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The Revival of Respondeat Superior and Evolution of Gatekeeper Liability

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In an era of servants and masters, respondeat superior emerged to hold the powerful accountable for the acts of those they control. That doctrine's significance has only grown in an economy driven by large corporations that rely heavily on legions of subsidiaries and independent contractors, such as banks deploying independent call centers, oil companies using drilling contractors, and tech platforms connecting consumers to app developers. It is widely believed that firms can avoid third-party liability for many laws by outsourcing or creating subsidiaries.

This Article shows that common narratives of the demise of third-party liability are incomplete. Respondeat superior is alive and well. Moreover, in environmental, employment, consumer protection, discrimination, and other areas, the law requires large companies to act as gatekeepers by regulating third parties. These gatekeepers incur liability when they fail to enforce the law. In light of these features, the expansion of liability would be aptly described as respondeat gatekeeper.

The task ahead is to understand and reinforce liability's ongoing adaptation to a financially and digitally intermediated world. Updating courts' analytic tools to include economics and network theory would more accurately measure power compared to the current, intuitive approach. Moreover, courts should view pervasive technologies of control—most importantly surveillance tools and online platforms—as stronger evidence of liability. The revival has the potential to restructure corporations, markets, and society in a beneficial manner by bringing harmful activities, as a matter of law, back within the fold of the firm.

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INTRODUCTION

Liability is a pillar of the law. It is "the means for enforcing contracts, civil rights, labor and employment law, environmental regulations, federal tax law, intellectual property law, most kinds of property rights, and just about every other kind of law on the books."[1] Some view limited liability as "the corporation's most precious characteristic"[2] and an invention more important than "steam and electricity."[3] The desire to avoid liability determined the shape of the modern business organization.[4] Moreover, understanding a firm's liability boundaries has become more pressing because businesses increasingly rely on call centers, online third-party sellers, sales agents, brokers, ride-sharing contract drivers, debt collectors, delivery services, and many other external providers that may harm third parties.[5]

Despite liability's centrality to the legal system and industrial organization, an existential question for decades received limited attention: When is one company liable for the acts of a separate entity?[6] The legal issue of when a business can be held liable for the acts of another business traces back to the common law doctrine of respondeat superior. The law as long recounted in scholarship, cases, and textbooks is that except in unusual circumstances, businesses are not liable for the acts of independent contractors.[7] Additionally, as the Supreme Court has observed, "It is a general principle of corporate law deeply 'ingrained in our

1. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 4 (1996).

2. William W. Cook, *"Watered Stock"—Commissions—"Blue Sky Laws"—Stock Without Par Value*, 19 MICH. L. REV. 583, 583 (1921) (quoting President Charles Eliot of Harvard University).

3. William P. Hackney & Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 841 (1982) (quoting President Nicholas Murray Butler of Columbia University).

4. *See, e.g.*, LoPucki, *supra* note 1, at 21 ("Limiting liability—that is, defeating part of it—is the principal reason for creating [multiple corporate] entities.").

5. *See, e.g.*, Margaret M. Blair, Erin O'Hara O'Connor & Gregg Kirchhoefer, *Outsourcing, Modularity, and the Theory of the Firm*, 2011 BYU L. REV. 263, 272–90 (describing the hierarchy and production interdependence of corporations).

6. Sustained attention on the topic has mostly focused on legal subareas without providing a big-picture perspective, or on economic issues of whether vicarious liability provides an optimal level of incentive to take precautions. For economic treatments, see, for example, Jennifer H. Arlen & W. Bentley MacLeod, *Beyond Master–Servant: A Critique of Vicarious Liability*, *in* EXPLORING TORT LAW 111, 122–24 (M. Stuart Madden ed., 2005); Richard R. W. Brooks, *Liability and Organizational Choice*, 45 J.L. & ECON. 91, 93–94 (2002); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1233 (1984). For an example of third-party liability in a narrower organizational context, see Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 102 (arguing that it is inappropriate to apply vicarious liability to franchisor–franchisee relationships).

7. *See, e.g.*, Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1375 (1982) ("An enterprise is not liable for the torts of its independent contractors . . . ."); Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1753 (1996) ("[T]he negligence of the contractor is (absent special circumstances) not attributed to that party.").

economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries."[8]

The dominant corporate law narrative is thus that businesses can avoid liability by drawing organizational boundaries.[9] For instance, as mounting liability loomed for the tobacco industry and asbestos manufacturers, "disaggregation came swiftly," through corporate spinoffs and organizational walls, enabling companies to avoid taking responsibility for ending many lives.[10] Businesses have also sought to avoid paying employment benefits by using independent contractors.[11] More recently, the legal literature has turned its attention to "intermediary liability" for content posted online by third parties[12] and to Amazon's ability to avoid product liability for defective items sold by third-party sellers.[13] Scholars in these conversations portray a legal architecture that provides "a broad grant of immunity from tort liability."[14] Those recent conversations in specific areas reinforce the longstanding notion that the law's inability to keep pace with subsidiaries and outsourcing has put liability "at risk of death."[15]

This Article resumes those narratives where others left off—at liability's lowest point—by demonstrating how respondeat superior and its progeny are in the midst of a resurgence. It expands the intermediary liability conversation to recent

8. United States v. Bestfoods, 524 U.S. 51, 61 (1998); *see also infra* Part I.

9. The most active and recent corporate law conversations about third-party liability have focused on holding parent companies liable for the acts of corporate subsidiaries, especially "piercing the corporate veil." Scholars examining vicarious liability typically reach a similar conclusion as the Court—that considerable barriers exist to holding companies liable for the acts of subsidiaries. *See, e.g.*, Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 303–04 (2001) ("Traditional entity law . . . creates a fundamental barrier to the imposition of liability . . . ."). The context-specific motivation could move firms toward liability or away from it, but all else being equal, they have incentives to outsource to contractors with limited assets. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 944 & n.238 (1998).

10. *See* LoPucki, *supra* note 1, at 65.

11. *See infra* notes 188–89 and accompanying text.

12. The law and technology literature has examined third-party liability mostly from the perspective of intellectual property and speech. *See, e.g.*, H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369 (2008); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1601–03 (2018); Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 269 (2018).

13. *See* Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259, 263 (2020).

14. *See, e.g.*, Holland, *supra* note 12, at 370 (describing how the Communications Decency Act "is now conceived as a broad grant of immunity from tort liability").

15. *See* LoPucki, *supra* note 1, at 7 ("[T]ort and statutorily imposed liability are at risk of death."). Another common context for vicarious liability in the corporate law literature is in an internal sense of determining whether individual officers or shareholders may be held vicariously liable for the actions of the corporation or its employees. *See, e.g.*, Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1206–07 (2002) (exploring the possibility of holding shareholders vicariously liable for tort-like statutory violations). There, again, the answer is almost never. *See* Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 338–43 (2004) (documenting the growth of statutory- and common law-liability protections for shareholders and officers).

areas of wrongdoing where the law has increasingly imposed restrictions on tech platforms. And for other large industries, it adds the next chapter after the predicted death of corporate liability. Not only do many legal rules now arguably "pierce the corporate veil" by holding the parent liable for the subsidiary's acts,[16] but they also offer ways to reach outside the corporate structure to impose liability for the harms of completely independent contractors.[17] To provide a full account of corporate liability, it is essential to consider a broader set of laws and institutional arrangements than exists in the literature.[18]

Changes in markets, technology, and governance have reenergized third-party liability. Although the doctrinal test for respondeat superior is muddled, two key factors are whether the principal could monitor and punish the third party.[19] Large companies' pervasive utilization of big data and remote-surveillance tools better equips them to monitor independent contractors and other service providers.[20] In terms of punishment, industries such as air travel and telecommunications are far more concentrated, often leaving consumers with few options.[21] Consequently, the remaining businesses can pose more of a threat by ceasing to do business with any wrongdoer, thereby cutting off vital access to substantial portions of a given market. Because businesses today have heightened capacity to monitor and punish their contractual counterparties, courts have stronger foundations for seeing the relationships as principals controlling third-party agents.[22]

Governance changes also drive some of the liability resurgence. As I have explained elsewhere, over the past few decades lawmakers and regulators have increasingly deputized sizeable firms as enforcers of public law—making them the new gatekeepers.[23] Whereas the old gatekeepers were mostly accountants, lawyers, and other peripheral actors tasked with ensuring firms' legal compliance,[24] the new gatekeepers are the world's largest firms themselves. When the Federal Trade Commission (FTC) orders Facebook to monitor and punish app

16. Whether respondeat superior should be described as piercing the veil in such instances or as providing an alternative has been subject to debate, though the answer to that debate does not alter this Article's thesis. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1063 (1991) (finding forty-eight cases in which courts used agency law to pierce the corporate veil, or eight percent of all cases reviewed). *But see* Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 983 (1971) (criticizing descriptions of agency law and tort law as piercing the corporate veil).

17. *See infra* Part II.

18. As scholars recognized decades ago, even in a world of unlimited veil piercing, companies could still strategically outsource harmful activities to independent contractors that are not subsidiaries. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1915 (1991) (discussing the implications of downsizing and disaggregation).

19. *See infra* Part II.

20. *See infra* Section II.A.1.

21. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 20–21 (2018).

22. *See infra* Section II.A.

23. *See* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 470–71, 493–94 (2020).

24. *See* Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 WASH. & LEE L. REV. 797, 802 (2016); Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 54 & n.3 (1986) (defining gatekeepers as "third parties who can

developers, or the Consumer Financial Protection Bureau (CFPB) tells banks to develop policies to monitor call centers and debt collectors for consumer violations, authorities are conscripting firms to serve as quasi-regulators.[25]

That emerging form of governance affects third-party liability both indirectly and directly. Indirectly, the requirement of policing third parties for misbehavior may set the company up to be perceived as being in a principal–agent relationship—and thus more likely to be held liable under the law.[26] More directly, prosecutors and regulators increasingly do not need to establish agency because the law or informal authority can hold companies liable for the acts of third parties without an agency relationship by mandating nondelegable duties.[27] In some instances, this regulatory authority has moved toward breaching one of the most heavily reinforced barriers of corporate law—individual officers' near immunity from liability—as exemplified by the FTC making Mark Zuckerberg civilly and criminally liable for future Facebook privacy missteps.[28] What can be seen as an expansion of gatekeeper liability is extending the principles of respondeat superior.

In short, this Article shows how liability is stretching to reintegrate many activities back into the large businesses that outsourced them. Without formally describing it as such, the law often treats those activities as performed by employees of the company, thereby organizationally situating harms where the law comfortably reaches.[29] In other words, the doctrine is adapting to the profound restructuring and disintegration of enterprises by—as a matter of law—putting the pieces back together.

The implications of that reintegration are far-reaching. Third-party liability has become more relevant in a modern economy characterized by heightened levels of outsourcing and specialization. Markets today are also financially and technologically intermediated to an unprecedented extent.[30] As a result, even outside of

disrupt misconduct by withholding support"); Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1585 (2010) (explaining how these and other various actors act as a net of gatekeepers).

25. *See* Van Loo, *supra* note 23, at 482, 485.

26. *See infra* Section II.A.

27. *See infra* Section II.B.

28. *See* United States v. Facebook, Inc., No. 19-2184 (TJK), 2020 WL 1975785, at *5 (D.D.C. Apr. 23, 2020); *see also* Van Loo, *supra* note 23, at 502–05 (discussing how authorities are pushing individuals toward personal liability). In this regard, some of the liability revival demonstrates Professor Mark Roe's point that "Delaware's chief competitive pressure comes not from other states but from the federal government." Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003).

29. *See infra* Part II.

30. *See* Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 575 (2015) (describing how changes "in information technology and financial innovations have radically changed how capital moves from investors to projects" and the growing influence of financial intermediaries); Tom C.W. Lin, *Infinite Financial Intermediation*, 50 WAKE FOREST L. REV. 643, 655 (2015) ("Instead of true disintermediation, where links in a financial process are eliminated, financial innovation has generally further strengthened intermediation through substitution and layering."). *But see* Mark Fenwick & Erik P.M. Vermeulen, *Technology and Corporate Governance: Blockchain, Crypto, and Artificial Intelligence*, 48 TEX. J. BUS. L. 1, 4 (2019) ("The consensus is that [digital technologies] will drive a societal shift away from a 'centralized world' to more *decentralized* and *disintermediated* alternatives.").

online platforms, producing a good or service now involves a more extensive network of business entities than ever before.

A third-party doctrine should ensure that firms internalize the full costs of their business activities, but to do so, it must adjust for the evolving nature of industrial organization. Despite meaningful advances, the revival has proceeded in a piecemeal manner. Part of the problem is that a common law agency test with over ten factors[31] can obscure what should be the focus: the firm's ability to monitor and punish the third party. Moreover, traditional analyses of respondeat superior are outdated because they ignore even basic economic considerations like market share, company size, and network theory. Those omissions risk distorting the measurement of power.

What is needed is the ability to impose liability on those best positioned to prevent harms due to their influence over a given web of business relationships, financial ties, and technological links. That concept is as much about network liability as it is either about gatekeeper liability or respondeat superior.[32] If judges, legislators, and administrative agency leaders recognize that an expansive third-party liability is not only becoming commonplace but also consistent with the common law, they will have the doctrinal and normative foundations for meaningful legal updates that can improve efficiency and distribution. They can then more deliberately continue the centuries-old task of adapting the doctrine to ever shapeshifting forms of corporate control.

Part I chronicles the decline and limitations of respondeat superior as documented in sources spanning from decades-old literature to recent Supreme Court cases. Part II recounts third-party liability's rebirth due to policy and technological changes. Those changes have both strengthened the common law's ability to find agency under respondeat superior and created new classes of duties that large firms are prohibited from delegating even if a principal–agent relationship does not exist. Part III previews the societal implications of and normative foundations for the revival of third-party liability. This revival implicates organizational choices on whether to outsource, exert closer control over third parties, and build platforms. Ways to improve measuring power include examining market share, valuation, and network influence.

Some clarification is in order before turning to the main discussion. Respondeat superior means different things to scholars in particular fields. Some have a more capacious interpretation, seeing it as synonymous with vicarious liability, whereas others see those concepts as separate.[33] Additionally, for some

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31. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958) (listing ten factors "among others").

32. *See infra* notes 314–17 and accompanying text (distinguishing gatekeeper liability).

33. *See, e.g.*, Arlen & MacLeod, *supra* note 6, at 112 ("Vicarious liability (or *respondeat superior*) holds organizations (and other principals) liable for their agents' torts . . . ."). However, vicarious liability is sometimes used as a broader concept that incorporates or grew out of respondeat superior. *See, e.g.*, Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1843 (2000) ("Vicarious liability in

parts of the liability revival, a better analogy than respondeat superior lies elsewhere, such as in negligent supervision or the failure to supervise.

Due to the breadth of this project, space constraints do not allow for distinguishing these and other terminology nuances and field-specific liability regimes. Viewed as its Latin translation of "let the superior make answer,"[34] respondeat superior might be seen as an appropriate name for all of the expansion discussed below. Nonetheless, to lessen potential terminology confusions across fields, respondeat superior is mostly used here in its narrower sense. The revival of respondeat superior thus more precisely refers to the extension of the common law respondeat superior's potential to reach a greater number of entities. The broader expansion includes a reincarnation of that doctrine in new forms, and thus for the sake of clarity merits a new name that reflects its two primary conceptual frameworks—respondeat gatekeeper.[35]

I. THE DECLINE OF RESPONDEAT SUPERIOR

Respondeat superior emerged long before the rise of the modern globalized economy. It originated as a means of holding the head of a household responsible for the acts of household members—in particular, servants and slaves.[36] Over time, however, the common law has changed regarding who must answer for what acts. The most consistent theme in this messy and evolving doctrine is a goal still relevant to today's commercial landscape, dominated as it is by fragmented actors and large corporations: to impose liability on those with the power to control others.[37]

A. THE COMMON LAW RISE AND FALL

As commercial channels stretched and spread in the late seventeenth and early eighteenth centuries, judges began to apply respondeat superior to remote business relationships, including that between shipowner and crew.[38] Courts also moved from holding parties liable only for specifically commanded acts to imposing liability for a broader set of acts committed in the course of business.[39] The guiding principle in this expansion was the idea that "[b]ecause employers

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copyright differs from the tort doctrine of respondeat superior because it extends vicarious liability beyond the employer/employee or master/servant relationship.").

34. *Respondeat Superior*, BLACK'S LAW DICTIONARY (11th ed. 2019).

35. An alternative would be "respondeat imperium," reflecting the Latin word for "power."

36. John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317–18 (1894).

37. *See, e.g.*, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2198–99 (2005) (explaining the roots in holding liable those with the power to control); Deanna N. Conn, *When Contract Should Preempt Tort Remedies: Limits on Vicarious Liability for Acts of Independent Contractors*, 15 FORDHAM J. CORP. & FIN. L. 179, 180 (2009).

38. *See, e.g.*, Boson v. Sandford (1689) 91 Eng. Rep. 382; 2 Salk. 440 (holding shipowner liable for freight spoiled by crew). *See generally* Wigmore, *supra* note 36 (providing a history of respondeat superior).

39. *See* Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 693 (1930).

expected to profit from their employees' work, it was fair for them to pay for their employees' torts."[40]

In the nineteenth century, some courts applied respondeat superior even more liberally by holding liable whoever paid for the harmful activity—even if that party paid an independent contractor.[41] When someone hired a carpenter or mechanic, for instance, a number of courts held that the payments meant the hiring party was liable for harms the independent contractor committed to third parties.[42] By the twentieth century, however, courts had coalesced around common law agency as a necessary—albeit not sufficient—condition for holding a company liable for the act of a third party in many contexts.[43] Agency remains a foundation of vicarious liability today for a vast assortment of federal statutes and regulations.[44]

When compared to their focus on the party paying, courts' embrace of the agency test marked a setback for respondeat superior and in hindsight planted the seeds of the doctrine's eventual downfall. The test to determine agency over a contractual party has many factors,[45] causing scholars much consternation about the judicial variance in applying the doctrine.[46] Above all, the agency test requires plaintiffs to establish that the hiring party controlled, or had the right to control, the particular act causing harm.[47] Merely paying an independent contractor is insufficient to establish respondeat superior absent control.[48]

Despite making it difficult to establish claims for third-party liability,[49] agency law did not prevent courts from holding businesses accountable for the acts of their employees.[50] Respondeat superior thereby accommodated more far-reaching liability for long periods in the nineteenth and twentieth centuries.

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40. Achtenberg, *supra* note 37, at 2202.

41. *See, e.g.*, Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 304–05 (2001).

42. *See id.* at 304 & n.41 (summarizing cases).

43. *See* Sayre, *supra* note 39. There are other tests and many context-specific elements depending on the area of application, including the need to establish an employer–employee relationship (formerly master–servant). *See* RESTATEMENT OF EMP'T LAW § 1.01(a)(3) (AM. LAW INST. 2015) (listing as one of the conditions of employment that "the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson"); RESTATEMENT (THIRD) OF AGENCY § 7.07 (2) (AM. LAW INST. 2006) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.").

44. *See infra* notes 104–09.

45. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

46. *See e.g.*, Conn, *supra* note 37, at 186–89; Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL L. REV. 1281, 1295–96 (2015).

47. *See, e.g.*, Meyer v. Holley, 537 U.S. 280, 286 (2003) (laying out the right to control and agreement by the parties as two determinative elements for agency); *see also* Moorehead v. District of Columbia, 747 A.2d 138, 143 (D.C. 2000) (stating that "the power to control" is usually "the determinative factor" (internal quotation marks omitted)).

48. *See Moorehead*, 747 A.2d at 143.

49. *See, e.g.*, *id.* (rejecting respondeat superior claim involving special police officer); Blumberg, *supra* note 9, at 304 (calling agency "rigorously restricted").

50. *See, e.g.*, Achtenberg, *supra* note 37, at 2199.

During those periods, vertical integration was more common than it is in today's economy, meaning that large companies often directly employed workers providing the key inputs into the production process. For instance, early American tycoons such as Cornelius Vanderbilt, John Rockefeller, and Henry Ford used their own workers to build railroads, drill oil, and assemble automobile parts.[51] Because those vertically integrated companies handled so much of their business operations internally, respondeat superior still provided a means of imposing liability for a large array of harms.[52] In other words, in this internal-to-the-firm context, respondeat superior did not have the same downfall.

However, companies now often hire independent manufacturers and service providers, even for internal services like janitorial work, which they would have previously done through their own workforce.[53] Those changes set the stage for the doctrine's demise because the agency test proved restrictive in holding one business liable for the acts of third parties, such as among those relationships created by this vertical disintegration.[54] For instance, the black-letter law for torts is that a company is not responsible for the acts of independent contractors, except for certain "nondelegable" activities viewed as inherently dangerous or risky, such as road construction.[55]

Especially in light of respondeat superior's roots in master–servant relationships,[56] the modern business configuration that would seem most likely to meet the exacting test for agency is that between parent and subsidiary because the parent company owns the subsidiary. Indeed, in the early twentieth century, many courts used agency law to hold parents liable for their subsidiaries' harms by inferring control from some forms of ownership.[57] However, courts eventually applied the same agency test to subsidiaries as to independent contractors, meaning that the mere act of ownership was not enough to establish agency—active control was also necessary.[58]

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51. *See, e.g.*, Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 995–1013 (2016) (summarizing historical labor practices).

52. *See, e.g.*, *id.* at 972–74.

53. *See* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 16 (2010); *see also* George S. Geis, *An Empirical Examination of Business Outsourcing Transactions*, 96 VA. L. REV. 241, 242 (2010) ("Business outsourcing partnerships have become an increasingly common strategy for firms seeking to cut costs, upend their value chains, or focus on narrower slivers of competence.").

54. Courts rarely even held franchisors liable for the acts of franchisees in the 1990s. *See* Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 433, 436 (2005).

55. *See* RESTATEMENT (SECOND) OF TORTS §§ 409, 409 cmt. b (AM. LAW INST. 1965). The company's label for a contractor does not matter as much as factors such as the control exercised. *See id.* § 409 cmt. a. Certain nondelegable duties such as road construction were well established under the common law, whereas others evolved over time. *See id.* §§ 410, 416, 427; *infra* Section II.B.

56. *See* John C. Tillotson, *Vicarious Liability of Filling Station Oil Companies Under Respondeat Superior*, 3 WASHBURN L.J. 88, 88–89 (1963).

57. Robert B. Thompson, *Agency Law and Asset Partitioning*, 71 U. CIN. L. REV. 1321, 1326 (2003).

58. *See id.*

According to some scholars, a wave of reorganizations subsequently occurred, motivated by the desire to move riskier activities from parent companies to more judgment-proof subsidiaries that the parent did not technically control.[59] Given the varying motivations for such arrangements today—including cost savings from specialization[60]—it is difficult to know even roughly what percentage of modern outsourcing is motivated by a desire to evade liability. Nonetheless, there is reason to believe that the avoidance of respondeat superior was inefficient and perhaps had regressive distributional implications.[61] Regardless of the reason for the outsourcing, those reorganizations—and outsourcing more broadly—marked the first phase of a fading respondeat superior because they began to make businesses less responsible for harms flowing from activities that produced their profits.

B. THE STATUTORY RISE AND FALL

To understand the full arc of third-party liability, it is necessary to look beyond the common law to judicial interpretation and application of statutes. Even though statutory liability by default incorporates common law liability principles, judges have at times interpreted statutes as imposing a higher level of liability. In the latter half of the twentieth century, on different timelines depending on the area of law, judges had grown bolder in imposing third-party liability for both independent contractors and subsidiaries.

Federal discrimination laws helped shape the statutory trajectory for independent contractors because they culminated in multiple Supreme Court cases. Beginning in the 1970s, under the Fair Housing Act,[62] courts held that the duty not to discriminate was nondelegable.[63] A similar line of reasoning materialized in the employment context under the Enforcement Act of 1870, enacted pursuant to the Fourteenth Amendment.[64] In a 1978 case, employers defended against charges that they had discriminated against twelve Black plaintiffs by pointing to an operating engineer union's practices as the source of the discrimination.[65] The court found that the employers could not delegate their duty not to discriminate.[66] The same case found independent grounds for holding those employers liable for the unions' discrimination under the common law test for respondeat superior.[67]

59. Hansmann & Kraakman, *supra* note 18, at 1881.

60. *See* Geis, *supra* note 53.

61. *See infra* Sections I.C, III.B.1. On the efficiency effects of common law evolution, see Frank Partnoy, *Synthetic Common Law*, 53 U. KAN. L. REV. 281, 291–97 (2005).

62. 42 U.S.C. § 3601 (2018).

63. *See, e.g.*, Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552 (9th Cir. 1980); Marr v. Rife, 503 F.2d 735, 741–42 (6th Cir. 1974).

64. Pub. L. No. 41-114, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981 (2018)).

65. Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 335, 409, 412 (E.D. Pa. 1978), *aff'd*, 648 F.2d 923 (3d Cir. 1981), *rev'd*, 458 U.S. 375 (1982).

66. *Id.*

67. *Id.* at 411–13.

In 1982, the Supreme Court began to curtail these expansions in *General Building Contractors Ass'n v. Pennsylvania*.[68] It first reasoned that the relationship between the employers and the union was insufficient to satisfy common law respondeat superior because the employers were not in a principal–agent relationship with the union.[69] Thus, one way the Court may have curtailed respondeat superior directly in statutory cases was by imposing a higher bar for agency than lower courts would have used.

The Court went on to conclude that Congress, in drafting the Enforcement Act of 1870, had not intended for the statute to create a duty with respect to third parties.[70] This ruling relied on the Court's prior understanding of congressional intent for the Enforcement Act.[71] That emphasis on the particulars of a single statute allowed lower courts in the late 1980s and early 1990s to continue finding nondelegable duties in other statutes, such as the Fair Housing Act.[72]

Liability for subsidiaries' harms followed a roughly similar trajectory. In the late 1900s, courts increasingly held parents liable for the acts of subsidiaries by interpreting federal statutes as intending to impose liability on subsidiaries more broadly than what the common law would allow through veil piercing and agency law. Examples include the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[73] and Employee Retirement Income Security Act (ERISA).[74]

Although corporate law scholars paid limited attention to the implications of these trends for independent contractors, many responded in the 1990s with some enthusiasm to the parent–subsidiary rulings as a sign of an emerging "enterprise liability."[75] Enterprise liability views the various corporate pieces—including subsidiaries—as one entity.[76] That approach was seen as a means of breaking through increasingly complex and diffuse corporate structures to hold the larger

68. 458 U.S. 375 (1982).

69. *Id.* at 393–94.

70. *Id.* at 396–97.

71. *See id.*

72. *See, e.g.*, Walker v. Crigler, 976 F.2d 900, 904 (4th Cir. 1992); Coates v. Bechtel, 811 F.2d 1045, 1051 (7th Cir. 1987); Saunders v. Gen. Servs. Corp., 659 F. Supp. 1042, 1059 (E.D. Va. 1987).

73. 42 U.S.C. § 9601 (2018); *see* New York v. Shore Realty Corp., 759 F.2d 1032, 1044–45 (2d Cir. 1985); CPC Int'l, Inc. v. Aerojet–Gen. Corp., 777 F. Supp. 549, 571 (W.D. Mich. 1991), *vacated sub nom.* United States v. Bestfoods, 524 U.S. 51 (1998).

74. 29 U.S.C. § 1001 (2018); *see, e.g.*, Alman v. Danin, 801 F.2d 1, 4 (1st Cir. 1986) (using agency law to hold parent company liable for subsidiary's failure to contribute to employee-benefit plans).

75. *See* Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 296 (1996); Peter S. Menell, *Legal Advising on Corporate Structure in the New Era of Environmental Liability*, 1990 COLUM. BUS. L. REV. 399, 406–08 (describing greater parent-corporation liability under CERCLA); Cindy A. Schipani, *Infiltration of Enterprise Theory into Environmental Jurisprudence*, 22 J. CORP. L. 599, 619 (1997).

76. *See* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1287 (2001) ("Enterprise liability is a . . . modern theory of strict liability. . . [that] expresses the maxim that those who profit from the imposition of risk should bear the costs of the accidents that are a price of their profits.").

corporation responsible.[77] Yet the Supreme Court dealt a blow to that optimism at the turn of the twenty-first century.

In the 1998 decision *United States v. Bestfoods*, a unanimous Court declined to hold a parent company liable for cleaning up a subsidiary chemical plant's hazardous waste.[78] It thereby disagreed with a district court that had interpreted CERCLA as imposing liability broader than common law liability.[79] Perhaps more importantly, the Court further cautioned that—in the absence of clear statutory language—it was inappropriate in corporate liability cases to move beyond common law principles.[80] Instead, judges should look to veil-piercing principles and agency law.[81] *Bestfoods* thereby made it significantly less likely that a parent would be held liable for the acts of a subsidiary, whether under CERCLA or other statutes.[82]

Several years later, the Court returned to the question of nondelegable duties in antidiscrimination legislation.[83] Disagreeing with rules adopted in several jurisdictions, the Court in *Meyer v. Holley* declined to hold the owner of a real estate corporation liable for its local broker's refusal to sell to, and use of derogatory language about, a mixed-race couple.[84] In an immediate sense, the ruling confined the couple alleging racial discrimination to pursuing the claim against a financially troubled corporation and the local sales agent, neither of which had sufficient assets to make a lawsuit worthwhile.[85] More broadly, the Court reasoned that because the Fair Housing Act had not explicitly mentioned a nondelegable duty, such silence permits "an inference that Congress intended to apply *ordinary* background tort principles," which hinge on respondeat superior's higher bar of common law agency.[86] The ruling thus helped solidify courts' difficulty in reading nondelegable duties into federal statutes.

In sum, for both corporate subsidiaries and independent contractors, by the late 1900s, the law had edged toward greater liability for the acts that business organizations had pushed outside the bounds of the firm. The Court's turn-of-the-century rulings eroded what had become a promising statute-based avenue for adapting respondeat superior to an economy marked by fragmented business structures.

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77. *See, e.g.*, Blumberg, *supra* note 75, at 296–97.
78. 524 U.S. 51, 55 (1998).
79. *See id.* at 59, 67.
80. *Id.* at 63–64.
81. *Id.* There is controversy around the relationship between agency law and veil piercing, but courts sometimes allow agency law to pierce the corporate veil. *See* Thompson, *supra* note 16.
82. *See, e.g.*, Thompson, *supra* note 57, at 1336.
83. Meyer v. Holley, 537 U.S. 280, 290 (2003).
84. *Id.*
85. *See* Andrew Brownstein, *Real-Estate Agency Owners Win Liability Protection in Supreme Court*, TRIAL, Mar. 1, 2003, at 19.
86. *See Meyer*, 537 U.S. at 286, 290.

C. SCHOLARLY NARRATIVES OF THE DECLINE

Most corporate law observers have paid limited attention to the Court's independent contractor cases and indeed to independent contractors more broadly.[87] But some have argued that the modern, limited reach of respondeat superior causes inefficiency because it motivates businesses to avoid exerting control over potentially tortious activities by excessively using independent contractors.[88] Prominent observers also view *Bestfoods* as making subsidiaries more appealing[89] and giving "the enterprise a substantial chance to essentially judgment proof itself."[90] Ironically, rather than ensuring that businesses closely monitor their employees to minimize harm, the Supreme Court's vicarious liability jurisprudence "deters principals from using employee relationships in the very situation in which they are most needed."[91]

The weakness of third-party liability is a significant enough problem to have also animated numerous calls by legal scholars outside of corporate law to hold companies more liable for the acts of third parties in specific legal arenas. Proposals include allowing lawsuits against Internet service providers for subscribers' cyberbullying and intellectual property violations;[92] imposing strict liability when artificial intelligence harms third parties;[93] making employers strictly liable for wage violations that occur along the supply chain;[94] holding banking, accounting, and legal gatekeepers liable for securities fraud;[95] treating Amazon as a seller to ensure it pays consumers injured by products sold by third

87. The bulk of scholars' attention to vicarious liability has gone to parent–subsidiary relationships, and secondarily to corporate liability for employees' acts, with typically at most a passing reference to independent contractors. *See, e.g.*, Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 620 (2012); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 582 (1988).

88. Arlen & MacLeod, *supra* note 6, at 139–40.

89. *See, e.g.*, Thompson, *supra* note 57, at 1336 (noting the *Bestfoods* factors give "planners within corporate groups enormous room to structure their business in ways to limit liability").

90. *E.g.*, Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 530 (2001).

91. *See* Arlen & MacLeod, *supra* note 6, at 139. Some have lauded the limitations to liability, such as for helping innovation. *See* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1355–56, 1366 (2004).

92. *See, e.g.*, Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41 (2007), https://www.yalelawjournal.org/forum/regulating-cyberbullies-through-notice-based-liability [https://perma.cc/NQV4-8PQG]; Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 904 (2002); Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 222 (2006).

93. Anat Lior, *AI Entities as AI Agents: Artificial Intelligence Liability and the AI Respondeat Superior Analogy*, 46 MITCHELL HAMLINE L. REV. (forthcoming 2020) (manuscript at 3) (available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3446115 [https://perma.cc/V58P-WRBK]).

94. *See* Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 205 (2011).

95. *See* Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491, 492 (2001).

parties;[96] and imposing liability on oil companies even if they do not fully control the third parties responsible for oil spills.[97]

These and other reform proposals respond to a doctrine perceived as insufficient to support third-party liability in the overwhelming majority of cases.[98] The direst warning in the literature about such outsourcing is that "if the strategy of disaggregation is successful, it will bring the system full circle to where it was before respondeat superior and other forms of vicarious liability evolved."[99] In other words, the weakness of respondeat superior could mean that "[n]o entity . . . will be liable for the acts of any other, because all relationships will be among 'independent contractors.'"[100]

Still, much of the literature focuses on corporate organizational topics such as parent–subsidiary relationships, whereas most discussions of liability for independent contractors are decades old, focused on particular fields, or made in passing. Even in more recent field-specific studies of vicarious liability, the focus is typically not on independent contractors.[101] Thus, the parent–subsidiary literature is incomplete, and there has been insufficient examination of how liability law intersects with outsourcing at a time when that business practice has become pervasive.

This Part has pieced together the foundations for understanding widespread concerns about the enfeeblement of a once-potent respondeat superior. The chief protagonists in that downfall were agency law and corporate organizational strategy, both of which made it difficult to bring suits against large businesses for the acts of their subsidiaries or independent contractors. The demise of liability would be a concerning outcome given the ubiquity of businesses in society and the central role that liability plays in so many areas of law—from environmental to consumer protection to employment discrimination. There are normative reasons—based in efficiency, distribution, and the rule of law—to desire a third-party liability regime in which firms internalize the costs of doing business.[102] Fortunately, the organizational shifts that have threatened to stifle third-party liability must reckon with a countervailing sea change more recently enabled by developments in technology, markets, and governance.

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96. *See* Janger & Twerski, *supra* note 13, at 264.

97. *See* Garry A. Gabison, *Limited Solution to a Dangerous Problem: The Future of the Oil Pollution Act*, 18 OCEAN & COASTAL L.J. 223, 239 (2013).

98. For other proposals, see, for example, Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1103 (2002) (proposing a liability regime that follows trademark law, making the franchisor vicariously liable for the acts of its franchisees). In specific fields, some authors recognize that vicarious liability has increased. *See, e.g.*, Lemley & Reese, *supra* note 91, at 1366 (observing that in copyright, "[v]icarious liability for infringement committed by a third party has expanded in recent years").

99. LoPucki, *supra* note 1, at 66.

100. *Id.*

101. *See, e.g.*, Rogers, *supra* note 53, at 13 (noting that the article does not address the second main employment law issue related to independent contractor status).

102. *See infra* Section III.B.

II. THE REVIVAL AND EVOLUTION OF THIRD-PARTY LIABILITY

The Supreme Court's turn-of-the-century jurisprudence may have marked a significant setback for third-party liability, but it left open two main avenues for a comeback. Most immediately, future litigants still have the option of satisfying the common law test for respondeat superior. Additionally, regulators and legislators could directly impose nondelegable duties rather than relying on judges to read them into statutes. This Part offers examples of significant legal movement in both of these areas, encouraged by technological advances. The breadth and timing of these developments not only provides evidence of a resurgence of third-party liability, but also call into question the extent of the original decline.

A. REVIVING COMMON LAW AGENCY

The common law test for agency remains important to third-party liability because it is necessary not only for state torts but also many federal statutes when they are silent on the issue of third-party liability.[103] The domain of silent statutes is large, including significant legislation in antitrust,[104] consumer protection,[105] environmental,[106] intellectual property,[107] and antidiscrimination,[108] among others.[109] Thus, when a company enters into an agency relationship with a third party, it becomes more likely to be liable under a broad swath of laws. Because control of the third party is central to agency analyses,[110] this Section focuses on technological and governance enhancement of control.

1. Technological Control

Information technologies have reconstructed industrial organizations and relationships in ways that may constitute new mechanisms for establishing agency.

103. *See, e.g.*, Meyer v. Holley, 537 U.S. 280, 286 (2003) (stating the rule for federal statutes); Schramm v. Foster, 341 F. Supp. 2d 536, 543–46 (D. Md. 2004) (applying agency law to a respondeat superior analysis under state tort law).

104. *See* Clayton Act, 15 U.S.C. § 12 (2018); *In re* Sugar Indus. Antitrust Litig., 579 F.2d 13, 18 (3d Cir. 1978) (failing to find explicit guidance on third-party liability).

105. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 41 (2018); Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 (2018); P.F. Collier & Son Corp. v. FTC, 427 F.2d 261, 267 (6th Cir. 1970) (applying the FTC Act); DISH Network, LLC, 28 FCC Rcd. 6574, 6584 (2013) (applying the TCPA).

106. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (2018); United States v. Bestfoods, 524 U.S. 51, 62–70 (1998) (applying CERCLA).

107. Akamai Techs., Inc. v. Limelight Networks, Inc., 797 F.3d 1020, 1023 (Fed. Cir. 2015) (en banc) (per curiam) (applying the Patent Act); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 261–62 (9th Cir. 1996) (applying the Copyright Act).

108. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000 (2018); Fair Housing Act of 1968, 42 U.S.C. § 3601 (2018); *Meyer*, 537 U.S. at 282 (applying the Fair Housing Act); Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 259–60 (4th Cir. 1997) (applying Title VII of the Civil Rights Act).

109. Other statutes include the Commodity Exchange Act. 7 U.S.C. § 1 (2018); *see* Corn Prods. Ref. Co. v. Benson, 232 F.2d 554, 564–65 (2d Cir. 1956) (applying the Commodity Exchange Act).

110. *See supra* note 47 and accompanying text.

The agency law test for control is flexible and has many factors, but courts essentially look for the power to "police" the third party for violations.[111]

a. Three Doctrinal Components: Monitoring, Instructions, and Punishment

Policing can be broken down under the agency test into three root components: monitoring, providing instructions, and punishing.[112] Technology has advanced all of these components, although it is most relevant to monitoring and providing instructions.

In terms of monitoring, per the Third Restatement of Agency, the right to control includes the right "to assess the agent's performance."[113] Accordingly, for courts to allow third-party liability claims to proceed, plaintiffs typically must show that principals knew of the wrongful acts or could have reasonably obtained such knowledge.[114] Targets and mechanisms of the monitoring come in diverse forms. For example, a flea market operator demonstrates the ability to detect copyright infringements by sending employees to walk the aisles to enforce rules.[115] The ability to audit business records or inspect the agent's premises can also show control.[116]

Legal scholars have previously observed in other contexts that private monitoring was limited "because full observation of [an] agent's actions [was] either impossible or prohibitively costly."[117] Even through much of the industrial era—the period in which the respondeat superior doctrine integrated agency principles for independent contractors—remote monitoring was a labor-intensive process.[118] For example, Henry Ford hired private investigators to keep tabs on

111. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1174 (9th Cir. 2007) ("Google lacks the practical ability to police the infringing activities of third-party websites."); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001) ("Napster had the right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material."); Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 308–09 (2d Cir. 1963) (emphasizing the store owner's power to police concessionaires).

112. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. LAW INST. 2006). There is great variation in judicial approaches to the agency control test for purposes of third-party liability. Although listed together, these three elements are weighted differently. *See, e.g.*, United States v. Bonds, 608 F.3d 495, 515–17 (9th Cir. 2010) (Bea, J., dissenting) (applying comment f(1), and arguing that Barry Bonds' ability to assess and instruct his trainer and "[m]ost importantly" terminate their relationship created a principal–agent relationship).

113. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. LAW INST. 2006).

114. *See, e.g.*, Engate, Inc. v. Esquire Deposition Servs., LLC, 236 F. Supp. 2d 912, 914–15 (N.D. Ill. 2002) (dismissing claim partly due to defendants' lack of knowledge of contractors' illegal activity).

115. *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262–63 (9th Cir. 1996); Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1328 (D. Mass. 1994).

116. *See, e.g.*, J.M. v. Shell Oil Co., 922 S.W.2d 759, 764 (Mo. 1996) (en banc) (holding that the factual issue of whether an oil company controlled a gas station when it regulated daily activities and performed routine inspections precluded summary judgment).

117. Asaf Eckstein, *Skin in the Game for Credit Rating Agencies and Proxy Advisors: Reality Meets Theory*, 7 HARV. BUS. L. REV. 221, 222–23 (2017).

118. *See generally* Carlson, *supra* note 41 (reviewing the history of respondeat superior).

employees outside of work and walked his factory floors with a stopwatch to improve assembly-line efficiency.[119]

Today, companies deploy controversial surveillance of workers, consumers, and independent contractors through cameras, identity tags, apps, remote computer screenshots, and other devices that often leverage artificial intelligence.[120] By way of illustration, banks can silently join or listen to recordings of independent call centers' phone conversations to search for consumer protection violations. Those approaches provide considerable advancement in oversight compared to sending someone out to the call centers in person.[121] Amazon uses an app to track its independent delivery contractors' routes to their destinations, and its dispatchers can call the contractors if they are late or other problems arise.[122] Not only are these technologies a far cry from the days of Ford's stopwatch, but they also demonstrate how the same technologies that enhance monitoring also enable another important component of the doctrinal test: the delivery of instructions.

Under the Third Restatement of Agency, the "power to give interim instructions . . . is the hallmark of an agency relationship."[123] For all large companies, information technologies more readily allow interim instructions because it is now more cost-effective than before to collect the information necessary to assess what has been done incorrectly and to communicate the preferred behavior.[124] It is also now a widespread practice to engage in such feedback-oriented monitoring.[125] A separate but more uncertain argument is that when large companies provide the technological interface used by third parties—as an array of companies, including financial institutions, increasingly do—those platforms set the technical terms of how third-party companies connect to their systems. Thus, the more a large company adopts surveillance technologies and provides the technological means of interface, the more it may be seen as satisfying the monitoring and instructions components of the agency test.

In terms of the doctrinal emphasis on punishment, the link is more nebulous and variable. Nonetheless, technology's enhancement of punishment may contribute evidence of control in some contexts. In particular, online platforms offer a mechanism for other parties to come together. Amazon connects buyers and

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119. Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 741 (2017) (summarizing the history of employer surveillance).

120. *See id.* at 742–45; *see also* Rebecca Crootof, *The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference*, 69 DUKE L.J. 583, 505, 596–600 (2019) (discussing how Internet-connected devices, collectively known as the "Internet of Things," enable companies to surveil).

121. *See* Citibank, N.A., CFPB No. 2015-CFPB-0015, at 12–13 (July 21, 2015) (consent order).

122. Patricia Callahan, *When Fast, Free Shipping Delivers Heartbreak*, N.Y. TIMES, Sept. 5, 2019, at A1.

123. Smith v. State Farm Mut. Auto. Ins. Co., 30 F. Supp. 3d 765, 776 (N.D. Ill. 2014) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. LAW INST. 2006)).

124. *See* Ajunwa et al., *supra* note 119, at 742–45, 745 fig.1 (summarizing features of information technology).

125. *See id.* at 743.

sellers, Uber connects drivers and passengers, YouTube connects content providers and viewers, and Facebook connects app developers and users. Control of the platforms means the ability to punish providers by cutting off that vital access. For example, Amazon regularly delists sellers who do not comply with its policies, such as when it suspects they have paid for fake reviews to buoy their sales.[126]

Another way that technology may enhance punishment, broadly construed, is by promoting increasingly concentrated markets. Many information technologies create network effects. For instance, the more of an individual's friends who are on Facebook, the more valuable Facebook becomes to that individual.[127] Additionally, the accumulation of big data may create barriers to entry.[128] In these and other ways, technology can lead to fewer companies, each with greater market shares. In more concentrated markets, the termination of an account by Amazon of a small seller or by Facebook of an app developer can be devastating because it leaves fewer alternatives than would be the case if there were many ways to reach users. Thus, in theory, technologies can enhance monitoring, instructions, and punishment.

b. *Signs that Courts Are Moving Toward a Technological Revival*

This combination of monitoring, instructions, and punishment may help explain why courts have allowed agency control claims to proceed in a number of online contexts. For example, in cases against Napster and Alibaba, judges have ruled that platforms can sufficiently "police" wrongdoing for purposes of agency control if they can search the activities that occur on their networks and "terminate users."[129] A court also has found that PayPal plausibly controlled third-party point-of-sale partners by setting the parameters for software interface with its payment system, including providing a software instruction booklet.[130]

It is important to recognize that many of these instances of liability are not necessarily only about technology companies but also reflect the technological

126. *See, e.g.*, Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. (forthcoming 2021) (manuscript at 2) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576562 [https://perma.cc/TWR7-EWVL]) (summarizing how platforms sanction users).

127. *See* Maurice E. Stucke & Ariel Ezrachi, *How Digital Assistants Can Harm Our Economy, Privacy, and Democracy*, 32 BERKELEY TECH. L.J. 1239, 1245 (2017).

128. *See* Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1989 (2018).

129. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001) ("Napster . . . has the ability to locate infringing material listed on its search indices, and the right to terminate users' access to the system. The file name indices, therefore, are within the 'premises' that Napster has the ability to police."); Keck v. Alibaba.com Hong Kong Ltd., 369 F. Supp. 3d 932, 937–38 (N.D. Cal. 2019) ("Defendants failed to police their websites/marketplaces to the fullest extent . . . ."). Intellectual property subtleties are worth examining further but are beyond the scope of this Article.

130. Ioengine, LLC v. Paypal Holdings, Inc., No. 18-452-WCB, 2019 U.S. Dist. LEXIS 12195, at *7–10, 14 (D. Del. Jan. 25, 2019); *see also* Pers. Audio, LLC v. Google, Inc., No. 1:15-CV-350, 2017 U.S. Dist. LEXIS 122635, at *14–15 (E.D. Tex. May 15, 2017) (relying heavily on Google's practice of providing computerized instructions to third parties for its Google Play, and allowing a patent claim to survive summary judgment on the issue of control).

evolution of traditional industries. As one example, for over one hundred years, it was well-established law that cruise ship owners were not liable for negligent medical care provided on board.[131] In 2014, however, a federal court upended that precedent by reasoning that telemedicine advances enabled shipowners to supervise medical care remotely, indicating that companies could be held liable for the negligent acts of their onboard medical employees.[132]

As another example, courts have come to widely varying conclusions about how to classify taxi drivers but have often held that taxi companies were not liable because they lacked control over drivers.[133] In contrast, in various cases alleging that Uber drivers assaulted passengers, courts have ruled in the plaintiffs' favor on the control issue by finding that drivers are employees.[134] To support those decisions, judges cite Uber's technological tools, including regular smartphone communications, algorithmically monitored limits to drivers' ability to refuse rides, and use of user ratings to influence driver performance.[135] Judicial approaches to cruise line and ride-hailing cases illustrate how some courts are already implicitly aware that technology presses business relationships toward agency. It remains to be seen whether courts' treatment of Uber reflects their emerging approach to platform liability.

Courts have sometimes declined to find sufficient control when the harmful conduct occurred on third-party websites to which the platforms link.[136] And online platforms still enjoy explicit statutory protection in some contexts, such as

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131. *See, e.g.*, Barbetta v. S/S Bermuda Star, 848 F.2d 1364, 1370 (5th Cir. 1988) (basing decision not to "impute the doctor's negligence" onto a cruise liner on "a rule of law which courts that have considered the question for the last one hundred years have embraced").

132. *See* Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1248 (11th Cir. 2014) (finding that cruise lines "proudly advertise" their land-based telemedicine departments, which enhance the ability of shipowners to supervise medical staff onboard).

133. *See, e.g.*, Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 381 (D.C. Cir. 1983) ("The freedom to conduct 95 percent of one's business independently dwarfs the significance of whatever control might inhere in the commercial contracts."); Ali v. U.S.A. Cab Ltd., 98 Cal. Rptr. 3d 568, 572, 581 (Ct. App. 2009) (finding insufficient evidence of control for purposes of vicarious liability). *But see* City Cab Co. of Orlando v. NLRB, 628 F.2d 261, 262, 265 (D.C. Cir. 1980) (upholding decision that taxi drivers were employees under significant control due to factors such as the taxi company's dress code for drivers). In these cases, the courts have looked predominately at the (1) extent to which the company holds drivers accountable for income; (2) regulation of hours; (3) right to select passengers; (4) independent versus company goodwill; and (5) dress codes. *See id.* at 264–65.

134. *See, e.g.*, Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016); Search v. Uber Techs., Inc., 128 F. Supp. 3d 222, 232–34 (D.D.C. 2015); *see also* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1311 (2017) (concluding that Uber and Airbnb can be sued for intentional discrimination by hosts and drivers). These suits may nonetheless fail for other reasons, such as whether the alleged wrongdoing was within the scope of employment. *See, e.g.*, Phillips v. Uber Techs., Inc., No. 16 Civ. 295 (DAB), 2017 U.S. Dist. LEXIS 94979, at *14–19 (S.D.N.Y. June 14, 2017) (finding that assault was not foreseeable incident of employment).

135. *Doe*, 184 F. Supp. 3d at 782; *Search*, 128 F. Supp. 3d at 233.

136. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1175–76 (9th Cir. 2007) (finding that neither Amazon nor Google exerted control over the infringing material because it occurred on third-party websites rather than on Amazon's or Google's platforms).

for publishing copyright violations and defamation by third parties.[137] The law also does not impose liability for all manners of contractor outsourcing. For instance, Amazon has sometimes managed to evade liability for accidents caused by its contractors in delivering billions of packages each year, even though it "directs the destinations, deadlines and routes for its network of contract delivery drivers."[138]

However, the case law indicates that for activities that occur on their own systems, platforms' inherent ease of monitoring and blocking users can be persuasive evidence of agency.[139] Stated otherwise, the doctrine of respondeat superior may be evolving to recognize early scholars' observation that "code is cyberspace's 'law,'"[140] and that the writers of that code exert tremendous control.[141]

These signs of the agency relationship evolving with platforms carries more significance than simply holding a new tech industry to a standard of stricter liability. The most valuable U.S. companies today operate sizeable online platforms.[142] The scale of the platform economy alone—if courts hold online platforms liable for third-party harms—would significantly increase the modern influence of respondeat superior.

More importantly, the judicial treatment of online platforms may provide a window into the future of other markets. Like taxis, many traditional industries are migrating toward online platforms. Airbnb dominates the vacation rental market. One of the oldest U.S. banks, Citigroup, closed thousands of branches nationwide and now mostly relies on smartphones and other technological interfaces.[143] Other large financial institutions, many of which operate payment platforms, are also transforming technologically such that they are arguably now all fintechs.[144]

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137. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, § 202(c), 112 Stat. 2860, 287–81 (1998) (codified at 17 U.S.C. § 512(c) (2018)); Communications Act of 1934 § 230, 47 U.S.C. § 230 (2018). For a few examples from the voluminous literature on this subject, see Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 279–80 (2019); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 116 (2009); Daphne Keller, *The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation*, 33 BERKELEY TECH. L.J. 287, 295 (2018); Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y 123, 124–25 (2010).

138. Callahan, *supra* note 122; *see also infra* note 185 and accompanying text (explaining how Amazon avoids product liability).

139. This can be seen in both the cases finding liability for conduct on the platforms, as well as cases where the conduct did not give rise to liability on third-party platforms. *See supra* notes 133–36 and accompanying text. It also can arguably be inferred from judicially approved settlements between companies such as Amazon, Google, and Facebook with the FTC—although other sources of authority may be at work there. *See infra* Section II.B.

140. LAWRENCE LESSIG, CODE 5 (2d ed. 2006)

141. *Cf. id.* at 5–6 (describing the regulatory power of code).

142. *See Fortune 500*, FORTUNE, https://fortune.com/fortune500/search/ (last visited Aug. 18, 2020) (identifying Microsoft, Apple, Amazon, Alphabet, and Facebook as the five largest companies by market value as of March 31, 2020).

143. Telis Demos, *No Branch, No Problem. Citigroup Bets Big on Digital Banking.*, WALL ST. J. (May 12, 2019, 5:01 PM), https://www.wsj.com/articles/no-branch-no-problem-citigroup-bets-big-on-digital-banking-11557662401.

144. Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 240 (2018).

Thus, the documented downfall of respondeat superior coincided with the birth of innovations that ultimately strengthen the case for liability. Many large firms' mass surveillance capabilities and technologically enhanced market power move them toward greater control over third-party businesses under the common law agency test. An age characterized by data and platforms may meaningfully help reverse the decline of a doctrine born in an era of horses and carriages.

2. Gatekeeper Governance Control

Commentators have yet to consider in any sustained manner how new modes of governance are altering the common law test for agency. Of particular relevance is federal regulators' recent, widespread conscription of the world's largest firms to oversee their smaller service providers for legal violations, or what can be described as mandated gatekeeping.[145] The FTC ordered Facebook to oversee small app developers that collect data; the CFPB told banks to prevent call centers from deceiving consumers; and the Food and Drug Administration (FDA) told pharmaceutical companies to ensure their suppliers exercise safety precautions.[146] Various corporate law pressures, such as increased compliance demanded by the Sarbanes-Oxley Act of 2002,[147] also can contribute to third-party oversight.[148] Although different from common law respondeat superior, these shifts may influence the common law agency test by increasing monitoring, ratification, and punishment.

a. Monitoring

At the very least, gatekeeper mandates are worth considering in the context of third-party liability because one strategy that firms have deployed is to limit their visibility into the third party's affairs, which later enables them to claim that they should not be expected to have known.[149] Gatekeeper regulatory mandates make those self-blinding strategies ineffective. For instance, Facebook responded to the FTC's enforcement order by instituting questionnaires of all service providers about their security architecture followed by select audits.[150] The audits included activities such as "testing of the service provider's controls, a vulnerability scanning program, a web application penetration test, and/or a code review for security defects."[151] Courts emphasize the rights reserved in determining what

145. *See generally* Van Loo, *supra* note 23 (describing how private businesses have become regulatory enforcers of other private businesses).

146. *See id.* at 482, 485, 492.

147. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in Titles 11, 15, 18, 28, and 29 of the U.S. Code).

148. *See* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 398 (2019).

149. FTC v. Lifewatch Inc., 176 F. Supp. 3d 757, 773 (N.D. Ill. 2016) ("Lifewatch's ostrich-like approach to its telemarketers' compliance with the law is extremely troubling.").

150. Facebook Compliance Report at 9, Facebook, Inc., No. C-4365 (F.T.C. Nov. 13, 2012).

151. *Id.* at 10.

knowledge the principal could have obtained,[152] and they assess the degree of "visibility" into the agent's affairs, which can be established by both the frequency and breadth of the monitoring.[153] For firms ordered to undertake such extensive third-party monitoring, it will be difficult to avoid the perception of having visibility into a large sphere of activity.

b. Ratification

These extensive monitoring programs also speak to another avenue that firms use to argue against responsibility for the acts of third parties. In some legal contexts, once control is established, the agency analysis then asks whether the alleged harms in question were within the scope of authority granted.[154] The principal will not be held liable for activities outside the scope of authority.[155] That requirement allows firms to offer a contractor "gone-rogue" defense, claiming that the illicit activity was unauthorized.[156]

There is another path to establishing liability even if it is unclear that the agent had authority to act in a particular manner: subsequent ratification.[157] A business "may ratify an act by failing to object to it or to repudiate it" or by "receiving or retaining [the] benefits it generates."[158] Either knowledge of the act or willful ignorance is necessary for ratification.[159]

For instance, in the 2019 case *Henderson v. United Student Aid Funds, Inc.*, the Ninth Circuit considered whether the financial institution, USA Funds, should pay for third-party debt collectors' violations of the Telephone Consumer Protection Act (TCPA).[160] In particular, an audit of USA Funds revealed evidence

152. *See, e.g.*, Lawyers Title Ins. Corp. v. Phillips Title Agency, 361 F. Supp. 2d 443, 448–50 (D.N.J. 2005) (finding a title agency could be liable for the fraudulent actions of its independent contractors because it was contractually obligated to oversee the contractors' behavior).

153. *See* Dobkin v. Enter. Fin. Grp., Inc., No. 2:14-cv-01989 (WHW)(CLW), 2014 WL 4354070, at *4 (D.N.J. Sept. 3, 2014).

154. Authority is more relevant to liability in the context of contracts than of torts. *See* RESTATEMENT (THIRD) OF AGENCY § 6.01 (AM. LAW INST. 2006). The paths to establishing authority can be summarized as actual authority, apparent authority, and ratification. *Id.* §§ 2.02(1), 2.03, 4.01(1).

155. *See, e.g.*, Fidelity Nat'l Title Ins. Co. v. Mussman, 930 N.E.2d 1160, 1168 (Ind. Ct. App. 2010) ("Fidelity's authority to audit ITC's escrow accounts does not convert ITC's limited agency to issue title insurance commitments and policies into a broader general agency in which Fidelity has vicarious liability as the principal.").

156. *See* Life Alert Emergency Response, Inc. v. LifeWatch, Inc., 601 F. App'x 469, 474 (9th Cir. 2015) ("The district court did not buy this story of telemarketers-gone-rogue, and neither do we.").

157. The main paths to authority are actual authority, apparent authority, and ratification. *See supra* note 154. Each path provides an independent basis for authority. Thus, all that is needed to show an expansion of the agency test is to show that at least one of the paths has become more likely. *See* Harrison v. Legacy Hous., LP, GPLH, LC, 324 F. Supp. 3d 1288, 1300 (M.D. Ga. 2018); *supra* note 154. After ratification, it is as if the agent had actual authority at the time of the act. *See, e.g.*, J'Carpc, LLC v. Wilkins, 545 F. Supp. 2d 1330, 1337 (N.D. Ga. 2008).

158. RESTATEMENT (THIRD) OF AGENCY § 4.01 cmts. f, g (AM. LAW INST. 2006).

159. *See id.* at § 4.06 cmts. b, d.

160. 918 F.3d 1068, 1071 (9th Cir. 2019).

consistent with the illegal combination of both auto dialers and skip tracing.[161] The lender's "audit findings combined with its knowledge about common practices in the industry should have alerted USA Funds that it needed to investigate further."[162] Its subsequent failure to do so, and silence on the matter, could have plausibly shown that USA Funds had actual knowledge of the violations or ratified those acts through willful ignorance.[163]

Henderson shows how once a company's third-party monitoring program uncovers evidence of wrongdoing, any failure to investigate further or take steps to end the practice can set the company up for the ratification of illegal acts.[164] Although there still needs to be a connection between the business relationship and the act of wrongdoing,[165] extensive monitoring programs can increase liability risks in some contexts even when the large firm did not authorize the specific acts of wrongdoing.

c. *Punishment*

Control can be defined as the "legal right to stop or limit" harmful behavior and the "practical ability to do so."[166] Though monitoring is indicative of control, even more important is an enforcement mechanism—or means of punishment.[167] Principals typically enforce through the ability to terminate the agent's participation in some kind of business activity. The principal enhances such authority by reserving the right to exit the contract with the agent at any point.[168] Termination may also mean blocking the agent from a venue over which the principal has control, such as a marketplace.[169]

Much of the regulatory gatekeeper strategy rests on mandating that large businesses wield their influence to keep smaller businesses in line. To that end, regulators instruct large firms to contractually reserve the right to exit the business

161. *Id.* at 1072 n.1, 1075 (finding violation of TCPA for practice of "obtaining previously-unknown [sic] phone numbers associated with the name on an account, such as by contracting with 'third-party database services' or by 'calling an individual's relatives [and] known acquaintances'" (second alteration in original) (quoting deposition of senior director of operations of student loan provider)).

162. *Id.* at 1076.

163. *Id.*

164. *See id.* at 1075–76; *see also* Johansen v. HomeAdvisor, Inc., 218 F. Supp. 3d 577, 587–88 (S.D. Ohio 2016) (examining the theory of ratification based on constructive knowledge when the principal should have but failed to investigate further).

165. *See Johansen*, 218 F. Supp. 3d at 587.

166. *E.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1173–74 (9th Cir. 2007) (concluding that "Google lacks the practical ability to police the infringing activities of third-party websites").

167. *See* Whitfield v. Century 21 Real Estate Corp., 484 F. Supp. 984, 986 (S.D. Tex. 1979) (acknowledging that the ability to conduct annual audits demonstrated "a certain amount of control," but finding no agency relationship because Century 21 had no "provision for any direct input" and had not "reserved for itself the authority to supervise or control" the franchise).

168. *See, e.g.*, Carlson, *supra* note 41, at 345 ("[A]n employer's unrestricted right to discharge is inconsistent with the worker's status as an independent contractor . . . ."); Robert B. Hocutt, *The Filling Station Operator: Agent or Independent Contractor*, 3 INTRAMURAL L. REV. WAKE FOREST C. 41, 45 (1967) (observing that "an option to cancel the agreement on short written notice" is indicative of control).

169. *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262–63 (9th Cir. 1996).

relationship if the third party does not comply with the law.[170] For instance, the CFPB issued a guidance bulletin stating that financial institutions should include "in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities."[171]

When a firm has the ability to exit the relationship at any point, it has practical leverage in delivering instructions because any failure to comply could cost the third party a valuable stream of revenue.[172] Moreover, the contractual ability to exit satisfies courts' emphasis on the legal right to stop behavior.[173] Gatekeeping governance thus thrusts firms toward agency by mandating that large firms have the practical ability and legal right to stop harmful behavior.

Overall, given the flexible tests for establishing multiple paths to agency, judges sometimes emphasize context-specific elements that would not be influenced by the new gatekeeper enhancement of monitoring, ratification, and punishment.[174] Courts' doctrinal flexibility makes it difficult to predict the precise impact of governance shifts on a finding of agency in any given case.

However, a common refrain in judicial opinions denying vicarious liability is that prior cases finding liability involved "something more."[175] Pervasive new gatekeeper mandates by regulators drive firms toward a greater level of involvement in overseeing third parties in terms of being able to monitor and to punish whenever they choose. Governance mandates and powerful surveillance technologies may thus provide that "something more" that establishes greater control or ratification sufficient for third-party liability.

B. EVOLVING LIABILITIES

The discussion so far has focused on indirectly pushing companies toward greater liability through the common law agency test, but a more direct path exists. Legal authorities can impose a nondelegable duty or strict liability

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170. *See* Van Loo, *supra* note 23, at 501–02.

171. BUREAU OF CONSUMER FIN. PROT., COMPLIANCE BULLETIN AND POLICY GUIDANCE; 2016-02, SERVICE PROVIDERS (Oct. 31, 2016), https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf [https://perma.cc/NA6S-UDQK].

172. *See* Van Loo, *supra* note 23, at 501 ("Big businesses are expected to enforce . . . by blocking access to markets."). The extent of this exit threat depends largely on the principal's market power, which will be greater in more concentrated industries. *See id.* at 514–15.

173. *See, e.g.*, Hodgin v. UTC Fire & Sec. Ams. Corp., 885 F.3d 243, 252–53 (4th Cir. 2018). *But see* Kristensen v. Credit Payment Servs. Inc., 879 F.3d 1010, 1015 (9th Cir. 2018).

174. For instance, in one case the plaintiff sufficiently alleged authority by asserting, among other things, that the telemarketer employees represented themselves as calling on behalf of the alleged principal. *See* Dobkin v. Enter. Fin. Grp., Inc., No. 2:14-cv-01989 (WHW)(CLW), 2014 WL 4354070, at *4 (D.N.J. Sept. 3, 2014). Gatekeeper governance is probably irrelevant to that consideration.

175. *See, e.g.*, Engate, Inc. v. Esquire Deposition Servs., LLC, 236 F. Supp. 2d 912, 914–15 (N.D. Ill. 2002) ("The cases in which vicarious liability has been imposed all involved something more than exists here."); Conn, *supra* note 37, at 186 (explaining "[i]f the 'actual' relationship is akin to that of an employee/employer relationship," then there is a higher likelihood of finding agency); *see also* Thomas v. Taco Bell Corp., 879 F. Supp. 2d 1079, 1086 (C.D. Cal. 2012) ("[K]nowledge, approval, and fund administration . . . fall[] short of establishing [direction or control].").

regardless of whether another actor more immediately caused the harm. A nondelegable duty can come from the common law or statutes.

1. Judicial Developments

The most familiar set of nondelegable duties comes from tort law. For a certain set of inherently dangerous activities or those that pose a "peculiar risk," like construction on public roads or digging ditches,[176] the common law did not allow one party to evade tort liability by delegating to another—even to an independent contractor.[177] When scholars and judges frequently characterize the law as not holding companies liable for the acts of independent contractors except in limited circumstances, by "limited circumstances" they often mean those common law tort nondelegable duties.[178]

Courts, at times, have created new nondelegable duties by finding that an activity posed a peculiar risk. For example, in *Wislon v. Good Humor Corp.*, a three-year-old girl was struck and killed by traffic while crossing the street to reach an ice cream truck.[179] The court found no evidence of sufficient control to establish an agency relationship between the larger ice cream manufacturer and the smaller ice cream truck company.[180] Nonetheless, the court held that the exception for a peculiar risk applied because the ice cream manufacturer knew of the dangers of a curbside vendor playing music and offering products attractive to children while on a busy street.[181] Although courts have sometimes expanded common law tort nondelegable duties, they are mostly limited to physical harms.[182]

Product liability law offers another area in which courts created third-party liability. In the 1800s, it was rare for a plaintiff to win on product liability lawsuits. But in the 1960s, the California Supreme Court implemented a strict liability regime that would hold all participants in the chain of distribution—from

176. *See, e.g.*, Wilkey v. Rouse Constr. Co., 28 S.W.2d 674, 676–77 (Mo. Ct. App. 1930) (holding a contractor vicariously liable for its subcontractor's negligence in constructing a bridge on a public highway because the work was inherently dangerous); Beckman v. Butte–Silver Bow Cty., 1 P.3d 348, 353–54 (Mont. 2000) (holding a contractor vicariously liable for its subcontractor's failure to take precautions to reduce the unreasonable risks associated with digging a trench because "[t]renching operations of this nature are intrinsically or inherently dangerous as a matter of law").

177. *See* RESTATEMENT (THIRD) OF AGENCY § 7.03(c) (AM. LAW INST. 2006); RESTATEMENT (SECOND) OF TORTS §§ 410, 416, 427 (AM. LAW INST. 1965). Like much else in the respondeat superior doctrine, the case law is unclear as to whether peculiar risk and inherently dangerous activities are a single category or two. *Compare* Pusey v. Bator, 762 N.E.2d 968, 973 (Ohio 2002) ("Work is inherently dangerous when it creates a peculiar risk of harm to others unless special precautions are taken."), *with* Wilson v. Good Humor Corp., 757 F.2d 1293, 1303 (D.C. Cir. 1985) (explaining that peculiar risk is a separate path to nondelegable duty). For this Article, the important point is that a set of nondelegable duties exist.

178. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 57 (AM. LAW INST. 2012) ("Except as stated in [Sections detailing nondelegable duties], an actor who hires an independent contractor is not subject to vicarious liability . . . ."); *supra* note 7.

179. 757 F.2d at 1295.

180. *See id.* at 1302–03.

181. *See id.* at 1303, 1305–07. This court's holding is limited to its jurisdiction.

182. *See* RESTATEMENT (SECOND) OF TORTS §§ 410–427 (AM. LAW INST. 1965).

manufacturers to retailers—strictly liable for defective products.[183] Most states adopted a similar regime in the 1960s and 1970s.[184] The emergence of online marketplaces poses new challenges to plaintiffs. For example, for a portion of its sales, Amazon has successfully argued that it was not the seller because it lacked control, and that the seller was instead the third-party merchant that Amazon merely connected to the consumer.[185] However, California recently bucked that trend by holding that Amazon was liable for an injury resulting from a third-party product sale.[186] Regardless of where that online seller issue goes, product liability has constituted an overall increase in third-party liability.

Courts have also created nondelegable duties outside of tort law. For instance, some insurers' duty of good faith is nondelegable when they hire independent attorneys who breach that duty.[187] Additionally, in the context of labor law, over the past couple of decades, many state courts have discarded the prior agency control test and instead moved toward viewing independent contractors as presumptive employees when they are providing a central service of the business.[188] That shift forced many businesses to abide by wage and benefit laws with respect to independent contractors whom agency law had previously removed from such responsibilities.[189]

Judicially created nondelegable duties and other enhancements of third-party liability are, however, uncommon—particularly after the Supreme Court limited judges' ability to read them into federal statutes.[190] When Congress has spoken on liability in a given context, the common law must defer.[191] Because many large businesses are heavily regulated by federal statute today, those restraints

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183. Vandermark v. Ford Motor Co., 391 P.2d 168, 172 (Cal. 1964); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963).

184. Mark A. Geistfeld, *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation*, 105 CALIF. L. REV. 1611, 1632 (2017).

185. *See, e.g.*, Oberdorf v. Amazon.com, Inc., 936 F.3d 182, 183 (3d Cir. 2019) (vacating judgment and granting Amazon's petition for a rehearing after previously holding that Amazon is a seller); Fox v. Amazon.com, Inc., 930 F.3d 415, 421, 425 (6th Cir. 2019) (affirming dismissal of products liability claim against Amazon after a hoverboard purchased on Amazon's webpage burned down a house). For further analysis, see Christoph Busch, *When Product Liability Meets the Platform Economy: A European Perspective on* Oberdorf v. Amazon, 8 J. EUR. CONSUMER MKT. L. 173 (2019) (comparing the Third Circuit's analysis of platform liability in *Oberdorf* to European Union rules on product liability).

186. Bolger v. Amazon.com, LLC, No. D075738, 2020 WL 4692387, at *20 (Cal. Ct. App. Aug. 13, 2020).

187. *See, e.g.*, Majorowicz v. Allied Mut. Ins. Co., 569 N.W.2d 472, 477 (Wis. Ct. App. 1997).

188. *See, e.g.*, Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 35 (Cal. 2018) (designating a new test that presumes a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits); *see also* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 65–66 (2015) (documenting states' movement to a "simplified version" of the prior agency control test).

189. *See* Deknatel & Hoff-Downing, *supra* note 188, at 71.

190. *See supra* Section I.B.

191. *See, e.g.*, CSX Transp., Inc. v. McBride, 564 U.S. 685, 696 (2011) (finding that the Federal Employers' Liability Act's "in whole or in part" formulation precluded application of common law proximate cause tests in suits over railroad employee injuries suffered on the job).

mean that courts in many contexts cannot add to the list of nondelegable duties.[192] Courts thus have more limited opportunities to create third-party liability than do administrative agencies and legislators.

2. Administrative Agency and Statutory Developments

Statutes and regulations have provided perhaps the most significant advances in third-party liability, especially at the federal level. When the text of the legislation is silent, in a particularized application of *Chevron* deference,[193] courts defer to regulators' reasonable interpretations on what third-party liability to apply.[194] Moreover, prosecutors and regulators have tremendous informal enforcement authority over firms, which allows them to pressure businesses into settlements to pay for the acts of third parties even without a clear legal mandate.[195] Authorities have thereby expanded nondelegable duties, or otherwise imposed third-party liability that goes beyond the common law. Examples follow from pharmaceuticals, technology, oil, and finance—the sectors in which the largest U.S. companies operated as of writing.[196]

The primary regulator of pharmaceutical companies, the FDA, formally articulates what is increasingly a common view among regulators. Drug companies regularly hire external labs to conduct tests or source their materials from third parties. Through rulemaking, the FDA has clarified that it "regards extramural facilities as an extension of the manufacturer's own facility."[197] In other words, pharmaceutical companies cannot escape liability by outsourcing to third parties—they have a nondelegable duty.

In the tech sector, third parties are more removed than in the pharmaceutical sector, in that platforms arguably do not hire app developers and instead allow them to participate on their platforms. Yet the tech sector's primary regulator, the FTC, has initiated consumer protection suits against Amazon and Google for third-party app developers' charges that allowed children to incur sometimes thousands of dollars in fees for making quick purchases in the middle of video games.[198] The agency also pursued Google and other companies for insufficient oversight of third-parties' privacy practices.[199] Although tech companies face a weaker form of nondelegable duty than in the other industries discussed here, at

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192. *Cf.* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 409 (1989) (referencing "the sheer volume of federal statutes and regulations").

193. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

194. *See, e.g.*, Henderson v. United Student Aid Funds, Inc., 918 F.3d 1068, 1072 (9th Cir. 2019) (deferring to the Federal Communication Commission's interpretation in applying the TCPA).

195. *See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2119–20 (2016) (questioning the legal foundations for prosecutors' imposition of compliance departments); Van Loo, *supra* note 148, at 412–19 (documenting regulators' ability to pressure firms by ramping up enforcement and costly regulatory monitoring, such as inspections and record examination).

196. *See Fortune 500*, *supra* note 142.

197. 21 C.F.R. § 200.10(b) (2019).

198. *See* Van Loo, *supra* note 23, at 469.

199. *Id.* at 482.

least in some contexts they cannot delegate privacy and consumer protection responsibilities to independent third parties without incurring legal liability.[200]

For large oil companies, there is sometimes a gap between liability in practice and liability in the law. In 1989, the *Exxon Valdez* oil tanker crashed off the coast of Alaska, spilling eleven million barrels of oil.[201] The ship was owned and operated by a subsidiary of Exxon, and thus Exxon likely could have escaped liability under a literal application of the law.[202] However, government pressure and concerns about reputation forced Exxon to pay for much of the damage caused by the spill.[203] The Justice Department indicted Exxon on five criminal charges, which served as a bargaining chip in the larger settlement negotiations,[204] and high-level government officials, including the President, Vice President, and Secretary of Transportation, became involved.[205]

After the *Exxon Valdez* spill, Congress expanded the liability of oil companies for the actions of their subsidiaries—already a strengthening of third-party liability—but the legislation omitted independent contractor liability.[206] That suggested firms might still avoid liability by outsourcing to independent contractors, and there is evidence that some did.[207] However, the incident may have also signaled that oil companies could not rely on what the law said to predict liability. Indeed, the larger industry move at the time seems to have been for oil companies to bring such transportation activities in-house.[208]

The catastrophic Deepwater Horizon oil spill in the Gulf of Mexico offers a more complex picture of liability because the main owner of the well, BP Oil, was one of three main independent parties found to have been at fault in both at trial and in a final federal report.[209] The contractor, Transocean, owned and ran the oil rig that did the drilling, and made some of the most significant direct

200. For example, notification to consumers may limit liability considerably.

201. *See* Gabison, *supra* note 97, at 223 & n.7.

202. *See* Mendelson, *supra* note 15, at 1243 ("Had Exxon claimed limited liability . . . the subsidiary could not possibly have paid the cleanup costs.").

203. *See id.* (mentioning reputational concerns); *Exxon to Renew Alaska Cleanup; Accord Ends Standoff with State*, N.Y. TIMES, Feb. 22, 1990, at A1 (discussing intense pressure on Exxon from state and federal officials).

204. *See* John H. Cushman Jr., *Justice Officials See Exxon Trial as Risk for U.S.*, N.Y. TIMES, Mar. 1, 1990, at A1.

205. DEP'T OF TRANSP., U.S. COAST GUARD, DOT-SRP-94-01, FEDERAL ON SCENE COORDINATOR'S REPORT T/V EXXON VALDEZ OIL SPILL 84 (1993).

206. *See* Oil Pollution Act of 1990 § 1002, 33 U.S.C. § 2702 (2018).

207. *See* Polinsky & Shavell, *supra* note 9, at 944 n.238 ("[A]fter the Exxon Valdez oil spill, Shell shifted some responsibility for the transport of oil from its own tanker fleet to vessels owned by independent contractors.").

208. *See* Brooks, *supra* note 6, at 110.

209. *In re* Oil Spill by Oil Rig "Deepwater Horizon," 21 F. Supp. 3d 657, 747 (E.D. La. 2014) (finding that BP was reckless and allocating 67% of the liability to it for the blowout); NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING—REPORT TO THE PRESIDENT 90 (2011), https://www.govinfo.gov/content/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf [https://perma.cc/4C7P-EUPY].

mistakes that caused the spill.[210] The disaster started in unstable cement laid by another contractor, Halliburton, which likely could have prevented the problem if it had properly tested the cement before laying it on the ocean floor.[211] However, given the many different causes and multiple parties involved, "sorting out the respective responsibility for the accident would be an impossible task."[212] Ultimately, the Environmental Protection Agency secured about $19 billion in settlement from BP, compared to $1.4 billion from Transocean.[213] It is difficult to know how much perception, including public pressure from President Obama on BP, contributed to these results,[214] and the underlying liability laws are numerous and complex. Regardless, the intent of some of the key statutes[215] and result of their regulatory enforcement has been to push the companies earning the most profit toward liability even when independent contractors are making key mistakes.

Financial regulators exercise perhaps the most explicitly extensive third-party oversight. The CFPB, the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency all have mandates enabling them to sue third-party service providers that serve banks.[216] Instead, however, regulators have pursued major financial institutions themselves. The CFPB has successfully brought enforcement actions against each of the four largest banks—Bank of America, Citibank, JP Morgan Chase, and Wells Fargo—among others, for the acts of service providers.[217]

That regulatory strategy begins with holding financial institutions responsible for making a good decision about which independent contractor to select. Following prosecution by financial regulators, courts have required banks to research third-party provider "qualifications, expertise, capacity, reputation, complaints, information security, document custody practices, business continuity, and financial viability."[218] In the wake of such an order, the failure to vet contractors thoroughly at the outset, as well as on an ongoing basis, would violate the law.

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210. *See id.* at 92–93, 119, 124.

211. *See id.* at 94–99, 115–18 (explaining also how BP made critical errors).

212. W. Kip Viscusi & Richard J. Zeckhauser, *Deterring and Compensating Oil-Spill Catastrophes: The Need for Strict and Two-Tier Liability*, 64 VAND. L. REV. 1717, 1746 (2011); *see id.* at 1742 (noting also that the parties can shift some liability contractually).

213. *Deepwater Horizon—BP Gulf of Mexico Oil Spill*, EPA, https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill [https://perma.cc/UEL5-QMLP] (last visited Aug. 20, 2020). BP's total amount paid out as a consequence of the spill was over $60 billion. *See* Yong Gyo Lee, Xavier Garza-Gomez & Rose M. Lee, *Ultimate Costs of the Disaster: Seven Years After the Deepwater Horizon Oil Spill*, 29 J. CORP. ACCT. & FIN. 69, 75–78 (2018).

214. President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010, 8:01 PM) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/remarks-president-nation-bp-oil-spill [https://perma.cc/SGB7-WXQU].

215. *See infra* note 297 and accompanying text.

216. *See* 12 U.S.C. §§ 1867(c), 5514(e) (2018).

217. Van Loo, *supra* note 23, at 485 (reviewing legal actions).

218. *See* HSBC Bank USA, N.A., No. AA-EC-11-14, at 11 (Dep't of Treasury, Office of the Comptroller of the Currency Apr. 13, 2011) (consent order).

In contrast, under the common law, courts rarely hold companies liable for negligent hiring of independent contractors.[219] In one case, the court refused to impose liability on a company whose independent contractor transported hot asphalt but had no insurance and a suspended license—even though the company did not check such documentation beforehand.[220] The driver ran a red light, crashed into a telephone pole, and dumped the asphalt onto another car, severely burning the victim.[221] Regulators thus have stepped in to impose liability for non-delegable duties in ways that courts have been historically reluctant or unable to do.

The federal regulatory growth of third-party liability is not confined to the pharmaceutical, technology, oil, and finance industries. In labor law, for instance, when an agricultural company uses a third-party service to provide the labor to harvest crops, the agricultural company is statutorily liable for the third party's violations of wage laws.[222] State legislatures have codified courts' characterization of independent contractors as presumptive employees when the contractors provide a central service to the business.[223] In addition, federal regulations hold trucking companies liable for accidents caused by drivers who are independent contractors.[224] Nondelegable duties, or liability standards that are considerably easier to satisfy than the common law agency test for control, thus govern many industries' third-party contractors and many different areas of law.

Nondelegable duties have not yet reached every industry and area of law. The U.S. Department of Housing and Urban Development (HUD), for example, enforces the Fair Housing Act.[225] The HUD wrote a rule allowing vicarious liability for discrimination but made that liability "consistent with agency law."[226] Put differently, some regulators use their discretion to adhere more closely to the Supreme Court's default of lesser third-party liability.[227] Nonetheless, the expansion of nondelegable duties and related liability would be significant even if occurring only in the industries in which the largest U.S. companies operate, given the economic scale and broad number of businesses involved in finance, technology, oil, and pharmaceuticals. Its presence in these industries and many

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219. Gabison, *supra* note 97, at 240.

220. *See* Mavrikidis v. Petullo, 707 A.2d 977, 982–83, 986, 989 (N.J. 1998).

221. *Id.* at 980.

222. *See, e.g.*, Rogers, *supra* note 53, at 5 n.7, 12 (summarizing the doctrine on third-party liability for wage theft).

223. *See, e.g.*, 2019 Cal. Legis. Serv. Ch. 296 (West) (codified at CAL. LAB. CODE §§ 2750.3, 3351 (West 2020) and CAL. UNEMP. INS. CODE §§ 606.5, 621 (West 2020)); MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(1)–(3) (West 2020); *supra* notes 188–89.

224. *See* 49 C.F.R. § 390.5 (2019) (defining employee as "including an independent contractor while in the course of operating a commercial motor vehicle").

225. *Fair Housing Enforcement Activity*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/enforcement [https://perma.cc/QDK6-FB3V] (last visited Aug. 20, 2020).

226. 24 C.F.R. § 100.7(b) (2019).

227. *See supra* Section I.B.

others means that despite great variation, third-party liability has expanded well beyond common law respondeat superior's reach.

In summary, the new gatekeeper governance paradigm is propelling some businesses into higher control relationships, thereby making it more likely courts will see them as principals under the common law. Technological changes further strengthen that case for agency by making it more practical for companies to monitor wrongdoing, stay in constant communication, and punish wrongdoing through platform expulsion. Numerous nondelegable duties have also appeared. These might be better seen as a new form of gatekeeper liability because they often seek to promote one party's legal compliance by making another responsible.[228]

More study of the revival of respondeat superior and gatekeeper liability is needed to determine the extent of their prevalence. Certainly, courts and legislatures have in recent decades sometimes made moves in the opposite direction by insulating businesses from third-party liability.[229]

Overall, however, a closer look at laws, markets, and organizations calls into question the demise of respondeat superior and companies' supposed ability to insulate themselves from third-party liability. Legal observers should revise their common assertion that a firm is not liable for the acts of independent businesses "absent special circumstances."[230] In light of a statutorily growing list of nondelegable duties, coupled with technologies and regulators moving firms toward agency, large businesses today have far fewer opportunities to shield themselves from liability by outsourcing to third parties.

III. IMPLICATIONS

As judges decide cases, lawmakers pass legislation, and administrative agencies regulate, they all should understand the implications of promoting a new era of expanded third-party liability. The purpose of the expansion should not be to punish large size. Instead, the legal architecture should make firms internalize the full costs of their operations in a manner that advances efficiency while balancing other values, such as distribution. Policymakers will face difficulties analyzing those implications because firms might organizationally respond to greater liability by insourcing or more tightly controlling their counterparties—moves that could undermine competition and innovation. Despite the challenge of weighing these various considerations, legal authorities, at a minimum, can increase liability by adopting more sophisticated tools for measuring a firm's power over the web of businesses that directly or indirectly bring it profit.

228. *See infra* Section III.C (discussing gatekeeper liability in greater depth).

229. *See supra* Part I.

230. *See supra* note 7 and accompanying text (providing examples of this commonly repeated observation).

A. RESTRUCTURING ORGANIZATIONS

In designing business liability law, it is essential to adjust for how the firm will respond to new laws. Lawyers have traditionally advised corporate clients to structure their organizations to avoid liability.[231] In an era of robust third-party liability—which assumes that the penalties imposed by liability are sufficiently high—some companies may seek to limit liability through two main institutional design shifts, both of which may be pursued simultaneously. The first is for businesses to bring more activities in-house rather than outsource, thereby contributing to even larger organizations. The second and related option would be the business more tightly controlling its counterparties. In the extreme, it may rigidly limit which parties can interface in its business ecosystem, facilitated perhaps through greater reliance on technological platforms.

1. Expanding Large Firms

Scholars have documented some historical outsourcing by firms as an attempt to escape liability—sometimes referred to as disaggregation or disintegration.[232] This Article has shown how the law has, for purposes of liability, essentially reintegrated many enterprises. It is also possible that the enterprises themselves will choose to organizationally reintegrate in response to those legal shifts. More broadly, the resurgence of third-party liability may alter the outsourcing decision—and thus the size and efficiency of firms.

There are no doubt still good reasons to outsource, such as benefits related to costs, specialization, and nimbleness.[233] Those advantages could outweigh the pressures that a resurgent liability regime would place on companies to insource.

But for many current business relationships between large companies and third parties, liability is no longer a reason to outsource and may instead provide significant motivation to reintegrate. According to some scholars, "strong empirical evidence indicates that increasing exposure to tort liability has led to the widespread reorganization of business firms to exploit limited liability to evade damage claims."[234] Despite difficulties in knowing the magnitude of such reorganizations in the past,[235] whatever portion of outsourcing is currently motivated by avoiding liability could be a target for future insourcing under an expanded third-party liability.

Indeed, even outsourcing motivated solely by other considerations—such as efficiency—could be moved in-house if the liability regime makes it sufficiently

231. *See, e.g.*, Menell, *supra* note 75, at 401 ("[T]he role of the corporate lawyer, as a specialist in structuring corporations to insulate clients from serious potential liabilities, has remained much the same.").

232. *See* Hansmann & Kraakman, *supra* note 18, at 1913–14; *supra* note 10 and accompanying text.

233. *See, e.g.*, Geis, *supra* note 53 (noting rising outsourcing and causes).

234. Hansmann & Kraakman, *supra* note 18, at 1881.

235. *See* George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955, 999–1000 (2007) (noting the lack of quantitative data to support how falling interaction costs have led to an increase in monitoring activity); *see also* Geis, *supra* note 53 (providing many possible reasons linked to outsourcing).

expensive to monitor, enforce, and pay for harms caused by third parties. In other words, the incentives in a world of robust vicarious liability should move companies more towards relying on third parties only when the business reasons for doing so are not outweighed by any increased liability-related costs. The magnitude of increased liability costs will be determined not only by the legal penalties, but also by the costs and effectiveness of monitoring.[236]

Ideally, the result would be firms competing to reduce harms more efficiently. However, trust and a reliable estimate of third-party compliance will often be difficult to obtain without intense monitoring. Many of the most desirable smaller third-party contractors are essentially judgment-proof—perhaps because they are thinly capitalized or located abroad.[237] Their ability to avoid paying for legal violations means they are more likely to have insufficient incentives themselves to take precautions.[238] Contract law, through indemnity clauses, could help in some limited contexts but does not provide a comprehensive solution.[239] To the extent that regulators or prosecutors are more willing to impose liability on the large company that hired the third party, expansive third-party liability could further lower those incentives. Firms may not want to take the risk of waiting and seeing which third parties are taking adequate precautions. There is some limited evidence that firms have in the past responded to the threat of heightened third-party liability by taking third-party services in-house.[240]

The revival of liability may also speak to past organizational arrangements that have puzzled legal scholars. Despite economic theory suggesting that they should vertically disintegrate, some industries have persisted in their vertical integration—particularly those steeped in intellectual property and intensive knowledge production, such as pharmaceuticals and information technology.[241] More expansive third-party liability could also contribute to surprisingly enduring vertical integration.

Moving forward, to fully assess the efficiency and social implications, policymakers should examine how a reinvigorated third-party liability may contribute

236. A third party that is worse than the primary company at compliance could still be profitable to have as a contractual counterparty if it added more value than it lost in worsened compliance. However, in that instance, the third party would have incentives to improve its compliance to avoid losing the primary company's business—and the primary company would still have an incentive to monitor that company's compliance.

237. *See, e.g.*, Arlen & MacLeod, *supra* note 6, at 126.

238. *See id.*

239. Regulators sometimes do not allow the firm to recoup its losses from the third-party contractor. *See supra* Section II.B.2. Additionally, risk-spreading considerations would often weigh against such provisions when the third party is smaller because the larger firm is better able to spread costs. Furthermore, indemnification does not help for third parties whose judgment-proof status motivated the outsourcing.

240. *See, e.g.*, Brooks, *supra* note 6, at 109–10, 111 fig.1 (finding a "sharp increase" in the percentage of oil carried by oil companies following the *Exxon Valdez* oil spill).

241. *See* Peter Lee, *Innovation and the Firm: A New Synthesis*, 70 STAN. L. REV. 1431, 1442–44 (2018) (reviewing the literature and attributing the outsourcing resistance to knowledge aggregation challenges).

to larger enterprises that avoid outsourcing.[242] Given the scale of outsourcing in the economy, the implications of even a partial shift would be significant.

2. Building Walled Gardens and Platforms

Increased third-party liability could also drive many big businesses to restrict their remaining third parties more closely, particularly because big businesses increasingly have the technological means to monitor in a cost-effective manner.[243] Large companies' incentives to police third parties more closely implicates a fundamental design decision that many firms already face regarding the level of access to allow third parties, symbolized by a choice between walled and open gardens. Moreover, some technological means of control—such as those imbedded in platform code—may become more appealing if the law fails to keep up.

At one extreme, the "walled garden" model is especially associated with Apple's central authority and limited third-party participation, rather than the more open platforms of Google's Android and Microsoft's PC.[244] A walled garden is characterized as "a system where an entity controls as many aspects of a product as possible and where features are only available if approved by a central authority."[245] That model reflects the historical business norm. For instance, telecommunications carriers and broadcast companies have closely limited third parties' ability to contribute content and otherwise build systems.[246] The original Apple handheld devices allowed users little ability to access source code and otherwise engineer or tailor the product.[247]

Walled gardens contrast with the open-platform model that gained prominence with the advent of computing and the Internet.[248] Two examples of more broadly open platforms include Wikipedia, which allows users to edit content, and early desktop computers, which let operators more easily program the underlying code.[249]

These options should be seen as lying on a fluid spectrum rather than as a binary and fixed choice. Companies can move toward convergence while still retaining dimensions of the divergent archetypes. Google made its Android

242. These implications are discussed further *infra* Section III.A.3.

243. Stated otherwise, the agency costs of outsourcing may increase if large companies are responsible for the acts of third parties who have diminished incentives to comply with the law. On agency costs in outsourcing, and firms' increasing ability to monitor contributing to outsourcing, see Geis, *supra* note 235, at 962.

244. *See* JONATHAN L. ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 1–4, 29 (2008) (describing Apple's tight control over the functionality of its first iPhone model as a break from the "PC revolution" that encouraged innovation by others).

245. Michael H. Wolk, *The iPhone Jailbreaking Exemption and the Issue of Openness*, 19 CORNELL J.L. & PUB. POL'Y 795, 797 (2010).

246. *See* ZITTRAIN, *supra* note 244, at 181 (describing cable companies as walled gardens).

247. *See id.* at 2–4.

248. *See id.* at 3.

249. *See id.* at 127–48 (providing a case study of Wikipedia's openness).

source code open, although it has created walled gardens elsewhere.[250] Apple at one point opened its ecosystem by developing its App Store,[251] but the company still supervises the interactions between users and app developers more closely than Google does.[252]

Additionally, the vertical integration decision can dovetail with that of walled gardens. Whereas Apple manufactures all of its phones, Google long operated only through phones made by others, such as Nokia, Motorola, and Samsung.[253]

Businesses will weigh many factors in choosing how extensively to wall off. Open platforms will retain some appeal due to competitive advantages from having a broader field of collaborators and perhaps additional revenues from winning over consumers who prefer open platforms.[254] There are also independent reasons to choose walled gardens, including the protection of intellectual property and enclosure of data and predictive algorithms.[255] But a resurgent third-party liability may encourage more platforms to move toward walled gardens because a "bottleneck" central authority inherently allows for greater policing of third parties.[256] By contrast, the prior era of frail respondeat superior provided greater incentives to opt for an open system, which allowed third parties to operate more independently.

Another outcome is possible that may free the firm from compromising by either insourcing or building walled gardens. The platform business model may offer a strategy for circumventing liability when the law allows. Platforms offer a shield due to statutory intermediary liability protections afforded in some contexts, such as against defamation lawsuits, and can confound previously established third-party liability, such as Amazon's early avoidance of product liability.[257]

More broadly, it is unclear that courts and lawmakers have recognized the extent to which computer code, big data, and the design of technical interfaces may constitute more subtle forms of control.[258] If the law fails to adapt to these

250. J. Gregory Sidak, *Do Free Mobile Apps Harm Consumers?*, 52 SAN DIEGO L. REV. 619, 621 (2015); Stucke & Ezrachi, *supra* note 127, at 1291.

251. James Grimmelmann & Paul Ohm, *Dr. Generative or: How I Learned to Stop Worrying and Love the iPhone*, 69 MD. L. REV. 910, 920–24 (2010) (book review).

252. *See* Richard N. Langlois, *Design, Institutions, and the Evolution of Platforms*, 9 J.L. ECON. & POL'Y 1, 12 (2012).

253. The company recently began to manufacture its own phones. *See id.* at 9, 12. Apple still would use third-party contractors in the manufacture.

254. *See id.* at 13; *see also* Salil K. Mehra, *Paradise Is a Walled Garden? Trust, Antitrust, and User Dynamism*, 18 GEO. MASON L. REV. 889, 894 (2011) (discussing user-generated innovation). If a company believed that appealing to the do-it-yourself crowd would improve revenues overall, it might opt for an open-source model with higher liability.

255. *See, e.g.*, Langlois, *supra* note 252, at 13; Mehra, *supra* note 254, at 920.

256. The model is, after all, built on control. *See supra* notes 244–46 and accompanying text.

257. *See supra* notes 13, 126 and accompanying text.

258. On the law's failure to keep up with platformization, see Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 177–87 (2017).

developments—fails either to grasp how they work or to scrutinize them[259]—businesses would have an option, based in agency law, for evading third-party liability. Stated otherwise, the law's failure to keep up could offer companies technological means to avoid liability while retaining control of third parties.

3. Implications of Strategic Reorganization

The discussion so far has focused on outlining potential strategic responses by businesses. Identifying the implications and risks of those hypothetical responses is also an integral part of navigating the path forward.

Compared to open platforms, walled gardens rely more on "secrecy and obfuscation."[260] When companies close off their networks, innovation may suffer.[261] Closed systems can also limit opportunities for competitors and entrepreneurs to participate, and in the extreme, they can facilitate monopoly power.[262] Concerns about openness have prompted a number of scholars to propose regulations that would allow for more broad-based participation, including mandating network architecture,[263] an open Internet,[264] and creativity-conducive Internet design principles.[265]

The issue is further complicated because walled gardens, along with the regulatory gatekeeper model requiring significant monitoring, are conducive to obtaining valuable competitive information about the practices of those third-party companies.[266] That information would help educate the large company on how to replicate those third-party services in-house. The closeness also could inform decisions on whether to purchase those third parties it is monitoring closely, thus leading to further consolidation.

As a result, some third parties may resist close monitoring if it would risk revealing competitively sensitive information.[267] However, that resistance could exacerbate the make-or-buy decision. The more the third party resists monitoring, the more nervous the principal may be about liability—thus further incentivizing insourcing. In light of these disparate levels of comfort with information sharing

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259. *See generally* Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563 (2019) (discussing challenges to monitoring technologies and platforms).

260. *See* Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1975, 1982 (2006).

261. *See* Mehra, *supra* note 254, at 894–96 (arguing that walled gardens can be preferable overall and offer great innovation). Of course, Apple's semi-open "walled garden" appeals to many users.

262. *See, e.g.*, Zittrain, *supra* note 260.

263. BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 387–89, 392 (2010).

264. *See* Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 571–98 (2010).

265. *See* Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 928–29, 971 (2001).

266. *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1006–08 (2019) (analyzing Apple's monitoring of apps that compete with comparable Apple services).

267. The law would likely provide limited protection in the case of trade secrets accessed. *See* Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 244 (1998) (noting that trade secret protection is weaker than other forms of intellectual property protection because it requires the breach of relationally specific duties).

and the great heterogeneity of business counterparties, large companies would likely adopt a variety of strategies.

Overall, the smart move for many of those companies may be to more tightly control a smaller remaining corps of third parties and to simultaneously bring some portion of services in-house. In that scenario, the expansion of liability would drive toward greater concentration of authority in the private sector and away from distributed authority—analogous to the trend in the public sector toward concentration strategies.[268] Today's large firms would become even larger and more insular.

A move along the spectrum toward walled gardens and larger companies is not inevitably negative.[269] However, those shifts can lead to significant harms that would need to be addressed by other legal mechanisms, such as antitrust law. Some efficiency could also be lost if firms bring in-house services that would be more cost-effective to handle externally. Additionally, because the walling off of companies is a potential consequence, it is important to recognize that demands for a more open Internet, and indeed an open society, may be in tension with a reinvigorated third-party liability.[270]

Thus, if greater third-party liability pushes more firms toward larger walled gardens, the decreased openness and greater concentration could produce unintended, harmful consequences. Policies mandating third-party platform access, and modernizing antitrust, may take on greater urgency. These implications are worthy of attention as decisionmakers consider whether and how to continue expanding third-party liability.

B. WEIGHING NORMATIVE FOUNDATIONS

The organizational incentives that push toward larger walled garden firms inform the broader normative question of whether and under what conditions a resurgent liability regime is desirable. Three potential justifications are found in efficiency, distribution, and the need for the law to keep up with change. Although each of these has limitations, they provide normative foundations for third-party liability that different parties may find persuasive.

1. Balancing Efficiency and Distribution

To the extent that stronger third-party liability drives insourcing, the economic implications could be mixed. Larger walled firms could cause inefficiencies, most notably if they undermine competition or cut off avenues for leveraging more nimble and specialized business structures. However, some have concluded that the weak vicarious liability regime created incentives in the past to outsource excessively and to take insufficient precautions to avoid harm.[271] Consequently,

268. *See* Univ. of Chi. Law Sch., *Saul Levmore, "How Does Law Work? Concentration and Distribution Strategies,"* YOUTUBE (Nov. 5, 2014), https://youtu.be/-xIPzgn9kq4.

269. On the spectral nature of the choice between walled gardens and open platforms, see, for example, Mehra, *supra* note 254, at 895.

270. For a related tension in intermediary liability, see *supra* note 137.

271. *See, e.g.*, Arlen & MacLeod, *supra* note 6, at 139–40.

some portion of large companies' historical disaggregation may have been inefficient, if the companies could have operated the outsourced services at lower costs than the third parties.[272] Under those assumptions, efficiency could improve as a result of strong liability.

The overall costs to society of business activity also include externalities, or the effects that business activities have on other parties, such as causing physical injuries. Those costs could decline if businesses took more appropriate precautions as a result of internalizing the risk of harm. A similar internalization-of-costs argument can be made for requiring firms to pay for the benefits of contract workers.[273] Importantly, a stronger liability regime would improve the economy by more closely mapping liability to those who profit most from the economic activity giving rise to the responsibility.[274] For internalization to occur, the remedies would need to reflect the costs of the activity rather than simply imposing liability on the optimal party.[275]

Finally, there are potential efficiency gains in relying on a large business, rather than the government, to regulate smaller businesses.[276] Because the large business is already in the industry and in touch with its smaller contractors, it can presumably monitor and enforce in a more cost-effective manner, compared to paying for a government entity to re-create the information transfer and sophistication. Of course, there are countervailing concerns about accountability and industry capture of a privatized regulatory process—although it is not clear that government regulation would offer an improvement.[277] Some of these issues are taken up below, but for now, the main point is that there is a theoretical basis for concluding that the growth in third-party liability would significantly increase efficiency by undoing some previously inefficient outsourcing, removing externalities, and lowering the costs of regulation.[278] Assuming those observations are accurate, the overall costs to society of offering a good or service could decrease due to stronger third-party liability.

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272. *See id.*; *see also* Hansmann & Kraakman, *supra* note 18, at 1914–15 (describing two examples where a disaggregation strategy would result in inefficiencies through lost economies of scale or scope). Outsourcing to inefficient third parties could still make economic sense for the primary firm because the savings in liability exceed the losses in third-party inefficiency. *See id.*

273. *See* Michael C. Harper, *Using the Anglo-American* Respondeat Superior *Principle to Assign Responsibility for Worker Statutory Benefits and Protections*, 18 WASH. U. GLOBAL STUD. L. REV. 161, 165–66 (2019) (arguing for cost internalization in the context of digital platform labor). On efficiency and labor law more broadly, see generally Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471 (1993).

274. *See supra* note 40 and accompanying text (tying respondeat superior liability to profits). *But see generally* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010) (raising issues with product liability).

275. *Cf.* Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267, 1359 (1997) (describing enterprise liability as imposing "responsibility on injurers commensurate with their power" based on profits).

276. Van Loo, *supra* note 23, at 512.

277. *Id.*

278. *See* Arlen & MacLeod, *supra* note 6, at 139–40.

A reinvigorated third-party liability also may bring progressive distributional effects. Consumers harmed by discrimination, deception, privacy invasions, and other violations likely have an overall lower income than owners and executives of large companies.[279] Yet a weak liability regime could subject many individuals to uncompensated harms. Requiring employers to pay for contract workers' benefits may also lower inequality.[280]

However, it is possible that greater liability overall would increase the costs of doing business in some industries. Businesses could pass those increased costs on to consumers and possibly workers. Thus, the distributional effects would be multidirectional. Nonetheless, the most straightforward change would be to shift more of the costs of doing business from uncompensated individuals and small businesses to large companies.[281] Stronger liability could thereby play a role in reducing economic inequality.

Although the full efficiency and distributional implications are impossible to predict with any great accuracy, it is noteworthy that often policymakers must decide which of two important goals to advance—efficiency or equality—at the expense of the other.[282] In theory, stronger third-party liability can increase both.

2. Administering Justice and Adapting the Law

Some harms involved in liability, such as environmental degradation or systemic risk, fit less readily into distributional and efficiency analyses. Whatever the normative foundations for the underlying laws of financial regulation, antidiscrimination, consumer protection, and other areas, there is a need for liability to keep up with a changing world. These non-quantifiable considerations point to the value of improving the administration of justice.

Judges have repeatedly shown an inclination to expand third-party liability to reach independent contractors and subsidiaries.[283] Although economic considerations can justify that expansion, some courts have implied that they have additional motivations. They have made known their distaste for businesses that strategically delegate responsibilities to third parties to evade liability—what one judge described as "mere subterfuge" and another as "ostrich-like" behavior.[284]

279. This statement can be inferred because consumer spending is more spread among the population than ownership of large companies, which is highly concentrated in wealthy households even after adjusting for stock ownership. *See, e.g.*, Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1293–95 (2016) (noting that many economists believe that anticompetitively higher prices contribute to economic inequality).

280. *Cf.* Harper, *supra* note 273, at 190–94 (making a case, out of economic fairness, for strengthening respondeat superior in the context of digital platform labor).

281. On the tradeoff between consumers and firms, see Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 235 (2019).

282. *See* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1650–51 (2018); Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828, 1879–80 (2017) (describing the typical tradeoff and demonstrating efficiency grounds for equitable policies).

283. *See supra* Part I.

284. Ga. Truck Sys., Inc. v. Interstate Commerce Comm'n, 123 F.2d 210, 212 (5th Cir. 1941) (referring to interstate motor carriers' avoidance of liability); FTC v. Lifewatch Inc., 176 F. Supp. 3d 757, 773 (N.D. Ill. 2016).

Another way of viewing the expansion is thus simply as ensuring that the laws reach the activities they were originally intended to reach without becoming obsolete due to either organizational or technological change.

The judicial rejection of a respondeat superior test that focused on who paid for the service—and adoption of an agency law test—may have made sense at a time when individuals and small businesses dominated commerce and when middle-class consumers would have had a hard time policing the growing array of independent contractors.[285] Additionally, the technologies did not exist then for cost-effective monitoring. In the 1800s, independent contractors such as mechanics were therefore more reasonable parties to hold solely liable. Even when giant monopolies began to populate the twentieth-century economy, respondeat superior still often forced them to internalize more of the costs of their businesses because they handled more of their services internally through their own employees.[286] For these reasons, the traditional respondeat superior regime fit better with the organizational landscapes in the pre-industrial and industrial eras.

In contrast, a liability regime that reaches only employees makes less sense in the modern context of technologically advanced companies hiring significantly smaller contractors. It is impractical to sue or regulate many of these smaller contractors, specifically those chosen to avoid liability. Today's largest companies are often in a position either to complete the third party's work in-house or to control the contractors they hire.[287] They do not need the protections from liability that nineteenth-century middle-class consumers and smaller businesses may have needed upon hiring mechanics. Additionally, because large companies have more customers than a small third-party contractor, they may ultimately be better positioned to spread the costs—allowing the allocation of liability to serve as a kind of insurance.[288]

Furthermore, the modern economy exhibits several structural features that complicate the analysis of business relationships. Businesses operate on a modular service model, often hiring part-time independent contractors who may themselves hire independent contractors.[289] The companies WeWork, Upwork, and TaskRabbit, for instance, provide on-demand services such as office space and

285. *See* Carlson, *supra* note 41, at 304. Moreover, even under a stringent respondeat superior regime, the harmed party could always sue the independent contractor directly rather than going after the company that hired it. Thus, centuries ago, when the hiring business did not dwarf service providers to the same extent as today, and when most independent contractors were domestic, respondeat superior did not necessarily shield a significantly more sophisticated or deep-pocketed defendant. *See supra* Part I.

286. *See supra* notes 51–52 and accompanying text.

287. On the ease of control, see *supra* Section II.A.

288. *Cf.* Partnoy, *supra* note 95, at 492, 542–46 (conceptualizing securities gatekeeper liability as insurance). *But see* Polinsky & Shavell, *supra* note 274, at 1441 (arguing that products liability forces people to pay for insurance they may not want).

289. *See* Blair et al., *supra* note 5; *see also* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 723–24 (2013) (discussing trends toward temporary and contingent workers).

temporary help.[290] Additionally, technology and finance have interjected layers of intermediation into almost every industry, including at the labor level through the gig economy.[291] These changes in sophistication, technology, and business organization justify an update to third-party liability.

A "chief attribute"[292] of the common law is to adjust to changes in society.[293] The law should not provide rights without remedies.[294] Yet allowing large businesses to manipulate corporate structures and leverage outsourcing to avoid liability would too often leave a harmed party without recourse to the law. Greater understanding of the revival of respondeat superior can help address that problem because, in applying the common law to changing contexts, judges often look to other courts and broader indicators of policy.

In summary, there are theoretical normative foundations in efficiency and distribution for expanding liability to subsidiaries and independent contractors. The empirical evidence is, however, quite limited. Future studies should examine those factors through an expanded lens that includes how businesses might respond by insourcing, building walled gardens, and deploying technological mechanisms of control. The findings would ideally inform the necessary project of adapting a colonial-era doctrine to an economy driven by remote technologies and large corporations.

C. MODERNIZING LIABILITY

Regardless of whether one agrees with the normative foundations for doing so, policymakers and judges are frequently holding large businesses liable for the acts of smaller independent entities and subsidiaries. A substantial path to that liability lies through a flexible common law test for control developed long ago. More sophisticated analyses could help to sharpen the test, decrease its inconsistency, and better calibrate penalties. Similar tools might be used in gatekeeper liability and related areas. In particular, two components would benefit from greater clarity in any update to third-party liability: the measurement of power and mapping of network influence.

1. Measuring Power

A focus on power is at the doctrine's roots, in its test for control, and at the heart of many courts' twentieth-century efforts to read third-party liability into federal statutes.[295] Regulators in diverse industries have already embraced the

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290. *See* Inara Scott & Elizabeth Brown, *Redefining and Regulating the New Sharing Economy*, 19 U. PA. J. BUS. L. 553, 561–65 (2017).

291. *See* Judge, *supra* note 30, at 574–75, 592; Lin, *supra* note 30.

292. Utermehle v. McGreal, 1 App. D.C. 359, 368 (D.C. Cir. 1893), *rev'd sub nom.* MacGreal v. Taylor, 167 U.S. 688 (1897).

293. *See, e.g.*, Achtenberg, *supra* note 37, at 2241.

294. Marbury v. Madison, 5 U.S. 137, 163 (1803).

295. *See supra* Part I; *see also* Search v. Uber Techs., Inc., 128 F. Supp. 3d 222, 231 (D.D.C. 2015) (stating that the "power to control" is usually "the determinative factor" in the agency test for respondeat superior (quoting Moorehead v. District of Columbia, 747 A.2d 138, 143 (D.C. 2000))); CPC Int'l, Inc. v. Aerojet–Gen. Corp., 777 F. Supp. 549, 573 (W.D. Mich. 1991) (holding that "a parent corporation is

idea of holding the largest companies liable.[296] As the judge in the B.P. Oil Deepwater Horizon case stated, the Clean Water Act was "designed to 'place[] a major part of the financial burden for achieving and maintaining clean water upon those who would profit by the use of our navigable waters and adjacent areas.'"[297]

Despite the consistent emphasis on power and policing third parties, courts can lose sight of what is most important as they weigh many diverse factors, and "[a] fact found controlling in one combination may have a minor importance in another."[298] Accordingly, the traditional test weakens the analysis of power—or at least allows for less informative measures of it—by joining so many other considerations in a nonhierarchical manner.

In practice, prosecutors, plaintiffs, and regulators often have little problem identifying the party they should pursue: the most valuable company with significant involvement in the harm.[299] Such decisions flow from diverse psychological foundations, including the allure of the greater wealth and attention that comes from suing large companies.

Nonetheless, the legal test for control should be—and arguably already is in many instances—simplified to prioritize the principal's ability to police, as defined by monitoring and punishing.[300] Courts would then give less weight to secondary considerations used in some contexts, such as whether the alleged agent saw or represented itself as an agent. Additionally, courts should view any firm's use of extensive surveillance technologies for its workforce or independent contractors as strengthening the case for third-party liability because that surveillance indicates monitoring ability.

Even when courts focus on technologies, monitoring, and enforcement, those inquiries are bereft of many indicators that can help identify power. In particular, they often leave out any quantitative measures. Other regulatory analyses that hinge on market power, such as antitrust, tend to focus on micro-level indicators such as price, activity-level profits, and market share.[301] Courts could in respondeat superior analyses consider such metrics because they provide some insight into whether a firm is truly in a position to punish a third-party contractor by terminating a contract. However, the antitrust analysis does not provide an off-the-

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directly liable under [S]ection 107(a)(2) [of CERCLA] as an operator only when it has exerted power or influence over its subsidiary"), *vacated sub nom.* United States v. Bestfoods, 524 U.S. 51 (1998).

296. *See supra* Sections II.A.2.a, II.A.2.c.

297. *In re* Oil Spill by Oil Rig "Deepwater Horizon," 844 F. Supp. 2d 746, 759 (E.D. La. 2012) (alteration in original) (quoting United States v. Coastal States Crude, 643 F.2d 1125, 1128 (5th Cir. 1981)), *rev'd in part*, 21 F. Supp. 3d 657 (E.D. La. 2014). The court had to read that design into the statute through historical research because it was not clearly stated. *See id.* at 759–60.

298. Burruss v. B. M. C. Logging Co., 31 P.2d 263, 264 (N.M. 1934).

299. For examples, see *supra* Part II.

300. *See supra* Section II.A.

301. Another topic potentially worth exploring is how common ownership might factor into the respondeat superior reforms. On the issues raised by concentrated ownership, see Frank Partnoy, *Are Index Funds Evil?*, ATLANTIC, Sept. 2017, https://www.theatlantic.com/magazine/archive/2017/09/are-index-funds-evil/534183.

shelf analytic toolkit because it is resource-intense, has inherent limitations, and is not tailored to the kind of control analysis involved in third-party liability.[302]

There are, however, more straightforward approaches that are in some ways more fitting to respondeat superior—rooted, as that doctrine is, in one party's domination of another. Courts could inquire into how much of the alleged agent's revenues come from the principal—whether from the principal's direct payments or from other factors, such as access to consumers. That straightforward figure would better indicate the principal's ability to punish than the current emphasis on the contractual right to terminate.[303] After all, a threat to terminate a contract that accounts for a small percent of the contractor's business will have limited leverage.

Another measure of power—market value—is not officially part of liability analyses. A company's market valuation reflects the appraisal of many sophisticated investors.[304] It monetizes difficult-to-quantify sources of power, such as the value of data, and considers the entire corporation—including, in the case of Alphabet, subsidiaries such as Google and YouTube.[305] Moreover, valuation is more readily available and relatively standardized, at least for publicly traded companies, which are the world's largest.[306]

Establishing quantitative estimates of power is not necessary for a liability regime to thrive, but focusing more explicitly on power can provide insight into control, potentially making a disorganized doctrine more coherent. It might also inform a project that is beyond the scope of the current discussion: setting the penalties at an optimal amount. Thus, to enrich their analyses of monitoring and punishment as a means of determining control, lawmakers and courts should consider prioritizing the most important components of monitoring and punishment as indicators of control, as well as bringing quantitative metrics into the analysis. The aim of those metrics would be to ensure businesses internalize the full costs of their activities.

2. Mapping Network Control

Along with power, another dimension of third-party liability needing an upgrade is the approach to networks. More specifically, how should the doctrine respond to the nonlinear and indirect nature of many business relationships?

In a heavily intermediated world, the solution does not lie in returning to the nineteenth-century alternate approach to respondeat superior of holding

302. Many of the core antitrust considerations are difficult to analyze and define, making courts' and juries' tasks difficult. Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1284 (2012); *see also* Ian Ayres & F. Clayton Miller, *"I'll Sell It to You at Cost": Legal Methods to Promote Retail Markup Disclosure*, 84 NW. U. L. REV. 1047, 1078 (1990) (showing how firms may obfuscate profit levels to evade regulation).

303. *See supra* Section II.A.2 (discussing courts' emphases on contract termination).

304. *See, e.g.*, MICHAEL C. EHRHARDT & EUGENE F. BRIGHAM, CORPORATE FINANCE: A FOCUSED APPROACH 293 (6th ed. 2017).

305. *See id.*

306. *See Fortune 500*, *supra* note 142.

accountable the party that pays for the independent contractor. That alternative might sometimes work but would often not translate in a straightforward manner. As an initial matter, fragmentation can introduce degrees of separation and shroud relationships. In a fragmented economy, powerful firms are hubs with numerous direct ties, each of which may have many of its own contractors.[307] In mortgages, for instance, a broker often initiates a loan, the bank provides the money, investment funds purchase the loan, and a non-bank mortgage servicer receives the homeowner's payments.[308] In these business networks, there is sometimes no single answer to the question of which party is paying whom for the core service. In addition, often the party paying the independent contractor is the consumer on Amazon, or a smaller business may pay the large platform for access to consumers.[309] Furthermore, payment can be in subtle forms, like a consumer's attention or data.[310] Focusing on direct monetary payment would thus leave out some indications of modern power and potentially recreate the problem—rejected in the 1800s—of holding unsophisticated parties liable for risks they cannot monitor.

Despite the extended relationships, businesses have demonstrated the ability to exert control over network actors who are more removed. For instance, Walmart and other retailers pressure manufacturers to police their foreign production facilities as part of supply chain management,[311] aiming to use such control to limit risks.

The law would ideally have a means to trace liability through the various connections to the actors who can most effectively use their power and remote technologies to influence even those who are not direct counterparties. In other words, a network theory of liability is needed.[312] Network theory can help to determine whether a given company has sufficient control over a business network. For instance, one can estimate whether a given node is responsible for more than 30% of the network traffic—perhaps measured by data or payments—as part of a nonlinear, more holistic analysis.[313] The greater the influence on the

307. *See, e.g.*, Blair et al., *supra* note 5, at 287–89.

308. *See* Raymond H. Brescia, *Capital in Chaos: The Subprime Mortgage Crisis and the Social Capital Response*, 56 CLEV. ST. L. REV. 271, 289–91 (2008).

309. *See* Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1275–76 (2017).

310. John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 166 (2015).

311. *See* Rogers, *supra* note 53, at 16–17; *see also* Jane K. Winn, *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, 58 ARIZ. L. REV. 193, 209–10 (2016) (describing mandatory requirements and voluntary commitments by employers like Walmart to "maintain an acceptable minimum level of protection for workers and suppliers," including through antislavery and antitrafficking efforts).

312. Developed independently from this Article, Anat Lior has also begun to apply network theory to liability, but in a significantly more sustained manner. *See* Anat Lior, *The AI Accident Network: Artificial Intelligence Liability Meets Network Theory*, 95 TUL. L. REV. (forthcoming 2021).

313. *See, e.g.*, Daijun Wei, Xinyang Deng, Xiaoge Zhang, Yong Deng & Sankaran Mahadevan, *Identifying Influential Nodes in Weighted Networks Based on Evidence Theory*, 392 PHYSICA A 2564, 2570–71 (2013) (discussing a method of statistical analysis to find influential nodes in a weighted network).

network flow, the more likely the actor can exert control over the participation of other parties.

Together, these elements for measuring both power and network influence could be seen either as ways to retool existing doctrines or as an updated approach to third-party liability. These concepts build on existing ideas of respondeat superior, "gatekeeper liability," and enterprise liability but go beyond them.[314] The influential notion of gatekeeper liability is distinct in that it seeks to hold accountants and other peripheral actors liable for failing to catch the violations that they are supposed to prevent when they sign off on business activities.[315] Gatekeeper liability is targeted at a third party, often a peripheral actor, and seeks to hold the watchperson liable.[316] In contrast, the revival aims to hold the real parties with power liable—more analogous to imposing liability on the nobles who would have hired the old watchpersons, rather than imposing liability on the watchpersons themselves. Thus, something akin to respondeat gatekeeper has emerged, in that firms with the ability to monitor and punish must "answer" if they do not adequately enforce the law against third parties.[317]

Neither the revival nor this Article's proposals are based on a conception of large corporations' size as inherently positive or negative. They do not view business size as harming society any more than network theory views high-traffic nodes in the network as bad. Rather, from a theoretical perspective, high-traffic nodes may merit additional scrutiny for the health of the network—as would a ladder between two decks on a ship, which if improperly engineered can serve as a bottleneck for the flow of the crew.[318] By analogy, holding businesses liable when they can influence conduct—by technologically enhanced monitoring and punishing—improves the health of markets. Retooling third-party liability offers a potential means of building more efficient commercial networks or marketplaces, while

314. Network keeper liability reflects many scholarly calls for "enterprise liability" at its broadest level of abstraction, which is "the maxim that those who profit from the imposition of risk should bear the costs of the accidents that are a price of their profits." Keating, *supra* note 76. It is necessary to distinguish network liability, however, because enterprise liability has many meanings and typically applies to different (and narrower) contexts than this Article's focus. For example, enterprise liability sometimes refers to holding all manufacturers in an industry liable for a tort when it is impossible to identify the actual harm-causing manufacturer. *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924, 928 & n.9 (Cal. 1980). More commonly, it refers to holding the organizationally connected web of subsidiaries and parents responsible as one entity, but those discussions rarely reach independent contractors. *See, e.g.*, Meredith Dearborn, Comment, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 198–202, 252–54 (2009) (focusing on parent–subsidiary relationships in proposing reforms to strengthen enterprise liability); *supra* note 75 and accompanying text. Network liability thus builds on enterprise liability to expand the concept to a broader group of actors connected through subtle modern modes of intermediation.

315. *See* Kraakman, *supra* note 24, at 53–54 (identifying and developing gatekeeper liability).

316. *See id.* at 54 & n.3.

317. Another way to conceive of it is as "respondeat imperium," reflecting the Latin word for "power."

318. *See* Douglas Rigterink, Rebecca Piks & David J. Singer, *The Use of Network Theory to Model Disparate Ship Design Information*, 6 INT'L J. NAVAL ARCHITECTURE & OCEAN ENGINEERING 484, 489 (2014) (applying network theory to ship passageways).

potentially also answering calls to hold businesses accountable for laws they have too often evaded.

3. Objections

Both the power and network elements of an updated liability regime need greater development than space constraints allow here. Nonetheless, several potential objections merit at least brief additional consideration. These objections apply to both the specific tools discussed above to modernize liability and to the idea of reinforcing respondeat gatekeeper.

One challenge is that any quantitative test for power cannot avoid some degree of vagueness and debatable metrics. Thus, whatever metrics are adopted for network power—market valuation, network theory, or otherwise—would have significant limitations. With that said, the test for holding a company liable for the acts of an independent contractor is already an inconsistent "morass."[319]

Thus, it is important to assess new tools in comparison to the existing ones rather than compared to an impossible standard of absolute clarity.[320] When viewed with the current judicial test as the reference point, a focus on the ability to monitor and punish wrongdoing—and factoring in quantitative measures of power—helps to prioritize and focus the existing factors, and thus could improve doctrinal and policymaking cohesion.

Another potential objection—and one faced by any proposal for increased regulation, whether antitrust, consumer financial protection, or vicarious liability—is the risk of stifling investment and innovation. Other scholars' examinations of increased liability, such as for "unlimited liability," have devoted considerable attention to addressing these and other critiques from a theoretical perspective,[321] but innovation is difficult to measure. Fortunately, this Article's proposals reflect what is already implicitly happening in some of the most lucrative industries.[322] Until data from direct studies arrive, these large parts of the economy are profitable and innovative, boosting confidence that widespread application of respondeat gatekeeper will not halt innovation or investment.[323]

Indeed, adding the proposed quantitative tests could improve innovation by making it more feasible for small actors to thrive. Because quantitative measures

319. Conn, *supra* note 37 ("Companies do not know in what circumstances liability will attach. Uncertainty and inconsistency are rife and well documented."). The doctrinal generality of vicarious liability allows judges to come to differing conclusions based on similar fact patterns. This "ad hoc approach" leads to "imponderability and unpredictability." King, Jr., *supra* note 54, at 462; *see also* Richardson v. APAC–Mississippi, Inc., 631 So. 2d 143, 150 (Miss. 1994) ("[T]he various tests to determine the type of relationship are themselves generalities which can be viewed quite differently, depending upon which judge is applying them.").

320. *See* Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 17–18 (2009) ("The general theory of second best holds that where it is not possible to satisfy all the conditions necessary for an economic system to reach an overall optimum, it is not desirable to satisfy as many of those conditions as possible.").

321. *See* Hansmann & Kraakman, *supra* note 18, at 1880, 1887, 1903–06.

322. *See supra* Part II.

323. Most notably, it is occurring in the technology sector. *See supra* Part II.

might consider valuation and industry share of profits, the test could be designed so that small businesses would incur lower levels of third-party liability. Startups would thus have a barrier to growth removed in the early phases of their business life cycles when it may not make sense to require them to develop a sophisticated third-party monitoring apparatus.[324]

Proposals for greater regulation of businesses also face a practicality hurdle. Because the rise of respondeat gatekeeper occurred without any interdisciplinary push or even recognition, it is inconsistently distributed—different industries face varying levels of vicarious liability and judges emphasize different factors in the test for control.[325] Also, the legal foundations lie in a patchwork of sources, including statutes, administrative agency rules and guidance, and court-approved settlements.[326] Ideally, the framework for third-party liability would be updated through comprehensive federal legislation clarifying the agency test. That process would enable a more systematic consideration of all of the potential implications of a revival, such as insourcing and walled gardens. A federal statute would also address the piecemeal manner of liability's evolution, which currently subjects companies to potentially disparate liability depending on the regulator or judge. Yet such legislation is unlikely.

In the absence of legislation, an upside of the nebulous, flexible test for control currently applied is that judges can emphasize network liability principles today—by focusing on the most important factors offered by the common law—without going against precedent.[327] For instance, the common law can extend along a chain of relationships if each agent had the authority to appoint the next agent in the chain of authority.[328] Thus, unlike other proposals such as tax restructuring and antitrust reform to pursue efficiency and distribution goals, meaningful liability change could happen without any need to overturn well-established precedents or build consensus in gridlocked legislatures.

CONCLUSION

Agency law has long constricted the reach of respondeat superior through an exacting test for control. That test previously provided businesses with an opportunity to avoid third-party liability by relying on subsidiaries or independent

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324. *Cf.* Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 200 (2019) (observing that startups struggle to monitor internally); Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 385 (2017) (describing recent startups as "regulatory entrepreneurs" whose business plans include pushing for legal changes).

325. *See supra* Section II.B.2 (summarizing differences in approaches across regulators); *supra* note 319 and accompanying text (discussing judicial inconsistency).

326. *See supra* Part II.

327. *Compare* White v. Gulf Oil Corp., 406 A.2d 48, 50–52 (Del. 1979) (emphasizing that the various common law agency factors, including the "predominant" power to control, provide a dynamic, flexible tool courts may utilize to find principal–agent relationships), *with* U.S. EEOC v. Glob. Horizons, Inc., 915 F.3d 631, 640–41 (9th Cir. 2019) (relying solely on the power to control and ignoring the other common law agency factors as inapplicable in finding an employment relationship).

328. *See* RESTATEMENT (THIRD) OF AGENCY § 3.15(2) (AM. LAW INST. 2006).

contractors. The disintegration of industry threatened to shrink the reach of an influential doctrine and contract the liability boundaries of the firm.

Third-party liability is now in the midst of a renaissance. By pushing today's largest firms to police their counterparties, regulators have increased the chances that courts will see those firms as occupying a position of control. Furthermore, ubiquitous technologies of surveillance and platform exclusion make companies more vulnerable to charges of ubiquitous control. Regardless of courts' approach to agency law, policymakers in many industries have bypassed the agency test to impose third-party liability through nondelegable duties. For this reason alone, it is no longer accurate to describe the state of the law as imposing liability only for the acts of independent contractors in unusual circumstances.

Businesses would be expected to respond by bringing previously outsourced services in-house, more closely guarding their remaining counterparties, or leveraging technologies in ways that confuse courts as to the level of control. The potential growth and insulation of already large and dominant companies require attention. However, the revival, in the aggregate, is likely beneficial because a weak respondeat superior provides insufficient incentives for companies to take adequate precautions and absorb the full costs of their business affairs. Enhancing third-party liability is a rare legal reform that has the potential to improve both efficiency and equality—and to do so on a large scale.

Thus, judges, regulators, and lawmakers should not hesitate to use the tools they each already have to reinforce the current patchwork of principles. Given courts' historical receptivity to expanding vicarious liability for large companies, and the pervasive use by federal statutes of the common law test for control, a widespread judicial increase in respondeat gatekeeper is within reach without new legislation. Either way, the centuries-old measure of power is outdated and applied inconsistently. The third-party liability analysis would benefit from modern metrics of control and remedies that cause firms to internalize the costs of their activities.

The core doctrinal and policy question is what firm sits at the nexus of power such that it could cost-effectively monitor and punish wrongdoing in its web of business associations. This emerging worldview amounts to network keeper liability, in which actors are responsible in proportion to their influence over a sphere of activities. Even in its current form, it has already begun to adapt third-party liability so that in a fragmented world, the superiors answer again.