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THE NOT-SO-NOBLE LIE: THE NONINCORPORATION OF STATE CONSENSUAL SURVEILLANCE STANDARDS IN FEDERAL COURT*

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> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[1]

I. INTRODUCTION

The eavesdropper, like Dickens' Artful Dodger[2], is a figure much maligned and much envied in society. Part technologist and part voyeur, the eavesdropper fulfills one's unstated fantasies of venturing undetected, if only briefly, into the private lives of others.[3] In the 1960s and 1970s, however, the nation increasingly found itself not the voyeur but the victim of electronic surveillance. As a result of the numerous scandals[4] and hearings[5] of that period,

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1 Olmstead v. United States, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting).

2 C. DICKENS, OLIVER TWIST (R. Garland ed. 1984).

3 Social scientists have discovered a relationship between increasingly sophisticated surveillance devices and a rise in individual cases of voyeurism. Yalom, *Aggression and Forbiddeness in Voyeurism*, in 3 ARCHIVES OF GENERAL PSYCHIATRY 305 (1960). *See also* Rovere, *The Invasion of Privacy (1): Technology and the Claims of Community*, 27 AM. SCHOLAR 413, 416 (1985)("[while] [t]here is a hermit spirit in each of us . . . [there is] also a snooper, a census taker, a gossipmonger and a brother's keeper.").

4 During the 1960s and 1970s, the press reported widespread governmental surveillance, including the Army's surveillance of various political figures, such as Edward Kennedy, George McGovern, and various state officials. *See, e.g.*, N.Y. Times, Feb. 29, 1972, at A4, col. 1. Victims of surveillance ranged from a Supreme Court Justice to the Los Angeles Chamber of Commerce. Williamson v. United States, 405 U.S. 1026, 1028

such exotic devices as "shot-gun mikes,"[6] radioactive "tagging,"[7] and "laser window pick-ups"[8] became public knowledge for the first

(1972)(Douglas, J., dissenting); OFFICE OF TECHNOLOGY ASSESSMENT, SURVEILLANCE: HISTORICAL POLICY REVIEW 21 (1985)[hereinafter HISTORICAL POLICY REVIEW]. Newspapers were also filled with stories of international espionage in which the government itself was the victim, including the highly embarassing revelations that a Soviet bug was uncovered in the Great Seal of the United States, a gift from the Soviets which had hung over the desk of the United States Ambassador for a number of years. NATIONAL WIRETAPPING COMMISSION, COMMISSION STUDIES, SUPPORTING MATERIALS FOR THE REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 177 (1976)[hereinafter NWC COMMISSION STUDIES].

5 *See, e.g.*, SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, WARRANTLESS FBI ELECTRONIC SURVEILLANCE, S. REP. No. 755, 94th Cong., 2d Sess., 271 (Supplementary Detailed Staff Reports, Book III, Final Report 1976); *Invasion of Privacy: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 1 (1965); *Wiretapping, Eavesdropping, and the Bill of Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. pt. 1-5 (1959); *Wiretapping: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. 53 (1955). *See also* Holmes v. Burr, 486 F.2d 55, 64 (9th Cir. 1973)("The Government's uninvited ears and eyes have conjoined its cybernatic memory to compile hundreds of dossiers on high political figures, domestic . . . programs . . . and average citizens.").

6 The "shot-gun mike" derives its name from the series of interfitting tubes extending several feet, usually from atop a tripod, that causes the mike to resemble a rifle. The device can focus its receiving power on a very selective target (within 300 feet) enabling the operator to listen to a single conversation amidst a crowded room or a noisy street. NWC COMMISSION STUDIES, *supra* note 4, at 171-72. *See also* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, AUDIO SURVEILLANCE AND COUNTERMEASURES 10 (1973)(describing complex surveillance devices); Westin, *Science, Privacy, and Freedom*, 66 COLUM. L. REV. 1003, 1007 (1966).

7 The Soviets use this method to follow a target at considerable distances while insuring easy detection should the target allude the actual "tailing" agents. In the past, the Soviets have used a low-grade radioactive substance to "tag" a target, allowing agents to follow the individual with a device similar to a Geiger counter. N.Y. Times, Aug. 29, 1985, at A4, col. 2. Recent accounts of the "dusting" of United States diplomats and their families in Moscow with a chemical material called nitrophenylpentadienal, illustrates the continued use of this method of surveillance. N.Y. Times, Aug. 22, 1985, at A1, col. 6; N.Y. Times, Aug. 29, 1985, at A4, col. 2. *See also* Westin, *supra* note 6, at 1005 (describing early uses of fluorescent dyes and radioactive substances by police in the 1950s). Both radioactive and chemical "tagging" give the KGB the added benefit of detecting individuals who have come into contact with the target by simply looking for radioactive or chemical residue in their homes or on their bodies.

8 This device is used to listen to conversations conducted within a closed room which cannot be penetrated to plant a bug without detection. The laser window pick-up directs a continual laser beam onto a windowpane and picks up the conversation from the vibrations of the glass. NWC COMMISSION STUDIES, *supra* note 4, at 181. A "spike mike" is used more often than the "laser window pick-up." The "spike mike" is operated by simply placing a metal rod against any conventional heating or ventilation duct. The duct then becomes a giant listening tube from which conversations several floors above are monitored effectively. Westin, *supra* note 6, at 1007. Nevertheless, the most commonly used form of surveillance today is the telephone wiretap which, in 1986, ac-

time.[9] The result was public outcry for greater restrictions on police surveillance[10] to protect what Justice Brandeis once referred to as "the most comprehensive of rights and the right most valued by civilized men," the right to be left alone.[11]

In 1968, Congress enacted title III of the Omnibus Crime and Control Act, a national regulation controlling the use of electronic surveillance by private and governmental parties.[12] The purpose of the Act was two-fold: to enable law enforcement agencies to use electronic surveillance to combat organized crime and to create a rigid system of safeguards to protect individual privacy.[13] Recognizing the natural tension between those goals, Congress sought to insure individual privacy through a minimum federal standard. Applicable also to the states, this minimum standard codified various constitutional protections found wanting by the Supreme Court in previous state and federal regulations.[14]

Congress imposed the minimum federal standard on the states through a condition on state privacy statutes enacted under the Act. Congress authorized the states to experiment with their own privacy standards on the condition that those standards be as stringent as the federal model.[15] States borrowed from title III in varying de-

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counted for seventy-nine percent of all surveillance operations. ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTIONS OF WIRE OR ORAL COMMUNICATIONS 16-17 (table 6)(1986)[hereinafter U.S. COURTS REPORT (1986)]. Microphones are the second most common form of surveillance. *Id.*

9 This is not to say that the early years of surveillance technology were scandal-free. One of the greatest surveillance scandals occurred as a result of the infamous Palmer raids against aliens in which the government employed indiscriminate wiretappings. HISTORICAL POLICY REVIEW, *supra* note 4, at 4.

10 *See, e.g., Invasion of Privacy: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 2 (1965); HISTORICAL POLICY REVIEW, *supra* note 4 at 3. *See also* Holmes v. Burr, 486 F.2d 55, 63 (9th Cir. 1973)("Public fear of omnipresent electronic surveillance has escalated with increasing revelations of widespread wiretapping, bugging, monitoring, and recording.").

11 Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).

12 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801-04, 82 Stat. 197, 211-25 (codified as amended at 18 U.S.C. §§ 2510-20 (1982 & Supp. IV 1986) and 47 U.S.C. § 605 (1982 & Supp. III 1985)).

13 S. REP. No. 1097, 90th Cong., 2d Sess. 89, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2177. *See also* Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 1 (1983). Goldsmith stated:

> [W]hile it has been suggested that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was enacted "[t]o guard against the realization of Orwellian fears and conform to the constitutional standards for electronic surveillance," the statute can better be characterized as a conscious compromise forged by Congess between competing privacy and law enforcement concerns.

Id. (quoting United States v. Marion, 535 F.2d 697, 698 (2d Cir. 1976)).

14 *See infra* notes 81-90 and accompanying text.

15 S. REP. No. 1097, *supra* note 13, at 98, *reprinted in* 1968 U.S. CODE CONG. & ADMIN.

grees, with some states incorporating the federal language virtually *in toto*[16] and others incorporating only individual sections.[17] Some states, however, went far beyond the federal model and either curtailed sharply or barred outright the use of electronic surveillance.[18]

NEWS at 2187 ("[The Act] envisions that states would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.").

[16] At present, forty-six states and the District of Columbia have statutes regulating electronic surveillance. ALA. CODE §§ 13A-11-30 to 37 (1975); ALASKA STAT. §§ 42.20.3.00-.340 (1983); ARIZ. REV. STAT. ANN. §§ 13-3004 to 3014 (1978 & Supp. 1987); ARK. STAT. ANN. § 23-17-107 (1987); CAL. PENAL CODE §§ 630-637.2 (West 1970 & Supp. 1988); COLO. REV. STAT. §§ 16-15-101 to 104 (1986 & Supp. 1987); CONN. GEN. STAT. ANN. §§ 53a-187 to 189 (West 1985 & Supp. 1988); DEL. CODE ANN. tit. 11, § 1336 (1987); D.C. CODE ANN. §§ 23-541 to 556 (1981); FLA. STAT. ANN. §§ 934.01-.10 (West 1985 & Supp. 1988); GA. CODE ANN. §§ 26-3001 to 3010 (1983); HAW. REV. STAT. § 803-41 to 49 (1985 & Supp. 1987); IDAHO CODE §§ 18-6701 to 6709 (1987 & Supp. 1987); ILL. ANN. STAT. ch. 38, para. 14-1 to 14-6 (Smith-Hurd 1979 & Supp. 1988); IOWA CODE ANN. § 727.8 (West 1979); KAN. STAT. ANN. §§ 22-2514 to 2519 (1981 & Supp. 1987); KY. REV. STAT. ANN. §§ 526.010-.080 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. §§ 15:1301 to 1312 (West 1981 & Supp. 1988); ME. REV. STAT. ANN. tit. 15, § 709-712 (1980 & Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. §§ 10-401 to 412 (1984 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1980 & Supp. 1988); MICH. COMP. LAWS ANN. §§ 750.539-.540 (West 1968); MINN. STAT. ANN. §§ 626.A.01-.23 (West 1983 & Supp. 1988); MISS. CODE ANN. § 97-25-53 (1972 & Supp. 1987); MONT. CODE ANN. § 45-8-213 (1987); NEB. REV. STAT. §§ 86-701 to 712 (1987); NEV. REV. STAT. ANN. §§ 179.410-.515 (Michie 1986); N.H. REV. STAT. ANN. § 570-A:1 to A:11 (1986 & Supp. 1987); N.J. STAT. ANN. §§ 2A:156A-1 to 26 (West 1985); N.M. STAT. ANN. §§ 30-12-1 to 11 (1984); N.Y. CRIM. PROC. LAW §§ 700.05-.70 (McKinney 1984 & Supp. 1988); N.C. GEN. STAT. § 14-158 (1986); N.D. CENT. CODE § 8-10-07.2 (1987); OHIO REV. CODE ANN. § 4931.28 (Baldwin 1978 & Supp. 1987); OKLA. STAT. ANN. tit. 13, §§ 176.1-.14 (West 1983 & Supp. 1988); OR. REV. STAT. §§ 133.721 to .739 (1987); 18 PA. CONS. STAT. ANN. §§ 5701-5726 (Purdon 1983 & Supp. 1988); R.I. GEN. LAWS §§ 12-5.1-1 to 16 (1981 & Supp. 1987); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1 to 21 (Supp. 1987); TENN. CODE ANN. § 39-3-1324 (1982); TEX. CRIM. PROC. CODE ANN. § 18.20 (Vernon Supp. 1988); UTAH CODE ANN. §§ 77-23a-1 to 11 (1982); VA. CODE ANN. §§ 19.2-61 to 70 (1983); WASH. REV. CODE ANN. §§ 9.73.030 to .090 (1988); W. VA. CODE §§ 62-10-1 to 16 (Supp. 1988); WISC. STAT. ANN. §§ 968.27-.33 (West 1985); WYO. STAT. §§ 7-3-601 to 610 (1987).

[17] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-3004 to 3014 (1978 & Supp. 1987); GA. CODE ANN. §§ 26-3001 to 3010 (1983); MINN. STAT. ANN. §§ 626.A.01-.23 (West 1983 & Supp. 1988); N.Y. CRIM. PROC. LAW §§ 700.05-.70 (McKinney 1984 & Supp. 1988).

[18] The surveillance statutes of fifteen states do not authorize electronic surveillance. ALA. CODE § 13A-11-30 to 37 (1975); ALASKA STAT. §§ 42.20.3.00-.340 (1983); ARK. STAT. ANN. § 23-17-107 (1987); CAL. PENAL CODE §§ 630-637.2 (West 1970 & Supp. 1988); ILL. ANN. STAT. ch. 38, para. 14-1 to 14-6 (Smith-Hurd 1979 & Supp. 1988); IOWA CODE ANN. § 727. 8 (West 1979); KY. REV. STAT. ANN. §§ 526.010-.080 (Michie/Bobbs-Merrill 1985); ME. REV. STAT. ANN. tit. 15, § 709-712 (1980 & Supp. 1987); MICH. COMP. LAWS ANN. §§ 750.539-.540 (West 1968); MISS. CODE ANN. § 97-25-53 (1972 & Supp. 1987); MONT. CODE ANN. § 45-8-213 (1987); N.C. GEN. STAT. § 14-158 (1986); N.D. CENT. CODE § 8-10-07.2 (1987); OHIO REV. CODE ANN. § 4931.28 (Baldwin 1978 & Supp. 1987); TENN. CODE ANN. § 39-3-1324 (1982). Two of these states retain statutes that prohibit electronic eavesdropping. ARK. STAT. ANN. § 23-17-107 (1987); N.D. CENT. CODE § 8-10-07.2 (1987). *See* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE 1-17 (2d ed. 1986)(these "archaic statutes" are largely ineffectual). Four states have no law gov-

Variant state and federal standards have led to serious conflicts between state and federal courts over the use of illegally gathered state evidence in federal prosecutions. Most federal circuits follow a rule that evidence gathered illegally under a state privacy law is nevertheless admissible in federal court if the evidence satisfies the minimum federal standard.[19] Increasingly, however, a number of courts have challenged this "majority rule" and have construed title III as incorporating the more stringent state standards into the federal standard of admissibility, thereby making a violation of a state privacy law by state agents a collateral violation of title III as well.[20] Under this "minority rule," adopted in the Second, Tenth, and Eleventh Circuits, federal courts must apply state standards to determine the admissibility of any evidence gathered by state agents under a more stringent state privacy law.[21]

The minority rule courts, however, limit the scope of this rule in one significant way: evidence gathered from surveillance conducted with the consent of one party to a conversation is governed by federal, not state, law.[22] This consensual exception is based on language in title III that expressly exempts federal agents from the provisions and procedures of the Act if they have "one-party" consent.[23] Conversely, title III requires federal agents to secure court orders when they cannot obtain the consent of one of the parties to a monitored conversation.[24] Any "nonconsensual" surveillance that occurs without a court order is expressly made inadmissible under the Act's suppression provision[25] and can provide grounds for civil suits by injured parties.[26] Consent, therefore, becomes a critical

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erning state law enforcement agent activities in areas of surveillance, even though the current federal legislation effectively bars states without such laws from conducting electronic surveillance. These states are Indiana, Missouri, South Carolina, and Vermont.

19 For a list of cases employing the majority rule including past cases from the Second, Tenth, and Eleventh Circuits before those circuits adopted the minority rule, see Note, United States v. McNulty: *Title III and the Admissibility of Illegally Gathered State Evidence*, 80 NW. U.L. REV. 1714, 1724-45 n.80 (1986)[hereinafter *Title III and Admissibility*].

20 *See, e.g.*, United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); United States v. McNulty, 729 F.2d 1243 (10th Cir. 1984)(en banc).

21 *Title III and Admissibility*, *supra* note 19, at 1717 n.13.

22 *See, e.g.*, *McNulty*, 729 F.2d at 1266 ("Where one party consented and no state court order or warrant was obtained . . . the requirement . . . that the applicable state law must be complied with, does not come into play.").

23 18 U.S.C. § 2511(2)(c) (Supp. IV 1986)("It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.").

24 *Id.* at § 2516.

25 *Id.* at § 2518(10)(a)(i).

26 *Id.* at § 2520(c)(2). Title III's civil damages section was amended in 1986 to differ-

threshold test for admissibility of federal evidence in federal courts.

Minority rule courts assert that, because title III expressly states that it does not make warrantless consensual surveillance unlawful, consensual surveillance as a whole does not come under the Act's various provisions and sanctions.[27] Thus, the Act's suppression provision and, more generally, its incorporation of more stringent state standards apply only to nonconsensual surveillance.

The minority rule's consensual distinction seriously undermines a number of state privacy laws that require consent by all parties to a monitored conversation before a state can conduct a warrantless surveillance. In these "all-party" states,[28] it is possible for state agents to gather evidence unlawfully, without a court order, and then to turn over their ill-gotten gains to federal counterparts for prosecution under the lower federal standards. In a number of cases, consensual surveillance evidence suppressed in state courts

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entiate between types of commission transmissions. Congress, however, also significantly raised potential damages under the Act. The new section provides:

> [A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate. . . .
> (2)[T]he court may assess as damages whichever is the greater of—
> (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
> (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

Id.

27 *See, e.g.*, United States v. McNulty, 729 F.2d 1243, 1266 (10th Cir. 1984); United States v. Sotomayor, 592 F.2d 1219, 1225 (2d Cir. 1979); United States v. Nelligan, 573 F.2d 251, 254 (5th Cir. 1978). *See also* United States v. Gervasi, 562 F. Supp. 632, 650 (N.D. Ill. 1983); *Title III and Admissibility*, *supra* note 19, at 1736 n.162.

28 *See, e.g.*, ILL. ANN. STAT. ch. 38, para. 14-1 to 14-6 (Smith-Hurd 1979 & Supp. 1988); NEV. REV. STAT. ANN. §§ 179.410-.515 (Michie 1986); N.H. REV. STAT. ANN. § 570-A; N.M. STAT. ANN. §§ 30-12-1(c) (1984); OR. REV. STAT. §§ 133.721 to .739 (1987); WASH. REV. CODE ANN. §§ 9.73.030 to .090 (1988). *Cf.* CAL. PENAL CODE §§ 630-637.2 (West 1970 & Supp. 1988)(warrantless consensual surveillance prohibited except when used by law enforcement agents); MASS. GEN. LAWS ANN. ch. 272, § 99(D)(1)(c) (West 1980 & Supp. 1988)(warrantless consensual surveillance prohibited except when used to investigate "organized crime"); WISC. STAT. ANN. §§ 968.27-.33 (West 1985)(warrantless consensual surveillance allowed but not admissible at trial); *see also* State v. Parisi, 181 N.J. Super. 117, 436 A.2d 948 (1981)(requiring oral or written authorization for consensual surveillance in New Jersey); State v. Glass, 583 P.2d 872 (Alaska 1978)(interpreting Alaska constitution as prohibiting warrantless consensual surveillance, even though Alaska has a consensual exception similar to 18 U.S.C. § 2511(2)(c) as part of its surveillance statute). In Montana, a warrant is apparently required for face-to-face consensual surveillance or videotaping but not telephone surveillance. *See e.g*, State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978)(face-to-face surveillance); State v. Solis, 693 P.2d 518 (Mont. 1984)(videotaping); State v. Canon, 687 P.2d 705 (Mont. 1984)(telephone surveillance). Similarly, Oregon allows warrantless consensual surveillance of telephone conversations but not of face-to-face conversations. OR. REV. STAT. § 165.540(1)(a) and (c) (1987).

has been "recycled" for use in federal courts in open defiance of state privacy standards.[29] Moreover, given the wider use of consensual surveillance, the consensual distinction opens a large gap in the Act's privacy protections through which a potentially high amount of suppressed or suppressable state evidence can pass into federal court.[30]

This Article contests the logic of excluding consensual surveillance from the minority rule. The argument in favor of this extension will be based on both statutory and policy grounds. It will be shown that many of the statutory arguments used by the minority rule courts to defeat the majority rule's blanket rejection of state standards are equally applicable and persuasive in the consensual context. It will be further argued that minority rule courts have failed to present a justifiable alternative to the incorporation of state consensual laws. This Article argues that the past justifications for the minority rule's consensual distinction are unsupportable on a theoretical level and present serious problems of federal preemption and police forum shopping.

This Article first provides a brief background of consensual surveillance and the consensual distinction.[31] After showing how the consensual distinction developed in early legal doctrine and how it was finally codified in title III,[32] this Article discusses the majority and minority rules.[33] By examining the arguments used by minority

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29 *See, e.g.*, United States v. Jarabek, 726 F.2d 889 (1st Cir. 1984); United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983). *See also* United States v. Daniel, 667 F.2d 783 (9th Cir. 1982)(evidence unlawfully gathered by state agent for federal prosecution), and United States v. Shaffer, 520 F.2d 1369, 1371 (3d Cir. 1975)(evidence unlawfully gathered by state agent for federal prosecution). *Cf.* United States v. McNulty, 729 F.2d 1243, 1266 (10th Cir. 1984)(re-use of state suppressed nonconsensual surveillance evidence in federal court).

30 Because no formal reporting requirement for state consensual surveillance exists, gauging the rough number of state consensual operations conducted annually is difficult. It is generally believed that consensual surveillance, which is free of procedural and legal restrictions, is used far more frequently than nonconsensual surveillance. This belief is borne out in the few reports containing statistics on consensual surveillance. For example, federal authorities conducted a total of 957 nonconsensual surveillance operations from 1968 to 1974. NATIONAL WIRETAPPING COMMISSION, ELECTRONIC SURVEILLANCE, REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 43 (table 1) (1976) [hereinafter NWC REPORT]. During the same period, federal authorities conducted 4103 consensual surveillance operations. *Id.* This figure is based on internal Justice Department figures for requests made for consensual surveillance under a departmental rule requiring advance approval of consensual operations. *Id.*

31 *See infra* notes 40-90 and accompanying text.

32 *See infra* notes 69-109 and accompanying text.

33 *See infra* notes 122-74 and accompanying text.

rule courts to refute the majority rule,[34] this Article shows that many of these arguments can be used to refute the consensual distinction. Following a discussion of the statutory and policy arguments challenging the consensual distinction, this Article suggests an expansion of the minority rule to apply state law in cases in which state officers violate state consensual standards.[35] This Article then considers the alternative interpretation suggested by minority rule courts.[36] Because the statutory basis of the minority rule's consensual distinction remains unclear,[37] this Article will consider the two possible interpretations of the consensual provision that would explain the result reached by the minority rule courts. It will be shown that neither of these interpretations can be sustained under current Supreme Court doctrine and that one of the interpretations actually results in the application, not the exclusion, of state law.[38] Finally, this Article will present a series of legislative proposals that would more clearly mandate the application in federal court of more stringent state standards, nonconsensual and consensual, under title III.[39]

II. BACKGROUND OF ELECTRONIC SURVEILLANCE AND THE EVOLUTION OF THE CONSENSUAL DISTINCTION

A. CONSENSUAL SURVEILLANCE: HISTORICAL AND LEGAL ROOTS

Ancient history is rife with tales of the cunning uses of eavesdropping by rulers and rebels alike.[40] In the hills of Syracuse, Sicily, a large man-made cave remains as a testament to man's preoccupation with knowing the secrets of his neighbor. This S-shaped cave, called the "Ear of Dionysius," was designed to enable the rulers of ancient Syracuse to overhear the whispers of their captives.[41] In

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34 *See infra* notes 143-70 and accompanying text.

35 *See infra* notes 205-62 and accompanying text.

36 *See infra* notes 263-317 and accompanying text.

37 *See infra* notes 205-06 and accompanying text.

38 *See infra* notes 263-318 and accompanying text.

39 *See infra* notes 319-51 and accompanying text.

40 For a brief history of electronic surveillance, see J. CARR, *supra* note 18, at 1-1 to 2-3; HISTORICAL POLICY REVIEW, *supra* note 4, at 1-33; NWC REPORT, *supra* note 30, at 33-40; Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952).

41 This type of surveillance would be considered "strategic intelligence surveillance," that is, indiscriminate surveillance intended to gather any and all intelligence that might be useful. This type of surveillance is expressly prohibited in title III. Zweibon v. Mitchell, 516 F.2d 594, 669 (D.C. Cir. 1975). For an extreme example of indiscriminate surveillance in which police seized the entire contents of a house for the purpose of sifting through it at a police station to uncover anything incriminating, see Kremen v. United States, 353 U.S. 346 (1957).

modern-day parlance, such eavesdropping is called "nonconsensual" because, presumably, none of the captives gave their consent to the monitoring.[42] If one of the Syracusian captives turned collaborator and initiated a conversation to incriminate his colleagues, however, the monitoring would then be "consensual," because the collaborator, as one of the parties to the conversation, would have consented to having his conversation overheard.[43]

Early uses of electronic surveillance in America were predominantly nonconsensual.[44] During the Civil War, wiretappers uncovered the plans and troop movements of the enemy by "splicing" recently laid telegraph wires.[45] These military wiretappers[46] turned professional after the war and plied their trade in more profitable pursuits with scandalous results.[47]

The first regulations on wiretapping were state laws designed to place some restrictions on these early practitioners.[48] Like their

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42 For a short historical look at eavesdropping as a science, see NWC REPORT, *supra* note 30, at 33-40. For other studies of consensual surveillance, see generally J. CARR, *supra* note 18; Fishman, *The Interception of Communications without a Court Order: Title III, Consent, and the Expectation of Privacy*, 51 ST. JOHN'S L. REV. 41 (1976); Comment, *Does The "One-Party Consent" Exception Effectuate the Underlying Goals of Title III?*, 18 AKRON L. REV. 495 (1985). For a more technical discussion of electronic surveillance, see Horgan, *Thwarting the Information Thieves*, IEEE SPECTRUM, July 1985, at 30-41.

43 The overhearing of the Syracusian captives might today be covered by title III, because the "Ear of Dionysius" was technically a listening device, albeit a very large one. The distinction between an "overhearing" and a "monitoring" became quite important following the enactment of title III. An "interception," which the Act defines as requiring the use of an "electronic, mechanical or other device," triggers the provisions of title III. 18 U.S.C. § 2510(4), (5) (1982 & Supp. IV 1986). Consequently, an unaided overhearing does not qualify as an interception today. S. REP. No. 1097, *supra* note 13, at 90, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2178. Under the Act's definition of "electronic, mechanical, or other device," 18 U.S.C. § 2510 (1982 & Supp. IV 1986), the "Ear of Dionysius" might qualify as one of those "other device[s]" covered by the Act.

44 *See generally* J. CARR, *supra* note 18, at 3-55 to 3-93; Comment, *supra* note 42 at 496.

45 NWC REPORT, *supra* note 30, at 33. Although military wiretappers functioned on a limited basis in Europe, the American Civil War represented the first application of military wiretapping on a large scale.

46 The most accurate figures place the number of trained wiretappers in the Civil War at less than 200. The figures are difficult to gauge, however, because some Civil War commanders trained their own wiretappers. One commander, General J.E.B. Stuart, even had a professional wiretapper on his personal staff. NWC REPORT, *supra* note 30, at 33. *See also* S. DASH, R. SCHWARTZ & R. KNOWLTON, EAVESDROPPERS 23 (1959).

47 S. DASH, R. SCHWARTZ & R. KNOWLTON, *supra* note 46, at 23 ("A correspondent for a Boston evening newspaper who had been an expert Civil War telegrapher was exposed as a wiretapper. . . . [revealing] that he would often save himself the trouble of newsgathering by listening to the dispatches of other correspondents as they were sent over the wires."). *See also* NWC REPORT, *supra* note 30.

48 Other restrictions came in the form of agency rules. For example, in 1924, Attorney General Harlan Fiske Stone, a staunch critic of electronic surveillance, banned all use of the technique by the FBI's forerunner, the Bureau of Investigation. HISTORICAL POLICY REVIEW, *supra* note 4, at 4. Electronic surveillance was later included in the Bu-

successors, these early laws left consensual surveillance and recording entirely free from regulation.[49] Generally, however, state laws prohibiting or regulating nonconsensual surveillance were largely ineffectual.[50] Although twenty-eight states had made wiretapping a crime by 1927, the eavesdropping industry, like much else in the industrial revolution, flourished.[51] During this period, the law provided few substantive protections for citizens beyond the common law, which treated eavesdropping as nothing more than a nuisance.[52]

Consensual surveillance in these early years caused little concern among the legislatures, courts, or the public at large.[53] While critics often denounced nonconsensual surveillance as invasive and unseemly,[54] consensual surveillance was generally viewed as simply

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reau's Manual as one of the enumerated "Unethical Tactics." *Id. See also* SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, WARRANTLESS FBI ELECTRONIC SURVEILLANCE, S. REP. NO. 755, 94th Cong., 2d Sess., 271 (Supplementary Detailed Staff Reports, Book III, Final Report 1976).

[49] S. DASH, R. SCHWARTZ & R. KNOWLTON, *supra* note 46, at 23. Ironically, these regulations were written in response to abuses by one of the most persistent critics of electronic surveillance, the press. *Id.* One of the early statutes prohibiting electronic eavesdropping, passed in 1905 in California, followed a highly publicized newspaper scandal involving the San Francisco Examiner's tapping of a competing newspaper's communications. *Id.* at 25. Wiretappers trained during the Civil War found eager employers in the press as newspapers competed for "scoops" by tapping each other's communications and pilfering each other's stories. *Id.* at 23. *See also* Westin, *supra* note 40, at 172 n.35.

[50] *See* NWC REPORT, *supra* note 30, at 35. *See also* S. DASH, R. SCHWARTZ & R. KNOWLTON, *supra* note 46, at 30.

[51] OFFICE OF TECHNOLOGY ASSESSMENT, ELECTRONIC SURVEILLANCE AND CIVIL LIBERTIES 31 (1985) [hereinafter OTA REPORT]. *See also* HISTORICAL POLICY REVIEW, *supra* note 4, at 3.

[52] Katz v. United States, 389 U.S. 347, 366 (1967)(Black, J., dissenting)(Eavesdropping was an ancient practice which at common law was condemned as a nuisance.).

[53] Interestingly, public reaction to early uses of eavesdropping was probably more ambivalent than the critical comments of popular historical figures might suggest. NWC REPORT, *supra* note 30, at 34-35; Westin, *supra* note 40, at 166; OTA REPORT, *supra* note 51, at 32. *See also* Goldsmith, *supra* note 13, at 5-6 (society's acquiescence toward electronic surveillance may "reflect an overall satisfaction with the utilitarian compromise between crime control and privacy rights that Title III sought to achieve, but it also might be attributable to fatigue after years of debate"); NWC REPORT, *supra* note 30, at 35 ("[I]n 1933, legislation was passed, but it banned only the use of wiretap evidence in prosecutions under the Prohibition laws, which themselves were abandoned that same year.").

[54] This negative view of eavesdropping and eavesdroppers stems in part from strong cultural attitudes regarding the use of any form of surreptitious surveillance:

> [T]he least admirable of the groups of creatures that qualify for membership in the human race . . . moving by stealth and secrecy . . . [spending] so much time in manholes, cellars and other hideouts that would be frightened by the noonday sun. They violate every sacred relation established by God and protected by law; husband and wife; parent and child; minister and parishioner; doctor and patient; law-

a part of an individual's right to repeat a conversation as a participant to a conversation.[55] Courts even analogized the danger posed by electronic surveillance to the danger posed by an unreliable friend with a perfect memory.[56] Thus, courts viewed the difference created by the new surveillance technology as one of degree of completeness present in electronically versus orally reproduced statements.[57] Accordingly, courts welcomed the development of consensual surveillance technology as a protection against, rather than a vehicle of, police abuse. Before the advent of this technology, courts often relied on the sometimes questionable memory and veracity of the police informers who participated in critical conversations.[58] Consensual surveillance technology, particularly record-

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yer and client. . . . It is a patent fact that the wiretapper invades privacy more outrageously and procures more detailed information on people's intimate affairs than could an intruder making an unlawful search and seizure.

Fly, *Wiretapping Outrage*, NEW REPUBLIC, Feb. 5, 1950, at 14 (article by former Chairman of the Federal Communications Commission). *See also* Lopez v. United States, 373 U.S. 427, 466 (1963)(Brennan, J., dissenting)("[M]ost of us would still agree that [electronic surveillance] is an unsavory practice."); Olmstead v. United States, 277 U.S. 438, 470 (1928)(Holmes, J., dissenting)(characterizing electronic surveillance as a "dirty business").

55 In Rathbun v. United States, an early consensual surveillance case, the Supreme Court incorporated this view as part of its decision upholding the use of warrantless consensual surveillance. 355 U.S. 107 (1957). The Court stated that "[w]e need not say that a man may never make a record of what he hears on the telephone by having someone else listen . . . as in the case at bar, even by allowing him to interpose a recording machine. The receiver may certainly himself broadcast the message as he pleases . . . ." *Id.* at 110 n.7 (quoting United States v. Polakoff, 112 F.2d 888, 889). Later, in United States v. White, 401 U.S. 745, 751 (1971), the Court reaffirmed this point: "For constitutional purposes, no different result is required if the [undercover] agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them . . . (2) or . . . simultaneously transmits [them]."

56 *See, e.g.*, Katz v. United States, 389 U.S. 347, 363 (1967)(defendant takes the risk that "his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another."); Lopez v. United States, 373 U.S. 427, 439 (1963)("We think the risk that petitioner took . . . fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.").

57 The accuracy advantage in electronic monitoring and recording has appealed to courts considering electronic surveillance evidence. *See, e.g.*, United States v. White, 401 U.S. 745, 753 (1971). The Court in *White* concluded that an electronic recording will "many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent." *Id.* The Court stated that the informant is less likely to change his or her mind with a recording in existence and, thus, chances are less that threat or injury will suppress unfavorable evidence. *Id. Compare id. with* Goldsmith, *supra* note 13, at 1 (a Watergate juror, commenting after deliberations, said that "[i]t's hard to argue with . . . tapes—It's too bad we couldn't have tapes at every trial.")(quoting ITHACA J., Jan. 2, 1975 at 2, col. 2).

58 This fear of inaccurate or untruthful accounts is clearly evident in the opinions of jurists like Blackstone, who described eavesdropping as "listen[ing] under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slan-

ing devices, supplied these courts with a reliable and accurate record of a conversation that was unembellished and unedited by the memory of a biased witness.

The unregulated status of consensual surveillance was also supported by a general predilection for holding individuals responsible for their own statements and actions. Running through many consensual surveillance cases is the notion that, when revealing anything in a conversation with another person, there is always a risk that the confidence placed in the other person is in fact misplaced.[59] Absent coercion or confusion, the law traditionally left it to the individual to weigh these risks and rejected any judicial role in protecting the gullible from the unreliable.[60]

These implicit perceptions of consensual surveillance helped insulate it from legislative efforts to curb the practice in the 1920s and 1930s.[61] Although congressional concern over the expanding use of electronic surveillance was increasingly evident during this period, congressional attention focused entirely on nonconsensual surveillance.[62] In 1934, Congress passed section 605 of the Communications Act of 1934,[63] which was the first major national regulation of electronic surveillance. Although section 605 contained a sweeping prohibition of wiretapping,[64] consensual surveillance re-

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derous and mischievious tales . . ." 4 W. BLACKSTONE, COMMENTARIES *168. *See also* United States v. White, 401 U.S. 745, 753 (1970)(In addition to the higher reliability afforded by electronic surveillance, "[i]t may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat of injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony.").

59 Katz v. United States, 389 U.S. 347, 363 (1967)("When one man speaks to another he takes all the risks ordinarily inherent in so doing . . . The Fourth Amendment does not protect against unreliable (or law-abiding) associates.").

60 *See, e.g.*, Lopez v. United States, 373 U.S. 427, 465 (1963)(Brennan, J., dissenting)("The risk of being overheard . . . or betrayed . . . is probably inherent in the conditions of human society.").

61 State laws focused predominantly upon nonconsensual surveillance, giving little, if any, consideration to consensual surveillance. NWC REPORT, *supra* note 30, at 113-17. These laws were largely ineffectual, however. Part of the problem with these early laws has been attributed to their requirement that state officers enforce standards that they were consistently, even notoriously, violating themselves. *Title III and Admissibility*, *supra* note 19, at 1715 ("At the height of police surveillance, New York City police may have wiretapped as many as 26,000 telephone conversations in a single year.").

62 NWC REPORT, *supra* note 30, at 35.

63 Communications Act of 1934, Pub. L. No. 416, ch. 652, § 605, title VI, 48 Stat. 1103 (codified at 47 U.S.C. § 605 (1982 & Supp. III 1985))("No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.").

64 Section 605 ostensibly banned the nonconsensual interception and divulgence of communications. *See supra* note 63. The Supreme Court later appeared to reaffirm this

mained unregulated. Thus, in the 1940s and 1950s, opponents of consensual surveillance turned to the courts for relief, arguing a plethora of statutory and constitutional objections to consensual surveillance.

The Supreme Court first considered the constitutionality of warrantless consensual surveillance in *On Lee v. United States*.[65] In that case, a government informer allowed federal agents to monitor a series of conversations with his friend, On Lee.[66] During these conversations, On Lee incriminated himself in a conspiracy to sell opium out of his laundry.[67] Later arrested and convicted on narcotics charges, On Lee appealed on the ground that the use of the electronic surveillance constituted an unreasonable search and seizure. Rejecting this fourth amendment argument, the Court noted that "[s]ociety can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law."[68]

The consensual distinction was first used by the Court in *Rathbun v. United States*.[69] This case involved the use by police of a telephone extension to overhear a death threat made by Rathbun in an effort to extort a stock certificate from a business associate.[70] Rathbun challenged the use of the telephone extension under section 605 which, he argued, prohibited any interception of a wire or oral

interpretation of the provision in Nardone v. United States, 302 U.S. 379 (1937)(*Nardone* I) and Nardone v. United States, 308 U.S. 338 (1939)(*Nardone* II). Yet, despite its absolute language, section 605 was ineffective in curbing wiretapping by federal officers. Numerous factors contributed to this impotence. First and foremost, the section's seemingly comprehensive wiretapping ban was eroded by a Justice Department interpretation. The language of section 605 prohibited the interception and divulgence of intercepted communications. Accordingly, until 1963, the Justice Department claimed the perogative to wiretap for investigatory purposes so long as it did not divulge the acquired information outside the Department. NWC REPORT, *supra* note 30, at 3. *See also* S. REP. No. 2700, 81st Cong., 2d Sess. at 5 (1950)(congressional oversight committee described this interpretation as "strained and over-technical."). Supreme Court decisions narrowly construing its operative language reduced the efficacy of section 605 in curbing illegal wiretapping. *See* Goldsmith, *supra* note 13, at 13-32 (imposing tougher standing requirements and limiting the law to the federal courts); Schwartz v. Texas, 344 U.S. 199 (1952)(interceptions by state officials are not prohibited by section 605 and can be admitted as evidence in state prosecutions).

65 343 U.S. 747 (1952). Although *On Lee* was one of the Court's earliest considerations of warrantless consensual surveillance, the holding in the case was narrowly tailored to section 605. The Court held that section 605 did not bar the use of such surveillance because the Act only governed conversations sent over communications systems. *Id.* at 754.

66 *Id.* at 749.

67 *Id.*

68 *Id.* at 756.

69 355 U.S. 107 (1957).

70 *Id.* at 107-08.

communication. While recognizing that section 605 barred unauthorized interceptions, the Court distinguished conversations overheard with the consent of one of the participants from those overheard without such consent. The Court stated that it would be strange for Congress to prohibit third-party consensual surveillance when it is clear that either party to the conversation could record and publish the conversation.[71] "The conduct of the [publishing] party," the Court concluded, "would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it."[72] The Court stressed various policy and practical reasons for distinguishing between consensual and nonconsensual surveillance. First, to do otherwise, the Court noted, would allow one party to force another into secrecy merely by using a telephone.[73] Second, the Court stated that "common experience" makes any expectation of privacy unreasonable when one uses a telephone.[74] "Each party to a telephone . . . " the Court concluded, "takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation."[75]

The consensual distinction inaugurated by *Rathbun* outlasted section 605 and was gradually expanded to include not just overhearings and recordings but all forms of electronic surveillance.[76] In later cases, the Court repeatedly rejected fourth amend-

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[71] *Id.* at 110-11.

[72] *Id.* It is interesting to note that this emphasis on telephonic communication is stressed in some states which allow warrantless consensual surveillance of telephone conversations, but not face-to-face oral conversations. *Compare* State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978)(warrant required for consensual surveillance of face-to-face conversation) *with* State v. Solis, 693 P.2d 518 (Mont. 1984)(no warrant required for consensual surveillance of telephonic conversation). Also, it is interesting to compare OR. REV. STAT. ANN. § 165.540(1)(a) (1987), which allows one-party consent for surveillance of telephonic conversations, with OR. REV. STAT. ANN. § 165.540(1)(c) (1987), which requires all-party consent for surveillance of oral communications.

[73] 355 U.S. at 110 ("[O]ne party may not force the other to secrecy merely by using a telephone."). Although the Court wished to keep "one party [from] forc[ing] the other into secrecy merely by using a telephone," *id.*, it is ironic that in a number of states it is possible to do so by not using a telephone. *See supra* note 72.

[74] 355 U.S. at 111.

[75] *Id.* at 111.

[76] *See infra* notes 90-109 and accompanying text. The constitutionality of warrantless consensual surveillance was generally assumed after United States v. White, 401 U.S. 745 (1971). *See also* Lopez v. United States, 373 U.S. 427, 439 (1963)(reaffirming Rathbun v. United States, 355 U.S. 107 (1957)). In *White*, the Court held, in a plurality decision, that the use of a transmitter to record a conversation with the consent of a government informer did not violate the fourth amendment. The Court stressed that recordings, like oral renditions by a participant, are a natural risk that one assumes in engaging in any conversation.

> For constitutional purposes, no different result is required if the [undercover] agent instead of immediately reporting and transcribing his conversations with defendant,

ment arguments that consensual surveillance amounted to an unreasonable search and seizure[77] or that it violated the nonconsenting party's right to privacy.[78] The distinction, therefore, was heavily ensconced in Supreme Court precedent, when, in 1967, the Court embarked upon a thorough reevaluation of the constitutionality of electronic surveillance.

In two 1967 watershed cases, the Supreme Court rewrote the constitutional guidelines for the use of electronic surveillance. In the first case, *Berger v. New York*, the Court held a state surveillance statute unconstitutional because it failed to contain certain fourth amendment protections of individual privacy.[79] In the second case, *Katz v. United States*, the Court dispensed with its previous trespass-based test for unreasonable searches and seizures and adopted a new approach that would protect people, not just places.[80] Although both of these cases involved nonconsensual surveillance, they would have a pronounced effect on consensual surveillance. In *Berger*, the Court specified the various constitutional deficiencies that it found in the New York electronic surveillance statute.[81] *Ber-*

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either (1) simultaneously records them with electronic equipment which he is carrying on his person, Lopez v. United States . . . (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. On Lee v. United States . . . If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneously recording of the same conversations made by the agent or others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

White, 401 U.S. at 751 (plurality opinion). *But cf.* United States v. Kline, 366 F. Supp. 994, 996 (D.D.C. 1973)(*White* places "an enormously dangerous and insidious power . . . in the unsupervised hands of the public and the police."). *See also* J. CARR, *supra* note 18, at 3-59 (courts have generally reacted negatively to *White* and have used its plurality status to circumvent its holding); Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1, 18-19 (1981)(arguing for a more liberal reading of *White*).

77 *See, e.g.*, United States v. Caceres, 440 U.S. 741 (1979); United States v. White, 401 U.S. 745 (1971); Lopez v. United States, 373 U.S. 427 (1963).

78 *See, e.g.*, United States v. White, 401 U.S. 745 (1971); *see generally* Walinski & Tucker, *supra* note 76.

79 388 U.S. 41 (1967).

80 389 U.S. 347 (1967).

81 The *Berger* Court listed eight deficiencies in the New York statute that would need to be corrected before the statute would comply with the fourth amendment. *Berger*, 388 U.S. at 51-60. The Court's guidelines for a constitutional violation were subsequently described in a Senate report as containing the following:

1. Particularity in describing the place to be searched and the person or thing to be seized.
2. Particularity in describing the crime that has been, is being, or is about to be committed.
3. Particularity in describing the type of conversation sought.
4. Limitations on the officer executing the eavesdrop order which would:
   a) prevent his searching unauthorized areas, and

ger gave Congress both a framework for future legislation and an indication that such legislation, if carefully crafted, would weather a fourth amendment attack.[82] Notably missing from that framework, however, was any warrant or administrative procedure directly relating to consensual surveillance.

The absence of consensual surveillance protections in *Berger*'s legislative guidelines suggested that any future legislation need not include such protections to be constitutional. That conclusion was given implicit support in *Katz v. United States*.[83] Handed down six months after *Berger*, *Katz* represents the final rejection of the trespass doctrine, which had been the Court's fourth amendment test for thirty-nine years.[84] Under the trespass doctrine, the police could use any manner of electronic surveillance as long as there was no actual physical trespass on the suspect's property.[85] In *Katz*, a bug

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b) prevent further searching once the property sought is found.
5. Probable cause in seeking to renew the eavesdrop order.
6. Dispatch in executing the eavesdrop order.
7. Requirement that executing officer makes return on the eavesdrop order showing what was seized.
8. A showing of exigent circumstances in order to overcome the defect of not giving prior notice.

S. REP. No. 1097, *supra* note 13, at 74, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2161-62. *Berger* involved a series of "bugs" used by state officials in their investigation of an alleged conspiracy to corrupt the New York Liquor Authority. In striking down New York's surveillance statute, N.Y. CODE CRIM. PROC. § 813 (1881), repealed by N.Y. CRIM. PROC. LAW § 700.05-.70 (McKinney 1984 & Supp. 1988), as permitting illegal fourth amendment searches, the Court stressed New York's failure to adapt its regulation to new, more intrusive surveillance devices. "The law," the Court stated, "though jealous of individual privacy, has not kept pace with these advances in scientific knowledge." *Berger*, 388 U.S. at 49.

82 NWC REPORT, *supra* note 30, at 38.

83 389 U.S. 347 (1967).

84 The trespass doctrine was established in Olmstead v. United States, 277 U.S. 438 (1928). After ruling that only a physical trespass could trigger the fourth amendment prohibition of unreasonable search and seizure, a series of cases paraded through the courts and presented smaller and smaller physical intrusions in a defendant's property. The absurdity of the distinction was illustrated by Clinton v. Virginia, 377 U.S. 158 (1964), in which the Court pondered whether the penetration of a listening device by no more than a thumbtack was indeed a trespass. *Compare* Silverman v. United States, 365 U.S. 505 (1961)(penetration of listening device into a person's room violates fourth amendment) *with* Goldman v. United States, 316 U.S. 129 (1942)(the dectecaphone, a device which is placed against a wall much like a glass in order to hear conversation on the other side, does not violate fourth amendment). It is interesting to note that the race between surveillance technology and the law apparently continues today. *See infra* notes 319-24 and accompanying text.

85 In *Olmstead*, which established the trespass doctrine, the Court actually encouraged Congress to pass legislation if the result produced by the trespass doctrine was unpopular. 277 U.S. at 465-66 ("Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence."). Seven separate bills were proposed in Congress to overturn *Olmstead*. Goldsmith, *supra*

was carefully placed on the exterior of a public telephone booth, so as to avoid a physical intrusion. Brushing aside this fine distinction, the Court held that the bug was an unreasonable search because Katz had a *reasonable expectation of privacy* in using the phone.[86]

Although the reasonable expectation test was clearly an advance from the archaic trespass doctrine, its practical impact was to further legitimize warrantless consensual surveillance in cases after *Berger* and *Katz*. When taken in context with the Court's earlier consensual surveillance rulings, the *Katz* test served as something of an endorsement, albeit implicit, of warrantless consensual surveillance.[87] In *Rathbun* and other earlier cases, the Court had already concluded that it was unreasonable for anyone to presume that another party to a conversation would never record or otherwise reveal a conversation's contents.[88] Thus, the reasonable expectation test dovetailed perfectly with these previous consensual surveillance holdings to effectively block most potential fourth amendment challenges to consensual surveillance.

The real importance of *Berger* and *Katz*, however, was more legislative than judicial. In the summer of 1967, congressional committees were already working on new electronic surveillance legislation.[89] It was clear from the Court's granting of certiorari that the guidelines established in these cases would ultimately be incorporated into the new legislation. In *Berger* and *Katz*, the Court mapped out the minimum constitutional protections required of any future legislation, a constitutional prospectus that did not include consensual surveillance protections. Congress quickly translated this prospectus into statutory form and, only seven months after the *Katz* decision, enacted the successor to the Federal Communication Act—title III.[90]

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note 13, at 11 n.48. The final result was section 605 of the Communications Act of 1934, Pub. L. No. 416, ch. 652, § 605, title VI, 48 Stat. 1103 (codified at 47 U.S.C. § 605 (1982 & Supp. III 1985)), which courts and administrations later undermined by various interpretations of its language. *See supra* notes 63-65 and accompanying text.

86 In rejecting the trespass doctrine, the Court in *Katz* stated that "the Fourth Amendment protects people, not places." 389 U.S. 347, 351 (1967). *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974).

87 For a good discussion of the reasonable expectations test, see Goldsmith, *supra* note 13, at 29-32.

88 *See supra* notes 65-82 and accompanying text.

89 A presidential commission lobbying for the adoption of a comprehensive surveillance statute specifically stipulated that such legislation should await the guidance of the *Berger* and *Katz* decisions. NWC REPORT, *supra* note 30, at 38-40.

90 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801-804, 82 Stat. 197, 211-25 (codified as amended at 18 U.S.C. §§ 2510-20 (1982 & Supp. IV 1986) and 47 U.S.C. § 605 (1982 & Supp. III 1985)).

III. THE STATUTE

On June 19, 1968, title III of the Omnibus Crime Control and Safe Streets Act was enacted into law. Heralded as Congress' most comprehensive and daring effort in the field of electronic surveillance,[91] title III purported to accomplish two principal objectives: to protect the privacy of wire and oral communications and to codify the circumstances and conditions for the authorized interception of oral and wire communications, as required by *Berger* and *Katz*.[92] Prior to its enactment, title III received wide bipartisan support.[93] Although the cost,[94] effectiveness,[95] and privacy implications[96] of

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91 NWC REPORT, *supra* note 30, at 189. Title III, albeit the most inclusive, is actually one of seven statutes regulating different aspects of electronic surveillance. OTA REPORT, *supra* note 51, at 25-26. Among them are title III's two sister statutes, section 705 of the Communications Act of 1934 and the Foreign Surveillance Act of 1978.

Section 705 of the Communications Act of 1934 arose from an amendment of the Communications Act. After title III's enactment, section 605 was amended to cover only radio communications. Communications Act of 1934, Pub. L. No. 98-549, § 705(a), 47 U.S.C. § 605 (Supp III 1985)(to be codified at 47 U.S.C. § 705(a)). This amended provision, designated section 705 of the Communications Act of 1934, provides that "[n]o person not being authorized by the sender shall intercept any radio communication and divulge . . . such intercepted communication to any person." *Id.*

Title III's foreign surveillance counterpart, the Foreign Intelligence Surveillance Act of 1978, regulates the collection and disclosure of foreign intelligence and counterintelligence within the United States borders. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978)(codified at 50 U.S.C. §§ 1801-11 (1982 & Supp. III 1985)).

92 S. REP. No. 1097, *supra* note 13, at 66. *See also* NWC REPORT, *supra* note 30, at 42; NWC COMMISSION STUDIES, *supra* note 4, at 5.

93 Goldsmith, *supra* note 13, at 37. *See also* NATIONAL WIRETAPPING COMMISSION STUDIES, SUPPORTING MATERIALS FOR THE REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF THE FEDERAL AND STATE LAW RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCES 109 (1976) [hereinafter NWC COMMISSION HEARINGS].

94 The costs of electronic surveillance have grown at a remarkable rate since the Act's enactment. In 1968, the year title III was enacted, the average cost of a federal intercept, or eavesdropping operation, was $1358. NWC REPORT, *supra* note 30, at 268 (table F-4B). By 1986, the average cost had risen to $62,975. U.S. COURTS REPORT (1986), *supra* note 8, at 15 (table 5); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTIONS OF WIRE OR ORAL COMMUNICATIONS 21 (table 7) (1984)[hereinafter U.S. COURTS REPORT (1984)]($8087 was the average cost in 1974); Goldsmith, *supra* note 13, at 160-61 n.957 (electronic surveillance is both highly expensive and labor intensive). *See also* HISTORICAL POLICY REVIEW, *supra* note 4, at 38 (federal government spent at least $13,000,000 on electronic surveillance in 1983 alone).

95 Because the circumstances surrounding each intercept vary widely, the effectiveness of electonic surveillance is difficult to gauge. Nevertheless, the utility of government intercepts can, in most cases, be questioned as an investigatory tool on empirical grounds. Between 1973 and 1983, arrests arising out of intercepts fell from 3030 to 1716. During the same period convictions fell from 1833 (60.5%) to 521 (30.4%). ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS 23 (table 9) (1983)[hereinafter U.S. COURTS REPORT (1983)]. *Cf.* U.S. COURTS REPORT

governmental electronic surveillance concerned many legislators, both proponents and opponents of police surveillance saw compromise in their best interests.[97] Members previously opposed to electronic surveillance voted in favor of title III in order to guarantee some procedural safeguards against unwarranted governmental intrusion.[98] "Law and order" advocates also supported the bill, preferring electronic surveillance with some restrictions to a possible outright prohibition.[99]

Title III was most remarkable in the scope of its provisions. It expressly prohibited nonconsensual surveillance by private parties.[100] Nonconsensual surveillance by the federal government was

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(1986), *supra* note 8, at 19-25, (tables 7 and 9)(noting that 27% of the 2393 persons arrested in 1984 on the basis of surveillance information were convicted, even though only 25% of intercepted communications in 1984 were considered incriminating).

In its report, the National Wiretapping Commission was sharply divided over the desirability of police intercepts due to its high cost and relatively low record of convictions:

> A substantial minority of the Commission disagrees with [the majority's] broad general approval of court-authorized wiretapping. This minority found that court-authorized surveillance had been used successfully in a limited number of major cases, and has resulted in the conviction of only a few upper-echelon crime figures; more frequently, however, court-authorized surveillance has proven to be costly and generally unproductive, has served to discourage the use of other investigative techniques, and, even under the authorization and supervision of a court, has resulted in substantial invasions of individual privacy.

NWC REPORT, *supra* note 30, at xiii. *See also* Goldsmith, *supra* note 13, at 35 (quoting former U.S. Attorney General Ramsey Clark's opposition to electronic eavesdropping because it is "neither effective nor highly productive").

96 S. REP. No. 1097, *supra* note 13, at 182, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2242 (statement of Sen. Fong). Early detractors of title III would likely feel some vindication in the number of individuals subjected to surveillance since the Act's passage. From 1977 to 1983 alone, it is estimated that the govenment has monitored at least 370,000 people. HISTORICAL POLICY REVIEW, *supra* note 4, at 38.

97 NWC REPORT, *supra* note 30, at 40; *Title III and Admissibility*, *supra* note 19, at 1732-33.

98 NWC REPORT, *supra* note 30, at 40. Not all of the Act's oppositon was persuaded, however. Particularly vocal in his continued opposition was Senator Edward Long who stated that to "help eliminate crime in the streets, Congress is asked to sell its soul for a mess of porridge." S. REP. No. 1097, *supra* note 13, at 161, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2223. *See Title III and Admissibility*, *supra* note 19, at 1732-33.

99 S. REP. No. 1097, *supra* note 13, at 1-146, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2112-2209. Advocates of title III viewed the Act primarily as a tool against organized crime. 115 CONG. REC. 23,238 (1969)(statement of Sen. John McClellan). Title III was, in fact, designed to afford federal and state law enforcement agents greater flexibility in investigating top mob leaders. NWC COMMISSION STUDIES, *supra* note 4, at 6. *See generally* E. LAPIDUS, EAVESDROPPING ON TRIAL 49-71 (1974); Goldsmith, *supra* note 13, at 22-23; Comment, *supra* note 42, at 501-03; *Title III and Admissibility*, *supra* note 19, at 1732-33.

100 18 U.S.C. § 2511 (1986). Calculating the level of illegal interceptions conducted by private parties is a highly suspect practice because most interceptions go undetected and, once detected, most go unreported. OTA REPORT, *supra* note 51, at 13. According to FBI spokesman William Carter, the number of illegal interceptions of private parties

prohibited in the absence of a court order.[101] Nonconsensual surveillance by state authorities was prohibited unless authorized under a state statute[102] containing a standard as restrictive as the federal standard.[103] To insure compliance with the statute's objectives, a court order system was established to handle federal electronic surveillance requests as well as a system of civil damages to remedy surveillance abuses.[104] Moreover, unlike its legislative forerunners,

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by private parties declined from 524 reported incidents in 1981 to 392 reported incidents in 1984. Horgan, *supra* note 42, at 32. Cost may also be a factor in explaining the drop in illegal intercepts. Modern communications technology, primarily microwave telephone circuits, are very expensive to intercept. *Id.* at 14 (current costs of microwave intercept equipment approximately $40,000). For a description of the type of devices available to private parties on a more modest scale, see NWC HEARINGS, *supra* note 93, at 1212-29 (variety of devices and advertisements, including "Sea Captain" wall thermometer and hidden mike model, $69.50; "Micro Mini Mike," powerful wireless mike the size of a paper clip with 450 foot range, $14.95); S. DASH, R. SCHWARTZ & R. KNOWLTON, *supra* note 46, at 349-50 (parabolic mike called "The Snooper" permits eavesdropping from distances of 500 feet, $12.98); J. CEDERBAUM, WIRETAPPING AND ELECTRONIC EAVESDROPPING: THE LAW AND ITS IMPLICATIONS, A COMPARATIVE STUDY 7 (1969)("Bugged Martini" is a $500 plastic olive containing a transmitter and a miniature antenna in the guise of a toothpick).

101 18 U.S.C. § 2511 (1982 & Supp. IV 1986).

102 As of January, 1985, thirty-one states and the District of Columbia have enacted such statutes authorizing state electronic surveillance. ARIZ. REV. STAT. ANN. §§ 13-3004 to 3014 (1978 & Supp. 1987); COLO. REV. STAT. §§ 16-15-101 to 104 (1986 & Supp. 1987); CONN. GEN. STAT. ANN. §§ 53a-187 to 189 (West 1985 & Supp. 1988); DEL. CODE ANN. tit. 11, § 1336 (1987); D.C. CODE ANN. §§ 23-541 to 556 (1981); FLA. STAT. ANN. §§ 934.01-.10 (West 1985 & Supp. 1988); GA. CODE ANN. §§ 26-3001 to 3010 (1983); HAW. REV. STAT. § 803-41 to 49 (1985 & Supp. 1987); IDAHO CODE § 18-6701 to 6709 (1987 & Supp. 1987); KAN. STAT. ANN. §§ 22-2514 to 2519 (1981 & Supp. 1987); LA. REV. STAT. ANN. §§ 15:1301 to 1312 (West 1981 & Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. §§ 10-401 to 412 (1984 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1980 & Supp. 1988); MINN. STAT. ANN. §§ 626.A.01-.23 (West 1983 & Supp. 1988); NEB. REV. STAT. §§ 86-701 to 712 (1987); NEV. REV. STAT. ANN. §§ 179.410-515 (Michie 1986); N.H. REV. STAT. ANN. § 570-A:1 to A:11 (1986 & Supp. 1987); N.J. STAT. ANN. §§ 2A:156A-1 to 26 (West 1985); N.M. STAT. ANN. §§ 30-12-1 to 11 (1984); N.Y. CRIM. PROC. LAW §§ 700.05-.70 (McKinney 1984 & Supp. 1988); OKLA. STAT. ANN. tit. 13, §§ 176.1-.14 (West 1983 & Supp. 1988); OR. REV. STAT. §§ 133.721 to .739 (1987); 18 PA. CONS. STAT. ANN. §§ 5701-5726 (Purdon 1983 & Supp. 1988); R.I. GEN. LAWS §§ 12-5.1-1 to 16 (1981 & Supp. 1987); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1 to 21 (Supp. 1987); TEX. CRIM. PROC. CODE ANN. § 18.20 (Vernon Supp. 1988) UTAH CODE ANN. §§ 77-23a-1 to 11 (1982); VA. CODE ANN. §§ 19.2-61 to 70 (1983); WASH. REV. CODE ANN. §§ 9.73.030 to .090 (1988); W. VA. CODE §§ 62-1D-1 to 16 (Supp. 1988); WISC. STAT. ANN. §§ 968.27-.33 (West 1985); WYO. STAT. §§ 7-3-601 to 610 (1987).

103 S. REP. NO. 1097, *supra* note 13, at 66. By the close of 1984, thirty-one states and the District of Columbia had taken advantage of the authorization under section 2516 through the passage of statutes which permitted the use of electronic surveillance by their state law enforcement officers. U.S. COURT REPORT (1984), *supra* note 94, at 9 (table 1); OTA REPORT (1985), *supra* note 51, at 19.

104 18 U.S.C. § 2520 (1982 & Supp. IV 1986). Actual or punitive damages are allowed along with attorney fees and other litigation costs. *Id.* *See* Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979)(monetary damages for intangible injury permitted under

title III also directly addressed the issue of consensual surveillance, albeit to allow its unregulated use by private and governmental parties.[105]

Title III's language takes the form of a series of statutory "do's" and "don't's."[106] The Act begins with a sweeping prohibition of all electronic surveillance, "[e]xcept as otherwise specifically provided."[107] This prohibition, contained in section 2511, essentially makes everything under the Act a "don't" unless affirmatively stated as a "do." The prohibition in section 2511 is followed by a list of enumerated "do's," including the following:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.[108]

A codification of *Rathbun*'s consensual distinction, this subsection places consensual surveillance outside the federal warrant require-

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§ 2520); Jacobson v. Rose, 592 F.2d 515 (10th Cir. 1979), *cert. denied*, 442 U.S. 930 (1979); Wolfe v. Wolfe, 570 F. Supp. 826 (D.S.C. 1983)(attorney fees); Gerrard v. Blackman, 401 F. Supp. 1189 (N.D. Ill. 1975)(permissible damages under § 2520 include injuries of extreme emotional harm).

105 In addition to the civil damages available under § 2520 to injured parties in federal actions, twenty-seven states and the District of Columbia have incorporated § 2520 or similar provisions into their own state privacy statutes. CAL. PENAL CODE § 637.2(b) (West 1970 & Supp. 1988); CONN. GEN. STAT. ANN. § 54-41r (West 1985); DEL. CODE ANN. tit. 11, § 1336(w) (1987); D.C. CODE ANN. § 23-554 (1981); FLA. STAT. ANN. § 934.10 (West 1985 & Supp. 1988); HAW. REV. STAT. § 803.48 (1985 & Supp. 1987); IDAHO CODE § 18-6709 (1987 & Supp. 1987); ILL. ANN. STAT. ch 38 para 14-6 (Smith-Hurd 1979 & Supp. 1988); KAN. STAT. ANN. § 22-2518 (1981); LA. REV. STAT. ANN. § 15:1312 (West 1981 & Supp. 1988); ME. REV. STAT. ANN. tit. 15 § 711 (1980 & Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 10-410 (1984); MASS. GEN. LAWS ANN. ch. 272, § 99(Q) (West 1980); MICH. COMP. LAWS ANN. § 750.539h (West 1968); MINN. STAT. ANN. § 626A.13 (West 1983); N.H. REV. STAT. ANN. § 570-A:11 (1986); N.J. STAT. ANN. §§ 2A:156A-24 (West 1985); N.M. STAT. ANN. § 30-12-11 (1984); OR. REV. STAT. § 133.739 (1987); 18 PA. CONS. STAT. ANN. § 5725 (Purdon 1983); R.I. GEN. LAWS § 12-5.1-13 (1981); TEX. CRIM. PROC. CODE ANN. § 18.20(16) (Vernon Supp. 1988); UTAH CODE ANN. § 77-23a-11 (1982); VA. CODE ANN. § 19.2-69 (1983); WASH. REV. CODE ANN. § 9.73.060 (1988); W. VA. CODE § 62-1D-12 (Supp. 1988); WIS. STAT. ANN. § 968.31(2)(d) (West 1985); WYO. STAT. § 7-3-609 (1987). *See also* Goldsmith, *supra* note 13, at 76 n.454. 18 U.S.C. § 2511(2)(c) (1986). These statutes generally follow the language of the civil damages provision before the recent amendments. *See supra* note 26.

106 NWC REPORT, *supra* note 30, at 4 ("Title III takes the form of a series of limitations and prohibitions on lawful eavesdropping: the do's' are largely the residue of multitudinous dont's'.").

107 18 U.S.C. § 2511 (1982 & Supp. IV 1986).

108 *Id.* at § 2511(2)(c). Private consensual surveillance is also permitted under the Act so long as the surveillance is not done "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." *Id.* at § 2511(2)(d).

ments and procedural safeguards of the Act.[109]

How the consensual distinction in section 2511 relates to state statutes enacted pursuant to title III is unclear, however.[110] Title III expressly permits states to enact their own surveillance statutes so long as those statutes contain standards as stringent as the federal standards.[111] States opposed to warrantless consensual surveillance have taken advantage of this authorization by enacting statutes containing provisions that strictly limit or ban entirely[112] the use of warrantless consensual surveillance by state agents.[113] These states interpret title III's authorization of more stringent state standards as implicitly including areas in which Congress chose not to limit surveillance as well as those areas in which the limitations are minimal.

The federal courts, however, have adopted an alternative interpretation of title III's authorization. When asked to suppress evidence gathered unlawfully under state consensual provisions, federal courts have unanimously rejected the applicability of the provisions in federal court.[114] According to these courts, the consensual distinction in section 2511 confines the Act's provisions, including its authorization of more stringent state statutes, to nonconsensual surveillance.[115] Section 2511, therefore, is viewed as a provision excluding all consensual surveillance from the operation of the Act as a whole rather than a specific standard for the conduct of consensual surveillance by federal agents.[116]

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109 The legislative history states that subsection 2511(2)(c) is largely a codification of existing law. The Senate report cites *Lopez*, *Rathbun*, and *On Lee* as the sources for that codification. S. REP. No. 1097, *supra* note 13, at 93-94, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2182.

110 *See* United States v. Keen, 508 F.2d 986, 988 (9th Cir. 1974)("It is not clear [from section 2511's language] . . . that Congress showed an intention to displace more rigorous requirements found in state laws."); *Title III and Admissibility*, *supra* note 19, at 1736 n.162 (section 2511 ambiguous at best in supplanting of state standards in federal court).

111 S. REP. No. 1097, *supra* note 13, at 98, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2187.

112 *See* statutes cited *supra* note 18.

113 *Id.* A number of states also ban consensual surveillance by private parties. *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 1335(a)(3), (4) (1987); FLA. STAT. ANN. § 934.03(2)(d)(West 1985); ILL. ANN. STAT. ch. 14, para. 14-2(a) (Smith-Hurd 1979 & Supp. 1988); ME. REV STAT. ANN. § 711 (1980) & Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 10-402(c)(3) (1984 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (West 1980); MICH. COMP. LAWS ANN. § 750.539c (West 1968); MONT. CODE ANN. § 45-8-213(c) (1987); 18 PA. CONS. STAT. ANN. § 5704(4) (Purdon 1983).

114 *See, e.g.*, United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978); United States v. Shaffer, 520 F.2d 1369 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983).

115 *Id.*

116 *Gervasi*, 562 F. Supp. at 650 ("Title III is addressed to the interception of wire or oral communications where there has not been one-party consent.").

The proper interpretation of section 2511, therefore, depends largely on where one places section 2511 in the overall context of the Act. Title III can be viewed as having dual purposes. First, it is a federal regulation, stating the controlling standards for all federal surveillance operations. Second, it is a national legislative model, supplying states with the minimal statutory protections required under the Act. Viewed as part of the Act's federal regulatory function, the consensual distinction presents few problems for states opposed to warrantless consensual surveillance. Under this view, consensual distinction in section 2511 is simply a specific standard governing federal surveillance operations. Accordingly, although the Act's standard for federal operations is the unlimited use of warrantless consensual surveillance, nothing prevents a state from enacting a more stringent consensual provision.[117]

Viewed as part of the Act's function as a national legislative model, however, section 2511's consensual distinction takes on a wholly different meaning. The consensual distinction, it can be argued, was not a specific standard, but was instead an intentional limitation of the Act's scope by Congress.[118] In other words, the national legislative model is exclusively nonconsensually based, and, accordingly, all state statutes enacted under the Act must also be nonconsensually based.

This Article argues that section 2511's consensual distinction is part of the federal regulatory function. However, before examining the specific statutory support for this position, it is important to understand why federal courts should apply *any* state law, consensual or nonconsensual.[119] Clearly, prior to addressing the consensual question, a federal court must first ask whether a higher state nonconsensual standard must be considered in determining the admissibility of state-derived surveillance evidence in federal court.[120] This threshold question is vital because federal courts that reject the application of state nonconsensual laws will necessarily rule out the application of state consensual laws as well. Moreover, this Article asserts that many of the arguments used by courts to apply state nonconsensual standards in federal court are equally persuasive for applying state consensual standards.[121]

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117 *See infra* notes 202-33 and accompanying text.

118 *See, e.g.*, *Gervasi*, 562 F. Supp. at 648.

119 *See Title III and Admissibility*, *supra* note 19, at 1741-42.

120 *Id.*

121 *See infra* notes 234-37 and accompanying text.

A. THE MAJORITY RULE AND THE PRESUMPTION AGAINST APPLYING STATE SURVEILLANCE STANDARDS

The majority rule is based on a narrow interpretation of the language and legislative history of title III. Beginning with the presumption that federal law controls over state law unless the federal statute expressly states otherwise,[122] majority rule courts have concluded that title III's critical provisions are too ambiguous to support the application of state law.[123] While recognizing that title III does allow more stringent state standards, these courts have rejected the application of such standards in federal court without a more clear expression of congressional intent. Thus, in majority rule courts, the unlawful gathering of electronic surveillance evidence by state agents will not result in the suppression of the evidence in federal court unless the evidence would also violate the minimal federal standard.

In *United States v. McNulty*, the United States Court of Appeals for the Tenth Circuit considered the majority rule in both a three-judge panel decision[124] and in a subsequent en banc decision which reversed the panel decision and adopted the minority rule.[125] Writing a concurrence in the panel decision, Judge William Doyle argued in favor of the majority rule and its narrow reading of title III. This concurrence remains one of the most complete presentations of the majority rule.[126]

McNulty involved the use of an illegal state wiretap to gather evidence against the defendant, a local gambling figure, for state gambling violations.[127] After conducting the illegal wiretap, Colorado authorities turned over all of their evidence to federal prosecutors, who, in turn, brought charges under the federal gambling laws.[128] After a district court suppressed the evidence under Colorado law, the three-judge panel reversed the lower court decision and ruled that the evidence, gathered illegally under the state wiretap, was admissible.[129]

In his concurrence in the panel decision, Judge Doyle stressed the absence of a clear, unambiguous mandate in the statute for ap-

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122 *Title III and Admissibility*, *supra* note 19, at 1724-29.

123 *See, e.g.*, United States v. Little, 753 F.2d 1420, 1434 (9th Cir. 1984); United States v. McNulty, 729 F.2d 1243, 1248-58 (10th Cir. 1984)(reversed en banc); United States v. Hall, 543 F.2d 1229, 1233-35 (9th Cir. 1976)(en banc), *cert. denied*, 429 U.S. 1075 (1977).

124 United States v. McNulty, 729 F.2d 1243, 1244-63 (10th Cir. 1984).

125 *Id.* at 1264.

126 *Id.* at 1250-56 (Doyle, J., concurring).

127 *Id.* at 1248.

128 *Id.* at 1249.

129 *Id.* at 1248.

plying state surveillance standards in federal court. Beginning with the assumption that "this case should be governed by federal law inasmuch as the cause is being tried in federal court and is a criminal charge . . . aris[ing] under federal statutes,"[130] Judge Doyle examined title III for any express instruction to the contrary. Finding little reference to state law, he concluded that "Title III is ambiguous on the question, and does not direct reference to state law."[131] Moreover, Judge Doyle rejected claims that Congress' authorization of more stringent state laws evidences a congressional intent that state laws should be applied in federal court.[132] Although he stated that it is clear that Congress did not intend to preempt state laws in state court,[133] Judge Doyle concluded that the statute was too "ambiguous" to support the application of state law in federal court.[134]

The majority rule presumption against applying state standards is equally evident in another leading majority rule case, *United States v. Hall*.[135] In *Hall*, state police violated California's surveillance statute by using federal wiretap information, in a manner prohibited under the state standard, to make a narcotics arrest. After seizing damaging evidence against the defendants, the state prosecutor handed over the evidence to his federal counterpart who convicted both defendants in federal court.[136] Although accepting that the evidence seized by the state agents would have been suppressed in state court, the United States Court of Appeals for the Ninth Circuit held that the evidence was admissible.[137]

The court in *Hall* specifically rejected a defense argument based on section 2517 of the Act.[138] This section authorizes the disclosure of surveillance evidence gathered under title III. Subsections 2517(1) and (2) respectively authorize federal and state officers to disclose or use intercepted material as long as their actions are in accord with their official duties.[139] The two prerequisites of this

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130 *Id.* at 1250 (Doyle, J., concurring).

131 *Id.* at 1251 (Doyle, J., concurring).

132 *Id.* at 1253 (Doyle, J., concurring).

133 *Id.* at 1253 (Doyle, J., concurring)(citing S. REP. 1097, *supra* note 13, at 98, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2187).

134 *McNulty*, 729 F.2d at 1251 (Doyle, J., concurring).

135 543 F.2d 1229 (9th Cir. 1976).

136 *Id.* at 1237-38 (Koelsch, J., dissenting).

137 *Id.* at 1230.

138 *Id.* at 1233.

139 Subsections 2517(1) and (2) provide:

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such

provision are: the lawful interception of the original material and the disclosing party's authority to receive such material under title III. The defense in *Hall* argued that the use of the federal wiretap evidence violated section 2517 because, under California law, "such use by its officers [was] not appropriate to the proper performance of [their] official duties.' "[140] The Ninth Circuit rejected the section 2517 argument by stating that it is difficult to believe "that the qualifying phrase [concerning proper official duties] in section 2517 (1) and (2) was . . . intended to obliquely import state standards."[141] "Had that been the aim," the *Hall* court stressed, "Congress would have said so more clearly."[142]

Both the *McNulty* and *Hall* majority opinions were accompanied by strong dissents arguing in favor of the minority rule.[143] The dissenting opinion in *McNulty* ultimately was adopted by the Tenth Circuit en banc in near-verbatim form in that circuit's break from the majority rule camp.[144] Six circuits expressly follow the majority rule,[145] while the Tenth and Eleventh Circuits[146] have joined the

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disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. §§ 2517(1) and (2) (Supp. IV 1986).

140 *Hall*, 543 F.2d at 1233 (quoting 18 U.S.C. § 2517(2) (1982 & Supp. 1986)).

141 *Id.* ("Instead we view the phrase [appropriate to the proper performance of their official duties'] as designed to protect the public from unnecessarily widespread dissemination of the contents of interceptions and from the wholesale use of information gleaned from a legal wiretap by an officer—state or federal—for personal or illegal purposes.").

142 *Id.*

143 *McNulty*, 729 F.2d at 1258; *Hall*, 543 F.2d at 1238 (Koelsch, J., dissenting).

144 *McNulty*, 729 F.2d at 1264-69. The Tenth Circuit actually voted unanimously in favor of the minority rule interpretation. The dissent to the en banc opinion occurred over the interpretation of a state statute. *Id.* at 1269.

145 In addition to the Second, Tenth, and Eleventh Circuits, courts in the First, Third, and Ninth Circuits have indicated some movement away from the majority rule. *See, e.g.*, United States v. Jarabek, 726 F.2d 889, 900 (1st Cir. 1984)(expressly avoiding the majority rule as basis for applying federal law in favor of distinguishing facts from those of leading minority rule cases); United States v. Daniel, 667 F.2d 783, 785 (9th Cir. 1982)(expressly reserving question whether "information acquired by a state officer in violation of state law without federal involvement is admissible in federal court."); United States v. Mora, 623 F. Supp. 354, 358 (D. Mass. 1985)(endorsing minority rule); United States v. Geller, 560 F. Supp. 1309, 1312 (E.D. Pa. 1983)("[S]tate law standards which relate to the issuance and execution of a wiretap order predominate where they are more demanding than federal ones."), *cert. denied*, 105 S. Ct. 786 (1985); United States v. Pine, 473 F. Supp. 349, 357 (D. Md. 1978)(state laws govern application, authorization, and execution of state orders). For a discussion of a recent First Circuit private surveillance case employing many minority rule arguments, see *infra* note 307.

Second Circuit in applying state surveillance standards in federal court.

B. THE MINORITY RULE AND THE PRESUMPTION IN FAVOR OF APPLYING STATE LAW

The majority rule's assumption, that had Congress intended to "obliquely import state standards . . . [it] would have said so more clearly,"[147] is strongly contested by minority rule courts, which argue that precisely the opposite should be true.[148] Responding to the majority rule's demand for statutory clarity of congressional intent, Judge M. Oliver Koelsch suggested that "[h]ad Congress intended by Title III to obliterate the more restrictive rules of conduct . . . it certainly could have said so more clearly."[149] Moreover, minority rule courts have argued that there is ample evidence in both title III's language and legislative history to support the application of state standards in federal court.

Minority rule courts argue against the very essence of the majority rule position: that there is a conflict between title III and more stringent state laws.[150] No conflict exists, it is argued, because the state standards are themselves part of title III.[151] Minority rule courts insist that Congress intended to incorporate state standards into title III, thereby making certain violations of state standards collateral violations of the federal Act as well.[152] In support of this position, minority rule courts point to critical provisions of title III that, these courts contend, cannot be implemented without reference to state standards. State standards, it is argued, must be considered in order to resolve three determinative issues under the Act: the legality of the court order authorizing an interception; the legality of the actual interception conducted; and the authority of the publishing agent to disclose or use the surveillance material.

Section 2516 governs the legality of a court order.[153] Subsection 2516(2) expressly authorizes state judges to grant requests for

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146 *See, e.g.*, United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); United States v. McNulty, 729 F.2d 1243 (10th Cir. 1984). *See supra* note 145 for circuits indicating possible shifts to the minority rule.

147 *Hall*, 543 F.2d at 1233.

148 *See, e.g.*, *Hall*, 543 F.2d at 1239 (Koelsch, J., dissenting); *see also Title III and Admissibility*, *supra* note 19, at 1729-37.

149 *Hall*, 543 F.2d at 1239 (Koelsch, J., dissenting).

150 *See, e.g.*, *id.* at 1239-40 (Koelsch, J., dissenting).

151 *Id. See also* Navarra v. Bache Halsey Stuart Shields, Inc., 510 F. Supp. 831, 833 (E.D. Mich. 1981).

152 *See generally Title III and Admissibility*, *supra* note 19, at 1729.

153 18 U.S.C. § 2516 (1982 & Supp. 1986).

state interceptions but only "in conformity . . . with the applicable State statute . . . ."[154] Citing section 2516, minority rule courts stress that title III predicates a "lawful authorization" on compliance with both federal and state provisions.[155] The lawfulness of a state authorization, they argue, can only be determined by reference to the state court order and the state standards governing its execution.[156] This question, it is further argued, ultimately controls the admissibility of such evidence because the Act expressly mandates the suppression of any evidence derived from an unlawful authorization.[157]

The legality of an interception is important for the purposes of section 2517, the provision governing the disclosure of surveillance material under the Act.[158] Subsection 2517(3), which covers disclosure by private parties, stipulates that disclosure of surveillance material can occur only when the material was "intercepted in accordance with the provisions of [title III]."[159] Minority rule

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154 18 U.S.C. § 2516(2). The full text provides:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crime dangerous to life, limb, or property and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

18 U.S.C. § 2516(2) (Supp. IV 1986).

155 *See, e.g.*, United States v. McNulty, 729 F.2d 1243, 1259 (10th Cir. 1984); United States v. Sotomayor, 592 F.2d 1219, 1225 (2d Cir. 1979); United States v. Hall, 543 F.2d 1229, 1241 (9th Cir. 1976)(Koelsch, J., dissenting), *cert. denied*, 429 U.S. 1075 (1977); United States v. Curreri, 388 F. Supp. 607, 615-17 (D. Md. 1974). *See also Title III and Admissibility*, *supra* note 19, at 1730.

156 *Id.*

157 *Title III and Admissibility*, *supra* note 19, at 1731 ("[s]ection 2517, in conjunction with the minority rule's interpretation of section 2516, prohibits federal courts from admitting any surveillance evidence that was gathered unlawfully under state law.").

158 For the text of section 2517, see *supra* note 139 and accompanying text.

159 Under subsection 2517(3), a person may disclose or use title III material if that person is authorized to receive such material under the Act and if the interception was lawfully conducted under the Act. 18 U.S.C. § 2517(3) (1982 & Supp. IV 1986). The lawful interception condition may only be determined by reference to the interception authorization provision, which is subsection 2516(2). In the *McNulty* court's view, the language in subsection 2517(3) strengthened the argument that "[t]he primary question governing admissibility is whether the information was lawfully intercepted within the meaning of the statute." *McNulty*, 729 F.2d at 1259.

courts assert that the only way to determine the legality of an interception is to look at the authorization given for it. Thus, it is argued, a federal court must turn to the provision governing lawful authorization, section 2516, which requires compliance with state law. Disclosure of state surveillance material then is dependent on a lawful state authorization which, minority rule courts argue, is dependent on state law.

Minority rule courts also stress the type of authorization necessary for proper disclosure under section 2517. As mentioned above, subsections 2517(1) and (2) allow the disclosure or use of surveillance evidence only if "such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure."[160] State surveillance standards often expressly forbid state agents from disclosing or using unlawfully gathered surveillance evidence in any way. Minority rule courts argue that subsections 2517(1) and (2) cannot reasonably be followed in cases involving disclosures by state agents without applying the controlling state disclosure provisions.[161]

Finally, minority rule courts direct attention to the suppression provision in title III, subsection 2518(10)(a).[162] Section 2518 requires courts to suppress evidence when one of three circumstances are shown. First, a court must suppress any evidence that was "unlawfully intercepted."[163] Second, a court must suppress evidence that was gathered under an invalid court order.[164] Third, a court must suppress evidence that was derived from an interception that was "not made in conformity with the order of authorization or ap-

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160 18 U.S.C. § 2517(1) (1982 & Supp. IV 1986).

161 *See, e.g.*, United States v. Sotomayor, 592 F.2d 1219, 1225-26 n.13 (2d Cir. 1979); United States v. Marion, 535 F.2d 697, 702 (2d Cir. 1976).

162 18 U.S.C. § 2518 (1982). Subsection 2518(10)(a) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter.

163 *Id.* at § 2518(10)(a)(i).

164 *Id.* at (ii).

proval."[165] All three of these conditions, and particularly the last two, it is argued, necessarily require the application of state law.[166]

In addition to this statutory support, minority rule courts stress title III's legislative history. Crucial to the Act's passage, they argue, was the invitation to states to enact more stringent laws of their own.[167] The Senate report that accompanied the proposed Act states that Congress in enacting the Act "envision[ed] that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation."[168] This policy of state experimentation, it has been argued, was the product of a careful compromise between "civil libertarians" and "law and order advocates."[169] The policy enabled states unsatisfied with the minimal federal standard to protect privacy rights to a greater extent than the federal government while guaranteeing that no state would have fewer protections than the federal model. This compromise helped form the coalition that led to the Act's passage, a coalition that included congressmen interested in banning electronic surveillance entirely and others in favor of leaving the issue entirely to the states.[170]

As noted earlier, until recently, only the Second Circuit followed the minority rule and applied state standards in federal court. In 1985, however, two circuits, the Tenth and the Eleventh, broke from their previous adherence to the majority rule and adopted the minority rule.[171] These circuits, however, limit the minority rule in a very significant way.[172] State law is applied only in cases that in-

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165 *Id.* at (iii).

166 *See, e.g.*, United States v. McNulty, 729 F.2d 1243, 1264 (10th Cir. 1984)(en banc). *See also Title III and Admissibility*, *supra* note 19, at 1731-32.

Title III also contains an exclusionary rule, section 2515, which requires the exclusion from evidence of any wire or oral communication "if the disclosure of that information would be in violation of [title III]." 18 U.S.C. § 2515 (1982). This exclusionary rule extends to evidence "directly or indirectly obtained in violation of [title III]." S. REP. No. 1097, *supra* note 13, at 96. *See also* United States v. Vest, 813 F.2d 477, 488 (1st Cir. 1987)(suppressing illegally gathered evidence under section 2515).

167 *See, e.g.*, United States v. Hall, 543 F.2d 1229, 1242 (9th Cir. 1976)(Koelsch, J., dissenting); United States v. Marion, 535 F.2d 697, 702 (2d Cir. 1976). *See also Title III and Admissibility*, *supra* note 19, at 1732.

168 S. REP. No. 1097, *supra* note 13, at 98, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2187.

169 *Title III and Admissibility*, *supra* note 19, at 1732.

170 *Id.*

171 *See* United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); United States v. McNulty, 729 F.2d 1243 (10th Cir. 1984)(en banc).

172 The Second and Tenth Circuits have also limited the minority rule to interception cases. *See, e.g.*, *McNulty*, 729 F.2d at 1260; *Sotomayor*, 592 F.2d at 1222-27. *See also* United States v. Mora, 623 F. Supp. 354, 358 (D. Mass. 1985). Like consensual state laws, violations of post-interception laws, such as the rules governing the sealing of tapes, are

volve nonconsensual surveillance.[173] Thus, minority rule courts apply federal, not state, standards in cases involving surveillance conducted with the consent of one of the parties to a conversation.[174]

C. THE MINORITY RULE'S CONSENSUAL DISTINCTION: LIMITING STATE EXPERIMENTATION UNDER TITLE III

The minority rule's consensual distinction is based on a narrow interpretation of subsection 2511(2)(c). By stating that warrantless consensual surveillance is "not unlawful under this chapter,"[175] minority rule courts present subsection 2511(2)(c) as a clear expression of congressional intent to exempt consensual surveillance from the procedures and restrictions of the Act.[176] Thus, minority rule courts will admit the evidence in federal court even when such evidence was gathered unlawfully by state agents and suppressed by state courts.

Nowhere are the statutory arguments and the practical implications of this distinction more clear than in the case of *United States v.*

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expressly placed outside the minority rule. Title III, it is argued, mandates the application of:

> only those more stringent state statutory requirements or standards that are designed to protect an individual's right of privacy, as distinguished from procedural rules that are essentially evidentiary in character. . . . Since a state's protection of privacy normally reflects principles central to its social and governmental order, our failure to respect its more stringent protection of privacy rights would not only violate principles of federalism, but encourage state and federal law enforcement to by-pass state law and to engage in federal forum-shopping of tainted evidence.

Sotomayor, 592 F.2d at 1225. Although this Article is only concerned with consensual surveillance, the Author finds the post-interception distinction no less problematic. It is difficult to discern the fundamental difference, in terms of privacy and federalism, between interception and post-interception violations. Both are often intended to protect individual rights and the violation of either in state court could result in the suppression of the evidence. State agents are no less "encourage[d] . . . to by-pass state law and to engage in federal forum-shopping of tainted evidence" when the evidence is suppressed under a post-interception provision than under an interception provision. *Id. See also Title III and Admissibility*, *supra* note 19, at 1735 n.161.

173 *See, e.g.*, *McNulty*, 729 F.2d at 1266; United States v. Nelligan, 573 F.2d at 253 (5th Cir. 1978); United States v. Shaffer, 520 F.2d at 1371 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

174 It should be noted that, with regard to the consensual distinction, there is no difference between the interpretation given section 2511 by majority or minority rule courts. *Compare McNulty*, 729 F.2d 1243 *and Sotomayor*, 592 F.2d 1219 (minority rule courts applying consensual distinction) *with* United States v. Horton, 601 F.2d 319 (7th Cir. 1979) *and* United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983)(majority rule courts applying consensual distinction). The following discussion includes consideration of arguments presented by both majority and minority rule courts.

175 18 U.S.C. § 2511(2)(c) (1982 & Supp 1986).

176 *See, e.g.*, United States v. McNulty, 729 F.2d 1243, 1266 (10th Cir. 1984).

Gervasi.[177] In this case, the State's Attorney's office in Chicago monitored a series of conversations between a government informer and an attorney, John Gervasi, over a two-month period.[178] Although done with the consent of a participating undercover agent, the State's Attorney's office decided not to apply for a court order, as required under Illinois' "all-party" consent law.[179] The consensual surveillance produced evidence against Gervasi and a co-defendant of the attempted bribery of a police officer.[180] This evidence, however, was later held inadmissible by the Illinois Supreme Court.[181] Applying Illinois' "all-party" consent law, the state supreme court held that such evidence is inadmissible without either the consent of all of the parties to the conversation or a court order authorizing nonconsensual surveillance.[182]

Unable to use the suppressed evidence in state court, the assistant state's attorneys asked their counterparts in the United States Attorney's office to prosecute the two defendants under the federal consensual standard.[183] Without the suppressed evidence, they said, "the state case against Gervasi and . . . [his co-defendant] was unprovable."[184] The United States Attorney's office agreed and, after four and one-half years of being prosecuted by the State's Attorney's office, the two defendants found themselves in federal court facing the same evidence previously suppressed in state court.[185] On a defense motion to suppress the evidence in federal court, however, the United States District Court for the Northern District of Illinois refused to follow the state "all-party" consent law and held the evidence admissible under subsection 2511(2)(c).[186]

In admitting the evidence, the *Gervasi* court relied heavily on two consensual cases that admitted surveillance evidence under similar circumstances. The first case, *United States v. Nelligan*,[187] in-

177 562 F. Supp. 632 (N.D. Ill. 1983). The Seventh Circuit is a majority rule court. For a minority rule court's rationale for the consensual distinction, see *Sotomayor*, 592 F.2d at 1225.

178 *Gervasi*, 562 F. Supp. at 636.

179 ILL. ANN. STAT., ch. 38, para. 14-2(a) (Smith-Hurd 1979 & Supp. 1988).

180 *Gervasi*, 562 F. Supp. at 634-36.

181 *Id.* at 635.

182 *Id.*

183 *Id.* Meeting in a bar with a federal counterpart, an assistant state's attorney stated that "the reason the *Gervasi* case was sent over to federal court was that the state couldn't get a fair shake . . . from [the presiding judge],' and that "[w]e can try our case over there better than we can in front of [the judge] . . . .' "). *Id.* at 636.

184 *Id.* at 635.

185 *Id.* The state prosecution was dropped three hours before the federal charges were brought.

186 *Id.*

187 573 F.2d 251 (5th Cir. 1978).

volved a Florida detective who, in violation of state law, recorded an incriminating conversation with the defendant to show that the latter was defrauding the telephone company.[188] The United States Court of Appeals for the Fifth Circuit[189] refused to consider the state law in admitting the evidence. Although suggesting that it might be necessary to consider "relevant state law" as part of the federal standard in some cases, the Fifth Circuit stated that such incorporation is clearly ruled out in consensual cases by subsection 2511(2)(c).[190]

The second case cited in *Gervasi* was *United States v. Shaffer*,[191] in which Delaware police violated that state's "all-party" consent rule in gathering evidence against the defendant in an extortion case.[192] The United States Court of Appeals for the Third Circuit rejected the defendant's motion to suppress the evidence under state law. Pointing out that the consensual surveillance is lawful for federal operations, the Third Circuit also warned that "[i]f the states could require federal courts to exclude evidence in federal criminal cases, some convictions would undoubtedly be lost, and the enforcement of congressional policy would be weakened."[193]

Interestingly, the *Gervasi* court, in dicta, did endorse the minority rule, even though the Seventh Circuit itself still ostensibly follows the majority rule.[194] Interpreting subsection 2516(2), the court noted that "[t]he effect of this section is to adopt as a part of federal law the more stringent standards (if any) of the state wiretap law . . . . [so that] evidence . . . obtained in violation of state law' (made federal law by Title III's incorporation provision) . . . is inadmissible in federal court."[195]

The *Gervasi* court, however, followed its endorsement of the minority rule with a critical interpretation of the Act as a whole. That interpretation is often left unstated by minority rule courts in dealing with consensual cases. Although federal courts must apply state standards in cases involving the legality of a court order, the court stated, "[t]his is a statutory protection [only] afforded by Congress

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188 *Id.* at 253.

189 *Nelligan* was handed down before the division of the Fifth Circuit. Florida is now part of the Eleventh Circuit, which is a minority rule circuit.

190 573 F.2d at 254.

191 520 F.2d 1369 (3d Cir. 1975).

192 *Id.* at 1371.

193 *Id.* at 1372. *Cf.* United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984)(applying federal law to illegal state car search so as to avoid loss of conviction, saying that a state officer is already "punished" by the exclusion of evidence in the state criminal trial).

194 *Title III and Admissibility*, *supra* note 19, at 1717 n.14.

195 *Gervasi*, 562 F. Supp. at 650.

to those who come within the terms of the statute."[196] Construing subsection 2511(2)(c), the court concluded that title III is a nonconsensual surveillance statute and its provisions, including the provisions incorporating state laws, relate only to nonconsensual surveillance.[197] "For those who do not come within the terms of Title III—such as the defendants in this case—the added protections afforded by the Congressional adoption of the more stringent state standards do not exist."[198]

The *Gervasi* court concluded that, without an express congressional mandate to extend title III's incorporation provisions to state consensual laws, the application of state standards in these cases would raise serious questions of preemption under the supremacy clause.[199] Such an extension would, in the court's opinion, result in the unconstitutional intrusion of a state legislature into a federal prosecution and would bar "the federal government from effectively prosecuting people for violations of federal law."[200]

Gervasi remains one of the best articulations of the consensual distinction.[201] The narrow interpretation of subsection 2511(2)(c) that confines the incorporation provisions of the Act to nonconsensual standards alone is fundamental to the consensual distinction. Although acknowledging the Act does incorporate state standards through provisions like subsection 2516(2), minority rule courts, such as the *Gervasi* court, construe subsection 2511(2)(c) as affirmatively placing consensual surveillance outside of the operations and privacy protections of the Act.

IV. SUBSECTION 2511(2)(C): FEDERAL REGULATORY STANDARD OR NATIONAL LEGISLATIVE MODEL?

Critical to the minority rule's consensual distinction is the interpretation of subsection 2511(2)(c) as a statutory limitation on the scope of the Act itself and not just another federal standard.[202] As was argued in *Gervasi*, subsection 2511(2)(c) can be construed as

196 *Id.*

197 *Id.* ("Title III is addressed to the interception of wire or oral communications where there has not been one-party consent.").

198 *Id.*

199 *Id.* at 649-50 ("Such an interpretation would raise constitutional questions under Article VI of the United States Constitution, the Supremacy Clause, if a state legislature thus would be able to bar the federal government from effectively prosecuting people for violations of federal law.").

200 *Id.*

201 *See also* United States v. Sotomayor, 592 F.2d 1219, 1226 (2d Cir. 1979); United States v. Mora, 623 F. Supp 354, 358 (D. Mass. 1985).

202 *Id.*

making title III a nonconsensual surveillance statute, entirely divorced from the use or misuse of consensual surveillance.[203] This argument is what was referred to earlier as the national legislative model interpretation.[204] Subsection 2511(2)(c) can be construed either as part of a federal regulatory function or a national legislative model function. The meaning of the consensual provision will differ radically depending on how a court views the provision's function in terms of the Act as a whole. As part of a federal regulatory function, the consensual provision is simply one of the standards governing federal operations. Accordingly, while Congress chose a standard of unlimited use of federally gathered consensual evidence, states would still be entitled to apply their own more stringent standards, as is the case with the Act's nonconsensual standards.

Alternatively, a court can view subsection 2511(2)(c) as part of a national legislative model function. This interpretation construes the provision as shaping the national legislative model that must be incorporated into any state surveillance statute. Although states are entitled to enact more stringent standards, they cannot expand the very scope of the Act itself. Thus, title III is presented by the minority rule courts as a nonconsensual statute that only allows for more stringent state nonconsensual surveillance standards.

This section will look carefully at the statutory support for interpreting subsection 2511(2)(c) as part of a federal regulatory function. A statutory analysis reveals ample evidence that the consensual provision was meant as nothing more than a federal standard subject to more stringent state laws. This Article will argue that a close examination of the Act's legislative history belies any notion that subsection 2511(2)(c) was intended to serve a legislative model function. Also, this Article will show why, even if the Act is unclear as to the correct interpretation of the subsection, courts should presume the applicability of state law. Drawing from cases involving the federal preemption doctrine and other Supreme Court doctrines, this Article will show why this interpretative presumption in favor of state law is solidly grounded in analogous cases of concurrent state and federal regulation.

A. SUBSECTION 2511(2)(C) AND THE STATUTORY SUPPORT FOR EXTENDING THE MINORITY RULE

Minority rule courts generally rely on the supposed plain mean-

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203 *Gervasi*, 562 F. Supp. at 650.

204 *See supra* note 118 and accompanying text.

ing of subsection 2511(2)(c) to support their consensual distinction. The admission of unlawfully gathered state evidence is often dealt with perfunctorily with little more than a citation to subsection 2511(2)(c) and a conclusory sentence regarding its meaning.[205] This approach, however, is clearly inadequate because the fact that it is not unlawful for federal officers to conduct warrantless consensual surveillance does not resolve the question of whether federal courts must look to state law when admitting evidence gathered by state officers. Rather, the primary question is what constitutes the federal law on consensual surveillance and whether, as with the nonconsensual standards, the federal law on consensual surveillance incorporates more stringent state consensual standards.[206]

Some minority rule courts have realized that a simple citation to subsection 2511(2)(c) is insufficient to support the consensual distinction and have attempted to reconcile their incorporation of nonconsensual state provisions with their nonincorporation of consensual state provisions. These courts have stressed subsection 2516(2), the provision heavily relied upon by minority rule courts in refuting the majority rule.[207] As noted above, subsection 2516(2) requires that any state authorization of electronic surveillance be conducted "in conformity with . . . the applicable State statute . . . ."[208] This provision is used by minority rule courts as an "incorporation provision," incorporating state standards into the federal standards applicable in federal court.[209]

In the consensual context, minority rule courts argue that the incorporation of state standards in subsection 2516(2) was not open-ended. Before state standards can be applied in federal courts, these state standards must be "relevant," as well as more stringent.[210] Subsection 2511(2)(c), it is argued, makes consensual standards irrelevant by its authorization of warrantless consensual surveillance. Thus, while more stringent nonconsensual state standards are incorporated by subsection 2516(2), the incorporation

205 *See, e.g.*, United States v. Horton, 601 F.2d 319, 323 (7th Cir. 1979), *cert. denied*, 444 U.S. 937 (1979).

206 *Title III and Admissibility*, *supra* note 19, at 1736 n.162.

207 *See, e.g.*, United States v. McNulty, 729 F.2d 1243, 1259 (10th Cir. 1984); United States v. Sotomayor, 592 F.2d 1219, 1225 (2d Cir. 1979); United States v. Hall, 543 F.2d 1229, 1241 (9th Cir. 1976)(Koelsch, J., dissenting), *cert. denied*, 429 U.S. 1075 (1977); United States v. Curreri, 388 F. Supp. 607, 615-17 (D. Md. 1974). *See also Title III and Admissibility*, *supra* note 19, at 1730.

208 18 U.S.C. § 2516(2) (1982 & Supp. IV 1986). For the text of subsection 2516(2), see *supra* note 154.

209 United States v. Gervasi, 562 F. Supp. 632, 650 (N.D. Ill. 1983).

210 United States v. Nelligan, 573 F.2d 251, 254 (5th Cir. 1978)(the federal statute includes only "relevant" state law in the context of state court authorizations).

policy has "no application to situations [like consensual surveillance] outside the scope of the federal statute."[211]

When the consensual provision is viewed as part of a federal regulatory function, however, subsection 2516(2) and the Act's other incorporation provisions take on a different and a more plausible meaning. The dichotomy drawn by minority rule courts between nonconsensual and consensual surveillance is difficult to devine from the language of the Act itself. Subsection 2511(2)(c) is the only place in the entire Act in which consensual surveillance is mentioned. Although it can be argued that this absence of statutory reference evidences a congressional design to exclude consensual surveillance from the scope of the Act, it is equally possible that the nature of state surveillance was simply never meant to be determinative for purposes of admissibility under the Act. In all of the Act's provisions affecting the admissibility of state evidence, title III concentrates on the legality of the state agent's conduct vis-a-vis the controlling state standards. Under these provisions it is the nature of the officer's conduct, not the nature of the surveillance itself, that is determinative under the Act's exclusionary rule. Critical sections, such as section 2517 and section 2518, are written to mandate adherence by state agents to their own laws in intercepting, disclosing, or using state surveillance evidence. A close examination of these provisions refutes any suggestion that Congress intended the obligation of a state officer to obey state laws to change with the fortuity of one-party consent in a particular surveillance operation.

Title III places particular importance on the legality of the interception conducted by federal and state agents. The criteria for admissibility also appears in subsection 2517(3), which concerns interceptions by private parties.[212] More importantly, the lawful interception criteria is present in section 2518, which is the Act's exclusionary provision. In section 2518, Congress made it quite clear that evidence "unlawfully intercepted" must be suppressed.[213] It is interesting to note that the unlawful interception provision in section 2518 is only one of the three circumstances requiring suppression. The other two circumstances concern interceptions made under an invalid court order[214] and interceptions "not made in conformity with the order of authorization or approval."[215] Read with these two latter provisions, the unlawful interception provision ap-

211 *Gervasi*, 562 F. Supp. at 650.
212 *See supra* note 139 and accompanying text.
213 18 U.S.C. § 2518(10)(a)(i) (1982).
214 *Id.*
215 *Id.*

pears as something of a catch-all rule mandating the suppression of evidence that, while gathered under a valid court order and in conformity with that court order, is nevertheless unlawful under the controlling law. This would indeed be the case with consensual surveillance and, while it cannot be shown that this first provision was written to include consensual surveillance, the general suppression mandate belies the strict interpretations put on the Act by the minority rule courts.

Another criteria for admissibility that is conduct-related is the requirement of proper use and disclosure. Subsections 2517(1) and (2) govern the use and disclosure of surveillance evidence by state and federal agents.[216] These provisions allow the disclosure of surveillance evidence only when "such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure."[217] The use and disclosure provisions specifically target the conduct of the agent and the legality of that conduct under the controlling law. The intent of the provisions is clear: to insure the accountability of federal and state officers to the standards that govern them. The nature of the surveillance is irrelevant to this question because the violation of a consensual provision, rather than a nonconsensual provision, will not make the conduct of a state agent any more proper under state law.[218]

Like subsection 2516(2) and section 2518, the use and disclosure provisions in section 2517 are used by minority rule courts to support the application of state nonconsensual standards in federal court.[219] As one minority rule court noted, "[b]ecause the scope of a state officer's official duties is defined by state, not federal, law, Title III incorporates a state's rules on the use of wiretap information by its own officers."[220] To ignore state law in judging the proper conduct of state officers, it is argued, would be "to obliterate the more restrictive rules of conduct which some states impose on

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216 *Id.* at §§ 2517(1) & (2). *See supra* note 139 for the text of § 2517(1) and (2).

217 *Id.*

218 It is interesting to note the importance placed by minority rule courts on deterring police misconduct in their argument against the majority rule. *See, e.g.*, United States v. Sotomayor, 592 F.2d 1219, 1225 (2d Cir. 1979), *cert. denied*, 442 U.S. 919 (1979)(supporting the minority rule rather than "encourag[ing] state and federal law enforcement officers to by-pass state law and to engage in federal forum-shopping of tainted evidence"); United States v. Hall, 543 F.2d 1229, 1237, 1244-45 (9th Cir. 1976)(Koelsch, J., dissenting)(denouncing the majority rule as endorsing police abuse and forum shopping).

219 *See, e.g., Sotomayor*, 592 F.2d at 1225-26 n.13; United States v. Marion, 535 F.2d 697, 702 (2d Cir. 1976).

220 *Hall*, 543 F.2d at 1239 (Koelsch, J., dissenting).

their own law enforcement officers . . . ."[221] Yet, as persuasive as this argument is in the nonconsensual context, minority rule courts have thus far refrained from applying it in consensual cases.[222] Nor have minority rule courts explained how provisions requiring adherence by state officers to state rules of conduct would be any less compromised by a violation involving a consensual, as opposed to a nonconsensual, standard.

Although neglected by minority rule courts in consensual cases, these provisions offer strong support for the application of more stringent state standards regardless of their consensual or nonconsensual character. The statutory inconsistencies in the consensual distinction, however, are only part of the problem for minority rule courts. The question remains why Congress, after granting great discretion to states to enact more restrictive surveillance legislation, would draw such a distinction in the first place. It would seem likely that the exclusion of a major area of surveillance from a national surveillance statute would be accompanied by some clear rationale or explanation. This is particularly true when the exclusion results in a significant loss of privacy protections under an Act in which the protection of privacy was an overriding congressional concern.[223] Not surprisingly, an examination of the Act's legislative history indicates a congressional intent to simply establish a federal standard subject generally to more stringent state standards—consensual or nonconsensual.

A brief examination of title III's background and legislative history offers further evidence that Congress intended subsection

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221 *Id.*

222 *See, e.g.*, United States v. McNulty, 729 F.2d 1243 (10th Cir. 1984); United States v. Sotomayor, 592 F.2d 1219 (2d Cir. 1979).

223 This interpretation also draws into question the significance placed on the importance of federal participation in joint state-federal surveillance activities. A number of courts circumvent the issue of the incorporation of state law by noting that surveillance conducted with federal cooperation should be governed by federal, not state, law. *See, e.g.*, United States v. Jarabek, 726 F.2d 889, 899 (1st Cir. 1984), and United States v. Eyerman, 660 F. Supp. 775, 780 (S.D.N.Y. 1987)(rejecting the application of the minority rule to a joint state-federal operation). This issue has presented itself in another form in state court where federal agents have been accused of gathering surveillance evidence below state standards and then handing over the evidence to their state counterparts for use in state court. *See, e.g.*, State v. Williams, 94 Wash. 2d 531, 617 P.2d 1012 (1980); State v. O'Neill, 103 Wash. 2d 853, 700 P.2d 711 (1985); Basham v. Commonwealth, 675 S.W.2d 376 (Ky. 1984); People v. Fidler, 72 Ill. App. 3d 924, 391 N.E.2d 210 (1979). In *O'Neill*, a dissenting judge strongly objected to what he felt was the evisceration of state privacy laws under the guise of "[f]ree and open cooperation." "[T]hat kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom." *Id.* at 728, 103 Wash. 2d at 884, (Dore, J., dissenting)(quoting Elkins v. United States, 364 U.S. 206, 221-22 (1960)).

2511(2)(c) to have a federal regulatory, rather than a legislative model, function. As stated above, the consensual distinction originated in a series of Supreme Court cases stretching back to *On Lee v. United States*.[224] In drafting title III, Congress sought to codify the constitutional guidelines established previously by the Court.[225] In the nonconsensual area, this meant codifying the holdings and dicta of cases like *Katz* and *Berger*, which supplied the foundation for the Act's warrant procedures and privacy protections. In codifying the Court's consensual holdings, Congress looked to cases such as *On Lee* and *Rathbun*. As noted above, these cases left few, if any, constitutional barriers to consensual surveillance.[226] The Court had repeatedly rejected constitutional challenges to warrantless consensual surveillance and, in *Katz* and *Berger*, had established a fourth amendment test that all but ruled out challenges to consensual surveillance and unreasonable searches.

The absolute language of subsection 2511(2)(c), therefore, was not the manifestation of some overarching pro-consensual policy of Congress, but was rather the simple codification of the law at that time. The Act's legislative history supports this conclusion, referring directly to subsection 2511(2)(c) as largely a reflection of existing law.[227] Thus, title III's consensual standards, like its nonconsensual standards, were the result of the minimal protections articulated by the Supreme Court. In the case of consensual surveillance, those protections were few and did not include a warrant procedure. In codifying this standing law, therefore, subsection 2511(2)(c) was written in absolutist terms: "It shall not be unlawful under this chapter . . . ."[228] Given the fact that the federal nonconsensual standards were the product of this same process, the codification of the Court's minimum consensual protections should not foreclose more stringent state laws or the application of those laws in federal court.

Just as the origin of the consensual distinction supports the federal regulatory interpretation, other parts of the Act's legislative history do not support the argument that subsection 2511(2)(c) was

224 343 U.S. 747 (1952). *See supra* notes 65-89 and accompanying text.

225 The Senate report on the Act cites three Supreme Court cases as part of its codification of "existing law": Lopez v. United States, 373 U.S. 427 (1963); Rathbun v. United States, 355 U.S. 107 (1957); On Lee v. United States, 343 U.S. 747 (1952). S. REP. No. 1097, *supra* note 13, at 94, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2183-84.

226 *See supra* notes 77-88 and accompanying text.

227 S. REP. No. 1097, *supra* note 13, at 94 ("[This provision] largely reflects existing law.").

228 18 U.S.C. § 2511(2)(c) (1982 & Supp. IV 1986).

meant to limit the Act's incorporation provisions to more stringent state nonconsensual standards. The Senate report that accompanied the Act's final passage expressly authorized states to enact their own surveillance standards.[229] Congress, the report states, "envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation."[230] This authorization of state experimentation became part of a compromise packet that ultimately brought about the Act's passage in the face of opposition from both sides.[231] From its inception, title III was besieged by detractors claiming, on the one hand, that it would unnecessarily restrict the work of police and prosecutors in combatting organized crime and, on the other hand, that it would eviscerate fundamental individual privacy rights. The Act's passage, as stated previously, was the product of a careful compromise between these "law and order advocates" and "civil libertarians."[232] The policy of state experimentation insured that states more concerned with mob-fighting could operate close to the Court's minimal guidelines while other states more concerned with individual privacy could radically limit, and even ban entirely, the use of electronic surveillance.

This state experimentation policy is based in large part on the view of title III as containing standards that are subject to change. Civil libertarians such as Senator Bayh supported title III "reluctantly" while calling for continued efforts to guarantee "that organized crime and not the individual citizen will become the target of this [Act]."[233] Under the proposed Act, these efforts were to be carried out at the state, as well as the federal, level. It would seem strange for Congress to authorize such state experimentation but then intentionally carve out an entire area of surveillance that many feel is more, not less, troublesome for individual privacy. Moreover, one attractive aspect of the policy of state experimentation for civil libertarians was the possibility that states traditionally opposed to all electronic surveillance could still ban it entirely. Yet, under the minority rule's legislative model interpretations, subsection 2511(2)(c) blocks a federal court from giving any weight or deference to state consensual laws and thereby significantly limits the power of these states to execute anti-surveillance policies. A restriction of this sort

229 S. REP. No. 1097, *supra* note 13, at 98, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2187.

230 *Id.*

231 *Title III and Admissibility*, *supra* note 19, at 1732-33.

232 *Id.*

233 S. REP. No. 1097, *supra* note 13, at 187, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2246 (statement of Sen. Bayh).

seriously undermines the very premise of state experimentation: that states could go as far as they dared in limiting the use of electronic surveillance.

An examination of title III's statutory language and legislative history, therefore, produces mixed results for a court wrestling with the consensual question. First, critical sections of the Act seem to presume the applicability of state law without reference to the nature of the surveillance. Second, the background of the consensual distinction indicates that subsection 2511(2)(c) was the result of the simple codification of the law at that time and not a reflection of any policy to limit the scope of the Act. Third, the legislative history of the Act demonstrates a congressional intent to allow for state experimentation, which was a critical element in the final compromise package that led to the passage of the Act. Finally, however, it is clear that neither the statutory language nor the legislative history explicitly rule out the minority rule's consensual distinction. Although the above statutory and historical sources strongly support the interpretation of subsection 2511(2)(c) as serving a federal regulatory function, neither the Act nor its history affirmatively rule out the consensual distinction. The following section, therefore, considers how courts should resolve the consensual question in the absence of unambiguous statutory language or legislative history.

B. A QUESTION OF DEFERENCE: RESOLVING STATUTORY AMBIGUITY UNDER TITLE III

In arguing against the majority rule, minority rule courts reject the requirement of majority rule courts that defendants must show a clear statutory mandate before state nonconsensual standards can be applied in federal court.[234] While recognizing that title III does not expressly authorize the application of state standards, minority rule courts argue that, before state control over state officers is severed in federal court, it is incumbent upon the federal prosecutors to show an intent by Congress to supersede more stringent state laws.[235] It would be illogical, one judge has noted, to "infer such intent without a clearer expression by Congress."[236]

The deference shown to state standards by minority rule courts in the nonconsensual area, however, is distinctly absent in their

234 *See, e.g.*, United States v. Hall, 543 F.2d 1229, 1239 (9th Cir. 1976)(Koelsch, J., dissenting)("Had Congress intended by Title III to obliterate the more restrictive rules of conduct which some states impose on their own . . . officers . . . it certainly could have said so more clearly.").

235 *Id.*

236 *Id.*

treatment of consensual cases. In these latter cases, minority rule courts infer a congressional intent to divorce all consensual surveillance operations from federal regulation solely on the basis of subsection 2511(2)(c).[237] While this inference runs counter to the statutory language and legislative history discussed above, minority rule courts rarely measure the strength of their strict interpretation of the consensual provision against the proper degree of deference that should be accorded state law. Nevertheless, assuming that the Act's statutory language and history are not persuasive to a court, it is necessary to determine the extent to which a federal court should presume the validity of a state law, absent a clear statutory mandate to the contrary. To answer this question, it is necessary to look to other areas in which the federal courts have had to deal with such state and federal conflict.

There is no federal rule of statutory interpretation that applies directly to the circumstances in these cases, namely, the interpretation of an ambiguous federal statute as to the application of state exclusionary standards in federal court.[238] The federal courts, however, have dealt with numerous areas involving conflicting concurrent state and federal regulation. Before deciding the proper deference entitled state standards, courts can draw from these analogous areas in gauging the degree of favorable presumption entitled to more stringent state standards under title III.

1. Subsection 2511(2)(c) and the Federal Preemption Doctrine

Since *Gibbons v. Ogden*,[239] federal courts have applied the federal preemption doctrine in cases involving conflicting state and federal regulations. Derived from the supremacy clause of the Constitution,[240] the federal preemption doctrine applies whenever a state law regulates conduct in a way contrary to federal law or, alternatively, regulates in an area where federal law has exclusive jurisdiction.[241] Pursuant to the supremacy clause, the doctrine demands

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237 *See, e.g.*, United States v. McNulty, 729 F.2d 1243 (10th Cir. 1984); United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978); United States v. Shaffer, 520 F.2d 1369 (3d Cir. 1975); United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983).

238 For arguments supporting the use of the federal preemption doctrine by analogy in nonconsensual cases, see *Title III and Admissibility*, *supra* note 19, at 1737-41.

239 22 U.S. 1, 189 (1824)(holding that Congress may regulate all "commerce which concerns more states than one").

240 The supremacy clause provides that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. CONST. art. VI, cl. 2.

241 Head v. New Mexico Board, 374 U.S. 424, 430 (1963).

that, when there is a conflict between state and federal law, state law must give way to federal law.[242]

Federal preemption is periodically discussed in the title III context in both state and federal courts.[243] In state court, the federal preemption doctrine is often applied to resolve questions concerning the latitude of state regulation allowed by title III.[244] Although federal courts have also considered the doctrine directly in resolving federal questions,[245] these courts generally use federal preemption to mean simply the suggested subordination of a state law by a conflicting federal law.[246] While federal preemption *per se* is not involved in most federal cases, it is natural to look to past federal preemption cases in resolving the question of applying more stringent state surveillance standards in federal court. In the absence of a directly applicable doctrine of statutory interpretation, it is possible to draw upon federal preemption tests by analogy to gain some notion of the proper degree of deference generally accorded conflicting state regulations. Moreover, as is shown below, the federal preemption test is critical when one considers the possible interpretations used to support the minority rule's consensual distinction.

The nonincorporation of state consensual standards is in some ways commensurate with traditional federal preemption situations

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242 *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941).

243 *See generally Title III and Admissibiity, supra* note 19, at 1737-41.

244 The questions in such cases often involve federally derived evidence and arguments that state laws are preempted to the extent that they would exclude such evidence. *See, e.g.*, State v. O'Neill, 103 Wash. 2d 853, 700 P.2d 711 (1985); Basham v. Commonwealth, 675 S.W.2d 376 (Ky. 1984); State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975); Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975); People v. Warner, 65 Mich. App. 267, 237 N.W.2d 284 (1975); People v. Conklin, 12 Cal. 3d 259, 522 P.2d 1049, 114 Cal. Rptr. 241, (1974) *dismissed for want of substantial federal question*, 419 U.S. 1064 (1974). A couple of state courts have raised federalism concerns over the exclusion of evidence in state court under section 2515. *See e.g.*, In re Marriage of Lopp, 268 Ind. 690, 704, 378 N.E.2d 414, 421 (1978), *cert. denied*, 439 U.S. 1116 (1979); Halpin v. Superior Court of San Bernardino County, 6 Cal.3d 885, 896, 495 P.2d. 1295, 1305, 101 Cal. Rptr. 375, 384, *cert. denied*, 409 U.S. 982 (1972). For a discussion of these cases and general tenth amendment concerns in title III, see Michigan v. Meese, 666 F. Supp. 974 (E.D. Mich. 1987).

245 *See, e.g.*, United States v. Gordon, 712 F.2d 111 (5th Cir. 1983); Ansley v. Stynchcombe, 480 F.2d 437 (5th Cir. 1973); United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983); United States v. Proctor, 526 F. Supp. 1198 (D. Haw. 1981); Navarra v. Bache Halsey Stuart Shields, 510 F. Supp. 831 (E.D. Mich. 1981). The preemption question is sometimes framed in terms of state law preempting federal law in federal court. *See, e.g.*, United States v. Hall, 543 F.2d 1229, 1232 (9th Cir. 1976) ("The state law cannot preempt the federal unless the federal act itself sanctions the application of state standards.").

246 *See, e.g.*, United States v. Hall, 543 F.2d at 1239 n.6, 1240 n.7 (Koelsch, J., dissenting); United States v. Van Horn, 579 F. Supp. 804, 810 (D. Neb. 1984).

in which federal law limits or bars state regulatory power in an area. In the nonconsensual cases, minority rule courts argue that, when state surveillance evidence is involved, a state exclusionary rule is controlling in both federal and state court. Minority rule courts, however, limit that area of state regulation so that state exclusionary rules are only applicable in federal court when they concern nonconsensual surveillance. This conflict between federal and state standards, leading to the limitation of the permitted area of state regulation, is easily analogized to federal preemption cases. The minority rule's consensual distinction can be viewed as preempting part of the state surveillance statute by limiting the reach of the state exclusionary rule as to state-derived evidence. Although this comparison is by no means complete, the situations resulting from the minority rule consensual distinction bear strong resemblance, from the state perspective, to more traditional federal preemption cases.

A brief examination of federal preemption cases evidences a strong presumption by the Supreme Court in favor of concurrent state regulations. The Court has traditionally refused to invalidate concurrent state standards without clear proof that these standards violate the federal regulation or frustrate an intention by Congress "to occupy the entire field" of regulation.[247] In *Head v. New Mexico Board*, the Court developed a two-part test for determining preemption questions.[248] The *Head* test requires federal courts to presume the validity of a state regulation unless there is either "evidence of a congressional design to preempt the field. . . . " or "such actual conflict between the two schemes of regulation that both cannot stand in the same area . . . ."[249] Clearly, in terms of title III as a whole, federal preemption cannot be found under either of these

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247 People v. Conklin, 12 Cal. 3d 259, 265-67, 522 P.2d 1049, 1052, 114 Cal. Rptr. 241, 244-46, (1974) *dismissed for want of substantial federal question*, 416 U.S. 1064 (1974).

248 372 U.S. 424, 430 (1963). *See also* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)("[F]ederal regulation of a field . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.").

The *Head* test is useful for these purposes because of its two-part structure, yet courts often simply state the test as one of congressional intent. *See, e.g.*, Sims v. Dept. of Highway Safety & Motor Vehicles, 832 F.2d 1558, 1565 (11th Cir. 1987). Congressional intent need not be expressly stated but rather can be "implicitly contained in [a statute's] structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). *See also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

249 *Head*, 374 U.S. at 430 (quoting *Florida Avocado Growers*, 373 U.S. at 141). The two-prong *Head* test originally posed the question of "actual conflict" first, but courts generally reverse the prongs. *Title III and Admissibility*, *supra* note 19, at 1738-39.

two steps.[250] Both the Act's provisions and its legislative history expressly state that concurrent state surveillance regulation was envisioned by Congress in enacting the Act.[251]

However, minority rule courts do not claim that all state statutes are preempted under title III. Rather, these courts maintain that one provision of the state statutes—the "all-party" consent rule—is inapplicable in federal court.[252] Applied to the narrower conflict between state and federal consensual provisions, only the second step of the *Head* test remains relevant.[253] Because it is clear that a state can regulate in the area and that Congress did not intend to occupy the entire regulatory field, a court must ask whether a state "all-party" consent rule is in "actual conflict" with the federal law. In answering this question, however, one court stressed that "[p]reemption is not to be lightly inferred where Congress has allowed for concurrent State regulation as long as the State statute is substantially similar in design and effect to the Federal enactment or where the State statute is, according to congressional directive, more restrictive."[254] The thrust of federal preemption cases is to assume a congressional intent for the coexistence of concurrent state and federal statutes.[255] While a statute need not expressly mandate preemption, the Court has required evidence of congressional intent for preemption or in the very least a showing that state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress."[256]

The minority rule's consensual distinction lacks any statutory basis for its suggested statutory conflict beyond a strict interpretation of subsection 2511(2)(c). No legislative history is presented to support this distinction, nor are there policy reasons for why Congress would have acted in this way. Moreover, minority rule courts insist on the presence of a conflict without considering the strong

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250 *But see Title III and Admissibility*, *supra* note 19, at 1738 (applying *Head* by analogy to nonconsensual cases).

251 *Id.*

252 *See, e.g.*, United States v. McNulty, 729 F.2d 1243, 1266 (10th Cir. 1984).

253 *Title III and Admissibility*, *supra* note 19, at 1739 (Title III's plain meaning and legislative history, refute any suggestion that "Congress intended to preempt the field—that is, whether it intended to occupy an entire area of law to the exclusion of all state regulation.").

254 Commonwealth v. Vitello, 367 Mass. 224, 250, 327 N.E.2d 819, 835 (1975)(citing Askew v. Am. Waterways Operators, Inc., 411 U.S. 325 (1973)).

255 *See, e.g.*, Toll v. Moreno, 458 U.S. 1 (1982); Jones v. Rath Packing Co., 430 U.S. 519 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

256 Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

policy and statutory arguments to the contrary.[257]

As noted above,[258] it is easy to argue that no conflict between the two regulations exists when the consensual provision is viewed from a federal regulatory perspective. Because the state provisions do not attempt to control the conduct of federal agents or their operations in the state, there is no conflict between the two statutes beyond the conflict present in the nonconsensual area, namely the use of unlawfully gathered state evidence. It can further be asserted that no conflict is even possible since, as was argued by the minority rule courts in the nonconsensual context, more stringent standards are part of the federal law.[259]

In order to supersede state surveillance standards under the *Head* test, minority rule courts must accept, largely by fiat, the legislative model argument. They must conclude that, without expressly stating, Congress intended title III to be a regulation of nonconsensual surveillance and never envisioned more stringent consensual standards. Yet, this strict interpretation ignores the support in the Act's language and legislative history discussed above. More importantly, this strict interpretation presumes the inapplicability of state law absent a clear congressional mandate to the contrary. As the *Head* test illustrates, the Supreme Court has always given the favorable presumption to the states in areas of conflict. This presumption is traditionally even greater in areas of "historic police powers . . . ."[260] As the Court stated in *Florida Avocado & Lime Growers v. Paul*, "federal regulation of a field . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[261]

Thus, although federal preemption is not directly involved in these consensual cases, the federal preemption tests and cases evidence a strong presumption generally accorded to conflicting state

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257 Specifically, minority rule courts refuse to consider state consensual surveillance standards as part of the federal standards applicable in federal court.

258 *See supra* notes 202-33 and accompanying text.

259 *See, e.g.*, United States v. Hall, 543 F.2d 1229, 1239-40 (9th Cir. 1976)(Koelsch, J., dissenting)("I discern no conflict between the [state and federal] . . . statutes . . . . To the contrary, I suggest that Congress sought to incorporate into Title III state-imposed limitations on the conduct of state officers . . . .").

260 Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 146 (1963)(quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))("The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the 'historic police powers of the States,' is not to decree such a federal displacement, 'unless that was the clear and manifest purpose of Congress . . . .' ").

261 *Florida Avocado Growers*, 373 U.S. at 142.

statutes. In cases involving concurrent state and federal statutes, the Court has traditionally ruled in favor of statutory coexistence absent a clear manifestation of congressional intent to the contrary. Regardless of how close one feels the analogy with the federal preemption cases is, the adoption of the minority rule requires the collateral adoption of a presumption against statutory coexistence. The minority rule's interpretation of the consensual provision would limit state exclusionary rules in a significant and possibly fatal way.[262] Moreover, this interpretation runs counter to a plausible interpretation of the provision that makes an "actual conflict" impossible. As the following section shows, the minority rule's consensual distinction may raise direct, not analogous, federal preemption problems when a court adopts its legislative model argument.

2. *The Minority Rule's Consensual Distinction under the Federal Preemption and* Di Re *Doctrines*

The previous section considered the consensual provision as analogous to a federal preemption question and showed how concurrent state regulation is generally given a high presumption of validity by the Court. This section looks at the implications of ignoring this presumption and the earlier statutory, legislative, and historical support in favor of the minority rule's consensual distinction. Assuming all of the preceding material is unconvincing, the alternative solution presented by the minority rule courts must be examined carefully. Under any such examination, it becomes clear that the adoption of the minority rule's consensual distinction is untenable under current Supreme Court doctrines.

The minority rule's consensual distinction is based on a critical interpretation of the function of subsection 2511(2)(c) in title III's regulatory scheme as a legislative model function. This means that the subsection was a limit of the Act's scope and not just another federal standard.[263] A number of courts have stated that the subsection essentially divorces title III from consensual surveillance entirely, thus making the Act a regulation of nonconsensual surveillance alone.[264] Most courts, however, do not define precisely how they are using subsection 2511(2)(c). Although the possibility that the consensual provision is just another federal standard sub-

[262] *Hall*, 543 F.2d at 1240 (Koelsch, J., dissenting)(to admit evidence excluded by state courts "is to find in Title III a congressional intent to encourage state officers to break faith with the state and its citizens and violate clearly expressed state policy.").

[263] *See supra* note 118 and accompanying text.

[264] *See, e.g.*, United States v. Keen, 508 F.2d 986, 988 (9th Cir. 1974); United States v. Gervasi, 562 F. Supp. 632, 650 (N.D. Ill. 1983).

ject to more stringent state standards has been clearly ruled out, minority rule courts leave its specific function within the Act largely unexplained.[265]

There are two possible ways that subsection 2511(2)(c) can be used under the legislative model approach. First, the consensual provision can be viewed as essentially legitimating all warrantless consensual surveillance. Thus, minority rule courts could argue that Congress intended title III to deal with consensual surveillance but only to affirmatively make all warrantless consensual surveillance lawful under the Act. Second, the consensual provision could be viewed, as is the case with a number of courts, as limiting the scope of the Act and as manifesting a congressional intent to limit the Act's provision only to nonconsensual surveillance.[266] Thus, the consensual surveillance portion could be read as essentially stating that "nothing in this Act applies to consensual surveillance."

The following sections deal with both of these possibilities and take them to their logical conclusions. It will be shown that both alternative bases for the legislative model approach run afoul of either the federal preemption doctrine or the other Supreme Court doctrines. Even if the foregoing statutory and legislative historical arguments for extending the minority rule are not conclusive, the minority rule's consensual distinction does not present a plausible alternative interpretation of subsection 2511(2)(c) that would warrant exclusion from the minority rule.

i. Subsection 2511(2)(c) as a Legitimation of Consensual Surveillance

In enacting title III, it can be argued that Congress intended to regulate both consensual and nonconsensual electronic surveillance. The consensual side of the Act, however, was intended to be brief but to the point. Subsection 2511(2)(c), under this approach, was meant to legitimate all warrantless consensual surveillance and affirmatively endorse its use by federal and state agents.[267] The consensual provision, therefore, becomes a critical qualification of the area susceptible to more stringent state standards allowing such standards in the nonconsensual area while preserving all consensual surveillance from any state regulation.

Placed in the federal preemption context, the legitimation argu-

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265 *See supra* note 207 and accompanying text.

266 *See supra* note 264 and accompanying text.

267 While courts are almost uniformly silent on the basis for the consensual distinction, those few courts that have given reasons for the distinction seem to favor a limitation rather than a legitimation rationale. *See infra* notes 273-87 and accompanying text.

ment suggests that, in enacting title III, Congress occupied the entire field of electronic surveillance and thereby displaced all state regulations. Then, through its incorporation provisions, Congress returned to the states the authority to legislate in the field so long as their resulting regulations were as stringent as the federal regulations.[268] However, Congress limited this authorization in subsection 2511(2)(c) by barring states from making warrantless consensual surveillance unlawful. Thus, Congress chose to return regulatory control over some, but not all, uses of electronic surveillance.

Viewed as a legitimation of consensual surveillance, therefore, subsection 2511(2)(c) works to limit the area within which states can legislate under the Act. This is different from the other interpretation of the consensual distinction which views subsection 2511(2)(c) as a limitation on the scope of the Act itself. Under the legitimation approach, the consensual provision amounts to a congressional retention of the area of consensual surveillance from state legislation.

The legitimation notion, however, leads courts into a difficult federal preemption problem. If Congress sought to retain full control over consensual surveillance by insulating consensual surveillance from more stringent state standards, then it is not clear where states get the authority to pass "all-party" consent laws in the first place. The only authority for states to legislate in the area of electronic surveillance is title III. Thus, if Congress restricts a state's regulatory authority to nonconsensual surveillance alone, then Congress has continued to occupy the entire field of consensual surveillance.

Under the *Head* test, in order for there to be coexisting concurrent federal and state regulations, there must be no evidence of "a congressional design to preempt the entire field."[269] Title III was intended as a single, unitary national regulation of the entire field of electronic surveillance.[270] In enacting the Act, Congress essentially occupied the entire field of electronic surveillance and then returned parts of the field to limited state control. Yet, viewed from the legitimation approach, Congress placed consensual surveillance outside the provisions of the Act so as to insure warrantless consensual surveillance on both the state and federal levels. If this were

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268 S. REP. No. 1097, *supra* note 13, at 98, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2187.

269 Head v. New Mexico Board, 374 U.S. 424, 430 (1963)(quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 141 (1963)).

270 S. REP. No. 1097, *supra* note 13, at 67, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2187.

the case, however, Congress affirmatively retained control over consensual surveillance and thus continued to occupy the field of consensual surveillance.

If Congress did retain exclusive control over consensual surveillance, then states have no authority to pass "all-party" rules or, for that matter, any consensual surveillance provision.[271] This authority only comes from title III which, under the legitimation approach, was meant to legitimate all consensual surveillance by placing it outside of the Act's provisions, including those provisions authorizing state standards.

The legitimation interpretation of the minority rule's consensual distinction would, therefore, raise federal preemption problems. Federal courts adopting this view of the function of subsection 2511(2)(c) should not be concerned with whether, like state nonconsensual standards, state consensual standards are applicable in federal court. Rather, federal courts should ask where the states get the authority to pass *any* state consensual standards. If Congress sought to legitimate warrantless consensual surveillance and separate it from the Act's provisions, then Congress never authorized state consensual regulation. Thus, the field of consensual surveillance remains in the exclusive control of the federal government, and any state consensual standards would be preempted in *both* state and federal court.[272]

ii. Subsection 2511(2)(c) as a Limitation on the Entire Act

If the basis for the minority rule's consensual distinction is not the interpretation of subsection 2511(2)(c) as a legitimation of all warrantless consensual surveillance, then the subsection must be read as a limitation on the Act itself. Thus, rather than legalizing all warrantless consensual surveillance by preempting all state consensual laws, subsection 2511(2)(c) can be viewed as limiting the entire Act solely to nonconsensual surveillance by expressly removing warrantless consensual surveillance from the Act.[273] As will be shown,

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271 This is not to suggest that federal preemption of state consensual laws would be without controversy. Certainly, these cases present a circumstance far afield from traditional federal preemption cases involving concurrent economic or environmental regulation. By prohibiting any more stringent consensual state standards, Congress would be taking a highly invasive role in state police functions. Nevertheless, while strong arguments against federal preemption could be made, the Supreme Court has broadly intercepted Congress' constitutional powers over areas of traditional state functions. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

272 Pennsylvania v. Nelson, 350 U.S. 497, 501-02 (1956).

273 *See, e.g.*, United States v. Nelligan, 573 F.2d 251, 254 (5th Cir. 1978); United States

however, this interpretation also leads minority rule courts into serious logical problems.

Earlier in this Article, it was shown that only a few minority rule courts have attempted to explain their basis for distinguishing between consensual and nonconsensual surveillance.[274] Thus, it is not clear in many of these cases whether the legislative model approach is based on the notion of the consensual provision as either a legitimation of consensual surveillance or as a limitation on the Act.[275]

In *United States v. Gervasi*, however, the court expressly adopted the limitation notion of subsection 2511(2)(c) as the basis of the consensual distinction.[276] After recognizing that more stringent state standards are applicable in federal courts in cases involving state-derived nonconsensual evidence, the court refused to suppress the illegally gathered state consensual evidence.[277] The *Gervasi* court stated that "[t]his is a statutory protection afforded by Congress to those who come within the terms of the statute. Title III is addressed to the interception of wire or oral communications where there has not been one-party consent."[278] Thus, the court construed subsection 2511(2)(c) as codifying the Act's provisions to nonconsensual surveillance alone and entirely divorced from the area of consensual surveillance.

The limitation interpretation presents the inverse of the legitimation problem. Rather than facing the preemption problems of a field entirely occupied by federal regulation, the minority rule courts adopting the limitation interpretation must decide consensual cases in the absence of any applicable federal statute. Under this approach, title III is a regulation of only nonconsensual surveillance, which, in turn, means that Congress has never passed a regulation of consensual surveillance. Presented with evidence gathered unlawfully under a state "all-party" consent law, therefore, a federal court must choose between following the state law or simply introducing the evidence in the absence of any federal law to the contrary.

In *United States v. Keen*, the United States Court of Appeals for the Ninth Circuit faced this question in determining the admissibil-

v. McNulty, 729 F.2d 1243, 1266 (10th Cir. 1984); United States v. Gervasi, 562 F. Supp. 632, 648 (N.D. Ill. 1983).

274 *See supra* notes 205-11 and accompanying text.

275 *See e.g.*, *McNulty*, 729 F.2d 1243; *cf.* United States v. Little, 753 F.2d 1420, 1435 (9th Cir. 1984)(majority rule court).

276 562 F. Supp. at 650.

277 *Id.*

278 *Id.*

ity of evidence gathered unlawfully by state officers under Washington's "all-party" consent law.[279] The federal prosecutors in *Keen* argued that the state law was entirely irrelevant in federal court because subsection 2511(2)(c) expressly allows warrantless consensual surveillance.[280] Adopting a limitation interpretation of the provision, the court disagreed with the government's legitimation notion of the consensual provision. "Section 2511(2)(c)," the *Keen* court argued, "is worded as an exception to that section's general prohibition of judicially non-authorized wire taps, not as a positive authorization of such taps."[281] However, the court also correctly noted that interpreting subsection 2511(2)(c) as a limitation on the Act does not solve the question of admissibility. By construing the consensual provision in this way, the court noted, title III is interpreted as simply leaving all prior state consensual laws intact.[282] "It is not clear, therefore, that Congress showed an intention to displace more rigorous requirements found in state laws."[283]

Although the *Keen* court ultimately upheld the admission of the unlawfully gathered consensual evidence on other grounds,[284] the legitimate role of a federal court in such cases is unclear. Nevertheless, there is precedent for applying state law in federal court in the absence of an applicable federal statute. The Supreme Court, for example, has repeatedly upheld the application of state law to determine the validity of warrantless arrests made by state officers in situations in which there is no applicable federal law. In *United States v. Di Re*, the Supreme Court considered this issue in a case involving a warrantless arrest conducted by state agents in violation of New York law.[285] In defending the validity of the defendant's arrest, federal prosecutors argued that "an arrest without a warrant for a federal crime is a matter of federal law to be determined by a uniform rule applicable in all federal courts."[286] The Court, however, ruled in favor of applying the state law and invalidated the arrest. "[I]n the absence of an applicable federal statute," the Court stated, "the law of the state where an arrest without warrant takes place deter-

279 508 F.2d 986 (9th Cir. 1974)(majority rule court). *See also* United States v. Proctor, 526 F. Supp. 1198, 1201 (D. Haw. 1981).

280 *Keen*, 508 F.2d at 988.

281 *Id.*

282 *Id.*

283 *Id.*

284 *Id.* at 989 ("Where no constitutional right has been abused, the admissibility . . . is governed by common law principles, not by local statutes.").

285 332 U.S. 581 (1948).

286 *Id.* at 589.

mines its validity."[287]

The *Di Re* doctrine establishes a two-part test for determining the validity of warrantless state arrests in the absence of a controlling federal statute.[288] First, the arrest must be valid under the applicable state law. Second, the arrest must also comply with federal constitutional standards.

Courts sometimes invoke the *Di Re* test in cases like *United States v. Hall*,[289] in which state officers used illegally obtained surveillance evidence to sustain a finding of probable cause.[290] In *Hall*, after arresting the defendant and seizing evidence, state police transferred the entire case to federal court. In dissenting from the Ninth Circuit's majority rule decision in *Hall*, Judge Koelsch strongly endorsed the use of *Di Re* in such probable cause cases.[291] Judge Koelsch argued that allowing state agents to use prohibited surveillance evidence to reach probable cause eviscerates a state's authority both to pass more stringent state laws and to control its own police officials. Without the state agents' violation of the state law, probable cause would never have been shown.[292] "This is what *Di Re* is about. . . ." Judge Koelsch stated, and "[i]f Title III were not controlling as 'an applicable federal statute,' the challenged evidence would be subject to suppression under the federal common law rule of *Di Re*."[293]

Regardless of how persuasive a court finds Judge Koelsch's argument, *Di Re* clearly offers a close analogy to the present circumstances that supports the application of state standards in federal court. Simply following the *Di Re* doctrine by analogy, a federal court interpreting subsection 2511(2)(c) as a limitation on the Act would still apply state consensual standards. Yet, the *Di Re* doctrine is not the only authority that would support this result.

While the Supreme Court has required the application of state laws in federal cases under *Di Re*, it has also required the application of federal law in state court.[294] In *Rea v. United States*, a federal court

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287 *Id.*

288 *Id.* at 589-90.

289 543 F.2d 1229 (9th Cir. 1976).

290 *Id.* at 1245 (Koelsch, J., dissenting). *See also* Theis, *Choice of Law and the Administration of the Exclusionary Rule in Criminal Cases*, 44 TENN. L. REV. 1043, 1066 (1977)(discussing *Di Re* in the title III context).

291 *Hall*, 543 F.2d at 1245-46 (Koelsch, J., dissenting).

292 *Id.* at 1246.

293 *Id.*

294 This Article does not argue the *Di Re* or *Rea* are directly applicable in these consensual cases but that these doctrines offer close analogies that courts can look to in the absence of clear statutory language.

suppressed evidence in a narcotics case that was derived from an unlawful warrant.[295] After the evidence was suppressed, the case was introduced in state court, where the testimony of a federal agent constituted most of the prosecution's case.[296] The Supreme Court ruled that the federal agent could not testify, even though the warrant used by the agent would have met the lower state standards.[297] The Court specifically dismissed arguments that, since the warrant would have been lawful under the state law, the federal agent should be allowed to testify in state court under the lower state standard. The Court rejected this logic, arguing that "[t]he fact that [the agent's] . . . violation may be condoned . . . has no relevancy to our problem. . . . [These warrant procedures] are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied."[298]

The *Rea* decision offers another aspect of the Court's traditional application of federal or state standards outside of their respective forums. In *Rea*, the Court stressed the importance of deterring police abuse and maintaining the accountability of police officials to the laws that govern them.[299] There is little doubt, the Court concluded, that privacy policies will be "defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."[300]

The concern for deterring police abuse was also central to the Supreme Court's decision in *Elkins v. United States*.[301] In that case,

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295 350 U.S. 214 (1956).

296 *Id.* at 220.

297 *Id.*

298 *Id.* at 217-18.

299 *But cf.* United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983)(*Rea* not applicable because evidence in title III cases was gathered in compliance with federal law.).

300 *Rea*, 350 U.S. at 218.

301 364 U.S. 206 (1960). It has been asserted that the majority rule undermines the dual rationales of *Elkins*, which are judicial integrity and deterrence. *Title III and Admissibility*, *supra* note 19, at 1741-43. In *Elkins*, the Supreme Court struck down the "Silver Platter Doctrine." 364 U.S. at 222. Under that doctrine, the Court had previously held that "[I]t is not a search by a federal officer [for fourth amendment purposes] if evidence secured by state authorities is turned over to the federal authorities on a silver platter." Lustig v. United States, 338 U.S. 74, 78-79 (1949). The analogy between *Lustig* and *Elkins* has previously been stressed:

> In *Elkins*, the Court based its rejection of the "silver platter" doctrine on the exclusionary rule's objectives of preserving judicial integrity and deterring improper police conduct. The Court emphasized the danger of turning the federal judiciary into an accomplice that helps state officers perpetrate unconstitutional acts in frustration of state policies. Furthermore, the exclusionary rule, in the Court's view, deters state and federal officers from engaging in collusion and subterfuge in order to qualify evidence that otherwise would be admissible. . . . Certainly, little difference can be discerned between the dangers posed by the "silver platter" doctrine and those posed by the majority rule. Although based on state statutory rather than

the Court ruled that evidence gathered by state officers is inadmissible in federal court if the evidence was obtained in violation of the fourth amendment.[302] The Court based its exclusionary rule on two rationales: the need to deter police abuse and the need to preserve judicial integrity.[303] These rationales, the Court argued, are equally important in the title III area.[304] Although statutory, not constitutional, rights are involved in such a situation, the circumvention of state privacy rights by state agents undermines the very authority of the states to control derelict officers and to afford their citizens greater privacy protections than those provided by the federal government.[305]

These rationales have been applied to title III cases in support of the application of state privacy protections.[306] Although *Elkins* involved fourth amendment rights, the threat to judicial integrity and need for deterrence of police abuse is equally great in the title III context.[307] A Pennsylvania state judge, after chronicling the re-

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constitutional violations, the majority rule's promise of unrestrained forum shopping is no less real, its concomitant threat to judicial integrity no less keen.

Title III and Admissibility, *supra* note 19, at 1742-43.

302 *Elkins*, 364 U.S. at 223.

303 *Id.* at 224.

304 *Id.* at 223. Justice Brandeis stressed the danger of allowing state agents to use the federal system to circumvent their own courts:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id. at 223 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928)(Brandeis, J., dissenting)).

305 *Title III and Admissibility*, *supra* note 19, at 1747.

306 *Id.* *See* United States v. Eyerman, 660 F. Supp. 775, 780 (S.D.N.Y. 1987). The *Eyerman* court stated:

> Where a state has demonstrated its emphasis on privacy in enacting a stringent wiretap statute, it would ill serve the concerns of federalism for a federal court to allow state officials to flaunt that law by making cases in federal court with evidence that their state legislature has deemed tainted.

Id. *See also* State v. O'Neill, 103 Wash. 2d 853, 883, 700 P.2d 711, 727 (1985)(Dore, J., dissenting)("Policy arguments rooted in deterrence and maintaining judicial integrity . . . have great validity [in cases of illegally gathered consensual evidence].").

307 Concerns for individual privacy and deterrence were recently shown to be equally important in cases where the federal prosecutors seek to introduce evidence derived from an illegal *private* surveillance. *See* United States v. Vest, 813 F.2d 477 (1st Cir. 1987). In this case, Jesse James Waters, a suspect in the shooting of a police officer, illegally recorded the bribing of two other police officers. The government sought to admit the tapes at the trial of one of the officers, arguing that "it would be pointless to apply [the Act's exclusionary rule] . . . where . . . the government is the innocent recipient, rather than the guilty interceptor, of an illegally-intercepted communication." *Id.* at 480. The First Circuit rejected this argument, holding that to read title III as allowing "the government's use of unlawfully intercepted communications where the government

peated and open circumvention of state courts by state officers, argued strongly in favor of extending the *Elkins* holding to such cases.[308] The judge warned that "[i]f a federal court sitting within the same city . . . admits evidence seized by state police, which patently violates state law, the court becomes a potential depository for sordid police activities."[309] A Washington state judge argued and objected that "court[s] should not condone . . . [the] incentive to circumvent . . . [state law] by subterfuge and evasion of state-guaranteed privacy interests."[310] Federal judges have reacted similarly and have invoked *Elkins*, in concert with statutory support, in favor of applying state law.[311] The analogy of *Elkins* to nonconsen-

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was not the procurer would eviscerate the statutory protection of privacy from intrusion by illegal private interception.' " *Id.* (quoting United States v. Vest, 639 F. Supp. 899, 914-15 (D. Mass. 1986), *aff'd*, 813 F.2d 477 (1st Cir. 1987).

This logic is readily applicable to a case involving illegally gathered state evidence, whether nonconsensual or consensual. Yet, although some district courts have apparently embraced the minority rule, the First Circuit has not expressly endorsed the minority rule. *See supra* note 145. While the evidence in *Vest* was gathered below the federal standard (unlike most of the cases in this Article), the loss of privacy protections are no less severe when federal prosecutors are the "innocent recipients" of evidence gathered illegally by state agents.

308 Ziegler, *Constitutional Rights of the Accused—Developing Dichotomy Between Federal and State Law*, 48 PENN. B.A.Q. 241 (1977). In this article, Judge Zeigler considered what he called the "copper platter doctrine," which is the circumvention of state privacy rights by state agents through the use of the federal courts. "In practice, we are witnessing a resurrection of problems not unsimilar from those which were countenanced in *Lustig* and condemned in *Elkins*." *Id.* at 252-53. *Cf.* State v. O'Neill, 103 Wash. 2d at 883-84, 700 P.2d at 727-28 (Dore, J., dissenting)(rejecting "new version of the silver platter doctrine' " in which federal agents gather evidence below state standards and then hand over the evidence to state counterparts for use in state court).

309 *Ziegler, supra* note 308, at 252-53.

310 State v. O'Neill, 103 Wash. 2d at 884, 700 P.2d at 728 (Dore, J., dissenting). *O'Neill* involved what is sometimes referred to as a "reverse silver platter" problem, where federal agents collect surveillance evidence under the lower federal standards and then hand over the evidence for use in state prosecutions.

311 *Id.* One federal judge, considering both the *Di Re* and *Elkins* arguments, stated:

> I see no inconsistency between *Di Re* . . . and *Elkins*, which held "that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial." (citation omitted) It would appear that *Elkins* dictum concerns the second prong of the *Di Re* test, i.e., whether federal constitutional standards were violated by the state officers. Notably, the circuits which depart from this court's interpretation of *Di Re* seem to reason that *Elkins* somehow "vitiated" the holding of *Di Re* . . . However, United States v. Watson, (citation omitted) and Ker v. California, (citation omitted) strongly suggest otherwise.

United States v. Hall, 543 F.2d 1229, 1245 n.15 (9th Cir. 1976)(Koelsch, J., dissenting). *See also* United States v. Sotomayor, 592 F.2d 1219, 1226 (2d Cir. 1979). The Second Circuit in *Sotomayor* stated:

> Since a state's protection reflects principles central to its social and governmental order, our failure to respect its more stringent protection of privacy rights would not violate principles of federalism, but encourage state and federal law enforce-

sual surveillance cases has been advanced, but the relevance of the argument is equally relevant in the consensual area:

> [s]ince state court efforts to deter police violations of state law appear as unsuccessful as their earlier attempts to deter state officers' fourth amendment violations, the only effective deterrent for this type of forum shopping is to deny the admission in federal court of all illegally gathered state surveillance evidence. The majority rule court's blatant evasion of state law denigrates the judicial integrity of federal courts no less than the "silver platter" doctrine struck down in *Elkins*. If the judicial integrity imperative of *Elkins* has any contemporary vitality, federal courts must refuse to admit illegally gathered state evidence laundered through federal prosecutors. But suppression must be without exception. So long as forum shopping is even marginally preferable to compliance with state law, evasion of state law will continue. State and federal officers seeking a conviction will gravitate to the forum of least resistance.[312]

The dual rationales of *Elkins* are further evidence of the Court's past preference in favor of applying state law when privacy interests and the deterrence of police abuse are involved.[313] As with *Rea*, *Elkins* was based in large part on the observation that, without the exclusionary rule, the circumvention of privacy rights would continue.[314] This danger is particularly acute in the area of consensual surveillance in which states are viewed as having little success in

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ment to by-pass state law and to engage in federal forum-shopping of tainted evidence.

Id. at 1225. *Cf. Elkins*, 364 U.S. at 250 (Frankfurter, J., dissenting)("[i]t seems to me unseemly for a federal court not to respect the determination of a state court that its own officials were guilty of wrongdoing . . . ."); United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983)(per curiam), *cert. denied*, 467 U.S. 1218 (1984)(stating in dictum in a nonsurveillance case that "[t]here is much to be said for the argument that federal courts should, in the interest of comity, defer to a state's more stringent exclusionary rule with respect to evidence secured without federal involvement.").

312 *Title III and Admissibility*, *supra* note 19, at 1747.

313 *See* Lee v. Florida, 392 U.S. 378, 386-87 (1968)("We conclude . . . that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it.' ")(quoting, *Elkins*, 364 U.S. at 217).

314 Some courts strongly reject the deterrence argument in applying state standards in federal court. *See, e.g.*, United States v. Shaffer, 520 F.2d 1369, 1372 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976)("If the states could require federal courts to exclude evidence in federal criminal cases, some convictions would undoubtedly be lost, and the enforcement of congressional policy would be weakened."). In United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984), the Third Circuit, in a nonsurveillance case, rejected the deterrent argument after considering minority rule cases by analogy. The court reasoned that "sanctions already exist to control the state officer's conduct. He is punished' by the exclusion of evidence in the state criminal trial . . . ." *Id. See also* United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987)(rejecting applicability of *Elkins* policies in a nonsurveillance case since "[a] state prosecutor whose case relies on evidence that may be inadmissible in a state court trial has no power or authority to effect a prosecution in federal court.").

curbing abuses.[315] The Court has traditionally deterred police abuse by guaranteeing that the police would not derive any practical benefit from violating the law. In *Silverthorne Lumber Co. v. United States*, the Court noted: "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all."[316]

The import of decisions like *Di Re*, *Rea*, and *Elkins* offers strong support for applying state consensual standards in federal surveillance cases. Minority rule courts that readily embrace the limitation argument as a basis for the consensual distinction must consider the consequences carefully. It is far from clear that the simple argument that subsection 2511(2)(c) affirmatively limits the Act to nonconsensual surveillance will defeat a suppression motion based on a state "all-party" consent rule.[317]

The amenability of the limitation interpretation to the application of state standards, however, is not meant to suggest that the limitation interpretation is a solid one. Both the legitimation and limitation interpretations neglect a number of compelling arguments against the use of a consensual distinction. Yet, even putting these arguments aside, either basis for the distinction is difficult to maintain in the manner that the minority rule courts have used them. Either minority rule courts run afoul of the federal preemption test, or they unjustifiably ignore state law in the absence of an applicable federal statute. The result is a theoretical and practical morass that can be avoided by the simple extension of the argument used by minority rule courts in their rejection of the majority rule.

Legislative action to resolve the increasing questions concerning the Act's language is long overdue. The following section suggests some statutory changes that would amend title III to more clearly require the application of more stringent state standards—consensual or nonconsensual—in federal court.

V. Codifying the Federal Regulatory Interpretation: A Legislative Proposal

The minority rule's consensual distinction is generally based, either explicitly or implicitly, on an interpretation of subsection

315 It was recently suggested that Congress consider repealing the electronic surveillance authority of states "because the state courts seem to be performing the worst job of enforcing the statutory safeguards . . . ." Historical Policy Review, *supra* note 4, at 55.

316 251 U.S. 385, 392 (1920).

317 *See Title III and Admissibility*, *supra* note 19, at 1736 n.162.

2511(2)(c) as performing a legislative model function. Rather than viewing the provision as just another federal standard subject to more stringent state law, minority rule courts view it as shaping the legislative model that was to serve as a template for future state surveillance statutes. Regardless of whether a court views the provision as legitimating all warrantless surveillance or as limiting the Act itself, the result of the legislative model approach is the same: the restriction of state authority solely to the enactment of nonconsensual surveillance statutes.

The extension of the minority rule to include consensual surveillance can be easily accomplished through a more careful reading of the Act and its legislative history. However, withstanding such a change in the various circuits, the time is ripe for legislative action to clarify the statute and the role states are to play under it.[318] Remarkably, Congress substantially revised the Act recently and entirely ignored both the rift between the majority and minority rule circuits as well as the problems regarding more stringent state consensual laws.[319]

The product of over two years of congressional hearings and study, the Electronic Communications Privacy Act of 1986[320] radically expanded both the breadth and the bite of the eighteen-year-old statute to fit a different technological and regulatory era. Originally enacted to control the interception of telephone conversations, title III was rewritten to extend beyond the confines of simply aural communications in order to encompass such nonaural varia-

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318 A legislative solution to the problem is particularly appealing given the rather dismal record of courts in this area. One recent government report on electronic surveillance saves some of its harshest criticism for the courts:

> [T]he courts, on their own, and relying solely on constitutional principles and concepts, have neither the will nor the capacity to respond imaginatively and effectively to the new technologies. Only the legislature, often after judicial fumbling and failure, can adopt the measures that go some way toward reconciling the conflicting and varying needs . . . . The courts—which, in this context, means the Supreme Court—continually tries [sic] to pour the new wine of technology and technique into the old conceptual bottles but it doesn't do it successfully, and it becomes the job of the legislature to clean up the mess.

HISTORICAL POLICY REVIEW, *supra* note 4, at 2.

319 Recently, the 99th Congress comprehensively amended title III in an effort to bring the Act's provisions up to date with contemporary technological advances in electronic surveillance. *See generally Electronic Communication Privacy Act: Hearings on H.R. 3378 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. (1986). *See also*, 132 CONG. REC. S8000 (daily ed. June 19, 1986)(statement of Sen. Mathias)("This legislation responds to [recent technological] developments by protecting the privacy of information in any electronic form, while it is in transmission or temporary storage, and without regard to the medium of its transmission.").

320 Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986)(codified at 18 U.S.C. §§ 2510-21 (Supp. IV 1986)).

tions as textual, digital, and machine communications.[321]

The final changes enacted by Congress are sweeping. Title III now includes: a definition of all electronic communications, including voice transmissions;[322] a rule that all interceptions of computer systems require court warrants;[323] and a rule that the protection given to common carrier telephone systems would be extended to all electronic communications not intentionally designed to be accessible to the public.[324] As important as these changes were, however, the Act's final language was disappointing because of its failure to consider more general, nontechnologically related questions in title III. Foremost among these are questions over the general applicability of more stringent state standards in federal court and, if state standards are generally applicable, the specific applicability of more stringent state consensual standards.

A. THE INCORPORATION PROVISIONS: REINFORCING THE APPLICATION OF MORE STRINGENT STATE STANDARDS IN FEDERAL COURT

Before rectifying the current confusion over the consensual distinction, Congress must first clarify the general incorporation of state standards into the standards applied in federal court.[325] In cases involving unlawfully gathered state surveillance evidence, more stringent state standards should govern the admissibility of the evidence in federal court. Although the minority rule courts do not recognize the incorporation of more stringent state consensual standards, they muster a considerable amount of statutory and historical support in favor of applying state nonconsensual standards.[326] The first series of amendments, therefore, must be to

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321 *Id. See also* 132 CONG. REC. 44045 (daily ed. June 23, 1986)(statement of Rep. Kastenmeier)("The Electronic Communication Privacy Act updates [title III] . . . to take into account new forms of electronic communications such as electronic mail, cellular telephones, and data transmissions.").

322 18 U.S.C. § 2510 (Supp. IV 1986).

323 18 U.S.C. § 2518 (Supp. IV 1986).

324 18 U.S.C. § 2511 (Supp. IV 1986).

325 A recent government report went so far as to suggest that it might be time to consider repealing state surveillance statutes altogether. HISTORICAL POLICY REVIEW, *supra* note 4, at 55. The Historical Policy Review, written by Herman Schwartz, states:

> [A] case can be made for the proposition that because state use is primarily for gambling and relatively minor narcotics enforcement, and because the state courts seem to be performing the worst job of enforcing the statutory safeguards, there is little to lose and much to gain from such a proposal. A more limited . . . option would entail reducing the crimes for which state officials may use electronic surveillance, by limiting them to serious felonies like murder or kidnapping.

Id. at 55-56.

326 *See, e.g.*, United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), *cert. denied*, 472

those provisions misconstrued by majority rule courts.[327] After strengthening the minority rule, Congress can then amend subsection 2511(2)(c) to insure the extension of the minority rule in consensual surveillance cases.

Three of the Act's eleven sections are viewed as critical to the admission or exclusion of state standards in federal court. The first provision is section 2515, which prohibits the use of surveillance evidence "if the disclosure of that information would be in violation of this chapter."[328] Section 2515 effectively bars the use of the fruits of illegally gathered surveillance evidence. It is unclear, however, whether this provision defines a "violation of this chapter" to include violations of the state laws enacted under it.[329] One way of clarifying this language would be to modify section 2517, the provision governing lawful disclosure under the Act, to expressly incorporate state standards. In the absence of, or in addition to, such a change to section 2517, however, section 2515 can be amended in the following way to require the incorporation of state standards in using state-derived evidence:[330]

> [w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of *any state or federal standard contained or enacted pursuant to* this chapter.[331]

The second provision often discussed by majority and minority rule courts is section 2517.[332] As noted above, this provision controls the proper disclosure and use of surveillance evidence. Section 2517, therefore, defines a lawful disclosure for the purposes of section 2515, which bars the disclosure of any evidence falling outside of its definition.[333] Subsection 2517(1) governs the disclosure of surveillance material by state and federal agents. Such disclosure is allowed only when "appropriate to the proper performance of the official duties of the officer making or receiving

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U.S. 1017 (1985); United States v. McNulty, 729 F.2d 1243 (10th Cir. 1984)(en banc); United States v. Sotomayor, 592 F.2d 1219 (2d Cir. 1979).

327 *See generally Title III and Admissibilty*, *supra* note 19, at 1747-51.

328 18 U.S.C. § 2515 (1982).

329 *Id.*

330 For suggested amendments of § 2517, see *infra* notes 332-40 and accompanying text.

331 18 U.S.C. § 2515 (1982 & Supp. 1986)(italicized portions added by Author).

332 18 U.S.C. § 2517 (1982 & Supp. 1986).

333 For the language of § 2517, see *supra* note 139.

the disclosure."[334] Minority rule courts have stressed that federal courts must apply state law to determine whether a state officer's disclosure is in fact appropriate for the proper performance of his official duties.[335] Majority rule courts, however, have disagreed, arguing that more clear language is required before state law can displace federal law.[336] Subsection 2517(1), therefore, could be amended to satisfy the majority rule's clarity requirement:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure, *as provided for by the controlling state or federal standards*.[337]

Section 2517 governs the use of surveillance material by state and federal officers.[338] Subsection 2517(2) requires that state and federal officers use surveillance material only in accordance with their official duties. Once again, the absence of an express mandate to apply the standards of the controlling state or federal law has been given great weight by majority rule courts.[339] The amendment of this subsection, therefore, would parallel the modification of subsection 2517(1):

> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties, *as provided for by the controlling state or federal standards*.[340]

The third provision often involved in majority or minority rule opinions is section 2518.[341] Subsection 2518(10)(a) is the Act's main exclusionary rule and requires the suppression of evidence that is unlawfully intercepted, intercepted under an invalid court order, or intercepted in violation of a court order.[342] Minority rule courts claim that the application of more stringent state standards in

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334 18 U.S.C. § 2517(1) (1982 & Supp. 1986).

335 *Id. See, e.g.*, United States v. Hall, 543 F.2d 1229, 1252 (9th Cir. 1976)(Koelsch, J., dissenting); United States v. Sotomayor, 592 F.2d at 1225-26 n.13 (2d Cir. 1979); United States v. Marion, 535 F.2d 697, 702 (2d Cir. 1976).

336 *See, e.g.*, *McNulty*, 729 F.2d at 1251 (Doyle, J., concurring); *Hall*, 543 F.2d at 1232.

337 18 U.S.C. § 2517(1) (Supp. IV 1986)(italicized portions added by Author).

338 *Id.*

339 *See, e.g.*, *McNulty*, 729 F.2d at 1251 (Doyle, J., concurring); *Hall*, 543 F.2d at 1232.

340 18 U.S.C. § 2517(2) (Supp. IV 1986)(italicized portions added by Author).

341 18 U.S.C. § 2518 (1982 & Supp. IV 1986).

342 *Id.* at § 2518(10)(a) (1982).

cases of state-derived evidence is essential for determining these threshold tests of admissibility.[343] Majority rule courts, however, insist that there is no explicit mandate to apply state law and that, without such a mandate, the presumption must be that federal law applies in federal court.[344] Thus, majority rule courts construe prerequisites such as a lawful interception and valid court order as requiring the standards that would have been imposed by a federal authorizing court.[345] The following two changes would make express what is already implied by the provision's language:

> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication, intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted *in violation of the state or federal law governing the law enforcement officers conducting the surveillance*;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face;
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. *The legality of an interception, court order, or execution of a court order will be determined by the law of the state or federal jurisdiction under which the interception or court order was executed.* If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter.[346]

These amendments to sections 2515, 2517, and 2518 would remove all doubt as to the applicability of more stringent state standards in federal court. In some ways, the amendments are redundant, particularly the amendments to sections 2515 and 2517. The clear incorporation of state standards into the definition of a lawful disclosure would be enough to trigger section 2515's exclusionary rule without the added amendment to section 2515. Moreover, the simple enactment of any amendment for this purpose

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343 *McNulty*, 729 F.2d at 1264 (en banc)(section 2518 requires suppression of unlawfully intercepted evidence, the unlawfulness of which is defined by state law); *Sotomayor*, 592 F.2d at 1225-26 n.13 (section 2518(10)(a) requires lawful interception and whether it is lawful can be determined only by reference to state law through section 2516).

344 *See, e.g.*, *McNulty*, 729 F.2d at 1251 (Doyle, J., concurring)("We conclude that Title III is ambiguous on the question, and does not direct [sic] reference to state law.").

345 *Title III and Admissibility*, *supra* note 19, at 1741-52.

346 18 U.S.C. § 2518(10)(a) (1982)(italicized portions added by Author).

would result in new legislative history supporting the Act's already implicit incorporation of state standards.

B. SECTION 2511: EXTENDING THE MINORITY RULE TO CONSENSUAL SURVEILLANCE

Once the Act has been amended to better support the minority rule's incorporation of state law generally, Congress can easily amend subsection 2511(2)(c) to guarantee the extension of the minority rule to consensual surveillance.[347] The purpose of the amendment to the consensual provision would be to refute any notion that the provision serves a legislative model function. By adding the words below, the consensual provision would state clearly that its authorization of warrantless consensual surveillance is simply a federal standard subject to more stringent state consensual laws.

> (2)(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception, *subject to the more stringent state consensual standards of a controlling state jurisdiction*.[348]

This amendment to the consensual provision would bring more stringent state consensual standards under the Act's other provisions, including the incorporation and suppression provisions. While this Article takes no position on the continuation of the warrantless consensual federal standard, such an amendment would guarantee the realization of Congress' policy of state experimentation in both the consensual and nonconsensual areas. Conversely, the failure to include the amendment to subsection 2511(2)(c) with the other amendments would implicitly adopt the consensual distinction. Before such a drastic decision is made, however, Congress must look carefully at the suggested differences between consensual and nonconsensual surveillance in terms of individual privacy,[349]

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347 This assertion assumes that Congress would reject the option of eliminating the consensual distinction entirely by banning all warrantless electronic surveillance. Although the vast majority of prosecutors oppose this option, some prosecutors apparently support such an option or at least are not "aghast at the thought of putting consensual devices under court order." NWC REPORT, *supra* note 30, at 118 (quoting STAFF STUDIES, STATE, ESSEX COUNTY (NEWARK), NEW JERSEY 1976).

348 18 U.S.C. § 2511(c) (Supp. IV 1986)(italicized portions added by Author).

349 *Title III and Admissibility*, *supra* note 19, at 1736 n.162. It is important to note that minority rule courts stress privacy concerns in their refusal to apply more stringent state laws in cases involving post-interception violations. In addition to their consensual distinction, minority rule courts use the post-interception distinction to apply only state procedures governing the interception of wiretap evidence. *Id.* at 1735-36 n.161. State

federalism,[350] and law enforcement.[351] In such an event, Congress must also be prepared to answer the federal preemption questions and policy questions raised in this Article. Under even a cursory examination of the issue, Congress will find that the evidentiary value of using illegally gathered state evidence pales in comparison to its systemic and individual costs.

VI. CONCLUSION

This Article has considered the statutory and historical evidence supporting the minority rule's consensual distinction and the arguments for the rule's extension. This Article has shown how the consensual distinction evolved from Supreme Court cases and how

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procedures governing the preservation of such evidence after interception are deemed more tied to evidentiary than privacy concerns:

> [there is good reason] for distinguishing between the "right of privacy" and the "evidentiary" dimensions of wiretap regulations is [sic] provided by Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2515, *et seq.*, the federal statute governing wiretapping by federal and state authorities. In enacting Title III, Congress specifically intended to leave the states free to adopt limitations on eavesdropping more stringent than those applicable to warrants issued by a federal court. . . . Read as a whole Title III suggests that the reference to state law extends only to the conditions for the issuance and execution of an eavesdropping warrant, as distinguished from postinterception evidentiary procedures such as sealing.

Sotomayor, 592 F.2d at 1225-26 n.13. If privacy is such a determinative issue for these courts, then the concern should be at its greatest in consensual cases in which the danger to privacy is probably more acute. It is precisely because of the heightened privacy concerns that states passed these standards. To allow state officers to circumvent state courts effectively eviscerates state privacy protections.

350 The states' placement of greater limitations on the conduct of their law enforcement officers exemplifies the states' resumption of their traditional role in protecting privacy interests. Accepting Congress' invitation to limit electronic surveillance, described by the Court as one the the greatest threats to liberty, state legislatures passed laws protecting their citizens' privacy to a greater extent than the protections offered under federal law.

Title III and Admissibility, *supra* note 19, at 1751; *see also* United States v. Elkins, 364 U.S. 206, 221 (1960)("The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.").

351 It has been suggested that Congress did not deal much with consensual surveillance in the Act because of its dubious use in combating organized crime. As Walinski & Tucker, *supra* note 76, at 23 argue:

> Congress may have ignored consent wiretaps because, unlike bugging and nonconsensual wiretaps, consent taps are of little value in solving that unique law enforcement prolems [sic] associated with fighting organized crime. The usual methods of law enforcement, including the use of informants and undercover work, are ineffective in fulfilling Title III's goal of combatting organized crime. Consent taps, which require the cooperation and consent of insiders, are of little use.

Id. *See also* S. REP. No. 1097, *supra* note 13, at 74, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2161-62 (in organized crime circles, "[i]nsiders are kept quiet by an ideology of silence underwritten by a fear, quite realistic, that death comes to him who talks."). Conversely, it is clear that there are many incentives for state and federal officers to circumvent more stringent state privacy standards. *Title III and Admissibility*, *supra* note 19, at 1743-45.

Congress later codified that distinction in subsection 2511(2)(c) of title III.[352] There is no evidence, however, either in the Act's language or legislative history that indicates that this codification reflected an intent by Congress to insure the continued use of warrantless consensual surveillance on both the federal and state levels. Nor is there any evidence of an intent to confine the operations of the Act to nonconsensual surveillance alone. Rather, subsection 2511(2)(c) appears to be the product of the same process that produced the nonconsensual provisions—the simple codification of standing Supreme Court standards for the purpose of establishing minimum federal standards subject to more stringent state laws.

Ultimately, the disagreement over the consensual provision is one of rivaling notions of the provision's function in the overall scheme of the Act.[353] This Article has suggested that the provision performs a federal regulatory function that sets the standard that must be followed by federal agents. Just as the nonconsensual federal standards were, in large part, derived from standing Supreme Court precedent, the consensual standard was meant to be the minimum standard for federal operations alone. In the consensual surveillance area, the standard for federal agents—the Court's standing precedent in the area—was the unregulated use of consensual surveillance. Accordingly, like the nonconsensual standards, this standard should be subject to the more stringent consensual standards of state laws.[354]

In order to support their consensual distinction, minority rule courts must construe the consensual provision as serving a legislative model function.[355] These courts must argue that the provision affirmatively limits the incorporation provisions of the Act. Although minority rule courts generally do not articulate precisely how they are interpreting the provision's language, only two possibilities present themselves as bases for the legislative model approach. First, the provision can be read as being a legitimation of all consensual surveillance activities.[356] Under this view, the provision would reflect an intent by Congress to pass a national regulation of both consensual and nonconsensual surveillance but only permitting more stringent state standards in the nonconsensual area. However, interpreted in this manner, minority rule courts run into

352 *See supra* notes 65-109 and accompanying text.
353 *See supra* notes 118-22, 202-05 and accompanying text.
354 *Title III and Admissibility*, *supra* note 19, at 1750.
355 *See supra* notes 116-18, 202-04 and accompanying text.
356 *See supra* note 267-72 and accompanying text.

difficult federal preemption problems because if Congress never authorized more stringent state consensual standards, then any more stringent state consensual provisions might be preempted. Congress would, in effect, have retained exclusive regulatory control of the area.

The other possible basis for the consensual distinction would be to view the provision as a limitation on the Act.[357] That is, minority rule courts could argue that Congress intended subsection 2511(2)(c) to essentially state that "nothing in this Act applies to warrantless consensual surveillance." However, this interpretation also presents serious problems for minority rule courts. If the provision is a limitation on the scope of the Act, then there is no federal statute on consensual surveillance. If there is no applicable federal statute on consensual surveillance, however, it is not clear that a federal court can ignore the state standards and admit unlawfully gathered evidence. In a number of closely analogous areas, the Supreme Court has required the application of a state law when there is no applicable federal statute or where there are issues of deterrence and judicial integrity involved.[358]

These difficulties, however, can be avoided with the simple extension of the minority rule to the consensual area. There is a solid base of support in the Act's statutory language and legislative history to support this extension.[359] In addition, strong policy reasons exist for upholding state privacy protections whenever possible. Because minority rule courts have already recognized these policy rationales in their rejection of the majority rule, this Article has concentrated on the validity of the minority rule's consensual distinction in terms of its statutory and logical support. This is not to disregard the policy arguments previously argued by various courts[360] and commentators[361] for applying state law, however. Although this Article is intended to show that the minority rule's consensual distinction is unsupportable theoretically, it is dangerous to ignore the underlying privacy and federalism dangers involved in superseding state protections of individual privacy. The emphasis placed on prosecuting criminals as expeditiously as possible often neglects these countervailing considerations. At the time

357 *See supra* notes 273-317 and accompanying text.

358 *See supra* notes 285-317 and accompanying text.

359 *See supra* notes 205-33 and accompanying text.

360 *See, e.g.*, United States v. Hall, 543 F.2d 1229, 1240 (9th Cir. 1976)(Koelsch, J., dissenting), *cert. denied*, 429 U.S. 1075 (1977); State v. O'Neill, 103 Wash. 2d 853, 865, 700 P.2d 711, 721 (1985)(Dore, J., dissenting).

361 *See, e.g.*, Ziegler, *supra* note 308.

of *Olmstead v. United States*,[362] this trade-off between privacy and prosecutions was made in furtherance of the war against bootleg liquor.[363] Today, the cause is more likely to be the war on drugs.[364] Yet, whatever the cause, the potential costs to society remain prohibitively high. As Justice Holmes eloquently stated in his dissent in *Olmstead*, in these cases of cost-benefit analysis, far more important societal interests are involved than the conviction of a single criminal:

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.[365]

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362 277 U.S. 438 (1928).

363 Electronic surveillance became a significant political issue during Prohibition with "dry" congressmen advocating its use and "wet" congressmen calling for its ban. HISTORICAL POLICY REVIEW, *supra* note 4, at 8. One "wet" congressman, Representative Tinkham, offered an amendment banning electronic surveillance entirely, a move another "wet" congressman called vital to countering the "moral fanaticism that is behind the enforcement of the eighteenth amendment . . . ." 74 CONG. REC. 2,902 (1931)(statement of Rep. Beck). *See also* HISTORICAL POLICY REVIEW, *supra* note 4, at 8. The amendment failed but was later passed in the post-prohibition era.

364 As with the Prohibition, the national mobilization against drugs is clearly reflected in a shift in governmental surveillance targets. In 1974, the largest percentage (54%) of all nonconsensual surveillance was conducted against illegal gambling targets. NWC REPORT, *supra* note 30 at 267, (table F-3). In 1986, narcotics targets replaced gambling targets as the most common crime under surveillance (43%). U.S. COURTS REPORT (1986), *supra* note 8, at 10 (table 3).

365 277 U.S. 438, 470 (1928)(Holmes, J., dissenting). *Cf.* Florida v. Rodriguez, 469 U.S. 1, 13 (1984)(Stevens, J., dissenting)(warning in a narcotics case that "[t]he single-minded achievement of results in individual cases is not a virtue that should characterize the work of this Court.").