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## CONTRACT FORMATION IN AN INTERNET AGE

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Should the “mailbox” doctrine of contract acceptances be applied in technological contexts far beyond the nineteenth century context for which it was established? Among modern contracting parties, the e-mail inbox has largely replaced the postal mailbox and the near-instantaneous process of electronic communication can mimic the characteristics of a face-to-face discussion. Such technological advancements of the late-twentieth and twenty-first centuries pose a challenge to the doctrinal and normative rationales articulated by the *Adams v. Lindsell* court and other early “mailbox” rule advocates. Moreover, the advent of electronic communication has implications even for application of the “mailbox” precedent within the framework of postal and other traditional communication systems. Only a receipt-based contracting precedent, applied to technologies both new and old, can properly enhance inter-jurisdictional legal uniformity and incentivize efficient contracting behavior.

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## I. INTRODUCTION

The “mailbox” rule is a paradigm of the aphorism that technology outpaces law.<sup>2</sup> In the early 1800s, when English courts were faced with the question of whether to make an acceptance valid at dispatch or at receipt, communication over long distances had a single predictable quality—it was very, very slow. Messages could take days, weeks, or even months to reach their destinations, and considerations of convenience and fairness led courts to conclude that an offeree should be able to accept a contract with the knowledge that it would be binding immediately.<sup>3</sup> Hence the “mailbox” rule, also termed the dispatch rule, became the well-settled doctrine of the land, not only in England but also in the United States.<sup>4</sup> The alternative doctrine, known as the receipt rule, was relegated to governing other types of communications between parties, such as offers and rejections, but never acceptances.<sup>5</sup>

Despite the relative unanimity of courts on this issue, a debate about the appropriate default rule raged among early legal commentators. With renowned scholars and eloquent arguments on both sides,<sup>6</sup> the debate eventually reached a stalemate. The conflicting literature produced a general apathy in the legal community: the informal consensus was that both the dispatch rule and the receipt rule had “substantially equal justification—or lack of justification.”<sup>7</sup> But only one rule could be chosen, and the

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<sup>2</sup> See Henry H. Perritt, Jr., *Law and the Information Superhighway 2* (2d ed. Aspen Law & Business 2001).

<sup>3</sup> See *Adams v. Lindsell*, (1818) 106 Eng. Rep. 250, 251 (K.B.); see also discussion *infra* Part II.

<sup>4</sup> See *Mactier’s Adm’rs v. Frith*, 6 Wend. 103, 154-57 (N.Y. 1830); see also discussion *infra* Part II.

<sup>5</sup> See discussion *infra* Part V.A.

<sup>6</sup> See Artur Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, 36 Colum. L. Rev. 920 (1936), for a review of early literature supporting and criticizing the dispatch rule. For example, the early-twentieth century English scholar Sir William Anson supported the rule upon the simple rationale that an offeree should not suffer due to an unexpected event that interrupts the transport of her acceptance between the time of dispatch and receipt. *Id.* at 920 n.9. Nineteenth century French scholar Merlin, on the other hand, used the hypothetical of the “acoustic vault” to demonstrate his opposition to the dispatch rule. The essence of his thought experiment was the following: if an offeree’s acceptance, yelled across an acoustic vault, were to reach the offeror only *after* the offeree had subsequently run across the vault and notified the offeror of his revocation, then surely the offeror could not reasonably hold the offeree to his earlier statement. *Id.* at 920 n.11.

<sup>7</sup> Gyula Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 Am. J. Comp. L. 311, 317 (1979).

dispatch rule became the preferred choice simply because most courts had already established the dispatch rule as the precedent.<sup>8</sup>

The two rules are no longer equally or even near-equally justifiable. Technological innovation has ushered in a new commercial era, with communication between contracting parties occurring in the blink of an eye. The very name of the “mailbox” rule conjures up its dated origins, raising the question whether nineteenth-century jurists would have sanctioned its application in technological contexts far beyond their wildest imaginations. The proliferation of the Internet<sup>9</sup> and other electronic<sup>10</sup> communication systems has occasioned a new reason (or opportunity, it could be said) to choose between the dispatch and receipt rules for contract acceptances.<sup>11</sup> It is time to

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<sup>8</sup> See Arthur L. Corbin, *Contracts* 78 (1st ed. West Publ'g Co. 1952); Beth A. Eisler, *Default Rules for Contract Formation by Promise and the Need for Revision of the Mailbox Rule*, 79 Ky. L.J. 557, 568 (1991) (“[T]he current dispatch rule is no more convenient than the proposed default rule.”).

<sup>9</sup> For example, 71% of people in the United States had access to the Internet in 2007, and the average Internet user spent 33 hours per week using web products or services. David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 Nw. U. L. Rev. 1987, 1990-91 (2008).

<sup>10</sup> The term “electronic” is commonly used to refer to modern communication systems whose substantially instantaneous qualities are determined primarily by their electronic functionality, as in the case of Internet communications and Electronic Data Interchange. See discussion *infra* note 35. Thus, for purposes of convenience, this Article sometimes employs the terms “electronic” and “substantially instantaneous” interchangeably. This is not to say that some instantaneous technologies do not have analog components (e.g., the modern telephone), or to say that other, non-instantaneous technologies do not utilize any electronic components (e.g., even telegraph communications involve some transmission of electric signals).

<sup>11</sup> Some scholars have challenged the utility of adjusting default rules; positing, for instance, that the substance of a default rule is trivial because of the low transaction costs of contracting around it. See Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. Rev. 542, 557 (1990) (arguing that because default rules can be avoided at such little cost, they “aren’t very important . . . even for small companies”); Henry Hansmann, *Corporation and Contract*, 8 Am. L. & Econ. Rev. 1, 1-2 (2006) (noting that the “conventional wisdom” is that “[default rules] are inconsequential, or they have at most a modest influence” (citation omitted)). Other scholars are skeptical of reforming default rules not because they believe the rules lack substantive significance, but rather because appropriate defaults are so rarely selected and so rarely implemented at sufficiently low cost. As a result, these scholars view reform efforts as ineffective, or even deleterious. See, e.g., George S. Geis, *Automating Contract Law*, 83 N.Y.U. L. Rev. 450, 489-92 (2008); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 595-609 (2003).

Yet even the critics generally leave room for the desirability of certain, limited default rule reforms. The thesis of this Article does not necessarily run contrary to these theories, particularly if the potential efficiency gains in the special case of the receipt rule are as significant as hypothesized. Basic logic, for instance, tells us that even the relatively efficient technique of consolidating best contracting practices into “model agreements,” a common occurrence among

construct a legal doctrine that anticipates and accommodates future developments and does not leave the law lagging behind technological reality.

Nearly instantaneous electronic contracting is increasingly common<sup>12</sup> and has taken on many forms, including even the use of electronic agents to reduce transaction costs by altogether eliminating human involvement.<sup>13</sup> These new capabilities are so efficient that “few companies are likely to rely exclusively on the ‘old ways’ of doing business.”<sup>14</sup> Nevertheless, the technological revolution in contracting has been subdued by the lingering uncertainty of businesses and consumers concerned with the rules and risk allocations of utilizing new media.<sup>15</sup> The moment that an acceptance to an offer becomes binding is a matter of particular scrutiny because it identifies the point at which

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EDI trading partners, will not be as satisfactory to parties and to economic markets as the possibility of contracting under a default rule regime that already embodies the “model” regulations. *See* E. Allen Farnsworth, *Farnsworth on Contracts* §1.7, at 29 (3d ed. Aspen Publishers 2004); Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 *Int’l Rev. L. & Econ.* 446, 453 (2005) (arguing that “most parties would want . . . commercial law . . . to minimize the sum of . . . the costs to the parties of embodying contracting solutions in written agreements (legal knowledge costs) [and] . . . the costs to the parties of solving contracting problems (problem-solving costs)”). Moreover, a mere finding that the cost of contracting around a default rule is small in a single transaction does not negate the possibility of significant efficiency gains where the benefit of a correct default rule is multiplied through a large volume of transactions, as it would be here. Third, as discussed *infra* Part V.B., even a slight efficiency benefit to a transaction conducted through electronic means can lead to relatively outsized future efficiency gains if it incentivizes parties to switch from traditional forms to electronic forms of communication in subsequent transactions. *Cf.* Amelia H. Boss & Jane Kaufman Winn, *The Emerging Law of Electronic Commerce*, 52 *Bus. Law.* 1469, 1470 (1997) (“The increased costs of dealing with . . . new legal uncertainties may offset any reduction in costs achieved through the use of new technologies and, as a result, may slow needlessly the rate at which businesses are willing to implement new technologies.”). But the most important reasons that default rule critics do not undermine the relevance of the argument herein is that this Article (a) involves a theoretical comparison of one particular and famously important default rule, the “mailbox” rule, and its counterpart, the receipt rule, as opposed to a macro-analysis of default rule regimes generally, and (b) goes beyond the issues of efficiency and fairness to implicate larger questions about the interplay between new technology and traditional legal norms.

<sup>12</sup> *See, e.g.*, Shawn E. Tuma & Christopher R. Ward, *Contracting over the Internet in Texas*, 52 *Baylor L. Rev.* 381, 381-82 (2000).

<sup>13</sup> Jean-Francois Lerouge, *The Use of Electronic Agents Questioned under Contractual Law: Suggested Solutions on a European and American Level*, 18 *J. Marshall J. Computer & Info. L.* 403, 404 (1999).

<sup>14</sup> Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 *Rutgers Computer & Tech. L.J.* 215, 218 (2000).

<sup>15</sup> Boss & Winn, *supra* note 11, at 1470; Maureen A. O’Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity*, 14 *Berkeley Tech. L.J.* 635, 637 (1999).

legal duties are established that did not formerly exist.<sup>16</sup>

This Article argues that twenty-first century communication has created a world in which there is no room for indifference between the dispatch and receipt rules. Electronic technology has redistributed the risks of contracting between offerors and offerees; at the same time, it has dramatically reduced the import of the “meeting of the minds” doctrine and mitigated the primary evidentiary and practical reasons for application of the “mailbox” rule. As a result, our world is now one in which “substantially instantaneous”<sup>17</sup> acceptances should be valid at receipt.

Moreover, while it has been previously theorized that technological innovation sparks a need for new legal rules,<sup>18</sup> this Article argues one step further, positing that innovation has generated a need for new legal rules to govern even old contexts and old technologies. As electronic communication spurs globalization and as the number of cross-border transactions soars, the consistency of legal rules both domestically and internationally will be essential to the proper functioning of commercial markets. Retaining the “mailbox” rule for non-instantaneous communications disrupts this consistency and, additionally, discourages parties from communicating by the most efficient means available to them. This Article contends that modernity has induced transformations even in seemingly traditional applications of contract law; consequently, contracts formed through the use of postal mail and other non-instantaneous technologies, whether or not justifiably governed by the dispatch rule in the past, should now be governed by receipt as well.

Part II, below, provides a primer to the “mailbox” rule and receipt rule doctrines, discussing the foundational case of *Adams v. Lindsell*<sup>19</sup> and the recent legislative and scholarly responses to the emergence of electronic contracting. Part III defines the terms “substantially instantaneous” and “receipt,” the language constituting the heart of the Article’s thesis. Part IV articulates precisely why application of a receipt rule is imperative for electronic contracting, and Part V builds upon the conclusions of the previous Part’s analysis, conceptualizing two novel rationales that militate against applying the dispatch rule even in the “snail mail” context. Part VI concludes the Article, highlighting the relationship between the court system’s institutional role and its role in facilitating economic growth.

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<sup>16</sup> Sylvia Mercado Kierkegaard, *E-Contract Formation: U.S. and EU Perspectives*, 3 *Shidler J.L. Com. & Tech.* 12, ¶21 (2007), <http://www.lctjournal.washington.edu/Vol3/a012Kierkegaard.html>.

<sup>17</sup> This term is defined *infra* Part III.A.

<sup>18</sup> See, e.g., Eisler, *supra* note 8; Anjanette H. Raymond, *Manner, Method, Receipt or Dispatch: The Use of Electronic Media is Nothing New to the Law*, 52 *Loy. L. Rev.* 1, 1 (2006).

<sup>19</sup> *Adams v. Lindsell*, (1818) 106 Eng. Rep. 250 (K.B.).

## II. HISTORICAL BACKGROUND OF DISPATCH AND RECEIPT THEORIES

### A. Origins of the Dispatch Rule

The dispatch rule first appeared in the 1818 case *Adams v. Lindsell*, in which the King's Bench employed the rule to specify the moment of contract formation.<sup>20</sup> The court justified its choice by stating that if, instead, a receipt rule were applied to acceptances sent through the mail,

[N]o contract could ever be completed by post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*.<sup>21</sup>

The court also theorized that an individual who sends an offer through the mail is effectively reiterating her offer through every moment of the letter's travel. Therefore, at the first moment of acceptance by the offeree, the contract is complete.<sup>22</sup>

The *Adams* conceptualization of contract formation made its debut in the United States in 1830. The case *Mactier's Administrators v. Frith*<sup>23</sup> presented the New York Court for the Correction of Errors with the difficult question of whether an acceptance was binding when the offeree died just after depositing it in the mail, but before the offeror had received it. The *Mactier's* court drew from the *Adams* court's analysis and held that a dispatch rule should be applied to all acceptances, reasoning that it was a "meeting of the minds of the contracting parties" that determined the moment that the agreement became binding and not a "knowledge of this meeting."<sup>24</sup>

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<sup>20</sup> *See id.* at 251.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Mactier's Adm'rs v. Frith*, 6 Wend. 103 (N.Y. 1830).

<sup>24</sup> *Id.* at 118. The *Mactier's* court also provided an ancillary basis for its decision, stating that dispatch represented the moment at which the offeree surrendered control of the acceptance. *Id.* This justification has been roundly rejected, in large part because postal regulations and mail management evolved such that consumers were able to recall individual pieces of mail. *See, e.g., Dick v. United States*, 82 F. Supp. 326, 329-30 (Ct. Cl. 1949) (citing postal regulations regarding the ability to reclaim posted mail); Samuel Williston, *A Treatise on the Law of Contracts* §81, at 266-67 (3d ed. 1957).

In the early twentieth century the dispatch rule was extended to contracts made by telegraph.<sup>25</sup> The rule has been consistently applied to acceptances ever since, including those situations in which the offeror's burden under the rule is at its zenith—that is, including situations in which the acceptance message is ultimately lost in transit and the offeror, unaware that a contract exists, is nevertheless legally bound to perform.<sup>26</sup>

Early commentators, however, were less convinced of the merits of the dispatch perspective. The influence of *stare decisis* was unable to quell the debate in the scholarly realm, where vigorous critiques of the “mailbox” rule and its underlying rationales emerged.<sup>27</sup> Many of the most distinguished scholars in the field of contract law expressed their disapproval, including Langdell, Page, Pollock, and Williston.<sup>28</sup> This disapproval, of negligible judicial consequence in litigation related to acceptance through post and telegraph, gained some ground in the context of litigation about telephone and telex.<sup>29</sup>

In England, in fact, the perceived similarity between telephone/telex and contracting in person persuaded a majority of the courts to apply a receipt rule to such transactions.<sup>30</sup> In the United States, however, a seemingly unwarranted allegiance to the dispatch rule survived<sup>31</sup> (despite the contrary endorsement by the drafters of the Restatement, who had sanctioned the “mailbox” rule for post<sup>32</sup> but were sanctioning a

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<sup>25</sup> See, e.g., *Weld & Co. v. Victory Mfg. Co.*, 205 F. 770, 772 (E.D.N.C. 1913); *W. Union Tel. Co. v. Wheeler*, 245 P. 39, 40 (Okla. 1926); *Field v. Descalzi*, 120 A. 113, 114 (Pa. 1923); *Kenedy Mercantile Co. v. W. Union Tel. Co.*, 167 S.W. 1094, 1094 (Tex. Civ. App. 1914) (interpreting contracts made by telegraph or telegram in the same manner as ordinary contracts, including application of the “mailbox” rule).

<sup>26</sup> See, e.g., *Worms v. Burgess*, 620 P.2d 455, 459 (Okla. Civ. App. 1980) (universality of the dispatch rule requires offeror to bear burden of non-delivery unless otherwise specified).

<sup>27</sup> See Nussbaum, *supra* note 6 *passim*, for a review of early critiques of dispatch theory; an example of one such critique is provided *supra* note 6.

<sup>28</sup> *Id.* at 921.

<sup>29</sup> Telex is a “two-way form of written communication between teletypewriters” that replaced telegraph communication in the mid-twentieth century. *W. Union Tel. Co. v. Fed. Comm'n's Comm'n.*, 665 F.2d 1126, 1132 (D.C. Cir. 1981).

<sup>30</sup> See, e.g., *Entores Ltd. v. Miles Far E. Corp.*, (1955) 2 Q.B. 327, 337 (A.C.) (stating that so far as telex messages are concerned, “parties are to all intents and purposes in each other's presence”).

<sup>31</sup> See, e.g., *Cardon v. Hampton*, 109 So. 176, 177 (Ala. App. 1926); *Bank of Yolo v. Sperry Flour Co.*, 74 P. 855, 855 (Cal. 1903); *Trinity Universal Ins. Co. v. Mills*, 169 S.W.2d 311, 314 (Ky. 1943) (contract made by telephone is made at the place from which the accepting party speaks).

<sup>32</sup> Restatement (Second) of Contracts § 63 (1981); Restatement (First) of Contracts § 64 (1932).

receipt rule for telephone and telex<sup>33</sup>). In the pre-Internet era, few American courts were persuaded that modern communication was analogous to face-to-face contracting and that this similarity might, in turn, warrant application of a receipt rule.<sup>34</sup>

### *B. History of Dispatch and Receipt Approaches to Electronic Contracting*

The advent of new, high-speed technologies such as Electronic Data Interchange (EDI),<sup>35</sup> cellular text messaging, and especially Internet communication (including all its

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<sup>33</sup> Restatement (Second) of Contracts § 64 (1981); Restatement (First) of Contracts § 65 (1932).

<sup>34</sup> Courts that did stray from the “mailbox” rule include, for example, the court in *Slobojan v. United States*, 136 Ct. Cl. 620, 623 (1956) (“[W]here the validity of a bilateral contract is involved it is necessary that acceptance of the offer be communicated to the offeror before a valid and binding contract is made.”). *Accord Rhode Island Tool Co. v. United States*, 128 F. Supp. 417, 419 (Ct. Cl. 1955)

The sender now does not lose control of the letter the moment it is deposited in the post office, but retains the right of control up to the time of delivery. The acceptance, therefore, is not final until the letter reaches destination, since the sender has the absolute right of withdrawal from the post office, and even the right to have the post master at the delivery point return the letter at any time before actual delivery.

*Id.* at 419; *Exeter Mfg Co. v. Glass-Craft Boats, Inc.*, 173 A.2d 791, 794 (N.H. 1961) (“When the means of communicating is by telephone it has been authoritatively stated that the transaction is to be treated as though the dealings were face to face. We hold this rule to be applicable here.” (citation omitted)); *see also United States v. Bushwick Mills, Inc.*, 165 F.2d 198, 202 (2d Cir. 1947)

And under the broad provisions of §925(c) [Emergency Price Control Act, 50 App. U.S.C.A. §925(c)], if the buyer telephoned an offer which the seller accepted, [the seller’s] words uttered in Brooklyn, but projected into New York, were operative in New York to establish venue there, since though the contract technically was made in Brooklyn, an essential part of the contract occurred in New York where the acceptance was received.

165 F.2d at 202; *cf., e.g., Morrison v. Thoelke*, 155 So.2d 889, 905 (Fla. Dist. Ct. App. 1963) (“[T]his decision [to apply the ‘mailbox’ rule] is limited in any prospective application to circumstances involving the mails and does not purport to determine the rule possibly applicable to cases involving other modern methods of communication.”); *Linn v. Employers Reins. Corp.*, 139 A.2d 638, 640 (Pa. 1958) (noting that application of a receipt rule to telephone transactions is a “sound theoretical view”).

<sup>35</sup> EDI, the successor to telex, is a communication method in which data is transmitted electronically, over either a telephone line or satellite network, in standardized formats. Elec.

e-mail, “chatting,” and point-and-click derivations), and the Restatement’s endorsement of a receipt rule for these technologies, caused a resurgence of the controversy on the issue of electronic acceptances. While most courts of the late twentieth and early twenty-first centuries have been steadfast in their application of the “mailbox” rule, some courts have suggested that a receipt rule is actually the best default option.<sup>36</sup> In response to this jurisprudential ambivalence, the National Conference of Commissioners on Uniform State Laws joined forces with the American Law Institute to develop a major piece of legislation entitled the Uniform Commercial Information Transactions Act (UCITA).<sup>37</sup> Although the scope of the UCITA is limited to “computer information transactions,”<sup>38</sup> the Act explicitly repudiates the “mailbox” rule by providing that an electronic acceptance is effective when received, even if no individual is aware of its receipt.<sup>39</sup>

Only Maryland and Virginia have adopted UCITA,<sup>40</sup> due primarily to controversial provisions unrelated to those involving the timing of acceptance.<sup>41</sup> Nevertheless, because of UCITA, the receipt rule is now the governing law for computer information contracts in two states. This contrasts with the outcome of the other significant pieces of legislation on the subject of electronic transactions, the widely-adopted<sup>42</sup> Uniform Electronic Transactions Act (UETA)<sup>43</sup> and the Electronic Signature in

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Messaging Servs. Task Force, *The Commercial Use of Electronic Data Interchange—A Report and Model Trading Partner Agreement*, 45 Bus. Law. 1645, 1649 (1990).

<sup>36</sup> See, e.g., *Romala Corp. v. United States*, 20 Cl. Ct. 435, 443 (1990) (stating that a mailed acceptance is not valid until it is received by an offeror), *aff’d*, 927 F.2d 1219 (Fed. Cir. 1991); *Trinity Homes, LLC v. Fang*, 63 Va. Cir. 409, 410-11 (Va. Cir. Ct. 2003) (suggesting that a receipt rule should be applied to substantially instantaneous transmissions); see also *Metro. Air Serv., Inc. v. Penberthy Aircraft Leasing Co.*, 648 F. Supp. 1153, 1156 (S.D.N.Y. 1986) (“[W]hether the ‘mailbox rule’ applies to contracts created through telex [is] an issue apparently still unresolved in the United States.”).

<sup>37</sup> Unif. Computer Info. Transactions Act (2002), available at <http://www.law.upenn.edu/bll/archives/ulc/ucita/2002final.pdf> [hereinafter UCITA].

<sup>38</sup> *Id.* § 103(a).

<sup>39</sup> *Id.* § 214(a).

<sup>40</sup> Michael D. Scott, *Tort Liability for Vendors of Insecure Software: Has the Time Finally Come?*, 67 Md. L. Rev. 425, 436 n.73 (2008).

<sup>41</sup> See generally James S. Heller, *UCITA: Still Crazy After All These Years, and Still Not Ready for Prime Time*, 8 Rich. J.L. & Tech. 5, 5-10 (2001).

<sup>42</sup> At the close of the 2005 legislative sessions, forty-six states had adopted UETA. The remaining four states, Georgia, Illinois, New York, and Washington, all have their own laws recognizing electronic signatures. Nat’l Conference of State Legislatures, Uniform Electronic Transactions Act, <http://www.ncsl.org/programs/lis/CIP/ueta-statutes.htm> (last visited May 3, 2009).

<sup>43</sup> Unif. Elec. Transactions Act (1999), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.pdf> [hereinafter UETA].

Global and National Commerce Act (E-SIGN).<sup>44</sup> Neither the UETA, which facilitates e-commerce by providing a means of “effectuating electronic records and signatures,”<sup>45</sup> nor E-SIGN, which is a federal statute preempting state law to the extent that a state has not enacted UETA (or a similar alternative),<sup>46</sup> takes a stand on whether an acceptance of a contract is valid at dispatch or at receipt.

These legislative developments have occurred against the backdrop of a newly enlivened scholarly debate. A number of commentators have come out in various degrees of support for the idea that electronic acceptances are valid at receipt, though almost all have stopped short of a full-scale endorsement.<sup>47</sup> Notably, Professor Farnsworth has been unequivocal, stating that “[t]he [“mailbox”] rule has no application to substantially instantaneous means of communication, such as telephone, telex, facsimile, and electronic mail.”<sup>48</sup> But many commentators remain ambivalent about how to address the questions raised by electronic communication, and several have submitted the idea that application of either a dispatch rule or a receipt rule should be determined based on situation-specific variables.<sup>49</sup> Despite this multiplicity of opinions, it appears that the proliferation of technologies able to mimic face-to-face interactions has engendered an awareness that perhaps the time has come for a new offer-and-acceptance framework.

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<sup>44</sup> Electronic Signature in Global and National Commerce Act, 15 U.S.C. §§ 7001-7006, 7021, 7031 (2006) [hereinafter E-SIGN].

<sup>45</sup> UETA, at Prefatory Note.

<sup>46</sup> Valerie Watnick, *The Electronic Formation of Contracts and the Common Law “Mailbox Rule”*, 56 *Baylor L. Rev.* 175, 191-92 (2004).

<sup>47</sup> *Id.* at 202 (urging retention of the “mailbox” rule).

<sup>48</sup> Farnsworth, *supra* note 11, §3.22, at 340. However, Professor Farnsworth provides no explanation for his statement beyond a general suggestion that the “relative reliability and speed” of a given means of communication may undermine the justification for an application of the dispatch rule. *Id.* at 339.

<sup>49</sup> See, e.g., Ian R. Macneil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 *U. Pa. L. Rev.* 947, 965 (1964) (stating that no rationale “justifies the universal application of either an ironclad dispatch rule or an ironclad receipt rule” in the context of non-receipt or delay of transmission of acceptances); Paul Fasciano, *Internet Electronic Mail: A Last Bastion for the Mailbox Rule*, 25 *Hofstra L. Rev.* 971, 999-1003 (1997) (arguing that Internet e-mail should be exempt from any application of the receipt rule to new technologies).

## III. DEFINITIONS OF TERMS

*A. Definition of “Substantially Instantaneous” Communication*

This Article divides mediums of communication into two primary categories, those that are “substantially instantaneous,” and those that are not. This language is borrowed from the Restatement (Second) of Contracts § 64, which states, without defining its terms, that an “[a]cceptance given by . . . substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.”<sup>50</sup> This Article employs this language not as a means of being faithful to the Restatement *per se*, but rather because, if construed properly, this is simply the best way of categorizing the mediums of communication that should be governed by the receipt rule. On the other hand, this Article does not employ the term “two-way,” which has generated much confusion among commentators interpreting § 64.<sup>51</sup> At best, the term is duplicative, and at worst, it represents a sort of additional “real-time” requirement for communication that is unnecessary and that is inconsistent with the Restatement’s own position that a receipt rule should be applied to telex<sup>52</sup> (telex does not have the “real-time” back-and-forth capability of telephone conversation or Internet “chatting”).

The utility of the phrase “substantially instantaneous” is two-fold. First, it highlights the similarity between contracting in person, considered instantaneous, and contracting through a very fast, reliable, and accurate communication system, which approximates the same distribution of benefits and risks. Second, it is a standard flexible enough to accommodate future technological developments. Accordingly, “substantially instantaneous” technologies are here defined as technologies that, when operating normally, can transmit a message somewhere in the time frame of a few seconds to a few minutes. The purpose of articulating this timeframe is not to engage in a hyper-technical debate about how many minutes of time can transpire before an allusion to “instantaneity” becomes farcical. Rather, the purpose is to propose a way of grouping, generally, those technologies that are *more akin* to communicating in person *than they are to communicating by post*, or, to be even more precise, more akin to communicating in person than they are to communicating through mediums that place a disproportionate amount of risk upon the offeree.<sup>53</sup>

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<sup>50</sup> Restatement (Second) of Contracts § 64 (1981).

<sup>51</sup> Compare, for example, Watnick, *supra* note 46, at 200-01 (stating that telephone is “two-way” but electronic communication is not), with, for example, Fasciano, *supra* note 49, at 984-86, 1002 (arguing that some electronic communication is “two-way” but Internet e-mail is not, and that some technologies that are not “two-way” may still fall under Restatement (Second) of Contracts § 64).

<sup>52</sup> Restatement (Second) of Contracts § 64 (1981).

<sup>53</sup> *Cf.* Raymond, *supra* note 18, at 23

Functionally speaking, substantially instantaneous communication includes telephone, telex, facsimile, EDI, e-mail, and other Internet communication,<sup>54</sup> but does not include mail by post or telegraph. While in isolated incidents a message sent electronically may take more than a few minutes, such cases are anecdotal and represent only a small fraction of communications.<sup>55</sup> In fact, technological innovation is tending toward ever-higher rates of transmission, and the days of communications that require even a few minutes will be gone before we know it. By far the more common experience of contracting parties, both now and into the future, will be the transmission of messages in mere seconds, or fractions thereof.

### *B. Definition of "Receipt"*

This Article advocates marking the timing of acceptance at "receipt." "Receipt" of an acceptance occurs when an acceptance has entered an information processing system designated for such messages by the offeror (e.g., the offeror's computer server, her telephone voicemail, etc.),<sup>56</sup> even if the offeror has not actually reviewed the message. In other words, this Article conceptualizes receipt as entailing the capacity to access a message, whether or not it is, in fact, accessed.<sup>57</sup>

This definition has several advantages. First, an access-based conceptualization of receipt is grounded in existing law.<sup>58</sup> Second, it promotes efficiency by imposing on both

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The distinction between 'instantaneous' and 'substantially instantaneous' communication is at the heart of the timing of acceptance in electronic contracting. The Second Restatement of Contracts . . . establishes a lower standard than instantaneous communication. Therefore, the standard is not to be measured as equal to face-to-face communications but as something less than face-to-face communications . . . .

*Id.* at 23.

<sup>54</sup> See Kidd & Daughtrey, *supra* note 14, at 261 (listing email, internet chats, and EDI as forms of "almost instantaneous" communications).

<sup>55</sup> See Watnick, *supra* note 46, at 201 n.199.

<sup>56</sup> In situations where the recipient's information processing system is defective or set to reject incoming messages, the sender will receive some indication that delivery of the message was not possible. Fasciano, *supra* note 49, at 998 n.106. Because this notification informs the sender that she must resend her message (or find an alternative means of communication), she should bear the risk of not doing so.

<sup>57</sup> Of course, actual review of the message by a party would also indicate that it had been "received."

<sup>58</sup> See, e.g., UETA § 15(b) (1999); *United Leasing, Inc. v. Commonwealth Land Title Agency, Inc.*, 656 P.2d 1246, 1250 (Ariz. Ct. App. 1982) (handing a letter of acceptance to receptionist with reassurances that the letter would be delivered to offeror is a valid acceptance of offer);

parties to the transaction a duty to act reasonably: just as an offeree will not be excused if her message does not reach the appropriate information processing system, the offeror will not be excused for failure to retrieve the message. Third, this definition provides at least a partial antidote for the situation in which a recipient's computer server or other communication service, through no fault of either contracting party, fails to deliver the message to the end-user device. If in such a situation the recipient actually controls the server (for example, if it is a private entity's own server), then it makes sense for the recipient to bear the risk of malfunction.<sup>59</sup> In the alternative, if the recipient does not control the server herself, she is likely to be in a contractual relationship with the operator of her communication technology.<sup>60</sup> Thus, again, it makes sense for the recipient to bear the risk of failure, for she is incentivized to choose a reliable operator *ex ante* and may furthermore have a legal remedy sounding in contract law against the operator of the faulty service.<sup>61</sup> Finally, the above reasoning applies analogously to situations in which a spam filter, firewall, or similar obstacle diverts a message, as well as to situations in which it is a party's employer who technically "controls," or has contracted for, the operating system.<sup>62</sup> In all such cases, it is the recipient, and not the sender, who can better prevent communication malfunctions and better address them when they do occur.

#### IV. A RECEIPT RULE SHOULD BE APPLIED TO SUBSTANTIALLY INSTANTANEOUS COMMUNICATIONS

Acceptances sent through substantially instantaneous means should not be governed by the common law "mailbox" precedent but rather should be valid at receipt. This change is justified on the basis that (1) new technology has reallocated the risks of contracting between offerors and offerees, (2) the premise that contracts are formed at the moment of a "meeting of minds" is now obsolete, and (3) evidentiary practicalities no longer favor application of the dispatch rule. As new technologies become even faster and more efficient, the rationales for a receipt rule will only grow stronger.

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*Calabrese v. Springer Personnel*, 534 N.Y.S.2d 83, 84 (Civ. Ct. 1988) (arguing that as long as the recipient's fax machine properly received the document sent to it, it would be "folly" to allow the recipient to claim he had not been served process); Restatement (Second) of Contracts §68 (1981).

<sup>59</sup> See, e.g., *Thomson Printing Mach. Co. v. B.F. Goodrich Co.*, 714 F.2d 744, 748 (7th Cir. 1983) (holding that recipient assumed the risk of the malfunctioning of its own mailroom).

<sup>60</sup> Fasciano, *supra* note 49, at 998.

<sup>61</sup> *Id.* at 998 & n.105.

<sup>62</sup> See Raymond, *supra* note 18, at 36.

*A. Substantially Instantaneous Communication Redistributes the Risks between Offerors and Offerees*

Traditionally, the offeror, as “master of his offer,”<sup>63</sup> has enjoyed certain advantages in contract formation, including the right to dictate the terms of the offer, to restrict the offeree’s power of acceptance, and to revoke the offer at any time prior to a valid acceptance.<sup>64</sup> Nevertheless, when the parties are in each other’s presence, these advantages, in light of other considerations, are not so significant as to merit protection of the offeree’s interests through application of a dispatch rule.<sup>65</sup> When two parties are negotiating in person, if a loud ambulance siren drowns out an offeree’s statement of acceptance, or her acceptance is otherwise not “received” by the offeror, the acceptance is not valid.<sup>66</sup> A receipt rule is applied because it simply is not burdensome to ensure receipt of an instantaneous communication.

On the other hand, authorities have concluded that the power imbalance between offeror and offeree becomes excessive in contracts formed over a distance.<sup>67</sup> The offeror continues to enjoy the advantages that accrue to her when the parties negotiate in each other’s presence, but the offeree is undermined by her inability to rely on the contract with certainty.<sup>68</sup> In the absence of a dispatch rule, an offeree who relies immediately on her mailed or telegraphed acceptance subjects herself to the risk that a revocation might arrive before her acceptance has reached its destination; in fact, without a confirmation that her acceptance has been received, the offeree may never know whether she is legally

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<sup>63</sup> Restatement (Second) of Contracts §52 cmt. a (1981).

<sup>64</sup> See, e.g., *Maddox v. N. Natural Gas Co.*, 259 F. Supp. 781, 783 (S.D. Okla. 1966) (“In order that an offer and acceptance may result in a binding contract, the acceptance must be absolute, unconditional, and identical with the terms of the offer, and must in every respect meet and correspond with the offer.”); *Bd. of Control of E. Mich. Univ. v. Burgess*, 206 N.W.2d 256, 259 (Mich. App. 1973) (“A simple offer may be revoked for any reason or for no reason by the offeror at any time prior to its acceptance by the offeree.”); Restatement (Second) of Contracts § 29, at 42, 52 (1981). But there are exceptions under which revocation of an offer is not permissible, such as with option contracts, see Restatement (Second) of Contracts §25 (1981), and “firm offers” extended under U.C.C. § 2-205 (2003).

<sup>65</sup> See Restatement (Second) of Contracts §64 cmt. a (1981).

<sup>66</sup> See *id.*; 1 Samuel Williston, *A Treatise on the Law of Contracts* §82A (3d ed. 1957).

<sup>67</sup> That is, the power imbalance becomes excessive in the absence of the dispatch rule.

<sup>68</sup> See Farnsworth, *supra* note 11, at 339 (“[A]llowing the offeror to revoke until the [non-instantaneous] acceptance is received would aggravate the already vulnerable situation of the offeree, who may have relied, even though he may not be able to prove it (for example, if his reliance is by inaction).”).

bound to perform.<sup>69</sup> This vulnerability is particularly acute in an agreement where “time is of the essence.”<sup>70</sup> Acceptance of such a contract may implicitly *require* the offeree to begin performing during the period in which her letter or telegram is still being transmitted. Accordingly, the common law protects the interests of the offeree by shortening the period of revocability and by placing the risk of a lost or delayed acceptance on the other party.

This precedent does not account for late-twentieth and twenty-first century technological advancements, which have redistributed the benefits and risks between offerors and offerees in a way that favors application of a receipt rule. For example, by increasing the speed, reliability, and overall efficiency of written communication,<sup>71</sup> substantially instantaneous technologies like e-mail have strengthened the offeree’s negotiating position. In the past, an offeree dissatisfied with the power differential between parties was always free to trade places with the offeror. By responding to an offer with a counteroffer (or even by responding with a rejection and reiteration of the exact same original offer), the offeree could effectively switch the benefits and risks of contract formation assigned to each negotiating party. Yet considerations of timing and efficiency stood as strong disincentives to that strategy. The risk of waiting additional days or weeks to form a binding contract was prohibitive for an offeree who wished to protect against an offeror’s change of heart and wanted to consummate the agreement as quickly as possible. New technologies that can transmit messages in a fraction of a second, however, have completely changed this contracting landscape. Such technologies greatly reduce the transaction cost of continued communications,<sup>72</sup> putting the offeree in a relatively stronger negotiating position and in lesser need of the dispatch rule’s “protection.”

Second, substantially instantaneous communication has newly resolved the problem of the offeree’s immediate need to rely on a dispatched acceptance. E-mail, EDI, text messaging, and the like are so fast that application of a receipt rule extends the offeree’s exposure to an intervening revocation<sup>73</sup> by just a few seconds or perhaps a few minutes—nothing like the extra days or weeks of vulnerability that might be endured were a receipt rule applied to an acceptance mailed by post. Not only will an acceptance reach its destination nearly instantaneously, but the faster and more efficient the technology utilized, the smaller the transaction cost associated with either party seeking additional confirmation regarding the contract. Practically speaking, this transaction cost of a follow-up communication is only slightly greater with e-mail or phone than it is with

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<sup>69</sup> *But see* Macneil, *supra* note 49, at 965 (discussing some hazards that the dispatch rule poses even for parties who rely on the existence of a contract).

<sup>70</sup> *See* Restatement (Second) of Contracts §242 cmt. c (1981).

<sup>71</sup> *See, e.g.*, Elec. Messaging Servs. Task Force, *supra* note 35, at 1670 n.96; discussion *infra* Part V.B.

<sup>72</sup> Eisler, *supra* note 8, at 567-69; Elec. Messaging Servs. Task Force, *supra* note 35.

<sup>73</sup> That is, a revocation received after the offeree has sent her acceptance, but before that acceptance has reached the offeror.

a conversation taking place between parties in each other's presence. When communication systems are pre-programmed to automatically provide senders with a notice of successful message delivery, as is increasingly common with electronic communication systems,<sup>74</sup> such transaction costs approach zero.<sup>75</sup> The “*ad infinitum*” cycle of delayed notifications envisioned and feared by the *Adams v. Lindsell* court<sup>76</sup> is not a plausible scenario in the modern world.

Finally, in instances in which parties rely on messages immediately, and do not wait for the legal certainty that their agreements are enforceable, the dispatch rule for electronic technologies is not justifiable. Authorities have typically analyzed contract formation scenarios from the perspective that legal certainty is a principal objective<sup>77</sup> and that open communication improves commercial efficiency.<sup>78</sup> This certainty may very well be a laudable goal and yet, at the same time, the truth remains that parties do not always require it. Businesses and individuals take informed risks based on uncertainties all the time; for example, the risk of relying on an as-yet uncertain communication may be willingly assumed so long as the expected benefit is positive relative to alternative courses of action. In situations ranging from “time is of the essence” agreements to market speculation strategies to calculated assumptions based on assurances and past behaviors of an opposing party,<sup>79</sup> offerees and offerors alike may decide to rely on a contract prior to the moment that it becomes technically binding—that is, well prior to

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<sup>74</sup> See, e.g., Elec. Messaging Servs. Task Force, *supra* note 35, at 1665 (“The significant functional feature of EDI is that it provides the ability for businesses to immediately confirm, by return message, that a receiving party has received the original message, and to confirm that no errors or omissions occurred in the transmissions.”).

<sup>75</sup> For a discussion of some of the ways in which the new information economy has dramatically reduced transaction costs, see generally Joseph Romm, Arthur Rosenfeld, & Susan Hermann, Ctr. For Energy & Climate Solutions, Global Env't & Tech. Found., *The Internet Economy and Global Warming: A Scenario of the Impact of E-commerce on Energy and the Environment 12-14* (1999), available at <http://www.p2pays.org/ref/04/03784/0378401.pdf> (explaining that the electronic world makes possible “nearly costless reproduction,” “infinite expansibility,” and communication “at the speed of light”).

<sup>76</sup> See *Adams v. Lindsell*, (1818) 106 Eng. Rep. 250, 251 (K.B.).

<sup>77</sup> See, e.g., Macneil, *supra* note 49, at 956.

<sup>78</sup> See Eisler, *supra* note 8, at 571 (“Economists agree that efficient contracting encompasses communication between the parties. . . . That communication, however, is efficient only when both negotiating parties are aware of their basic rights and duties.”).

<sup>79</sup> In fact, the tendency to rely on the past behaviors of an opposing party is perceived as so common and so reasonable that in some circumstances the common law offers legal protection to the relying party, despite the fact that the party acted in a context of uncertainty. For instance, if an offeror and offeree, through the course of their past transactions, have agreed that the offeree's silence expresses assent to a contract, then the offeree's later silence or inaction may be legally construed as acceptance of a similar contract. See, e.g., *Hobbs v. Massasoit Whip Co.*, 33 N.E. 495, 495 (Mass. 1893).

the moment that they may rely on it with the certainty that it will be enforced. When *these* situations are accounted for in addition to the more traditional “first an offer, then a valid acceptance, then reliance and performance” chronology, the dispatch rule is especially unconvincing.

In reliance under uncertainty, switching the default rule from dispatch to receipt would not simply result in a mirror-image reallocation of risks, where one party or the other enjoys an advantage of comparable magnitude.<sup>80</sup> Rather, the receipt rule more evenly allocates risks across the negotiating parties than does the dispatch rule, which imposes a disproportionate burden on the offeror. Stated differently, an offeror who preemptively relies on a contract under the dispatch rule<sup>81</sup> bears a significantly greater burden than an offeree who preemptively relies on a contract under the receipt rule.<sup>82</sup> This is because the likelihood that sending an offer will eventually result in an enforceable contract is, *ceteris paribus*,<sup>83</sup> inherently less than the likelihood that sending an acceptance will result in an enforceable contract. Even when the offeror has reason to believe that the offeree will “certainly” accept the offer, this “certainty” is not the same as the certainty of the offeree who actually transmits the acceptance. Moreover, even when the offeror has sufficient information to make an educated guess about *when* the acceptance will be made, and thus approximately when it will arrive, this is, *ceteris paribus*, inherently less information than the offeree has, as the offeree knows the *exact* moment of sending and therefore has a better ability to predict the time of receipt. In sum, while the choice to preemptively rely on an agreement would be a gamble for either the offeror, under a dispatch rule, or the offeree, under a receipt rule, the risk placed on the offeror in the former scenario is relatively greater. This distributive effect is particularly important in light of the technological advancements available today, that, as discussed above, have already reduced the overall transaction costs associated with contracting over a distance. Given that substantially instantaneous communications have reduced so dramatically the offeree’s risk of revocation, risk of unsuccessful message transmission, and risk of follow-up communications, the disproportionate effect of the dispatch rule on the allocation of reliance risks appears to grant the offeree an unnecessary windfall.

Taken together, these considerations suggest that substantially instantaneous technology has arranged the benefits and risks of contracting over a distance in a way more similar to contracting in person than to contracting through post or telegram. The appropriate default rule, then, should be analogized from the receipt rule that is applied to

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<sup>80</sup> This argument contradicts a common theoretical perspective that the risk allocation under either rule is approximately symmetrical. See, e.g., Eisler, *supra* note 8, at 568 (“Under the proposed [receipt] rule, the advantage is merely shifted from the offeree to the offeror . . .”).

<sup>81</sup> Meaning that the offeror has successfully completed her required half of the contract formation process by submitting an appropriate offer, but remains uncertain as to whether the opposing party has consummated the negotiation by dispatching a prompt acceptance of the offer.

<sup>82</sup> Meaning that the offeree has dispatched an acceptance, but remains uncertain as to whether the acceptance has been received and created a binding contract.

<sup>83</sup> “Other things being equal.” Black’s Law Dictionary 243 (8th ed. 2004).

parties in each other's presence,<sup>84</sup> not from the dispatch rule applied to slower means of communication.<sup>85</sup>

*B. New Technology Has Rendered Moot the Traditional Notion of a "Meeting of the Minds"*

One prominent justification for the dispatch rule is that dispatch marks the moment of a "meeting of the minds" between offeror and offeree, as expressed through the objective manifestations<sup>86</sup> of their intent.<sup>87</sup> In the case of *Tayloe v. Merchants' Fire Insurance* (1850),<sup>88</sup> for instance, the court had to determine whether or not a contract for fire insurance was valid though the insured property had burned down while the acceptance letter was in transit. The majority held that the acceptance was valid at dispatch because "[o]n the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete."<sup>89</sup> This conceptualization was based on a rigid understanding of contracts formed over a distance, in which courts envisioned one party using simple postal or

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<sup>84</sup> See Restatement (Second) of Contracts § 64 (1981).

<sup>85</sup> See *Adams v. Lindsell*, (1818) 106 Eng. Rep. 250, 251 (K.B.).

<sup>86</sup> Such manifestations may be made either by conduct, by written words, or by words orally spoken. See Restatement (Second) of Contracts § 50 cmt. c (1981).

<sup>87</sup> Note that some scholars consider the original "meeting of the minds" concept a subjectivist approach (i.e., contrary to the objective theory of contract formation). See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 575-78 (1933). Over time, therefore, many authorities came to prefer instead the similar concept of "mutual assent," which cohered better with the objective theory and focused explicitly on the outward words and conduct of the parties. See *Kabil Devels. Corp. v. Mignot*, 566 P.2d 505, 507-08 (Or. 1977). However, many courts continue to use the "meeting of the minds" terminology, positing that it is a requirement for an enforceable contract. See, e.g., *Specht v. Netscape Commc'ns. Corp.*, 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001); *Semco Div., Delwood Furniture Co. v. Williams (In re Metzler)*, 405 F. Supp. 622, 625 (N.D. Ala. 1975); cf. Arthur L. Corbin, *Corbin on Contracts* § 106 (1963) (concluding that neither an objective nor a subjective theory can entirely explain contract formation). A discussion of the contemporary relevance and interpretation of these two assent philosophies is beyond the scope of this Article. The crucial feature here is simply that the "meeting of the minds" concept helped justify the original application of the dispatch rule and is part of the reason for that rule's continued precedential weight. Insofar as some courts no longer ascribe to the "meeting of the minds" requirement (and insofar as these same courts continue to endorse the dispatch rule), this only underscores the argument made *infra* Part IV.B. that the "meeting of the minds" rationale for the dispatch rule has become obsolete.

<sup>88</sup> *Tayloe v. Merchs. Fire Ins. Co.*, 50 U.S. 390, 390 (1850).

<sup>89</sup> *Id.* at 400.

telegraph communication<sup>90</sup> to submit what could unambiguously be characterized as a formal “offer,” and another party using the same means to unambiguously submit a formal “acceptance.” Mapping a theoretical “meeting of the minds” onto such a basic chronology was a straightforward exercise.

However, the process that actually embodies contract formation today often involves negotiations of far greater complexity. Electronic communication allows parties to compress immense quantities of data and to send thousands of documents back and forth faster than the blink of an eye. Even determining what data constitutes an “offer” and what constitutes an “acceptance” can be nearly impossible,<sup>91</sup> but attempting to designate an exact moment of the “meeting of the minds” of the parties has become a fruitless theoretical exercise with little real-world meaning.<sup>92</sup> Take, for instance, the trend of contracting through Electronic Data Interchange. EDI technology is capable of fully automating the creation and execution of purchase agreements. A buyer’s computer might electronically track inventory levels and transmit appropriate product orders when necessary, while the supplier’s computer accepts and processes any orders falling within certain mandated parameters. Every step of the contract formation process, from order to payment to transport, can be conducted without human intervention.<sup>93</sup> Such automation, with the efficiency it affords, is a major component of twenty-first century contracting. And yet, without hopelessly twisting the original “meeting of the minds” doctrine, it is impossible to accurately pinpoint the exact moment in which the mind of a human buyer, who is not even cognizant of the order her computer has placed, “meets” with the mind of a human supplier, who is equally unaware.<sup>94</sup> It would seem that modern technology as it

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<sup>90</sup> See *Mactier’s Adm’rs v. Frith*, 6 Wend. 103, 115 (N.Y. 1830) (holding that an offer by mail remains open, despite offeror’s death).

<sup>91</sup> Such as in a “battle of the forms” scenario arising under U.C.C. § 2-207 (1977).

<sup>92</sup> See UCITA § 112 cmt. 3c (2002) (“For electronic agents, assent cannot be based on knowledge or reason to know, since computer programs are capable of neither and the automated nature of the interaction may mean that no individual is aware of it.”); Kidd & Daughtrey, *supra* note 14, at 242-45. Flaws in the “meeting of the minds” justification for the dispatch rule have been raised before, most notably by Professor Langdell, who pointed out, *inter alia*, that no “meeting of the minds” occurred when an acceptance was dispatched after the offeror had mailed a revocation but before the offeree received that revocation. See Nussbaum, *supra* note 6, at 921 (citing Christopher C. Langdell, Summary of the Law of Contracts 15-21 (2d ed. 1880)).

<sup>93</sup> See Elec. Messaging Servs. Task Force, *supra* note 35, pt. VI.A.1; Tuma & Ward, *supra* note 12, at 395-96.

<sup>94</sup> Cf. Lerouge, *supra* note 13, at 417

[Some] authors are convinced that the traditional contractual theory requires that the enforceability of the contract would depend upon whether the computer was autonomous. . . . However, the proponents of this position may well be trapped in a subjectivist approach of the meeting of minds. . . . Is the fact that the company does not know the content and the moment of the contract formation relevant according to the objective theory?

stands today, and as it will develop in the future, is not conducive to a designation of “meeting of the minds” in the way the concept was traditionally applied.<sup>95</sup> Indeed, these new electronic technologies are becoming so popular precisely for the reason that businesses *want* to avoid the encumbrances and liabilities of human oversight and human agency.

In limited contexts, courts of recent years have accepted the need to deviate from the old theoretical framework. Recognizing the commercial convenience<sup>96</sup> of contracting through shrink-wrap licenses<sup>97</sup> and other accept-or-return agreements, a majority of courts<sup>98</sup> presented with such cases have endorsed the view that while “some contracts are formed and their terms fully defined at a single point in time, many transactions involve a rolling or layered process.”<sup>99</sup> The leading case of this nature, *ProCD Inc. v. Zeidenberg*,<sup>100</sup> involved a shrink-wrap license that prohibited certain noncommercial uses of a computer program. Despite the fact that the exact moment of contract formation could not be determined, the court upheld the contract because the user was free to return

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*Id.* at 417.

<sup>95</sup> The drafters of the Uniform Commercial Code seem to have recognized this problem. See U.C.C. §2-204(2) (2003) (rejecting the need to pinpoint a precise moment of contract formation by stating that “[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined”).

<sup>96</sup> See, e.g., *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447, 1451-52 (7th Cir. 1996).

<sup>97</sup> Shrink-wrap license contracts involve license terms hidden within the plastic or cellophane wrapping of computer software. Similar contracts called “click-wrap” or “browse-wrap” agreements are the software licensing agreements that pop up on a computer screen before a consumer can use or install a particular program. All of these types of contracts are referred to collectively as “accept-or-return” agreements. See *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313 (Wash. 2000). Such contracts have generally been held enforceable. See, e.g., *ProCD*, 86 F.3d at 1449; *Caspi v. Microsoft Network*, 732 A.2d 528, 531 (N.J. Super. Ct. App. Div. 1999). But see *Specht v. Netscape Commc’ns. Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) (refusing to uphold a clickwrap agreement to arbitrate where users were not explicitly asked to review the license or agree to its terms). See generally Drew Block, *Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites*, 14 Loy. Consumer L. Rev. 227, 228-43 (2002) (reviewing the law regarding shrink-wrap and click-/browse-wrap agreements).

<sup>98</sup> See *M.A. Mortenson*, 998 P.2d at 313 n.10.

<sup>99</sup> *Id.* (quoting UCITA); accord *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997); *ProCD*, 86 F.3d at 1450; *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998). But cf. *Specht v. Netscape Commc’ns. Corp.*, 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001) (“Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King’s Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today.”), *aff’d*, 306 F.3d 17 (2d Cir. 2002).

<sup>100</sup> *ProCD*, 86 F.3d at 1447.

the program to an appropriate vendor after reviewing the enclosed agreement.<sup>101</sup> Thus the emerging philosophy in the accept-or-return context, and the one this Article argues should also be extended to any contracting conducted through substantially instantaneous means, is that while the “meeting of the minds” doctrine need not be rejected outright, it also need not hinder the sensible development of contract law.

It may be that a “meeting of the minds,” in some broader connotation of the term, is still occurring in even the most complex and automated of transactions. Nevertheless, new technologies have rendered moot the straightforward conceptualization proffered in cases like *Adams* and *Mactier’s*. As that traditional conceptualization has been undermined, so has the argument, sprouting from those early authorities, that an acceptance should be valid at dispatch. This argument no longer stands as an obstacle to the adoption of a receipt rule.

### *C. A Receipt Rule Does Not Raise the Evidentiary Complications It Once Did*

Opponents of the receipt rule have expressed the concern that the practicalities of determining when a message is received make application of the rule untenable.<sup>102</sup> In 1984 the court of *In re Marin Motor Oil* extensively articulated these concerns:

Under a dispatch rule, there will be very few disputes concerning whether the seller made a timely dispatch; the concept of dispatch is straightforward and the date of dispatch is easily measurable—for example, the court can simply look at the postmark date on the envelope or the electronically recorded date and time that a telex was sent. . . .

. . . However, we believe that applying a receipt rule in the modern world, where telex and other forms of electronic communication are becoming the norm, will require the courts to become involved in a number of conceptually difficult disputes concerning what constitutes receipt. For example, in this case there is no doubt that [appellant’s] telex demand was sent at 11:04 on April 21st. . . . But what constitutes “receipt” of the message? Apparently, [appellee’s] machine was not turned on between the time [appellant] sent the message and the next morning . . . would that be enough for receipt? Or suppose the secretary who was in charge of the telex machine for [appellee] accidentally left the machine on when he left the office at 5:00 p.m. on April 21. In that case, the message would have been visible on the screen in [appellee’s] office, but no one would have been there to read it. Is that enough to constitute receipt? The possibilities are endless, but the point is a valid one: the concept of

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<sup>101</sup> *Id.* at 1452-53; see also Watnick, *supra* note 46, at 188-89.

<sup>102</sup> See *In re Marin Motor Oil, Inc.*, 740 F.2d 220, 228 (3d Cir. 1984); Watnick, *supra* note 46, at 198. *But see, e.g.*, Macneil, *supra* note 49, at 967 (calling the evidentiary argument for the dispatch rule “quite unpersuasive”).

“receipt” in today’s world can be very difficult to measure, whereas “dispatch” is a somewhat more concrete and easily measurable event.<sup>103</sup>

These issues have been partially addressed by the definition of “receipt” proposed in this Article.<sup>104</sup> Neither the status of the machine receiving a communication, nor the moment that the recipient decides to view the message, are considerations as to whether there has been receipt under a definition prescribing that receipt is marked at the point the message reaches the information processing system designated by the recipient. Just as an offeror under traditional common law cannot excuse herself from legal obligations by refusing to examine an acceptance letter in her mailbox,<sup>105</sup> an offeror cannot excuse herself from legal obligations by refusing to turn on a computer or check an electronic “inbox.”

Moreover, recent technological advancements have made determination of the moment of receipt relatively straightforward for evidentiary purposes. For example, in the case of *Osprey L.L.C. v. Kelly-Moore Paint Co.*, the court used the “fax activity report” and “telephone company records” to determine, over the objections of a party claiming otherwise, that a fax had been transmitted successfully to the correct recipient at a time prior to a set deadline.<sup>106</sup> Similarly, many electronic communication systems automatically imprint messages with the date and time of receipt,<sup>107</sup> or automatically provide the sender with a confirmation of receipt or notice of transmission error. Indeed, such confirmation has become a “standard feature”<sup>108</sup> of fax machines and e-mail programs, though the user may be required to activate the appropriate options. Not only do these amenities ensure that parties know, or have reason to know, of any communication failure, but they also generate a paper trail that makes false allegations of receipt or non-receipt easier to disprove in court.<sup>109</sup> Given that these technological advantages are readily available, an offeree who refuses to utilize them should bear the risk of her choice,<sup>110</sup> just as an offeror attempting to prove receipt of an offer or revocation would bear the risk of hers.

Finally, the technological progress that has led to improvements in the speed and reliability of communications has also improved a sender’s ability to predict what will happen to her message after dispatch. This is important because the more the parties’ expectations about contract formation reflect the reality (legal and practical) of their

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<sup>103</sup> *In re Marin*, 740 F.2d at 228.

<sup>104</sup> *See supra* Part III.B.

<sup>105</sup> Restatement (Second) of Contracts §68 cmt. a., illus. 1 (1981).

<sup>106</sup> *Osprey L.L.C. v. Kelly-Moore Paint Co.*, 984 P.2d 194, 199 (Okla. 1999).

<sup>107</sup> *E.g.*, Eisler, *supra* note 8, at 572; Kidd & Daughtrey, *supra* note 14, at 261 n.204.

<sup>108</sup> Raymond, *supra* note 18, at 28 & n.125.

<sup>109</sup> *See* Eisler, *supra* note 8, at 571-72.

<sup>110</sup> Raymond, *supra* note 18, at 28-29.

communication process,<sup>111</sup> the more likely it is that contract formation will be economically efficient,<sup>112</sup> that problems will be resolved promptly, and that disputes will not become litigious.<sup>113</sup> Unlike the era in which post and other non-instantaneous means constituted the dominant method of communication, a party utilizing substantially instantaneous communication need not resign herself to the idiosyncrasies of the postal system,<sup>114</sup> but is instead comfortable in predicting the timely receipt of her message and, in turn, a timely response or performance by the other party. In the absence of such a response, or simply in the spirit of diligence, the sender is able to quickly transmit a further inquiry and confirm negotiated details. The benefits of a receipt rule are such that not only does the rule facilitate the production of evidence directly, but it furthermore reduces the likelihood that litigious evidentiary inquiries will be necessary in the first place.

#### V. NEW REASONS WHY THE DISPATCH RULE IS OUTMODED EVEN FOR COMMUNICATION THROUGH POSTAL MAIL

Apart from appearances of the receipt rule in a few controversial judicial

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<sup>111</sup> As Eisler explains, “Generally, parties do not negotiate in advance with respect to the particulars concerning the formation of an enforceable contract. Parties enter negotiations with their own perceptions of contract formation and expect the default rules of contract formation to comport with those perceptions.” Eisler, *supra* note 8, at 557 n.1, para. 2; *see also* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55, 58-59 (1963) (discussing how contracting parties may be unaware of the laws affecting their negotiations and transactions). *But see* *Jim L. Shetakis Distrib. Co. v. Centel Commc’ns Co.*, 756 P.2d 1186, 1188 (Nev. 1988) (“[W]here the circumstances indicate that a particular manner of contract formation is contemplated by the parties, a binding contract is not formed in the absence of compliance with the contemplated procedure.”).

<sup>112</sup> *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 89 (1989) (“Economists . . . believe that . . . if lawmakers choose the wrong default [rule] . . . there will be increased transaction costs of a second order of magnitude.”); Boss & Winn, *supra* note 11, ¶32 & n.60 (noting that most EDI trading partners prefer a receipt rule for contract formation and choose to contract around the dispatch rule through model trading agreements).

<sup>113</sup> *See* Eisler, *supra* note 8, at 557-61; *cf.* Marianne M. Jennings, *The True Meaning of Relational Contracts: We Don’t Care About the Mailbox Rule, Mirror Images, or Consideration Anymore—Are We Safe?*, 73 Denv. U. L. Rev. 3, 4 n.7 (1995) (discussing a scenario in which an offeree, unaware of the dispatch rule, believed that a valid contract had not been formed and mistakenly contracted elsewhere).

<sup>114</sup> *See* Raymond, *supra* note 18, at 6 n.23 (stating that “the mailbox rule attempts to account for the unpredictable timing of the postal system”).

opinions,<sup>115</sup> American case law has overwhelmingly endorsed the dispatch rule for acceptances made by post or other non-instantaneous means.<sup>116</sup> The commentary about this precedent, however, has not been so one-sided, with scholars unfettered by the dictates of *stare decisis* continuing the receipt rule debate. After much back and forth, the debate seems to have reached an impasse.<sup>117</sup> This Article seeks not to rehash the old controversy, which scholars have articulated so extensively<sup>118</sup> and eloquently in the past; rather, this Article suggests that the Internet Era has given rise to altogether new issues, not considered by those who have justified or criticized the “mailbox” rule in its original context of the telegraph and postal systems.<sup>119</sup> These new considerations create additional rationales for application of a receipt rule to non-instantaneous communication—rationales so strong as to be dispositive. In particular, a receipt rule should be applied to mail by post because (1) it would enhance the uniformity of legal guidelines in a way preferable to extending the dispatch rule to all communications, and (2) the offeree should be incentivized to choose an efficient method of communication for contract formation. Together, these factors reveal not only that technological development has invoked a need for new rules, but also that technological development is augmenting the grounds for applying new rules *even to old technologies*.

#### *A. Applying a Receipt Rule to Non-Instantaneous Communications Would Enhance Uniformity*

Commentators have long contended that uniformity across a legal system is desirable.<sup>120</sup> Such uniformity is advantageous for reasons of efficiency and justice

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<sup>115</sup> See, e.g., *McCulloch v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278, 287 (1822); see also *supra* notes 34, 36.

<sup>116</sup> See *supra* Part II.A.

<sup>117</sup> See *supra* Part I, para. 2; Part II.A., para. 4.

<sup>118</sup> The “mailbox” rule debate in the context of post and telegram has been so thoroughly discussed elsewhere as to be beyond the scope of this Article.

<sup>119</sup> Nor are these issues yet considered even by authors who have advocated, in the electronic context, for a receipt rule. See, e.g., Raymond, *supra* note 18, at 34 (endorsing the receipt rule for electronic acceptances but refusing to challenge the dispatch standard for communications of a non-electronic nature).

<sup>120</sup> E.g., Arthur L. Corbin, *Corbin on Contracts* §1, at 1 (1st ed. 1952) (stating that the underlying purpose of law is best achieved by a judicial system that acts with uniformity); Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 *Vand. L. Rev.* 1167, 1174 (2005) (“[I]nterstate procedural uniformity remains a desirable, viable and achievable goal . . . .”); Carl Tobias, *Civil Justice Reform Sunset*, 1998 *U. Ill. L. Rev.* 547, 606 (“At a rather general level, the objectives of revitalizing and increasing uniformity, simplicity, and transsubstantivity, and of decreasing expense and delay should continue to animate [legal] reform efforts.”). *But see*

ranging from facilitation of planning by contracting parties<sup>121</sup> to conservation of judicial resources<sup>122</sup> to fairness towards financially-constrained public interest litigants.<sup>123</sup> Applying a receipt rule not only to electronic communication but also to non-instantaneous communication would improve the consistency of contract law both internally (across U.S. jurisdictions) and externally (with respect to the laws of other nations).

First, application of the receipt rule to postal mail would harmonize the rules governing postal acceptances with the well-settled jurisprudence dictating that other types of contractual communications (including offers,<sup>124</sup> revocations,<sup>125</sup> counteroffers,<sup>126</sup>

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A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. Pa. L. Rev. 1567, 1579-82 (1991) (discussing the “utility of informed inconsistency”). Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that it is “one of the happy incidents of the federal system” that states may individually experiment with the law); Raymond T. Nimmer, *International Information Transactions: An Essay on Law in an Information Society*, 26 Brook. J. Int’l L. 5, 21 (2000) (noting that although “[g]reater uniformity is clearly important . . . the richness of global society consists in part in its diversity”).

<sup>121</sup> See Andrew Beckerman-Rodau, *The Supreme Court Engages in Judicial Activism in Interpreting the Patent Law in eBay, Inc. v. MercExchange, L.L.C.*, 10 Tul. J. Tech. & Intell. Prop. 165, 190 (2007).

<sup>122</sup> Gregory E. Maggs, *Ipsa Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 Geo. Wash. L. Rev. 508, 532 (1998).

<sup>123</sup> Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 Ariz. St. L.J. 1393, 1423 (1992)

[I]nterdistrict disuniformity . . . complicates the efforts of lawyers with national practices, such as federal government attorneys, to participate in lawsuits in districts that follow procedures with which they are not completely familiar. These problems will afflict everyone who litigates in multiple districts, but will be acute for public interest litigants, such as the Sierra Club and the NAACP, and public interest lawyers. For example, resource deficiencies make it difficult for the public interest groups and attorneys to learn about, command, and conform to the procedures.

*Id.* at 1423 (footnote omitted). For other examples of the benefits of uniformity across districts, see Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 Duke L.J. 929, 951 (1996) (stating that disuniformity of rules is “a source of cost and delay, and a significant trap for the unwary”). *Id.* at 948 (noting that disuniformity gives local lawyers an advantage over lawyers from other jurisdictions); Gillette & Scott, *supra* note 11, at 453 (stating that uniformity of contract law “reduces drafting costs”); Maggs, *supra* note 122, at 539 (“If the contract law differs between . . . two jurisdictions, the parties may have difficulty determining which rule will govern their conduct, and the result may surprise one party or the other.”); Tobias, *supra* note 123, at 1425 (suggesting that disuniformity of legal implementation can frustrate the legislative intent behind substantive statutes).

<sup>124</sup> E.g., Farnsworth, *supra* note 11, at 254.

rejections,<sup>127</sup> and acceptances to option contracts<sup>128</sup>) be valid upon receipt. Furthermore, if the recommendation of this Article is followed and American courts do agree to apply the receipt rule to electronic acceptances, then applying a receipt rule to postal transactions would, of course, bring the rules of the postal context in line with the rules of the electronic context.

But the general principle of improving uniformity is an old one, relevant regardless of era, and contributes little that is novel to the “mailbox” rule debate. Moreover, such a limited analysis faces the counterargument that it would likewise enhance uniformity to choose the reverse approach, and extend the dispatch rule to electronic communications and perhaps even to offers, revocations, counteroffers, and so on.

When analyzed in light of modern technological progress, however, this goal of uniformity takes on an extra dimension. While uniformity could be enhanced through consistent use of either rule, the most efficient application of the uniformity doctrine entails an evaluation of what rule is better *for the most prevalent method of communication*, with subsequent adaptation of that rule to the other, less prevalent technology.<sup>129</sup> Under this line of argument, the rationale for applying the dispatch rule either to postal or to electronic technology is weakened with the passing of each day. As individuals and businesses move away from post and toward twenty-first century communication systems, it becomes increasingly appropriate to impose the rule most desirable for electronic contracting onto non-instantaneous contracting.<sup>130</sup>

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<sup>125</sup> *E.g.*, *Brauer v. Shaw*, 46 N.E. 617 (Mass. 1897). However, if the offer was not directed at a specific individual or entity but rather was a public offer, a receipt rule will not be applied to revocation. *See Shuey v. United States*, 92 U.S. 73, 76 (1875) (stating that a reward offer posted in a newspaper may be revoked at any time the same way with no rights accruing unless the contract terms had already been fulfilled).

<sup>126</sup> *E.g.*, Restatement (Second) of Contracts §40 (1981).

<sup>127</sup> *E.g.*, 2 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* §6:42 (4th ed. 2008).

<sup>128</sup> *E.g.*, *Romain v. A. Howard Wholesale Co.*, 506 N.E.2d 1124, 1128 (Ind. Ct. App. 1987); *River City Dev. Corp. v. Slemmer*, 781 S.W.2d 525, 526 (Ky. App. 1989). *But see Worms v. Burgess*, 620 P.2d 455, 459 (Okla. Ct. App. 1980) (applying the “mailbox” rule to an acceptance of an option contract, despite acknowledging that “substantial support exists” for application of the receipt rule).

<sup>129</sup> *Cf.* Farnsworth, *supra* note 11, at 340 (stating that “the increasing use of [substantially instantaneous] means has diminished the practical importance of the [dispatch] rule”); Eisler, *supra* note 8, at 583 (suggesting that the dispatch rule has no function in an era in which “[m]ail and telegram are the exception,” while “[t]elephone, fax, and EDI are now the common and reasonable means of communication”).

<sup>130</sup> This point does not merely beg the question explored *supra* Part IV (i.e., that a receipt rule is the most desirable rule for electronic communications). Rather, the point is a broader one, positing that if a receipt rule is eventually applied to substantially instantaneous communications

Second, applying a receipt rule to all acceptances would be more in keeping with intellectual and legislative developments abroad. Generally speaking, civil law countries (including continental Europe, Latin America, most of Africa, and many Asian countries) apply a receipt rule to acceptances;<sup>131</sup> common law countries, including the United States, England, and other countries once ruled by the British Empire, apply the “mailbox” rule. But even in many common law countries, the “mailbox” rule is applied less faithfully than it is in the United States. For example, a majority of courts in England apply the receipt rule to communications made by telephone and telex.<sup>132</sup> Perhaps more importantly, multinational efforts have been directed at harmonizing commercial laws across countries, and one consequence of that collaboration has been the UN Convention on Contracts for the International Sale of Goods (CISG),<sup>133</sup> which has been adopted by seventy-three nations<sup>134</sup> and rejects the dispatch rule in favor of the receipt rule.<sup>135</sup>

Extension of the receipt rule in the United States to non-instantaneous technologies would make American jurisprudence consonant with these international trends. But once again this observation is based on a general principle of uniformity that would have been relevant even before the technological revolution of recent years.

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even for reasons *not* including the reasons described in this Article, for example (a) due to its endorsement by the Restatement (Second) of Contracts and other persuasive authorities or (b) due to legislative mandate requiring it (as in the case of the two states that adopted the UCITA), then in any such instances, the rising popularity of electronic communication will progressively undermine the rationale for applying a dispatch rule to mail by post.

<sup>131</sup> See, e.g., Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the Sale of Goods*, 23 Int'l Law. 443, 454 (1989) (“The classic civil law approach is that an acceptance is not effective, hence the contract is not perfected, until it reaches the offeror, thus placing the risk of transmission of a written offer on the offeree. Because the offeree was the party that selected the medium of communicating the acceptance, the offeree is considered in the best position to insure against possible delays and hazards.”).

<sup>132</sup> See *Entores Ltd. v. Miles Far E. Corp.*, (1955) 2 Q.B. 327, 337 (A.C.) (stating that so far as telex messages are concerned, “parties are to all intents and purposes in each other’s presence”).

<sup>133</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3, *reprinted in* 52 Fed. Reg. 6262 (1987) [hereinafter CISG].

<sup>134</sup> As of April 5, 2008, according to United Nations Commission on International Trade Law, Status: 1980 – CISG, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Mar. 28, 2009) (listing state parties that have adopted the CISG).

<sup>135</sup> Mikio Yamaguchi, *The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law*, 37 Cornell Int'l L.J. 357, 377-79 (2004). Notice, however, that the CISG has a provision meant to protect the parties in the case of an unforeseen delay in the transmission of the acceptance message. If a timestamp or postmark on a tardy message indicates that, in the normal course of communication, the communication should have reached the offeror on time, then the late acceptance is valid unless the offeror promptly informs the offeree that he or she considers the offer to have lapsed. CISG, *supra* note 132, art. 21(2).

However, an additional development that has made the case for the receipt rule especially compelling is the following: as globalization has proceeded and substantially instantaneous technology has become so widespread, uniformity of legal rules has become ever more essential to the proper functioning of the global marketplace.<sup>136</sup> Stated in a slightly different manner, the rise of electronic technologies has made contracting across jurisdictions more common, at the same time that such cross-border transactions have become central to the economic success of commercial entities.<sup>137</sup> These trends, in turn, have heightened the need for consistency of international legal norms and, more specifically, the need for U.S. courts to apply a receipt rule to all contracts formed over a distance, including those formed by post.

*B. Offerees Should be Incentivized to Choose Communication Methods that are Efficient and Reliable*

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<sup>136</sup> Eisler, *supra* note 8, at 570-71, 570 n.82; *see also* John Honnold, *A Uniform Law for International Sales*, 107 U. Pa. L. Rev. 299, 300-01 (1959).

Many businesses which specialize in foreign trade have developed detailed form contracts which seek to resolve the questions on which the law may be unsettled or in conflict. For some commodities, trading can be carried on with dispatch by referring to standard contracts drafted by trade associations; and under the auspices of the United Nations Economic Commission for Europe, detailed standard contracts have been prepared for international sales of lumber, citrus fruit, cereals and machinery. . . . [Also], machinery for arbitration is widely used in international sales; in this manner businessmen seek to escape from conflicting and antiquated national laws into a regime of commercial understanding. These various measures for legal self-help, although highly useful in skillful hands, *do not remove the need for improving and unifying the underlying law.*

*Id.* (emphasis added).

<sup>137</sup> *See, e.g.,* Boss & Winn, *supra* note 11, at 1473 (“In an information economy, intangible resources such as intellectual property and databases play a pivotal role in economic success. Opportunities in an information economy are global, not national. Information and technology exports play an increasingly crucial role in the United States’ balance of payments with its trading partners.”); Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. Rev. 359, 364 (2007).

[C]ommunications and economic growth are tightly intertwined. Economists understand that economic growth is driven by new ideas creating ever newer goods and services. The human relations made possible by the Internet are capable of producing enormously diverse ideas . . . and allowing them to be disseminated on a large scale, thus triggering crucial economic growth that will benefit society as a whole.

*Id.* (footnotes omitted).

The buffet of new technologies available to individuals in the twenty-first century has created, inherently, the opportunity for offerees to *choose* between different communication options. The common law does not curtail this choice, so long as the offeror has not specified the means to be used for acceptance and the means selected by the offeree are reasonable under the circumstances.<sup>138</sup> The law of contracts should be structured so as to take advantage of this flexibility and to incentivize offerees to utilize communication methods that are efficient and reliable.

The relative benefits offered by the Internet and other electronic technologies are myriad and well-documented. The first and most apparent advantage is that nearly instantaneous, highly reliable, and highly accurate communication<sup>139</sup> can be had at the click of a mouse and at little expense.<sup>140</sup> The by-products of such fast and affordable communication include the opportunity for quicker negotiations and contract formation as well as quicker resolution of disputes, among others.<sup>141</sup> Second, the document management capabilities possible through the Internet are far superior to any similar capabilities available through postal mail. For instance, e-mails can be dispersed to many different recipients at once, with only minor modification to the process of single-recipient e-mailing; mass mailings, which are the physical mail equivalent, require production of documents, envelopes, and postage.<sup>142</sup> E-mail also maintains the advantage of being in a digital format, making it easy to scan, skim (especially for particular facts and figures such as the date and timestamp of the message or for particular “keywords” of interest to the reader), arrange by topic, and delete; moreover, the data is usually formatted to allow computer users to copy, manipulate, and edit messages as they see fit.<sup>143</sup> Third, electronic communication is more environmentally friendly than mail by post.<sup>144</sup> Finally, researchers have suggested such unconventional benefits as the minimal

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<sup>138</sup> See, e.g., Restatement (Second) of Contracts §§30(2), 63(a), 65, 66 (1979); see *Cantu v. Cent. Educ. Agency*, 884 S.W.2d 565, 567-68 (Tex. App. 1994).

<sup>139</sup> See Elec. Messaging Servs. Task Force, *supra* note 35, at 1669-70; William J. Haddad, *Authentication and Identification of E-mail Evidence*, 96 Ill. B.J. 252, 253 (2008) (“[E]-mail is virtually instantaneous throughout the world.”).

<sup>140</sup> See Eisler, *supra* note 8, at 568-69; Haddad, *supra* note 139, at 253 (“The biggest difference is the ease of composition and low cost of delivery compared to earlier forms of communication (this accounts for the massive volume of messages transmitted, billions every day) . . .”).

<sup>141</sup> See Elec. Messaging Servs. Task Force, *supra* note 35, at 1666, 1697.

<sup>142</sup> See Fasciano, *supra* note 49, at 990. Moreover, e-mail can be transmitted to and from mobile devices, whereas delivery methods for physical mail are more limited. Haddad, *supra* note 138, at 253.

<sup>143</sup> See Fasciano, *supra* note 49, at 990-91.

<sup>144</sup> E.g., Romm, Rosenfeld, & Hermann, *supra* note 75, at 39 (predicting that the Internet could reduce the demand for paper by as much as 2.7 million tons by the year 2003, equaling a

need for social niceties in e-mails and instant messages, a phenomenon that streamlines communications and helps socially awkward individuals participate in the market economy.<sup>145</sup>

This is not to say that new technology is always preferable to mail by post. For instance, because of the discoverable and manipulable written trail left by electronic communications, correspondents may feel restricted in what they can disclose to recipients electronically.<sup>146</sup> Others may face obstacles related to the loosely-regulated nature of the electronic universe.<sup>147</sup> But these drawbacks are situation-specific and are far outweighed by the many advantages that new technology offers.

Given this reality, a receipt rule should be applied not only to electronic communications, but also to mail by post and all other non-instantaneous messaging. Such an arrangement would place the burden of transmission delay or error on the individual sending the acceptance, motivating her to select the quickest, most efficient method among her array of options. This legal scheme could avoid disputes like that in *Farmers' Produce Co. v. McAlester Storage & Communication Co.*, where an offeree chose to respond to a telegram offer with an acceptance by post, causing the offeror to lose money due to the delay.<sup>148</sup> Otherwise, an offeree capable of sending a message by electronic means may instead choose postal mail in order to enjoy the legal protection of the dispatch rule.

The recommendation of this Article cuts against the popular theory that the offeror, as the master of her offer,<sup>149</sup> should bear the risk of communication failure unless she takes the initiative to prescribe a particular means of acceptance. This theory overlooks the broader social desirability of efficiency in communication, as well as the simple truth that the person sending each message—the offeror in the case of an offer or revocation, and the offeree in the case of an acceptance, counteroffer, or rejection—is the

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reduction of 10 million tons of greenhouse gas emissions, and that both figures could double by the year 2008).

<sup>145</sup> See Fasciano, *supra* note 49, at 991. Similarly, e-mail allows participants to control how they present themselves to the world, including a better ability to conceal personal characteristics. Race and gender, for instance, are more difficult to discern and thus less likely to lead to discrimination. Llewellyn J. Gibbons, Robin M. Kennedy, & Jon M. Gibbs, *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. Rev. 27, 32 (2002).

<sup>146</sup> Fasciano, *supra* note 49, at 992; see Juna Woo, *E-Mail Archives Provide Windfall for Lawyers Seeking Evidence*, Wall St. J., Jan. 4, 1993, at B5 (discussing the modern trend of including electronic media in discovery requests).

<sup>147</sup> See, e.g., Jeffrey D. Goldman & Eric J. German, *Pollution in the Blogosphere: The Only Purpose of a New Form of Blog, Called a Splog, is Fraud and Infringement*, L.A. Law., June 2007, at 32 (discussing the problem of copyright and trademark infringement on the Web due to inadequate regulation of blog content).

<sup>148</sup> *Farmers' Produce Co. v. McAlester Storage & Comm'n Co.*, 150 P. 483, 485 (Okla. 1915).

<sup>149</sup> See discussion *supra* Part IV.A and note 60.

best decision-maker with respect to communicating *her message* from *her location* to the specified destination.<sup>150</sup> That is, the sender is the most knowledgeable party as to the idiosyncrasies of her Internet provider, her cellular phone service, or her local mailman. It is the sender who, even when directed by an offeror to accept “by e-mail,” will choose the computer, the e-mail account, and the exact time of day to transmit the message. Likewise, even when directed by an offeror to accept “by post,” it is the sender who chooses whether to leave the message for pick-up by the mailman (thereby taking the hypothetical risk that it gets stolen before the mailman can retrieve it from her mailbox)<sup>151</sup> or to take it directly to a post office, and which post office, and so forth. No matter how many variables an offeror attempts to take into account, the offeree will almost always know more about how to get her message to the offeror as efficiently and reliably as possible; moreover, it is the offeree who may have a remedy sounding in contract law against a communication services provider whose services malfunction.<sup>152</sup> This Article argues that rather than place the risk of error on the offeror, who can never exercise as much control over transmission of the acceptance as can the offeree, courts should apply a receipt rule. A receipt rule will incentivize the sender to best utilize the communication services accessible to her.

It is also for this reason that extending the “mailbox” rule to electronic communication is less advantageous than the reverse approach, the approach advocated herein. While applying the “mailbox” rule to all acceptances could be characterized as a technology-neutral solution, offering parties the chance to select among technologies based solely on their substantive qualities and not on their associated legal protections, such an approach fails to take advantage not only of the efficiency differential *between* technologies but also of the differential between various ways of employing *the same* technology. An acceptance doctrine based only on the dispatch rule will neither steer the offeree away from the inefficiencies of “snail mail” nor motivate her, for instance, to visit the post office and send her message with return receipt requested.

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<sup>150</sup> This argument is a derivation of the theory of “least-cost avoider,” which proposes that risk be placed on the party who can avoid a problem at least cost. Theoretically, distributing the risk in this way results in the most efficient outcome where transaction costs prohibit negotiation among market agents. For example, the common law of torts has been interpreted as a rough attempt at achieving safety in an efficient way by placing liability on the least-cost avoider of an injury. See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 135-40 (1970); see also *Conoco Inc. v. J.M. Huber Corp.*, 289 F.3d 819, 826 n.6 (Fed. Cir. 2002) (discussing the least-cost avoider principle); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat’l Bank of Wash. D.C.*, 5 F.3d 554, 557 (D.C. Cir. 1993) (Silberman, J., concurring) (discussing the least-cost avoider); David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 Ariz. L. Rev. 357, 363-73 (1994) (discussing the least-cost avoider).

<sup>151</sup> Litigation does, indeed, arise from such seemingly “outlandish” scenarios. Compare this situation with, for example, *Vassar v. Camp*, 11 N.Y. 441, 444 (1854), in which an acceptance letter that had reached the destination post office and been placed in the recipient’s mail drawer somehow “disappeared” from the drawer prior to the recipient’s being able to retrieve it.

<sup>152</sup> See discussion *supra* Part III.B.

## VI. CONCLUSION

The academic stalemate between the dispatch rule and the receipt rule has been disrupted, and the rationales in favor of the receipt rule are now dispositive. The world today is wholly different from the world of the court in *Adams v. Lindsell*; indeed, it is wholly different even from the world of twenty years ago. Substantially instantaneous communication has fundamentally altered the allocation of risk between offeror and offeree, leaving an offeree today much less vulnerable in contractual negotiations than her predecessors. This risk redistribution, combined with the theoretical death of the “meeting of the minds” concept and the evidentiary possibilities wrought by technological advances, convincingly militates against a continuing application of the dispatch rule to substantially instantaneous acceptances. Furthermore, the receipt rule should be applied to *all* acceptances, even those made by post, as the myriad communication options available to contracting parties have made the uniformity of law more desirable, and the efficiency of transactions more attainable, than ever before.

In their reluctance to deviate from the “mailbox” rule, courts are fighting a losing battle. Already, a large proportion of legal reform activity in the late-twentieth and twenty-first centuries has been concerned with promoting the growth of the information economy.<sup>153</sup> The economic, political, and social momentum behind these efforts is overwhelming, and legal institutions have a unique opportunity to be leaders and guides in the effort, cultivating a synergy in which the societal roles of the legal system and the roles of technological innovation are mutually reinforced. Courts may be especially reluctant to initiate such pioneering in situations where modifications to past precedent are needed, not because the essence of the precedent is flawed, but rather simply because contemporary developments have rendered the precedent obsolete. Nevertheless, courts that persist in a steadfast commitment to traditional doctrine may be putting their own relevance at risk.

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<sup>153</sup> See Raymond T. Nimmer, *International Information Transactions: An Essay on Law in an Information Society*, 26 *Brook. J. Int'l L.* 5, 19 (2000).