greatly restricted debtors’ abilities to reorganize.”).

269. In 2014, a Delaware bankruptcy judge approved a DIP agreement even though the judge was concerned that the agreement would chill bidding for the debtor’s § 363 sale. Santo, supra note 267 (quoting Judge Walrath as explaining: “I will reluctantly approve it because I don’t think the debtor has any alternative”).

more competition, lenders would have less leverage to impose such controlling provisions.\textsuperscript{271} Why then is there still a problem? I suggest two reasons.

One, there may not be substantially more competition among DIP lenders. Traditional lenders may be hesitant to re-enter the market, and new lenders may be hesitant to enter the market for the first time. Although the Bankruptcy Code protects DIP lenders with high priority, it still feels risky and counter-intuitive to lend money to bankrupt companies, particularly in light of the Great Recession.\textsuperscript{272} Lenders may be more cautious with their money, fearfully anticipating another recession.\textsuperscript{273}

Two, there may be more competition among DIP lenders, but practices during the Great Recession established a standard, and courts have not reversed that standard even though the circumstances have changed.\textsuperscript{274}

Judge Gerber, while approving an aggressive DIP loan during the Great Recession, explicitly cautioned against this possibility. He warned that aggressive DIP loans, necessary during an economic crisis, should not become precedent and commonplace during a healthier economy:

\begin{quote}
I assume, or at least hope that economic conditions in this country, including freeze-ups of the lending markets and the very limited present availability of credit will ultimately improve. What I’m of a mind to recognize and respect now in the way of economic reality will be trumped by the facts on the ground with respect to economic conditions at the time of the next financing I’m asked to approve. And people should be wary of using this case as a precedent in the next one that comes down the road,
\end{quote}

\begin{small}
\textsuperscript{271} See, e.g., Tung, supra note 129, at 6 (“When credit is plentiful and lenders must compete to make loans, borrowers enjoy more bargaining power to minimize constraints. The opposite is true when credit is scarce.”).

\textsuperscript{272} See id. at 30 (“DIP financing is crucial for many debtors, but lenders may understandably be hesitant to lend to firms in severe financial distress.”).


\textsuperscript{274} Tung, supra note 129, at 30 (“It could be that extraordinary provisions such as roll-ups and milestones are here to stay. Judges and lawyers, the repeat players in bankruptcy, may have acclimated to a new status quo . . . ”); Rosner, supra note 125, at 16 (“By many accounts, extraordinary DIP financing terms became customary after 2009 even when financing was readily accessible. The Loan Syndication and Trading Association acknowledged that ‘to be sure, the terms of DIP loans are customized to the bankruptcy process.’” (footnotes omitted) (quoting Elliot Ganz & Allison Hester-Haddad, \textit{DIP Loans: A Common-Sense Assessment of “Extraordinary Provisions,”} \textit{SECURED LENDER}, Oct. 2013, at 32, 34)).
\end{small}
especially if that’s the case after the liquidity markets have loosened up.275

Though prudent, Judge Gerber’s advice may not have been followed.276 As Professor Tung succinctly put it, “what was once extraordinary may have become commonplace.”277 For whatever reason, DIP financing is still a problem, despite the post-recession economy.

One proposed solution is that courts should simply stop approving these aggressive DIP loans.278 But when the court is presented with only one option, and the debtor in possession claims it cannot find financing elsewhere, the court has its hands tied.279 If the court rejects the loan, the debtor in possession will likely be unable to operate and the reorganization will fail.280 Alternatively, the court can approve the loan, as it has often done.281 The debtor in possession may lose substantial control rights, but at least there is a chance that the reorganization will still succeed.

Another proposed solution is to amend the Bankruptcy Code. In 2014, the Wall Street Journal asked Paul Leake, then-head of Jones Day’s bankruptcy group and now head of Skadden’s same group,282 the one change he would like to make to the Bankruptcy Code.283 Leake commented that there “needs [to be] changes to ensure that funding is more readily available on terms that support a more predictable and orderly Chapter 11 process that maximizes [the] value of the enterprise.”284 While

276. See Tung, supra note 129, at 30 ("It could be that extraordinary provisions such as roll-ups and milestones are here to stay.").
277. Id.
278. See FINAL REPORT, supra note 6, at 80 ("A court should not approve permissible extraordinary financing provisions in connection with any proposed postpetition financing under section 364 in any interim order. In this context, ‘permissible extraordinary financing provisions’ include: (i) milestones, benchmarks, or other provisions that require the trustee to perform certain tasks or satisfy certain conditions . . . .").
279. See, e.g., Santo, supra note 267 (explaining why one judge reluctantly approved aggressive loan provisions after a financial advisor testified the debtor had no other options).
280. See Tung, supra note 129, at 3 ("[R]ejection of the DIP loan would spell doom for the debtor.").
281. See id. ("[J]udges quite understandably hesitate to reject DIP loans under these circumstances, and instead reluctantly approve the arrangements on the view that the terms were necessary to induce critical lending.").
283. Leake, supra note 125.
284. Id.
changing the Bankruptcy Code is a viable solution, it may not be the most
efficient.\footnote{Leake admitted that “[t]here is no one change that could
accomplish this objective.”}\footnote{Id.}

Instead of relying on judicial action or legislative changes to the
Bankruptcy Code, I propose an alternative solution—one that could be
implemented quickly in practice: a government guaranty program. Even if
lenders are not exerting substantial control once this Article is published,
this Article remains important. The government can implement this
proposal during the next economic downturn—when lenders inevitably
look to regain control.\footnote{Id.}

To be clear, there is nothing inherently wrong with lenders seeking to
exert control over the bankruptcy process. Indeed, it is probably prudent for
lenders to act accordingly when their collateral is deteriorating and the
debtor is struggling.\footnote{Id.} The lenders have every right—and incentive—to
exert as much control as possible.\footnote{Id.}

But the lenders’ actions are at odds with the fundamental bankruptcy
theory that the debtor—and not the lender—should control the
reorganization.\footnote{See Harvey R. Miller, Chapter 11 in Transition: From
Boom to Bust and Into the Future, 81 AM. BANKR. L.J. 375, 390 (2007) (lamenting that
creditors effectively neuter “the debtor-in-possession, who is supposed to serve as an
independent fiduciary” through controlling loan terms).} And if the government has any interest in protecting the
policies of its Bankruptcy Code, then the government should intervene.

\section*{III. A Solution: Government Guaranties}

“I think the U.S. government should guarantee DIPs . . . . That would sort
of open up the market.”

\begin{flushright}
– Arthur Newman, then Co-head of Restructuring, Blackstone Group (2009)
\end{flushright}

\footnote{See supra Part II.B.2 (explaining how lenders exerted aggressive control over debtors in
possession during the Great Recession).}

\footnote{See BAER ET AL., supra note 126, at 39 (explaining that lenders exert control over the
bankruptcy process so that they can have “an escape route in the event that the borrower’s business
falters”).}

\footnote{Id.}

\footnote{See Caroline Humer & Emily Chasan, Blackstone Exec Says US Govt Should Back DIP Loans,
REUTERS (Feb. 6, 2009), http://www.reuters.com/article/blackstone-idUSN0646643920090206.}
Newman’s proposed solution was never implemented; the government never established a program to guarantee DIP loans.\textsuperscript{292} Further, the proposal received little consideration in academic literature.\textsuperscript{293}

The suggestion was primarily intended for the credit squeeze during the Great Recession.\textsuperscript{294} But nearly a decade later, despite a healthier economy, the DIP credit market remains thin, and DIP lending remains problematic.\textsuperscript{295} As discussed in the first two Parts of this Article, DIP lending has subverted one of the fundamental theories in corporate reorganizations—the debtor’s control over its business.\textsuperscript{296}

This Part considers how government guaranties would solve the current problems of DIP lending. Specifically, Section A provides ten elements of a framework that the government could implement to guarantee DIP loans, and Section B describes how such a framework would provide political, economic, and social benefits.

\textit{A. A Framework for Government Guaranties}

If the government (as it should) implements a DIP guaranty program,\textsuperscript{297} it should mirror the program after the government’s SBA Loan


\textsuperscript{293} There is no mention of this proposal in academic journals beyond a brief discussion in a student note. See Martin et al., supra note 177, at 1222–24 (discussing the arguments for and against government guarantees in brief before concluding that the government would be the “lender of last resort”).

\textsuperscript{294} Humer & Chasan, supra note 291 (noting that DIP financing “has been difficult for companies to find since the global credit crisis has caused lenders to pull back on all types of loans”).

\textsuperscript{295} See supra Parts II.C.2–3 (detailing the stages of the Great Recession and the remaining provisions from that time).

\textsuperscript{296} See supra Parts I, II (discussing how Bankruptcy Code provisions are designed to benefit the debtor but, in practice, the DIP lender asserts much authority over the business).

\textsuperscript{297} Just recently, Professor Melissa Jacoby proposed a “Sunlight Fund”—a non-profit enterprise that would work “to advance the goals of corporate bankruptcy by providing an alternative and competing source of capital for businesses in bankruptcy.” Jacoby, supra note 125, at 1743. Though she does not give details on how, Jacoby proposes that, among other actions, the Sunlight Fund “could reduce the leverage of pre-petition lenders to condition DIP lending on refraining from estate- and transparency-promoting activities, including certain causes of action.” Id. A government guaranty program would be an ideal method to do so.
Through its SBA Loan Program, the federal government guarantees loans that partner banks make to qualifying small businesses. Because these SBA loan guaranties protect the lenders, the loan agreements can be more favorable for borrowers as they try to grow their businesses.

The same theory applies here. Because government guaranties would protect the DIP lenders, loan agreements can be more favorable for debtors in possession as they try to reorganize. The rest of this Section lays out ten elements of a potential framework for the government to implement.

1. Eligibility

Like with the SBA Loan Program, certain debtors would not be eligible for guaranties. Examples include:

- life insurance companies,
- businesses engaged in pyramid sale distribution plans,
- businesses deriving more than one-third of gross annual revenue from legal gambling activities,
- businesses engaged in illegal activity,
- private clubs or businesses that limit membership for reasons other than capacity,
- government-owned entities, and
- businesses that primarily engage in political or lobbying activities.

298. See Martin et al., supra note 177, at 1223 (mentioning the SBA model but not providing any details on how a similar DIP program would function).
299. Terms, Conditions, and Eligibility, U.S. SMALL BUS. ADMIN., https://www.sba.gov/partners/lenders/7a-loan-program/terms-conditions-eligibility (last visited Dec. 4, 2018) [hereinafter Terms, Conditions, and Eligibility].
300. Mary Norris & Dave Kaneda, Expand Your Opportunities: Get to Know the SBA Loan Programs, WELLS FARGO (May 9, 2014), https://wellsfargoworks.com/credit/video/expand-your-opportunities-get-to-know-the-sba-loan-programs (“SBA loans are a lot like conventional business loans. . . . But because SBA loans are backed by the government, they allow lenders to be more flexible about features like down payments, repayment terms, and collateral.”).
302. Id.
303. Id.
304. Id.
305. Id.
306. Id.
307. Id.
308. Id.
2. Guaranty Limit

In the SBA Loan Program, the government only guarantees up to 85% for small loans and up to 75% for bigger loans.\textsuperscript{309} In a similar fashion, the government should only guarantee up to 80% of DIP loans. By not guaranteeing the full amount, the government keeps the lender on the hook and prevents the lender from making careless loans.\textsuperscript{310}

3. Guaranty Fee

In the SBA Loan Program, the government charges a guaranty fee ranging from 2% to 3.75% depending on the size of the guaranty.\textsuperscript{311} Because DIP loans are safer than SBA loans, DIP guaranty fees should be lower.\textsuperscript{312} I propose the following guaranty fees, at least as a baseline that the government could raise (or lower) if it wished to do so.

<table>
<thead>
<tr>
<th>Guaranty Amount</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0 – $99 million</td>
<td>2.00 %</td>
</tr>
<tr>
<td>$100 – $499 million</td>
<td>2.50 %</td>
</tr>
<tr>
<td>$500 million plus</td>
<td>3.00 %</td>
</tr>
</tbody>
</table>

As long as the fee is larger than 0.5% (the estimated risk of default for DIP loans\textsuperscript{313}), the government will earn an expected profit on the loan.\textsuperscript{314} By ranging the fees from 2% to 3%, the government earns an additional

\textsuperscript{309} Types of 7(a) Loans, U.S. SMALL BUS. ADMIN., https://www.sba.gov/partners/lenders/7a-loan-program/types-7a-loans (last visited Dec. 4, 2018) (explaining that the SBA guarantees as much as “85% for loans up to $150,000 and 75% for loans greater than $150,000”).

\textsuperscript{310} See Kuniyoshi Saito, Do Credit Guarantees Encourage Moral Hazard?, WORLD ECON. F. (Nov. 14, 2014), https://www.weforum.org/agenda/2014/11/do-credit-guarantees-encourage-moral-hazard/ (reporting empirical findings that indicate lenders make fewer risky loans when government guarantees cover only 80% rather than 100% of the loan).

\textsuperscript{311} Terms, Conditions, and Eligibility, supra note 299.

\textsuperscript{312} Whereas SBA loans have an estimated 10% default rate, DIP loans have an estimated 0.5% default rate. Emily Maliby, Small Biz Loan Failure Rate Hits 12%, CNN MONEY (Feb. 25, 2009), http://money.cnn.com/2009/02/25/smallbusiness/smallbiz_loan_defaults_soor.smb/; \textsc{William Fahy}, \textsc{Moody’s Global Corp. Fin.}, \textsc{Moody’s Comments on Debtor-In-Possession Lending} 4 (Oct. 2008), https://www.moodys.com/sites/products/DefaultResearch/2007300000539803.pdf (using data to suggest “a default probability of about 0.5%” for DIP loans).

\textsuperscript{313} Fahy, supra note 312.

\textsuperscript{314} See Farid Tayari, Expected Value Analysis, PENN ST. C. OF EARTH & MIN. SCI., https://www.e-education.psu.edu/eme460/node/730 (last visited Dec. 4, 2018) (defining expected profit as “the probability of receiving a certain profit times the profit”).
return (everything over 0.5%) to compensate for the overhead (time and resources) necessary for the program.\textsuperscript{315}

The fee structure would also protect the government against any fluctuations of the DIP default rate.\textsuperscript{316} A guaranty program could lower the default rate because interest rates would be lower,\textsuperscript{317} maturities would be longer,\textsuperscript{318} and non-financial defaults would be less likely because the debtors in possession would not have to adhere to strict conditions.\textsuperscript{319} If the default rate on DIP loans decreased, the government would earn an even larger expected return.

Alternatively, a guaranty program could increase the default rate because lenders may start making careless loans.\textsuperscript{320} Lenders would have less control over the debtors, potentially allowing the debtors to be more reckless with the loan proceeds.\textsuperscript{321} Yet even if the default rate on DIP loans quadruples from 0.5% to 2%, the government would still earn a profit on its guarantees because of the proposed fee schedule ranging from 2% to 3%.\textsuperscript{322}

4. Partnership

The government should partner with banks and other lenders, just like it does in the SBA Loan Program.\textsuperscript{323} To obtain an SBA loan, a small

\begin{footnotesize}
\begin{enumerate}
\item See id. (explaining that, on average, repeated investments with a given level of risk will produce a net gain).
\item Norris & Kaneda, \textit{supra} note 300.
\item See Fahy, \textit{supra} note 312, at 6–7 (discussing how DIP loans that mature before a debtor reorganizes increase default risk).
\item See infra text accompanying notes 364–69 (explaining how only loans without aggressive terms would qualify for a guaranty).
\item Cf. Chris Hurn, \textit{Careless SBA Lending Tells Same Old Story}, HUFFINGTON POST (June 30, 2015), https://www.huffingtonpost.com/chris-hurn/careless-sba-lending-tell_b_7689892.html (opining that the SBA’s practice of encouraging “small business lenders to offer government guaranteed 7(a) loans in ever-larger amounts with yet smaller collateral contributions from borrowers” amounts to “irrational exuberance”).
\item Cf. id. (differentiating between using loan proceeds “for business acquisitions, partner buyouts, working capital loans, and so forth,” and “fixed assets like commercial property and heavy equipment,” insinuating that the former are proper places to spend loan proceeds, and the latter are not).
\item See Tayari, \textit{supra} note 314 (explaining why, averaged over a large number of investments, an investor will earn an overall profit so long as expected profits exceed expected costs).
\item Brendan Kiernan, \textit{SBA 7(a) Loan Program: An Overview}, MIRUS CAP. ADVISORS, (Apr. 16, 2010), http://merger.com/sba-7a-loan-program-an-overview/.
\end{enumerate}
\end{footnotesize}
business applies for the loan from a lender that has partnered with the government. The lender then applies to the government for its guaranty, declaring that it will only make the loan if it obtains a guaranty.

In a similar fashion, a debtor in possession would apply for a DIP loan from a DIP lender that has partnered with the government. A list of potential partners include: Wells Fargo, JPMorgan, Bank of America, PNC Bank, and U.S. Bank. Each of those lenders are SBA partners and thus are familiar with the guaranty process. The DIP lender, in turn, would apply to the government for its guaranty.

DIP lenders, like SBA lenders, that wish to partner with the government must meet the following four requirements:

[H]ave a continuing ability to evaluate, process, close, disburse, service and liquidate small business loans; be open to the public for the making of such loans (and not be a financing subsidiary, engaged primarily in financing the operations of an affiliate); have continuing good character and reputation; and be supervised and examined by a state or federal regulatory authority, satisfactory to SBA.

If a partner DIP lender becomes reckless in its underwriting, then the lender could face civil liability, criminal liability, or both.

324. Id.
325. Id. (“When a lending partner applies to SBA for a guaranty on a proposed loan, it must certify that it would only make the loan if SBA guarantees it.” (emphasis omitted)).
327. Id.
5. Disclosure

When a debtor in possession asks the court to approve a DIP loan, the debtor in possession must summarize all material and essential terms of the loan agreement. This procedural rule saves the court time and effort because it does not have to comb through hundreds of pages of a DIP loan agreement and prevents the DIP lender or debtor in possession from hiding material provisions that could hurt the estate.

In a similar fashion, if a DIP lender is seeking a government guaranty, the government should require the DIP lender to disclose the material and essential terms of the agreement. The government would require the DIP lender in its application for a guaranty to disclose, either in a summary or a list, the following terms: interest rate, maturity, priority, liens, and any material covenants and conditions. This system would prevent the government from wasting time and resources identifying such provisions in the agreement. Misrepresenting such disclosures would result in a penalty (e.g., a fine, a civil fraud lawsuit, a criminal fraud lawsuit, or some combination thereof).

6. Maturity

The DIP loan must have a maturity date of at least 9 months, but preferably at least 12 months. In the SBA Loan Program, the government will guarantee shorter loans for small businesses. But shorter loans, such as loans with maturities of less than six months, are problematic for a debtor in possession because the short maturity does not give the debtor sufficient

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330. Fed. R. Bankr. P. 4001(c)(1)(B). Federal Rule of Bankruptcy Procedure 4001(c) specifically provides:

The motion shall...begin with a concise statement of the relief requested...that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions.

Id.

331. See H.R. Rep. No. 95-595, at 409 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6365 (clarifying that the depth of disclosures required depend on a balance of practical measures such as the “cost of preparation” and the speed of plan confirmation).

332. See Zumbro, supra note 125, at 14 (explaining why DIP loan terms of less than one year are unduly detrimental to debtors).
time to reorganize. As a result, courts are starting to push for DIP loans to be closer to 12 months. The government should require likewise.

7. Interest Rate

Prior to the Great Recession, DIP loans typically had an interest rate about 2–4% above LIBOR. During the Great Recession, DIP loans became more expensive; rates ranged from 6% to 10% above LIBOR, with some of the most expensive loans priced at 12% above LIBOR. Recall the earlier 2008 Yellowstone case. In addition to exerting substantial control over the debtor through aggressive provisions, the DIP lender received interest 12% above LIBOR.

Pricing now, in a post-recession economy, has seemed to improve somewhat. Rates now appear to range from 4% to 7% above LIBOR.

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[333] See id. (“The recent trend is for maturities of one year or less. These shorter-maturity DIP facilities may not provide the debtor company with enough time to reorganize and emerge from bankruptcy.”); Alarna Carlsson-Sweeny, DIP Financing: A Rough Road to Recovery, PRAC. L., July 28, 2009, THOMSON REUTERS, Doc. No. 2-386-7115, http://us.practicallaw.com/2-386-7115 (quoting a bankruptcy partner who said that “[e]xcessively short loan maturities tie up the debtor in worrying about securing more DIP financing when it should be concentrating on how to reorganize and exit bankruptcy”).

[334] Carlsson-Sweeny, supra note 333 (quoting a bankruptcy partner who said that “judges are starting to push for loans around the 12-month mark”).

[335] KEY DEVELOPMENTS AND TRENDS IN DIP FINANCING, supra note 9, at 1 (“Interest rates on DIP loans historically were about 200 to 400 basis points above LIBOR.”); see also Chad Langager, What is a Basis Point (BPS)?, INVESTOPEDIA (Dec. 15, 2017), https://www.investopedia.com/ask/answers/what-basis-point-bps/ (explaining that 100 basis points equal 1%).

[336] KEY DEVELOPMENTS AND TRENDS IN DIP FINANCING, supra note 9, at 1 (“However, in 2008 and 2009, pricing increased to the range of 600 to 1000 basis points or more above LIBOR. At the peak of the credit crunch, some DIP loans were priced at 1200 basis points above LIBOR.”); see also Tina Peng, $400M DIP Financing Approval for General Growth, LAW360 (May 14, 2009), https://www.law360.com/articles/101569/400m-dip-financing-approved-for-general-growth (noting that General Growth’s lenders set the interest rate on its 2009 DIP loan at one month LIBOR plus 1,200 basis points).


[339] KEY DEVELOPMENTS AND TRENDS IN DIP FINANCING, supra note 9, at 1 (“Rates are now well off their 2009 peak . . . .”)

[340] Id. (noting that rates are now “averaging LIBOR plus 675 basis points for term facilities”); see also, e.g., U.S. SEC. & EXCH. COMM’N, CURRENT REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934: VANGUARD NAT’L RES. LLC (2017), https://www.sec.gov/Archives/edgar/data/1384072/0001384072170000035/form8-k020217.htm (explaining that the interest rate on the DIP credit agreement was set at the LIBOR rate plus 5.50%); U.S. SEC. & EXCH. COMM’N, CURRENT REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934: VANGUARD NAT’L RES. LLC (2017), https://www.sec.gov/Archives/edgar/data/1384072/0001384072170000035/form8-k020217.htm (explaining that the interest rate on the DIP credit agreement was set at the LIBOR rate plus 5.50%).
Though this range is partly better than rates during the Great Recession, the rates are still more expensive than they were prior to the recession.\textsuperscript{341} Further, these rates are similar to rates imposed on risky loans; they do not represent rates that would typically accompany safe loans with a default rate of 0.5\%.\textsuperscript{342}

To guarantee a DIP loan, the government should require that the loan’s interest rate revert back to pre-recession norms (2–4\% above LIBOR).\textsuperscript{343} The government should not mandate an interest rate; let the market compete. But the government should put a ceiling on such rates at 4\% above LIBOR—or preferably, at a comparable rate using a different benchmark since LIBOR is being phased out.\textsuperscript{344} By relating the ceiling to a benchmark rate, the government would allow the interest rate to adjust to economic conditions and market standards.\textsuperscript{345} That said, the government could allow slightly more expensive DIP loans (e.g., five points above LIBOR) in the early stages of this guaranty program if doing so would encourage new lenders to take advantage of the program. Once new lenders enter the market and the market stabilizes, the government could then implement the “LIBOR plus four” ceiling more strictly.
8. Priority

Recall that § 364 of the Bankruptcy Code grants administrative or super-administrative priority to postpetition credit. DIP lenders predominantly receive super-administrative priority for their loans. Such priority requires the DIP lender to be paid back before other administrative claimants (such as the debtor’s bankruptcy professionals and other specific creditors).

To be eligible for a government guaranty, a DIP loan should only be granted administrative priority and not super-administrative priority. DIP lenders that have a guaranteed loan should not be concerned with the order the debtor repays its lenders. Whether it is from the debtor in possession or the government, the lender will still be repaid in full—or at least up to the 80% that the government guarantees.

Only permitting administrative priority would also result in a more efficient judicial process. Recall that the court must approve the DIP loan under § 364. To grant administrative priority, the court requires a lower standard than if it was to grant super-administrative priority. Debtors in possession would spend less time and resources trying to meet this higher standard, and creditors would spend less time and resources objecting. The whole estate thus would benefit because estate resources would be saved.

346. See supra Part II.A (explaining § 364 and the three postpetition priority categories).
347. See Ayotte & Morrison, supra note 104, at 525 (finding that 95% of DIP lenders received a super-priority administrative claim).
349. See Martin et al., supra note 177, at 1222 (arguing that government guaranteed DIP loans would “drastically reduce[] the risk for banks”).
350. See supra Part III.A.2 (proposing the government should only guarantee up to 80% of DIP loans).
351. See supra Part II.A. (noting that the court has authority over ultimate approval of the DIP loan).
352. Administrative priority is the default for postpetition credit. 11 U.S.C. § 364(a)–(b); see also S. REP. NO. 95-989, at 57–58 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5843–44 (explaining that subsection (c) should only be used if subsections (a) and (b) cannot be used). Super-administrative priority, on the other hand, requires the debtor to prove that it was “unable to obtain unsecured credit” as an administrative expense. 11 U.S.C. § 364(c).
353. See supra Part II.B.5 (discussing the inefficiencies of the current Bankruptcy Code).
354. See supra Part II.B.5 (describing how the current system harms the bankruptcy estate).
9. Collateral

Recall that a majority of DIP lenders receive a priming lien on collateral that another creditor has already secured. Such priming harms the estate’s creditors, particularly the primed creditors.

To be eligible for a government guaranty, the DIP lender cannot prime any other liens. In other words, the DIP lender cannot take a security interest that is senior to another perfected security interest. Rather, the lender may take a lien on any of the debtor in possession’s unencumbered assets or may take a junior lien on any encumbered assets.

Just as with priority, not permitting priming liens would also result in a more efficient judicial process. When a lender seeks to prime a lien, the lender must prove that the prior lien is adequately protected. Proving this protection requires time and resources, and the primed creditor often objects. Thus, just as with priority, the whole estate would benefit by not permitting priming liens because this saves estate resources.

To be clear, the government should encourage the DIP lender to take all the collateral that it can get without priming other creditors. The government’s guaranty is not a substitute for collateral. An absence of available collateral, though, should not be a sufficient reason for the government to deny a lender’s guaranty request.

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355. Ayotte & Morrison, supra note 104, at 525 (finding that 65% of DIP lenders receive a priming lien).

356. See Martin et al., supra note 177, at 1213 (noting that court-granted priming liens “place DIP lenders in front of the secured creditors”).

357. See id. at 1213 n.53 (explaining that a priming lien by definition “attaches in front of prepetition secured creditors”).

358. See supra Part II.A.3 (explaining how a DIP lender can currently take a security interest that is senior to another perfected security interest); 11 U.S.C. § 364(c)(2)–(3) (authorizing non-priming liens when the trustee is unable to obtain unsecured credit).


360. See supra Part I.B.2 (noting that creditors can object before the court).

361. See supra Part III.A.8 (explaining how only permitting administrative priority would save both creditors and debtors time and resources).


363. See id. (“The SBA does not, however, decline requests to guarantee loans if the only unfavorable factor is insufficient collateral, provided the borrower offers all collateral it has available to secure the loan.”).
Perhaps most importantly, the DIP loan cannot take away important control rights from the debtor in possession. Ideally, the DIP loan should not have any of the aggressive provisions discussed earlier. The DIP lender should not: (i) direct the debtor to file in a certain venue, \(^{364}\) (ii) require the debtor to hire or fire certain management, \(^{365}\) (iii) determine which contracts and leases the debtor will assume, \(^{366}\) (iv) influence asset sales, \(^{367}\) or (v) dictate the timing or substance of the reorganization plan. \(^{368}\)

But the government may, depending on the circumstances and at its own discretion, still guarantee a loan if it has aggressive provisions, provided that the provisions are minimal and not significant. It is important that the debtor in possession maintains its control rights, as the Bankruptcy Code prescribes. \(^{369}\)

Critics will argue that this proposed solution risks taxpayers’ hard-earned money—why throw good money at bad businesses? Critics of the SBA program share similar thoughts—why lend money to a risky business if the private market would not lend to that business without a guarantee? \(^{370}\) Critics, likewise, argue that the government is losing money through the SBA program. \(^{371}\)

But such worry is unnecessary for this proposal. As discussed earlier, and though it may seem counter-intuitive, DIP loans are extremely low-risk
because of the administrative priority they receive. As a result, DIP loans have an estimated 0.5% default risk, as opposed to the much higher default risk for SBA loans. In other words, for every 200 DIP loans, only one is likely to default. For every 200 SBA loans, though, 10 to 20 of them are likely to default.

A government guaranty program thus would be of little risk to taxpayers. Under the fee schedule this Article proposed earlier, the government would likely earn enough money solely from guaranty fees to pay for any defaults. Taxpayers would pay nothing.

While the solution of guaranties seems to make sense for the government, the government is not the only party involved. For this solution to be implemented, it must make sense for the lenders and borrowers as well. Why would a lender pay the proposed guaranty fee, just so it can charge a lower interest rate and take a lower priority with less control? This solution is not necessarily for the lenders currently in the market. This solution is for other lenders who need encouragement to enter the market. Their entrance would provide competition among all DIP lenders and force the current lenders to be less aggressive.

These new lenders can also pass the guaranty fee onto the borrowers, the debtors in possession. The debtors in possession would likely have no problems paying a small fee if it meant they would remain in control of their operations and important business decisions. In the aforementioned

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372. See Lynn Adler, DIP Loans to Distressed Companies Mount with Bankruptcies, REUTERS (Apr. 28, 2016), http://www.reuters.com/article/us-diploans-mount-idUSKCN0XP2AX (quoting David Keisman, a senior vice president and default analyst at Moody’s Investors Service, who explained that “DIP[] loans are a well structured, superpriority asset class that has investment-grade characteristics in terms of loss and default performance”).

373. Fahy, supra note 312 (using data to suggest “a default probability of about 0.5%” for DIP loans).

374. SBA loans are probably about 10 to 20 times as risky as DIP loans. Compare Fahy, supra note 312 (suggesting a default probability risk as low as 0.5% for DIP loans), with Tom Steward, What Happens When an SBA-Backed Loan Goes Bad?, WATCHDOG (Mar. 30, 2015), https://www.watchdog.org/national/what-happens-when-an-sba-backed-loan-goes-bad/article_3ab1b7be-d2cf-5b4c-9ff4-fed8ade49a67.html (“The SBA doesn’t advertise the default rate for loans that fail, though in recent years the figure appears to average 4 percent to 5 percent.”), and Maltby, supra note 312 (reporting that the SBA loan default rate was either 10% or 11.9% in 2008). The SBA does not publish the default rate, but studies and estimates range from about 5–10%, with one study finding that nearly 12% of SBA loans defaulted in 2008. Id.

375. Fahy, supra note 312.

376. Steward, supra note 374; Maltby, supra note 312.

377. See supra Part III.A.3 (explaining the proposed fee schedule and calculations).

378. This policy is similar to the SBA policy; SBA lenders can pass the guaranty fees on to their small business borrowers. SBA Loan Rates: Everything You Need to Know, FUNDERA, https://www.fundera.com/business-loans/guides/sba-loan-rates (last updated Nov. 19, 2018) (“The lender initially pays the guarantee fee, but they usually pass that expense on to the borrower . . . .”).
Yellowstone case, for example, the DIP lender stripped the debtor in possession of a variety of important control rights in exchange for the $19.75 million loan.\(^{379}\) For just $395,000, the debtor in possession would have retained those rights.\(^{380}\) The debtor could have had a longer time to file a reorganization plan with more control over the substance of the plan, and it could have had more control over its management and asset sales.\(^{381}\)

Further, the debtor in possession would most likely pay a lower interest rate on the guaranteed loan than if the loan was not guaranteed.\(^{382}\) The debtor in possession thus would save money on lower interest expenses.\(^{383}\)

B. The Benefits of Government Guaranties

Despite being low-risk for the government, guaranteeing DIP loans would generate high rewards.\(^{384}\) Specifically, guaranteeing DIP loans would result in political, economic, and social benefits.

First, this Article’s proposal would realign bankruptcy theory with bankruptcy practice. As discussed throughout the Article, a divide currently exists between theory and practice because of the DIP lending market.\(^{385}\) The government has an interest in shrinking that divide so that bankruptcy practice functions as the legislature intended it to function.\(^{386}\) To be guaranteed under this suggested framework, DIP loans would not be able to contain many of the aggressive provisions that currently contribute to the theory-practice divide.\(^{387}\) Further, government-guaranteed DIP loans would

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380. See supra Part III.A.3 (proposing a 2% fee for a loan of this amount).
381. See supra Part III.A.6 (explaining that the proposed system would give a debtor more time to reorganize and prohibit lenders from seizing important control rights).
382. Interest rates compensate for, among other things, the risk associated with repayment. Because guaranteed loans come with less repayment risk, lenders would be willing to take lower interest rates. See MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE WITH POWER AND MARKET 1084 (2d ed., Ludwig von Mises Inst. 2004) (explaining how a risky borrower must “pay high interest rates to compensate for the added risk”).
383. See BAER ET. AL., supra note 126, at 26 n.122 (explaining that borrowing from a lender who offers a lower interest rate is a less expensive option for debtors in possession).
384. Cf. CONG. OVERSIGHT PANEL, supra note 189, at 36 n.225 (“A liquid market for DIP loans would temper the DIP lender’s leverage in the reorganization process by providing the debtor with alternative offers for DIP financing.”).
385. See, e.g., supra notes 51–53 and accompanying text (explaining how in theory Chapter 11 lets debtors remain in control of their businesses), But see supra Part II.B (explaining how DIP lenders subvert this system in practice by using loan terms that shift control to them).
386. See supra notes 87–94 and accompanying text (explaining that Congress intended to allow the debtor to remain in control as part of the 1978 Reform Act).
387. See supra Part II.B (detailing common provisions DIP lenders use to assert authority over debtors’ businesses).
encourage more lenders to enter the market, generating more competition among lenders and more leverage for debtors to negotiate against these aggressive provisions. 388

Second, the government would reap direct and indirect economic benefits if it implemented this Article’s proposal. As mentioned earlier, the government would charge a fee on its guaranties. 389 As long as the income from fees is greater than the expenditures to reimburse banks for defaults, the government would earn a positive return on its investment. 390 Because the default rate is so low for DIP loans, the government is very likely to earn a return from its fees. 391

On top of the income directly earned from fees, the government would also benefit indirectly from corporate income taxes. Through its guaranties, the government would be supporting companies in their efforts to reorganize effectively rather than liquidate. If debtors in possession are able to successfully and efficiently reorganize then the companies will be able to operate after exiting bankruptcy protection. 392 Once operating outside of bankruptcy, the companies would resume paying corporate income taxes. 393 The government would not receive any taxes, on the other hand, from companies that liquidated and ceased operations. 394

Last, by fixing this bankruptcy problem, the government would produce societal benefits. 395 Perhaps most tangibly, the government would help preserve jobs. 396 A successfully reorganized company employs more people than a liquidated company that ceases to exist. 397

388. CONG. OVERSIGHT PANEL, supra note 189, at 36 n.225.
389. See supra Part III.A.3 (explaining proposed government guaranty fee system).
390. See supra notes 313–14 and accompanying text (explaining the minimum fee the government must collect to earn a profit from providing the guaranty).
391. See supra note 315 and accompanying text (explaining why a 2% to 3% guaranty fee would produce a net profit for the government at current DIP default rates).
393. See id. (explaining that reorganization allows businesses to return to a viable state, whereas liquidated businesses are no longer viable); Business Taxes, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/business-taxes (last updated Apr. 12, 2018) (“All businesses except partnerships must file an annual income tax return.”).
394. See H.R. REP. NO. 95-595, at 220 (noting that unlike liquidation, reorganization potentially preserves jobs and corporate income producing assets); see also Business Taxes, supra note 393 (noting that both corporate and employee income are taxable).
395. See Jacoby, supra note 125, at 1722 (“Business restructuring and failure produce ripple effects in communities and society at large.”); id. at 1723 (“At the very least, the public has a stake in who makes the key decisions in corporate bankruptcy and whether that process comports with basic constitutional and democratic norms.”).
396. H.R. REP. NO. 95-595, at 220 (“The purpose of a business reorganization case . . . is to restructure a business’s finances so that it may continue to operate, provide its employees with jobs, pay
If this Article’s solution involves little risk, yet generates substantial benefits, why has it not been implemented yet? This question is a typical objection by economists and scholars that strictly adhere to the efficient market theory—if the proposed solution was truly a good idea, then someone would have implemented it already.\footnote{398}

Aside from what I think about the objection in general,\footnote{399} there is a legitimate reason why no one has yet implemented a guaranty program for DIP loans. Implementing such a framework would require a third party (the government) to enter a two-party transaction (between the DIP lender and the debtor in possession).\footnote{400} Thus it is possible, and even likely, that as an outside third party the government is not fully aware of the problems between the two other parties.\footnote{401}

And no party has an incentive to inform or lobby the government for help. The current DIP lenders have no incentive because they benefit from their aggressive DIP loans and their substantial control over the

\footnote{397. H.R. REP. NO. 95-595, at 220 (“It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.”). Newman, the Blackstone executive discussed earlier, suggested that the government could sell a guaranty program to taxpayers “by saying we’re saving jobs.” Hum & Chasan, supra note 291.}

\footnote{398. This objection parallels—or stems from—a classic economics joke where an economist and a friend are walking down the street. Larry Swedroe, \textit{The Twenty Dollar Bill}, ETF (Mar. 16, 2004), https://www.etf.com/sections/features/123.html. The friend notices a $20 bill on the ground, and the friend proceeds to tell the economist about it. \textit{Id.} The economist replies, “[c]an’t be. If there was a $20 bill on the ground, somebody would have already picked it up.” \textit{Id}.}

\footnote{399. One problem with this “efficient market” objection is that a strict following of the theory would result in the end of progress and innovation. See Trevir Nath, \textit{Investing Basics: What is the Efficient Market Hypothesis, and What Are its Shortcomings?}, NASDAQ (Oct. 15, 2015), https://www.nasdaq.com/article/investing-basics-what-is-the-efficient-market-hypothesis-and-what-are-its-shortcomings-cm530860 (arguing the efficient market hypothesis fails to account for the impact of volatility, and thus investors who slavishly follow it miss opportunities to identify mispricing and progressively improve their investment strategies). Every great idea becomes worthless. See Lars Lofgren, \textit{Why Your Idea is Worthless}, http://larslofgren.com/marketingbasics/why-your-idea-is-worthless (last visited Dec. 4, 2018) (arguing that all ideas are worthless if no one executes them). If the idea was truly great, it would have already been implemented. Someone, though, must be first. Someone has to be the first person to pick up the $20 bill. Swedroe, supra note 398.}

\footnote{400. See supra Part III.A (explaining briefly that, in the author’s proposal, the government would guarantee loans made to businesses from a lender).}

\footnote{401. See supra Part III.A.5 (proposing disclosure requirements for maximum transparency of the loan terms).}
reorganization process.\textsuperscript{402} Seeking a government guaranty would require the lenders to relinquish that control.\textsuperscript{403}

Debtors in possession, likewise, have no incentive either. They already have little cash; they cannot afford to spend any of it lobbying the government.\textsuperscript{404} And even if a debtor in possession tried lobbying the government for a guaranty program once the debtor neared or was in bankruptcy, any success would likely take too long to be valuable.\textsuperscript{405} By its very nature (and often for good reason), the government often moves at a slow, bureaucratic pace—not helpful when the debtor needs a DIP loan as soon as possible.\textsuperscript{406}

Could a solvent, healthy business lobby for reform in advance of a potential bankruptcy so that if the business does file for Chapter 11, the reform would already be implemented and the business could maintain control? Doubtful. For one, a healthy business would likely not waste time and resources for something that might eventually benefit it in bankruptcy because healthy businesses have no intentions of going bankrupt. Though it may be prudent to be cognizant of a potential bankruptcy, a business is not likely to consider the possibility until the last minute. In addition, a solvent, healthy business is likely not aware of the problems with DIP loans. It would not know from experience because the business has never been through bankruptcy. And it would not know from information because, again, healthy businesses do not consider the ramifications of bankruptcy until the last minute.\textsuperscript{407} Healthy businesses do not employ bankruptcy counsel until it is necessary.

That no one has already implemented this proposal does not refute its merit. This proposal is a low-risk solution to a severe problem that has

\textsuperscript{402} See supra Part II.B (discussing why DIP lenders want control and the ways they can control the debtor’s business under the current regime).
\textsuperscript{403} See supra notes 364–68 and accompanying text (explaining that government-guaranteed loans would reduce the ability for lenders to use self-serving tactics).
infected the bankruptcy system.\textsuperscript{408} And yet, despite being low in risk, guaranteeing DIP loans would generate high political, economic, and social benefits.\textsuperscript{409}

\section*{CONCLUSION}

Anytime you suggest what the government should do with financial resources, you open yourself up to political and economic discourse. Add a bankrupt business to the other side of the equation, and the likelihood of discourse surely grows.

I understand that, at first glance, this Article’s thesis appears controversial. It (seemingly) uses taxpayer money for the benefit of large companies, banks, and investment funds. I hope, however, that after the Article’s explanation, the reader understands the thesis as a pragmatic and effective solution to a major problem—a dividing contrast between legislative theory and bankruptcy practice.

By guaranteeing loans to debtors in possession, the government would provide flexibility in loan provisions and confidence in loan repayment.\textsuperscript{410} In doing so, the government would shift control back to the debtor in possession, just as the Bankruptcy Code prescribes.\textsuperscript{411} Debtors in possession would be more able to successfully reorganize and preserve valuable jobs.\textsuperscript{412} Lenders would continue to receive a financial return on their loans, with the added safety and protection of a government guaranty.\textsuperscript{413} And the government would earn a financial return on the fees it charges while preserving more jobs for society.\textsuperscript{414}

If the government implemented a guaranty program, future research could and should be conducted. The potential topics would be plentiful. Scholars could examine how the guaranties changed loan provisions. They

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{408} See \textit{ supra} Part III (providing a framework for restoring debtor control of distressed businesses while minimizing risks to taxpayers).
\item\textsuperscript{409} See \textit{ supra} Part III.B (outlining the potential political, economic, and social benefits of the proposed framework for government guaranteed DIP loans).
\item\textsuperscript{410} Cf. Norris & Kaneda, \textit{ supra} note 300 (explaining how SBA guarantees reduce risk to lenders and thus make them willing to offer more flexible terms).
\item\textsuperscript{411} See 11 U.S.C § 1107(a) (2012) (declaring that a debtor in possession is to have all the rights and powers of a trustee); id. § 1108 (granting trustees the power to operate a debtor’s business).
\item\textsuperscript{413} See \textit{ supra} Part III.A (discussing how the proposed guaranty system would protect DIP lenders).
\item\textsuperscript{414} See \textit{ supra} notes 389–97 and accompanying text (asserting that the proposed system would increase government net revenue while preserving jobs).
\end{itemize}
\end{footnotesize}
could compare default rates of guaranteed loans with non-guaranteed loans. They could study whether the guaranties have encouraged new lenders to enter the market or whether only current lenders use the guaranties. They could determine the rate at which the government will agree to guarantee a DIP loan and what factors the government appears to consider in its decisions. They could examine if the program is financially successful for the government. The list goes on.

If the federal government successfully implemented this solution, local governments could follow suit by guaranteeing the DIP loans for smaller, local businesses. Or alternatively, local governments could test this solution with their local bankrupt businesses, and then the federal government could follow suit.

Regardless of whether local or federal governments implement the proposed program, such a program would realign bankruptcy theory and practice, generate a financial return for the government, and preserve jobs within the economy. This Article is the first to provide a comprehensive framework for a DIP loan guaranty program. Though its success may not be guaranteed, the program is a low-risk, high-reward solution to a bankruptcy problem that desperately needs solving.
PRIVATE CITIZENS POLICING CORPORATE BEHAVIOR:
USING A QUI TAM MODEL TO CATCH FINANCIAL FRAUD

Zachary M. Dayno

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INTRODUCTION

In 2008, Wall Street’s reckless behavior plunged America’s economy into a deep recession. The 2008 Financial Crisis had long-lasting effects on the global economy and on American society. While everyday Americans suffered, financial executives walked away from the Financial Crisis with multimillion-dollar bonuses.

Since the 2008 Financial Crisis, public outrage over “corporate greed” and the favorable treatment of executives has become a popular narrative in the American ethos. Fringe candidates emerged in the 2016 presidential primaries with populist messages, disparaging the bankers of Wall Street. Senator Bernie Sanders, a populist candidate leading what he dubbed a...

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4. See Bernie Sanders, Corporate Greed Must End, HUFFINGTON POST: THE BLOG (June 24, 2015, 9:29 AM), https://www.huffingtonpost.com/rep-bernie-sanders/corporate-greed-must-end_b_7653442.html (“It is time to say loudly and clearly that corporate greed and the war against the American middle class must end. Enough is enough!”).
5. See Letter from Elizabeth Warren, U.S. Senator, Mass., to the Honorable Michael E. Horowitz, Inspector Gen., Dep’t of Justice (Sept. 15, 2016), https://www.scribd.com/document/324064523/Elizabeth-Warren-DoJ [hereinafter Warren Letter] (“Nine individuals were implicated in these [FCIC] referrals . . . . Not one of the nine has gone to prison or been convicted of a criminal offense. Not a single one has even been indicted or brought to trial.”).
“political revolution,” came surprisingly close to edging out former Secretary of State Hillary Clinton for the Democratic Party’s nomination—the last states to vote decided the race. In the Republican Primary, Donald Trump—running an unconventional campaign with a populist message—emerged the victor, outlasting 16 Republican candidates. Perhaps the most shocking and significant ripple effect of the 2008 Financial Crisis was Donald Trump’s surprise victory over Hillary Clinton in the 2016 presidential election. Riding a wave of anger and frustration at corporate America, Trump promised to “drain the swamp” of Washington insiders and lobbyists with ties to Wall Street. By 2016, the Financial Crisis was almost a decade gone, but the scars it left were clearly still fresh in the minds of many Americans.

A more direct result of the 2008 Financial Crisis was Congress passing the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank). The bill’s sponsors designed the law to “promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail[,]’ . . . [and] to protect consumers from abusive financial services practices . . . .” In ushering in the most comprehensive set of new financial regulations since the Great

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Depression, Dodd–Frank drastically changed how the Securities and Exchange Commission (SEC) regulates financial products.\textsuperscript{15}

A well-known section of Dodd–Frank is the Whistleblower Provision.\textsuperscript{16} Within the Whistleblower Provision, § 922(d)(1)(G) directed the SEC’s Office of the Inspector General (OIG) to consider:

\begin{quote}
[W]hether, in the interest of protecting investors and identifying and preventing fraud, it would be useful for Congress to consider empowering whistleblowers or other individuals, who have already attempted to pursue the case through the Commission [SEC], to have a private right of action to bring suit based on the facts of the same case, on behalf of the Government and themselves, against persons who have committee [sic] securities fraud.\textsuperscript{17}
\end{quote}

The concept of citizens bringing a private right of action on behalf of the government is not new. The False Claims Act (FCA)\textsuperscript{18} of 1863 employs this same technique, to great success.\textsuperscript{19} The FCA includes what is known as a \textit{qui tam} provision,\textsuperscript{20} which allows individuals to act as “private Attorney[s] General[”],\textsuperscript{21} and to bring suits against both corporations and citizens that defraud the U.S. government.\textsuperscript{22} The purpose of these \textit{qui tam} suits is to “encourage[e] private individuals to come forward with information about fraud that might otherwise remain hidden.”\textsuperscript{23}

\textsuperscript{15} See Koba, supra note 13 (“In simple terms, Dodd–Frank is a law that places major regulations on the financial industry. It grew out of the Great Recession with the intention of preventing another collapse of a major financial institution like Lehman Brothers . . . . Dodd–Frank requires that the riskiest derivatives—like credit default swaps—be regulated by the SEC or the Commodity Futures Trading Commission (CFTC).”).

\textsuperscript{16} Dodd–Frank Act § 922, 124 Stat. at 1841–49 (Whistleblower Provision).

\textsuperscript{17} Dodd–Frank Act § 922(d)(1)(G), 124 Stat. at 1849.


\textsuperscript{19} See Pamela H. Bucy, Private Justice, 76 S. CAL. L. REV. 1, 54 (2002) (“The number of suits filed and monetary judgments obtained . . . shows that the qui tam FCA private justice model is successful.”).

\textsuperscript{20} The term qui tam is borrowed from the Latin phrase “\textit{qui tam pro domino rege quam pro se ipso in hac parte sequitur},” which translates to “who pursues this action on our Lord the King’s behalf as well as his own.” Vt. Agency of Nat. Res. v. United States \textit{ex rel.} Stevens, 529 U.S. 765, 768 n.1 (2000); see also 31 U.S.C. § 3730(b) (outlining the FCA’s qui tam provision).

\textsuperscript{21} See Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (using the term “private Attorney General[”] to refer to a private individual in whom the government has vested “authority to bring a suit . . . [whose] sole purpose is to vindicate the public interest”).

\textsuperscript{22} See Bucy, supra note 19, at 44–45.

\textsuperscript{23} United States \textit{ex rel.} Barajas v. United States, 258 F.3d 1004, 1012 (9th Cir. 2001); see also S. REP. NO. 99–345, at 2 (1986) (“The proposed legislation seeks not only to provide the Government’s
This Article argues that the SEC should recommend to Congress that it add a *qui tam* private right of action to Dodd–Frank to combat fraud in the securities sector and to re-instill public confidence in Wall Street. This Article also examines the viability of adding a private right of action to the Whistleblower Provision of Dodd–Frank. Part I explores the root causes of the Financial Crisis. Part II discusses the Department of Justice’s (DOJ’s) failure to successfully prosecute a single high-ranking executive for financial crimes after the crisis. Part III examines the inadequacy of current civil suit options available to individuals looking to recover money for securities violations. Next, Part IV explores the FCA’s *qui tam* model and its underlying theory. Part V discusses adapting the FCA’s model to suit securities’ regulation. Finally, Part VI provides an in-depth recommendation for how to structure a *qui tam* private right of action under Dodd–Frank’s Whistleblower Provision and addresses possible concerns about this proposal.

I. THE 2008 FINANCIAL CRISIS

A. The Aftermath of the Crisis

While the acts and policies that created the Financial Crisis occurred over the course of decades, the actual crisis unfolded over a matter of days. On September 15, 2008, the Wall Street banking firm Lehmann Brothers filed for Chapter 11 bankruptcy. That same day, Bank of America agreed to purchase faltering Merrill Lynch—Wall Street’s third largest bank at the time. The next day, the U.S. government announced an $85 billion bailout of AIG. The 2008 Financial Crisis was in full swing. On October 3, 2008, President George W. Bush signed the Troubled Asset Relief Program (TARP) in an effort to halt a full economic
depression. This Act authorized the federal government to spend up to $700 billion on troubled assets to restore liquidity to the financial markets. The week after President Bush signed TARP into law, the stock market continued to spiral downwards: the Dow Jones Industrial Average closed below 10,000 for the first time in over four years—an 18% decrease from the market's all-time high in October 2007.

A deep freeze in the U.S. economy followed, lasting over two years. Unemployment ballooned to over 10% in October 2009. Americans lost $17 trillion in net wealth. Thirteen million families lost their homes. The Financial Crisis touched almost every American, as well as individuals, families, and companies worldwide.

B. A Brief Review of the Crisis’s Root Causes

The 2008 Financial Crisis was a product of decades of economic policies and practices. After the Great Depression, the federal government passed a series of securities and banking laws that were designed to protect the public from banks taking too many risks with consumers’ savings and investments. Congress passed a set of sweeping laws in the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act). Congress also passed the Banking Act of 1933, Congress passed as set of sweeping laws in the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act). Congress also passed the Banking Act of 1933, Congress also passed the Banking Act of 1933, Congress also passed the Banking Act of 1933.
frequently referred to as Glass–Steagall, to separate commercial banking activities from investment banking activities. In the 1950s, as more and more banks began to merge and form conglomerates, the federal government stepped in to regulate these new “[b]ank holding” companies. The Bank Holding Company Act of 1956 effectively restricted bank-holding companies from engaging in “nonbanking” activities, such as investment and insurance activities. In response to the Great Depression and its lasting effects, the federal government increasingly regulated the financial sector.

In the 1980s, however, politicians and industry insiders began to push for deregulation of the U.S. banking and investment sectors. In November 1999, after years of persistent lobbying from the financial industry, President Clinton signed the Gramm–Leach–Bliley (GLB) Act, removing Glass–Steagall’s and the Bank Holding Company Act’s barriers that had separated commercial banks from engaging in investment and insurance activities. The GLB Act was both the climax of financial deregulation in the 1990s and a precursor to the deregulation of the early 2000s.

With banks allowed to engage in commercial activities as well as make investments and issue insurance, the financial sector aggressively pushed to
consolidate and offer a “one-stop shop” to consumers. This rush started with the Citicorp-Travelers merger, 46 and included other high-profile mergers, such as Chase Manhattan Corporation with JPMorgan & Co. (forming JPMorgan Chase) in 2000, 47 and Bank of America with FleetBoston Financial Corporation in 2004. 48 With these mergers, commercial banks—which for years had been confined to managing checking and savings accounts—could now encourage people to invest their savings in securities and investment products. 49 Deregulation also opened the door for banks to securitize their own assets to create new investment offerings. 50

As banks became increasingly creative at diversifying risk, the federal government continued to deregulate securities. In 2000, Congress passed the Commodity Futures Modernization Act (CFMA), a bill pushed by finance-industry lobbyists and the Federal Reserve Chairman, Alan Greenspan. 51 The CFMA prevented the federal government and the states from regulating new financial products created during the housing market boom. 52 The CFMA strictly prohibited the SEC, or any other agency—state or federal—from regulating Collateral Debt Obligations (CDOs) 53 or Credit


49. FCIC REPORT, supra note 28, at 55.

50. Banks began to securitize their own and other loan originators’ loans to create revenue streams. Id. at 42. In a basic securitization system, banks first structured the “principal and interest payments from a group of mortgages to flow into a single pool.” Id. at 70. The payments were then tranched (split into different risk levels) “to protect some investors from losses. Investors in the tranches received different streams of principal and interest” based on the risk associated with each tranche. Id.


52. See FCIC REPORT, supra note 28, at 48 (“The CFMA effectively shielded OTC derivatives from virtually all regulation or oversight.”).

53. CDOs are “package[s]” of loans that have been securitized. LINDA O. SMIDDY & LAWRENCE A. CUNNINGHAM, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 273 (LexisNexis, 8th ed. 2014). A mortgage secures a house loan by assigning the house as collateral in the case of a default. Franklin A. Gevurtz, The Role of Corporate Law in Preventing a Financial Crisis: Reflections on In re Citigroup Inc. Shareholder Derivative Litigation, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 113, 117 (2010). Banks pooled housing loans into CDOs. Id. CDOs are attractive to investors
Default Swaps (CDSs).\textsuperscript{54} The abundance of these “over-the-counter (OTC)”\textsuperscript{55} derivatives grew exponentially after Congress passed the CMFA.\textsuperscript{56} In 2000, OTC products’ gross-market value globally was $3.2 trillion—by Spring 2008, that figure had grown to more than $20 trillion.\textsuperscript{57}

The mechanisms that led to the Financial Crisis were extremely complex and complicated, so much so that many of the bankers and investors that traded in these new OTCs did not realize what they were doing until it was too late.\textsuperscript{58} Asset Backed Commercial Paper (ABCP), CDOs, CDSs—financial institutions created all of these OTC products to extract profit from the housing market in the early 2000s.\textsuperscript{59} When the housing bubble burst in 2007, the market for financial products that relied on the housing market collapsed too, leading to widespread economic distress.\textsuperscript{60} Furthermore, banks, loan originators, and even auditors contributed to the Financial Crisis by engaging in fraud—in the mortgage market and the rating systems for these new financial products.\textsuperscript{61} The securitization of risky mortgages, the rampant fraud in the industry, and the federal government’s aggressive deregulation policies of the 1980s and 1990s all compounded and ultimately led to the stock market tumbling in 2008.\textsuperscript{62}

because they diversify an investor’s risk—instead of an investor’s money put into just one individual asset, the risk is spread across all the assets in the pool. \textit{Id.} In addition, CDOs are split into different “classes”—called tranches—and the different tranches are assigned a rating based on their level of risk (for example, a high-quality, low-risk tranche would have a rating of AAA). \textit{Id.}

\textsuperscript{54} See FCIC REPORT, supra note 28, at 50 (“The purchaser of a CDS transferred to the seller the default risk of an underlying debt. The debt security could be any bond or loan obligation. The CDS buyer made periodic payments to the seller during the life of the swap. In return, the seller offered protection against default or specified ‘credit events’ such as a partial default. If a credit event such as a default occurred, the CDS seller would typically pay the buyer the face value of the debt.”).

\textsuperscript{55} \textit{Id.} at 46.

\textsuperscript{56} \textit{Id.} at 48 (“The OTC derivatives market boomed.”).

\textsuperscript{57} \textit{Id.} For context, the U.S. GDP in 2008 was roughly $14.7 trillion. Kimberly Amadeo, 2008 GDP, Growth, and Updates by Quarter: The Financial Crisis Bludgeons the Economy, BALANCE, https://www.thebalance.com/2008-gdp-growth-updates-by-quarter-3305542 (last updated Nov. 9, 2018). Thus, the value of the OTC market, just one type of investment vehicle, outgrew the annual production of the U.S. economy by a wide margin. \textit{See FCIC REPORT, supra note 28, at 48 (noting that the OTC market value was $20.3 trillion in 2008).}

\textsuperscript{58} \textit{See FCIC REPORT, supra note 28, at 188 (describing how executives at some of the country’s largest banks did not understand the risks inherent in their new investment instruments, such as CDOs).}

\textsuperscript{59} \textit{Id.} at xxiv (“[E]ach step in the mortgage securitization pipeline depended on the next step to keep demand going.”).

\textsuperscript{60} \textit{Id.} (“When borrowers stopped making mortgage payments, the losses—amplified by derivatives—rushed through the pipeline.”).

\textsuperscript{61} \textit{Id.} at xxv (labeling the credit rating agencies “key enablers” for their role in the 2008 Financial Crisis).

\textsuperscript{62} \textit{See Crash Course, supra note 1 (summarizing the causes of 2008 Financial Crisis).}
II. REGULATORY SHORTCOMINGS AT THE DOJ

A. A Lack of Criminal Prosecutions

In the wake of the Financial Crisis, Congress established the Financial Crisis Inquiry Commission (FCIC) to "examine the causes, domestic and global, of the current financial and economic crisis in the United States."63 Beginning in May 2009, the independent commission spent over a year combing through millions of pages of documents and held over 700 interviews.64 The FCIC’s January 2011 report to Congress concluded that the Financial Crisis was the result of human error and that it could have been avoided: “The captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks within a system essential to the well-being of the American public.”65 The FCIC detailed evidence of reckless executive behavior and “stunning instances of [corporate] governance breakdowns and irresponsibility.”66 The FCIC also referred nine individuals to the DOJ for violating certain sections of the Exchange Act and the Sarbanes–Oxley Act (SOX).67 None of these individuals, however, were ever even charged with a crime.68

The U.S. government failed to successfully prosecute a single high-ranking corporate executive in the aftermath of the Financial Crisis.69 In 2009, a jury acquitted Bear Sterns’s managers Ralph Cioffi and Matthew Tannin of charges that they had illegally inflated the value of their hedge fund.70 Cioffi and Tannin were the only high-ranking corporate executives

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65. FCIC REPORT, supra note 28, at xvii.
66. See id. at xix (describing institutions’ reckless behavior).
67. See Warren Letter, supra note 5 (“Nine individuals were implicated in these [FCIC] referrals . . . .”).
68. See id. (“Not one of the nine has gone to prison or been convicted of a criminal offense. Not a single one has even been indicted or brought to trial.”).
69. See Michael Winston, Why Have No CEOs Been Punished for the Financial Crisis?, HILL (Dec. 8, 2016), http://thehill.com/blogs/pundits-blog/finance/309544-why-have-no-ceos-been-punished for-the-financial-crisis (“Nearly a decade after the fraud and irresponsible actions at Wall Street banks, Countrywide Financial, and other companies brought the nation to the brink of total economic collapse, there have been no prosecutions against their key executives.”).
70. The hedge fund, which was loaded with risky mortgage-backed securities, collapsed in 2007, losing investors $1.6 billion. David Goldman, Former Bear Stearns Execs Not Guilty, CNN MONEY, http://money.cnn.com/2009/11/10/news/companies/bear_stearns_case/ (last updated Nov. 11, 2009). Cioffi and Tannin later agreed to a $1.05 million settlement with the SEC for their role in the hedge fund’s collapse. Patricia Hurtado, Cioffi, Tannin Settlement with SEC Approved by U.S. Judge,
brought to trial in the wake of the Financial Crisis. The closest the government ever came to bringing a criminal case against a corporate CEO to trial was when it charged Angelo Mozilo, Countrywide’s CEO, with insider trading and securities fraud. The government dropped the charges against Mozilo after he paid $67 million in civil fines to the SEC. Unsurprisingly, the government’s success against mid-to-low level corporate officials is nearly as dismal.

The DOJ has often repeated that its lawyers struggled to file criminal charges against corporate executives because they lacked sufficient evidence for the mens rea element of securities crimes. Attorney General Eric Holder claimed that the DOJ had diligently investigated the FCIC referrals—at a 2015 National Press Club event, Holder explained: “The inability to make [prosecutions], at least to this point, has not been as a result of a lack of effort.” Lanny Breuer, the head of the DOJ’s Criminal Justice Division (2009–2013), told PBS Frontline in 2012 that, “when we [the DOJ] cannot prove beyond a reasonable doubt that there was criminal

73. Id. at 30.  
74. In 2013, a federal court sentenced Kareem Serageldin, a senior trader at Credit Suisse, to 30 months in prison for inflating the value of mortgage bonds. William D. Cohan, A Clue to the Scarcity of Financial Crisis Prosecutions, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/business/dealbook/a-clue-to-the-scarcity-of-financial-crisis-prosecutions.html. In 2010, the SEC filed a suit against Goldman Sachs and one of its traders, 28-year-old Fabrice Tourre, for misleading investors in setting up the infamous ABACUS deal, a synthetic CDO that later became the subject of Michael Lewis’s famous book The Big Short. JESSE EISINGER, THE CHICKENSHT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES 263–68 (Simon & Schuster 2017). In 2014, a federal district court in New York ordered Tourre to pay the SEC more than $850,000 in civil fines for his role in the ABACUS deal; Goldman later settled with the SEC. Id. at 268.  
intent, then we have a constitutional duty not to bring those cases.” Breuer elaborated that the Criminal Division within the DOJ in fact had tried to prosecute the FCIC referrals: “[W]e looked hard at every one of the referrals that we had [from the FCIC].” But Breuer and Holder ultimately concluded it would be too hard to prove the mens rea element of these crimes.

According to Breuer, “federal criminal cases are hard to bring—I have to prove that you had the specific intent to defraud. I have to prove that the counterparty, the other side of the transaction, relied on your misrepresentation. If we cannot establish that, then we can’t bring a criminal case.”

According to Breuer, proving a securities violation hinged on the alleged wrongdoer’s intent and whether the counterparty actually relied on the misinformation.

High-profile legal scholars disagree with the DOJ’s interpretation of the law. Jed S. Rakoff, a Senior Judge on the U.S. District Court for the Southern District of New York, has said the DOJ misconstrued the law: “In actuality, in a criminal fraud case the government is never required to prove—ever—that one party to a transaction relied on the word of another.”

In other words, “[t]he SEC need not plead or prove reliance, that is, it need not show that it (or any actual investor) relied on a misstatement in making an investment decision.” According to Judge Rakoff and others, the DOJ mistakenly believed that it needed to prove reliance in prosecuting securities violations.

Others accuse the DOJ of being timid and scared to lose at trial. After several embarrassing mishaps at the DOJ in the early 2000s related to white-collar prosecutions, government lawyers seemed to fear how a trial

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78. Id.
79. See id. (documenting Breuer’s position that the government could not prove the necessary intent to secure criminal prosecutions after the Financial Crisis).
80. Id.
81. Id.
84. Only “private plaintiffs must both plead and prove reliance” in securities fraud civil suits. Id.
85. See Eisinger, supra note 74, at 230 (explaining how the DOJ during the Holder era preferred easier-to-prove insider trading cases to securities fraud cases).
loss would affect their reputation. U.S. Attorneys frequently try to land associate positions at prestigious private firms after stints at the DOJ; ambitious federal prosecutors consider a less-than-sterling trial record in their government work a career liability. In 2014, the DOJ brought 29% fewer cases against corporations than in 2004. In 2016, the DOJ brought 40% fewer white-collar criminal cases against individuals than in 1996. While there are several potential explanations for this drop in prosecutions, many see it as a failure by the DOJ to pursue difficult cases.

B. The Rise of the Deferred Prosecution Agreement

The Deferred Prosecution Agreement (DPA) has become the favored tool of the government in financial misconduct cases (along with its sister agreement, the Non-Prosecution Agreement (NPA)). Preferred over more difficult, costly, and time-consuming criminal prosecutions, DPAs and NPAs are now “mainstay[s]” at the DOJ. Why would the government or any federal prosecutor choose to go up against a billion-dollar company with a high-powered defense team when, in lieu of bringing a trial, the government could opt for an easy settlement that grabs national headlines? Herein lies the trap of DPAs: they are easy on both the government and on corporations, but DPAs rarely result in compensation for victims of financial crimes. With DPAs, the government receives “eye-popping

86. See id. at 57 (“The [Arthur] Anderson case ushered in an era of prosecutorial timidity when it came to taking on the largest corporations in America.”).
87. See id. at 191 (“Most white-collar criminal law partners were former government officials, especially federal prosecutors.”); see also id. at 230 (describing how easy wins are the way to further a federal prosecutor’s career).
88. See id. at xviii–xx (noting the drop in the number of cases that the DOJ brought against corporations in 2014 and then again in 2016).
89. See infra Part II.B (explaining how the SEC favors using certain types of settlement agreements in lieu of criminally prosecuting white collar crimes).
90. See EISINGER, supra note 74, at 231 (“The government failed,’ says a former top prosecutor in the Southern District [of N.Y.], in a sentiment echoed by several former assistant US attorneys in the office. ‘We didn’t do what we needed to do.’”).
92. Id.; see also EISINGER, supra note 74, at 93 (explaining the rise of the DPA).
dollar amounts” and the federal prosecutors “set themselves up for lucrative careers in the private sector.”

Corporations favor DPAs because they can halt SEC investigations in the early stages without admitting any wrongdoing (to limit the corporation’s liability in civil suits). Furthermore, shareholders—not the corporation’s executives—pay for the settlements. These incentives for both the government and the corporations accused of financial crimes have led to a “[s]ettlement culture.”

As of 2017, 49 separate financial corporations had doled out a combined $190 billion in fines and settlements for their conduct in regards to the Financial Crisis (DPAs and NPAs). For the DOJ, some of the highlights include a $16.65 billion settlement with Bank of America for its marketing and structuring of mortgage-backed securities and CDOs; a $13 billion settlement with JPMorgan Chase, the nation’s largest bank, for its mortgage-lending practices; and a $7 billion settlement with Citigroup for its mortgage-backed securities practices. At the SEC, prosecutors also secured several eye-popping settlements, albeit not in the league of the DOJ. Although the DOJ’s and the SEC’s settlements are large and hard

the general deterrent and adverse publicity impact that results from corporate crime prosecutions and convictions. . . . It could very well be that the rise of these deferred and non prosecution agreement deals represents a victory for the forces of big business who for decades have been seeking to weaken or eliminate corporate criminal liability.”).}

94. EISINGER, supra note 74, at xix.
95. See id. at 93, 100 (discussing the first DPA and its effect on corporate prosecution); see also Mokhiber, supra note 93 (highlighting a number of cases where prominent corporations, such as Arthur Anderson and Aetna, entered into DPAs and NPAs and were not required to admit wrongdoing); see also infra notes 103–05 and accompanying text (further discussing the benefits corporations gain from entering into DPAs and NPAs).
96. EISINGER, supra note 74, at xix.
97. See id. at xx (describing the corrosive effects of “[s]ettlement culture”).
98. Id. at 317.
102. This includes a $550 million settlement with Goldman Sachs for misleading investors into the notorious ABACUS deal; a $285 million settlement with Citigroup for misleading investors and betting against one of its own CDO funds, and a $153.6 million settlement with JPMorgan Chase for the company’s role in misleading investors in a mortgage-backed securities transaction. SEC Enforcement
for everyday Americans to comprehend, the settlements represent just a fraction of these corporations’ assets, are usually much less than reported due to tax write-offs available to corporations, and are ultimately paid for by the companies’ shareholders.

C. The Difficulties of Proving the Mens Rea Element in Securities Crimes

Proving the mens rea element—the alleged bad actor’s intent—is incredibly difficult in a securities fraud case. The world of financial products is complex and in many ways like the Wild West; financial institutions are continuously creating new products at a pace far ahead of the government’s ability to successfully regulate them. Thus, prosecutors are left to apply outdated laws to complex transactions. Furthermore, prosecutors are rarely well versed in the inner workings of financial products, such as derivatives and default swaps. Executives and financial

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106. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 (2007) (describing *scienter* as “a mental state embracing intent to deceive, manipulate, or defraud” and discussing generally the high burden of proof plaintiffs must allege in bringing a securities action (citation omitted)).

107. See FCIC REPORT, supra note 28, at 6 (“Investors around the world clamored to purchase securities built on American real estate, seemingly one of the safest bets in the world. Wall Street labored mightily to meet that demand. Bond salesmen earned multi-million-dollar bonuses packaging and selling new kinds of loans, offered by new kinds of lenders, into new kinds of investment products that were deemed safe but possessed complex and hidden risks.”).

108. See Bucy, supra note 19, at 55 n.309, 56 (discussing the difficulty of applying economic and securities statutes to economic wrongdoing).

109. See id. at 55–56, 58 (explaining how many attorneys are ill-prepared to prosecute complex economic crimes because of a lack of technical training and investigatory resources).
traders, on the other hand, possess intimate knowledge of these products and can hide their intent to defraud or deceive behind a product’s complexities. Alternatively, executives rely on a common refrain: risks are inherent in any investment, especially those traded in financial markets. Executives also claim it is impossible to monitor every act of every employee in the corporation—especially when the corporation is a trillion-dollar institution with thousands of employees across the globe.

This confluence of factors makes the prosecutor’s task of proving an executive’s intent to mislead or defraud particularly arduous. Additionally, corporations have deep pockets and can afford the best white-collar defense lawyers. Further complicating matters, the federal courts have become more business friendly in the last 20 years. Because of the many factors stacked against prosecutors in white-collar cases, the government is bringing fewer charges against corporate misfeasors. This trend is troubling and achieves neither justice nor accountability.

110. See id. at 55 (“[Economic wrongdoing] often . . . is hidden within a large organization, buried in paper trails and electronic messages, concealed by false documentation, [and] involves complex and intricate transactions . . . .”).

111. See 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE 130 (Am. Law Inst. Publishers 1994) (1992) (“The basic policy underpinning of the business judgment rule is that corporate law should encourage, and afford broad protection to, informed business judgments . . . in order to stimulate risk taking . . . .”).

112. See EISINGER, supra note 74, at 242 (examining Ian Lowitt’s—Lehman Brothers’s last C.F.O.—defense when SEC regulators began investigating him for securities violations in the lead up to Lehman’s bankruptcy).

113. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319, 321 (2007) (explaining what a prosecutor must demonstrate to prove an executive’s intent to mislead or defraud); see also Bucy, supra note 19, at 3–4 (highlighting how difficult it is to prove mens rea for economic crimes); see also EISINGER, supra note 74, at 324 (discussing the Heritage Foundation’s advocacy for mens rea reform).

114. See EISINGER, supra note 74, at 186–89 (describing the important role that white-shoe defense firms play in corporate America).


116. See EISINGER, supra note 74, at 230 (providing some reasons why prosecutors do not charge financial institutions with securities violations).
III. CIVIL SUIT DEAD ENDS

A. Section 10b of the Exchange Act and the SEC’s Rule 10b–5

The most frequently used statutory tools for enforcing securities violations are SEC Rule 10b–5 and § 10b of the Exchange Act of 1934.\textsuperscript{117} Section 10b is the main antifraud provision of the Exchange Act and provides the statutory authority for the government to bring civil enforcement actions and criminal prosecutions against violators.\textsuperscript{118} The SEC promulgated Rule 10b–5 in 1948 pursuant to § 10b of the Exchange Act.\textsuperscript{119} Rule 10b–5 states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.\textsuperscript{120}

The Supreme Court has recognized an implied “private cause of action from the text and purpose of § 10(b).”\textsuperscript{121} Thus, under Rule 10b–5, private investors can bring a civil suit against a corporation that defrauds them.\textsuperscript{122} The SEC has stated that this private cause of action is “an essential tool for

\textsuperscript{117} See Choi & Pritchard, supra note 83, at 34 (“By far the most important antifraud provision is Rule 10b–5 . . . .”).

\textsuperscript{118} See 15 U.S.C. § 78j(b) (2012) (“It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”).

\textsuperscript{119} See Choi & Pritchard, supra note 83, at 34 (stating that the SEC promulgated Rule 10b–5 pursuant to § 10(b) of the Exchange Act); Cecilia A. Glass, Note, Sword or Shield? Setting Limits on SLUSA’s Ever-Growing Reach, 63 Duke L.J. 1337, 1340 (2014) (“The SEC promulgated Rule 10b–5 in 1948 . . . .”).

\textsuperscript{120} 17 C.F.R. § 240.10b–5 (2018).

\textsuperscript{121} Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37 (2011); see also Choi & Pritchard, supra note 83, at 34 (explaining that courts read into Rule 10b–5 a private right of action with regularity).

\textsuperscript{122} See Matrixx Initiatives, 563 U.S. at 37 (implying “a private cause of action” under § 10(b)).
enforcement of the [Exchange] Act’s requirements.”

There are six elements to a private 10b–5 claim: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”

B. Limits on Private Suits Against Corporations for Securities Fraud: Rule 9(b), the Private Securities Litigation Reform Act, and the Securities Litigation Uniform Standards Act

Rule 9(b) of the Federal Rules of Civil Procedure (FRCP) establishes the baseline pleading requirement for securities fraud claims. The first part of Rule 9(b) states: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” The Second Circuit has interpreted the “particularity” requirement to mean a plaintiff must: “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” The second part of Rule 9(b) states: “Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Based on this language, it appears that a plaintiff only needs to generally plead the intent element of a securities fraud claim.

The second part of Rule 9(b)—the Rule’s scienter requirement—has been a source of considerable confusion and disagreement amongst the federal circuit courts in the past several years. Three main interpretations have emerged. The Fourth, Eleventh, and D.C. Circuits maintain the original meaning of Rule 9(b) and do not require a heightened pleading

126. FED. R. CIV. P. 9(b).
128. FED. R. CIV. P. 9(b).
129. Id.
standard for *scienter* in fraud suits.\(^{131}\) The First, Third, Fifth, Sixth, Seventh, and Eighth Circuits apply *Twombly*’s plausibility standard to Rule 9(b)’s *scienter* requirement;\(^ {132}\) thus, a plaintiff cannot allege intent generally but must allege it in such a way that makes her claim of fraud “plausible on its face.”\(^ {133}\) The First Circuit explained that, under this plausibility requirement, plaintiffs must describe “enough facts from which malice might reasonably be inferred.”\(^ {134}\) Rounding out the circuit split is the Second Circuit, which has perhaps the most stringent pleading requirements for fraud, requiring plaintiffs to allege “facts that give rise to a strong inference of fraudulent intent.”\(^ {135}\) “A plaintiff can satisfy this requirement by ‘(1) alleging facts to show that defendant had both motive and opportunity to commit fraud, or by (2) alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.’”\(^ {136}\)

In the context of securities litigation, Congress did not believe that Rule 9(b)’s heightened pleading standard for fraud was high enough.\(^ {137}\) After years of lobbying by the defense bar and corporate America, Congress enacted the Private Securities Litigation Reform Act (PSLRA) in 1995 to deter “frivolous” securities lawsuits.\(^ {138}\) Taking aim at nuisance filings, “targeting of deep pocket defendants,” vexatious discovery requests, and “the manipulation by class action lawyers,”\(^ {139}\) the PSLRA created a pleading standard even more strenuous than that required by Rule 9(b):\(^ {140}\)

\(^{131}\) See id. (“The Fourth, Eleventh, and D.C. Circuits have yet to require heightened pleading for *scienter* in fraud.”); see also Urquilla-Diaz v. Kaplan Univ., 780 F.3d 1039, 1051 (11th Cir. 2015) (holding that plaintiffs may allege *scienter* generally under 9(b)).

\(^{132}\) See Ashcroft v. Iqbal, 556 U.S. 662, 696 (2009) (“Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly*’s words, a plaintiff must ‘allege facts’ that, taken as true, are ‘suggestive of illegal conduct.’” (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 n.8 (2007))).

\(^{133}\) *Twombly*, 550 U.S. at 570; see Roberts, *supra* note 130 (“The First, Third, Fifth, Sixth, Seventh, and Eighth Circuits have all interpreted Rule 9(b)’s *scienter* standard as a plausibility standard in the post-*Iqbal* era.”).

\(^{134}\) Schatz v. Republican State Leadership Comm., 669 F.3d 50, 58 (1st Cir. 2012).

\(^{135}\) First Capital Asset Mgmt. v. Satinwood, Inc., 385 F.3d 159, 179 (2d Cir. 2004) (emphasis omitted) (citations omitted).


\(^{138}\) See id. at 32 (“This legislation implements needed procedural protections to discourage frivolous litigation.”).

\(^{139}\) Id. at 31.

\(^{140}\) Rule 9(b) is a heightened pleading standard in and of itself—more is required for a complaint in fraud actions than in other suits, which are subject to the *Twombly* plausibility standard.
Under the PSLRA’s heightened pleading instructions, any private securities complaint alleging that the defendant made a false or misleading statement must: (1) “ specify each statement alleged to have been misleading and the reason or reasons why the statement is misleading,” . . . and (2) “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”

The Supreme Court further clarified what it meant by “strong inference,” stating such inferences must be “cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”

The PSLRA’s heightened pleading standard makes surviving a defendant’s motion to dismiss more difficult for plaintiffs with legitimate securities claims. Members of the public rarely have insight into the specific mental state of a company or its executives, and thus it is difficult to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind” for each instance of fraud.

The PSLRA included several other important changes to securities laws, including adding a “safe harbor” provision for “forward-looking statements” and limiting who can serve as the lead plaintiff in class-action securities suits. The safe harbor provision requires any fraud claim based on a “forward-looking statement,” such as a projection of profit, to plead with particularity “actual knowledge” that the defendant intended to defraud or mislead consumers. Congress enacted the “lead plaintiff”

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142. Id. at 324.

143. See Jonathan D. Glater, Hurdles of Different Heights for Securities Fraud Litigants of Different Types, 2014 COLUM. BUS. L. REV. 47, 82–83 (detailing the hurdles plaintiffs face after Congress passed the PSLRA).

144. Id. at 71 (quoting 15 U.S.C. § 78u-4(b)(2)(A) (2006)).


147. See Glater, supra note 143, at 71 (“The plaintiff must prove that the forward-looking statement was made ‘with actual knowledge . . . that the statement was false or misleading.’” (quoting 15 U.S.C. § 77z-2(c)(1)(B)(i))).
provision to limit plaintiffs’ lawyers’ ability to churn out strike suits.  
This provision, however, has made bringing class actions much more difficult for investors. Generally, class actions are the only way for individual investors to bring their claims against multibillion-dollar corporations. While the PSLRA only covers claims brought in federal courts, Congress passed the Securities Litigation Uniform Standards Act (SLUSA) in 1998, which applied the PSLRA and its requirements to claims brought in state courts.

The heightened pleading standard for securities lawsuits makes it extremely difficult for individual investors to bring civil suits in state and federal courts. In the wake of the 2008 Financial Crisis, individuals hoping to recover their investments frequently had their claims dismissed on FRCP Rule 12(b)(6) due to their inability to meet PSLRA’s heightened pleading requirements. Adding a private right of action to Dodd–Frank’s Whistleblower Provision that is similar to the qui tam model of the FCA would enable the SEC and private citizens to effectively plead securities violations against both individual and corporate wrongdoers.

IV. THE FALSE CLAIMS ACT’S QUI TAM PROVISION

A. Introduction to the False Claims Act

Congress passed the FCA in 1863 to combat fraudulent acts against the federal government. Since its inception, the FCA has been the federal law

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148. 15 U.S.C. § 78u–4(a)(3)(B); see Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371 (1966) (explaining that “strike suits” are suits brought by “people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them”).
149. See Glater, supra note 143, at 79–83 (discussing the effects of the lead-plaintiff provision).
150. See, e.g., Deutschman v. Beneficial Corp., 132 F.R.D. 359, 378 (D. Del. 1990) (“The class action device is especially appropriate in securities fraud cases, such as this one, wherein there are many individual plaintiffs who suffer damages too small to justify a suit against a large corporate defendant.”).
152. See Glater, supra note 143, at 66 n.64 (“SLUSA bars shareholders from filing securities fraud class action suits in state court or under state law in federal court and thereby sidestepping the requirements of the PSLRA.”).
153. See id. at 82–83 (describing the effect of the PSLRA’s high standard as intentionally favoring corporate defendants over individual investors).
154. See id. at 90–92 (illustrating how in one case involving Wachovia Bank, “[t]he stumbling block for the plaintiffs was establishing scienter to satisfy the PSLRA’s high standard”).
government’s main statutory weapon for bringing individuals who file fraudulent claims against the U.S. to justice. 157 While the FCA has gone through many revisions, including a serious makeover in 1986, 158 one constant of the Act has been its qui tam provision. 159 The FCA’s qui tam provision allows private citizens with inside knowledge of fraud to bring private actions on behalf of themselves and the federal government. 160 The purpose of these qui tam suits is to “encourag[e] private individuals to come forward with information about fraud that might otherwise remain hidden.” 161 These whistleblowers are known as “relators” in the context of the FCA, and they are entitled to a share in “the proceeds of the action or settlement of the claim.” 162 The relator has standing to sue on the theory that the federal government has assigned its right to claim damages to a private citizen via the FCA. 163

The FCA’s qui tam provision sets out a detailed and unique procedure by which an individual whistleblower can bring a private action against an individual or company that submitted fraudulent claims to the U.S. A relator with inside information of fraud files a qui tam action in federal court. 164 Once filed, the court then seals the action for at least 60 days while the DOJ reviews the action’s merits. 165 If the government believes the claim has merit, 166 and believes the relator is the “original source” of the inside

“concerned that suppliers of goods to the Union Army during the Civil War were defrauding the Army”).


158. These changes included “increasing damages from double damages to treble damages and raising the penalties from $2,000 to a range of $5,000 to $10,000.” FCA Primer, supra note 156.

159. See Bucy, supra note 19, at 44–46 (comparing the different eras of the qui tam provision throughout the FCA’s history).

160. Id. at 44 (“Private parties who allege and prove fraud against the government bring qui tam lawsuits.”).

161. United States ex rel. Barajas v. United States, 258 F.3d 1004, 1012 (9th Cir. 2001); see also S. REP. NO. 99–345, at 2 (1986) (“The proposed legislation seeks not only to provide the Government’s law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward.”).


163. The “adequate basis for the relator’s suit . . . is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000).

164. 31 U.S.C. § 3730(b); see also id. § 3732(a) (stating where a relator may file an action).

165. See Bucy, supra note 19, at 49–50 (describing the DOJ evaluation process); see also 31 U.S.C. § 3730(b)(2) (“The complaint shall . . . remain under seal for at least 60 days . . . .”)

166. If the DOJ initially believes there is no merit to the claim, it will move to dismiss the suit pursuant to FCA procedure. See 31 U.S.C. § 3730(c)(2)(A) (“The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the
information, the government can do one of two things: (1) the DOJ can decide to intervene, which occurs when the government believes there is a high chance for success in the case, or (2) the DOJ can decide not to intervene and allow the relator to proceed with a civil claim of her own. Historically, *qui tam* cases in which the DOJ intervenes have much higher success rates than cases when the DOJ chooses not to intervene; thus, relators and their lawyers work extremely hard on the initial complaint to entice the government to intervene.

If the government chooses to intervene, it retains “primary responsibility” for the lawsuit; the complaint is unsealed and then served on the defendant. At this point, the suit continues as is “typical of other lawsuits.” However, the relator still remains a plaintiff to the suit, creating a “dual-plaintiff” system in which both the relator and the federal government retain specific rights detailed in the statute. If the action is successful, the relator is awarded 15–25% of the damages as a reward for their useful inside information.

If, on the other hand, the government does not intervene, the relator can proceed with a private suit of her own. If successful, the government awards the relator a significant share of the damages, anywhere between

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167. See id. § 3730(e)(4)(B) (defining “original source” as “an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) [sic] who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section”).

168. See Bucy, supra note 19, at 51–52 (detailing situations when the government decides to intervene in the *qui tam* process).

169. See id. at 51 (“The litigational advantages to private plaintiffs of obtaining DOJ intervention are so substantial that the acknowledged goal of any experienced relators’ attorney is to obtain the government’s intervention. Such intervention is obtained by preparing a thorough, complete, and convincing written statement for the government.”).


171. Id. § 3730(b)(3).


173. See Bucy, supra note 19, at 50 (“The relator retains certain rights if the government intervenes, including the right to object and be heard on a motion to limit the relator’s role, or to dismiss or settle the case.”); see also 31 U.S.C. § 3730(c)(3)–(4) (explaining that the government retains the right to dismiss the case or move to have the plaintiff’s role diminished for good cause).

174. 31 U.S.C. § 3730(d)(1); see Bucy, supra note 19, at 50 (describing the calculation for *qui tam* awards).

175. 31 U.S.C. § 3730(c)(3).
The government, while not a party to the suit, recovers the remainder of the award. In these actions, individual citizens with inside knowledge of wrongdoing become “private Attorney[s] General[,]” uncovering wrongs that may otherwise have gone unnoticed and unpunished. Even though the relator is the sole plaintiff in these suits where the government chooses not to intervene, the DOJ retains the ability to review the relator’s suit and can move to dismiss if it believes the claim is frivolous. Thus, the government possesses an important quality control measure over FCA qui tam suits, regardless of whether the government is a party.

**B. The Theory Behind a Qui Tam Approach to Regulation**

In her influential article “Private Justice,” University of Alabama Law School Professor Pamela (Pierson) Bucy describes the different theories that underlie the concept of private justice. Bucy defines the concept of private justice as “when private persons initiate lawsuits to detect, prove, and deter public harms.” According to Bucy, the FCA’s qui tam model is a “common good” action. Common good actions are those “brought by plaintiffs who have suffered no personal injury but who have been given authority to sue malfeasors because their lawsuits, which bring additional resources to law enforcement’s efforts, are viewed as helpful to the common community.” In her article, which examines other “private justice” models, Bucy argues the FCA’s qui tam model is the most

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176. *Id.* § 3730(d)(2).
177. *See Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (using the term “private Attorney General[]” to refer to a private individual in whom the government has vested “authority to bring a suit . . . the sole purpose [of which] is to vindicate the public interest”).
178. *See 145 CONG. REC. 16,032 (1999) (statement of Rep. Howard L. Berman) (detailing what would happen if changes were made to the FCA’s qui tam model).*
179. *See 31 U.S.C. § 3730(c)(3)–(4) (detailing the government’s options when it decides not to intervene).*
180. *See Bucy, supra note 19, at 13 (“There are three basic types of private justice actions.”).*
181. *Id.* at 4.
182. *See id.* at 13 (“Examples of ‘common good’ actions include citizen suits, generally available in environmental laws and in some consumer protection statutes, and the civil False Claims Act’s qui tam provisions.”).
183. *Id.*
184. *Bucy examines several private justice models, including those in environmental statutes (Clean Water Act, Resource Conservation & Recovery Act, etc.) and also those found in the Sarbanes-Oxley. Id.* at 11 n.36, 31–32, 32 n.167.
effective model at eliciting helpful information that leads to the successful regulation of bad actors.\footnote{185}

Between 1987 and 2015, the DOJ collected over $33.2 billion in settlements and judgments through FCA \textit{qui tam} actions.\footnote{186} During that same period, the courts awarded relators over $5 billion from successful FCA suits.\footnote{187} In 2015, the relators’ awards in cases with no DOJ intervention surpassed the amount of relators’ awards in cases with DOJ intervention.\footnote{188} This suggests that relators and their lawyers are continuing to pursue FCA claims even when the government declines to intervene and may be evidence that relators’ attorneys are becoming more adept at bringing these single-plaintiff suits.\footnote{189} It may also hint at the possibility that the DOJ lacks resources—or perhaps the will—to intervene in FCA suits.\footnote{190}

The government uses the FCA to police bad actors within the financial industry, albeit in limited situations. For example, the government has used the FCA in cases of Financial Assistance Fraud,\footnote{191} Mortgage Fraud,\footnote{192} Loan Fraud,\footnote{193} Securities Pricing Fraud,\footnote{194} and Emergency Fund Fraud.\footnote{195}

\footnote{185. “Enlisting the resource of inside information: knowledgeable insiders who are willing to alert regulators to malfeasance before or as it is occurring, is the only effective and efficient way to police wrongdoing motivated by economic gain. An effective private justice institutional design can provide this resource,” and “[o]nly one model, the qui tam provisions of the civil False Claims Act (‘FCA’), explicitly seeks to elicit inside information about public harms.” \textit{Id.} at 11–12. “[T]he ‘common good’ private justice actions, especially the qui tam FCA actions, are capable of producing beneficial resources for public regulators, namely, legal and investigative talent and inside information.” \textit{Id.} at 54–55. “The qui tam private justice model. . . has proven to be highly effective in recruiting legal talent who have the skill and resources to handle complex, expensive cases.” \textit{Id.} at 58. “[T]he qui tam FCA ‘common good’ private justice action is extremely successful in bringing forth helpful inside information.” \textit{Id.} at 61.

\footnote{186. See U.S. DEP’T OF JUSTICE, FRAUD STATISTICS—OVERVIEW (2015), https://www.justice.gov/opa/file/796866/download (documenting that a majority of the $33.2 billion, approximately $31 billion, came from \textit{qui tam} suits where the DOJ intervened).

\footnote{187. This was the first year that this occurred. \textit{Id.}


\footnote{189. See EISINGER, supra note 74, at 156, 183–84 (detailing the DOJ’s loss of resources over the years).

\footnote{190. Financial Assistance Fraud occurs when a company submits a fraudulent request for financial assistance to the government under the Troubled Asset Relief Program. Itri, \textit{supra} note 172.

\footnote{191. Mortgage Fraud occurs when a company submits “fraudulent or falsified information in conjunction with securing Federal Housing Administration (FHA) or Housing and Urban Development (HUD) funds, loan guarantees, or mortgage insurance” \textit{Id.}

\footnote{192. An example of Loan Fraud is when a hedge fund illegally uses an off-shore account. \textit{Id.}

\footnote{193. Securities Pricing Fraud occurs when a company “fraudulent[ly] price[es] . . . securities or financial products purchased by public pension funds or government entities.” \textit{Id.}

\footnote{194. Emergency Fund Fraud occurs when a company fails to provide promised services to the Federal Emergency Management Agency (FEMA). \textit{Id.}
Between 2009 and 2016, the DOJ collected billions of dollars in FCA judgments and settlements stemming from instances of housing and financial fraud. This included a $25 billion settlement that the DOJ and 49 states’ Attorneys General reached with America’s five largest private-mortgage servicers. In this record-breaking settlement, five *qui tam* relators shared a reward of $47 million for their inside information related to the companies’ fraudulent loan-servicing and foreclosure practices. Other significant financial-industry settlements reached in FCA *qui tam* actions include the DOJ’s $16.65 billion settlement with Bank of America in 2014 for the company’s illegal mortgage practices leading up to the Financial Crisis, as well as a recent $1.2 billion settlement with Wells Fargo for its practice of endorsing residential-home mortgages that did not meet the Federal Housing Administration standards.

All of these FCA claims filed against financial corporations share a common limitation—they deal with fraud perpetrated against the government and do not cover a corporation’s fraudulent acts that harm individual members of the public. While over half of the states in America now have their own *qui tam* fraud statutes, these state laws, like the federal law, only cover fraud against the state. This limitation, in addition to the inadequacies of civil litigation for securities violations and the recent failure of the DOJ to prosecute corporate executives in the wake of the Financial Crisis, all make it necessary for Congress to add a *qui tam* private right of action to § 922 of Dodd–Frank.

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197. The five largest private-mortgage servicers were, at the time, Bank of America Corporation, JPMorgan Chase, Wells Fargo, Citigroup, and Ally Financial. See id. (announcing the record settlement).

198. See id. (“The 2012 settlement included $911.7 million in civil False Claims Act recoveries on behalf of federal mortgage-insurance programs . . . .”).

199. Id.

200. Id.

201. Id.


203. See supra Part III.B (detailing the inadequacies of civil-litigation pathways currently available to individuals).

204. See supra Part II.A (outlining the failure of the DOJ to secure a single conviction of a high-ranking corporate executive in the aftermath of the 2008 Financial Crisis).
V. THE POTENTIAL FOR A QUI TAM PRIVATE RIGHT OF ACTION UNDER SECTION 922 OF DODD–FRANK

A. Introduction to Section 922 of Dodd–Frank

Dodd–Frank, passed in response to the institutional failures that precipitated the 2008 Financial Crisis, provides a unique avenue through which the SEC can make a recommendation to Congress encouraging the creation of a *qui tam* private right of action in the securities context. Section 922(d)(1)(G) of Dodd–Frank reads:

The Inspector General of the Commission shall conduct a study of the whistleblower protections established under the amendments made by this section, including . . . whether, in the interest of protecting investors and identifying and preventing fraud, it would be useful for Congress to consider empowering whistleblowers or other individuals, who have already attempted to pursue the case through the Commission, to have a private right of action to bring suit based on the facts of the same case, on behalf of the Government and themselves, against persons who have committed securities fraud.

In January of 2013, the SEC’s OIG released, in a report to Congress and the public, the findings of its study. The report concluded:

[I]t is premature to introduce a private right of action into the SEC’s whistleblower program at this time, since the program is still relatively new and has only been in place since August 2011 . . . Upon collecting additional data and assessing the effectiveness of the program after a reasonable amount of time, the OIG will be in a better position to opine on the usefulness of adding a private right of action to the SEC’s whistleblower program.

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208. Id. at 28.
It has been six years since the OIG concluded that it would be wise to delay any recommendation to Congress for a securities *qui tam* private right of action—in the hope that the additional time would allow for a better perspective on the issue. 209 The failure of the federal government to prosecute white-collar crimes, the limitations placed on private suits by the PSLRA, and the worrying trend of deregulation over the past several decades make the creation of a *qui tam* private right of action for securities violations all the more timely. 210 Thus, the SEC should, pursuant to § 922(d)(1)(G) of Dodd–Frank, recommend to Congress a private right of action under Dodd–Frank’s Whistleblower Provision similar to the *qui tam* model in the FCA. 211 A *qui tam* private right of action for whistleblowers in the securities-fraud context would serve to deter the illegal acts that precipitated the Financial Crisis and would provide a remedy to those aggrieved by such acts. 212

**B. This Article’s Proposed Legislation: An Introduction**

As a preliminary matter, it is important to note that § 922 of Dodd–Frank already contains a so-called “private right of action” for whistleblowers, albeit in a different form than the proposal contained in this Article. 213 The current private right of action now available in § 922 only applies to retaliation claims and is different from the *qui tam* private right of action under the FCA. 214 Under Dodd–Frank, a whistleblower who is fired for providing information to the SEC may file a retaliation complaint

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209. Id. at 30.

210. See supra Part I.B (discussing the causes and consequences of decades of financial deregulation); see also supra Part II.A (highlighting the lack of criminal prosecutions related to the Financial Crisis); see also supra Part III.B (demonstrating the limits of private suits under the PSLRA).

211. See Dodd–Frank Act § 922(d)(1)(G), 124 Stat. at 1848–49 (providing the best means to implement *qui tam* actions under Dodd–Frank).

212. See supra Part IV.B (illustrating how *qui tam* actions have led to the effective regulation of bad actors in other financial contexts).

213. See Protections Against Retaliation, SEC, https://www.sec.gov/whistleblower/retaliation (last modified July 25, 2018) (“Dodd–Frank . . . created a private right of action that gives whistleblowers the right to file a retaliation complaint in federal court.”). It is also important to note that Dodd–Frank established a process through which whistleblowers, who voluntarily provide original information to the SEC that results in a successful sanction that exceeds $1,000,000, can obtain an award, Dodd–Frank, however, did not create a public right of action under this subsection. Dodd–Frank Act §§ 23(a)–(b), 124 Stat. at 1740–41.

in federal court.\textsuperscript{215} The whistleblower, under the current law, does not have the right to act as a “private [A]torney [G]eneral[.]”\textsuperscript{216} The proposed legislation in this Article, however, would allow whistleblowers to do just that—to act as private Attorneys General under § 922 of Dodd–Frank.\textsuperscript{217}

As a second preliminary matter, this Article expands upon the work of Professor Pamela Bucy.\textsuperscript{218} Professor Bucy, in her seminal article “Private Justice,” called on Congress to enact a \textit{qui tam} private right of action for financial and environmental regulation, generally.\textsuperscript{219} Many of her recommendations were incorporated into Dodd–Frank, a testament to both her ingenuity and detailed proposal.\textsuperscript{220} This Article aims to build upon Bucy’s work—it suggests that § 922(d)(1)(G) of Dodd–Frank provides a timely opening for the SEC to recommend to Congress a \textit{qui tam} private right of action for financial regulatory purposes.\textsuperscript{221} In doing so, this Article applies lessons learned from the 2008 Financial Crisis to a possible \textit{qui tam} private right of action under Dodd–Frank.\textsuperscript{222}

\begin{enumerate}
\item \textsuperscript{215} See \textit{Protections Against Retaliation}, supra note 213 (“[E]mployers may not discharge, demote, suspend, harass, or in any way discriminate against an employee in the terms and conditions of employment because the employee reported conduct that the employee reasonably believed violated the federal securities laws.”); see also \textit{Dig. Realty Tr., Inc. v. Somers}, 138 S. Ct. 767, 770 (2018) (holding that Dodd–Frank’s anti-retaliation provision only extends to an individual who has reported a violation of the securities laws to the SEC).
\item \textsuperscript{216} Cf. \textit{Itri}, supra note 172 (describing the role of the private right of action in FCA, which is less significant in Dodd–Frank).
\item \textsuperscript{217} \textit{See infra} Part VI (proposing a \textit{qui tam} private right of action).
\item \textsuperscript{218} \textit{See infra} Part VI (suggesting an expansion of the private right of action under Dodd–Frank).
\item \textsuperscript{219} \textit{See} Bucy, supra note 19, at 8 (“Part III discusses how and why an optimally designed private justice model should be expanded into two areas: protection of the environment and protection of national financial markets.”).
\item \textsuperscript{220} \textit{See Baruch & Barr, supra} note 214, at 28 (“The concept behind the SEC’s whistleblower program [was] initially proposed by University of Alabama Law School Professor Pamela Pierson . . . .”).
\item \textsuperscript{221} \textit{See infra} Part VI.B (advocating for a \textit{qui tam} provision that provides whistleblowers with incentives and legal tools to deter fraud in financial markets); \textit{see infra} notes 254, 299–301 and accompanying text (describing the importance of whistleblowers in the effective enforcement of securities law); \textit{see infra} Appendix 1 (outlining the implication of this Article’s proposed \textit{qui tam} provision).
\item \textsuperscript{222} Bucy’s article was written in 2002 and therefore did not incorporate the lessons learned from the 2008 Financial Crisis. Bucy, \textit{supra} note 19.
\end{enumerate}
VI. A PROPOSAL ON HOW TO STRUCTURE A QUI TAM SECURITIES STATUTE

A. Key Components of the FCA’s Qui Tam Model That Should Be Retained in a Qui Tam Securities Statute

1. Original Source Jurisdiction

Under the False Claims Act, a relator may bring a claim in federal court only if he or she is the “original source” of the inside information. The FCA defines “original source” as:

> [A]n individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) [sic] who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

The “original source” provision, a result of the 1986 amendments to the FCA, is a safeguard against suits from individuals who are not whistleblowers but instead received information through public channels. This prohibits professional plaintiffs’ attorneys from churning out strike suits and is an important safeguard included in the FCA. The “original source” jurisdictional requirement should be included in any qui tam securities statute in order to protect against frivolous lawsuits.

2. Standing to Bring an Action on Behalf of the Government

The power assigned to private individuals to act as “private [A]ttorney[s] [G]eneral[]” and bring a civil suit on behalf of the federal government is found in § 3730(b) of the FCA. That provision states, “[a]
person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.” Thus, a private plaintiff is granted the authority to sue, standing in the shoes of the government. As mentioned previously, this theory of standing is based on the principle that Congress can assign, by way of statute, its right to sue to a private citizen. Any securities qui tam legislation must contain a similar provision in order to give standing to individual whistleblowers. Instead of the FCA’s language, the new securities statute should read:

A person may bring a civil action for a violation of ‘[1] Sections 11, 12(a) and (b), 15, 17 of the Securities Act of 1933[;] [2] Sections 6, 9, 10, 14, 15, 16(b), 18(a), 20, 29(b) of the Exchange Act of 1934[;] [3] Title 18, United States Code, Section 1344[;] and [4] Title 15 United States Code Section 7241(a).

Under this language, a whistleblower who is reporting securities fraud could bring her suit under several securities-violation theories.

3. The Dual-Plaintiff Model: Its Benefits to Plaintiffs and the Government and Its Check on Frivolous Suits

Under the FCA’s dual-plaintiff model, if the federal government chooses to intervene in a relator’s suit, the litigation proceeds with both the DOJ and whistleblower acting as plaintiffs, each with a set of rights. A qui tam securities statute should maintain the dual-plaintiff approach. However, in a qui tam securities statute the governmental party to the suit should be the SEC, not the DOJ. The SEC is well positioned to do this, as they have an enforcement division and are responsible for securing judgments and settlements against corporate wrongdoers. Thus, the

229. See supra text accompanying note 163 (“The relator has standing to sue on the theory that the federal government has assigned its right to claim damages to a private citizen via the FCA.”).
230. Bucy, supra note 19, at 105.
232. See supra notes 230–31 and accompanying text (listing several securities-violation theories under which a whistleblower may report securities fraud).
233. See 31 U.S.C. § 3730(c) (establishing the parties’ rights in a qui tam suit).
proposed *qui tam* securities statute could simply replace any mention of the DOJ with the SEC.

The dual-plaintiff model used in the FCA should be retained for several reasons. First, the model promotes efficient public-private partnerships. With both the government and the whistleblower as plaintiffs, the parties are able to combine their resources and expertise to put together a formidable plaintiff team. Plaintiffs could use these additional resources when going up against a large corporation’s high-powered defense team. Second, the dual-plaintiff model provides an important “quality-control” check on the litigation. Reckless plaintiffs’ attorneys risk setting bad precedent and raising the ire of Congress when filing frivolous lawsuits. When the SEC intervenes in a *qui tam* securities action and takes “primary responsibility,” the government retains the authority to dismiss a case at any time if it discovers the claim has no merit. Thus, a dual-plaintiff approach—one where the SEC represents the interests of the government and works alongside the individual whistleblower—is an important piece of any future *qui tam* securities statute.

4. Further Checks on Frivolous Suits: Instances When the Government Can Dismiss a *Qui Tam* Action Even When Not a Party to the Suit

Under the *qui tam* provision of the FCA, the government has the power to dismiss a fraud claim—even if the government is not a party to the suit. This occurs in two situations. First, the government may dismiss a claim brought by a whistleblower if, during its initial 60-day review of the sealed complaint, it believes that the whistleblower’s claim has no merit. The government can dismiss a meritless claim so long as “the court has

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236. *Id.* at 52 (“This dual-plaintiff design provides an efficient way for private litigants to supplement the DOJ’s resources throughout the duration of a case.”).

237. *Id.* at 52–53.

238. Indeed, this is exactly one of the reasons Congress enacted the PSLRA. See *H.R. Rep.* No. 104–369, at 32 (1995) (Conf. Rep.) (“This legislation implements needed procedural protections to discourage frivolous litigation.”).


240. *Id.* § 3730(c)(2)(A) (“The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.”).

241. *Id.* § 3730(c)(3)–(4).

242. *Id.* § 3730(b)(2) (“The Government may elect to intervene and proceed with the action within 60 days . . . .”).
provided the [whistleblower] with an opportunity for a hearing on the motion." Meritless claims dismissed before the 60-day review period are never made public, and thus the FCA provides an important protection against frivolous claims that may damage a company’s or individual’s reputation. A qui tam securities statute should contain the same protections against meritless suits, including a 60-day in camera waiting period during which time the government may move to dismiss any complaint it deems meritless.

The second situation in which the FCA’s qui tam model provides protection against frivolous suits is in actions when the government decides not to intervene initially, but after having reviewed evidence uncovered during discovery, it decides the case is meritless. Under § 3730(c)(2)(B)(3) of the FCA, the government may request evidence and discovery materials from the private plaintiff (the whistleblower). If at any point the government believes the private plaintiff no longer has a legitimate claim, it can move to dismiss. The FCA therefore provides two legitimate procedural checks on frivolous suits—one before discovery and one during and after discovery. This feature should be retained in any qui tam securities statute.

B. Differences Between the FCA’s Qui Tam Model and This Article’s Proposal

1. Damages and Whistleblower Awards

One area in which this Article diverges substantially from the FCA (and Bucy’s proposed legislation) is with respect to the calculation of

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243. This holds true at any stage of the litigation. Id. § 3730(c)(2)(A).
244. See id. § 3730(b)(2) (“The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.”).
245. See In Camera, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining in camera as “[i]n the judge’s private chambers”). Here, in camera essentially means sealed and only viewed by the judge.
246. 31 U.S.C. § 3730(c)(2)(A); see Bucy, supra note 19, at 70 (describing the government’s statutory authority under the FCA to prevent frivolous suits by dismissing qui tam actions regardless of whether it has intervened).
247. See 31 U.S.C. § 3730(c)(3) (“If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government’s expense.
248. Alternatively, the government may also choose to intervene and thus become a party to the suit—joining the whistleblower—if it deems there is a substantial likelihood of the suit succeeding. See id. (“[T]he court . . . may nevertheless permit the Government to intervene at a later date upon a showing of good cause.”).
damages and the whistleblower’s award. Under the current version of the FCA, the alleged wrongdoer pays three times—or “treble”—“the amount of damages which the Government sustains,” plus a $5,000–10,000 penalty per false claim. Under the FCA, the relator’s share is between 15% and 25% of the damages in a successful action if the government intervenes. If the government does not intervene, the relator receives 25–30% of the total damages. In either scenario, the specific amount awarded “depend[s] upon the extent to which the person substantially contributed to the prosecution of the action.” Courts, in making their relator-award determinations, use several factors to calculate the appropriate percentage from the statutory range.

This Article proposes changing the process for determining damages and the whistleblower’s award in the securities context, so as to make any new statutory scheme more effective at regulating securities. Actual damages in securities cases range from small sums to eye-popping amounts. The current FCA relator’s award calculations would provide little financial incentive for whistleblowers when securities fraud occurs on a small scale—their award would be meager. Thus, for qui tam securities claims under $1 million, the whistleblower’s award should be three times the amount of damages in intervener actions and five times the amount of

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249. See id. § 3730(d) (explaining qui tam plaintiff awards); see also Bucy, supra note 19, at 81–82 app. (outlining Professor Bucy’s proposed qui tam awards for plaintiffs pursuant to the FCA).
251. See id. § 3730(d)(1)–(2) (explaining the different calculations for qui tam awards).
252. Id.
253. Id. § 3730(d)(1).
254. Factors that courts consider in determining the whistleblower’s qui tam award include: “(A) the significance of the information provided to the Government [by the qui tam plaintiff]; (B) the contribution of the [qui tam plaintiff] to the result obtained; and (C) whether the information which formed the basis for the suit was [previously] known to the Government.” S. REP. NO. 99–345, at 28 (1986).
255. See infra notes 264–73 and accompanying text (outlining the policy rationales for potential changes to the damages scheme in securities’ whistleblower suits).
257. See Bucy, supra note 19, at 61–62 (describing the extreme consequences that can follow from “blow[ing] the whistle” on one’s own employer).
258. See 15 U.S.C. § 78u-6(a)(1) (demonstrating that the proposed cut off shares similarities with the current whistleblower provision under § 922 of Dodd–Frank, not for any other reason except to maintain uniformity).
damages where the government declines to intervene.\footnote{The increased \textit{qui tam} award amount also takes into account the risks a whistleblower faces when coming to the government with inside information of fraud. \textit{See} Paul Sullivan, \textit{The Price Whistleblowers Pay for Secrets}, N.Y. TIMES (Sept. 21, 2012), https://www.nytimes.com/2012/09/22/your-money/for-whistle-blowers-consider-the-risks-wealth-matters.html (describing the general risks to whistleblowers: financial, professional, and emotional); Bucy, supra note 19, at 61 (relaying the agonizing feelings that whistleblowers experience when they share inside information). Many executives make seven figures a year, so the award must be enough, when dealing with small sums, to entice those at the top of the corporation, who are, in some instances, the individuals who possess the most complete knowledge of the fraud. \textit{See} Louise Story & Eric Dash, \textit{Banks Prepare for Big Bonuses, and Public Wrath}, N.Y. TIMES (Jan. 9, 2010), https://www.nytimes.com/2010/01/10/business/10pay.html (describing the discussions surrounding paying “six-, seven- and even eight-figure sums for some chief executives and top producers.”).}

Furthermore, damages—here the actual amount lost in the fraud—should be paid out by the corporate or individual wrongdoer to the SEC.\footnote{\textit{Costs and attorney’s fees should also be awarded to the winning party.\footnote{See infra text accompanying notes 274–75 (“The SEC must have sufficient resources to fund its investigations as an intervener, and thus the fines provide an important source of funding to sustain the success of the program.”).}}} The SEC would take this damage amount and facilitate a payout to individuals or companies harmed by the fraud.\footnote{\textit{The SEC would take this damage amount and facilitate a payout to individuals or companies harmed by the fraud.}} Finally, the government should impose a fine against the wrongdoer—the fine should be the same amount as actual damages.\footnote{\textit{The actual amount of money lost in the fraud. \textit{See} \textit{Actual Damages}, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.”).}} Costs and attorney’s fees should also be awarded to the winning party.\footnote{\textit{Cf.} Theodore Eisenberg & Geoffrey P. Miller, \textit{The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts}, 98 CORNELL L. REV. 327, 327 (2013) (explaining the English rule for attorney fees, in which the winning party receives reasonable attorney fees from the losing party).} Costs and attorney’s fees should also be awarded to the winning party.\footnote{\textit{If the SEC declines to intervene, the wrongdoer would pay $700,000 to the SEC in this example: a $500,000 award that would go to the whistleblower, $100,000 in actual damages, and a $100,000 fine (mirrors actual damages).}}

To elucidate the proposal, take this example: a whistleblower uncovers that her company has been making fraudulent misrepresentations to shareholders that later costs the shareholders $100,000. The whistleblower files a \textit{qui tam} complaint in federal court, alleging a Rule 10b–5 violation. If the government intervenes and the suit is successful, the wrongdoer—here, the whistleblower’s company—would pay a total of $500,000 to the SEC, plus any attorney’s fees.\footnote{\textit{If the SEC declines to intervene, the wrongdoer would pay $700,000 to the SEC in this example: a $500,000 award that would go to the whistleblower, $100,000 in actual damages, and a $100,000 fine (mirrors actual damages).}} The $500,000 is comprised of three different “awards”: (1) $100,000 in actual damages, given to the harmed shareholders; (2) a $100,000 fine (same amount as actual damages); and (3)
a $300,000 award to the whistleblower for her inside information that led to the successful resolution of the action (three times the actual damages). This proposal for *qui tam* securities claims under $1 million takes into account the importance of providing a legitimate financial incentive to entice whistleblowers to come forward when the fraud, *i.e.*, the actual damage amount, is relatively small. It also seeks to provide the government with a financial incentive, through the fine, to intervene in legitimate, albeit low-paying, *qui tam* suits. The penalty paid to the SEC would be reinvested into the agency’s Office of the Whistleblower for future *qui tam* investigations. 265 Most importantly, under this proposal, the full amount of actual damages would be collected and returned to the victims to make them whole again.266

Critics will likely argue that such severe damage amounts for relatively small instances of fraud will weaken the economy.267 However, this ignores several external costs associated with widespread securities fraud. When there is fraud in the marketplace, investors lose confidence in the market and thus will invest less money in the economy. 268 Financial fraud undermines the free-market rationale, which is one of the theoretical bases of the U.S.’s economy. 269 In a free market, individuals and businesses possess the freedom “to choose from between an array of goods and

265. Securities investigations are expensive; thus, a fine leveled against a wrongdoer would be retained by the SEC and would go toward future *qui tam* investigations. Press Release, SEC, Former Company Insider Earns More Than $4.1 Million for Whistleblower Tip (Dec. 5, 2017), https://www.sec.gov/news/press-release/2017-222. The Office of the Whistleblower already administers the “investor protection fund” for whistleblowers under § 922 of Dodd–Frank. Id. It would be up to the SEC whether to establish a separate fund for just the *qui tam* investigations, or the SEC may elect to incorporate the *qui tam* fines into the existing “investor protection fund.” Id.

266. In the FCA’s payout model, the relator’s award comes out of the total amount paid by the defendant. 31 U.S.C. § 3730(d) (2012). Thus, the whistleblower’s award is subtracted from the actual damages amount. Id. In contrast, this Article proposes the following: the relator’s award would be paid by the defendant, in addition to any amount of actual damages owed to those who were aggrieved by the defendant’s fraud.

267. A common refrain heard from Wall Street and its lobby is that any regulations or fines imposed on the financial industry hamper the growth of the free market. See Peter A. French, *Enforced Corporate Responsive Adjustment*, 13 LEGAL STUD. F. 115, 127 (1989) (“Fines, however, have serious limitations and can be passed on to underserving populations in the form of higher prices, layoffs, etc.”).


services according to their tastes and preferences." When there is fraud in the marketplace, individuals and businesses cannot make informed decisions about where to allocate their resources, and thus the free market becomes inefficient. Total damages that are sometimes much greater than actual damages are therefore necessary to deter corporate malfeasance and, when compared to the external costs of fraud in the marketplace, these large damage amounts are appropriate.

For fraudulent acts that lead to damages over $1 million, the calculations for awards would be similar to the proposal above, save for one difference—the SEC’s fine should be calculated based on a graduated scale that takes into account several factors. The SEC should be charged with promulgating rules defining these factors, but possibilities include the severity of the wrongdoing (was it widespread or only within one department), whether the company is a repeat offender, and whether the company has demonstrated a noticeable and legitimate effort to improve its behavior. Fines collected here, like those in the under-one-million-dollar category, would be reinvested into the SEC for future qui tam securities investigations. The SEC must have sufficient resources to fund its investigations as an intervener, and thus the fines provide an important source of funding to sustain the success of the program.

Finally, any qui tam securities statute must address who will pay the fine, settlement, and award to the SEC. Under the current system, shareholders pay for most SEC fines and settlements levied against a corporation. Thus, these fines or settlements present “a classic example of the agency problem: managers who violate securities laws may gain

271. See Rapp, supra note 268, at 327 (explaining how fraud makes markets more inefficient).
272. See id. (“Private suits—because of the threat of large damages—arguably deter fraud . . . .”).
273. This proposal is designed to limit excessive fines in cases of widespread financial fraud where fraud damages can reach into the millions and billions of dollars. See, e.g., DOJ Fact Sheet, supra note 196 (discussing settlements of millions and billions of dollars against the nation’s largest mortgage servicers). If the fines were to mirror the actual damages of the fraud—as proposed in the under-one-million-dollar cases—the resulting fine would be unrealistically large.
275. Former SEC Commissioner Cynthia Glassman summed up the current system nicely: “When the boards and management are agreeing to these [SEC] penalties, they’re agreeing to pay with other peoples’ money.” Deborah Solomon, As Corporate Fines Grow, SEC Debates How Much Good They Do, WALL ST. J., https://www.wsj.com/articles/SB110001198122471832 (last updated Nov. 12, 2004).
from misconduct, especially in the short-term, while long-term losses from fines are spread across shareholders.\textsuperscript{276} If the corporation can shift the costs associated with its fraud onto its shareholders, there is no deterrent effect.\textsuperscript{277} In order for this proposal to effectively regulate the behavior of corporate America, any \textit{qui tam} securities statute must contain a provision that states that any fine, settlement, or award against a corporation must \textit{not} be passed on to the corporation’s shareholders or result in layoffs of low-level employees. Instead, the corporation, internally, must do one or several things to pay for the total cost of the judgment or settlement: (1) reduce executive compensation; (2) eliminate bonuses; (3) reduce corporate perks (such as food and travel expenses for executives); or (4) do an internal audit to find the bad actor(s) and force the bad actors to pay for the damages.\textsuperscript{278}

2. Any New Statute Must Explicitly State That \textit{Qui Tam} Actions May Be Brought Against Individual Wrongdoers

The FCA does not contain explicit language stating that a whistleblower may file a \textit{qui tam} civil suit against an individual.\textsuperscript{279} Section 3730(a) states: “If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.”\textsuperscript{280} However, the \textit{qui tam} provision of the FCA—§ 3730(b)—does not specify that a private citizen acting on behalf of the government has the authority to bring a suit against an individual wrongdoer.\textsuperscript{281} Section 3730(b) simply says that “[a] person may bring a civil action for a violation of section 3729.”\textsuperscript{282} Courts, however, have interpreted § 3730(b) to include violations of § 3729 perpetrated not just by a corporation but by individuals as well.\textsuperscript{283}

\textsuperscript{276} Steinway, supra note 105; see also Eisinger, supra note 74, at 204 (“[T]he SEC alleged that Bank of America lied to its shareholders, but the agency was making shareholders pay the bank’s fine. The victims of the scheme had to pay the penalty. The shareholders were getting screwed twice.”).

\textsuperscript{277} Steinway, supra note 105 (“There is ample evidence that \textit{individuals} can be deterred by the threat of financial penalties when they pay the cost themselves. However, if their employer (or its shareholders) pays, the deterrent effect is undermined.”).

\textsuperscript{278} These are just some suggestions for ways a corporation could possibly pay for the damages. The SEC would be allowed to promulgate other ways in which a corporation could pay—so long as the shareholders and low-level employees are not affected.

\textsuperscript{279} See 31 U.S.C. § 3730(b) (2012) (providing that a private person may bring a civil action for violations of the FCA but not explicitly stating that a private person may bring such actions against an \textit{individual}).

\textsuperscript{280} Id. § 3730(a).

\textsuperscript{281} Id. § 3730(b).

\textsuperscript{282} Id.

\textsuperscript{283} See Press Release, U.S. Dep’t of Justice, Justice Department Recovers over $4.7 Billion from False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016),
In drafting a *qui tam* securities statute, Congress should incorporate explicit language that states a whistleblower can bring a *qui tam* civil action against an individual wrongdoer. In the eyes of the American public, one of the biggest frustrations of the 2008 Financial Crisis was the government’s failure to hold individual actors responsible. Including explicit language in the new statute would not only preserve that right, but also ensure that the statute functions in the same way as the FCA. As discussed above, a fine or settlement against a company hits the shareholders, not the corporate executives who oversaw the misdeeds. A law that makes individual wrongdoers (bank and investment executives) personally liable for harm to others is an important step toward accountability and deterrence of future bad acts. For these reasons, the *qui tam* securities statute should explicitly state that a whistleblower has the authority to pursue action against individuals who violate federal securities laws. Thus, courts are not left to interpret any vague language in the statute, as they were forced to do in the case of the FCA’s *qui tam* provision, § 3730(b).

3. The Possibility for Criminal Charges in Intervener Suits

After the 2008 Financial Crisis, the public and elected officials expressed outrage that not a single high-ranking executive at any of the

https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016 (“[E]xamples of individuals held personally liable for alleged false claims include George Hepburn ($10.3 million), founder and president of Dynasplint Systems Inc.; Dr. Jonathan Oppenheimer ($9.35 million), former owner and chief executive officer of a Nashville drug testing laboratory; Gottfried and Mieke Kellermann ($8.5 million), founders of Pharmasan Labs Inc. and Neuroscience Inc.; Jacob (Jake) J. Kilgore ($4 million), former co-owner, vice president, and later president of Orbit Medical Inc.; Dr. David G. Bostwick ($3.75 million), founder and former owner and chief executive officer of Bostwick Laboratories Inc.; Mark T. Conklin ($1 million), former owner, operator, and sole shareholder of Recovery Home Care Inc. and Recovery Home Care Services Inc.; Dr. David Spellberg ($1.05 million) and Robert A. Scappa, D.O. ($250,000), urologists with 21st Century Oncology LLC; and Ralph J. Cox III ($1 million), former chief executive officer of Tuomey Healthcare System.”).


285. 31 U.S.C. § 3730(a)–(b)(1) (enabling private citizens to bring a *qui tam* civil action against an individual wrongdoer under the FCA).

286. See supra notes 105, 275–76 and accompanying text (explaining how company executives pass the cost of fines and penalties onto shareholders).

287. See Warren Letter, *supra* note 5 (criticizing the lack of DOJ prosecutions brought against individuals for corporate wrongdoing after “serious indications of violations” were found).

nation’s major financial institutions went to prison.289 Qui tam securities actions have the potential to provide the government with the ever-elusive mens rea element needed for criminal prosecutions of financial crimes.290 Any new qui tam securities statute must clearly detail a procedure by which the SEC may make criminal referrals to the DOJ, thus allowing the government to use the inside information gathered from whistleblowers to bring criminal suits.

This addition to a future securities law would make sense and be efficient.291 Under a securities qui tam suit in which the government is an intervenor, the SEC would already have invested the time and resources into vetting and interviewing the whistleblower.292 If the inside information uncovered points to criminal violations of securities statutes, there should be a set procedure included in the new qui tam law that would mandate the SEC to make a referral to the DOJ for further criminal investigation. Then, the DOJ could use this insider knowledge to help crack the mens rea barrier that has all too often kept the agency from bringing meaningful white-collar criminal charges.293 This provision would also signal to the American people that the government is serious about holding individuals accountable for white-collar crimes.294 Also, the possibility of criminal action against

289. See Warren Letter, supra note 5 ("[K]ey companies and individuals that were responsible for the financial crisis and were the cause of substantial hardship for millions of Americans faced no criminal charges. This failure is outrageous and baffling . . . .").

290. See supra Part II.C (explaining how difficult it is to prove the mens rea element of a securities claim); see also supra note 113 and accompanying text (outlining the problems a prosecutor may face in attempting to prove intent in a fraud case).

291. It also would be similar to the FCA. Under the FCA, the DOJ’s Criminal Division can opt to bring charges during the 60-day sealed review period of the whistleblower’s complaint. See U.S. DEP’T OF JUSTICE, OFF. OF THE U.S. ATTORNEYS, JUSTICE MANUAL: CRIMINAL RESOURCE MANUAL 932 (2018) (“Based on the information . . . a decision whether to enter the case and take it over or to decline to do so will be made. After that decision is made, the Commercial Litigation Branch will coordinate as necessary with the USAO to ensure proper handling of the qui tam litigation . . . .”). The only difference here would be that the SEC—the governmental agency involved in a qui tam securities action—would make a referral to the DOJ, as opposed to the DOJ’s Criminal Division that initially reviews the complaint. Id.

292. Only suits in which the SEC decides to intervene are eligible for referral to the DOJ for criminal prosecution. See infra Appendix 1 (“Criminal charges are available only in actions in which the SEC has chosen to intervene.”). Individual whistleblowers filing civil qui tam securities actions could not refer their case to the DOJ. See infra Appendix 1 (displaying when criminal charges are an option).

293. See Warren Letter, supra note 5 (detailing the lack of corporate-executive prosecutions).

294. This message would build off of the “Yates Memo” in which then-Deputy Attorney General Sally Yates wrote: “Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. . . . One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.” See Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, to U.S. Attorneys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.
companies and individuals will further serve as a deterrent against bad acts.\footnote{295}{See Five Things About Deterrence, NAT’L INST. JUST., https://nij.gov/five-things/pages/deterrence.aspx (last modified June 6, 2016) (explaining how the certainty of punishment serves as a deterrent to criminal activity).}

**CONCLUSION**

To this day, Americans’ dismay over the lack of corporate accountability in the aftermath of the 2008 Financial Crisis continues to reverberate throughout the country.\footnote{296}{See Mistrust in America Could Sink the Economy, ECONOMIST (Aug. 10, 2017), https://www.economist.com/business/2017/08/10/mistrust-in-america-could-sink-the-economy (discussing the continued mistrust that Americans have toward corporations and banks).} An average American tends to distrust corporate executives—in large part due to corporate America’s role in facilitating the 2008 Financial Crisis.\footnote{297}{See id. (attributing Americans’ decreasing trust in corporations to the 2008 Financial Crisis).} This distrust is not only worrisome for the economic stability of the U.S., but it wears at the very fabric of the country’s social and political order.\footnote{298}{See Andrew Ross Sorkin, From Trump to Trade, the Financial Crisis Still Resonates 10 Years Later, N.Y. TIMES (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/business/dealbook/financial-crisis-trump.html (describing the impact of 2008 Financial Crisis on the economy and politics).}

Section 922 of Dodd–Frank—the Whistleblower Provision—presents a promising pathway for creating a regulatory framework that has the potential to re-instill trust in corporate America.\footnote{299}{See S. REP. NO. 99–345, at 2 (1986) (quoting from the Senate Judiciary Committee’s report recommending the FCA’s 1986 amendment).} To effectively regulate securities fraud, Congress should borrow the FCA’s \textit{qui tam} private right of action model.\footnote{300}{See supra Part VI (explicating this Article’s proposal).} With individual whistleblowers acting as private Attorneys General, the corporate malfeasors in America will be put on notice that those inside their own companies—those with insider knowledge—are watching for fraud. This Article proposes a creative new solution to securities regulation. The proposed legislation in this Article “seeks not only to provide the Government’s law enforcers with more effective tools, but to encourage any individual knowing of [securities] fraud to bring that information forward.”\footnote{301}{See Aimee Picchi, 5 Ways Dodd–Frank Has Benefitted You, CBS NEWS (Feb. 3, 2017), https://www.cbsnews.com/news/5-ways-dodd-frank-has-benefited-you/ (noting that through August 2016, whistleblowers, under the current statutory framework, had received $100 million and triggered enforcement actions resulting in close to $600 million in sanctions).} With the right tools, the federal government,
private citizens, and the judicial system can work together to ensure a fair and healthy securities market.
APPENDIX 1

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<th>Party Bringing the Action</th>
<th>Corporation</th>
<th>Individual Executive</th>
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<td>SEC &amp; Whistleblower (SEC Intervenes)</td>
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<td>Whistleblower (Private Right of Action)</td>
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Figure 1. Displaying the possible scenarios that may result from this Article’s proposed *qui tam* securities statute. Criminal charges are available only in actions in which the SEC has chosen to intervene. The SEC will determine whether a violation rises to a criminal level, and if it does, the SEC will refer the criminal case to the DOJ for prosecution. If the DOJ brings criminal charges, civil charges may still be brought by the SEC and the Whistleblower together, or only by the Whistleblower under a private right of action. Actions against corporations and individual executives at those corporations may be brought simultaneously.

302. The proposed criminal-referral process follows the current system in place at the SEC. See LINDA CHATMAN THOMSEN, SEC, INTERNATIONAL INSTITUTE FOR SECURITIES MARKET DEVELOPMENT 1 (2005), https://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf (“Criminal enforcement of the federal securities laws is done through the U.S. Department of Justice and the individual U.S. Attorney’s offices throughout the country.”).
SOMEBODY’S KNOCKING, SHOULD I LET THEM IN?:
THE FIGHT OVER UNIONS ENTERS THE HOME

Brendan Williams

INTRODUCTION

Nationally, according to a 2018 report from the Paraprofessional Healthcare Institute, there are over 2 million home-care workers making a median hourly wage of $11.03 an hour. Due to these low wages, depressed by low Medicaid reimbursement where government is the payer, “[o]ne in four home-care workers lives below the federal poverty line (FPL) and over half rely on some form of public assistance.” Roughly 90% of home-care workers are women and only 40% are white—immigrants account for nearly 30% of the overall workforce.

This workforce is growing as our society ages. As Soo Oh reported in Vox, “The Bureau of Labor Statistics projects an increase of more than 1 million new direct care workers—personal care workers, home health aides, and nursing assistants—between 2014 and 2024.” The report also notes

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† The author acknowledges his son, Blake, who gives him hope in uncertain times.

2. Id.
that “the poor are essentially taking care of the poor.” These marginalized workers have been receptive to unionization in many states.

In 2014, the U.S. Supreme Court decided *Harris v. Quinn*. The Court, in a 5–4 decision, ruled that Illinois personal assistants providing long-term care in homes had a right to completely opt out of representation by the Service Employees International Union (SEIU).

In *Harris*, the Court expressed strong reservations about the 1977 precedent of *Abood v. Detroit Board of Education*, “which held that state employees who choose not to join a public-sector union may nevertheless be compelled to pay an agency fee to support union work that is related to the collective-bargaining process.” Yet the Court fell short of overturning *Abood*, distinguishing it by stating, “[t]he Illinois Legislature has taken pains to specify that personal assistants are public employees for one purpose only: collective bargaining. For all other purposes, Illinois regards the personal assistants as private sector employees.”

The Court declined to extend *Abood*, writing, “[i]f respondents’ and the dissent’s views were adopted, a host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion within *Abood*’s reach.”

Far from questioning the efficacy of union representation, the majority opinion, authored by Justice Alito, appeared concerned that it would be successful:

In this case, for example, the category of union speech that is germane to collective bargaining unquestionably includes speech in favor of increased wages and benefits for personal assistants. Increased wages and benefits for personal assistants would almost certainly mean increased expenditures under the Medicaid program, and it is impossible to argue that the level of Medicaid funding (or, for that matter, state spending for employee benefits in general) is not a matter of great public concern.

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5. *Id.*
8. *Id.* at 2623.
10. *Harris*, 134 S. Ct. at 2627 (citations omitted).
11. *Id.* at 2634.
12. *Id.* at 2638.
13. *Id.* at 2642–43.
The Court held that “[t]he First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.”\textsuperscript{14}

Writing for the four dissenters, Justice Kagan wrote that \textit{Abood} should control.\textsuperscript{15} She also noted, “[b]ecause of that bargaining, as the majority acknowledges, home-care assistants have nearly doubled their wages in less than 10 years, obtained state-funded health insurance, and benefited from better training and workplace safety measures.”\textsuperscript{16}

In 2018, the U.S. Supreme Court, in \textit{Janus vs. American Federation of State, County, & Municipal Employees (AFSCME)},\textsuperscript{17} built on \textit{Harris} and overturned the 41-year-old \textit{Abood} precedent.\textsuperscript{18} Like \textit{Harris}, Justice Alito authored the 5–4 decision in \textit{Janus}.\textsuperscript{19} The plaintiff, Mark Janus, worked for the Illinois Department of Healthcare and Family Services as a child support specialist.\textsuperscript{20} Janus objected to union representation, in part, because it was too successful in raising pay despite “the current fiscal crises in Illinois”—a self-sacrificing, even noble, position somewhat belied by the fact that after the decision Janus quit his job and joined a conservative policy group as a “senior fellow.”\textsuperscript{21} The group was among what the \textit{New York Times} described as “a Web of Conservative Donors” that bankrolled the case.\textsuperscript{22}

In response to the argument that to fail to pay dues to the union would result in “free riders” enjoying the benefits of its advocacy, Justice Alito wrote that Janus “strenuously objects to this free-rider label. He argues that

\textsuperscript{14} Id. at 2644.
\textsuperscript{15} Id. at 2645 (Kagan, J., dissenting).
\textsuperscript{16} Id. at 2648.
\textsuperscript{18} Id. at 2460.
\textsuperscript{20} Janus, 138 S. Ct. at 2461.
\textsuperscript{21} Id. To be sure, Illinois is a fiscal basket case. See, e.g., Editorial, \textit{Tell it Straight, Bruce and J.B., About the Pain Ahead for Illinois}, \textit{Chicago Sun-Times} (June 5, 2018), https://chicago.suntimes.com/opinion/illinois-budget-rauner-pritzer-gubernatorial-election/ (“The state’s backlog of bills stands at $6.6 billion and the new budget does little to address that problem. And the state’s massive pension debt—more than $130 billion in unfunded liabilities—just keeps growing.”).
he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.”

Again, Alito appeared to argue that public sector unions had been too successful, complaining that “ascendance of public-sector unions has been marked by a parallel increase in public spending.” He further complained of “the considerable windfall that unions have received under Abood for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.”

Furthermore, the majority decision requires government workers to opt into union membership: “Neither an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.”

In dissent, Justice Kagan accused the majority of “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.” Of Abood, she wrote: “More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding Abood. And likewise, judicial disruption does not get any greater than what the Court does today.”

Indeed, the disruption cannot be overstated. As Alana Semuels wrote in The Atlantic, “[u]ntil now, 22 states had in place a so-called ‘fair share’ provision, which required people represented by unions who did not choose to be members of these unions to pay fees to cover the cost of the unions’ collective bargaining activities.”

There may also be interesting collateral effects, as Washington Post columnist Dana Milbank wrote in anticipation of the decision: “Among the

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25. Id. at 2486. Justice Alito complains of “[u]nsustainable collective-bargaining agreements.”
26. Id. Could it not be argued that the remedy is either to not enter into such agreements in the first place, or to sustain them through additional revenue, as opposed to weakening the ability of unions to bargain?
27. Id. The use of the term “windfall” conjures the image of union leaders sitting, like Scrooge McDuck, upon piles of gold, when, in fact, have not the dues resulted—as Alito complains elsewhere—in improved compensation for those paying them?
28. Id. at 2501 (Kagan, J., dissenting).
29. Id. at 2487–88.
other things that might be challenged if government-imposed payments become unconstitutional ‘compelled speech’: bar dues, student-association fees, utility bills, auto-insurance premiums, continuing-education requirements for doctors and other professionals, homeowners association dues, training for school-bus drivers and others, vaccinations, attorney-supervised real estate closings.”

In California, for example, the effects of Janus were immediate, as the Sacramento Bee reported:

> The State Controller’s Office said on Wednesday that it would cease deducting fair share fees from the paychecks of state workers who are not full union members. Employees will notice the change in their paychecks for their work in July, with many of them saving about $1,000 a year that they had paid in labor fees.

In a celebratory Tweet—of course—President Trump exulted: “Big loss for the coffers of the Democrats!” He may be right.

The fight will now be to persuade public sector workers to join, or not join, unions. As the New York Times noted, even before the Janus decision, the conservative Bradley Foundation “substantially increased its contributions, totaling well over $1 million, to groups like the Independence Institute of Colorado and the Freedom Foundation of Washington State. Those groups have used such tools as direct mail, phone calls and door knocking to persuade public-sector workers to give up union membership.”

This Article examines the implications of Janus by first focusing on the state of Washington, where the fight between SEIU and those wishing to reduce its membership has been fierce ever since the Harris decision. The Article then extrapolates based on that example.

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34. Scheiber & Vogel, *supra* note 23.
I. WASHINGTON STATE: BATTLEGROUND OVER UNION REPRESENTATION

In Washington, home-care workers, also known as individual providers (IPs), gained the right to collectively bargain with the state through the 2001 passage of Initiative 775. Or as the conservative Freedom Foundation—which fought the SEIU—more cynically recounts it: “In 2001, the Service Employees International Union (SEIU) successfully backed Initiative 775, which opened the door for SEIU to unionize IPs. In a little-publicized, low-turnout election, SEIU Local 775 was certified to act as the monopoly provider of workplace representation for all individual providers with only 6,575 votes.”

In 2001, the plight of Washington’s IPs was objectively difficult. Their wages were not bargained for or based upon empirical criteria, but simply arbitrarily set in the state budget. The budget that passed in 2001 raised their wages to $7.68 per hour, from $7.18. In 2002, the Democratic Governor, Gary Locke, actually vetoed a wage increase.

Today SEIU Local 775, under the longtime leadership of its president David Rolf, has grown to be a powerful force in state politics; representing 45,000 long-term care workers in Washington and Montana. SEIU is pushing for a $15 minimum wage and other progressive policies. Under

38. Id.
41. See, e.g., id. (discussing unions post-Janus case). The New York Times had written that “Mr. Rolf is at the forefront of the shift in the labor movement—from a focus on organizing workers in manufacturing and crafts to those in the service sector, particularly low-income and women of color.” Alina Tugend, Leading the Way in the Fight for Human Rights, N.Y. TIMES (May 24, 2018), https://www.nytimes.com/2018/05/24/us/leading-the-way-in-the-fight-for-human-rights.html. In September 2018, it was announced that Rolf would be stepping away due to a term limit. See Jim Brunner & Benjamin Romano, David Rolf, Powerful Labor Leader, Handing Off Reins at Seattle-based SEIU 775, SEATTLE TIMES (Sept. 6, 2018). See Jim Brunner & Benjamin Romano, David Rolf, powerful labor leader, handing off reins at Seattle-based SEIU 775, SEATTLE TIMES (Sept. 6, 2018), https://www.seattletimes.com/business/david-rolf-powerful-washington-labor-leader-handing-off-reins-at-seiu-775/ (“Rolf, a power player in Seattle and state politics, reached the 15-year term limit in the union’s constitution and could not stand for re-election.”). The Freedom Foundation exulted:
the current union contract, each home care worker will make no less than $15 an hour by January 1, 2019, and workers today receive health care, workers’ compensation, retirement, and other benefits. They also have the nation’s highest training standards.

The Freedom Foundation is described as “a group tied to Republican billionaires long opposed to organized labor and its support of the Democratic Party.” Its objectives are clear. As one article described, “Freedom Foundation CEO Tom McCabe authored a fundraising letter touting its ‘proven plan for bankrupting and defeating government unions’ and addressing ‘a broken political culture’ fueled by union dues.”

Like Rolf, McCabe is a formidable political force, credited with killing homeowners’ rights legislation due to his friendship with the state’s long-time Democratic House Speaker—all while head of Washington’s homebuilding lobby.

The union’s national leadership, which considered Rolf one of its rising stars just a few months ago, couldn’t have been more pleased that the Freedom Foundation emerged as perhaps the most prominent policy organization in the nation in the fight to see Janus decided — despite the best efforts of Rolf and his henchmen to destroy us first.
The Freedom Foundation and the SEIU have been locked in conflict since *Harris*, and there is no reason to suppose the conflict will diminish after *Janus*. Indeed, after the *Janus* ruling, the Freedom Foundation filed suit in federal court seeking class-action status on behalf of IPs who did not want to pay dues to the SEIU.47

In a *Washington Examiner* column encouraging the result in *Janus*, Maxford Nelsen, of the Freedom Foundation, contended that the SEIU in Washington had “tarnished dissenters within their ranks, and run personal attack campaigns targeting the homes of Freedom Foundation leaders for simply trying to ensure workers understand their rights.”48 He previously maintained in an *Examiner* column that unions “siphon off Medicaid funds meant for society’s most vulnerable” and that, “[b]eyond periodically negotiating caregivers’ reimbursement rate with the state, the unions provide little in return.”49

Expressing the conservative viewpoint, Akash Chougule, with Americans for Prosperity, wrote in *Forbes* that “union members often flee when given the chance” and lauded the efforts of the Freedom Foundation relative to “public-sector child-care providers. Between 2014 and 2015, over 3,000 union members—more than half the bargaining unit—withdrew from the union.”50

SEIU Local 775 went to great lengths to thwart the Freedom Foundation’s efforts. As one conservative critic, Red Jahnke, claimed in the *National Review*:

SEIU 775 tightened resignation rules to lock in those who might become aware of their *Harris* rights. A member could resign, and a non-member could opt out, only by giving written notice to both the union and the state within 15 days.

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He stated, “SEIU 775’s machinations proved remarkably successful. Two years after Harris, it retained 94 percent of its membership, according to data the Freedom Foundation obtained from the state.”

In 2016, Washington voters had before them the union-backed Initiative 1501, magnificently-titled “Seniors and Vulnerable Individuals’ Safety and Financial Crimes Prevention Act” that—among other things—would keep caregivers’ information from organizations like the Freedom Foundation.

A Tacoma News Tribune article noted, “[e]ven the opponents of Initiative 1501 agree the measure, on its face, sounds innocuous.” According to the article, “[t]he Washington State Senior Citizens’ Lobby supports the initiative. Walt Bowen, the group’s president, said deterring identity thieves with stiff penalties is important, as is protecting the information of seniors and their caregivers from people who might abuse it.”

In contrast, the president of the Washington Coalition for Open Government opposed the measure, saying he is “concerned I-1501 sets a dangerous precedent by allowing a special-interest group to ‘stealthily create a new exemption in the Public Records Act’ via a citizen initiative.”

The Seattle Times, which editorially leans right on union issues and is ardent on public disclosure, editorialized in opposition: “I-1501 is a..."
Trojan horse. It’s being run by a deep-pocketed special-interest group that wants to weaken the state Public Records Act, reducing the people’s access to government records.”\textsuperscript{60} The editorial stated that “[b]ecause these care providers are public employees, basic contact information is available upon request. This is an inescapable facet of public service: In an open government, the public gets to know who is receiving its tax dollars.”\textsuperscript{61}

But, as an article in the Spokane \textit{Spokesman-Review} noted, the union alleged “members are being harassed by Freedom Foundation representatives who show up at homes, send mail and emails, and call.”\textsuperscript{62} In a \textit{Times} article, Rolf was quoted saying, “I don’t think that because you choose to be a caregiver, that you should become subject to endless harassment by anti-union ideologues.”\textsuperscript{63}

Conservatives took a different view. After Harris, a \textit{National Review} writer complained:

The Freedom Foundation effortlessly obtained SEIU 925’s membership list through the Public Record Act and notified members of their rights. The union shrunk nearly 60 percent. In the courts, Washington’s other SEIU chapter, SEIU 775, challenged the Freedom Foundation’s use of public records, and the Freedom Foundation prevailed. The state supreme court refused to hear the union’s appeal. In the aftermath of its legal loss, SEIU has donated $1.6 million to fund I-1501 public advocacy in a final attempt to prevent the think tank from obtaining its membership list.\textsuperscript{64}

\begin{footnotesize}


61. Id.


\end{footnotesize}
The initiative passed with 70.6% of the vote. Among other things, the initiative provides:

(1) Sensitive personal information of vulnerable individuals and sensitive personal information of in-home caregivers for vulnerable populations is exempt from inspection and copying under this chapter.

(2) The following definitions apply to this section:

(a) “In-home caregivers for vulnerable populations” means: (i) Individual providers as defined in RCW 74.39A.240, (ii) home care aides as defined in RCW 18.88B.010, and (iii) family child care providers as defined in RCW 41.56.030.

(b) “Sensitive personal information” means names, addresses, GPS [global positioning system] coordinates, telephone numbers, email addresses, social security numbers, driver’s license numbers, or other personally identifying information.

(c) “Vulnerable individual” has the meaning set forth in RCW 9.35.005.


66. WASH. REV. CODE § 42.56.640 (2018). A similar law passed in Oregon in response to the Freedom Foundation: “After a 2014 Supreme Court opinion allowed those workers to opt out of paying union dues, the foundation sought that information so that it could send mailers to those workers. The state delayed the request until the Legislature passed a law exempting the information from public...
Nor was I-1501 the end of the fight. In February 2018, the *Seattle Times* editorialized, “Washingtonians are paying a heavy price for an ideological war between the conservative Freedom Foundation and a powerful union representing in-home care providers.” The editorial board opposed Senate Bill 6199, which they characterized as “outsourcing employment of roughly 34,000 individual care providers to a private vendor” as a means of shielding from public disclosure the identities of those workers.

In protest of SB 6199, all House Republicans walked off the floor during the vote—being marked as absent—resulting in an uncommon 50-0 passage in the 98-member House. The bill passed into law. Under the new law, the state “shall endeavor to select and contract with one consumer directed employer to be a medicaid provider that will coemploy individual providers. The department shall make every effort to select a single qualified vendor.”

As a *Times* article noted, “private status would allow SEIU 775 to create a shop where home-care workers must pay either union dues or agency fees if they don’t claim religious exemptions.” Private status would also seem to circumvent *Janus*, which relates to government employment.

Under that 2015 Oregon law:

A public body that is the custodian of or is otherwise in possession of information that was submitted to the public body in confidence and is not otherwise required by law to be submitted, must redact all of the following information before making a disclosure described in ORS 192.355 (4):

1. Residential address and telephone numbers;
2. Personal electronic mail addresses and personal cellular telephone numbers;
3. Social Security numbers and employer-issued identification card numbers; and
4. Emergency contact information.


68. Id.


71. Id. at 1755.

II. JANUS IMPLICATIONS FOR HOME CARE NATIONALLY

As the clash between the Freedom Foundation and SEIU Local 775 in Washington suggests, the stakes will be high in other states with active unions for home-care workers.\(^{73}\) And the Freedom Foundation will be a key player.\(^{74}\) Maxford Nelsen, for example, has authored a 114-page report aimed at those states that seek to quantify and criticize “dues-skimming.”\(^{75}\) According to his analysis, “[a]ll told, states have deducted more than $1.4 billion in union dues and fees from caregivers’ wages from 2000-17.”\(^{76}\)

This will become more challenging under a rule proposed in July 2018 by the Trump Administration that would “remove the regulatory text that allows a state to make payments to third parties on behalf of an individual provider for benefits such as health insurance, skills training, and other benefits customary for employees.”\(^{77}\) This rulemaking would rescind a 2014 Obama Administration regulation that allowed state governments to facilitate dues collection from Medicaid providers, a regulation that the Trump Administration now argues: “grants permissions that Congress has foreclosed.”\(^{78}\) In its regulatory analysis, the U.S. Department of Health & Human Services concedes it “lacks information to reliably estimate the

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\(^{78}\) Id. at 32,253.
proportion of homecare providers likely to stop making payments versus those likely to continue making payments through alternative means.\(^{79}\)

With 80 canvassers along the West Coast, the Freedom Foundation’s reported aim “is to shrink union ranks in the three states by 127,000 members—and to offer an example for similar efforts targeting unions around the country.”\(^{80}\)

*Harris* was imperiling enough. After that ruling, as Semuels noted, the United Domestic Workers of America (UDW), representing California home-care workers, had to go door-to-door to retain membership: “Around 75,000 of 108,000 potential home-care workers in California have chosen to pay dues to the UDW.”\(^{81}\) That leaves quite a few outliers.

Organizing home-care workers is not like organizing a traditional workplace, where all of the targets of organization work together.\(^{82}\) Rather, it is a door-to-door effort. In many states, like Washington, it has been accomplished to date through statute or executive order.\(^{83}\)

One wishes that policymakers would simply do the right thing, for the right reasons, without pressure. Yet absent cohesive representation, home-care workers are unlikely to be able to effectively lobby legislatures or maintain political action committees to improve their compensation.\(^{84}\) An *Atlantic* article noted: “Women of color are the largest demographic group within the home-care workforce. Their vulnerability reflects a long history of exploitation of women of color working in-home jobs, and highlights a

\(^{79}\) Id. at 32,254. In a footnote, the Department relies heavily upon conservative sources, including a webpage maintained by the State Policy Network. *Id.* at 32,254 n.1 (citing *Dues Skimming FAQs*, STATE POL’Y NETWORK, https://spn.org/dues-skimming-faqs/ (last visited Dec. 4, 2018)). That webpage is entitled “Dues Skimming FAQs” and asserts, among other things, “[u]nions may argue they lobby for greater benefits in the state legislature. However, they are playing politics, not negotiating for caregivers.” *Dues Skimming FAQs*, supra (emphasis added).

\(^{80}\) Eidleson, *supra* note 44.

\(^{81}\) *Semuels*, *supra* note 30.


\(^{83}\) In Vermont, for example, an “[i]ndependent direct support provider” is represented by a labor union per statute. VT. STAT. ANN. tit. 21, § 1631 (2018). The Freedom Foundation catalogues these examples. See generally GETTING ORGANIZED, *supra* note 75 (cataloguing state-specific examples).

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growing inequality in the health-care workforce, even as health coverage expands to more and more Americans.”

Sarita Gupta and Ai-Jen Poo put it bluntly, “[h]istorically, care has been seen as women’s work; it was long voluntary or unpaid and thus systematically devalued.” They argue that “the profession’s historical associations with black women have led to harsher conditions and a deeper contempt.”

Setting aside the question of whether being in a union is desirable, or consistent with one’s personal beliefs, there is little question whether union representation brings compensation success for home-care workers in Washington and other states. Even Justice Alito, in Harris, acknowledged the arguments that “the union has been an effective advocate for personal assistants in the State of Illinois, and we will assume that this is correct.”

In Oregon, for example, the 2015–2019 contract between the state and the union representing home-care workers currently provides hourly wages of $14.65 an hour. In Massachusetts, the 2016–2019 union contract for personal-care attendants provided they receive $15 an hour effective July 1, 2018.

In 2018, the Connecticut General Assembly voted to increase wages for personal-care assistants—“from $13.53 to $14.75, then continue to increase in increments until reaching $16.25 on July 1, 2020. They would


87. Id.; See also Brendan Williams, Stop Cheering the Budget Deal. It’s a Blow to Long-term Care and the Safety Net., USA TODAY (Feb. 15, 2018), https://www.usatoday.com/story/opinion/2018/02/15/stop-cheering-budget-deal-its-ruinous-long-term-care-well-need-brendan-williams-column/337760002/ (criticizing bipartisan long-term care Medicare cuts, including $3.5 billion cut to home care, and writing “caregivers, and those they care for, do not enjoy the political clout of defense contractors. No grand parade will be staged in recognition of their sacrifice. Perhaps they are simply easier to marginalize because of their demographics”).


89. Id. at 2641.


become eligible for worker’s compensation coverage, while they still lack health care and retirement benefits under the deal.”

In contrast, in 2016, the average wage of a home-health aide in Texas, a right-to-work state, was $8.93 an hour. Texas-based Addus HomeCare Corporation, the nation’s largest agency home-care provider, does business in 25 states. Until recently Addus HomeCare “consistently paid its workers 50 cents to $1 an hour above minimum wage” according to an interview with its chief executive officer. In Washington, though, the SEIU Local 775 contract with Addus will require it to pay workers no less than $15.05 an hour by January 1, 2019.

As has been true in Washington, there will be efforts to trip up those looking to reduce union membership by contacting workers. After Janus, the Oregonian editorialized against such an effort, stating, “Gov. Kate Brown wasted no time Wednesday morning in pledging her unwavering fealty to the public - public employee unions, that is.” They wrote: “Brown is considering seeking new limits on what employee information can be released to the public with possible legislation aimed at the 2019 session.” According to the editorial:

The move, according to a letter by her chief of staff, comes in response to two developments: A May records request by the anti-union Freedom Foundation, which wants to contact employees to tell them how to opt


95. Id.


98. Id.

99. Id.
out of union membership and fees; and the release to The Oregonian/OregonLive of a data set with names, job titles, salaries, demographic information and month and year of birth. Neither provides a compelling reason to sacrifice transparency.\textsuperscript{100}

Caught in the middle of this conflict will be those who are cared for at home, who likely never imagined they would be infirm enough to need care, let alone that they would be the focus of such political machinations. Our society is aging.\textsuperscript{101} By 2030, there will be an estimated three million more 85-and-older residents than there were in 2012.\textsuperscript{102} Professor Paul Osterman of the Massachusetts Institute of Technology’s Sloan School of Management conservatively estimated that by 2030 “there will be a national shortage of 151,000 paid direct care workers and 3.8 million unpaid family caregivers.”\textsuperscript{103} As the prevalence of immigrants in the workforce suggests, the low wages are not appealing to native-born Americans, making the Trump Administration immigration restrictions all the more worrisome.\textsuperscript{104}

\textsuperscript{100} Id. In California, one writer noted unions “have done as much as they can to mitigate the ruling before it arrived.” Ben Bradford, California Unions Have Prepared For Janus, CAP. PUB. RADIO (June 27, 2018), http://www.capradio.org/articles/2018/06/27/california-unions-have-prepared-for-janus/. For example, “Gov. Jerry Brown signed a law that puts new employees through an orientation with their prospective unions. Provisions in a state budget bill this year require unions sign-off any emails, flyers or letters that agencies may hand out about unionization, while further preventing employers from discouraging new employees from joining.” Id. The Freedom Foundation has acknowledged these efforts have curbed its success—only 160 out of 76,000 teachers emailed by the Foundation in May 2018 opted out of their unions through a Foundation website set up for that purpose. Margot Roosevelt, Will the Supreme Court’s Janus Decision Sink California Unions?, ORANGE COUNTY REG. (June 27, 2018), https://www.ocregister.com/2018/06/27/can-californias-public-employee-unions-thwart-u-s-supreme-courts-janus-decision/.


\textsuperscript{102} See, e.g., id. at 6 (showing that in 2012 there were an estimated 5,887,000 citizens over 85 years old and in 2030 there are a projected 8,946,000).


Since families today are smaller and more scattered, unpaid family caregiving, the bedrock of long-term care, is not as feasible as it once was.\textsuperscript{105}

In conclusion, whether unionization can combat the serious challenges facing home care is now a question that will be debated home-by-home, in those states where home-care workers are unionized.

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immigration restrictions ignore this reality, focusing instead on how most home-care workers are native-born:

Steven Camerota isn’t worried about a shortage in home care workers. He’s the director of research at the Center for Immigration Studies, which advocates for restrictions on immigration. He points out that, despite the growing immigrant workforce, three-quarters of the people currently providing home care were born in the U.S. There’s no mystery to what it would take to increase that percentage, says Camerota. “Raise wages. Treat workers better.”


INTRODUCTION

The ways in which Americans communicate have changed considerably in the 141 years since the installation of the first telephone
lines. In 1968, when Congress enacted the first federal wiretap statute, 20% of American homes did not have a telephone. Today, over 95% of Americans own a mobile phone and 49 states have passed some form of wiretap statute. Vermont is the only state that has not, thereby leaving its citizens’ private communications vulnerable to interception. However, merely enacting a wiretap statute will not sufficiently protect Vermonters because rapidly evolving technology threatens the privacy that wiretap laws protect.

Wiretap laws have struggled to keep pace with the rapid changes in communications technology. Even the term wiretap is outdated and no longer accurately reflects the manner in which interceptions occur. For instance, today more than half of American households have only wireless phones. Wiretap laws must be able to adapt to evolving communications technology to remain effective and enforceable.

As the only state without a wiretap statute, Vermont is in a unique position to learn from the challenges faced by other states when applying new technology to existing wiretap laws. Vermont can use the most

5. Bast, supra note 4, at 868.
7. See id. (“Since 1986, technology has advanced at breakneck speed while electronic privacy law remained at a standstill.”).
10. See, e.g., Miles v. State, 781 A.2d 787, 800 (Md. 2001) (holding that a call between a cell phone and a landline was a “wire communication” under Maryland law because “[t]he transmission . . . involves the sound waves of the conversation being transmitted over the cellular phone company’s designated frequency to the cellular phone carrier’s transmitter, which sends the signal over a land-based wire to the ordinary telephone”); State v. Tango, 671 A.2d 186, 188 (N.J. 1996) (discussing
effective state approaches as models for its own law while also avoiding the mistakes of less successful states. Thus, Vermont will ensure that its wiretap law can adequately protect private communications even as technology continues to evolve.

This Note analyzes the various approaches states have taken to draft and enact wiretap laws, and the effectiveness of applying those laws to new technology. It also recommends the approach Vermont should take to draft a wiretap statute that will endure future technological changes. Part I provides a historical overview of federal and state approaches to wiretapping and discusses how Vermont courts have addressed wiretapping in the absence of a statute. Part II addresses the importance of wiretap statutes that can adapt to rapidly changing technology and the unique challenges that recent technologies pose. Part III compares the successes and failures of different state approaches to wiretapping. Finally, Part IV proposes how Vermont can avoid similar problems with evolving technological issues with wiretap laws. This Part includes a recommendation as to how Vermont should draft its own wiretap statute.

I. DEVELOPMENT AND EVOLUTION OF WIRETAP LAWS

A. Definitions of Wiretapping and Related Terms

“Wiretapping” traditionally referred only to the interception of communications sent by wire.\(^\text{11}\) However, this definition has evolved over time. The Communications Act of 1934 referred to “interstate or foreign communication[s] [transmitted] by wire or radio.”\(^\text{12}\) The Omnibus Crime Control and Safe Street Act of 1968 (Title III) defined wiretapping as the interception of “wire or oral communication.”\(^\text{13}\) In 1986, the Electronic Communications Privacy Act (ECPA) expanded that definition to include “electronic communication” as well.\(^\text{14}\)

Alternatively, some state laws use the term “eavesdropping.”\(^\text{15}\) Eavesdropping is “[t]he act of secretly listening to the private conversation

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\(^{11}\) See Woolf, supra note 8 (discussing the origin of the term “wiretap”).


\(^{15}\) See, e.g., 720 ILL. COMP. STAT. 5/14-1 (2018) (“An eavesdropping device is any device capable of being used to hear or record oral conversation or intercept, or transcribe electronic
of others without their consent.” Therefore, wiretapping is technically a method of eavesdropping via wires. However, because the statutory definition of wiretapping is much broader than the original use of the word, the terms eavesdropping and wiretapping are essentially interchangeable. This Note uses the term wiretap to refer to the interception of “wire, electronic, or oral communication,” even when discussing historical events that predate the current definition, unless otherwise indicated.

“Wiretapping” is the act of intercepting communications, not accessing stored communications. Intercepting is the overhearing or recording of oral, wire, or electronic communications. Accessing stored communications is the act of obtaining communications data that is electronically stored, such as data logs maintained by phone companies, emails stored on a server, voicemails, and other similar stored records. Evolving technology creates similar challenges for both intercepted and stored communications. The two issues are closely related, but this Note focuses only on intercepted communications because Vermont has already codified a statute on stored communications.

communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means . . . .”); A LA. CODE § 13A-11-30 (2018) (“[To eavesdrop is] [t]o overhear, record, amplify or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication, except as otherwise provided by law.”).


17. See Wiretapping, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “wiretapping” as “[e]lectronic or mechanical eavesdropping”) [hereinafter Wiretapping, BLACK’S LAW DICTIONARY].

18. Compare KY. REV. STAT. ANN. § 526.020 (West 2018) (“A person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time.”), with MO. REV. STAT. § 542.402 (2017) (indicating that a person is guilty of “illegal wiretapping” if he or she “[k]nowingly intercepts, [or] endeavors to intercept,” any wire or oral communication). But cf. COLO. REV. STAT. § 18-9-303 (2018) (stating that an individual commits a wiretap when he or she “overhears, reads, takes, copies, or records a telephone, telegraph, or electronic communication”); COLO. REV. STAT. § 18-9-304 (indicating that an individual eavesdrops when he or she “[k]nowingly overhears or records . . . [a] conversation or discussion” to which the eavesdropper is not “visibly present”).

19. Wiretapping, BLACK’S LAW DICTIONARY, supra note 17.

20. 18 U.S.C. § 2510(4) (2012) (“[I]ntercept’ means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.”).

21. Id. § 2510(17)(A)–(B) (defining “electronic storage” as “any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof,” as well as the storage of those communications “by an electronic communication service for purposes of backup protection of such communication”).

22. For example, the Supreme Court decided a case in which police officers accessed cell phone tower records without a warrant in order to place the defendants at the locations of multiple burglaries. Carpenter v. United States, 138 S. Ct. 2206, 2212–13 (2018). The defendants argued, and the Court agreed, that accessing the records without a warrant violated the Fourth Amendment. Id. at 2219.

Over time, the U.S. Supreme Court has expanded the reach of the Fourth Amendment from a more literal interpretation to a broader, conceptual interpretation to protect individual privacy against modern technology. In 1928, the Court first addressed whether wiretapping violated the Fourth Amendment in *Olmstead v. United States*.\(^{24}\) Olmstead ran an illegal rum-runner operation during Prohibition, smuggling liquor by boat from British Columbia into Seattle and then distributing it around the city.\(^{25}\) Federal prohibition officers tapped several phones associated with Olmstead’s operations.\(^{26}\) Olmstead and 11 associates received convictions for violating the National Prohibition Act.\(^{27}\) Evidence obtained from wiretaps conducted by the prohibition officers formed the basis for the defendants’ convictions.\(^{28}\) Olmstead and the other petitioners challenged their convictions, claiming that the wiretaps were an unreasonable search and seizure in violation of the Fourth Amendment.\(^{29}\)

Applying a strict textualist interpretation, the Court held that wiretapping did not violate the Fourth Amendment.\(^{30}\) Because the “historical purpose of the Fourth Amendment . . . was to prevent the use of governmental force to search a man’s house, his person, his papers and his effects,” the Court concluded that “the search [must] be of *material things*— the person, the house, his papers or his effects.”\(^{31}\) Therefore, a search must involve a physical trespass into a private space to violate the Fourth Amendment.\(^{32}\) In the Court’s view, telephone wires merely allowed people to talk with one another at a greater distance, and listening through a

\(^{24}\) Olmstead v. United States, 277 U.S. 438, 455 (1928).
\(^{25}\) Id. at 456.
\(^{26}\) Id. Prohibition officers were agents of the Bureau of Prohibition. The Bureau was created under the Volstead Act, which regulated enforcement of the Eighteenth Amendment. National Prohibition (Volstead) Act, Pub. L. No. 66, ch. 5, 41 Stat. 306 (1919).
\(^{27}\) Olmstead, 277 U.S. at 455.
\(^{28}\) The officers intercepted communications detailing the time and place of boat deliveries from Canada and calls from customers placing orders. Id. at 456–57.
\(^{29}\) Id. at 455.
\(^{30}\) Id. at 464.
\(^{31}\) Id. at 463–64 (emphasis added).
\(^{32}\) Id. at 466 (“Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.”).
wiretapping was the same as overhearing a face-to-face conversation.\textsuperscript{33} The prohibition officers’ use of wiretaps did not violate the Fourth Amendment because there was no physical trespass.\textsuperscript{34} Thus, they had obtained evidence not through the search or seizure of any material thing, but “by the use of the sense of hearing and that only.”\textsuperscript{35}

In his dissent, Justice Brandeis advocated for a broader interpretation of the Fourth Amendment.\textsuperscript{36} In his view, the Constitution protects against certain evils and those protections should not “be necessarily confined to the form that evil had theretofore taken.”\textsuperscript{37} In other words, the drafters used their own experiences as a framework for the principles they intended to enshrine in the Constitution, but they did not intend for its protections to apply only to their specific experiences.\textsuperscript{38} According to Justice Brandeis, the Fourth Amendment fundamentally protects against governmental invasion of individual privacy, which the drafters had only experienced as a physical invasion.\textsuperscript{39} Consequently, Justice Brandeis believed the Court should interpret the Fourth Amendment to prohibit the government from any invasion of privacy, not only the physical invasion the drafters had experienced.\textsuperscript{40}

The Olmstead decision led to the widespread, authorized use of wiretapping by both government and private actors for several decades, during which time both communications and wiretap technology evolved.\textsuperscript{41} The Communications Act of 1934 prohibited the dissemination or interception of radio or wire transmissions, with an exception for law enforcement with a subpoena.\textsuperscript{42} The Act applied only to actions that

\textsuperscript{33} Id. Chief Justice Taft likened a telephone wire to a long-distance loudspeaker, saying that “one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside.” Id.

\textsuperscript{34} Id. at 464.

\textsuperscript{35} Id.

\textsuperscript{36} Id. at 472 (Brandeis, J. dissenting).

\textsuperscript{37} Id. (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

\textsuperscript{38} Id.

\textsuperscript{39} Id. at 473.

\textsuperscript{40} Id. at 478.


involved a wire or radio transmission. It did not cover any other type of interception, such as listening through walls, or wearing a wire to record a conversation. Previous arguments that the Fourth Amendment prohibited surreptitious recordings not prohibited by the Communications Act had been unsuccessful. Those arguments failed because the wiretaps did not involve a physical invasion, which was an essential element of a Fourth Amendment violation under *Olmstead*.

However, the Court changed course in the early 1960s. In 1961, the Court ruled in *Silverman v. United States* that recording oral communications did constitute a search and seizure under the Fourth Amendment. Six years later, in *Katz v. United States*, the Court overturned *Olmstead*, holding a search and seizure did not require a physical trespass, thereby bringing wiretapping within the scope of Fourth Amendment protections.

In *Silverman*, police officers used a microphone to record conversations that incriminated multiple defendants of illegal gambling. The officers were in an adjoining row house and used the shared heating ducts to run a microphone into the defendants’ home. The Court held that the recording violated the Fourth Amendment because the officers used the microphone in a way that physically entered the defendants’ home. Although *Silverman* brought the recording of oral communications within the scope of the Fourth Amendment, the Court declined to extend its ruling

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43. *See also* Goldman v. United States, 316 U.S. 129, 133 (1942) (“Words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of the [Communications Act].”).

44. *See Goldman*, 316 U.S. at 133 (holding that the use of a detectaphone, a device that was pressed against the wall to hear what was said on the other side, to listen to the defendant having a conversation over the telephone, was not a violation of the Communications Act); On Lee v. United States, 343 U.S. 747, 752, 754 (1952) (stating that a conversation between a police informant and the defendant in the defendant’s laundry business, which was transmitted to a police officer stationed outside by a wire worn by the informant, was not a violation of the Communications Act).

45. *See Westin, supra* note 41, at 174–78 (providing an overview of unsuccessful Fourth Amendment challenges after *Olmstead*).

46. *See Goldman*, 316 U.S. at 134–35 (finding that the use of a detectaphone did not violate the Fourth Amendment because there was no physical trespass); On Lee, 343 U.S. at 754 (holding that an informant wearing a radio transmitter was not a physical trespass because the device had “the same effect on his privacy as if agent Lee had been eavesdropping outside an open window”).


50. *Id.*

51. *Id.* at 512 (“[T]he decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.”).
to recordings that did not involve a physical trespass. The Court did not find it necessary to reassess its previous holding in *Olmstead*, stating:

We are told that re-examination of the rationale . . . of *Olmstead v. United States* . . . is now essential in the light of recent and projected developments in the science of electronics . . . . We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society.

Despite the Court’s unwillingness to reassess those implications in *Silverman*, the Court overturned *Olmstead* only six years later in *Katz v. United States*. The government convicted Katz for violating interstate gambling laws, based on evidence obtained by FBI agents who recorded Katz’s phone calls in a public phone booth. In a stark departure from *Olmstead*, the Court held that a physical trespass was no longer an essential element of a search under the Fourth Amendment. According to the Court, the Fourth Amendment protects individuals in any situation where they have a reasonable expectation of privacy, not only when the government trespasses upon their physical, private property.

The Court in *Katz* emphasized that “the Fourth Amendment protects people, not places.” Recognizing the way that society’s perceptions of telephones had evolved since *Olmstead*, the Court held that failing to recognize a reasonable expectation of privacy in a phone booth would “ignore the vital role that the public telephone has come to play in private communication.” The Court indicated that Fourth Amendment protections must evolve over time to adapt to new technology and changing social and cultural norms. This more flexible, conceptual interpretation upheld the spirit of the Fourth Amendment, in which the framers intended to protect an individual’s reasonable expectation of privacy against government intrusion.

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52. Id. (“We find no occasion to re-examine Goldman here, but we decline to go beyond it, by even a fraction of an inch.”).
53. Id. at 508–09.
55. Id. at 348–49. There was no physical trespass in *Katz* because recording device was located on the outside of the phone booth. Id.
56. Id. at 353.
57. Id.
58. Id. at 351.
59. Id. at 352.
60. Id. at 351–52.
61. Id. at 350.
In response to the Court’s ruling in *Katz*,\(^62\) and in order to clarify federal authority to wiretap, Congress passed Title III.\(^63\) Title III covered only “wire or oral communication.”\(^64\) Under the ECPA, Congress modified the language of Title III to include “wire, electronic, or oral communication.”\(^65\) The ECPA, which remains in force today,\(^66\) generally prohibits the interception of wire, electronic, or oral communication, as well as the disclosure of information obtained through interception.\(^67\) Wiretapping is permissible under the ECPA when one party to a communication conducts the interception or consents to third-party interception.\(^68\) Wiretapping by law enforcement (or others acting under the color of law) is also permitted, but typically requires authorization in the form of a warrant.\(^69\) Except for those situations, the ECPA prohibits interception and disclosure by both government and private actors.\(^70\)

Title III and the ECPA have undoubtedly helped to define the scope of prohibited and permitted wiretapping.\(^71\) Nevertheless, federal courts have experienced challenges in applying the law to new technology.\(^72\) One issue courts have addressed is whether new technology is a form of “wire,
Another problem that arises is whether the courts consider the manner in which the new technology works as performing an “intercept[ion].”

Technology has evolved at an increasingly fast pace while the challenges of applying wiretap statutes to new technology have remained the same. For example, in 1976, the Fifth Circuit addressed the use of a cassette tape to intercept a communication. In that case, police found a cassette during a search of an individual’s car. The officers listened to the tape and discovered that it contained a phone call recording that incriminated the defendant. The court had no difficulty finding that the individual who tape-recorded his conversation with the defendant had intercepted the communication. The more complicated issue was whether the officers had also intercepted the communication when they listened to the tape. The court concluded that it would be an overly broad interpretation of the statute to include listening to a recording made by someone else in the definition of an interception.

In 2002, the Ninth Circuit also addressed what constitutes an interception, but in the context of a website rather than a cassette tape. The court had to determine if viewing information on another person’s

73. 18 U.S.C. § 2510(1)–(2). See, e.g., United States v. Steiger, 318 F.3d 1039, 1047 (11th Cir. 2003) (holding that information obtained by hacking into another person’s computer was an “electronic communication”) because it was transferred to the hacker via one of the mediums listed in the statute).
74. 18 U.S.C. § 2510(4). See, e.g., United States v. Herring, 933 F.2d 932, 934, 939 (11th Cir. 1993) (holding that a device that unscrambles satellite television signals accomplishes an “interception” despite the fact that the communications are first received by the satellite dish connected to the device).
75. See ACLU, supra note 6 (distinguishing the technology in 1986, when Congress enacted the ECPA, from modern technology and arguing that “[o]nline privacy law shouldn’t be older than the Web”). See also Carlos Perez-Alburuene & Lawrence Friedman, Privacy Protection for Electronic Communications and the “Interception-Unauthorized Access” Dilemma, 19 J. MARSHALL J. COMPUTER & INFO. L. 435, 440–45 (2000) (providing a brief historical overview of different cases involving statutory interpretations of the term “intercept”); Béla Nagy et al., Statistical Basis for Predicting Technological Progress, 8 PLOS ONE 1, 7 (Feb. 2013), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0052669&type=printable (indicating that there is a “strong tendency, across different types of technologies, toward constant exponential growth rates,” and “super-exponential improvement for information technologies over long time spans”).
77. Id. at 656.
78. Id. at 656–57.
79. Id. at 657.
80. Id.
81. Id. at 658 (“The argument that a new and different ‘aural acquisition’ occurs each time a recording of an oral communication is replayed is unpersuasive. That would mean that innumerable ‘interceptions,’ and thus violations of the Act, could follow from a single recording.”).
82. Konop v. Hawaiian Airlines, 302 F.3d 868, 876 (9th Cir. 2002).
secure website constituted an interception. The court found that, to qualify as an interception, the communication “must be acquired during transmission, not while it is in electronic storage.” Although the scope and reach of federal wiretap laws has increased significantly, new technology continues to complicate the interpretation and application of those laws.

D. State Wiretap Laws

States proactively passed wiretap laws long before the federal government took action: at the time of the Olmstead decision in 1928, 26 states had laws criminalizing wiretapping and 35 states prohibited telephone and telegraph operators from disclosing communications. Today, all states except Vermont have enacted a wiretap statute. Wiretapping is a criminal offense under all but three state wiretap laws, but only 35 states allow for civil action. Thirteen states have two-party consent laws, which prohibit an interception unless all parties to a communication to consent to it. The remaining 36 states require single-party consent, as does the federal statute. Under single-party consent laws, only one party to a communication must consent to its interception for the wiretap to be valid. These consent rules apply regardless of whether the interceptor is a party to the communication.

E. Vermont Common Law

Vermont is the only state that does not have a wiretap statute to protect citizens from interception of private communications. In the absence of such law, Vermont courts apply the Supreme Court’s analysis from Katz to the state constitution, which contains a search and seizure provision—

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83. *Id.* at 874.
84. *Id.* at 878.
85. *See Olmstead v. United States,* 277 U.S. 438, 479 n.13 (1928) (listing state statutes in effect at the time of the opinion).
87. *Id.*
88. *Id.* at 930. Some states require two-party consent to all communications, but others only require two-party consent to certain types of communications. *See, e.g., Conn. Gen. Stat.* § 52-570d (2017) (requiring two-party consent only for interception of “oral private telephonic communication”).
90. *Id.* at 869.
91. *Id.* For example, in a single-party consent state, if an individual records his or her own phone conversation with the other caller, then it is a valid interception. Alternatively, either caller could consent to a third-party interception, such as an informant making a phone call to a suspect while a law enforcement officer listens.
92. *Id.* at 868.
Article 11—similar to the Fourth Amendment. Vermont courts generally find that an interception violates Article 11 of the Vermont Constitution if the interception occurs where the individual has a reasonable expectation of privacy. The following cases illustrate Vermont’s current approach.

In State v. Blow, an undercover police officer wearing an electronic radio transmission device entered Blow’s residence to buy drugs. A detective stationed outside listened to and recorded the transmitted conversation. Blow objected to the admission of the recording as an unlawful search and seizure in violation of the state constitution. In its analysis, the court adopted Justice Harlan’s concurrence in Katz, establishing a two-part test to determine whether Blow had a reasonable expectation of privacy. The test requires “first that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.” The court recognized the possible effect of evolving technology, stating that “[i]n assessing the constitutionality of technologically enhanced government surveillance in a particular case, [the court] must identify the values that are at risk, and vest the reasonable-expectation-of-privacy test with those values.”

The court concluded that Blow had not intended to transmit the conversation outside his home, satisfying the first part of the test. The court also held that “reasonableness” under the second part of the test “must be tied to identifiable constitutional values.” Because “Article 11 concerns the deeply-rooted legal and societal principle that the coveted

93. Compare id. at 841 (summarizing the Supreme Court’s holding in Katz that Fourth Amendment protections extend to a private conversation in a public telephone booth), with id. at 863–64 (explaining the Vermont Supreme Court’s holding in Blow that a defendant had “no reasonable expectation of privacy” in a public parking lot). See also VT. CONST. ch. I, art. 11 (“That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure, and therefore warrants without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her, or their property, not particularly described, are contrary to that right, and ought not to be granted.”).

94. Bast, supra note 4, at 863.
96. Id.
97. Id. at 515, 602 A.2d at 555.
98. Id. at 517, 602 A.2d at 555.
99. Id. (alteration in original) (internal quotations omitted) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).
100. Id. at 518, 602 A.2d at 555.
101. Id. (citing Katz, 389 U.S. at 351).
102. Id. See also VT. CONST. ch. I, art. 11 (stating that “the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure”).
privacy of the home should be especially protected," Blow therefore had a reasonable expectation of privacy because he was in his own home when the officer recorded and transmitted the conversation.103

In State v. Geraw, a case very similar to Blow, the court held that the defendant still had a reasonable expectation of privacy even when the police officer involved was not undercover.104 Once again, the court focused on the importance of the conversation having taken place in the defendant’s home.105 The officer was uniformed and began the conversation by telling the defendant that he was investigating an allegation that the defendant had sexually abused a minor.106 That the officer in Geraw was uniformed (unlike the officer in Blow) was irrelevant in the eyes of the court, “for the heart of [its] holding in Blow was a recognition of the ‘deeply-rooted legal and societal principle that the coveted privacy of the home should be especially protected.’”107

One fact the court did find relevant in Geraw was that the officer concealed the recording device from the defendant.108 When speaking with a police officer, an individual “should reasonably expect that the conversation will be carefully noted and subsequently repeated,” but that person should not expect that the officer will record the conversation, thereby “exposing every word and phrase one speaks, every inflection or laugh or aside one utters, to the scrutiny of the world at large.”109 The court concluded that the officers hid the recording device from the defendant because they “understood that his expectations and, hence, his very words might be different if he knew that he was being recorded.”110

Vermont’s common law approach to wiretapping protects only against interceptions made by government actors without a warrant.111 The courts

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103. Blow, 157 Vt. at 517, 602 A.2d at 555. In another case decided on the same day as Blow, the court concluded that there was no reasonable expectation of privacy where a conversation was similarly transmitted and recorded, but took place in a shopping center parking lot through an open car window. State v. Brooks, 157 Vt. 490, 493, 601 A.2d 963, 963–64 (1991).
105. Id., 795 A.2d at 1223.
106. Id. at 352, 795 A.2d at 1220–22.
107. Id. at 354, 795 A.2d at 1222–23 (quoting Blow, 157 Vt. at 517, 602 A.2d at 555).
108. Id. at 357, 795 A.2d at 1225 (“The dissent would excuse the underhanded method the police utilized in this case to record the conversation with defendant, insisting that it was not ‘trickery.’ With respect, if it was not trickery to hide a tape recorder to secretly record a conversation with an unsuspecting citizen, what was it?”).
109. Id. at 356–57, 795 A.2d at 1224.
110. Id. at 357, 795 A.2d at 1224.
have placed a strong emphasis on the privacy of an individual’s home.\textsuperscript{112} This emphasis essentially makes any interception inside an individual’s home a \textit{de facto} violation of the state constitution.

\textit{F. Current Vermont Statutory Law}

Notwithstanding the absence of a broad, all-encompassing wiretap statute in Vermont, there are some narrow statutory privacy protections within existing laws. Vermont’s voyeurism statute prohibits recording an individual without his or her knowledge.\textsuperscript{113} However, this only applies when the individual is “in a place where he or she would have a reasonable expectation of privacy \textit{within} a home or residence.”\textsuperscript{114} Additionally, in June 2016, Vermont passed Act 169, titled “An act relating to privacy protection and a code of administrative rules.”\textsuperscript{115} The Act addresses one new technology in particular that poses a danger to privacy: it includes a provision requiring law enforcement to obtain a warrant in order to use drones for surveillance.\textsuperscript{116} The Act also includes a prohibition on real-time interception by law enforcement officers without a warrant.\textsuperscript{117} However, this essentially only codifies the protections already afforded by the state constitution and provides no protection against interception by private actors.\textsuperscript{118}

\textit{G. Inadequacies of Vermont’s Current Approach}

Vermont’s current approach does not provide sufficient guidance to courts faced with interpreting new technology. A lack of clarity can lead to incongruous decisions depending on how individual judges interpret

\textsuperscript{112} See, e.g., State v. Blow, 157 Vt. 513, 518, 602 A.2d 552, 555 (1991) (emphasizing that “the deeply-rooted . . . societal principle that the coveted privacy of the home should be especially protected”).
\textsuperscript{113} VT. STAT. ANN. tit. 13, § 2605 (2017).
\textsuperscript{114} Id. (emphasis added).
\textsuperscript{116} VT. STAT. ANN. tit. 20, §§ 4621–24 (2017).
\textsuperscript{117} VT. STAT. ANN. tit. 13, § 8108 (2017).
\textsuperscript{118} Compare id. (“A law enforcement officer shall not use a device which . . . intercepts in real time from a user’s device a transmission of communication content, real time cellular tower-derived location information, or real time GPS-derived location information, except for purposes of locating and apprehending a fugitive for whom an arrest warrant has been issued.’’), \textit{with} VT. CONST. ch. 1, art. 11 (prohibiting “warrants without oath or affirmation first made, affording sufficient foundation for them” from authorizing “any officer or messenger . . . to search suspected places, or to seize any person or persons, his, her, or their property’’).
technology. In Geraw, the court made an acknowledgement that draws attention to this weakness in Vermont’s current approach to wiretapping:

We have, to be sure, disagreed at times about the degree of emphasis to be placed on the location of the search and seizure, to the exclusion of other considerations, such as advanced technologies that may alter or intensify the nature of the intrusion.

Although the court adopted Justice Harlan’s reasonable-expectation-of-privacy test, it is still unclear how much value to assign different factors, especially the technology involved. Additionally, changing technologies are subject to the court’s interpretation of their importance.

A court’s interpretation of how technology works, and the purpose it serves, can have serious ramifications for the future. For example, the U.S. Supreme Court’s interpretation of telephones in Olmstead permitted wiretapping of private conversations for decades. This is especially true when technology’s role or function in society evolves over time—Chief Justice Taft could not predict how integral telephones would become to everyday life. He certainly could not have predicted that less than 100 years after Olmstead, most Americans would carry phones in their pockets and purses and that making calls would not be the phone’s most important or common function.

119. See Suzanne M. Monte, The Lack of Privacy in Vermont, 24 Vt. L. Rev. 199, 224–25 (1999) (detailing how the Vermont Supreme Court’s interpretation of the “modified open fields doctrine,” in which there is a reasonable expectation of privacy in an open field only when the landowner purposefully excludes others from their land by use of signage or fencing, led to a result that was contrary to public perceptions of privacy, and a “complicated and imprecise” application of the doctrine).


121. Id. at 353–54, 795 A.2d at 1222.

122. “Judges struggle to understand even the basic facts of such technologies, and often must rely on the crutch of questionable metaphors to aid their comprehension. Judges generally will not know whether those metaphors are accurate, or whether the facts before them are typical or atypical given the technology of the past or the present.” Orin S. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 875–76 (2004).

123. Id. at 843–45.

124. See Westin, supra note 41, at 168–69 (discussing the continued impact of Olmstead nearly thirty years later); Katz v. United States, 389 U.S. 347, 353 (1967) (noting that the Court “ha[d] since departed from the narrow view on which [the] decision [in Olmstead] rested”).

125. See Katz, 389 U.S. at 352–53 (holding that failing to expand Fourth Amendment protections to a public phone booth would “ignore the vital role that the public telephone has come to play in private communication”).

126. See Amanda Ray, The History and Evolution of Cell Phones, ART INSTS.: BLOG (Jan. 22, 2015), https://www.artinstitutes.edu/about/blog/the-history-and-evolution-of-cell-phones (explaining how “the purpose of the cell phone has shifted from a verbal communication tool to a multimedia tool,”
The lack of a clear, unified approach to interpreting wiretapping is also evident in Justice Skoglund’s dissent in Geraw.\textsuperscript{127} Justice Skoglund argued that the importance of protecting privacy in the home should not automatically create a reasonable expectation of privacy any time a conversation takes place there.\textsuperscript{128} She highlighted several other courts that had reached different conclusions in cases involving an officer in a defendant’s home.\textsuperscript{129} She also emphasized several times that Geraw invited the officer into his home and knew that the officer was there to discuss the sexual assault allegations against him.\textsuperscript{130} Justice Skoglund concluded: “I hesitate to speak for society as a whole, but respectfully suggest that Vermonters would not find reasonable a suspect’s expectations that his responses to police questions about possible involvement in a crime are private.”\textsuperscript{131} Thus, not only is the current approach unclear and uneven, it may not accurately reflect Vermonters’ values.

Justice Skoglund’s dissent exposes another issue with the current Vermont approach.\textsuperscript{132} In the absence of a statute, the courts are developing the state’s approach to wiretapping.\textsuperscript{133} This creates a twofold problem: first, this is a reactive, rather than proactive, approach; second, impartial, objective judges are less capable than elected representatives at developing a law that reflects the values and concerns of all Vermonters.\textsuperscript{134}

Judge-made law is reactionary.\textsuperscript{135} There must be an injury-in-fact before a plaintiff can bring a claim, and the judicial process can take a considerably long time.\textsuperscript{136} As Professor Orin Kerr notes, reliance on judicial rulemaking “leads to Fourth Amendment rules that tend to lag behind

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\textsuperscript{128} Id., 795 A.2d at 1230.
\textsuperscript{129} Id. at 365–66, 795 A.2d at 1228–30.
\textsuperscript{130} Id., 795 A.2d at 1231 (“I return again to the fact that defendant invited the officers into his home and agreed to answer questions surrounding their investigation.”).
\textsuperscript{131} Id. at 368, 795 A.2d at 1233.
\textsuperscript{132} Id. at 361–68, 795 A.2d at 1228–33.
\textsuperscript{133} Id.
\textsuperscript{134} See Monte, supra note 119, at 223–24 (explaining how the Vermont Supreme Court’s “modified open fields doctrine” failed to consider society’s views on privacy and police surveillance).
\textsuperscript{136} See Kerr, supra note 122, at 868 (“For a trial court to address the Fourth Amendment implications of a technology, . . . the use of the technology must yield evidence of a crime; it must lead to an arrest; and then it must lead to a constitutional challenge requiring judicial resolution. Appellate decisions come only much later.”).
parallel statutory rules and current technologies by at least a decade.”¹³⁷ This lag “result[s] in unsettled and then outdated rules that often make little sense given current technological facts.”¹³⁸ If Vermont continues to rely on judicial rulemaking to address wiretapping while technology evolves at an exponential rate, the lag between rules and technology will become even more pronounced.¹³⁹

To combat this lag between judicial rulemaking and technology, Vermont’s legislature must take control over the state’s approach to wiretapping. The legislature can respond to emerging technology much faster than the courts.¹⁴⁰ Professor Kerr explains that the legislature is positioned to draft a law that better reflects societal values because “[l]egislative rules tend to be the product of a wide range of inputs, ranging from legislative hearings and poll results to interest group advocacy and backroom compromises.”¹⁴¹ Conversely, judicial rulemaking “tend[s] to follow from a more formal and predictable presentation of written briefs and oral arguments by two parties.”¹⁴² Thus, the legislature can draft a statute that considers the values of all Vermonters, not just two opposing parties arguing before a court.

The current Vermont approach to wiretapping does not provide courts with sufficient guidance to make uniform rulings.¹⁴³ Relying on judicial rulemaking creates rules that lag far behind current technology.¹⁴⁴ The current approach also fails to consider a broad range of perspectives and input from Vermonters, resulting in rules that may not reflect societal values.¹⁴⁵ This approach inadequately addresses concerns with current

¹³⁷ Id.
¹³⁸ Id.
¹³⁹ See Nagy, supra note 75, at 7 (describing the “constant exponential growth rate[]” of technology over time, along with “super-exponential improvement for information technologies over long time spans”).
¹⁴⁰ See Kerr, supra note 122, at 870 (“Unburdened by the procedural barriers that limit and delay judicial power, legislatures can enact comprehensive rules far ahead of current practice rather than decades behind it.”). For example, Kerr notes that the ECPA regulated email privacy in 1986, long before many Americans had even heard of email. Id. Congress has even enacted legislation involving technology before it was invented, such as blocking funding for Pentagon research to develop new data-mining technology. Id.
¹⁴¹ Id. at 875.
¹⁴² Id.
¹⁴³ See Monte, supra note 119 (referencing the inconsistency in court rulings based on the current law).
¹⁴⁴ See Kerr, supra note 122, at 868 (Reliance on rulemaking “leads to Fourth Amendment rules that tend to lag behind parallel statutory rules and current technologies by at least a decade . . . .”).
¹⁴⁵ See infra Section III (describing cases involving statutory interpretation of wiretap statutes).
technology, and it will become increasingly ineffective as technology continues to evolve.

II. NEW TECHNOLOGY REQUIRES A PROACTIVE APPROACH TO PROTECT CITIZENS

As technology advances, it also becomes increasingly easy to use technology to intercept private communications. For example, most smartphones have microphones, high-resolution cameras, voice control, and a constant connection to a wireless network or internet service. These devices can easily intercept private communications. The current Vermont approach would protect against those interceptions only if done by law enforcement without a warrant, or in a place within a person’s residence where they would have a reasonable expectation of privacy. Almost all interceptions done by private actors are outside the scope of Vermont’s current approach to wiretapping.

Even though protection against unreasonable governmental interference into individual privacy is a fundamental constitutional right, protection against unauthorized interceptions by private actors is particularly important today. The widespread use of smartphones and the

146. See, e.g., Stephanie K. Pell & Christopher Soghoian, Your Secret StingRay’s No Secret Anymore: The Vanishing Government Monopoly Over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy, 28 HARV. J. L. & TECH. 1, 46 (2014) (describing how “[s]urveillance has become democratized and, correspondingly, the motives for surveillance have multiplied” because of lower costs and greater accessibility to interception technology).


149. VT. STAT. ANN. tit. 13, § 8108 (2017). Additionally, the current approach does not provide sufficient guidance to law enforcement on when to obtain a warrant. See, e.g., State v. Lizotte, 2018 VT 92, ¶ 1 (discussing whether law enforcement invalidated a warrant by opening an email attachment); State v. Wetter, 2011 VT 111, ¶ 15, 190 Vt. 476, 483, 35 A.3d 962, 968 (holding that a detective did not require a warrant to monitor a phone conversation between the defendant and an informant). Therefore, a wiretap statute would benefit law enforcement by clarifying the circumstances when a warrant is necessary. Cf. United States v. Staffeldt, 451 F.3d 578, 579–80 (9th Cir. 2006), amended in part by 523 F.3d 983 (9th Cir. 2008) (“[The ECPA] contains strict controls governing the issuance of wiretap warrants, and the use of wiretaps, in criminal investigations. Because Congress recognized the grave threat to privacy that wiretaps pose, it spelled out in elaborate and generally restrictive detail the process by which wiretaps may be applied for and authorized.”) (internal citation and quotations omitted).


151. See Sam Kamin, The Private is Public: The Relevance of Private Actors in Defining the Fourth Amendment, 46 B.C. L. REV. 83, 117–18 (2004) (discussing private conduct facilitated by modern technology that has raised new privacy concerns, such as workplace surveillance, consumer information misuse, and medical privacy intrusions); Margot E. Kaminski, Robots in the Home: What
increasing prevalence of devices such as Google Home and Amazon Echo create a greater likelihood than ever before that someone, or something, is monitoring private communications. Unique, unanticipated legal questions will almost certainly arise from this new technology: where does a reasonable expectation of privacy exist when someone carries their smartphone with them at all times? Does a device owner consent to be recorded by their device at any time, or only when the owner expressly consents? What about smart devices, like fitness trackers, or even home appliances—can those be interception devices?

There are numerous examples—including many found in this Note—of how statutory language may constrain the application of a wiretapping law to new technology. However, the absence of any comprehensive statutory provision provides even less protection against new forms of surreptitious surveillance and recording than a statute with outdated language.
Vermont’s current approach to wiretapping does not sufficiently protect private citizens. Vermont must act now to protect its citizens by codifying a statute that is able to adapt to rapidly changing technology.

III. STATE APPROACHES TO WIRETAPPING

When a new form of communications technology emerges, courts often struggle to define it by the terms used in the statute. Is the new technology an oral, wire, or electronic communication? Can it be used as an interception device? When the new technology is a modification of existing technology and used in a similar way, such as a call placed from a cell phone, rather than a landline, it may be relatively easy to define. However, when the new technology is a departure from previous technology, such as using a cell phone to send text messages, it is not as simple to equate with existing technology, or with existing statutory terminology.

Generally, states have adopted one of three approaches to wiretapping, with varying degrees of success: some state constitutions include an explicit right to privacy; some states have modeled their wiretap laws on the federal statute; and others have developed their own wiretap statutes not based on the federal statute. This Note examines each model to determine how Vermont should proceed in addressing wiretapping.

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159. See supra notes 4–5 and accompanying text (stating that Vermont is the only state that does not have a wiretap statute to protect citizens from interception of private communications).

160. See, e.g., In re Contents of Stored Comm’ns From Twitter, 154 A.3d 169, 175 (N.J. Super. Ct. App. Div. 2017) (holding that the audio portion of a video posted to Twitter was an “oral communication” under New Jersey’s wiretap statute).

161. See, e.g., Commonwealth v. Diego, 119 A.3d 370, 375 (Pa. 2015) (finding that an iPad is not a telephone under Pennsylvania’s wiretap statute).

162. See, e.g., Davis v. State, 21 A.3d 181, 194 (Md. Ct. Spec. App. 2011) (stating that the “listening post” theory—which holds that an interception occurs at the place the intercepted communications are first heard—applies equally to landline and cellular phone calls).

163. Compare Commonwealth v. Cruttenden, 976 A.2d 1176, 1181 (Pa. Super. Ct. 2009) (holding that an officer posing as an accomplice who received text messages from a suspect had “intercepted” the text messages), with Commonwealth v. Cruttenden, 58 A.3d 95, 96 (Pa. 2012) (reversing the Superior Court’s holding because an officer who directly receives text messages is “engaging in the communication,” not intercepting the communication, even though the sender believed the police officer was someone else).

164. Bast, supra note 4.

165. Id. at app. B (showing that 13 state statutes contain wording similar to the federal act, and 16 statutes are partially or loosely similar to the federal act).

166. Id. (indicating that the statutes of Alabama, Arkansas, California, Connecticut, Georgia, Kansas, Kentucky, Maine, Michigan, Montana, Nevada, North Carolina, South Carolina, South Dakota, Tennessee, Texas, and Washington are not similar to the federal act).
Although the U.S. Constitution does not contain an explicit right to privacy, courts have derived that right from other provisions.¹⁶⁷ Unlike the U.S. Constitution, eleven state constitutions include an explicit right to privacy.¹⁶⁸ Courts in those states thus often require strict construction of wiretap statutes to comply with the state constitution.¹⁶⁹ The Constitutions of New York and Florida directly prohibit interception of certain communications.¹⁷⁰

Comparing cases from New York and Florida shows the challenges and successes that arise from a constitutional prohibition on intercepting communications. Both constitutions prohibit the “unreasonable interception” of communications.¹⁷¹ New York’s Constitution applies only to “telephone and telegraph communications.”¹⁷² The language of Florida’s Constitution is considerably broader, prohibiting the interception of “private communications by any means.”¹⁷³

Even though both state constitutions contain a provision on intercepting communications, the subsequent statutes passed in each state have differentiated each state’s approach. Not only is the statutory language used in each state different, so is the manner in which the courts interpret those statutes within the constraints of their respective constitutions.¹⁷⁴ Because both states’ constitutions prohibit the interception of

¹⁶⁷. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that the “specific guarantees in the Bill of Rights have penumbras” that “create zones of privacy”).
¹⁶⁸. ALASKA CONST. art. I, § 22; ARIZ. CONST. art. 2, § 8; CAL. CONST. art. 1, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, §§ 6–7; ILL. CONST. art. 1, §§ 6, 12; LA. CONST. art. 1, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. 1, § 7.
¹⁶⁹. See, e.g., State v. Ault, 724 P.2d 545, 549 (Ariz. 1986) (stating that the “Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens,” and therefore the court would not allow for an exception to the statutory requirement that officers must have a warrant to enter a home).
¹⁷⁰. N.Y. CONST. art. 1, § 12 (“The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated . . . .”); FLA. CONST. art. I, § 12 (“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated.”). The Florida Constitution also separately recognizes the right to privacy. Id. art. I, § 23.
¹⁷¹. N.Y. CONST. art. 1, § 12; FLA. CONST. art. I, § 12.
¹⁷². N.Y. CONST. art. 1, § 12.
¹⁷³. FLA. CONST. art. I, § 12.
communications, both states necessarily enacted wiretap statutes that outline when interception is acceptable.\textsuperscript{175}

Florida courts view wiretap statutes as limited exceptions to the broad constitutional ban on interceptions.\textsuperscript{176} Thus, the courts have taken a very narrow, textualist approach to interpreting wiretap statutes. The Florida Supreme Court articulated the necessity for this strict interpretation of wiretap laws as follows: “[T]he protection of privacy in the area of communications is constitutionally mandated in express language. This Court is not at liberty to relax this protection afforded by the State Constitution.”\textsuperscript{177} Because the language of Florida’s constitutional provision is very broad, it applies to a wide range of eavesdropping, wiretapping, and other surreptitious recording activities.\textsuperscript{178} However, this broad application also necessarily requires that exceptions be very clear and explicit since courts are “not at liberty to relax this protection.”\textsuperscript{179}

Conversely, the language of the New York Constitution is much more specific, and only applies to wiretapping phones.\textsuperscript{180} The limited scope of the constitutional provision does not protect New Yorkers against an ever-growing number of other technologies.\textsuperscript{181} Many of New York’s wiretap statutes are not merely exceptions to the limited prohibition enshrined in the state constitution.\textsuperscript{182} Therefore, the courts do not employ the same strict textualist approach when interpreting wiretap laws that do not infringe on the constitutional protection against intercepting telephone communications.\textsuperscript{183}

\textsuperscript{175} See, e.g., N.Y. PENAL LAW § 250.65 (McKinney 2017) (permitting wiretapping under specific circumstances); FLA. STAT. §§ 934.07–08 (2017) (authorizing wiretapping and the use of intercepted communications under certain conditions).

\textsuperscript{176} See, e.g., Jackson v. State, 636 So. 2d 1372, 1374 (Fla. Dist. Ct. App. 1994) (“[Wiretap] statutes are exceptions to the federal and state constitutional rights to privacy and must be strictly construed.”) (internal citation omitted).

\textsuperscript{177} Tollett v. State, 272 So. 2d 490, 493 (Fla. 1973).

\textsuperscript{178} See, e.g., Jackson, 636 So. 2d at 1376 (holding that “information transmitted to a display pager is an electronic communication,” and in order to lawfully intercept that information, “the state must strictly comply with the requirements” laid out in the state law authorizing the interception of electronic communications by law enforcement); Holt v. Chief Judge of Thirteenth Judicial Circuit, 920 So. 2d 814, 818 n.4 (Fla. Dist. Ct. App. 2006) (discussing the court’s concern that an electronic court reporting system could unintentionally violate the Florida Constitution).

\textsuperscript{179} Tollett, 272 So. 2d at 493.

\textsuperscript{180} N.Y. CONST. art. 1, § 12.

\textsuperscript{181} See, e.g., People v. Di Raffaele, 433 N.E.2d 513, 516 (N.Y. 1982) (rejecting defendant’s argument that telephone toll-billing records were subject to a “more restrictive standard” under the New York Constitution).

\textsuperscript{182} See People v. Perez, 848 N.Y.S.2d 525, 531–32 (Sup. Ct. 2007) (listing cases in which New York courts have strictly interpreted the state statute authorizing wiretaps otherwise prohibited by the Constitution, and other cases in which the courts have not employed a strict interpretation).

\textsuperscript{183} Id.
i. McDade v. State and People v. K.B.

The first pair of cases this Note discusses illustrates how the differences between two constitutional provisions can lead to drastically different results. These cases are factually very similar, but the results of each case are in almost direct opposition to one another. For context, it is necessary to note that Florida law requires two-party consent, whereas New York requires only single-party consent.\(^\text{184}\)

In McDade v. State, a minor in Florida used an MP3 player to secretly record a conversation with her stepfather, in which he admitted to sexually abusing her.\(^\text{185}\) The minor turned the recordings over to police who arrested the stepfather, McDade.\(^\text{186}\) The court sentenced McDade to two terms of life imprisonment for sexual battery on a child.\(^\text{187}\) McDade appealed, claiming that the recordings were inadmissible as evidence because his stepdaughter recorded him without his consent, thus violating Florida’s two-party consent requirement.\(^\text{188}\) The Florida Supreme Court agreed with McDade, and ruled that the recordings were inadmissible.\(^\text{189}\) The court applied a strict, narrow reading of the state statute, finding that the law did not make any exceptions for a circumstance where one party was committing a crime.\(^\text{190}\) The court recognized that there might be a “compelling case” to allow for an exception to the two-party consent rule under circumstances such as those in McDade, but stated that “the adoption of such an exception is a matter for the Legislature.”\(^\text{191}\)

In New York, a near-identical case yielded a different result.\(^\text{192}\) In People v. K.B., a minor gave police a tape recording she made in which her father admitted to raping her.\(^\text{193}\) The father filed a motion to exclude the recording, claiming that even though the statute required only single-party consent, the daughter could not legally consent to the recording she had made because she was a minor.\(^\text{194}\) The court concluded that the daughter

\(^{184}\) Fla. Stat. § 934.03(d) (2017); N.Y. Penal Law § 250.00(2) (McKinney 2017). See supra notes 87–91 and accompanying text (describing single-party and two-party consent laws).

\(^{185}\) McDade v. State, 154 So. 3d 292, 295 (Fla. 2014).

\(^{186}\) Id. at 294.

\(^{187}\) Id. at 295.

\(^{188}\) Id.

\(^{189}\) Id. at 298.

\(^{190}\) Id. at 299.

\(^{191}\) Id.

\(^{192}\) People v. K.B., 984 N.Y.S.2d 547, 550 (Sup. Ct. 2014).

\(^{193}\) Id. at 548.

\(^{194}\) Id. at 549.
could give consent, and denied the father’s motion to exclude the recordings.\textsuperscript{195}

Unlike the Florida court, the New York court looked outside the bounds of the statute’s plain language to reach its conclusion.\textsuperscript{196} The court stated that one “policy consideration” of prohibiting minors from consenting to an interception under New York’s single-consent law was to “prevent the police from coercing minors into acting as police agents against their parents or other family members.”\textsuperscript{197} The victim in \textit{K.B.} had made the recording on her own, prior to any police involvement in her case, so that policy consideration was irrelevant.\textsuperscript{198} The law was “enacted for the benefit of minors” and therefore “should not be interpreted as to deprive a minor who is an alleged crime victim of what could obviously be powerful evidence against the perpetrator.”\textsuperscript{199}

The court’s reasoning also referred to technological changes, stating that, “courts cannot ignore the fact that the prevalence of technology has provided minors even younger than 14, with access to cell phones, smartphone apps, and other recording devices.”\textsuperscript{200} Therefore, while courts should review circumstances involving minors on a case-by-case basis, there was “no rational basis to reject a recording such as this because one party to the conversation is a minor.”\textsuperscript{201}

These cases demonstrate how the differences between the two state constitutions can lead to very different results. Florida’s broad constitutional provision protects against all interceptions.\textsuperscript{202} Florida wiretap laws therefore carve out narrow exceptions to this broad protection.\textsuperscript{203} The courts cannot expand those exceptions beyond the plain language of the

\begin{flushleft}
\textsuperscript{195} \textit{Id.} at 550.
\textsuperscript{196} \textit{Id.} at 549–50.
\textsuperscript{197} \textit{Id.} at 549. Curiously, the statute does not make any specific reference to minors, prohibiting only “intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto.” N.Y. P\textsc{en}al L\textsc{aw} §§ 250.00, 250.05 (McKinney 2017).
\textsuperscript{198} \textit{People v. K.B.}, 984 N.Y.S.2d at 549.
\textsuperscript{199} \textit{Id.} at 550.
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.} In a separate case where a non-custodial parent recorded the other parent abusing their child over an open phone line, the Court of Appeals found that the parent could consent “on behalf of his child” because he had a good-faith basis to believe that it was necessary to vicariously consent for his child. People v. Badalamenti, 27 N.Y.3d 423, 432 (2016). Interestingly, the court also concluded that the parent’s actions were not “wiretapping” under the state constitution because he was a “sender or receiver” of the telephonic communication, but his actions did constitute the crime of “mechanical overhearing of a conversation,” which under New York law was considered “bugging.” \textit{Id.} at 431–32.
\textsuperscript{202} See FLA. C\textsc{onst.} art. I, § 12 (providing that all people shall be protected “against the unreasonable interception of private communications by any means”).
\textsuperscript{203} FLA. S\textsc{tat. A}nn. § 934.03 (West 2018).
\end{flushleft}
In McDade, the court recognized that there was a “compelling case” to recognize an exception to the constitutional prohibition. However, the court could not expand statutory exceptions beyond those clearly stated in the statute without infringing upon McDade’s constitutional rights. Conversely, the New York court was able to expand the statute beyond its plain language. This case shows how in a very similar scenario, the New York Constitution can provide no protection, whereas the Florida Constitution does. While this led to a more just result in K.B. than in McDade, under different circumstances Florida’s constitution may lead to a better result than would New York’s.

ii. State v. McCormick and People v. Darling

The next pair of cases provide examples of how the state constitutions can be applied to new technology. In these cases, the two states came to relatively similar conclusions. Both cases concerned the particularity with which a warrant authorized a wiretap.

In State v. McCormick, Florida prosecutors appealed a trial court’s ruling that a warrant to wiretap a cell phone was overbroad because it did not list the defendant’s address. The court reversed the trial court’s decision, finding that because the warrant listed the unique phone number, it contained sufficient detail to “lead a reasonable person to the proper subject of the wire interception.” The court further acknowledged that the case “involve[d] new and evolving areas of both law and technology,” and that the court’s conclusion was “a logical solution to the problems created by the mobility of cellular telephones and the difficulty in locating them.”

In People v. Darling, a New York case, the defendants appealed a lower court’s ruling that a warrant was sufficient even though the defendants had changed phone numbers. The warrant listed the correct address, and the house had only one phone line. The defendants pointed to the “[c]ourt’s strict compliance jurisprudence,” in which the court had

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204. McDade v. State, 154 So. 3d 292, 297 (Fla. 2014).
205. Id. at 299.
206. Id.
207. See People v. K.B., 984 N.Y.S.2d 547, 550 (Sup. Ct. 2014) (providing evidence of the court’s expansion of § 710.30(1)(a) beyond the plain language of the statute).
209. Id. (quoting State v. Buffa, 347 So. 2d 688, 688 (Fla. Dist. Ct. App. 1977)).
210. Id. at 1223.
212. Id. at 599, 601.
suppressed evidence “when the authorities failed to comply strictly with constitutional and statutory requirements.”\textsuperscript{213} The court rejected the defendant’s argument, stating that “[s]trict compliance does not entail hypertechnical or strained obedience, nor is common sense its enemy.”\textsuperscript{214} The court concluded that the warrant was adequate: “No confusion was created merely because the number changed. There was no possibility for misdirection . . . . In the context of this case, the change in telephone number had no bearing on the established probable cause.”\textsuperscript{215}

As these cases demonstrate, a constitutional provision can be applied to new technology or unanticipated scenarios, though the specific language used may limit its scope and effectiveness. A broad constitutional provision such as Florida’s provides greater protection, but also necessarily requires very clear, specific language in any subsequent statutes.\textsuperscript{216} Additionally, it does not allow for judicial discretion to interpret statutes in light of technological changes or other important considerations.\textsuperscript{217} Alternatively, New York’s narrow constitutional provision provides no protection over any non-telephonic recording.\textsuperscript{218} This allows for greater flexibility based on changing technological norms.\textsuperscript{219} However, the narrow language may also render the constitutional protection essentially obsolete because of those same changing norms.

\textbf{B. State Statutes Developed Using the Federal Wiretap Statute as a Framework: Maryland and Massachusetts}

Unlike states with their own explicit constitutional provisions like Florida and New York, other states have used the ECPA as a guiding document when drafting their own statutes, or have adopted the language of Title III or the ECPA either in full or in part.\textsuperscript{220} To assess the effectiveness of this approach, this Note examines two states that have borrowed from
federal law: Maryland and Massachusetts. Maryland uses the ECPA as guidance, and Massachusetts has partially adopted the language of Title III.

The following cases demonstrate the successes and challenges of each approach. Maryland modeled its wiretap law on the ECPA, but the state statute contains some departures from the federal law, such as requiring two-party consent.\textsuperscript{221} Maryland’s approach allows courts to use the ECPA and related cases as compelling persuasive authority. Alternatively, Massachusetts partially adopted the language of Title III, but not the ECPA’s amended language.\textsuperscript{222} This approach has created significant, unnecessary confusion in Massachusetts courts.

i. Davis v. State

The Maryland case \textit{Davis v. State} demonstrates how Maryland’s approach to wiretapping provides guidance to its courts. In \textit{Davis}, the question presented was whether evidence obtained from an authorized wiretap of a cell phone was admissible under § 10-408(c) of Maryland’s wiretap statute, even when the defendant traveled across state lines.\textsuperscript{223} The court looked to federal court opinions interpreting similar cases under the ECPA, because “Maryland’s wiretap statutory scheme is an ‘offspring’” of the Act.\textsuperscript{224} Therefore, federal court opinions interpreting the ECPA were a source of persuasive guidance.\textsuperscript{225} Similarly, the court also looked to state court opinions from other states with wiretap laws modeled on the ECPA to see how those courts had interpreted their own related statutes.\textsuperscript{226}

The state’s legislative history also supported the court’s decision to look to the federal courts because it indicated that the legislature intended for the ECPA to “serve[] as the guiding light for the Maryland Act.”\textsuperscript{227} The legislative history also showed the intended scope and reach of Maryland’s statute.\textsuperscript{228} The court’s analysis showed that § 10-408(c) was enacted specifically “to account for the development of cellular phone technology.”\textsuperscript{229} After looking at several revisions to the statute’s language over time, the court recognized that “[a]lthough none of the legislative

\begin{itemize}
\item\textsuperscript{221} MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2009). \textit{See supra} notes 87–91 (defining two-party consent).
\item\textsuperscript{222} See Bast, \textit{supra} note 4, at app. B (noting Massachusetts’s partial adoption of the pre-amendment language of Title III).
\item\textsuperscript{223} \textit{Davis v. State}, 43 A.3d 1044, 1047–48 (Md. 2012).
\item\textsuperscript{224} \textit{id.} at 1051.
\item\textsuperscript{225} \textit{id.}
\item\textsuperscript{226} \textit{id.} at 1052–53.
\item\textsuperscript{227} \textit{id.} at 1051.
\item\textsuperscript{228} \textit{id.} at 1050.
\item\textsuperscript{229} \textit{id.}
\end{itemize}
history speaks directly to the interception of communications emanating from an out-of-state source, it is clear that the statute has been evolving steadily, trying to keep pace with emerging technology.\textsuperscript{230}

\textit{ii. Schmerling v. Injured Workers’ Insurance Fund}

Another Maryland case illustrates how Maryland’s approach can be particularly useful to courts when analyzing new technology. \textit{Schmerling v. Injured Workers’ Insurance Fund} presented the Maryland Court of Appeals with a case of first impression concerning a telephone monitoring system that recorded phone calls at a company call center.\textsuperscript{231} Although it was a case of first impression in Maryland, other jurisdictions had previously examined similar monitoring systems.\textsuperscript{232} Therefore, the court reasoned that it should look to “case law from jurisdictions which have considered the permissibility of using similar equipment pursuant to \textit{similarly enacted wiretapping laws} [that] may help guide [the court’s] ultimate conclusion.”\textsuperscript{233}

In addition to case law from other jurisdictions with similar wiretap statutes, the court also considered Maryland’s “heightened interest in the privacy of its citizens” in reaching its “ultimate conclusion.”\textsuperscript{234} According to the court, although Maryland modeled their statute on federal law, “[t]he alterations that were made . . . before enacting the Maryland Act were obviously designed to afford the people of [Maryland] a greater protection than Congress provided in Title III.”\textsuperscript{235} Therefore, the court must reach a conclusion that protects “the privacy sought by the Legislature.”\textsuperscript{236}

Because Maryland’s wiretap statute is similar, but not identical, to the ECPA, and because Maryland’s legislature has proactively modified their statute over time to keep pace with technology, the legislature has provided courts with extensive, yet flexible, guidance on statutory interpretation.\textsuperscript{237} When the Maryland statute contains similar or identical language to the federal statute, then the Maryland courts may look to the federal courts and other jurisdictions with similar statutes when presented with a novel

\begin{itemize}
\item \textsuperscript{230} Id. at 1051.
\item \textsuperscript{231} Schmerling v. Injured Workers’ Ins. Fund, 795 A.2d 715, 716 (Md. 2002).
\item \textsuperscript{232} Id. at 725.
\item \textsuperscript{233} Id. (emphasis added).
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Id. at 722 (first alteration in original) (quoting Standiford v. Standiford, 598 A.2d 495, 499 (Md. Ct. Spec. App. 1992)).
\item \textsuperscript{236} Id. at 725.
\item \textsuperscript{237} Id.; see also MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to 10-414 (West 2009) (providing extensive definitions of terms).
\end{itemize}
issue. If the language in Maryland’s statute differs from the ECPA, then the courts can assume that the legislature intended to provide more stringent protections than the federal statute. By looking at changes to the statutory language over time, the courts can assess the legislature’s intent to address new technological advancements.

In contrast to Maryland’s statutes, which the state drafted using the ECPA as a “guiding light,” Massachusetts adopted large swaths of Title III almost verbatim in 1968. However, after Congress passed the ECPA in 1986, the Massachusetts legislature did not similarly amend the state statute. On multiple occasions, litigants have challenged the applicability of the state statute to anything beyond wire and oral communication, which is the language used in the statute. Despite the absence of any amendments to the Massachusetts statute, the state courts have expanded the scope of the law beyond only wire and oral communication. However, justifying and supporting the courts’ interpretations of the statute requires significant time and research that could have been avoided by simply amending the statute after Congress passed the ECPA.

iii. Commonwealth v. Moody

Massachusetts courts have relied upon federal legislative history to ascertain the scope of the state wiretap law. In Commonwealth v. Moody,

238. See, e.g., Davis v. State, 43 A.3d 1044, 1051 (Md. 2012) (explaining that Maryland is seeking guidance from federal opinions for the current case because of the similarities between the Maryland and federal statutes).

239. See, e.g., Schmerling, 795 A.2d at 722 (noting that the Maryland act clearly intended to extend more protections than the federal scheme).

240. See, e.g., id. at 723 (stating that the reasoning and “discussion surrounding” amendments made to the language of Maryland’s statute “provide great insight into the purpose and scope” of the law).

241. Davis, 43 A.3d at 1051.

242. Bast, supra note 4, at app. B. Despite adopting the federal act in large part, the Massachusetts wiretap statute does contain some differences. See Commonwealth v. Vitello, 327 N.E.2d 819, 836 (Mass. 1975) (“[W]e note that the Massachusetts statute in major portion matches section for section the provisions of Title III. Admittedly, the phraseology of our State statute is not word for word that of the Federal act.”).

243. See supra notes 65–66 and accompanying text (describing the ways in which the ECPA updated the statutory language of Title III).


246. Moody, 993 N.E.2d at 720.

247. See, e.g., id. at 722 (determining the scope of Massachusetts’s law by examining federal legislative history of the ECPA).
the defendants appealed their drug trafficking convictions, arguing that the trial court should have suppressed the state-issued warrants to intercept their cell phone calls and text messages.\textsuperscript{248} Because the legislature did not amend the state law after the passage of the ECPA, the defendants claimed that cell phones and text messages were beyond the scope of the state law, which referred only to wire and oral communication.\textsuperscript{249} Therefore, the defendants argued, the judge did not have the authority under state law to issue a warrant to intercept cell phone and text message communications because they were not wire or oral communications.\textsuperscript{250}

In analyzing whether the state statute covered cell phones and text messages, the court looked to the legislative history of the ECPA.\textsuperscript{251} The legislative history indicated that Title III had covered a call from a cell phone to a landline because the call partially traveled over a standard telephone line, and was thus a “wire communication.”\textsuperscript{252} The court reasoned that “[w]hat was left in some doubt by [Title III] was whether a call from one cellular telephone to another, which traveled entirely by radio signals, except for its passage through a switching station, was protected.”\textsuperscript{253} The Congressional record noted that the ECPA clarified that cell-to-cell calls were, in fact, “wire communications” under Title III, not that the ECPA “mark[ed] the beginning of Title III’s coverage of cellular telephone calls.”\textsuperscript{254} Even though the Massachusetts legislature did not amend its statute after the passage of the ECPA, the court still ruled that the statute covered cell-to-cell calls, because the ECPA merely clarified that Title III already covered those calls.\textsuperscript{255}

The question of whether the statute covered text messages was more complicated.\textsuperscript{256} The ECPA narrowed the definition of “wire communication” from “any communication” to “any aural transfer.”\textsuperscript{257} It also moved non-oral communications to the newly created category of “electronic communication.”\textsuperscript{258} Unlike cell phone communications, which the ECPA merely clarified, the amended language intentionally excluded

\begin{footnotesize}
\textsuperscript{248} Id. at 716.
\textsuperscript{249} Id. at 717.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at 722–23.
\textsuperscript{252} Id. at 722.
\textsuperscript{253} Id. at 722 (emphasis added).
\textsuperscript{254} Id. at 723 (emphasis added).
\textsuperscript{255} See id. (holding that the retention of the 1968 language “does not mean that the Massachusetts statute is less protective than Title III—it only means that on its face the Massachusetts wiretap statute is less clear than its Federal counterpart”).
\textsuperscript{256} Id. at 723–24.
\textsuperscript{257} Id. at 720.
\textsuperscript{258} Id. at 723.
\end{footnotesize}
non-oral communications from the new definition of “wire communications.”

Once again, the court found the federal legislative history instructive. Congress anticipated that the revisions to the Federal Act may make it necessary for states to revise their statutes, but indicated that this might not be required in all circumstances. The ECPA gave states a two-year grace period to amend their statutes to comply with the changes to the federal statute. Thus, because the Massachusetts statute did not narrow the scope of “wire communications” as the ECPA had, text messages could still be included under the state’s definition of that term.

Even though the Massachusetts statute largely paralleled the language of Title III, one important difference between the statutes remained: the definition of “intercept.” The state statute’s definition of “intercept” was broader than the definition under Title III. The ECPA broadened the federal statute’s definition of intercept. The court concluded that the Massachusetts statute did not require any amendments to provide the same protections to text messages as the ECPA because its definition was already broader than Title III’s.

iv. Commonwealth v. Hyde

Despite the Massachusetts legislature’s failure to update the state statute, it nevertheless provides the courts with guidance in interpreting the law through a preamble outlining the legislature’s purpose and intent of

259. Id.
260. Id.
261. Id. (“[T]he defendants’ argument runs head long into the legislative history of the ECPA, which explicitly recognized the possibility that ‘state laws [might] not need [to] be changed to accommodate revisions on interceptions of wire or oral communications.’” (second and third alterations in original) (quoting H.R. Rep. No. 99-647, at 62 (1986))).
263. Moody, 993 N.E.2d at 724. (“Given that a text message is a communication transmitted over a cellular network that travels in part by wire or cable or other like connection within a switching station, it seems self-evident that text messages fall within the plain language of the definition of ‘wire communication’ in § 99.”).
264. Id.
265. Id.
266. Id.
267. Id. (“In light of the broad statutory definitions of the terms ‘wire communication’ and ‘interception,’ we conclude that the Massachusetts wiretap statute provides protection for the electronic transmission of text messages consistent with the protections currently provided by Title III . . . .”).
enacting the wiretap law. The preamble addresses the risks that evolving technology pose to the privacy of Massachusetts citizens:

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

The following case demonstrates how the preamble acts as a broad prohibition on wiretapping. In Commonwealth v. Hyde, during a traffic stop, the defendant used a handheld tape recorder to secretly record the arresting officer, which led to the defendant’s conviction for wiretapping. The defendant argued that he had not violated the wiretap statute, because the police officer had no reasonable expectation of privacy during a traffic stop.  The court held that “[t]he statute’s preamble expresses the Legislature’s general concern that” technology “‘pose[d] grave dangers to the privacy of all citizens of the commonwealth’ and this concern was relied on to justify the ban on the public’s clandestine use of such devices.” Whereas many jurisdictions have adopted the “reasonable expectation of privacy” standard from Katz, the Massachusetts court found that the preamble showed clear legislative intent to prohibit all “clandestine” use of recording devices. The lack of any exception to that rule led the court to conclude that the Massachusetts statute applied at all times, not only when the parties to a communication had a reasonable expectation of privacy.

269. § 99(A). Massachusetts is a two-party consent state. Id. § 99(B)(4).
271. Id.
272. Id. at 967 (second alteration in original) (quoting MASS. GEN. LAWS ch. 272, § 99(A) (2017)).
273. Id. See also Katz v. United States, 389 U.S. 347, 353 (1967) (holding that the Fourth Amendment protects individuals in any situation where they have a reasonable expectation of privacy).
274. Hyde, 750 N.E.2d at 966. See also Commonwealth v. Jackson, 349 N.E.2d 337, 340 (Mass. 1976) (rejecting an argument that the wiretap statute did not apply to a kidnapper when calling the victim’s family demanding ransom, because it “would render meaningless the Legislature’s careful choice of words if [the court] were to interpret ‘secretly’ as encompassing only those situations where an individual has a reasonable expectation of privacy”).
v. Dillon v. Massachusetts Bay Transportation Authority

In contrast, the court was willing to depart from a strict, literal reading of the statute in a case concerning the application of the telephone equipment exception to the definition of “intercepting device[s].”275 The Massachusetts Bay Transportation Authority (MBTA), which is responsible for public transportation operations in and around Boston, recorded almost all telephone communications at its major operational centers.276 The MBTA used one of those recordings in a disciplinary proceeding against an MBTA employee who made profane and insulting comments while on a business call.277 The employee filed suit against the MBTA, claiming that it had violated the state wiretap statute by recording her without consent.278

In response, the MBTA claimed that the recordings were valid under the telephone equipment exception to the wiretap statute.279 The exemption omits telephone equipment “furnished to a subscriber or user by a communications common carrier in the ordinary course of its business . . . and being used by the subscriber or user in the ordinary course of its business” from the definition of an “intercepting device.”280 The employee argued that the exception did not apply because the MBTA purchased the recorders from a commercial equipment manufacturer, not a “communications common carrier.”281 Opposing a strict, literal interpretation of the statute, the MBTA “urge[d] that in enacting the provision many years ago the Legislature could not have foreseen the sweeping changes in the telecommunications industry by which telephone equipment has become widely available from entities other than telephone companies.”282 Because of this unanticipated development, the MBTA argued that “an insistence on words over sense would be preposterous.”283

The court agreed with the MBTA, holding that a literal reading of the statute would fail to “preserve [the statute] in its intrinsic intended scope.”284 The court “d[id] not depart lightly from the express wording of a

276. Id. The MBTA’s reasons for recording calls included “improving efficiency, ensuring public safety, and seeing to employee compliance with applicable law.” Id.
277. Id. at 332.
278. Id.
279. Id.
281. Dillon, 729 N.E.2d at 331. See also MAss. GEN. LAWS ch. 272, § 99(B)(12) (2017) (“The term ‘communications common carrier’ means any person engaged as a common carrier in providing or operating wire communicating facilities.”).
282. Dillon, 729 N.E.2d at 332–33.
283. Id. at 333.
284. Id. at 334.
statute,” but indicated that the changed circumstances compelled such a
departure. A literal reading of the telephone equipment exception would
cause absurd results, “allowing the fortuity of the source of the equipment
to entail serious material consequences.”

The preamble thus acts as a broad prohibition on wiretapping, similar
to Florida’s constitutional provision. However, the preamble is a
statutory provision, not a constitutional one. Thus, the Massachusetts
courts have a greater degree of leniency when interpreting their statutes
than the Florida courts do in interpreting their Constitution. Massachusetts courts refuse to create exceptions not explicitly included in
the preamble, but the preamble functions especially well as evidence of legislative intent.

As these cases demonstrate, both Maryland’s and Massachusetts’s
approaches to wiretapping contain some distinct advantages. Maryland
has successfully utilized the ECPA to offer guidance to its courts, and to
signal legislative intent. The greatest success of Massachusetts’s
approach is the statute’s preamble, which provides its courts with concise,
straightforward guidance to interpret the statute. Maryland has
successfully used the ECPA to its benefit, while Massachusetts’s method of
partially adopting the federal law has resulted in needless confusion. The
adoption of Title III and the subsequent failure to update the state statute’s
language after the passage of the ECPA in 1986 complicates the application
and interpretation of the statute. The inconsistencies with the ECPA’s
language open the door to many challenges and require courts to perform

285. Id. at 333–34.
286. Id. at 334.
287. See supra Part III.A (describing how the language in Florida’s constitutional provision
broadly prohibits interceptions).
289. See Bast, supra note 4, at app. B (indicating which state laws contain wording similar to
the ECPA).
290. See supra note 237 and accompanying text (highlighting the benefits of Maryland’s
approach); see supra notes 264–67 and accompanying text (noting that Massachusetts’s wiretap law
provides more protections than Title III).
291. See supra notes 223–30 and accompanying text (explaining how the court in Davis used
interpretations of the EPCA as a source of “persuasive guidance” and as a window into the legislature’s
intent).
292. See supra note 268 (discussing how preambles provide legislative intent and purpose).
293. Compare supra note 237–40 and accompanying text (summarizing how Maryland has
benefited from using the ECPA framework), with supra notes 242–47 (discussing the confusion that
arose when Congress modified the EPCA and Massachusetts did not amend the state statute to reflect
the new language).
294. See supra Part III.B.iii (analyzing the differences between the federal and state statutes and
pointing out unresolved issues relating to the failure to update the statutory language).
intensive interpretative analyses in order to determine the scope of the statute.

Nevertheless, Massachusetts courts have liberally applied common sense to adapt the statute to new technologies and situations. However, as this Note previously explained, relying on judicial rulemaking leads to rules that lag behind current technology and rules that do not take a wide range of perspectives and opinions into consideration. Thus, despite the court’s liberal application of the law to new technology, this approach cannot keep pace with technological evolution.

**C. State Wiretap Statutes Not Based on Federal Statute: Nevada**

Some states have drafted wiretap statutes that are not modeled on Title III or the ECPA. The federal law still affects these state statutes because state law cannot allow what federal law prohibits. Even when the state law differs from federal law, courts may only interpret the state law as equal to, or more restrictive than, federal law. Nevada will serve to illustrate the strengths and weaknesses of this approach.

Nevada first passed a wiretap law in 1864, the same year it received statehood. Over 100 years later, after Congress passed Title III, Nevada revised its statute in order to comply with federal law, but did not parallel Title III’s language. Challenges to the state wiretap statute usually involve claims that federal law preempts the less restrictive state law.

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295. *See supra* notes 283–86 and accompanying text (recounting the common-sense argument by the MBTA that persuaded the court to liberally interpret the statute).

296. *See supra* notes 134–37 and accompanying text (discussing the lag behind technology of judge-made laws, and the lack of perspectives considered in judicial rulemaking).


298. *See* Arizona v. United States, 567 U.S. 387, 399 (2012) (“*State laws are pre-empted when they conflict with federal law. This includes cases where ‘compliance with both federal and state regulations is a physical impossibility,’ and those instances where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .’” (internal citations omitted) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141–43 (1963))).

299. S. REP. NO. 90-1097, at 98 (1968) (“The proposed provision envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.”).

300. *See Revised Laws of Nevada*, vol. I, at 1314 (1912) (indicating that the law was approved on Feb. 16, 1864). The original law prohibited “any person not connected with any telegraph company . . . by means of any machine, instrument, or contrivance, or in any other manner, [from] wilfully [sic] and fraudulently read[ing], or attempt[ing] to read any message or to learn the contents thereof whilst the same [was] being sent over any telegraph line.” Id. at 1316.

301. *See* Lane v. Allstate Ins. Co., 969 P.2d 938, 940 ( Nev. 1998) (“In 1973, the Nevada legislature made substantial amendments to NRS 200.620 through NRS 200.690, in order to bring Nevada law somewhat in conformity with federal wiretap statutes.”).

302. *See supra* Part III.C.ii (discussing the court’s reasoning in *Lane*).
Because the two laws do not complement each other in structure or language, it is more difficult to identify where the federal language and state language overlap.  

i. Sharpe v. State

Similar to Commonwealth v. Moody, one such challenge concerned the applicability of the state statute to cell phone calls and text messages. As in Massachusetts, even though Nevada revised the state statute to conform to Title III, it did not make any similar changes after the passage of the ECPA. In Sharpe v. State, the defendant argued that the state statute did not apply to cell phone calls and text messages because the statute only referred to “wire communications.” The court concluded, as in Moody, that even though the ECPA changed the federal definition of “wire communication,” under Nevada law, “wire communication” still applied to cell phone calls and text messages.

Sharpe also argued that federal law preempted Nevada’s wiretap law, because Nevada had not updated its language since the passage of the ECPA. The court rejected this argument because Sharpe did not demonstrate how Nevada’s failure to change the state statute made it less restrictive than the ECPA. The court held that “current Nevada wiretap law, like federal wiretap law, allows for the interception of cellular telephone calls and text messages.” The Nevada statute and the ECPA did not mirror one another’s language, but both laws fundamentally restricted the same conduct.

ii. Lane v. Allstate Insurance Co.

Other cases reveal that Nevada courts also use the distinct language of the state statute to determine legislative intent. In one case, the court
dismissed a plaintiff’s complaint against his employer, because the plaintiff, Lane, secretly recorded hundreds of phone calls with his employer in violation of Nevada’s general two-party consent requirement.\textsuperscript{313} Lane appealed the dismissal, arguing that the two-party consent requirement did not apply when an individual records his or her own phone calls.\textsuperscript{314} The court found that the legislative intent disproved Lane’s argument.\textsuperscript{315} The Nevada statute contains separate provisions for telephone conversations and in-person conversations.\textsuperscript{316} Section 650 permits single-party consent when using a listening device to intercept in-person conversations.\textsuperscript{317} The court determined that the legislature’s decision not to use that same language for telephone conversations under § 620 was intentional.\textsuperscript{318} The court reasoned that “[i]t seem[ed] apparent that the legislature believed that intrusion upon Nevadans’ privacy by nonconsensual recording of telephone conversations was a greater intrusion than the recording of conversations in person.”\textsuperscript{319}

The court also looked to the ECPA to determine the Nevada legislature’s intent.\textsuperscript{320} Under § 2511(2)(d), the federal statute explicitly authorizes the interception of communications “where such person is a party to the communication.”\textsuperscript{321} When “the Nevada legislature made substantial amendments . . . in order to bring Nevada law somewhat in conformity with federal wiretap statutes,” it did not adopt that provision of § 2511(2)(d).\textsuperscript{322} According to the court, “[i]t must be presumed that the exclusion of this provision in the Nevada statute was deliberate and was intended to provide a different result from that achieved under the federal wiretap statute.”\textsuperscript{323}

Finally, the court examined the legislative history of a failed amendment to § 620 that would have permitted one-party consent to phone

\begin{footnotesize}
\begin{enumerate}
\item[313.] Lane v. Allstate Ins. Co., 969 P.2d 938, 939 (Nev. 1998).
\item[314.] Id.
\item[315.] Id. at 940.
\item[316.] Id. Compare Nev. Rev. Stat. § 200.620 (2017) (indicating that it is illegal for “any person to intercept or attempt to intercept any wire communication unless: (a) The interception or attempted interception is made with the prior consent of one of the parties to the communication; and (b) An emergency situation exists and it is impractical to obtain a court order as required” (emphasis added)), with § 200.650 (prohibiting the interception of “any private conversation engaged in by the other persons . . . unless authorized to do so by one of the persons engaging in the conversation”).
\item[317.] § 200.650.
\item[318.] Lane, 969 P.2d at 940 (“If the legislature had wanted to create that limitation in NRS 200.620, it would have done so.”).
\item[319.] Id.
\item[320.] Id.
\item[322.] Lane, 969 P.2d at 940.
\item[323.] Id.
\end{enumerate}
\end{footnotesize}
calls by law enforcement. The legislature specifically discussed the difference between individuals recording their own conversations and interception by a third party. "However, legislators continued to express concern over potential abuses when judicial oversight is lacking," and the bill failed to pass. The court concluded that the bill’s failure “spoke eloquently of the legislative intent to prohibit the unauthorized interception of wire communications.”

iii. Abid v. Abid

In another case involving a custody dispute, a father hid a recording device in his child’s backpack to record conversations between the child and the mother. The district court concluded that the father had illegally recorded the conversations, because neither the child nor the mother had consented to the recording. The recordings were thus inadmissible as evidence in the custody dispute, but the district court allowed a child psychologist, who testified as an expert witness, to evaluate the recordings. The mother appealed, arguing that the district court should not have allowed the psychologist to review illegally obtained evidence.

Once again, the court found the distinctions between the state and federal laws illustrative of the legislature’s intent. Unlike the ECPA, Nevada’s law is silent on the admissibility of an illegal wiretap in a civil action. The court therefore refused to “read a broad suppression rule” into the state statute, because the legislature’s silence demonstrated that it did not intend for such a rule to apply in civil cases. Additionally, preventing the psychologist from reviewing the recordings did not contradict the purpose of the statute. Section 650 states that “a person shall not intrude upon the privacy of other persons,” indicating that its purpose is to protect an individual’s privacy. Therefore, because the psychologist was “already

324. Id.
325. Id. at 940–41.
327. Id.
329. Id.
330. Id.
331. Id.
332. Id. at 479.
333. Id.
334. Id.
inquiring into private details of the relationship between parent and child,” the recordings did not further intrude upon the privacy of the mother and the child.336

Lane and Abid demonstrate how courts may find the differences between Nevada’s wiretap statute and the ECPA useful when interpreting the state’s wiretap laws. Nevada courts can ascertain legislative intent when the language of the state law is more restrictive and the federal law establishes a baseline for the legal protection that the law must provide.337 In contrast to Massachusetts’s approach, the Nevada legislature is able to tailor laws to their exact specifications without following the structure of the federal law to avoid causing confusion.338 Alternatively, Maryland’s approach allows the legislature to use departures from the ECPA to indicate legislative intent that the state law provides greater protections than the corresponding federal law.339

Nevada’s approach makes challenges to the state law in relation to the federal law more frequent than in a state with laws modeled on the ECPA, because it is easier to identify differences between them and argue that those distinctions lead to different results. Maryland’s approach demonstrates the value of being able to draw parallels between the state law and the ECPA. Conversely, Massachusetts’s approach shows the potential problems that could arise from adopting the federal model.

Overall, Nevada’s approach is effective at protecting privacy and addressing new technology.340 However, like Massachusetts, Nevada’s approach allows for more challenges to the state law simply because the distinct language used can easily be interpreted as a substantive difference.341 Unlike Maryland, where the legislature uses distinct language to signal a purposeful departure from the ECPA, Nevada’s legislature may not intend for its distinct language to create substantively different protections from the ECPA.342 Similarly, the Massachusetts legislature has

337. See supra notes 318–27 and accompanying text (describing the Lane court’s approach to statutory interpretation).
338. See supra Part III.B.iii (discussing the confusion that resulted from Massachusetts’s initial adoption of Title III and subsequent decision not to adopt the ECPA’s amendments).
339. See supra notes 223–30 and accompanying text (describing the effectiveness of this approach).
340. See supra notes 304–36 and accompanying text (highlighting the effectiveness of Nevada’s approach).
341. See supra notes 313–27 and accompanying text (noting that the court in Lane focused on the “distinct language” of the statute).
342. Compare supra notes 237–40 and accompanying text (summarizing Maryland’s approach to statutory interpretation), with supra notes 301–03 and accompanying text (emphasizing that the Nevada legislature did not parallel the federal language when it updated its wiretap law).
created significant confusion by not adopting the ECPA’s amendments to Title III.\footnote{See supra Part III.B.iii (recounting one example of an issue caused by the legislature’s inaction).} However, its preamble offers clear evidence of legislative intent that the courts can use to determine if differences in language are intentional departures from federal law.\footnote{See supra notes 268–74 and accompanying text (explaining how courts have used the preamble to Massachusetts’s statute as evidence of legislative intent).} Nevada courts must instead search elsewhere, including failed amendments, to deduce legislative intent. Therefore, Nevada’s approach is effective, but it has some shortcomings that make it less successful than other states.

IV. RECOMMENDATION FOR VERMONT

Based on other states’ approaches, there are four recommendations that Vermont should follow. First, the statute should include a statement of legislative intent. Clear legislative intent guides courts in interpreting not only the literal language, but also the policy behind the law. Second, the statute must use broad language to define its scope and coverage. The combination of legislative intent and broad language will give courts greater flexibility to interpret the law in a manner consistent with its purpose, without being confined by the literal language. Third, the statute should generally follow the framework of the ECPA, thereby making any departure from its language a sign of a deliberate choice, rather than a legislative oversight. Finally, Vermont should pattern its statute on the federal law to provide a broader body of case law that courts can look to when faced with a novel issue.

A. Clear Statement of Legislative Intent

Vermont’s statute must include a clear, straightforward statement of legislative intent. Massachusetts’s preamble most effectively and concisely conveys legislative intent to its courts.\footnote{See supra notes 268–74 and accompanying text (illustrating how this preamble has been utilized by Massachusetts courts).} Florida’s constitutional provision is too restrictive, and constitutional amendments are harder to both pass and change.\footnote{See supra Part III.A (examining the rigidity of Florida’s constitutional provision).} Maryland and Nevada courts have ascertained legislative intent from how their state statutes follow, or purposely do not follow, the ECPA.\footnote{See supra notes 223–30, 320–27, 332–38, and accompanying text (discussing approaches of the Maryland and Nevada courts for ascertaining intent).} However, Massachusetts’s clear, straightforward preamble is part
of the state wiretap statute and therefore has greater authority over the courts than legislative intent gleaned from legislative history.348

Vermont has included provisions on the intent and purpose in other statutes. These provisions include policy guidelines,349 statements of legislative intent,350 and standards for construing and applying the law.351 The legislature has also included statements on the intended relationship between a Vermont statute and federal law.352 For example, Vermont’s False Claims Act indicates the legislature’s intent “that in construing this chapter, the courts of this State will be guided by the construction of similar terms contained in the Federal False Claims Act, 31 U.S.C. §§ 3729-3733, as from time to time amended by the U.S. Congress and the courts of the United States.”353 It is clear that the Vermont legislature is already familiar with, and comfortable including, statements of legislative intent or policy in statutes. Therefore, it could easily include a similar provision in a wiretap statute.

348. See Richard I. Nunez, The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination, 9 CAL. W. L. REV. 128, 130–31 (1972) (classifying preambles as more reliable evidence of legislative intent than “legislative evidence” such as floor hearings or committee reports); Daniel B. Listwa, Uncovering the Codifier’s Canon: How Codification Informs Interpretation, 127 YALE L.J. 464, 472 (2017) (“[A]lthough not generating substantive law, [a preamble] gives the interpreter insight into how Congress expected the statute to apply . . . and the interpreter ought to accord it significant weight.”).

349. See, e.g., VT. STAT. ANN. tit. 6, § 2671 (2018) (declaring that it is the policy of the state to protect and promote Vermont dairy operations through supervision, inspection, and licensing); VT. STAT. ANN. tit. 9, § 2480aa (2017) (“It is the policy of this State that [structured settlement] agreements, which have often been approved by a court, should not be set aside lightly or without good reason.”).

350. See, e.g., VT. STAT. ANN. tit. 9, § 4170 (2018) (“The Legislature finds and declares that manufacturers, distributors, and importers of new motor vehicles should be obligated to provide speedy and less costly resolution of automobile warranty problems.”); VT. STAT. ANN. tit. 18, § 4281 (2018) (“It is the intent of this chapter to create the Vermont Prescription Monitoring System . . . to promote the public health through enhanced opportunities for treatment for and prevention of abuse of controlled substances, without interfering with the legal medical use of those substances.”).

351. See, e.g., VT. STAT. ANN. tit. 16, § 2879e (2018) (“The purposes of this subchapter and all provisions of this subchapter with respect to powers granted shall be broadly interpreted to effectuate such intent and purposes and not as to any limitation of powers.”).

352. VT. STAT. ANN. tit. 32, § 641(b) (2018). See also VT. STAT. ANN. tit. 9, § 4500(a) (2018) (indicating that it is the legislature’s intent that Vermont’s public accommodations law “be construed so as to be consistent with the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and rules adopted thereunder, and [is] not intended to impose additional or higher standards, duties, or requirements than that act”).

B. Broad Statutory Language

A statement of legislative intent will be most effective when paired with broad statutory language. Vermont should adopt statutory language similar to Florida’s constitutional provision: “The right of the people . . . against the unreasonable interception of private communications by any means, shall not be violated.” This language is effective because it does not reference any specific technology. For example, Nevada and Massachusetts both used a technical argument to expand the scope of “wire communications.” To cover cell phone calls, those states had to conclude that even if a small portion of the transmission happens over wire, it is still a “wire communication.” Using broad language prevents courts from having to grasp at straws in order to uphold the statute’s purpose. As Justice Brandeis stated in his dissent in Olmstead: “[A] principle to be vital must be capable of wider application than the mischief which gave it birth.”

C. Using the ECPA as a “Guiding Light” for Vermont’s Statute

Vermont must walk a fine line between using the ECPA to its benefit, and becoming burdened by it. Massachusetts’s approach has created some of the most complicated problems when comparing the state law to federal law. That state’s decision to parallel Title III, but not to amend it after the passage of the ECPA, creates confusion. Even the Massachusetts courts have acknowledged that the legislature’s decision makes Massachusetts’s statute less clear than its federal counterpart. Nevada’s decision not to

354. See supra note 176 and accompanying text (explaining how the broad language of Florida’s constitutional provision protects the privacy of Florida’s citizens).
355. FLA. CONST. art. I, § 12 (emphasis added).
356. See supra notes 248–67, 304–12 and accompanying text (discussing the similarities between a Massachusetts case and a Nevada case interpreting “wire communication” as applied to cell phone calls).
357. See supra notes 247–67 and accompanying text (describing the technical analysis used Massachusetts to determine cell phone calls are “wire communications”).
358. See supra Part III.B.iii (showing the complicated judicial analysis needed to broaden application of narrow statutory language).
360. See supra Part III.B.iii (explaining the problems created by the decision to adopt a federal statute but not amend it to continue to parallel the federal statute).
361. See supra Parts III.B.iii–iv (examining Massachusetts cases analyzing state wiretap laws).
362. See Commonwealth v. Moody, 993 N.E.2d 715, 723 (Mass. 2013) (“This does not mean that the Massachusetts statute is less protective than Title III—it only means that on its face the Massachusetts wiretap statute is less clear than its Federal counterpart.”).
model its wiretap statute on the federal law at all also creates complications when comparing the two laws.\textsuperscript{363}

Maryland has developed the most effective relationship between its own statute and the federal law. By patterning its statute on the ECPA, it clarifies where it departs from the federal law.\textsuperscript{364} The relationship between the two laws is less ambiguous than between a statute that originally paralleled the federal law, but then later departed from it (as in Massachusetts), and a statute that contains no similarities whatsoever (as in Nevada). As technology evolves, so must wiretap laws. Maryland’s statute has the flexibility to make changes that clearly and deliberately distinguish state law by departing from the federal language.

It is important that Vermont also be able to distinguish its laws from the ECPA without creating unnecessary confusion. Vermont has a history as a trailblazing state and a reputation for distinguishing itself from the rest of the country.\textsuperscript{365} Vermont is sometimes years ahead of other states and the federal government in enacting laws.\textsuperscript{366} For Vermont’s wiretap law to reflect the state’s progressive spirit, the language of the ECPA must not encumber Vermont’s legislature or prevent it from making changes when necessary. However, that does not mean that Vermont should completely depart from the ECPA.

\textbf{D. Using the ECPA as a Source of Persuasive Authority}

Maryland’s approach highlights the value of using the ECPA as guidance. This approach allows Maryland’s courts to look to other jurisdictions when considering a novel application of its statute to new technology.\textsuperscript{367} This is particularly important for a small state such as Vermont. If Vermont patterned its statute on federal law, the state would not have to rely only on its own relatively sparse jurisprudence.\textsuperscript{368} It could look to other state and federal courts to see how those jurisdictions applied

\begin{itemize}
  \item \textsuperscript{363} See \textit{supra} Parts III.C.i–iii (discussing Nevada cases interpreting state wiretap laws).
  \item \textsuperscript{364} See Davis v. State, 43 A.3d 1044, 1051 (Md. 2012) (discussing the differences between the state and federal laws).
  \item \textsuperscript{365} For example, in 2016, Vermont became the first state in the nation to require GMO food labeling. Stephanie Storm, \textit{G.M.O.s in Food? Vermonters Will Know}, N.Y. TIMES (June 30, 2016), https://www.nytimes.com/2016/07/01/business/gmo-labels-vermont-law.html.
  \item \textsuperscript{366} For instance, Vermont was the first state to pass a law granting full marital benefits to same-sex couples in 2000, three years before any other state, and 15 years before same-sex marriage was legal in all 50 states. Anthony Michael Kreis, \textit{Stages of Constitutional Grief: Democratic Constitutionalism and Marriage Revolution}, 20 U. PA. J. CONST. L. 871, 884, 893 (2018).
  \item \textsuperscript{367} See \textit{supra} Part III.B.i (describing Maryland’s process of examining other jurisdictions with similar laws).
  \item \textsuperscript{368} See \textit{supra} Part I.E (providing an overview of Vermont’s common-law approach).
\end{itemize}
the same language to new technology. Vermont should follow Maryland’s approach of using the federal law as guidance, while avoiding the pratfall that Massachusetts found itself in when it adopted Title III but not the ECPA.

In sum, Vermont’s wiretap statute must contain a statement of legislative intent, similar to those found in other Vermont statutes. The language of the wiretap statute must be broad. It should not refer to anything that has the potential to limit the scope of its application in the future, such as wires or telephones. Vermont should use the ECPA as guidance when drafting its statute and parallel the ECPA’s overall framework, but should not wholly adopt its language. This will allow the statute to distinguish itself from federal law when necessary, while also allowing judges to use case law from other jurisdictions if interpreting a novel issue. Finally, because of the increased prevalence of personal recording devices, the statute must include both criminal and civil penalties.369

CONCLUSION

Communications technology has changed considerably since the early days of the telegraph and will continue to evolve at an exponential rate.370 Vermont must enact a proactive, forward-minded wiretap statute to protect privacy even as technology keeps changing. That does not mean that Vermont must be able to anticipate what kind of future technology will exist. This would be impossible. It does mean that the statute must be conceptual rather than literal. The drafters of the Fourth Amendment intended to protect individual privacy, and they chose language that reflected how they perceived privacy.371 Similarly, the drafters of Title III chose language to reflect technology that existed in 1968.372 As this Note has demonstrated, that well-intentioned language later lead to unintentional complications when technology and society changed. As the U.S. Supreme

369. See supra Part II (outlining the importance of protection against private actors as well as state actors).
370. Nagy, supra note 75.
371. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).
Court and others have found, what matters is the principles of privacy, not the form that an invasion of privacy takes.\(^{373}\)

Vermont must enact a wiretap statute to protect its citizens and provide guidance to the judiciary. Vermont should not leave wiretapping to the courts. Judges can best serve the state when they are able to focus on upholding the purpose of the law, rather than debating whether a cell phone call can technically be a “wire communication.” Furthermore, the legislature is able to make changes much faster than the courts, and to take input from the citizens they represent.\(^{374}\)

Instead of observing how technology works at this point in history, the drafters of Vermont’s statute must focus on the underlying societal values that a wiretap statute protects. Vermont’s wiretap statute should not only protect individual privacy. It should set the scope and standards for permissible wiretapping. The statute protects against privacy violations by both state and private actors. The legislature should not fixate on specific technology because it will inevitably become obsolete. The statute must reflect the value Vermonters place on their privacy, not the specific way in which technology currently intrudes upon that privacy. If Vermont heeds the lessons learned from its sister states by following these guidelines, it can enact a wiretap statute that can endure for decades to come.

* Hannah Clarisse

373. Olmstead v. United States, 277 U.S. 438, 440, 442 (1928) (finding that the principles of privacy apply to all invasions of the security of a person’s home); Katz v. United States, 389 U.S. 347, 352 (1957) (noting that the principles of privacy applied in offices, apartments, taxicabs, and phone booths).

374. See supra notes 140–45 (describing how legislatures can make changes faster than courts).

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