Notes

NO CLEAR WINNER: APPRAISING THE IMBALANCES OF DELAWARE’S QUASI-APPRaisal REMEDY AFTER BERGER v. PUBCO CORP.

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I. INTRODUCTION

In the recent and highly-publicized $24.9 billion buyout of Dell, Inc., activist investor Carl Icahn—believing the buyout offer to be undervalued—urged fellow Dell shareholders to prepare to exercise appraisal rights for their shares should the buyout be approved.1 Appraisal statutes generally allow dissenting minority shareholders in a corporate merger or buyout situation to bring suit to obtain the judicially determined fair value for their shares.2 In traditional long-form merger or buyout transactions, such as the Dell deal, the exercise of appraisal rights is one of several alternatives available to minority shareholders interested in challenging the merits of the transaction.3

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In short-form merger situations, however, after the seminal Delaware Supreme Court opinions in *Weinberger v. UOP, Inc.* and *Glassman v. Unocal Exploration Corp.*, judicial appraisal became the sole remedy available to minority shareholders wishing to challenge the merits of the short-form transaction, absent fraud or illegality. The exclusivity of the appraisal remedy for minority shareholders in short-form merger situations was decided, in part, based on the Delaware Supreme Court’s interpretation of the purpose of the Delaware short-form merger statute. That purpose was to provide a parent corporation, owning at least ninety percent of the outstanding shares of each class of stock of another corporation, with a mechanism to effectuate a merger unilaterally.

Delaware courts have held, however, that even when unilaterally effectuating a short-form merger, the majority shareholder corporation still owes certain fiduciary duties to the minority shareholders. These duties...
include the duty of full disclosure.\footnote{See Glassman, 777 A.2d at 248 (discussing majority shareholder’s duty of disclosure in short-form merger transactions).} In the event parent corporations violate their fiduciary duties in short-form merger transactions, Delaware courts have provided minority shareholders with a quasi-appraisal remedy.\footnote{See Geis, supra note 2, at 1642 (noting quasi-appraisal has been judicial response to short-form merger transactions effectuated with violations of fiduciary duties); see also Schumer et al., supra note 3, at 1 (“Generally, quasi-appraisal has been recognized in cases in which a corporation fails to make disclosures that directly affect the stockholders’ decision whether or not to seek appraisal.”).} The Delaware Supreme Court, however, in \cite{Weinberger} and \cite{Glassman}, had left open the question of what the appropriate procedural application of this quasi-appraisal remedy would be.\footnote{See Berger v. Pubco Corp., 976 A.2d 132, 138 (Del. 2009) (stating issue of what remedy should be available to minority shareholders in case of violation of fiduciary duty is one of first impression for Delaware Supreme Court).} This is an important question because it greatly impacts both majority and minority shareholders.\footnote{See Hossfeld, supra note 3, at 1359 (noting generally appraisal remedies should seek to balance risks of oppression by majority against harassment by minority); see also Joseph M. Coleman, \textit{The Appraisal Remedy in Corporate Freeze-Outs: Questions of Valuation and Exclusivity}, 38 \textit{S. W. L.J.} 775, 776 (1984) (noting appraisal proceedings “prevent majority shareholders from abusing their favorable position” in merger transactions). The importance of the quasi-appraisal remedy is also supported by the Delaware courts’ increased use of the remedy outside of short-form merger transactions. \textit{See, e.g.,} Schumer et al., supra note 3, at 2 (describing Delaware courts’ consideration of quasi-appraisal as protection for minority shareholders in sign and consent transactions). These cases are also notable as they suggest Delaware courts are willing to forgo pre-closing remedies of disclosure issues and defer to the protection provided to minority shareholders through the quasi-appraisal proceeding. \textit{See id.} at 4 (discussing evolution of quasi-appraisal remedy).} The appropriate quasi-appraisal remedy should balance the majority shareholders’ interest in effectuating a merger unilaterally with the minority shareholders’ right to make an informed appraisal decision.\footnote{See Hossfeld, supra note 3, at 1360 (discussing need for more balanced appraisal remedy).} Should Delaware courts loosely regulate fiduciary duties in short-form merger situations, minority shareholders may lack the necessary information to make an informed appraisal decision.\footnote{See McMullin v. Beran, 765 A.2d 910, 920 (Del. 2000) (finding minority shareholders must be able to make informed decision whether to accept buyout price or seek appraisal of their shares); see also Nebel v. Sw. Bancorp, Inc., Civ. A. No. 13618, 1995 WL 405750, at *5 (Del. Ch. July 5, 1995) (noting parent corporation has “duty . . . to disclose all facts material to minority stockholders’ decision whether to accept the short form merger consideration or seek an appraisal” (citing Shell Petroleum, Inc. v. Smith, 606 A.2d 112, 114 (Del. 1992))).} Without adequate information, minority shareholders would be vulnerable to the parent corporation’s interest (describing majority shareholder’s duty of disclosure in short-form merger transactions); Nebel v. Sw. Bancorp, Inc., Civ. A. No. 13618, 1995 WL 405750, at *5 (Del. Ch. July 5, 1995) (same).
in cashing out the minority at the lowest possible price. Conversely, should Delaware courts establish a jurisprudence that enforces fiduciary duties too strictly, majority shareholders effectuating short-form mergers would be continuously exposed to harassment in the form of quasi-appraisal claims. The issue of determining the appropriate procedural application of the quasi-appraisal remedy was one of first impression for the Delaware Supreme Court and was addressed in Berger v. Pubco Corp.

The Delaware Supreme Court’s opinion in Berger seems, on its face, to benefit minority shareholders in short-form merger transactions. This

16. See Aronstam et al., supra note 7, at 521 (explaining imposition of fiduciary duties guards against risk that majority shareholders could unilaterally implement transactions to detriment of minority shareholders).

17. See Hossfeld, supra note 3, at 1359 (noting generally appraisal remedies seek to balance risks of oppression by majority against harassment by minority); see also Schumer et al., supra note 3, at 2 (advocating quasi-appraisal remedy should be limited “to avoid the tipping of the balance of the law” in favor of post-merger litigation). Vice Chancellor Laster recently addressed the issue of disclosure claim harassment by minority shareholders and the importance of a balanced equitable remedy:

As we know from scholarly studies, the past decade has witnessed a dramatic transformation in the nature of public company M&A litigation. In 2010, 84.2 percent of announced deals attracted lawsuits. In 2010 and 2011, according to Cornerstone Research, 91 percent attracted lawsuits. According to the data for 2011, in the same study, 96 percent of deals valued at $500 million or more attracted lawsuits. That’s compared to 53 percent in 2007.

As these volumes have increased, merits-related outcomes have decreased. So of the 447 transactions involving public companies valued at a $100 million plus, between 2005 and 2010 for which data is available, 69.8 percent resulted in a settlement. The remaining 135 were dismissed by the Court. So all of those were either settled or dismissed. Of the cases that settled, 74.7 percent were supplemental disclosures only . . . . That was a sharp increase over 1999 through 2000 when . . . the rate of disclosure-only settlements was only 10 percent.

As I have observed, viewed against the background of these statistics, the increase in disclosure-only settlements is troubling. Disclosure claims can be settled cheaply and easily, creating a cycle of supplementation that confers minimal, if any, benefits on the class. I don’t think for a moment that 90 percent—or based on recent numbers, 95 percent of deals are the result of a breach of fiduciary duty. I think that there are market imbalances here and externalities that are being exploited.

What this means is that this Court needs to think carefully about balancing.


18. 976 A.2d 132, 133 (Del. 2009) (“The issue on this appeal is what remedy is appropriate in a ‘short form’ merger . . . . where the corporation’s minority stockholders are involuntarily cashed out without being furnished the factual information material to an informed shareholder decision whether or not to seek appraisal.”).

19. See Geis, supra note 2, at 1642 (noting that after Berger quasi-appraisal became more convenient than traditional appraisal for dissenting minority shareholders); see also Andrew J. Nussbaum, Delaware Supreme Court Establishes Equitable
Note, however, analyzes the imbalances of the quasi-appraisal remedy established in Berger and the detrimental effects that remedy will have on both the interest of parent corporations and the rights of minority shareholders in short-form merger transactions. Part II of this Note provides a brief background of Delaware’s quasi-appraisal jurisprudence with a focus on short-form mergers and the emergence of diverging procedural applications of the quasi-appraisal remedy. Part III details the facts and procedural posture of Berger and analyzes the Delaware Supreme Court’s holding. Part IV addresses the imbalances of the Delaware Supreme Court’s approach in Berger in regards to protecting minority shareholder rights while also preserving the interest of majority shareholders in short-form merger transactions. Finally, Part V concludes by suggesting that the Delaware Supreme Court revisit the holding of Berger to establish a more balanced quasi-appraisal remedy.

II. AN OVERVIEW OF QUASI-APPRAISAL JURISPRUDENCE LEADING UP TO BERGER V. PUBCO CORP.

Quasi-appraisal is a judicially created remedy available to minority shareholders who are deprived of the full right to statutory appraisal. As Delaware courts have held that statutory appraisal is the sole remedy available to minority shareholders in a short-form merger situation, quasi-appraisal has become an important protection of minority shareholders’ rights when the majority inequitably prevents the minority from making a fully informed statutory appraisal decision. Delaware courts, however, have struggled to balance the statutorily protected interests of the majority

Relief in Short Form Mergers, Harv. L. School F. on Corp. Governance & Fin. Reg. (July 26, 2009, 1:38 PM), http://blogs.law.harvard.edu/corpgov/tag/berger-v-pubco-corp/ (reasoning benefits provided to minority shareholders from Berger decision “may encourage increased litigation following short-form mergers”).

20. For a discussion of the detrimental effects of the quasi-appraisal remedy handed down in Berger, see infra notes 105–21 and accompanying text.

21. For a discussion of Delaware’s quasi-appraisal jurisprudence and the emerging diversion in application of the quasi-appraisal remedy, see infra notes 43–68 and accompanying text.

22. For a discussion of the facts, procedural posture, and the Delaware Supreme Court’s analysis in Berger, see infra notes 72–104 and accompanying text.

23. For a discussion of the effects of Berger on minority shareholder rights and the interest of majority shareholders in short-form merger transactions, see infra notes 105–21 and accompanying text.

24. For a discussion of the conclusion of this Note, see infra notes 142–47 and accompanying text.

25. See Gilliland v. Motorola, Inc., 873 A.2d 305, 312 (Del. Ch. 2005) (discussing appropriate remedy available to minority shareholders in case of “technical non-compliance with the appraisal statute” by majority shareholder); see also Geis, supra note 2, at 1648 (explaining rationale for creation of quasi-appraisal remedy by Delaware courts).

26. See Berger v. Pubco Corp., 976 A.2d 132, 145 (Del. 2009) (recognizing quasi-appraisal and its enforcement of statutory and fiduciary duties related to short-form mergers as important protection for minority shareholders); see also
with the rights of minority shareholders in the application of the quasi-
appraisal remedy. 27

A. Majority Shareholder Interest and the Purpose of the Delaware Short-Form Merger Statute

The Delaware Supreme Court initially addressed the purpose of the Delaware short-form merger statute in Stauffer v. Standard Brands, Inc. 28 The court in Stauffer held the purpose of the short-form merger statute was to provide parent corporations with a means of unilaterally eliminating minority shareholders’ interest in an enterprise. 29 Giving weight to the legislative intent of the Delaware short-form merger statute, the court in Stauffer further held that the exclusive remedy for minority shareholders in a short-form merger would be judicial appraisal. 30 The exclusivity of

Nussbaum, supra note 19 (discussing benefits provided to minority shareholders from Berger decision).

27. See Hossfeld, supra note 3, at 1359 (noting generally appraisal remedies seek to balance risks of oppression by majority against harassment by minority); see also Gilliland, 873 A.2d at 315 (holding minority shareholders must opt in and escrow a portion of merger proceeds to secure quasi-appraisal proceeding); Geis, supra note 2, at 1648 (acknowledging Delaware Supreme Court in Berger wrestled with open questions related to quasi-appraisal procedure). But see Nebel v. Sw. Bancorp, Inc., Civ. A. No. 13618, 1995 WL 405750, at *5 (Del. Ch. July 5, 1995) (holding quasi-appraisal is opt-out proceeding and minority shareholders are not required to escrow any merger proceeds).

28. 187 A.2d 78 (Del. 1962), overruled by Roland Int’l Corp. v. Najjar, 407 A.2d 1032 (Del. 1979) (“As to Stauffer, we agree that the purpose of § 253 is to provide the parent with a means of eliminating minority shareholders in the subsidiary . . . .”); see id. at 80 (discussing purpose of Delaware short-form merger statute).

29. See id. (determining purpose of Delaware short-form merger statute “is to provide the parent corporation with means of eliminating the minority shareholder’s interest” unilaterally).

30. See id. (holding in disputes related to value arising from effectuation of short-form merger, appraisal is exclusive remedy available to dissenting minority shareholders). The Delaware Supreme Court in Stauffer established that the court will protect majority shareholder parent corporations’ legitimate interest in being able to unilaterally effectuate short-form mergers against breach of duty challenges from minority shareholders. See id. (indicating that “power of the parent corporation to eliminate the minority [interest] is a complete answer to . . . breach of trust” claims). Later, the Delaware Supreme Court diverged from the premise established in Stauffer that the purpose of the Delaware short-form merger statute was to allow controlling shareholders to unilaterally eliminate minority interests. See Singer v. Magnavox Co., 380 A.2d 969, 980 (Del. 1977) (“[T]he fiduciary obligation of the majority to the minority stockholders remains and proof of a purpose, other than such freeze-out, without more, will not necessarily discharge it.”), overruled by Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). In Singer, the supreme court established a business purpose test applicable to appraisal actions and found that a controlling shareholder breaches its fiduciary duty to minority shareholders if it effects a merger for the sole purpose of eliminating the minority shareholders. See id. (holding short-form merger made solely for purpose of freezing out minority shareholders is violation of fiduciary duty). However, any precedent established by the Singer decision was short-lived as the Delaware Supreme Court in Weinberger overruled Singer and re-established the principles of Stauffer by eliminating the business purpose test and again limiting the minority stockholders re-
the appraisal remedy protects the interest of the majority shareholder in unilaterally effectuating the transaction.\textsuperscript{31} The Delaware courts have uniformly interpreted the purpose of the short-form merger statute over time.\textsuperscript{32} With this purpose in mind, Delaware courts have consistently protected a majority shareholder’s ability to unilaterally eliminate the minority interest through a short-form merger by making statutory appraisal the exclusive remedy available to objecting minority shareholders.\textsuperscript{33} Delaware courts have, however, carved out some exceptions to the exclusivity of the statutory appraisal remedy in short-form merger situations.\textsuperscript{34} The most notable exceptions are cases of fraud, illegality, or breach of fiduciary duty.\textsuperscript{35} The rationale behind allowing these exceptions is that, in cases of fraud, illegality, and breach of fiduciary duties, minority shareholders are unable to make an informed appraisal decision.\textsuperscript{36}

B. Minority Shareholders’ Rights to Informed Decisions and the Fiduciary Duty of Disclosure

Delaware courts have also consistently protected the right of minority shareholders to make an informed appraisal decision in short-form course in short-form mergers to a remedy known as quasi-appraisal. See Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983) (noting plaintiff’s monetary remedy in short-form merger situation should be confined to quasi-appraisal proceeding); see also Glassman v. Unocal Exploration Corp., 777 A.2d 242, 245–47 (Del. 2001) (describing history of Delaware jurisprudence related to exclusivity of appraisal in context of short-form mergers).

31. See Glassman, 777 A.2d at 248 (finding that in order to give effect to purpose of short-form merger statute, appraisal must be “exclusive remedy available to a minority stockholder who objects to a short-form merger”).

32. See id. at 245-48 (citing Stauffer, 187 A.2d at 80) (recognizing purpose of short-form merger statute as announced in Stauffer); Stauffer, 187 A.2d at 80 (“[T]he very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder’s interest in the enterprise.”); Nebel, 1995 WL 405750, at *5 (discussing purpose of short-form merger statute).

33. See, e.g., Glassman, 777 A.2d at 245 (noting exclusivity of appraisal remedy protects legislative intent of short-form merger statute); Stauffer, 187 A.2d at 80 (same).

34. See, e.g., Glassman, 777 A.2d at 247 (indicating equitable remedies other than statutory appraisal would be available in cases involving fraud or illegality); Weinberger, 457 A.2d at 714 (same); Stauffer, 187 A.2d at 80 (same).

35. See, e.g., Glassman, 777 A.2d at 247 (finding statutory appraisal is exclusive remedy for minority shareholders objecting to short-form mergers except in cases of fraud or illegality); Stauffer, 187 A.2d at 80 (same); see also Glassman, 777 A.2d at 248 (determining duty of disclosure remains in short-form merger transactions).

36. See Glassman, 777 A.2d at 248 (“Where the only choice for the minority stockholders is whether to accept the merger consideration or seek appraisal, they must be given all the factual information that is material to that decision.”); see also Nussbaum, supra note 19 (noting only obligation of parent company in short-form merger is to provide minority shareholders with sufficient information to make informed appraisal decision); Schumer et al., supra note 3, at 2 (discussing requirement for corporations to make disclosures that directly affect stockholder’s ability to make informed decision about appraisal).
merger situations.\textsuperscript{37} To ensure that minority shareholders are provided with the requisite information to make an informed decision, Delaware courts impose a fiduciary duty of loyalty on majority shareholders.\textsuperscript{38} As part of this duty of loyalty, majority shareholders effectuating a short-form merger must disclose any information material to the minority shareholders’ appraisal decision.\textsuperscript{39} Information is material if there is a substantial likelihood that a reasonable shareholder would consider the information important in making the appraisal decision.\textsuperscript{40} In the context of a short-form merger, the statutory appraisal remedy cannot adequately address situations in which the minority is left uninformed due to a breach of the majority’s duty of full disclosure.\textsuperscript{41} To address the inadequacies of the statutory appraisal remedy in these situations, the Delaware courts have fashioned an equitable quasi-appraisal remedy.\textsuperscript{42}

\textsuperscript{37} For a further discussion of the need for minority shareholders to make an informed decision whether to seek appraisal, see supra note 36 and accompanying text.

\textsuperscript{38} See Weinberger, 457 A.2d at 710 (discussing duty of loyalty owed by directors of Delaware corporations to their shareholders).

\textsuperscript{39} See id. at 703 (holding majority shareholders withholding information material to transaction is breach of fiduciary duty owed to minority shareholders); see also Glassman, 777 A.2d at 248 (finding fiduciaries owe duty of full disclosure to minority stockholders in short-form merger); Hossfeld, supra note 3, at 1348 (explaining parent corporation must satisfy duty of full disclosure in short-form merger).

\textsuperscript{40} See McMullin v. Beran, 765 A.2d 910, 925 (Del. 2000) (discussing materiality standard in context of breach of fiduciary duties arising from merger transaction); see also Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985) (“An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976))). The Delaware Chancery Court has also found omission of certain information can be per se material if that information is required to be provided by statute. See Nebel v. Sw. Bancorp. Inc., Civ. A. No. 13618, 1995 WL 405750, at *6 (Del. Ch. July 5, 1995) (holding statutory requirement that corporation include current appraisal statute in its short-form merger notice makes that information per se material).

\textsuperscript{41} See Weinberger, 457 A.2d at 714 (explaining appraisal remedy may not be adequate in certain cases and equitable remedy may be fashioned); see also Nebel, 1995 WL 405750, at *2 (discussing limitations of appraisal remedy in short-form merger situations). In these situations the claim is that the breach of duty has left minority shareholders unable to make an informed appraisal decision. See id. at *5 (discussing plaintiff’s claims related to breach of fiduciary duty). Therefore, the appraisal remedy, without the requirement of additional disclosures, cannot be an adequate remedy for that claim. See id. The exclusiveness of the appraisal remedy leaves minority shareholders especially vulnerable in short-form merger situations as, technically, the merger has taken place before the majority is required to disclose any information. See Geis, supra note 2, at 1648 (explaining short-form mergers become effective before any disclosures are made to minority shareholders); see also Del. Code Ann. tit. 8, § 253 (codifying requirements of short-form merger). For a further discussion of the minority shareholders’ right to make an informed appraisal decision in short-form merger situations, see supra note 15 and accompanying text.

\textsuperscript{42} See Geis, supra note 2, at 1648 (explaining judicial response to inadequacies of statutory appraisal has been to craft quasi-appraisal remedy); see also Schu-
C. The Quasi-appraisal Remedy

The Delaware judiciary developed the quasi-appraisal remedy to address situations in which minority shareholders had been deprived of the full right to statutory appraisal. Unfortunately, the Delaware courts have inconsistently applied the procedural aspects of the quasi-appraisal remedy. This inconsistency stems in part from the struggle of Delaware courts to fashion an equitable remedy that balances the rights of minority shareholders with the interests of parent corporations in short-form mergers.

1. Origins of Quasi-appraisal

The Delaware Supreme Court first recognized quasi-appraisal as an equitable remedy available to cashed-out minority shareholders in Weinberger. The Delaware Supreme Court in Weinberger found that as minority shareholders had tendered their shares on a materially uninformed basis, they were deprived of their right to statutory appraisal. The court in Weinberger also established the ability of Delaware courts to fashion equitable remedies in cases where appraisal would be an inadequate remedy due to fraud or violations of fiduciary duties.

The Delaware Supreme Court in Weinberger did not intend for quasi-appraisal to become the alternative remedy in all cases of corporate transactions involving fraud or breaches of fiduciary duties. Nevertheless, in

43. See Weinberger, 457 A.2d at 714–15 (discussing quasi-appraisal remedy now available to minority shareholders); see also Gilliland v. Motorola, Inc., 873 A.2d 305, 312 (Del. Ch. 2005) (discussing purpose of quasi-appraisal remedy).
44. For a discussion of the inconsistent application of the quasi-appraisal remedy, see infra notes 53–68 and accompanying text.
45. For a discussion of the importance of balancing the rights of minority shareholders with the interests of majority shareholders in short-form mergers, see supra notes 14–17 and accompanying text.
46. See Weinberger, 457 A.2d at 714–15 (discussing quasi-appraisal remedy now available to minority shareholders); see also Schumer et al., supra note 3, at 2 (acknowledging quasi-appraisal remedy was first recognized in Weinberger).
47. See Weinberger, 457 A.2d at 712 (concluding shareholder vote on tender offer was uninformed and therefore meaningless); see also Gilliland, 873 A.2d at 311 (discussing Weinberger holding).
48. See Weinberger, 457 A.2d at 714 (discussing other situations in which statutory appraisal remedy may not be appropriate); see also Coleman, supra note 13, at 789 (discussing Weinberger's enablement of Delaware courts to fashion equitable remedies). Shortly after Weinberger, the Delaware Supreme Court again supported the discretion of Delaware courts in these matters when it held that there are certain situations in which, even absent fraud or illegality, the court may establish equitable remedies other than judicial appraisal. See Rabkin v. Phillip A. Hunt Chem. Corp., 498 A.2d 1099, 1100 (Del. 1985) (concluding appraisal is exclusive remedy only if minority stockholders' complaints are limited to judgmental factors of valuation).
49. See Weinberger, 457 A.2d at 714 (enumerating limited types of cases to which quasi-appraisal remedy would apply). The court in Weinberger initially only
a number of post-Weinberger cases, the Delaware Chancery Court has used its Weinberger-supported discretion to extend the application of the quasi-appraisal remedy beyond the scope envisioned by the Delaware Supreme Court in Weinberger.\textsuperscript{50} Despite its increased application of the quasi-appraisal remedy, the Chancery Court had difficulty consistently fashioning a quasi-appraisal proceeding that balanced the majority shareholders’ interests with the minority shareholders’ rights.\textsuperscript{51}

2. Inconsistent Application of Quasi-appraisal Remedy in the Context of Short-Form Mergers

In two Delaware Chancery Court cases, Nebel v. Southwest Bancorp. Inc.\textsuperscript{52} and Gilliland v. Motorola, Inc.,\textsuperscript{53} the court found that parent corporations executing short-form merger transactions had breached their duty of disclosure to minority shareholders.\textsuperscript{54} In both cases, the court also found that the statutory appraisal remedy was inappropriate and chose to offer minority shareholders a quasi-appraisal remedy.\textsuperscript{55} The courts differed, however, in what they held to be the appropriate procedural application of the quasi-appraisal remedy.\textsuperscript{56}

intended the quasi-appraisal remedy to apply to similarly situated cases currently being litigated so those courts may apply the more liberalized valuation procedures established in Weinberger. See id. (noting limitations on application of quasi-appraisal remedy); see also Schumer et al., supra note 3, at 2 (“The Weinberger court did not attempt to create a new remedy apart from statutory appraisal . . . .”). In fact, the Delaware Supreme Court in Weinberger and in subsequent decisions stressed the exclusivity of the statutory appraisal remedy except in limited circumstances. See Weinberger, 457 A.2d at 714 (noting remedy available to minority shareholders should ordinarily be confined to statutory appraisal proceeding albeit with more liberalized valuation approach); see also Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2001) (reaffirming Weinberger’s statements about scope of appraisal).

50. See, e.g., Gilliland, 873 A.2d at 312 (applying quasi-appraisal remedy to short-form merger situation involving breach of fiduciary duty although statutory appraisal proceeding including Weinberger's liberalized valuation approach was available); see also Nebel v. Sw. Bancorp, Inc., Civ. A. No. 13618, WL 405750, at *7 (Del. Ch. July 5, 1995) (same); Schumer et al., supra note 3, at 3 (discussing variety of cases in which quasi-appraisal remedy was applied or was considered).

51. For a full discussion of the inconsistent application of the quasi-appraisal remedy, see infra notes 52–68 and accompanying text.


53. 873 A.2d 305 (Del. Ch. 2005).

54. See Nebel, 1995 WL 405750, at *6 (finding parent corporation violated its fiduciary duty of disclosure); see also Gilliland, 873 A.2d at 307 (finding majority stockholder breached its fiduciary duty).

55. See Nebel, 1995 WL 405750, at *7 (holding appropriate remedy for disclosure violation in question was quasi-appraisal); see also Gilliland, 873 A.2d at 307 (“The court must look beyond the [general appraisal] statute to fashion a proper remedy.”).

56. See Berger v. Pubco Corp., 976 A.2d 132, 137 (Del. 2009) (discussing differences between Nebel and Gilliland); see also Gilliland, 873 A.2d at 313 (discussing procedural aspects of quasi-appraisal remedy absent in Nebel).
a. The *Nebel* Approach to Quasi-appraisal

The Chancery Court in *Nebel* granted minority shareholders a quasi-appraisal remedy in which shareholders were neither required to opt in to the quasi-appraisal proceeding, nor were minority shareholders required to escrow any of the proceeds they had received from the merger.\[57\] The opt-out proceeding established by the court in *Nebel* essentially created a class action proceeding in which the entire class of minority shareholders would be included in the quasi-appraisal proceeding brought by any individual minority shareholder.\[58\] Although the *Nebel* court neglected to provide sufficient rationale for its decision to establish an opt-out proceeding, later opinions have suggested that this approach properly balances procedural burdens on majority and minority shareholders.\[59\]

b. The *Gilliland* Approach to Quasi-appraisal

In *Gilliland*, the Delaware Court of Chancery again addressed the issue of what the appropriate remedy should be in the case of a short-form merger effectuated with violations of the majority shareholder’s duty of disclosure.\[60\] The parties in *Gilliland* agreed that the transaction was effectuated with a breach of the duty of full disclosure.\[61\] The parties also agreed that quasi-appraisal would be the appropriate remedy.\[62\] The parties disagreed, however, on the proper procedural application of the quasi-appraisal remedy; specifically, they disagreed as to whether minority shareholders would be required to opt in and to escrow a portion of their

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\[57\] See Schumer et al., supra note 3, at 3 (discussing Chancery Court’s holding in *Nebel*); see also Berger, 976 A.2d at 137 (detailing quasi-appraisal proceeding resulting from *Nebel* decision). But see *Gilliland*, 873 A.2d at 312 (claiming *Nebel* assumed, without deciding, that quasi-appraisal would be opt-out proceeding).

\[58\] See Schumer et al., supra note 3, at 3 (describing *Nebel* remedy as “class-wide quasi-appraisal”).

\[59\] See *Nebel*, 1995 WL 405750, at *7 (granting quasi-appraisal remedy but not discussing procedural aspects). But see Berger, 976 A.2d at 143 (noting opt-out proceeding does not burden majority shareholder but relieves procedural burden on minority shareholders).

\[60\] See *Gilliland*, 873 A.2d at 307 (describing issue to be resolved).

\[61\] See id. (noting question of breach was addressed in previous opinion). The breach of the fiduciary duty stemmed from the fact that the majority shareholder in *Gilliland* had not provided any disclosures related to the company’s financial condition prior to the execution of the short-form merger transaction. See id. at 308 (discussing basis for prior court’s finding of breach of fiduciary duty of disclosure). Although in *Gilliland* most minority shareholders had been provided with adequate financial disclosures pursuant to a recent tender offer, some of which were publicly available, the court held that all minority shareholders involved in the short-form merger transaction must be provided with *at least* summary financial information, trading data of the shares, and a reference to publicly available sources from which additional data could be obtained. See id. (discussing minimum requirements for adequate financial disclosure).

\[62\] See id. at 307 (noting disagreement was focused solely on procedural issues related to quasi-appraisal remedy).
merger proceeds. Ultimately, the Court of Chancery in *Gilliland* held that the appropriate quasi-appraisal remedy required minority shareholders to both opt in and to escrow a portion of the merger proceeds.

The court’s rationale for the opt-in and escrow requirements was that this remedy properly reflects the legislative intent of the short-form merger statute and the modicum of risk inherent in a statutory appraisal proceeding. The court noted that, like in a statutory appraisal proceeding, the opt-in proceeding requires that the minority shareholders make a choice to participate in the action. Further, the court reasoned that the escrow requirement reflects the risk of the statutory appraisal proceeding in that minority shareholders may actually lose value should the judicially determined valuation be less than the proposed merger consideration.

III. *Berger v. Pubco Corp.*

In *Nebel* and *Gilliland*, the Delaware Court of Chancery handed down conflicting opinions regarding the appropriate procedural remedy to address violations of fiduciary duties in the context of a short-form merger. The Delaware Supreme Court, ruling on a matter of first impression, attempted to address this conflict in *Berger v. Pubco Corp.*

63. See id. at 308–10 (explaining disagreement in regards to quasi-appraisal procedure). The plaintiffs in *Gilliland* called for a class-wide quasi-appraisal action where all minority shareholders eliminated in the short-form merger would be automatically joined in the appraisal proceeding. See id. at 308–09 (detailing plaintiffs’ argument). The defendant, on the other hand, called for a more limited quasi-appraisal remedy wherein plaintiffs must opt in to the action individually and must escrow any proceeds received from the merger. See id. at 309 (detailing defendant’s argument).

64. See id. at 313 (deciding quasi-appraisal should be opt-in remedy in which minority shareholders involved are required to escrow portion of merger proceeds).

65. See id. at 313–14 (accepting defendant’s arguments); see also Berger v. Pubco Corp., 976 A.2d 132, 138 (Del. 2009) (discussing rationale behind court’s remedy in *Gilliland*).

66. See *Gilliland*, 873 A.2d at 313 (explaining rationale for opt-in requirement).

67. See id. (explaining rationale for escrow requirement); see also Schumer, *supra* note 3, at 1 (noting in statutory appraisal proceeding plaintiffs “bear the risk that the court will appraise the stockholder’s shares at a lower value than the merger consideration”). The *Gilliland* court also noted the escrow requirement will incentivize minority shareholders to make a more reasoned appraisal decision and would avoid a windfall to minority shareholders who would have chosen to accept the merger consideration if given the choice. See *Gilliland*, 873 A.2d at 313 (discussing benefits of escrow requirement).

68. For a discussion of the conflicting applications of the quasi-appraisal remedy, see *supra* notes 51–68 and accompanying text.

69. See Berger, 976 A.2d at 139–40 (detailing conflicting holdings of *Nebel* and *Gilliland*). The Chancery Court’s holding in *Nebel* favors defendant dissenting minority shareholders as it reduces the procedural burdens of having to opt in to the quasi-appraisal action and having to escrow cash that has already been received. See id. at 143 (explaining *Nebel*’s quasi-appraisal remedy is potentially less burdensome than *Gilliland* approach). Conversely, the Court of Chancery’s holding in
plaintiff, the Delaware Supreme Court held that in a short-form merger where the controlling shareholder failed to disclose material facts, the appropriate remedy would be an opt-out quasi-appraisal proceeding with no requirement that minority shareholders escrow any portion of the merger proceeds.\footnote{See id.
 at 143–44 (discussing appropriate quasi-appraisal procedure).}

A. Facts

Pubco Corporation (Pubco) was a Delaware corporation whose common shares were not publicly traded.\footnote{See id. at 134 (noting Pubco’s status as Delaware corporate entity).} The Pubco majority shareholder, owning over ninety percent of outstanding shares, bought out the interest of the minority shareholders via a short-form merger.\footnote{See Berger, 976 A.2d at 134 (“Under the short form merger statute, the only relevant corporate action required to effect a short term merger is for the board of directors of the parent corporation to adopt a resolution approving a certificate of merger, and to furnish the minority shareholders a notice advising that the merger has occurred and that they are entitled to seek an appraisal under [Title 8, Section 262]. Section 253 requires that the notice include a copy of the appraisal statute, and Delaware case law requires the parent company to disclose in the notice of merger all information material to shareholders deciding whether or not to seek appraisal.” (citations omitted))).} Under Delaware’s short-form merger statute, the board of directors must adopt a resolution approving the merger and supply minority shareholders with a notice informing them the merger has occurred and instructing them that they should seek appraisal.\footnote{See DEL. CODE ANN. tit. 8, § 253 (West 2013) (describing required procedures to effectuate short-form merger). In Berger, the majority shareholder, Robert H. Kanner, was also the sole director of the corporation. See Berger, 976 A.2d at 134 (describing role of Robert H. Kanner).} The short-form merger statute also requires that the minority shareholders receive a copy of the current Delaware appraisal statute.\footnote{See id. at 135 (noting that Delaware law requires controlling shareholder to attach copy of appraisal statute to short-form merger notice).} Additionally, Delaware common law requires the majority share-

\textit{Gilliland} favors defendant majority shareholders in that it would limit their potential liability in a quasi-appraisal action to only those shareholders that choose to opt in. \textit{See id.} (discussing benefits of opt-in proceeding to defendant corporations).
holder disclose to the minority shareholders all information material to shareholders deciding whether to seek appraisal.\footnote{\ref{75}}

In \cite{Berger}, the plaintiff minority shareholder received a notice from the parent corporation that Pubco’s controlling shareholder had effectuated a short-form merger.\footnote{\ref{76}} This notice disclosed information about Pubco’s business, the names of its officers and directors, the number of shares and classes of stock outstanding, a description of related business transactions, and copies of Pubco’s most recent interim and annual unaudited financial statements.\footnote{\ref{77}} Notably missing from the notice were disclosures regarding the company’s plans or prospects for the future, any meaningful discussion of Pubco’s operations, or disclosures of finances by division or line of business.\footnote{\ref{78}} Additionally, the copy of the Delaware appraisal statute provided to the minority shareholders was outdated.\footnote{\ref{79}}

\section{Procedural Posture}

The Court of Chancery found, and the Delaware Supreme Court agreed, that the disclosures provided to the minority shareholders provided no significant financial information with which an informed decision regarding appraisal could be made.\footnote{\ref{80}} Additionally, the disclosures provided no information as to how the majority shareholder had determined the buyout price.\footnote{\ref{81}} Ultimately, the Chancery Court found, and the

\begin{footnotes}
\item[75] \footnote{\ref{75}} See \cite{Berger}, 976 A.2d at 134 (noting additional requirements for appropriate effectuation of short-form merger). For a further discussion of the materiality standard applied by Delaware courts, see supra note 40 and accompanying text.
\item[76] \footnote{\ref{76}} See id. (describing information provided to minority shareholders pursuant to short-form merger). The short-form merger procedure is only available when at least ninety percent of each class of the outstanding shares is owned by another corporation. See tit. 8, § 253 (codifying required procedures to effectuate short-form merger); see also \cite{Berger}, 976 A.2d at 134 (noting short-form merger can only be effectuated by parent corporation). Therefore, Robert H. Kanner formed a wholly-owned subsidiary, Pubco Acquisitions, Inc., and transferred his Pubco shares to that entity. See \cite{Berger}, 976 A.2d at 134 (describing procedures performed by controlling shareholder to effectuate short-form merger).
\item[77] \footnote{\ref{77}} See \cite{Berger}, 976 A.2d at 134 (describing information provided to minority shareholders pursuant to short-form merger).
\item[78] \footnote{\ref{78}} See id. at 135 (identifying information not provided to minority shareholders). Specifically, the unaudited financial statements indicated Pubco held a “sizeable amount of cash” but provided no information as to the prospective uses of that cash. See id. (identifying information not provided to minority shareholders). Further, the description of the company provided to shareholders contained only five sentences and included vague statements such as “[t]he company owns other income producing assets.” See id. (alteration in original) (internal quotation marks omitted) (describing vagueness of information provided).
\item[79] \footnote{\ref{79}} See id. (noting appraisal statute had been updated with changes that became effective two months prior, but notice provided to minority shareholders did not reflect those changes).
\item[80] \footnote{\ref{80}} See id. at 138 (explaining disclosure violations were not at issue on appeal).
\item[81] \footnote{\ref{81}} See id. at 136 (determining that given mix of available information valuation method was substantially likely to alter total mix of available information).
\end{footnotes}
Delaware Supreme Court affirmed, that there were two distinct disclosure violations: first, the failure to disclose the valuation methodology used in calculating the merger price, and second, the outdated copy of the appraisal rights statute provided to minority shareholders.\footnote{82} It is important to note that the Chancery Court found that the requirement to disclose the methodology used to value the shares was limited to the specific facts of the case at hand.\footnote{83} Further, the Chancery Court made clear that only the valuation methodology need be disclosed, and no disclosure of valuation inputs or assumptions was required.\footnote{84}

The Court of Chancery held that because the notice did not disclose material facts, the minority shareholders were entitled to a quasi-appraisal remedy. The Chancery Court held further that shareholders who elected to pursue appraisal must “opt in” to the proceeding and escrow a portion of the merger proceeds they received.\footnote{85} The plaintiff appealed to the supreme court, arguing that the Chancery Court erred as a matter of law by

\footnote{82} See id. (discussing Chancery Court’s findings of two distinct disclosure violations); see also Evangelos Kostoulas, Case Law Developments: Terms of Equity Capital Raised in Unfair Transaction Reformed by Court, DEL. TRANSACTIONAL & CORP. L. UPDATE (Young Conaway Stargatt & Taylor, LLP), Winter 2009, at 3, available at http://www.youngconaway.com/files/Publication/fb241fe0-0aaf-46e6a169-324a449816c9/Presentation/PublicationAttachment/dd7d9c-a816-4e64-8e5e-0248657325be/DECorpUpdateWinter2009.pdf (noting Court of Chancery in Berger found violation in that short-form merger notice failed to disclose process for determining price of shares).

\footnote{83} See Berger, 976 A.2d at 136 (citing Berger v. Pubco Corp., Civil Action No. 3414-CC, 2008 WL 2224107, at *3 (Del. Ch. May 30, 2008)) (discussing disclosure violations). The valuation methodology was material in this case because the merger notice provided inadequate financial disclosures and no other financial or company information was publicly available. See id. (citing Berger, 2008 WL 2224107, at *3) (explaining disclosure of valuation methodology would substantially alter total mix of available information). For a further discussion of the standard of materiality, see supra note 40 and accompanying text.

\footnote{84} See Berger, 976 A.2d at 136 (“This does not mean that Kanner should have provided picayune details about the process he used to set the price; it simply means he should have disclosed in a broad sense what the process was . . . .” (quoting Berger, 2008 WL 2224107, at *3)). Although the Delaware Supreme Court did not directly address disclosure requirements, it did support the Chancery Court’s findings as evidenced by its quotation of the portion of the Chancery Court’s opinion relevant to the inadequacy of the disclosure. See id. (discussing materiality of valuation methodology).

\footnote{85} See id. at 138 (explaining quasi-appraisal remedy handed down by Chancery Court). Specifically, the Chancery Court’s quasi-appraisal remedy called for the dissenting shareholders to be furnished with all material information necessary to make an informed appraisal decision. See id. (same). Further, the Chancery Court’s quasi-appraisal remedy closely reflected the approach applied by the Gilliland court in that the remedy required that minority shareholders who wish to participate in the quasi-appraisal action opt in to the proceeding and escrow a portion of the merger proceeds they had received. See id. (same). The Delaware Supreme Court noted that the Chancery Court’s purpose for the opt-in and escrow requirements was to “replicate [the] modicum of risk” inherent in a general appraisal proceeding. See id. (discussing Chancery Court’s holding).
requiring the minority shareholders to opt in to the appraisal action and to escrow a portion of the merger proceeds. 86

C. Delaware Supreme Court Analysis and Holding

Ultimately, the Delaware Supreme Court in Berger held that the appropriate quasi-appraisal remedy was an opt-out remedy in which minority shareholders were not required to escrow any portion of their merger proceeds. 87 In arriving at this conclusion, the court analyzed a number of different procedural alternatives. 88 The court addressed the Nebel and Gililand approaches, as well as two other procedural alternatives not previously addressed by the Chancery Court. 89

1. Newly Developed Quasi-appraisal Alternatives

Although only two alternatives to the quasi-appraisal remedy had been previously presented in Delaware jurisprudence, the Delaware Supreme Court in Berger analyzed four possible remedies. 90 The supreme court raised and dismissed two alternative remedies that had not previously been discussed in the Court of Chancery. 91 The first was a replicated appraisal remedy in which the quasi-appraisal remedy accurately matched the general statutory appraisal proceeding. 92 The court rejected

86. See id. (explaining basis of plaintiff’s appeal). Although the issue of what constitutes a disclosure violation was not on appeal, the supreme court did not take issue with the Chancery Court’s statements that the addition of the valuation methodology to the total mix of available information may have constituted an adequate disclosure. See generally Kevin Miller, More on Berger v. Pubco: Disclosure in Notices of Appraisal Rights and Merger Proxies, DEALAWYERS.COM (July 20, 2009, 7:37 AM), http://www.deallawyers.com/Blog/2009/07/most-commentators-on-berger-v.html (noting Delaware Supreme Court took no issue with Chancery Court’s findings in regards to disclosure requirement).

87. For a further discussion of the holding of the Delaware Supreme Court in Berger, see infra notes 101–04 and accompanying text.

88. For a further discussion of the procedural alternatives discussed by the Delaware Supreme Court in Berger, see infra notes 91–104 and accompanying text.

89. For a further discussion of the procedural alternatives discussed by the Delaware Supreme Court in Berger, see infra notes 91–104 and accompanying text.

90. See Berger, 976 A.2d at 139 (“[F]our possible alternatives present themselves, of which only two are advocated by either side. The remaining two alternatives are advocated by no party. We nonetheless identify and consider them, because to do otherwise would render our analysis incomplete.”).

91. See id. (noting two alternatives discussed which were advocated by neither side and not previously discussed in Chancery Court).

92. See id. at 139–40 (discussing replicated appraisal approach). The replicated appraisal remedy would duplicate precisely the procedure of the general appraisal statute. See id. at 141 (discussing replicated appraisal). Under the replicated appraisal approach, the minority shareholders would receive all information determined to be material to making an informed appraisal decision. See id. (same). The shareholder would then make a formal demand for appraisal, which would include remission of stock certificates to the corporation and the entire merger proceeds received in the short-form merger. See id. (same). The corporation would then have the option of settling with dissenting shareholders or com-
this replicated appraisal approach due to the unacceptable burden placed on the minority shareholders. The second alternative the court addressed was to dismiss the quasi-appraisal proceeding altogether and find that the breach of duty rendered the short-form merger statute inapplicable. Under this approach an equity remedy would be determined using an entire fairness review. The court rejected this alternative, noting that to proceed with an entire fairness review would disregard the legislative intent of the short-form merger statute as interpreted by the Delaware Supreme Court in Stauffer and Glassman.

2. Quasi-appraisal Alternatives Developed by the Chancery Court

The court then shifted its focus to the two quasi-appraisal remedies previously discussed by the Court of Chancery in Nebel and Gilliland. The supreme court in Berger explained that the duty of disclosure and the quasi-appraisal remedy that arises from a breach of that duty provide important protections for minority shareholders. Therefore, the court

mencing a formal appraisal proceeding. See id. (same). The benefit of this approach is that it "would give maximum effect to the legislative intent" of the drafters of the Delaware short-form merger statute as recognized in Stauffer and Glassman. See id. (noting strongest argument favoring replicated appraisal).

93. See id. at 141 (discussing flaws of replicated appraisal which led to its rejection). The court also discussed the Chancery Court’s acknowledgement in Gilliland that requiring shareholders to return all merger proceeds would be unfair as it would expose the minority shareholders to the corporation’s credit risk for the duration of the appraisal proceeding. See id. (discussing flaws of requirement for minority shareholders to escrow all merger proceeds).

94. See id. at 140 (discussing alternative to rendering short-form merger statute inapplicable).

95. See id. (explaining implications of entire fairness proceeding). The argument for the application of the more liberal entire fairness review is that the fiduciary’s failure to make adequate disclosures would result in a remedy wherein the legality of the merger itself would be called into question. See id. (noting this remedy is applied in long-form merger cases where there is violation of fiduciary duty).

96. See id. at 141 (noting entire fairness is least favored alternative). The basis of the disclosure requirement is to enable minority shareholders to make an informed decision about seeking appraisal, and providing a non-appraisal remedy would be inconsistent with the purpose of the imposition of the duty. See id. (discussing purpose of fiduciary duty of full disclosure). For a further discussion of the Delaware Supreme Court’s interpretation of the legislative intent of the short-form merger statute, see supra notes 7–8 and accompanying text.

97. See Berger, 976 A.2d at 142 (discussing quasi-appraisal alternatives). The court noted both the Nebel and Gilliland quasi-appraisal alternatives would entitle minority shareholders to receive supplemental disclosures allowing them to make an informed appraisal decision. See id. (noting similarities of two quasi-appraisal alternatives). Further, the court noted both quasi-appraisal alternatives would allow minority shareholders to recover the difference between the merger proceeds and the fair value of their shares “without having to establish the controlling shareholders’ personal liability for breach of fiduciary duty.” Id.

98. See id. at 145 (explaining protections afforded by duty of disclosure and quasi-appraisal remedy).
held that access by minority shareholders to the quasi-appraisal remedy should not be restricted by requirements that minority shareholders opt in or escrow a portion of their merger proceeds. 99

The supreme court in Berger found that the opt-in requirement handed down in Gilliland potentially burdened minority shareholders desiring to seek an appraisal recovery, as it poses a risk of forfeiture. 100 Additionally, the supreme court did not support the requirement from Gilliland that minority shareholders escrow a portion of the merger proceeds. 101 The supreme court explained that fairness requires that majority shareholders forfeit their statutory right to retain the merger proceeds if they deprive the minority of material information. 102 Therefore, the Delaware Supreme Court in Berger established a class action quasi-appraisal remedy with no requirement that minority shareholders escrow any portion of the merger proceeds. 103

IV. APPRAISING THE IMBALANCES OF THE QUASI-APPRAISAL REMEDY AFTER BERGER V. PUBCO CORP.

Although the outcome of Berger benefited the minority shareholder plaintiffs in that case, Berger also suggests a limitation on minority shareholder rights in future short-form merger situations. 104 Specifically, the supreme court limited the disclosure requirements imposed on majority shareholder corporations wishing to execute a short-form merger. 105 Additionally, the gratuitous quasi-appraisal remedy granted to minority shareholders will make it difficult for Delaware courts in the future to require additional disclosures without tipping the balance of fairness too far.

99. See id. (finding quasi-appraisal remedy ordered by Chancery Court was legally erroneous). Ultimately, the court found that the opt-in requirement created a significant burden on the minority shareholders. See id. at 145 (discussing burdens imposed by opt-in and escrow requirements). Conversely, an opt-out structure would avoid the increased burden to minority shareholders while creating no additional procedural burden for the parent corporation. See id. (noting under either alternative parent corporation would be able to quickly identify class of dissenting shareholders). Further, although the defendants argued that the escrow requirement best mimics the risks associated with a general appraisal proceeding, the court found that the quasi-appraisal proceeding that operated in the fairest way does not require minority shareholders to escrow a portion of the merger proceeds. See id. at 143–44 (analyzing fairness of escrow requirement).

100. See id. at 145 (arguing if minority shareholder fails to appropriately opt in they forfeit opportunity to seek appraisal); see also Aronstam & Ross, supra note 71, at 24 (discussing holding of Berger).

101. See Berger, 976 A.2d at 144 (rejecting escrow requirement).

102. See id. (providing rationale for rejection of escrow requirement).

103. See id. at 143–44 (discussing appropriate quasi-appraisal procedure).

104. See id. at 136 (explaining majority does not have to provide valuation details but only broad sense of valuation process); Miller, supra note 86 (noting Berger opinion suggests level of required disclosure is not as detailed as required by previous Chancery Court opinions).

105. See Miller, supra note 86 (explaining increased disclosure requirements suggested by Chancery Court decisions).
in favor of minority shareholders.\footnote{106} Ultimately, Delaware courts must impose increased disclosure requirements to ensure that minority shareholders are provided with sufficient information to make an informed appraisal decision.\footnote{107} However, if these increased disclosure requirements are imposed, Delaware courts must also revisit the quasi-appraisal remedy established in \emph{Berger} to ensure the quasi-appraisal remedy does not expose parent corporations in short-form merger situations to overly burdensome litigation.\footnote{108}

A. \textit{Increasing Disclosure Requirements}

Commentators have highlighted a number of benefits to minority shareholders resulting from the supreme court’s decision in \emph{Berger}.\footnote{109} Ultimately, however, the disclosure threshold established in \emph{Berger} does not ensure that minority shareholders will be provided with sufficient information to make an informed decision whether to seek appraisal.\footnote{110} The only substantive disclosure violation noted in \emph{Berger} was the parent corporation’s failure to disclose the valuation methodology used to establish the merger price.\footnote{111} Therefore, the court suggests that although the minority shareholders had access to only limited unaudited financial data, an inadequate description of company operations, and no future projections, if the minority shareholders had knowledge of the valuation methodology, they could have made an informed decision as to whether to seek appraisal.\footnote{112}

\footnote{106. See Nussbaum, supra note 19 (discussing increased litigation risk associated with quasi-appraisal remedy handed down in \emph{Berger}).
107. See Miller, supra note 86 (noting \emph{Berger} opinion suggests level of required disclosure is not as detailed as required by previous Chancery Court opinions).
108. See Schumer et al., supra note 3, at 6 (explaining if quasi-appraisal becomes widely available to address post-closing disclosure claims, litigation costs could increase dramatically for parent corporations).
109. See Geis, supra note 2, at 1649 (highlighting benefits to minority shareholders of quasi-appraisal as class-action and rejection of requirement that minority shareholders escrow any portion or proceeds); see also Nussbaum, supra note 19 (discussing how benefits provided to minority shareholders from \emph{Berger} decision will encourage increased litigation following short-form mergers).
110. See Miller, supra note 86 (explaining disclosures required by \emph{Berger} are not as detailed as requirements in previous Chancery Court decisions).
111. For a further discussion of the disclosure violations found in \emph{Berger}, see supra notes 80–84 and accompanying text. The court characterized the second disclosure violation as a technical disclosure violation. \emph{See Berger v. Pubco Corp.}, 976 A.2d 132, 145 (Del. 2009) (“If only a technical and non-prejudicial violation of [Title 8, Section 253] had occurred, the result might be different. In some circumstances, for example, where stockholders receive an incomplete copy of the appraisal statute with their notice of merger, the \emph{Gilliland} remedy might arguably be supportable.”).
112. See Miller, supra note 86 (discussing financial disclosures made by parent company in \emph{Berger} and additional financial disclosures required by court). For a further discussion of the financial and operating disclosures provided to the minority shareholders in \emph{Berger}, see supra notes 78–79 and accompanying text. For a further discussion of the additional disclosure requirements addressed by the court in \emph{Berger}, see supra notes 80–84 and accompanying text. For further discus-}
1. Trust or Verification

The court justifies the limited disclosure requirement by noting that the minority shareholders’ decision to seek appraisal turns, at least partially, on a question of trust.\(^{113}\) However, shareholders also chose to verify the adequacy of the merger consideration by performing independent valuations.\(^{114}\) The inadequacy of the disclosure requirement in *Berger* results from the minority shareholders’ inability to independently calculate an accurate valuation of their shares.\(^{115}\) The inability of minority shareholders to rely on independent valuations instead of trust is further highlighted by incentives, inherent in the appraisal process, for parent corporations to discount the merger consideration. See, e.g., *id.* at 548 (describing negative incentives inherent in appraisal process).

\(^{113}\) See *Berger*, 976 A.2d at 136 (“Where, as here, a minority shareholder needs to decide only whether to accept the merger consideration or to seek appraisal, the question is partially one of trust . . . .”).

\(^{114}\) See Aronstam et al., *supra* note 7, at 552 (explaining subsidiaries often retain independent financial and legal experts to achieve best merger price for minority shareholders). Also, given the high cost of the appraisal proceeding, it is important for minority shareholders to form independent valuations to weigh their chances of success. *See id.* at 547 (“[I]t has been argued that smaller shareholders are economically unable to justify seeking the appraised value of their shares because the costs associated with pursuing an appraisal action will often times exceed the potential for recovered gains . . . .”). The need for minority shareholders to rely on independent valuations instead of trust is further highlighted by incentives, inherent in the appraisal process, for parent corporations to discount the merger consideration. *See* *supra* note 7, at 548 (describing negative incentives inherent in appraisal process).

\(^{115}\) See *Stauffer* v. Standard Brands, Inc., 187 A.2d 78, 80 (Del. 1962) (noting appraisal remedy is applicable to disputes over value), *overruled by* Roland Int’l Corp. v. Najjar, 407 A.2d 1032 (Del. 1983); *In re Netsmart Tech., Inc. S’holders Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007) (discussing material information to shareholders independently valuing shares); *Miller*, *supra* note 86 (noting disclosure requirements established by *Berger* were more limited than disclosure requirements established by previous Chancery Court decisions). In two notable Chancery Court cases, the Chancery Court discussed the fiduciary duty of disclosure in merger situations and seemed to suggest more robust disclosure requirements. *See Miller*, *supra* note 86 (discussing Chancery Court decisions in regard to disclosure requirements); *see also* *In re Pure Res., Inc. S’holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002) (holding that summary of methodologies used and ranges of values generated by financial analyses performed by client’s financial advisor were material information to minority shareholders making informed appraisal decision); *Miller*, *supra* note 86 (citing *In re Netsmart*, 924 A.2d at 203) (suggesting more robust disclosures are required for shareholders to make informed decision whether to accept proposed merger).

Further, the court in *Berger* limited the situations in which the valuation methodology disclosure requirement would apply. *See Berger*, 976 A.2d at 136 (suggesting in other short-form situations majority shareholder would not be required to disclose valuation methodology). For example, had Pubco been a registered company or had Pubco’s disclosures not been so grossly inadequate, there may have been no requirement to disclose the method of valuation. *See Miller*, *supra* note 86 (noting Delaware Supreme Court took no issue with Chancery Court’s findings in regards to disclosure requirement); Nussbaum, *supra* note 19 (explaining *Berger*’s holding is limited to short-form mergers accompanied by material disclosure violations).

Additionally, the court suggests that technical as opposed to substantive disclosure violations may not be subject to the same, opt-out, no escrow, quasi-ap-
ers to independently value shares would make it difficult for them to make an informed decision as to whether to seek appraisal.\textsuperscript{116}

2. \textit{The Need for Appropriate Disclosures}

More appropriate disclosure requirements are necessary to ensure that minority shareholders can make informed appraisal decisions in short-form merger situations.\textsuperscript{117} This is not to suggest that the \textit{Berger} court was wrong in not requiring more detailed valuation disclosures.\textsuperscript{118} In fact, even the required disclosure of the valuation methodology itself may be unnecessary.\textsuperscript{119} Instead, minority shareholders need more detailed financial and operating disclosures relating to the company itself so that they may perform independent valuations.\textsuperscript{120}

B. \textit{Revisiting the Quasi-appraisal Procedure}

Although Delaware courts need to require more appropriate disclosures to ensure that minority shareholders can make more informed appraisal decisions, doing so may overburden majority shareholders due to the quasi-appraisal remedy applied in \textit{Berger}.\textsuperscript{121} Given the current opt-out

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\item \textbf{116.} For a further discussion of the purpose of the duty of disclosure and material information, see \textit{supra} notes 37–40 and accompanying text.
\item \textbf{117.} For a further discussion of the inadequacy of the disclosure requirements in \textit{Berger}, see \textit{supra} notes 110–16 and accompanying text.
\item \textbf{118.} \textit{See Berger}, 976 A.2d at 136 ("This does not mean that Kanner should have provided picayune details about the process he used to set the price; it simply means he should have disclosed in a broad sense what the process was . . . ." (quoting \textit{Berger} v. Pubco Corp., Civil Action No. 3414-CC, 2008 WL 2224107, at *3 (Del. Ch. 2008))).
\item \textbf{119.} \textit{See In re Netsmart}, 924 A.2d at 203 (suggesting company information is more important to investors than valuation inputs). Even without knowledge of the valuation methodology used by the parent corporation, if given sufficient financial and operating information, minority shareholders can come up with an accurate valuation of the company using any number of valuation modeling techniques. \textit{See id.} ("Investors can come up with their own estimates of discount rates or . . . market multiples. What they cannot hope to do is replicate management’s inside view of the company’s prospects."). Notably, as the defendant in \textit{Berger} correctly argued, the short-form merger statute does not require the use of any sophisticated valuation methodology; therefore, it is possible valuation details cannot be provided because they do not exist. \textit{See Berger}, 976 A.2d at 136 (accepting defendant’s assertion that any valuation method can be used no matter how absurd).
\item \textbf{120.} \textit{See In re Netsmart}, 924 A.2d at 203 (discussing information necessary for minority shareholders to perform independent valuation).
\item \textbf{121.} \textit{See Hossfeld, supra} note 3, at 1359 (noting generally appraisal remedies should seek to balance risks of oppression by majority against harassment by mi-
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quasi-appraisal procedure, increasing disclosure requirements would subject parent corporations to increased litigation risk.\textsuperscript{122} Therefore, to allow the judiciary to consider imposing more appropriate disclosure requirements in short-form merger situations, Delaware courts must first revisit the quasi-appraisal remedy established in \textit{Berger}.\textsuperscript{123}

1. \textit{The Opt-out Requirement}

The opt-out requirement is too burdensome to parent corporations in short-form merger situations, given the need for more robust disclosure requirements.\textsuperscript{124} The supreme court in \textit{Berger} found that the alternative opt-in requirement is potentially burdensome to minority shareholders desiring to seek an appraisal recovery because it poses a risk of forfeiture.\textsuperscript{125} However, this risk of forfeiture is no different from the forfeiture experienced by a minority shareholder in a statutory appraisal situation who chooses to vote for the merger or not to elect appraisal.\textsuperscript{126}

In an appraisal proceeding, minority stockholders who seek appraisal must demand it, and only those minority stockholders that demand appraisal are entitled to receive the judicially determined fair value of their shares.\textsuperscript{127} Consequently, in a statutory appraisal proceeding, minority stockholders who take no action receive the merger price, regardless of the outcome of the judicial appraisal.\textsuperscript{128} The opt-in approach in \textit{Gilliland}, however, applied less stringent opt-in requirements than statutory ap-

\textsuperscript{122}. See \textit{Schumer et al.}, \textit{supra} note 3, at 2 (noting quasi-appraisal should be limited to “avoid tipping the balance of law too heavily in favor of post-transaction price litigation”). The Delaware Supreme Court’s holding in \textit{Berger} removed risks to minority shareholders previously associated with appraisal and therefore will encourage increased litigation. See \textit{Nussbaum}, \textit{supra} note 19 (theorizing quasi-appraisal remedy established by \textit{Berger} could result in increased post-merger litigation).

\textsuperscript{123}. For a further discussion of the need for more appropriate disclosure requirements, see \textit{supra} notes 113–18 and accompanying text. For a further discussion of the need to revisit the quasi-appraisal remedy, see \textit{infra} notes 125–41 and accompanying text.

\textsuperscript{124}. For a further discussion of the increased burdens of quasi-appraisal on parent corporations, see \textit{supra} notes 122–24 and accompanying text.

\textsuperscript{125}. See \textit{Berger v. Pubco Corp.}, 976 A.2d 132, 143 (Del. 2009) (indicating if minority shareholders fail to appropriately opt in, they forfeit opportunity to seek appraisal).

\textsuperscript{126}. See \textit{Del. Code Ann. tit. 8, § 251} (West 2013) (codifying requirements of shareholder approval in long-form merger transactions); see also \textit{Hossfeld}, \textit{supra} note 3, at 1338 (explaining required procedures for perfection of statutory appraisal rights).

\textsuperscript{127}. See \textit{Gilliland v. Motorola, Inc.}, 873 A.2d 305, 313 (Del. Ch. 2005) (describing statutory appraisal procedure).

\textsuperscript{128}. See id. (describing statutory appraisal procedure to be reflected by quasi-appraisal); see also \textit{Schumer et al.}, \textit{supra} note 3, at 6 (discussing rationale of \textit{Gilliland} approach).
These less stringent requirements would alleviate some of the perceived risks of forfeiture as compared to statutory appraisal. Ultimately, the imposition of the opt-out proceeding is a greater burden to the parent corporation than an opt-in requirement would be to a minority shareholder interested in pursuing appraisal. Therefore, an opt-in requirement similar to statutory appraisal or under Gilliland’s less stringent standard would better balance the majority shareholders’ interest with the minority shareholders’ rights than the opt-out applied in Berger.

2. The Escrow Requirement

The escrow requirement is not necessary to protect the rights of minority shareholders, and is also not essential to support the majority’s interest in unilaterally effectuating a short-form merger. The escrow requirement operates to expose the minority to the same risk inherent in statutory appraisal and to ensure the parent corporation can reclaim a portion of the merger proceeds should the judicially determined value of the shares be less than the merger price. As this requirement does not serve the rights of the minority shareholders or the interest of the majority, the supreme court in Berger decided this issue on the basis of fairness. As the court notes, fairness requires that the minority and majority shareholders be held to the same strict standards of compliance with the appraisal and short-form merger statute, respectively. Minority shareholders who fail to properly perfect their statutory appraisal rights as required by the technical procedures mandated in the appraisal statute

129. See Gilliland, 873 A.2d at 313 (discussing opt-in requirements of quasi-appraisal). For example, in Gilliland, as in Berger, the court did not require beneficial owners to request quasi-appraisal through their record holder as is required in statutory appraisal. See id. (expressing concern that shareholders would have difficulty ensuring cooperation of former record holders); see also Geis, supra note 2, at 1642 (discussing benefits of Berger court not requiring minority shareholders to act through record holders).

130. See tit. 8, § 262(d) (discussing procedure to perfect statutory appraisal rights). For a further discussion of the less stringent opt-in requirements discussed in Gilliland, see supra notes 128–30 and accompanying text.

131. See Schumer et al., supra note 3, at 5 (noting burden of exposure to unforeseen class-wide litigation would disincentivize parent corporations from pursuing short-form mergers).

132. See id. (describing burdens of opt-out quasi-appraisal proceeding on majority shareholder).

133. See Gilliland, 873 A.2d at 313 (discussing purpose of escrow requirement is to “replicate a modicum of risk” inherent in statutory appraisal proceeding).

134. See id. (discussing rationale for escrow requirement).


136. See id. (“[F]airness requires that the corporation be held to the same strict standard of compliance with the appraisal statute as the minority shareholders.”).
lose their right to appraisal.\textsuperscript{137} Therefore, as the supreme court held in \textit{Berger}, majority shareholders should also suffer a forfeiture should they fail to comply with the technical requirements of the short-form merger statute.\textsuperscript{138}

The protection of minority shareholders’ rights to make an informed appraisal decision is best addressed by requiring more adequate financial and operating disclosures.\textsuperscript{139} Further, the interest of majority shareholders in unilaterally removing the minority interest is most burdened by creating a class-wide remedy for the entire minority.\textsuperscript{140} Therefore, the court in \textit{Berger} properly rejected the escrow requirement because it is unnecessary to protect the minority’s rights and inessential to the majority’s interest.\textsuperscript{141}

\textbf{V. Conclusion}

The Chancery Court has been troubled by the increasing trend of post-merger disclosure-based litigation.\textsuperscript{142} Vice Chancellor Laster has

\begin{itemize}
\item \textsuperscript{137} See Del. Code Ann. tit. 8, § 251 (West 2013) (codifying requirements of shareholder approval in long-form merger transactions); see also Berger, 976 A.2d at 144 (discussing forfeiture by minority for failing to strictly comply with appraisal statute).
\item \textsuperscript{138} See Berger, 976 A.2d at 144 (applying fairness reasoning in rationale for rejecting escrow requirement). The Delaware Supreme Court noted that minority shareholders would receive a dual benefit from not having to escrow the merger proceeds because they were permitted to use the proceeds received, which they could possibly owe back to the parent corporation in the future, while simultaneously litigating for additional merger consideration. See id. 143–44 (noting dual benefit of shareholders retaining merger proceeds). However, the court found the dual benefit neither unfair nor inequitable. See id. (“[D]oes that make [the dual benefit] inequitable from the fiduciary’s standpoint? We think not.”); Aronstam & Ross, \textit{supra} note 71, at 23 (discussing court’s analysis of dual benefit to minority shareholders).
\item \textsuperscript{139} For a further discussion of the need for more appropriate disclosure requirements, see \textit{supra} notes 113–18 and accompanying text.
\item \textsuperscript{140} For a further discussion of the burdens of an opt-out appraisal procedure on parent corporations, see \textit{supra} notes 123–24 and accompanying text.
\item \textsuperscript{141} See Berger, 976 A.2d at 144 (holding quasi-appraisal remedy would not require minority shareholders to escrow any portion of merger proceeds). The rationale for the escrow requirement in \textit{Gilliland} was that the quasi-appraisal remedy should replicate the risk inherent to minority shareholders in statutory appraisal. See \textit{Gilliland}, 873 A.2d at 313 (“[T]his quasi-appraisal action should be structured to replicate a modicum of the risk that would inhere if this were an actual appraisal action . . . .”). The Delaware Supreme Court in \textit{Berger} made a more compelling argument, however, that just as minority shareholders who fail to observe the technical requirements of the appraisal statute forfeit their right to recover the fair value of their shares, parent corporations who fail to observe the technical requirements of the short-form merger statute should forfeit their right to the protections afforded to them under that statute. See Berger, 976 A.2d at 144 (discussing rationale for rejection of escrow requirement).
\item \textsuperscript{142} See, e.g., Transcript of Oral Argument at 10–12, Stourbridge Inv. LLC v. Bersoff, C.A. No. 7300-VCL (Del. Ch. Mar. 13, 2012) (discussing troubling trend in disclosure litigation).
\end{itemize}
noted the possibility of exploitation of parent corporations by minority shareholders through the use of disclosure claims. Conversely, commentators have highlighted the importance of the use of appraisal jurisprudence to protect minority shareholders from overreaching by the majority.

The legitimate concerns for protecting both minority and majority shareholders in short-form merger situations call for a balanced equitable remedy when a breach of fiduciary duty is found. The current Delaware jurisprudence does not provide the necessary, balanced, quasi-appraisal remedy. As the imposition of fiduciary duties and the construction of equitable remedies are responsibilities of the judiciary, Delaware courts should revisit the holding of Berger and attempt to develop a more balanced remedy.

143. See id. (noting externalities of disclosure jurisprudence that are being exploited).

144. See Coleman, supra note 13, at 777 (explaining appraisal proceedings prevent majority shareholders from abusing their favorable position in merger transactions); see also Geis, supra note 2, at 1642 (“[T]he appraisal remedy has been rehabilitated as a defense against abusive freezeout mergers by majority shareholders.”).

145. For a further discussion of the need to protect majority shareholders from disclosure claims, see supra notes 122–23 and accompanying text. For a further discussion of the need to protect minority shareholders in freeze-out situations, see supra notes 113–18 and accompanying text. For further discussion of the need for a balanced quasi-appraisal remedy, see supra note 14 and accompanying text.

146. For a further discussion of the inadequacies of the current quasi-appraisal remedy, see supra notes 113–38 and accompanying text.

147. For a further discussion of the need for more appropriate disclosure requirements and a change in the current quasi-appraisal procedure, see supra notes 113–38 and accompanying text.

JOCELYN COOPER*

I. INTRODUCTION

Mommy, I knew I was dying . . . I just didn’t want to tell you that I was dying because I knew it would upset you.”¹ Ten-year-old Sarah Murnaghan was correct when she told her mother that she had been dying.² For eighteen months, Sarah waited for a life-saving set of donated lungs and without judicial intervention, Sarah probably would have lost her battle with end-stage cystic fibrosis while waiting.³

¹ J.D. Candidate, 2015, Villanova University School of Law; M.A. 2010, University of Maryland; B.A. 2008, Franklin & Marshall College. I would like to thank my husband, Derek Hines, and my family for their continued love and support. I would also like to thank the editors of the Villanova Law Review for their hard work and advice.


³ See Michael Martinez & Steve Almasy, Family of Girl Desperate for Transplant Says She Can’t Wait for Policy to Change, CNN (June 3, 2013, 2:57 AM), http://www.cnn.com/2013/06/02/health/pennsylvania-girl-lungs/index.html (stating that Sarah’s parents felt that she had essentially been “left to die”).

¹. See About Cystic Fibrosis, CYSTIC FIBROSIS FOUND., http://wwwcff.org/aboutcf/ (last visited Jan. 31, 2014) (providing general information on nature and symptoms of cystic fibrosis). Cystic fibrosis is an inherited chronic disease that affects the lungs and digestive system of about 30,000 children and adults in the United States. See id. (noting 70,000 children and adults worldwide are affected). A defective gene and its protein product cause the body to produce unusually thick, sticky mucus that clogs the lungs and leads to life-threatening lung infections. See id. (explaining that most people are diagnosed before reaching two years old). The mucus also obstructs the pancreas and stops natural enzymes from helping the body break down and absorb food. See id. (stating that there is no cure for cystic fibrosis, but that there are aggressive treatments and therapies which can improve quality of life). People with cystic fibrosis can have a variety of symptoms including: “very salty-tasting skin; persistent coughing, at times with phlegm; frequent lung infections; wheezing or shortness of breath; poor growth [and] weight gain in spite of a good appetite; and frequent greasy, bulky stools or difficulty in bowel movements.” See id. (describing symptoms of cystic fibrosis). The predicted median age of survival for a person with cystic fibrosis is in the late thirties. See id. (noting that there is no definitive method of predicting how long people with cystic fibrosis will live, as various factors affect any person’s health).
As of October 2013, Sarah was one of 76,910 tragic stories of people waiting for a donated organ.\textsuperscript{4} For many of those 76,910 people, placement on the waitlist is a death sentence.\textsuperscript{5} Unfortunately, demand in the United States for donated organs far exceeds the supply and inherent in the nature of scarcity is the terrible reality that not everyone can receive a donated organ.\textsuperscript{6} While Sarah was lucky enough to receive her donated lungs after filing a temporary restraining order and preliminary injunction against the United States Department of Health and Human Services (HHS), the courts cannot save all remaining 76,909 waiting list candidates.\textsuperscript{7} Rather, judicial intervention into any individual transplant candidate’s case upsets the delicate balance of bioethical principles underlying organ allocation policy and risks destroying the carefully crafted system designed to benefit all 76,910 candidates.\textsuperscript{8}

Certainly, Sarah Murnaghan’s parents are glad that Sarah now will be able to go ride horses and play soccer like other healthy children.\textsuperscript{9} However, the Complaint in \textit{Murnaghan v. U.S. Department of Health and Human Services}\textsuperscript{10} raises pervasive questions regarding the judiciary’s reach into administrative agency rulemaking and the bioethical consequences of judicial intervention into organ allocation policy.\textsuperscript{11} How much influence


\textsuperscript{7. See OPTN Data, supra note 4 (providing most current numbers for active waiting list candidates).}

\textsuperscript{8. For further discussion of the destructive impacts that arise from judicial intervention into any individual transplant candidate’s case, see infra notes 177–90 and accompanying text.}


\textsuperscript{11. See Sydney Lupkin, Girl Prompts Small Change to Organ Transplant Policy, ABC NEWS (June 11, 2013), http://abcnews.go.com/Health/girl-prompts-small-change-organ-transplant-policy/story?id=19373685 (statement of Professor R. Alta Charo, Warren P. Knowles Professor of Law and Bioethics at the University of Wisconsin-Madison) (“It is unlikely that courts are the best place to make [organ allocation] decisions . . . . The reasons for giving priority to one category of patients over another are usually due to a complicated combination of factors.”).}
should the judiciary have in an administrative agency’s formulation of policy, especially in the creation of organ allocation policy?\textsuperscript{12} Does the \textit{Murnaghan} decision violate primary ethical principles of organ allocation policy as promulgated by the Organ Procurement and Transplantation Network (OPTN)?\textsuperscript{13}

This Note argues that the \textit{Murnaghan} decision demonstrates how judicial interference with the organ allocation system destroys the balance of bioethical principals upon which the system is formed.\textsuperscript{14} Furthermore, this Note argues that \textit{Murnaghan} violates Supreme Court precedent in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{15} because the judiciary failed to defer to organ allocation policy formed by administrative agencies and based upon expert scientific and medical knowledge.\textsuperscript{16}

Part II of this Note examines the history of the OPTN under the National Organ Transplant Act (NOTA), the mechanics of organ transplantation, and the fundamental bioethical principles underlying organ allocation policy.\textsuperscript{17} Part III discusses the relationship between the judici-

\begin{footnotesize}

13. For a further discussion of the bioethical impacts of judicial intervention in cases of individual transplant candidates, see \textit{infra} notes 177–90 and accompanying text.

14. For a discussion of the ethical principles guiding organ allocation policy, see \textit{infra} notes 58–90 and accompanying text. For a discussion of the impact of the \textit{Murnaghan} decision on those principles, see \textit{infra} notes 177–200 and accompanying text.


16. For a discussion of judicial authority and deference to administrative agency decisions, see \textit{infra} notes 91–116 and accompanying text.


The Secretary shall by contract provide for the establishment and operation of an Organ Procurement and Transplantation Network . . . .

(b) Functions

(1) The Organ Procurement and Transplantation Network shall carry out the functions described in paragraph (2) and shall—

(A) be a private nonprofit entity that has an expertise in organ procurement and transplantation, and

(B) have a board of directors—

(i) that includes representatives of organ procurement organizations . . . transplant centers, voluntary health associations, and the general public; and

(ii) that shall establish an executive committee and other committees . . . .

(2) The Organ Procurement and Transplantation Network shall—

(A) establish in one location or through regional centers—

(i) a national list of individuals who need organs, and

(ii) a national system, through the use of computers and in accordance with established medical criteria, to match organs and individ-
ary and administrative agencies and the general concept of judicial deference to administrative agency rulemaking and expertise in *Chevron*. Part IV sets forth the facts leading up to *Murnaghan* and the justification behind the court’s decision to direct the OPTN to cease enforcement of Policy 3.7 (Under 12 Rule). Part V critically analyzes the court’s intervention into administrative agency action and the bioethical consequences of that intervention. Part VI suggests several approaches to solve excessive judicial intervention into organ allocation policy.

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Id. § 274(a)–(b) (setting forth functions of OPTN and role of HHS).

18. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (determining that federal judges must defer to administrative agency policy decision). When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

Id. (recognizing that statutory interpretation should not be attempted by judges but rather by administrative agencies).


20. For further discussion of the interplay between *Chevron* and key bioethical principles of organ allocation in *Murnaghan*, see infra notes 136–90 and accompanying text.

21. For a further discussion of the approaches, which might be used to limit excessive judicial intervention in organ allocation policy, see infra notes 191–217 and accompanying text.
II. THE ANATOMY OF ORGAN ALLOCATION POLICY

To understand the difficulties facing Sarah Murnaghan and the OPTN in navigating organ allocation policy, it is critical to understand the substantial background information concerning organ transplantation. As the OPTN developed under NOTA, organ transplantation technology expanded the scope of transplant candidates and the need for donated organs. Thus, it became necessary to develop an organ allocation system that balanced the severity of individual cases with overall fairness to all the candidates on the waiting list. The bioethical principles of utility, distributive justice, and autonomy help policymakers decide how to distribute resources such as organs where demand is high and the supply is scarce.

A. History and Mechanics of NOTA and the OPTN

Modern advances in technology and medicine continue to expand the number of patients able to benefit from organ transplantation, yet the supply of organs is unable to meet the increasing demand. In October 2013, there were 76,910 active waiting list candidates for organ transplants and only 5,694 organ donors. Given the scarcity of donated organs, the OPTN, under the authority of NOTA, must continually strive to promulgate effective organ allocation policies and to maintain an efficient organ transplantation network. This section will provide a background on the implementation of NOTA and the establishment of the OPTN. This section then examines the mechanics of organ allocation and, more specifically:

22. For a discussion of the court’s decision in Murnaghan, see infra notes 117–55 and accompanying text.

23. See Jed Adam Gross, Note, E Pluribus UNOS: The National Organ Transplant Act and Its Postoperative Complications, 8 YALE J. HEALTH POL’Y. L. & ETHICS 145, 149 (2008) (“[A]s more patients were able to benefit from transplant surgery, the available supply of organs did not keep up with the demand . . . .”).

24. For a further discussion of the history of NOTA, see infra notes 31–36 and accompanying text. For a further discussion of the text of NOTA, see supra note 17.

25. For a discussion of utility, see infra notes 62–72 and accompanying text. For a discussion of distributive justice principles, see infra notes 73–84 and accompanying text.

26. See Gross, supra note 23, at 147 (claiming that there is persistent scarcity of donated organs).

27. See OPTN Data, supra note 4 (showing that number of organ donors, 5,694, only includes donations from January 2013 to May 2013).


29. For a discussion of the historical and legislative background of NOTA and the OPTN, see infra notes 31–36 and accompanying text.
cally, how lungs are allocated amongst adults and children under the age of twelve.\textsuperscript{30}

1. The History of NOTA and the OPTN

The first successful organ transplant in 1954 propelled the medical field into a new area of life-saving technology but at the same time, increased the need for legislation governing growing health and social policy concerns.\textsuperscript{31} In 1984, Congress enacted NOTA to facilitate the process of matching donor organs with patients needing transplants.\textsuperscript{32} NOTA articulated a consistent, national policy for allocating organs, established the

\textsuperscript{30} For a discussion of the organ donation process, see infra notes 37–53 and accompanying text.

\textsuperscript{31} See Organ Transplant History, N.Y. Organ Donor Network, \url{http://www.donatelifeny.org/all-about-transplantation/organ-transplant-history/} (last visited Jan. 31, 2014) (noting that first successful living-related kidney transplant, led by Dr. Joseph Murray and Dr. David Hume at Brigham Boston, was between identical twins and occurred on December 23, 1954); see also Gross, supra note 23, at 153–78 (examining history of organ transplantation prior to and after NOTA). Organ transplantation became a viable option in the 1950s. See id. at 153 (noting that 1950s organ transplantation technology was primitive and transplantation could be performed only between identical twins). At that time, there was no existing formal organ allocation system. See id. (explaining that because of newness and inefficiency of organ transplant technology there was no need for any formal organ donation system). In the late 1970s and early 1980s, the development of cyclosporine therapy, which was highly effective in preventing the rejection of donated organs, changed the nature of organ transplantation by increasing transplant survival rates. See id. at 170–71 (describing major technological advances in organ transplantation medicine). The development of cyclosporine therapy highlighted several “difficult and unusual social conditions,” including “dire scarcity amid material abundance . . . , a profound dependence on strangers . . . , a lack of reliable legal rules . . . , and stubborn, seemingly innate inequalities” in the distribution of organs. See id. at 172–73 (explaining need for structured organ donation system). In July and October of 1983, congressional hearings similarly emphasized several bioethical concerns regarding the allocation of organs after the introduction of cyclosporine. See id. at 181 (recounting beginning stages of NOTA in Congress). Specifically, the introduction of cyclosporine was likely to limit the persons who would benefit from organ transplantation because of the lack of money and donor organs. See id. at 182 (describing major concern for legislature in conceiving NOTA).

\textsuperscript{32} See Gross, supra note 23, at 149 (noting that accounts differ about legislative concerns or desires that prompted NOTA). Frank Sloan, an economist who has written extensively about health policy, suggested that Congress desired to establish a formalized organ donation system in order to expand the “relatively low rate of organ procurement” and to expand the national computerized matching system to include not just kidneys, but also livers and hearts. See id. (arguing that problems were on supply side of organ allocation, rather than demand side). Dr. Arthur Caplan, bioethicist at New York University’s Langone Medical Center, states that Congress was concerned that wealthy international patients were travelling to the U.S. in order to receive organs that should have been directed to Americans first. See id. (“[P]roblems were on the demand side of organ allocation, rather than supply side.”). Jeffrey Prottas, a political scientist specializing in health policy, emphasized the role of organized professional interests rather than public policy concerns and stated that NOTA was a “response to lobbying by medical practitioners seeking an expansion of reimbursement for transplant therapy following the
OPTN to maintain the organ donation system, and increased the number of organs available for transplant.\textsuperscript{35}

The OPTN is composed of transplant centers and organ procurement organizations (OPOs) across the country linked together by the OPTN’s computer network, which sends and receives donor information.\textsuperscript{34} To manage the network of OPOs, the OPTN facilitates the organ matching and placement process through the use of a centralized computer system, develops policies and procedures for organ procurement based on medical expertise and public consensus, harvests and transports donated organs, and collects national data about organ donation and transplantation.\textsuperscript{35} In 1999, the Secretary of the HHS promulgated the Final Rule under NOTA, which supplements the statute by requiring that

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\item introduction of . . . cyclosporine.\textsuperscript{a} See id. (theorizing that economic concerns were important in NOTA’s development).
\item See Gail L. Daubert, Politics, Policies, and Problems with Organ Transplantation: Government Regulation Needed to Ration Organs Equitably, 50 ADMIN. L. REV. 459, 463 (1998) (providing background on NOTA and discussing current problems with OPTN organ allocation system). Additionally, NOTA established the OPTN and directed the Secretary of HHS to contract with a private, non-profit organization to manage the OPTN. See id. (looking at Congress’s intent behind deciding to contract with private entity). Congress decided to contract with a private entity because private entities had taken the “initiative in developing the original organ transplantation networks.” See id. (“Congress feared that government bureaucracies would not keep pace with the rapidly changing medical field, and government intervention would impede the adoption of new policies.”); see also About OPTN: History, OPTN: ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, U.S. DEP’T OF HEALTH & HUMAN SERVICES, http://optn.transplant.hrsa.gov/optn/history.asp (Feb. 3, 2014) (noting that United Network for Organ Sharing (UNOS) was awarded initial OPTN contract on September 30, 1986 and has continued to operate OPTN for more than sixteen years and four successive contract renewals).
\item See Organ Procurement Organizations, supra note 5 (delineating OPO responsibilities and explaining that OPOs are federally regulated). OPOs are principally responsible for obtaining donor organs. See id. (detailing OPO methods for increasing organ donation including community outreach, advertising campaigns, and school and worksite programs); see also About OPOs, ASS’N OF ORGAN PROCUREMENT ORGS., http://www.aopo.org/about-opo (last visited Jan. 31, 2014) (revealing OPO structure and goals). There are fifty-eight federally-designated OPOs throughout the United States and its territories. See About OPOs, supra (“OPOs utilize cutting edge technology to facilitate medical advancements that place hope within reach for tens of thousands of Americans waiting for a life-saving organ transplant.”). OPOs are “generally structured to include clinical services, hospital development, donor family services, and public education.” Id. (reporting that each OPO is tailored to serve its local community).
\item See About OPTN: Profile, OPTN: ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, U.S. DEP’T OF HEALTH & HUMAN SERVICES, http://optn.transplant.hrsa.gov/optn/profile.asp (last visited Feb. 9, 2014) (listing OPTN’s responsibilities). These responsibilities include: collecting and managing organ transplantation statistics for the government, the public, students, and researchers to use for future improvements in organ allocation and transplantation and “developing . . . and maintaining a secure web-based computer system,” which matches organ donors and available organs nationally. See id. (noting that in handling all of its responsibilities, OPTN strives to be efficient and effective).
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the OPTN develop policies that provide organs to those with the greatest medical urgency through an “equitable” allocation system.\textsuperscript{36}

2. \textit{The Mechanics of Organ Allocation}

Generally, when any donor organ becomes available, the OPO enters information about the donor organ into the OPTN’s computerized match system in order to identify a list of potential recipients needing that type of organ.\textsuperscript{37} The list of candidates identified by the OPTN’s matching system is then ranked according to objective criteria.\textsuperscript{38} While each organ has its

\textsuperscript{36} See 42 C.F.R. § 121.8(b)(2) (2007) (emphasizing that organ allocation must be decided by medical urgency). Before the Final Rule, organs in the United States were distributed on a regional basis to patients based upon their need. See Dulcinea A. Grantham, \textit{Transforming Transplantation: The Effect of the Health and Human Services Final Rule on the Organ Allocation System}, 35 U.S.F. L. Rev. 751, 752 (2001) (discussing background and development of the Final Rule). This system was greatly criticized by health professionals because it often resulted in inequitable distribution based on location and was medically ineffective. See \textit{id}. at 770 (showing that prior to Final Rule, organ distribution was localized in smaller geographic regions rather than favoring one national, need-based system). The Final Rule transformed the organ allocation from a “local first” system to a national system, which achieved organ distribution in “regions broad enough to assure that those patients with greatest medical urgency are provided for.” See \textit{id}. at 766 (imposing additional requirement that Secretary of HHS has ultimate power to determine way in which organs are distributed). The ultimate goal of the Final Rule was to ensure an equitable nationwide system for donated organs. See \textit{id}. at 757 (showing legislative intent behind NOTA). The Final Rule was criticized for allocating organs to patients with low potential survival rates, for forcing small OPOs out of business, and for discouraging organ donations. See \textit{id}. at 774–77 (discussing disadvantages of having one nationwide equitable donation system); see also Letter from John Roberts to Kathleen Sebelius, \textit{supra} note 19 (describing process used to develop OPTN allocation policy). An OPTN committee with special knowledge of the particular organ develops all allocation policy for that organ. See \textit{id}. (asserting that OPTN committees formulate policy based on objective medical evidence and current clinical practice). The specialized committee develops a proposal that is forwarded to the public in order to allow comments by any interested parties or organizations. See \textit{id}. (explaining that all policy is open to public comment and committee will further refine proposal based on public comment before presenting it to OPTN/UNOS Board of Directors for review and vote). Approved policies are made available to the Department of Health and Human Services and are subject to the Secretary’s discretion for enforcement or reconsideration, under the provisions of the Final Rule. See \textit{id}. (highlighting distinction between OPTN’s role in creating policy based on extensive medical knowledge and Secretary’s governance role in approving policies created by OPTN).

\textsuperscript{37} See \textit{About Transplantation: Donor Matching System}, OPTN: ORGAN PROCUREMENT \& TRANSPLANTATION NETWORK, U.S. DEPT OF HEALTH \& HUMAN SERVs., http://optn.transplant.hrsa.gov/about/transplantation (last visited Feb. 9, 2014) (detailing process by which donor organs are matched with waiting list candidates).

\textsuperscript{38} See \textit{id}. ("Ethnicity, gender, religion, and financial status are not part of the computer matching system.").
own specific criteria for organ matching, all organs share certain allocation policy commonalities. 39

For lung transplant candidates, all candidates ages twelve and older are given an individualized lung allocation score (LAS) to prioritize them for matching organ offers. 40 Factors determining a potential recipient’s LAS and priority on the waitlist include: the probability of surviving the next year while remaining on the waitlist, the medical urgency of the candidate, the probability of surviving the first year after the transplant, the probability of surviving long term after the transplant and the raw allocation score. 41 Candidates with the highest LAS are offered donated organs

39. See Letter from John Roberts to Kathleen Sebelius, supra note 19 (summarizing shared commonalities of organ matching policy for all organs). The shared policy criteria that OPTN considers when matching donated organ with potential recipients include:
[A] local/zonal/national sequence of organ offers, to minimize organ preservation time and maximize the chance of a successful transplant;[;] priority in matching for identical blood type matching between donor and candidate, then for compatible but not identical blood types;[;] use of individual waiting time as an ultimate tiebreaker among two candidates who have otherwise equal priority;[;] discretion for the individual transplant center to apply individual acceptance criteria for offers for individual candidates, including donor size and age range.

Id. (listing various factors taken into account when matching donors with organs).

40. See A Guide to Calculating the Lung Allocation Score, United Network of Organ Sharing, http://www.unos.org/docs/lung_allocation_score.pdf (last visited Feb. 9, 2014) (discussing various factors which contribute to calculating potential recipient’s LAS and providing hypothetical computation of LAS). Factors determining a potential recipient’s LAS and priority on the waitlist include: the waiting list survival probability during the next year, the waitlist urgency measure, the post-transplant survival probability during the first post-transplant year, the post-transplant long-term survival measure, and the raw allocation score. See id. (noting complexity and highly technical nature of calculating LAS). “The specific emphasis in developing the LAS score for adolescents and adults was to base organ allocation on a balanced, ‘net-benefit’ concept.” Letter from John Roberts to Kathleen Sebelius, supra note 19. There are not enough donated organs currently available to meet all needs. See id. (emphasizing importance of designing one efficient organ allocation system). Organ allocation based purely on distributive justice principles (i.e., preferentially offering organs to those with the highest need) would result in lower overall survival rates because candidates may be so debilitated that post-transplantation survival would be unlikely. See id. (presenting pattern of distribution relying on distributive justice). Conversely, offering organs preferentially to those with the greatest chances of post-transplantation survival, “would lead to higher waitlist mortality among urgent candidates who could be helped.” See id. (presenting distribution relying on utility). The LAS score balances these conflicting priorities. See id. (taking into account both utility and distributive justice).

41. See A Guide to Calculating the Lung Allocation Score, supra note 40 (discussing various factors contributing to calculating potential recipient’s LAS and priority of waitlist).
The LAS formula is only used for adolescent and adult candidates. Instead of an LAS, children under the age of twelve needing lung transplants are given either a Priority 1, the highest medical urgency status, or a Priority 2 medical urgency status for ranking purposes. Priority 1 candidates either have respiratory failure or pulmonary hypertension, or have been approved as an exception case by the OPTN Lung Review Board. Waitlist placement among Priority 1 candidates is determined by the amount of time a candidate has been on the waitlist with the candidates who have been on the waitlist the longest being placed at the top. Priority 1 candidates are offered donated organs from all donors younger than twelve within a thousand-mile radius before the donated organs are offered to any candidates older than twelve in the same area. Pediatric candidates can receive lungs from adolescent donors but only if transplant programs decline them for all adolescent candidates between the age of twelve and seventeen within the same allocation area. Pediatric candidates can also receive lungs from adult donors but only if transplant programs decline them after all adolescent and adult candidates within the

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42. See id. (illustrating that ranking transplant candidates relies on several complex calculations which take into account various elements).

43. See Letter from John Roberts to Kathleen Sebelius, supra note 19 (describing lung allocation policy for candidates under twelve years old). Dr. John Roberts states that:

The LAS formula is used for adolescent and adult candidates. Its applicability among pre-adolescents is unknown. There are very few of these patients, and the diagnosis and progression of lung diseases may be different in this population. . . . For this reason, the [Thoracic Organ Transplantation Committee] felt that extrapolating the LAS below age 12 was inappropriate and, because of the small numbers, also concluded that waiting time for this population should remain the method of prioritizing patients in this group. Because there was no way to appropriately prioritize 0–11 year old patients with the list of patients ordered by LAS, it was decided to provide 0–11 candidates first priority for organs best suited for them—those from 0–11 year old donors.

Id. (explaining why it is not appropriate for children under twelve and adults to be prioritized by similar standards).

44. See Policy 3.7.6.2, Allocation of Thoracic Organs, Candidates Age 0–11, OPTN: Organ Procurement & Transplantation Network, U.S. Dept of Health & Human Servs. (Feb. 1, 2013), http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_Exec_Comm_mtg_materials_06-10-13.pdf [hereinafter Policy 3.7.6.2] (defining criteria for candidates to be placed in either Priority 1 status or Priority 2 status); see also Letter from John Roberts to Kathleen Sebelius, supra note 19 (illustrating unlikelihood that children will receive acceptable adult organs).

45. See Policy 3.7.6.2, supra note 44 (explaining how Priority 1 candidates are categorized).

46. See Letter from John Roberts to Kathleen Sebelius, supra note 19 (explaining how Priority 1 candidates are ranked).

47. See id. (noting children receive child-donated organs first).

48. See id. (stating children receive adolescent organs after adolescents decline them).
same allocation area have turned them down.\textsuperscript{49} Any transplant candidate who does not meet the criteria to be listed as a Priority 1 candidate is automatically listed as a Priority 2 candidate.\textsuperscript{50}

For all donated organs including lungs, after receiving a list of potential recipients, the OPO contacts the transplant surgeon caring for the top-ranked patient and depending on various factors, the transplant surgeon determines if the organ is suitable for the patient.\textsuperscript{51} Doctors determine whether organs are medically suitable by looking to the medical health history of the donor, the current health of the recipient, and the condition of the donated organ.\textsuperscript{52} If the organ is suitable, the OPO arranges transportation and schedules the transplant surgery.\textsuperscript{53} Because donated organs are in such high demand, organ allocation is guided by bioethical principles.\textsuperscript{54}

\textbf{B. Ethical Principles Governing Equitable Organ Allocation}

Organ allocation presents a unique and tragic bioethical dilemma.\textsuperscript{55} While available organs surround us in abundance, eighteen people still die every day on the waitlist.\textsuperscript{56} Because our donation system relies on donor altruism, it is an impossible task for the OPTN to reconcile the scarce supply of donated organs with the vast demand.\textsuperscript{57} Thus, the OPTN is compelled to make life and death decisions about who should receive a donated organ and who will have to remain on the waitlist.\textsuperscript{58}

\textsuperscript{49} See id. (stating children receive adult lungs only after all adolescent and adult candidates decline them).
\textsuperscript{50} See id. (stating children are given adult organs after adults and adolescents decline them).
\textsuperscript{51} See About Transplantation: Donor Matching System, supra note 37 (highlighting that donated organs cannot always be used).
\textsuperscript{52} See id. (explaining how doctors determine whether organs are medically suitable for donation).
\textsuperscript{53} See id. (stating that recovered organs are stored in cold organ preservation solution and transported from donors to recipient hospitals). For heart and lung recipients, it is best to transplant the organ within six hours of organ recovery. See id. (illustrating time-sensitive nature of organ transplantation).
\textsuperscript{54} For a discussion of utilitarianism in OPTN organ allocation policies, see supra notes 62–72 and accompanying text. For a discussion of distributive justice in OPTN organ allocation policies, see supra notes 73–84 and accompanying text. For a discussion of autonomy in OPTN organ allocation policies, see supra notes 85–90 and accompanying text.
\textsuperscript{55} See Gross, supra note 23, at 172 (explaining that one “difficult and unusual” condition of organ allocation is “dire scarcity amid material abundance”).
\textsuperscript{57} See OPTN Data, supra note 4 (illustrating vast difference in number between organ transplants and people waiting for organs).
For the purposes of determining who is given a donated organ, the OPTN justifies their policies based on principles of utility, distributive justice, and autonomy. It is important to understand the fundamental role these bioethical principles play in OPTN organ allocation policy in order to recognize the destructive bioethical impacts that the Murnaghan decision and the special review of Sarah’s case caused to the entire organ allocation system. This part discusses utility, distributive justice, and autonomy in the context of organ allocation.

1. Utility

The principle of utility holds an action to be ethically right if it produces the greatest aggregate good and minimizes the harms for the greatest amount of people. The goal of utilitarianism is to maximize the aggregate happiness of the whole society by distributing benefits to those who are going to maximize the benefit. Utility disregards the process by which a resource is maximized and rather, strives to reach the best possible outcome in the distribution of a resource. Developing policy that maximizes benefits requires that lawmakers compare the allocation methods “in some manner so that at least a rough estimate can be made determining which allocation produces the greatest good.”

Thus, as applied to organ allocation, the principle of utility requires that policymakers create organ allocation policy that maximizes the “best

59. See id. (“The transparent balancing of utility and [distributive] justice combined with a predictable and stable application of allocation policy is critical to the fairness of the national system.”).

60. For a further discussion of the bioethical consequences resulting from special review of any individual transplant candidate’s case, see infra notes 177–90 and accompanying text.

61. For a discussion of utilitarianism in OPTN organ allocation policies, see infra notes 62–72 and accompanying text. For a discussion of distributive justice in OPTN organ allocation policies, see infra notes 73–84 and accompanying text. For a discussion of autonomy in OPTN organ allocation policies, see infra notes 85–90 and accompanying text.


63. See BARRY R. FURROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 6 (1987) (noting that there are several, varying definitions of “happiness”).

64. See Principle of Beneficence, supra note 62 (explaining that utility determines moral righteousness of action by looking at outcome, not process).

65. See FURROW ET AL., supra note 63, at 6 (stating that utility is essential for thorough review of any allocation policy and requires system wide measurement).
use” of donated organs while minimizing possible negative consequences of transplantation. Organ allocation policy, which makes the most efficient and the “best” use of donated organs maximizes, “the saving of life, the relief of suffering and debility, the removal of psychological impairment, and the promotion of well-being.” Conversely, the harms that a utilitarian-based organ allocation policy attempts to minimize are patient post-transplantation mortality and mortality resulting from organ rejection and medicinal complications. Because of the scarce supply of donated organs in the face of ever-growing demand, utility remains an essential component of organ allocation policy, and the OPTN continues to rely on utility to efficiently manage its organ allocation system.

However, too much emphasis on utility and maximizing the best use of organs in allocation policy may result in persistent inequities in the distribution of organs. For instance, a system based solely on utility would seek, without regard to the pattern of distribution, to save the lives of as many organ transplant candidates as possible by taking into account factors including post-transplantation survival rates, long-term survival rates, and even an individual’s social worth. The result would be that certain groups, like the elderly, would have little chance at meeting these criteria and thus, would always be passed over for candidates who have a greater chance at maximizing the best use of donated organs.

2. Distributive Justice

Unlike utility, distributive justice focuses solely on the process by which a resource is distributed among potential beneficiaries and requires

66. See OPTN/UNOS, Ethical Principles, supra note 62 (noting that organ procurement and transplantation is undertaken to benefit groups of critically ill patients).

67. See id. (providing examples of utilitarian goals underlying organ allocation policies).

68. See id. (stating that utility takes into account all possible goods and harms that could be envisioned).

69. See OPTN/UNOS Memorandum, supra note 58 (noting that allocating in manner that maximizes best use of organ is in accordance with requirements of NOTA and Final Rule, and defining “best” in accordance with utility as that which maximizes greatest amount of good for greatest amount of people).


71. See Veatch, supra note 70, at 293–94 (discussing problems with a purely utilitarian organ allocation system).

72. See id. (stating that utilitarians seek efficiency in distribution of donated organs not fairness).
that equal persons be given equal access to the resource. Distributive justice attempts to create an allocation policy based on fair and equitable distribution of benefits and requires that people in similar situations be treated equally. The principle of distributive justice suggests that “society has a duty to the individual in serious need and that all individuals have duties to others in serious need.” In decisions regarding the allocation of resources, distributive justice does not evaluate the quality or social value of a candidate, but requires that the benefits and burdens should be distributed in an equitable manner.

In the context of organ allocation, distributive justice requires that all people in need of organs should have a fair opportunity to receive them and that no potential transplant candidate is denied organs because of personal, economic, or social qualities. Policies grounded in distributive justice and fairness take into account a variety of factors including medical urgency, time spent on the waitlist, number of past transplants, and age of the candidate. In response to NOTA’s requirement that donated organs

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73. See OPTN/UNOS Memorandum, supra note 58 (“[M]orally relevant differences may justify unequal distribution of goods[.]”); see also Friedrich Breyer, Health Care Rationing and Distributive Justice, 0 RATIONALITY MARKETS & MORALS 395, 401 (2009), http://www.rmm-journal.de/downloads/028_breyer.pdf (presenting several different meanings of “equal” in context of resource allocation).


75. See id. (emphasizing basic human right to health care).

76. See id. (noting society’s duty to individuals in serious need of any resource is not lessened because of beneficiary’s societal or financial status, or nature of illness). Well-known medical ethicist Georg Marckmann has suggested a set of criteria relevant to designing a just allocation policy. See Breyer, supra note 73, at 400 (discussing interchange between rationing scarce health care resources and distributive justice). Marckmann states that the criteria includes: “the transparency of the [allocation] process,” “the implementation by a democratically legitimized institution,” the possibility for important groups of interested parties to participate, consistency, and opportunities for appeal of decisions. See id. (illustrating that distributive justice focuses not on outcome but on pattern of distribution of goods).

77. See OPTN/UNOS Memorandum, supra note 58 (noting that when considering individuals, distributive justice requires that “likes be treated alike” and suggesting that “morally relevant differences may justify unequal distribution of goods”). Distributive justice requires that two patients who are equal in all “morally relevant” considerations should have the same chance of getting a donated organ. See id. (“[I]f one person has an objectively higher probability of dying without an organ than another person, that difference would be considered morally relevant [to allocation] and would justify giving the organ to first person.”).

78. See OPTN/UNOS, ETHICAL PRINCIPLES, supra note 62 (presenting these factors as ones which might be included in allocation policy because they seem necessary to treat potential recipients fairly and to give everyone fair chances of getting donated organs). Allocation schemes based on distributive justice may give consideration to the most medically urgent patients, who are unlikely to have long-term post-transplantation survival rates even if it is predictable that other patients
be distributed equitably, the OPTN balances all of these distributive justice factors when they rank transplant candidates.  

Too much emphasis on distributive justice may generate inefficiencies and waste donated organs for which the supply is limited and the demand is always growing. For instance, an organ allocation system designed purely with distributive justice in mind would hold as their principal goal that all people should have an equal opportunity to be as well-off and healthy as all other people. The implications of such a system would result in placing the sickest people at the top of the organ transplantation waiting list. However, the people with the greatest need for donated organs may also have higher post-transplantation mortality rates. While a system based solely on distributive justice would be fair in that it would allow for equal access to donated organs, arguably the number of people ultimately saved through organ transplantation would be fewer than a system balanced with utility.

3. Autonomy

The principle of autonomy holds that actions are ethically right insofar as those actions respect an individual’s exercise of self-determination and freedom to make decisions affecting one’s own person. Autonomy preserves an individual’s free will and right “to live one’s life according to reasons and motives that are taken as one’s own and not the product of manipulative or distorting external forces.” The central principle of autonomy who are not as sick may have better post-transplantation survival rates. See id. (emphasizing that distributive justice is concerned with fairness and equity).

79. See id. (pointing out that UNOS has continued to express concern for distributive justice in organ allocation); see also A Guide to Calculating Lung Allocation Score, supra note 40 (illustrating balancing of distributive justice factors and utility factors for purposes of ranking transplant candidates).

80. See Davis, supra note 70 (reflecting on attempt to balance utility and distributive justice in organ allocation policy). Because utility and distributive justice often conflict, an efficient, utilitarian system focused on maximizing a benefit will probably not be the most equitable or the most fair. See Veatch, supra note 70, at 295 (showing that conversely, pure distributive justice systems will probably be inefficient).

81. See Veatch, supra note 70, at 295 (demonstrating goals and results of distributive justice allocation system).

82. See id. (explaining how distributive justice organ allocation system would operate to distribute organs).

83. See id. (noting negative results of organ allocation system based solely on distributive justice).

84. See id. (stating need for organ allocation system balancing utility and distributive justice).

85. See OPTN/UNOS, Ethical Principles, supra note 62 (discussing importance of autonomy in creating organ allocation policy).

86. See Autonomy in Moral and Political Philosophy, Stan. Encyc. Phil. (Aug. 11, 2009), http://plato.stanford.edu/entries/autonomy-moral/ (“[T]o be autonomous is to be one’s own person, to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of . . . one’s authentic self.”).
tonomy is that a person has complete control to make decisions regarding their own person as long as those decisions do not impose upon the rights of others.87

When autonomy conflicts with utility and distributive justice in the creation of organ allocation policy, the OPTN often prioritizes utility and distributive justice over autonomy.88 However, the principle of autonomy deserves consideration in creating organ allocation policies as it preserves an individual’s free will and right to make decisions about organ transplantation.89 Factors relevant to the creation of organ allocation policies protecting autonomy include: “1) the right to refuse an organ; 2) [the right of] free exchanges among autonomous individuals; 3) allocation by directed donation; and 4) transparency of processes and allocation rules to enable stakeholders to make an informed decision.”90

III. PRESCRIBING LIMITS TO THE JUDICIARY’S REACH INTO ADMINISTRATIVE AGENCY RULEMAKING AUTHORITY

This section explores the parameters of judicial authority in the scope of administrative agency rulemaking and expertise.91 Because the Murnaghan decision highlights the relationship between the judiciary and an administrative agency, especially in light of bioethical considerations, it is essential to understand the respective authorities of the judiciary and administrative agencies.92 The relationship between the judiciary and an administrative agency is largely determined by fundamental separation of powers principles and Supreme Court precedent on judicial deference to administrative agency rulemaking expertise in Chevron.93

87. See OPTN/UNOS, ETHICAL PRINCIPLES, supra note 62 (“Persons and their actions are never ‘fully’ autonomous, but nevertheless it is possible to recognize certain individuals and their decisions as more or less substantially autonomous.”).

88. See id. (noting that “sometimes autonomy must give way,” “when it conflicts with other ethical principles” in determining equitable distributions of organs).

89. See id. (“If one of the characteristics of actions or practices that tend to make them right is that they respect autonomy, then it is possible that certain policies could be morally right, at least prima facie, even if they do not maximize utility and do not promote equitable distributions.”).

90. Id. (listing factors to consider when forming organ allocation policy grounded in autonomy).

91. For a further discussion of the relationship between the judiciary and administrative agencies, see infra notes 92–116 and accompanying text.


A. Administrative Agencies and the Judiciary: Separation of Powers

An administrative agency is a government authority with quasi-judicial power that promulgates, enforces, and interprets regulations for recently passed statutes.\footnote{See Christopher M. Rosselli, Note, Standards for Smart Growth: Searching for Limits on Agency Discretion and the Georgia Regional Transportation Authority, 36 Ga. L. Rev. 247, 257 (2001) (discussing role of administrative agencies in government’s tripartite system).} Unlike the judiciary, an administrative agency is not an independent branch of the government.\footnote{See Patrick M. Garry, The Unannounced Revolution: How the Court Has Indirectly Effectuated a Shift in the Separation of Powers, 57 Ala. L. Rev. 689, 694–95 (2006) (analyzing doctrine of separation of powers). The separation of powers doctrine provides a system of checks and balances and seeks to control governmental power by splitting it between the executive, legislative, and judicial branches. \textit{See id.} (“[E]ach branch must be confined to the exercise of its own function and not allowed to encroach upon functions of other branches.”).} Rather, legislative acts establish an administrative agency, and Congress delegates, through that act, the “jurisdiction, function, powers, and resources available to administrative agencies.”\footnote{See E.P. Krauss, Unchecked Powers: The Supreme Court and Administrative Law, 75 Marq. L. Rev. 797, 806 (1992) (placing administrative agencies in tripartite system of governance and explaining process by which administrative agencies gain authority).} Administrative agencies specialize in developing and implementing policy in complicated areas of legislation, and with their expert and specialized knowledge, they solve complex problems arising from ambiguous congressional legislation.\footnote{See Rosselli, supra note 94, at 257 (noting that administrative agencies have both quasi-judicial and quasi-legislative powers such that “they may take on administrative, investigative, rulemaking, determinative, enforcement, or oversight functions”). “The justifications for the delegation of congressional power to administrative agencies include Congress’s inability to handle technical issues and act efficiently and effectively. In addition Congress’s limited resources often make it unable to articulate meaningful standards for particular problems.” Peter Marra, Have Administrative Agencies Abandoned Reasonability?, 6 Seton Hall Const. L.J. 763, 767–68 (1996) (footnotes omitted) (addressing manner in which administrative agencies embody role of rational decision-makers).} In adopting this role, administrative agencies lighten the burden on the legislature and the judiciary by clarifying the law.\footnote{See Marra, supra note 97, at 766 (“[A]dministrative agencies may provide the mechanism through which Congress can respond to specific issues in a reasonable manner without having to draft highly technical legislation.”).}

The relationship between administrative agencies and the judiciary continues to change in response to evolving social, political, and economic concerns.\footnote{See Alexander J. Celli et al., 40 Mass. Prac. Admin. L. & Prac. § 1631 (2013) (showing that as administrative law has developed, courts have changed their methods of controlling agencies in response).} While the judiciary generally acts to control and to monitor unreasonable actions taken by administrative agencies, the judiciary has not always drawn a consistent line between judicial and administrative au-
In earlier years, courts “attempted to review the substance of [administrative] agency decisions by reviewing the agency’s interpretation of the law and findings of fact.” However, due to the technical nature of many agency decisions, the courts recognized their inability to truly comprehend the intricacies of agency policy and decided that judicial review of agency procedure was a “more familiar and arguably fairer review mechanism.” The courts now review the responsibilities and functions delegated to the administrative agency and determine whether they “have been performed within the confines of the traditional standards of procedural and substantive fair play.”

B. Supreme Court Precedent: Endorsing Judicial Deference to Administrative Rulemaking and Expertise

The seminal case by which the courts adopted their present approach to judicial review of the procedure rather than the substance of agency decisions is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

In *Chevron*, the Supreme Court analyzed the District of Columbia (D.C.) Circuit Court of Appeals’ interpretation of the Environmental Protection Agency (EPA) regulations under the Clean Air Act and ruled that the D.C. Circuit erred when it substituted its own construction of Clean Air Act

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100. See Marra, *supra* note 97, at 798–800 (explaining that courts act as restraints on administrative agencies, yet courts’ role is limited to after agency action has been taken).

101. See id. (detailing changes in courts’ approach to controlling administrative agency action).

102. See id. (citing *Chevron* to illustrate decisive change in courts’ approach to reviewing administrative action).

103. See Joel A. Smith, *Separation of Powers Redux-Receded Scope of Judiciary*, 44 Md. B.J. 18, 20 (2011) (quoting Dep’t of Natural Res. v. Linchester Sand & Gravel Corp., 334 A.2d 514, 522–23 (Md. 1975)). Smith noted that courts serve to provide forums for redress and restraint of illegal administrative action. See id.; see also Administrative Procedure Act, 5 U.S.C. §§ 701–06 (2012) (allowing judicial review of agency action when it is made reviewable by statute or when agency action is final and there is no other adequate remedy).

104. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (establishing two-step test by which reviewing courts are to evaluate interpretation of regulatory statute by any agency that administers statutes). First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Id.* (questioning first whether agency construction of any statute is permissible on its merits and second whether agency’s interpretive choice resulted from reasoned decision-making).
provisions in place of the EPA’s. The Supreme Court found that the judiciary was unable to truly comprehend the lengthy, technical, and highly complex nature of the Clean Air Act and determined that the D.C. Circuit "misconceived the nature of its role in reviewing the regulations at issue." According to the Supreme Court, federal judges have a duty to respect the legitimate policy decisions made by administrative agencies because of the expertise and knowledge underlying those decisions.

The Court further determined that where Congress fails to clearly define statutory provisions, the court may not impose its own construction. Rather, Congress’s express delegation of statutory authority to administrative agencies requires the agencies to formulate policy and to make rules that resolve uncertainties. An administrative agency’s formulation of policy combines the accommodation of competing interests and a thorough knowledge of highly technical and complex issues. Judges are not experts in technical fields nor are they part of either political branch of the government.

Thus, the Supreme Court established that in evaluating administrative policy, the judiciary should defer to the expertise of the administrative agency except when the policies are arbitrary, capricious, or manifestly contrary to the statute. The scope of review under the arbitrary and capricious exception used in Chevron is narrow and courts must not attempt to substitute their interpretation of legislative acts for that of an agency. For agency action to avoid being found arbitrary, the agency must look to all of the information relevant to the creation of the policy.

105. See id. at 866 (discussing whether court of appeals should have constructed its own meaning of “stationary source” in interpreting certain Clean Air Act provisions).
106. See id. at 845 (illustrating that once court of appeals recognized congressional gaps in any statute’s meaning, that court should have left interpretation of those gaps to EPA authority).
107. See id. at 845–44 (establishing that principles of deference to administrative action have been consistently followed by Supreme Court whenever interpretative decisions requiring more than ordinary knowledge, and regarding meaning or reach of any legislative act, necessitate reconciliation of conflicting policies and full understanding of that policy’s effects in any given situation).
108. See id. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.")
109. See id. at 843 (discussing administrative agency power to administer policy and to make rules where there are congressional gaps in legislature).
110. See id. at 865 (explaining why administrative agencies rather than judiciary should be interpreting statutes).
111. See id. (claiming that courts in some instances are reconciling competing political interests but that it is not appropriate to do so on basis of judges’ personal policy preferences).
112. See id. at 844 (stating standard by which policies must be analyzed under Administrative Procedure Act).
and must be able to demonstrate a “rational connection” between the evaluated information and the policy implemented. Even if the agency is able to show a rational connection, agency action might still be found arbitrary if the agency action relies on information which Congress did not intend for the agency to use, “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” The arbitrary exception is a very high standard to meet and even if the administrative agency creates policy with “less than ideal clarity,” the courts may not interfere with that policy if the agency’s goal is reasonably apparent.

IV. Case Study: Murnaghan v. U.S. Department of Health and Human Services

Battling with cystic fibrosis, ten-year-old Sarah Murnaghan never led an easy or normal life. For the eighteen months that Sarah waited on the transplant waitlist, her chance of survival, much less a normal life, steadily diminished until her parents took action by filing a temporary restraining order against HHS. The court’s justifications for granting the temporary restraining order included the nature of Sarah’s injury, the likelihood of the Murnaghans prevailing on the merits of the case, and the public interest in the case. These justifications reveal the dangers of ruling on an emotionally appealing individual transplant candidate’s case without knowledge and expertise of the rationale behind organ allocation policy.

114. See id. (setting forth criteria which must be met to avoid arbitrary exception).
115. See id. (listing various considerations which would cause administrative agency action to fall within arbitrary exception).
117. See Emergency Motion, supra note 92 (describing Sarah Murnaghan’s battle with cystic fibrosis).
118. See id. (noting that Sarah was in hospital for 106 consecutive days but on ninety-second day her condition took drastic turn for worse).
119. For a further discussion of the factors the court considered in deciding whether to grant the temporary restraining order, see infra notes 135–55 and accompanying text. For a further discussion of the events leading up to Murnaghan, see infra notes 122–34 and accompanying text.
120. For a discussion of the impact of changing policy for the sake of an emotionally appealing individual, see infra notes 156–76 and accompanying text.
A. Sarah’s Battle

Sarah Murnaghan was diagnosed with cystic fibrosis at eighteen months old, at which time she already had severe lung damage. As Sarah grew older, her lung function steadily declined, despite drugs and multiple forms of therapy. Every year Sarah made multiple trips to the hospital, staying for four to five days at a time. Yet, Sarah attended school and her life remained relatively normal.

In December 2011, Sarah’s condition drastically deteriorated and her lung capacity diminished to only thirty percent of its normal capacity. On December 7, 2011, Sarah was placed on the pediatric lung transplant waitlist, categorized as a Priority 1 candidate for a set of child-donated lungs and given an LAS of 40. Sarah remained on the pediatric lung transplant list for eighteen months. In May 2013, Sarah was admitted to the intensive care unit of the Children’s Hospital of Philadelphia (CHOP) after her condition worsened.

After the doctors told Sarah’s parents that she only had weeks to live, the Murnaghans began a petition on Change.org in order to mobilize sup-


122. See McCullough, supra note 121 (noting that with available drugs and therapies, cystic fibrosis patients can remain relatively healthy through their teens and beyond).

123. See Ruddock Declaration, supra note 121, at 4 (revealing that in addition to Sarah’s visits to hospitals, she also needed additional medical care at home).

124. See id. at 5 (stating that Sarah has been on supplemental oxygen twenty-four hours a day since December 2011).

125. See id. at 11 (illustrating gradual increase of Sarah’s condition from when she was placed on lung transplant waiting list in December 2011 until June 2013). Unlike adults, an LAS is not used to determine a child’s placement on the waiting list but rather UNOS gives children an LAS for data purposes. See id. (noting that Sarah was categorized as Priority 1 for purposes of placing her on child waiting list). In December 2011, Sarah’s LAS was at 40 and on June 3, 2013, Sarah’s LAS was at 66. See id. (showing drastic turn that Sarah’s condition had taken). If Sarah was an adult with an LAS of 66, she would be very likely to receive a donated lung. See Complaint, supra note 10, at 36 (revealing that, according to UNOS data, in 2011, LAS of 50 would put patient in top six percent of organ donor candidates).

126. See Ruddock Declaration, supra note 121, at 5 (emphasizing that Sarah remained on waitlist because Under 12 Rule kept her from receiving donor organ offers).

127. See id. at 12 (noting that Sarah had been at CHOP since April 2013). As of May 2013, Sarah had not received any offers for a set of adult donated lungs. See Complaint, supra note 10, at 34 (illustrating difficulty of receiving offer of lungs pursuant to OPTN’s Under 12 Rule). She had received three offers of donated lungs from children, but her doctors advised against taking any of them on the grounds that they were not medically suitable. See id. (explaining why Sarah had not been able to accept previous offers of donated lungs).
port for changing the OPTN’s Under 12 Rule.\textsuperscript{128} In response to the petition, the Secretary of the HHS directed the President of the OPTN Board of Directors to review the lung allocation policy for pediatric candidates.\textsuperscript{129} Recognizing that the OPTN’s formal review of policy could take weeks, on June 3, 2013, Sarah’s parents requested that the Secretary set aside the Under 12 Rule on an emergency basis.\textsuperscript{130}

On June 5, 2013, the Secretary had not responded to the Murnaghans’ request and the Murnaghans filed a motion in the Eastern District of Pennsylvania for a temporary restraining order and preliminary injunction to compel the HHS to cease enforcement of the Under 12 Rule.\textsuperscript{131} That same day, the court held a hearing on the motion and granted the temporary restraining order.\textsuperscript{132} On June 10, 2013, the OPTN Board of Directors unanimously passed a resolution to allow children under the age of twelve to be considered for the adult lung transplant list.

\begin{footnotesize}
\begin{enumerate}
\item[128.] See Ruddock Declaration, supra note 121, at 21 (stating that on May 16, 2013 Sharon Ruddock and Janet and Francis Murnaghan decided to start media campaign to fight “inequity”); see also Petition to Kathleen Sebelius: Allow Transplants of Adult Lungs to Children, CHANGE.ORG (June 2013), http://www.change.org/petitions/allow-transplants-of-adult-lungs-to-children [hereinafter Petition to Kathleen Sebelius] (presenting petition sent to Kathleen Sebelius and John Roberts, Director of OPTN, urging them to change OPTN policies and make exceptional rulings allowing Sarah to get donated lungs). Change.org is the world’s largest petition platform. See About, CHANGE.ORG, http://www.change.org/about (allowing anyone to create petition and recruit others to support petition). Sarah’s petition details OPTN policies regarding organ allocation to pediatric candidates and discusses the difficulties that Sarah has faced in receiving a set of donated lungs. See Petition to Kathleen Sebelius, supra (discussing OPTN’s Under 12 Rule and archiving various online news articles covering Sarah’s story).
\item[129.] See Letter from Kathleen Sebelius, Sec’y of U.S. Dep’t of Health & Human Servs., to Dr. John Roberts, Dir., Organ Procurement & Transplantation Network (May 29, 2013), available at http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_Exec_Comm_mntg_materials_06-10-13.pdf (requesting that OPTN forward information regarding protocol for pediatric lung transplants, in response to attention from national media, Congress, and others); see also id. (asking OPTN to consider new approaches for promoting pediatric organ donation).
\item[130.] See Complaint, supra note 10, at 45 (submitting request under 42 C.F.R. § 121.4(d), which allows any interested party to submit critical comments about OPTN policy to Secretary and allows Secretary to direct OPTN to change policies). Through Sarah’s doctors at CHOP, Sarah’s parents twice asked the OPTN Thoracic Committee if an appeal could be made to the OPTN Lung Review Board and the OPTN rejected both requests on the grounds that the OPTN Lung Review Board had no discretion to set aside the Under 12 Rule. See id. at 39 (discussing other methods plaintiff had tried prior to petitioning HHS).
\item[131.] See id. at 46 (claiming that time sensitive nature of Sarah’s case forced plaintiff to file suit).
\end{enumerate}
\end{footnotesize}
on a case-by-case basis by the OPTN’s Lung Review Board. Sarah received a set of adult donated lungs on June 12, 2013.

B. Granting Life

Before granting the temporary restraining order, the court heard arguments from Sarah’s doctor, the Director of the Lung Transplant Program at CHOP. Sarah’s doctor explained that Sarah was in the end stages of organ failure and that a lung transplant was the only way that Sarah would be able to live. When the court asked Sarah’s doctor about OPTN’s Under 12 Rule, which was limiting Sarah’s ability to get a donated lung, he claimed that age twelve “seemed like an arbitrary number,” and he did not see a basis for the Under 12 Rule for ten or eleven year-old children.

Before making its decision, the court stated that it was relying on the testimony of Sarah’s doctor that the Under 12 Rule was arbitrary and that the court was “in no way, shape, or form dictating who gets an organ transplant.”

133. See OPTN/UNOS Ethics Comm., Policy 3.7.6.4, Lung Candidates with Exceptional Cases, OPTN: ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, U.S. DEPT OF HEALTH & HUMAN SERVS. (June 10, 2013), http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_Exec Comm mtng_materials_06-10-13.pdf (supplementing previous pediatric lung allocation policy with review mechanisms for individual cases). The new policy states that “in the case of candidates aged 0–11 years old, transplant programs may request classification as an adolescent candidate for the purposes of Policy 3.7.11 (Sequence of Adult Lung Allocation) while maintaining their pediatric classification for the purposes of Policy 3.7.11.1 (Sequence of Pediatric Donor Lung Allocation).” Id. While the new policy became effective immediately, it will expire on July 1, 2014 at which time the OPTN Board of Directors and committees will reconsider whether it should be renewed. See OPTN/UNOS Executive Committee Approves Discretionary Listing of Pediatric Lung Transplant Candidates, OPTN: ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, U.S. DEPT OF HEALTH & HUMAN SERVS. (June 10, 2013), http://optn.transplant.hrsa.gov/news/newsDetail.asp?id=1598 (publicizing policy changes made by OPTN Board of Directors following Murnaghan).


135. See generally TRO Audio Recording, supra note 132 (hearing arguments on impact that Under 12 Rule has had on Sarah’s circumstance and OPTN’s reasoning why courts should not intervene in OPTN policy-making); cf. Liz Szabo, Ethicists Debate Girl’s Second Lung Transplant, USA TODAY (July 1, 2013), http://www.usatoday.com/story/news/nation/2013/07/01/girls-second-lung-transplant/2477699/ (statement of Dr. David Cornfield) (“When physicians take on the responsibility for an individual patient, they will continue to advocate powerfully and unremittingly for the patient who is before them.”).

136. See TRO Audio Recording, supra note 132, at 6:39–6:53 (explaining that Sarah needs bilateral lung transplant to survive).

137. See id. at 17:08–18:13 (arguing that age twelve seemed arbitrary cutoff because cystic fibrosis presents itself in children and adults in similar manner).
The court also recognized that “this is a serious and sensitive issue and has caused a great deal of concern by hundreds of people across the United States.” The court then set forth several factors underlying its grant of the temporary restraining order. The following sections will analyze each of these factors including the nature of Sarah’s legal injury, the likelihood that the Murnaghans would prevail on the merits of the case, and the public’s interest in the outcome of the case.

1. An Irreparable Injury

The court first considered the nature and circumstance of the injury inflicted on Sarah by the OPTN’s Under 12 Rule. The court explained that the nature and circumstance of Sarah’s condition were very serious. The court determined that under the present Under 12 Rule, Sarah would die. The court distinguished the nature of Sarah’s illness stating that it easily met the threshold requirement for injunctive relief since it was irreparable. Moreover, the court emphasized that it would be a “terrible tragedy” if it did not grant the temporary restraining order and a donated set of lungs were to become available for Sarah but she was unable to take them because she was under the age of twelve.

138. See id. at 43:44–44:40 (stating that decision does not dictate that Sarah will receive organ).
139. See id. at 43:41–43:51 (recognizing sensitive nature of organ allocation policy for transplant candidates dealing with life and death decisions).
140. See id. at 53:45–56:33 (discussing factors behind granting TRO).
141. For a further discussion of the irreparable nature of Sarah’s injury, the likelihood of success on the merits of the claim, and the public interest involved in this case, see infra notes 142–55 and accompanying text.
142. See TRO Audio Recording, supra note 132, at 53:45–54:01 (hearing testimony from Sarah’s doctor, CHOP’s Director of Lung Transplant Program).
143. See id. at 3:39–6:39 (describing nature of Sarah’s condition). The testimony of Sarah’s doctor revealed that Sarah had end-stage organ failure and she required support from a noninvasive ventilator to live on a daily basis. See id. (stating that Sarah had continually been on ventilators since March). Sarah’s doctor stated that the only thing that would allow her to continue to live would be a lung transplant. See id. at 6:39–6:53 (explaining that Sarah needs bilateral lung transplant to survive).
144. See id. at 20:11–20:39 (discussing Sarah’s chances of survival without lung transplant). Sarah’s doctor stated that over the first days of June 2013, Sarah’s condition had significantly deteriorated. See id. at 20:45–21:13 (answering question of urgency of Sarah’s situation). She had issues with fluid balance and her heart had shown signs of significant strain. See id. (answering court’s question of whether doctors had decided to intubate Sarah). After intubation, statistics show that patients generally have only weeks to live. See id. at 22:25–23:19 (discussing process after any patient is intubated). Sarah’s doctors believed that Sarah would need to be intubated within the week. See id. 22:07–22:24 (emphasizing that intubation is last resort for patients).
145. See id. at 53:45–54:01 (recognizing that Sarah’s injury is not any kind of damage that could be compensated other than by injunction).
146. See id. at 57:51–58:28 (acknowledging time sensitivity of Sarah’s case).
2. *Likelihood of Prevailing on the Merits*

The court struggled to assess the Murnaghans’ likelihood of prevailing on the merits of the case.\(^{147}\) The court explained that there was no Supreme Court or Third Circuit precedent governing discriminatory pediatric organ allocation policy.\(^{148}\) However, the court stated that it had a great deal of experience with cases involving discrimination against children.\(^{149}\) According to the court, Congress has been especially concerned with protecting children against discrimination and has enacted several laws to secure the interests of children.\(^{150}\) Additionally, the court gave great weight to the testimony of the Director of the Lung Transplant Program at CHOP who was an expert in lung allocation policy and stated that the Under 12 Rule was arbitrary.\(^{151}\)

3. *Public Interest*

Finally, the court considered the impact of granting the temporary restraining order on the public.\(^{152}\) The Director of the Lung Allocation Program at CHOP informed the court that only sixteen children across the United States would be affected by the decision.\(^{153}\) The court recognized that the benefit to those sixteen children would be great and that it would do little to affect the chances of adult and adolescent candidates to

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\(^{147}\) See *id.* at 54:02–54:20 (relating Sarah’s case to other cases involving discrimination against children because there is no legal precedent dealing with discriminatory organ allocation policy).

\(^{148}\) See *id.* (emphasizing lack of guidance on this issue).

\(^{149}\) See *id.* at 54:21–55:19 (relating this case to cases involving educational policies which discriminate against children because of their disabilities or mental handicaps).

\(^{150}\) See *id.* (showing that protection of children’s interests has always been of special concern to Congress, which implies that children should be protected against discriminatory organ allocation policy).

\(^{151}\) See *id.* at 15:53–18:13 (arguing that OPTN’s Under 12 Rule is arbitrary). The Director of the Lung Allocation Program at CHOP claimed that the justification behind the Under 12 Rule was due to the difference in the disease process between children and adults. See *id.* (explaining differences between disease process in children under the age of five compared to adults were incomparable). The Director testified that the Under 12 Rule was only helpful in classifying children under the age of five from adults and that there was little difference in the disease process between adults and kids over the age of five. See *id.* (testifying that Under 12 Rule was developed nine years ago before medical and scientific advances made that policy obsolete as applied to children five to eleven years old). The Director stated he felt that there was no medical justification for the Under 12 Rule and that the age of twelve seemed like an arbitrary number. See *id.* at 18:32–18:40 (arguing that only justification for rule is that “you don’t disadvantage one population to another”).

\(^{152}\) See *id.* at 56:09–56:11 (noting significance of public interest in this case).

\(^{153}\) See *id.* at 56:52–56:54 (finding that there was one other child under twelve years old waiting in Eastern District of Pennsylvania for donated lungs who would be affected by Murnaghan decision).
receive donated lungs. Therefore, the court determined that granting the temporary restraining order would greatly benefit the plaintiff and scarcely burden the defendant.

V. A CRITICAL EXAMINATION OF MURNAGHAN

The court’s controversial intervention into Sarah’s case highlights several problematic issues for dealing with future cases requesting judicial review of administrative agency policy. While the Murnaghan court justified its intervention into OPTN policy by using the “arbitrary” exception set forth in Chevron, the technical nature of organ allocation policy makes judicial intervention inappropriate in light of Chevron’s guiding principle that courts should defer to administrative agency expertise. Especially where administrative agency expertise is grounded in bioethical principles designed to benefit all transplant candidates, courts should not interfere in any individual transplant candidate’s case at the expense of utility, no matter how tragic that case is.

A. Directing the OPTN to Cease Enforcement of the Under 12 Rule Fails to Consider OPTN Expertise

The court made a conscious effort to emphasize the arbitrary nature of the OPTN’s Under 12 Rule in order to justify departure from Chevron precedent. Chevron allows judicial intervention into an administrative agency’s policy-making authority only when the legislative regulations are “arbitrary, capricious or manifestly contrary to the statute.” Thus, by classifying the OPTN’s Under 12 Rule as “arbitrary, capricious and an

154. See id. at 56:12–56:21 (stating that comparing burdens on plaintiff and defendant is one significant responsibility of courts).

155. See id. at 56:23–56:33 (emphasizing small number of patients affected by Murnaghan decision).

156. For a discussion of questions raised by the Murnaghan decision regarding judicial review of administrative agency policies, see infra notes 159–76 and accompanying text.

157. For a discussion of Chevron, see supra notes 104–16 and accompanying text. For a further discussion of the role Chevron plays in the Murnaghan case, see infra notes 159–76 and accompanying text.

158. For a further discussion of the bioethical principles used by the OPTN in creating organ allocation policy, see supra notes 55–90 and accompanying text. For a further discussion of the bioethical risks implicated by the Murnaghan decision, see infra notes 177–90 and accompanying text.

159. See TRO Audio Recording, supra note 132, at 47:34–47:53 (discussing application of Chevron). The court noted that Sarah’s doctor, the Director of CHOP’s Lung Allocation Program, felt that OPTN’s Under 12 Rule was arbitrary. See id. (stating that Sarah’s doctor’s testimony was highly credible). The court highlighted that the Director’s language brought the Under 12 Rule under the purview of Chevron. See id. at 47:53–48:18 (“[A]s we know from the law . . . one of the damning aspects of a regulation is that it’s arbitrary. . . . I think that is something that has a lot of weight.”).

abuse of discretion," the court acted within the language of *Chevron* when it directed the OPTN to cease enforcement of the Under 12 Rule. 161

However, whether the court’s ruling adhered to the *spirit of Chevron* is a more contentious question. 162 The answer to this question weighs the OPTN’s scientifically constructed allocation algorithms designed to distribute an extremely scarce resource in the most equitable way possible against the tragic story of a dying ten-year-old girl. 163

The OPTN is entrusted with developing and continually improving a donor system that distributes donated organs as equitably as possible according to principles consistent with carefully considered law. 164 The donor system shoulders the heavy responsibility of organ allocation and inherent in that role is the acknowledgement that the donated organ system will never be perfect. 165 Despite scientific algorithms and vast medical expertise behind organ allocation policy, the scarcity of organs prevents the OPTN system from saving every person waiting for a transplant. 166

The court’s directive to the OPTN suggests that any individuals who are unable to gain their desired results in the face of administrative agency policy may turn to the court for immediate relief. 167 The court’s decision

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161. See Complaint, *supra* note 10 (“[APA] authorizes a court to ‘set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .’”).

162. See *Chevron*, 467 U.S. at 844 (establishing that judges should provide “considerable weight” to administrative agency regulation and policy because such agencies have technical knowledge and expertise about complex issues in specific field).

163. See OPTN/UNOS Exec. Comm., *Lung Allocation Policy Review*, OPTN: ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, U.S. DEP’T OF HEALTH & HUMAN SERVS. 143 (June 10, 2013), http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_NameComm_meeting_materials_06-10-13.pdf [hereinafter OPTN/UNOS, *Lung Allocation Policy Review*] (responding to court’s directive to OPTN Executive Committee members to cease enforcement of OPTN’s Under 12 Rule). The OPTN Executive Committee emphasized that “[i]t is critically important for this discussion [of reviewing lung allocation policy] to separate the elements of policy that specifically drive allocation from the elements of policy that afford transplant centers the opportunity to speak on behalf of an individual patient.” *Id.* (expressing reluctance to review policy on behalf of individuals). The OPTN Executive Committee maintained that “[c]hanges to the former must not be made in response to the plea of an individual.” *See id.* (noting danger of creating policy based on individual cases is that such process fails to properly balance utility concerns).

164. See *id.* (reiterating heavy responsibility inherent in OPTN’s role of distributing organs).

165. See *id.* (noting that not every candidate’s needs can be met because of donated organ scarcity).

166. See *id.* (balancing scarcity of donated organs with large number of candidates needing organ transplants).

threatens the stability of administrative agency authority by exposing it to individual exceptions.\textsuperscript{168} Furthermore, the court’s decision presents an opportunity for future transplant candidates to request judicial intervention when they are unable to receive an organ thereby increasing the scope and number of individual causes of action.\textsuperscript{169}

In addition to the practical impacts of the \textit{Murnaghan} decision, the case implicates many of the underlying justifications of \textit{Chevron}.\textsuperscript{170} The reason why judicial deference to administrative authority is appropriate is because administrative agencies have extensive experience and knowledge of highly complex and technical issues.\textsuperscript{171} Lung allocation policy is highly scrutinized and evaluated by experienced medical professionals before it is implemented.\textsuperscript{172} The integrity of the system is at risk, however, when a judge has the authority to change the policy on behalf of an individual.\textsuperscript{173}

In \textit{Murnaghan}, judicial intervention into the sphere of administrative authority saved the life of a ten-year-old girl and certainly, the preservation of human life is the OPTN’s highest priority.\textsuperscript{174} Yet, the OPTN’s subsequent examination of pediatric lung allocation policy revealed little evidence that the policy was “arbitrary, capricious and an abuse of discretion”

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Langone Medical Center, who believes that \textit{Murnaghan} opened doors allowing future transplant candidates to turn to courts).
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\textsuperscript{168.} See OPTN/UNOS, \textit{Lung Allocation Policy Review}, \textit{supra} note 163, at 142 (explaining that special OPTN Executive Committee meeting was convened because one transplant center and one family believe that allocation policies did not sufficiently provide for circumstances of one individual patient). The OPTN noted the dangerous precedent set in the \textit{Murnaghan} decision of using the federal court as a mechanism for special review of individual cases. See \textit{id.} (calling \textit{Murnaghan} “an avalanche of events”).

\textsuperscript{169.} See \textit{Girl’s Need Breathes Life into Debate over Organ Allocation}, \textit{Nat’l Pub. Radio} (June 6, 2013), http://www.npr.org/blogs/health/2013/06/10/189927098/Girls-Need-Breathes-Life-Into-Debate-Over-Organ-Allocation (presenting Dr. Caplan’s concerns over \textit{Murnaghan} decision’s precedential value). Dr. Caplan states, “And then I can start to see other people saying, ‘You know what, I need a liver. I need a heart. Where’s a federal judge? ’” \textit{id.} (claiming that future transplant candidates will also seek judicial aid after \textit{Murnaghan}).

\textsuperscript{170.} For a further discussion of \textit{Chevron}, see \textit{supra} notes 104–16 and accompanying text.

\textsuperscript{171.} See \textit{Pauley v. BethEnergy Mines, Inc.}, 501 U.S. 680, 696–97 (1991) (discussing relationship between judiciary and administrative agencies in creation of policy). The Court noted that where there is a complex and highly technical policy, which necessarily requires significant expertise the court should appropriately defer to the administrative agency’s interpretation of policy. See \textit{id.} (following \textit{Chevron} precedent).

\textsuperscript{172.} See OPTN/UNOS, \textit{Lung Allocation Policy Review}, \textit{supra} note 163, at 24–68 (providing scientific algorithms underlying OPTN lung allocation policy). \textsuperscript{173.} See \textit{id.} (“The development of lung allocation policy, as with all OPTN allocation policy, follows a deliberative approach consistent with the OPTN Final Rule. It considers objective medical evidence, current clinical practice and input from all interested parties.”).

\textsuperscript{174.} See \textit{United Network for Organ Sharing}, http://www.unos.org (last visited Feb. 9, 2014) (“Success at UNOS means more lives being saved.”).
as would justify judicial intervention. Without findings showing that pediatric lung allocation policy was significantly underperforming or discriminating, the rationale for judicial intervention into OPTN policy fails to justify the substantial impacts resulting from review of individual cases.\footnote{See Memorandum from Thoracic Organ Transplantation Comm. & Pediatric Transplantation Comm. to OPTN/UNOS Exec. Comm. (June 10, 2013), available at http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_Exec_Comm_mtnng_materials_06-10-13.pdf (discussing OPTN findings after reviewing pediatric lung allocation policy following Murnaghan). In accordance with Murnaghan, the Thoracic Organ Transplantation Committee and the Pediatric Transplantation Committee held an emergency conference to determine if there was sufficient evidence available to support an immediate modification of the Under 12 Rule. See id. (describing process OPTN took after Murnaghan). The Committees found that “since the implementation of the policy dividing priority one and priority two pediatric lung candidates . . . the wait list death rate for lung transplant candidates between six and 11 years old is identical to the death rate for lung transplant candidates over age 18.” See id. (“[W]aitlist mortality for children is not significantly higher than it is for adults waiting for lungs.”). Furthermore, the Committees found that there was “no significant discrepancy between the death rates on the waiting list or the transplant rates amongst the pediatric lung candidates and patients over 18 years of age.” See id. (revealing that there is little discrepancy between transplant rates of children and adults). After reviewing the date, the Committees found that there was no imminent threat to pediatric lung candidates by the current lung allocation policy and that no emergency action should be taken to modify the Under 12 Rule. See id. (noting that long-term reassessment of OPTN system following OPTN policy development methods should be pursued). In response to the suggestion that the OPTN adopt an interim policy change allowing special review on individual pediatric cases, the Committees concluded that policy modification compelled by exigent circumstances was not an appropriate solution and that “potentially unintended consequences to other candidate groups awaiting lung transplantation would need to be carefully reviewed” before making any policy modifications. See id. (emphasizing need for policy to be made through deliberative processes and not in emergencies).}

B. Judicial Intervention in Individual Cases Violates the Bioethical Principles Underlying OPTN Policy

Granting the temporary restraining order directing the OPTN to cease enforcement of the Under 12 Rule is especially controversial when viewed in light of the bioethical principles underlying OPTN organ allocation policies.\footnote{See Sally Satel, How to Fix the Organ Transplant Shortage, AM. ENTERPRISE INST. (June 20, 2013), http://www.aei.org/article/society-and-culture/how-to-fix-the-organ-transplant-shortage/ (statement of David Magnus, bioethicist at Stanford University) (“If the distribution of organs becomes subject to the success of individual publicity campaigns, with organs going to those who hire best PR firms and lawyers, who on the waiting list would remain confident that their priority would be decided on the merits?”). Further, waitlist candidates might feel that organ allocation is decided on popularity rather than merit. See id.} Guided by the Final Rule, OPTN organ allocation poli-
cies are based upon the ethical principles of utility, distributive justice, and autonomy.\textsuperscript{178} OPTN organ allocation policy combines these ethical principles to develop an ideal donor organ system, which simultaneously maximizes the aggregate amount of medical good, distributes organs in a just manner, and preserves individual self-determination.\textsuperscript{179}

“The transparent balancing of utility, [distributive] justice combined with a predictable and stable application of allocation policy is critical to the fairness of the [donated organ] system.”\textsuperscript{180} Thus, there is a significant ethical risk in special review or exceptions to the allocation policy based on the circumstances and experiences of one particular organ transplant candidate.\textsuperscript{181} Reviewing the fairness of allocation policy through the experience of any individual transplant candidate’s case inevitably subordinates utility to distributive justice concerns.\textsuperscript{182}

The \textit{Murnaghan} decision highlights several significant ethical concerns including the risk of undermining public trust.\textsuperscript{183} The OPTN’s organ donation system is effective because it is based on public trust.\textsuperscript{184} If individual transplant candidates perceive judicial intervention as a way to circumvent OPTN policies and gain more favorable access to donated organs, “the result is likely to be significant chaos and inherent unfairness because access to the courts is not equal.”\textsuperscript{185} Where the court gives immediate relief to individuals requesting reevaluation of organ allocation policy, it suggests that candidates ought to use lawsuits to implement more favorable organ allocation rather than trusting in the expertise of administrative agencies.\textsuperscript{186}

\textsuperscript{178} For a further discussion of the Final Rule, see supra note 36 and accompanying text. For a further discussion of utility, see supra notes 62–72 and accompanying text. For a further discussion of distributive justice, see supra notes 73–84 and accompanying text. For a further discussion of autonomy, see supra notes 85–90 and accompanying text.

\textsuperscript{179} See OPTN/UNOS, Ethical Principles, supra note 62 (“[I]t is unacceptable for an allocation policy to strive single-mindedly to maximize aggregate medical good without any consideration of justice in distribution of the good, or conversely for a policy to be single-minded about promoting justice at the expense of the overall medical good.”).

\textsuperscript{180} OPTN/UNOS Memorandum, supra note 58 (evaluating bioethical risks which arise out of failing to balance utility and distributive justice).

\textsuperscript{181} See id. (noting that appeal to unique features of specific individual cases is not appropriate to make fairness claims against complex algorithms of allocation policy).

\textsuperscript{182} See id. (reiterating that effective organ allocation policy is achieved through balancing utility and distributive justice).

\textsuperscript{183} See id. (describing dangers of modifying organ allocation policy in hastily convened committees without open public comment).

\textsuperscript{184} See id. (noting that public trust in organ allocation policy is determined through transparent processes that minimize potential for bias or conflict).

\textsuperscript{185} See id. (stressing importance of donors’ faith in OPTN systems and belief that it is fair).

\textsuperscript{186} See id. (implicating principles of \textit{Chevron}).
Additionally, in reviewing any individual transplant candidate’s case, the court becomes susceptible to the “Rule of Rescue.”\textsuperscript{187} Especially in cases involving children, it is emotionally appealing to circumvent carefully constructed systems of equitable allocation, which may not offer the best chance at survival, in order to rescue the individual.\textsuperscript{188} For utility purposes, allocation policy often requires “dispassionate reasoning and extensive [medical] experience.”\textsuperscript{189} When judges intervene in the complex and highly technical algorithms of organ allocation, they are often well-intentioned; however, they, “fail to consider all the moral variables that must be balanced at the macro level rather than through an individual candidate’s experience.”\textsuperscript{190}

VI. CONCLUSION: CURING THE ILLS OF EXCESSIVE JUDICIAL INTERVENTION IN ORGAN ALLOCATION POLICY

Judicial intervention in any individual organ transplant candidate’s case should remain limited under \textit{Chevron} because judicial intervention undermines essential bioethical principles of organ allocation policy.\textsuperscript{191} The fundamental mission of \textit{Chevron} is to promote judicial deference to administrative agency expertise and knowledge.\textsuperscript{192} The need for judicial deference to administrative agency expertise is especially apparent in organ allocation policy.\textsuperscript{193} First, organ allocation policy is composed of highly complex scientific algorithms.\textsuperscript{194} Without any medical expertise, judges cannot expect to comprehend all the nuances and implications of organ allocation policy.\textsuperscript{195} Second, judicial intervention into any individ-

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\item \textsuperscript{187} See Satel, \textit{supra} note 177 (describing how Jonsen’s Rule of Rescue is applicable in \textit{Murnaghan}). The Rule of Rescue, defined by ethicist A.R. Jonsen, evidences the imperative people feel to rescue “identifiable individuals facing avoidable death.” See \textit{id.} (“People may expend heroic efforts that either put others at risk or pose costs to society that could be more efficiently spent to prevent abstract deaths in the larger population.”).
\item \textsuperscript{188} See \textit{id.} (claiming \textit{Murnaghan} imposed Jonsen’s Rule of Rescue because media attention surrounding case was eye-catching and effective).
\item \textsuperscript{189} See OPTN/UNOS Memorandum, \textit{supra} note 58 (noting that it is emotionally appealing for politicians or judges to intervene).
\item \textsuperscript{190} See \textit{id.} (describing why it is necessary for OPTN committees to make policy rather than courts).
\item \textsuperscript{191} For a further discussion of why judicial intervention undermines essential bioethical principles of organ allocation policies, see \textit{supra} notes 177–90 and accompanying text.
\item \textsuperscript{192} See \textit{Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837, 866 (1984) (holding that “responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones,” but rather are vested in political branches).
\item \textsuperscript{193} For a further discussion of why judicial deference is especially important in lung allocation policy, see \textit{supra} notes 173–76 and accompanying text.
\item \textsuperscript{194} See \textit{A Guide to Calculating the Lung Allocation Score, supra} note 40 (illustrating complexities of calculating LAS).
\item \textsuperscript{195} See David Kemp, \textit{Doctors and Lawyers and Such: A Pediatric Lung Transplant Case Illustrates the Complex Relationship Between the Government and Medical Providers},
ual transplant candidate’s case upsets the central bioethical principles underlying organ allocation policy and risks the stability of the entire organ donation system.196 Thus, the problem of excessive judicial intervention must be remedied in the context of organ allocation policy in order to achieve the goal of Chevron and to preserve fundamental bioethical principles.197 There are several approaches available to reduce instances of judicial intervention in organ allocation policy.198

First, Congress and the OPTN must take greater action to increase the supply of donated organs.199 With greater access to organs, fewer individuals will have a need to turn to the judiciary for aid in obtaining donated organs.200 One strategy, which has been proposed to increase the supply of organs, is to create an organ market and to allow individuals to broker contracts with other persons interested in selling an organ.201 Another suggested strategy is to enact laws that create presumed con-

JUSTIA (June 17, 2013), http://verdict.justia.com/2013/06/17/doctors-and-lawyers-and-such (explaining that decision to place organ transplant candidates on waitlist should be made only by medical experts and professionals with actual knowledge of individual circumstances).

196. See OPTN/UNOS Memorandum, supra note 58 (explaining that “circumvention of organ allocation through judicial appeals or other mechanisms is likely to undermine the main ethical directive of an equitable allocation system” based on utility and distributive justice).


198. For a discussion of the solutions to organ scarcity, see infra notes 199–217 and accompanying text.

199. See Arthur L. Caplan, Organ Transplantation: The Challenge of Scarcity, in THE PENN CENTER GUIDE TO BIOETHICS 679 (2009) (discussing organ transplantation problems resulting from donated organ scarcity). Before presenting possible solutions for expanding the donor pool, Caplan notes that the organ supply problem most likely will not be fixed at any time in the near future. See id. (stating that until scientists learn how to grow new organs for transplant, policymakers must continue to make life and death decisions about who gets organs). However, because it is obviously important to try and save more lives, it is necessary for policymakers “to consider options that might increase the supply of transplantable organs without risking the willingness of those now involved to donate.” See id. at 680 (noting legislature’s important role in increasing organ supply).

200. See Satel, supra note 177 (arguing that organ shortage drove Sarah’s parents to plead for Sarah’s life and to bring claims against Sebelius).

201. See Caplan, supra note 199, at 681–82 (presenting ethical challenges to organ markets). Dr. Caplan argues that even if the United States adopted an organ market it is unlikely that more people would donate. See id. at 682 (“[D]isincentive to cadaver donation has more to do with aesthetic, emotional, or religious concerns than lack of payment.”). Moreover, an organ market most likely would exploit the poor and encroach on individual free will and autonomy. See id. (illustrating that poor individual with little choice other than selling organs to live is free to donate or not donate but has relatively little choice about the matter). An additional bioethical concern is that allowing individuals to sell organs violates the core ethical norm of nonmaleficence. See id. (explaining that
In such a system, the presumption is that everyone wants to be an organ donor upon their death and people who do not want to be organ donors upon death must register with the state to provide otherwise. Additionally, doctors have suggested that persons for whom a determination of brain death cannot be made could be considered donors in order to expand the donor pool.

Second, the OPTN should permanently adopt a special exceptions policy to allow OPTN committee review of individual pediatric lung candidates. If the OPTN provided a mechanism by which individual candidates could seek further review of their particular circumstance, candidates would perceive the donor system as fairer and would be less likely to turn to the judiciary to seek aid. Moreover, providing individual candidates with the opportunity to seek a special exception through OPTN internal processes would keep issues regarding organ allocation policy within the OPTN’s scope of authority rather than in the hands of the judiciary.

Third, judges must restrain from being influenced by emotionally aggressive media campaigns and compelled to make hasty decisions. The removing organs from healthy person violates essential tenet of “do good, avoid harm” of nonmaleficence).

202. See id. at 682–83 (discussing presumed consent as one option for increasing organ supply and as being practiced in other countries). The advantage of a presumed consent system is that people still have the right to choose whether they want to donate or not since they have the right to opt out of the system. See id. (showing that in such systems procuring organs is consistent with fundamental medical ethics).

203. See id. (indicating that based on other countries’ success, United States could increase donor supply by shifting to presumed consent system).

204. See id. (explaining that lack of consistent national standards for determining cardiac death could hinder this solution).


206. See Improving Lung Donor Availability and Allocation—Without the Courts, PENN MEDICINE (June 24, 2013), http://www.uphs.upenn.edu/news/News_Releases/2013/06/halpern/ (statement of Dr. Halpern, medical ethicist at University of Pennsylvania) (suggesting several methods by which OPTN committees could make OPTN donated organ systems more efficient, stating, “Not only would these steps provide more patients with access to life-extending interventions, but by being more proactive the transplant community can protect the system it has worked so hard to build from future judicial intervention.”).

207. See generally OPTN/UNOS, Lung Allocation Policy Review, supra note 163 (emphasizing that courts are not proper venues for individuals to plead their case on organ allocation policy).

208. See Improving Lung Donor Availability and Allocation—Without the Courts, supra note 206 (questioning medical ethicists from Penn Medicine). Dr. Halpern, medical ethicist at the University of Pennsylvania believes that organ allocation
most effective way to do this is to defer to OPTN authority and if necessary, to make decisions based on extensive and thorough medical expert testimony.\textsuperscript{209} When the media highlights the tragic stories of individuals facing certain death, there is a greater public initiative to save these individuals immediately and by any means necessary.\textsuperscript{210} Judges may be influenced by the public’s plea and by the emotionally appealing nature of the case to grant relief to individual transplant candidates.\textsuperscript{211} However, if judicial intervention is necessary, judges should be making fully informed decisions after extensive and thorough expert testimony.\textsuperscript{212} By avoiding hasty decisions, encouraged by emotional media campaigns, judges can realize their own insufficient knowledge of organ allocation policy and can choose to defer to the expertise of the OPTN.\textsuperscript{213}

By enacting any of the preceding changes, we can limit judicial intervention into OPTN organ allocation policy and prevent controversial departures from \textit{Chevron} precedent like that in \textit{Murnaghan}.\textsuperscript{214} The tragedy inherent in organ allocation is never more apparent than in the case of

\begin{quote}

policies should not favor the most popular or richest transplant candidates who can run the most successful media campaign, or who have the closest connections with lawyers and judges. \textit{See id.} (statement of Dr. Halpern) (“Even if policies are imperfect, the integrity of the system is completely undermined when judges make medical decisions, particularly when they do so without considering the medical facts as happened in the Philadelphia cases.”).

\textsuperscript{209.} \textit{See} Katie Drummond, \textit{Need a Kidney, Please RT: How Social Media Is Changing Organ Donation}, \textsc{The Verge} (Sept. 26, 2013), http://www.theverge.com/2013/9/26/4773486/organ-donation-and-social-media-impact (expressing concern that media threatens to turn organ donation into popularity contests).


\textsuperscript{211.} \textit{See} Pennsylvania Girl’s Double-Lung Transplant a Success, Family Says, \textsc{Fox News} (June 13, 2013), http://www.foxnews.com/health/2013/06/13/philadelphia-girl-double-lung-transplant-success-family-says/ (statement of Dr. Arthur Caplan, New York University Langone Medical Center) (“[T]he road to a transplant is still to let the system decide who will do best with scarce, lifesaving organs. And it’s important that people understand that money, visibility, being photogenic . . . are factors that have to be kept to a minimum if we’re going to get the best use out of the scarce supply of donated cadaver organs.”).

\textsuperscript{212.} \textit{See} Szabo, \textit{supra} note 135 (statement of Dr. Kevin Donovan, Director of the Edmund D. Pellegrino Center for Clinical Bioethics at Georgetown University Medical Center) (“The courts will have the same sympathy that we all would, but not the same medical information as doctors at the bedside.”).

\textsuperscript{213.} \textit{See} Transplant Review Board Seek Medical, Legal Balance, \textsc{USA Today} (June 11, 2013), http://www.usatoday.com/story/news/nation/2013/06/11/transplant-vote-balance/2413207/ (stating that while members of OPTN committees voiced sympathy for anyone who is waiting for organs, they argued that making sudden changes to OPTN organ donation systems to help one group risks harming some other group).

\textsuperscript{214.} For a further discussion of the changes needed to decrease the effects of judicial intervention in organ allocation policy, see \textit{supra} notes 199–213 and accompanying text.
children and the heartbreaking story of a dying ten-year-old girl instinctively inspires the need to protect and rescue.\footnote{See OPTN/UNOS, \textit{Lung Allocation Policy Review}, supra note 163 (noting that candidates will continue to die on waiting lists until organ supply increases and that OPTN committees should use Sarah’s story to ensure that each person imploring OPTN committees to make donation systems better also makes that person commit to organ donation).}

However, donated organs are a scarce resource and the court must recognize that, even with the expertise and knowledge of the OPTN, not all of the tragic stories can be redeemed.\footnote{See \textit{id.} (increasing organ supply would drastically raise number of lives that could be saved).}

Checking judicial intervention into OPTN organ allocation authority will ultimately preserve an organ allocation system, which seeks to maximize the benefits of donated organs for all 76,910 active waiting list transplant candidates.\footnote{See OPTN Data, \textit{supra} note 4 (providing active waiting list data for number of active waiting list transplant candidates, number of donors, and number of transplants done).}
NOW I'M GUILTY, NOW I'M NOT: THE AUTOMATIC RIGHT TO PRE-SENTENCE GUILTY PLEA WITHDRAWALS IN PENNSYLVANIA SINCE COMMONWEALTH v. FORBES

THOMAS P. REILLY*

“Such a construction of our Supreme Court’s precedents would constrain trial courts to reward rather than sanction the most disingenuous of such claims, and the most brazen of perjuries.”

I. INTRODUCTION: THE FUNDAMENTAL RIGHT TO TRIAL VERSUS THE EFFICIENT ADMINISTRATION OF JUSTICE

Imagine for a moment that a young child, ten years of age, has been the victim of ongoing sexual abuse by an adult familiar to the child. After being indicted and having the opportunity to observe the incriminating evidence that begins to pile up, the accused perpetrator decides that pleading guilty is the best course of action. With the victim and victim’s

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1. Commonwealth v. Cole, 564 A.2d 203, 208 (Pa. Super. Ct. 1989) (Kelly, J., concurring) (arguing that trial courts should be able to assess credibility of movants’ explanations for seeking pre-sentence guilty plea withdrawals and rule accordingly, rather than being required to grant such motions upon any bald assertion of innocence).

2. Although these facts are fictional, they are loosely based on factual scenerios in several Pennsylvania cases where accused sexual offenders sought to withdraw their guilty pleas before sentencing and send their cases back to trial, requiring their victims to testify. See, e.g., Commonwealth v. Gordy, 73 A.3d 620, 623 (Pa. Super. Ct. 2013) (reversing trial court and allowing pre-sentence withdrawal of guilty plea in case involving ongoing sexual abuse of minors aged five and twelve); Commonwealth v. Katonka, 33 A.3d 44, 45 (Pa. Super. Ct. 2011) (en banc) (granting motion to withdraw guilty plea before sentencing where accused allegedly sexually abused his stepdaughter for over six years, beginning when she was eight years old); Commonwealth v. Kasecky, 658 A.2d 822, 822–23 (Pa. Super. Ct. 1995) (observing that defendant pleaded guilty to one count of Involuntary Deviate Sexual Intercourse for abusing his fifteen-year-old daughter but later sought to withdraw his guilty plea); Commonwealth v. Ammon, 418 A.2d 744, 745–46 (Pa. Super. Ct. 1980) (noting that defendant pleaded nolo contendere to Involuntary Deviate Sexual Intercourse with ten-year-old boy and later sought to withdraw his plea after one day of trial where sexual abuse victim had already testified).

3. See, e.g., Brady v. United States, 397 U.S. 742, 756 (1970) (“Often the decision to plead guilty is heavily influenced by the defendant’s appraisal of the prosecution’s case against him and by the apparent likelihood of securing leniency..."
family attempting to put the traumatic episode behind them, the victim approves a plea deal struck between the accused and the prosecution. After holding an extensive on the record guilty plea colloquy where the trial judge asks the defendant numerous questions to assure that the guilty plea is being made knowingly and voluntarily, the trial court accepts the defendant’s plea. However, several days before the matter is scheduled for sentencing the accused sexual predator moves to withdraw the guilty plea, offering the bare assertion that “I am innocent of the alleged

should a guilty plea be offered and accepted.”); Note, The Prosecutor’s Duty to Disclose to Defendants Pleading Guilty, 99 HARV. L. REV. 1004, 1004 (1986) [hereinafter The Prosecutor’s Duty to Disclose] (“A criminal defendant’s decision to plead guilty reflects his assessment of the strength of the state’s case against him.”).

4. Although this Note focuses on guilty pleas rather than plea bargaining specifically, it recognizes that a large portion of such guilty pleas will come as a result of bargaining between the prosecution and the defendant. See State v. Slater, 966 A.2d 461, 470 (N.J. 2009) (recognizing that vast majority of criminal cases are resolved through plea bargaining); Douglas D. Guidorizzi, Comment, Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics, 47 EMORY L.J. 753, 754–55 (1998) (observing that despite persistent arguments in favor of banning plea bargaining from scholars and policymakers alike, “plea bargaining remains the primary method of disposing of criminal cases”); Scott W. Howe, The Value of Plea Bargaining, 58 OKLA. L. REV. 599, 600 (2005) (“Guilty pleas, mostly induced by government concessions, remain the method by which the criminal justice system resolves approximately ninety percent of all criminal cases in America.” (footnote omitted)); Kirke D. Weaver, A Change of Heart or a Change of Law? Withdrawing a Guilty Plea Under Federal Rule of Criminal Procedure 32(e), 92 J. CRIM. L. & CRIMINOLOGY 273, 273 (2002) (observing that overwhelming number of cases in our criminal justice system are processed through plea bargaining).

5. See PA. R. CRIM. P. 590(A) (requiring that guilty pleas be taken in open court and stating that trial judges should not accept pleas unless such colloquies demonstrate that they are voluntarily and understandingly tendered). The comment to Rule 590 describes the mandatory minimum baseline inquiry that must be made by a trial judge before accepting a plea as follows:

(1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or nolo contendere?
(2) Is there a factual basis for the plea?
(3) Does the defendant understand that he or she has the right to trial by jury?
(4) Does the defendant understand that he or she is presumed innocent until found guilty?
(5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
(6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?
(7) Does the defendant understand that the Commonwealth has a right to have a jury decide the degree of guilt if the defendant pleads guilty to murder generally?

Id. cmt. Inquiry into these fundamental questions is mandatory. See Commonwealth v. Persinger, 615 A.2d 1305, 1307 (Pa. 1992) (noting that inquiry into these minimum requirements is mandatory and that failure to make these inquiries will require that defendants are able to withdraw their pleas); Cole, 564 A.2d at 206 (“The entry of a guilty plea is a protracted and comprehensive proceeding wherein the court is obliged to make a specific determination after extensive colloquy on the record that a plea is voluntarily and understandingly tendered.”).
crimes.”6 In Pennsylvania, this bare assertion of innocence would suffice to allow a defendant to withdraw a guilty plea and proceed to trial, unless there is a clear showing that withdrawal would prejudice the prosecution.7

In order to prove it would be prejudiced by a defendant’s withdrawal, the prosecution must affirmatively show that an event occurring after the defendant’s plea has made it significantly more difficult to prove its case.8 Such freely allowed plea withdrawals often force victims, like the one in the above scenario, to take the stand and testify at trial, eradicating the potential closure they attempted to reach when originally approving the defendant’s plea deal.9

6. See, e.g., Commonwealth v. Randolph, 718 A.2d 1242, 1242–43 (Pa. 1998) (noting that defendant sought to withdraw his guilty plea on day scheduled for sentencing and asserted he was not guilty of crimes he admitted to in his plea); Commonwealth v. Unangst, 71 A.3d 1017, 1019 (Pa. Super. Ct. 2013) (noting that defendant sought to withdraw two separate guilty pleas by merely stating in his withdrawal motion: “[d]efendant asserts his innocence in all matters and desires to proceed to trial”); Katonka, 33 A.3d at 45 (observing that defendant sought to withdraw his guilty plea over four months after initially entering it and subsequently asserted his innocence at hearing held on that motion).

7. See, e.g., Randolph, 718 A.2d at 1244–45 (holding that defendant’s initial assertion that he was not guilty was sufficient to allow him to withdraw his plea, despite his subsequent admissions that he was not innocent of every crime charged); Katonka, 33 A.3d at 50 (holding that defendant’s two clear assertions of innocence were sufficient to require trial judge to have allowed him to withdraw his plea before sentencing). For a further discussion of Pennsylvania’s modern day plea withdrawal jurisprudence, see infra notes 85–95 and accompanying text.

8. See Commonwealth v. Gordy, 73 A.3d 620, 624 (Pa. Super. Ct. 2013) (declaring that proving prejudice relates to Commonwealth’s ability to try its case, rather than inconvenience to complainants); Commonwealth v. Kirsch, 930 A.2d 1282, 1286 (Pa. Super. Ct. 2007) (noting that prejudice requires prosecution to show its ability to prove its case would be weakened if defendant were able to withdraw guilty plea); Cole, 564 A.2d at 205–06 (holding that Commonwealth would clearly be prejudiced by defendant’s plea withdrawal where defendant waited to plead guilty until after Commonwealth had transported star witness from Georgia, then moved to withdraw his plea once said witness had returned to Georgia); Commonwealth v. Ammon, 418 A.2d 744, 748 (Pa. Super. Ct. 1980) (finding prosecution had proven that withdrawal would cause substantial prejudice where ten-year-old sexual assault victim had already testified and had provided defendant with preview of Commonwealth’s case). The Superior Court in Kirsch further elaborated on the prejudice prong as follows:

[I]t would seem that prejudice would require a showing that due to events occurring after the plea was entered, the Commonwealth is placed in a worse position than it would have been had trial taken place as scheduled. This follows from the fact that the consequence of granting the motion is to put the parties back in the pre-trial stage of proceedings. This further follows from the logical proposition that prejudice cannot be equated with the Commonwealth being made to do something it was already obligated to do prior to the entry of the plea.

Kirsch, 930 A.2d at 1286 (footnote omitted).

9. See Gordy, 73 A.3d at 627 (rejecting trial court’s suggestion that complainant sexual abuse victims may be unwilling to testify if case were sent back for trial, stating it was unsupported by record); Kirsch, 930 A.2d at 1287 (noting that even if victims are reluctant to testify on remand, such reluctance would have affected prosecution had matter gone to trial in first place).
The vast majority of criminal convictions in the United States result from guilty pleas.\textsuperscript{10} The United States Supreme Court has highlighted key advantages of guilty pleas to both defendants and prosecutors alike.\textsuperscript{11} Pleading guilty can have tangible benefits for criminal defendants who believe they have a slim chance of acquittal; specifically, guilty pleas generally result in more lenient sentences.\textsuperscript{12} The principal utility of guilty pleas from the state’s perspective is in securing the efficient administration of criminal justice.\textsuperscript{13} Some courts and commentators have even suggested that the criminal justice system would collapse under the weight of its unmanageable caseload without guilty pleas and plea bargaining.\textsuperscript{14} How-

\textsuperscript{10} See Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., \textit{Felony Sentences in State Courts, 2006—Statistical Tables}, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT. 25 tbl. 4.1 (2010), available at http://www.bjs.gov/content/pub/pdf/fssc06st.pdf (noting that 94\% of state court felony convictions in 2006 resulted from guilty pleas). The percentage of convictions resulting from guilty pleas was higher in drug (96\%) and property (95\%) offenses than in violent offenses (90\%). See id.

\textsuperscript{11} See \textit{Brady v. United States}, 397 U.S. 742, 752 (1970) (“For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.”). The United States Supreme Court has described the advantages that guilty pleas provide to the prosecution as well:

[T]he more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof.

\textit{Id.} (emphasis added). The Supreme Court goes on to suggest that this “mutuality of advantage” may indeed explain the large proportion of cases that are resolved through guilty pleas. See id.

\textsuperscript{12} See Rosenmerkel et al., supra note 10, at 24 (“Prison sentences imposed in state courts were longer for felons convicted in a trial (8 years and 4 months) than for felons who pleaded guilty (3 years and 11 months) in 2006.” (citation omitted)). Furthermore, “[a]mong persons convicted of murder or non-negligent manslaughter, sentences to life in prison or death occurred more often in trial convictions (47\%) than in guilty pleas (15\%) in 2006.” \textit{Id.} (citation omitted).

\textsuperscript{13} See Santobello v. New York, 404 U.S. 257, 261 (1971) (asserting that plea discussions are desirable largely for their ability to facilitate “prompt and largely final disposition of most criminal cases”); \textit{Brady}, 397 U.S. at 752 (noting that guilty pleas dispose of cases more quickly and help preserve scarce local government resources); Weaver, supra note 4, at 273 (noting that principal purpose of plea bargaining is efficiency in adjudicating criminal cases).

\textsuperscript{14} See Santobello, 404 U.S. at 260 (“If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”); Lucian E. Dervan, \textit{Over-criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Over-criminalization}, 7 J.L. ECON. & POL’Y 645, 651 (2011) (asserting that United States Supreme Court’s decision in \textit{Brady}, which held that it is permissible for criminal defendants to plead guilty in exchange for the probability of lesser punishments, was “likely necessitated by the reality that the criminal justice system would collapse if plea bargaining was invalidated”); \textit{The Prosecutor’s Duty to Disclose}, supra note 3, at 1019 (“[P]lea bargaining is the primary means by which our system reaches ver-
ever, in deciding whether to waive their constitutional right to trial, defendants are faced with an extremely difficult choice in whether or not to plead guilty.\textsuperscript{15} The pressure to do so is often further increased by counsel that zealously advise their clients to plead guilty.\textsuperscript{16}

When defendants seek to withdraw their guilty pleas, they often offer a plethora of explanations, including that their attorneys pressured them to plead guilty, that they did not understand the significance of their pleas, or simply that they are innocent.\textsuperscript{17} In adjudicating such plea withdrawal motions, two competing interests collide: a defendant’s fundamental right to trial and the state’s interest in the efficient administration of justice.\textsuperscript{18} While important constitutional rights are at stake, the gravity of

\textsuperscript{15} See \textit{Brady}, 397 U.S. at 756 (stating that defendants’ assessments of prosecution’s case against them often present “imponderable questions for which there are no certain answers”); United States v. Barker, 514 F.2d 208, 221 (D.C. Cir. 1975) (“A guilty plea is very typically entered for the simple tactical reason that the jury is unlikely to credit the defendant’s theory or story. . . . A guilty plea frequently involves the making of difficult judgments.” (internal citations and quotations omitted)); People v. Breslin, 140 Cal. Rptr. 3d 906, 912 (Cal. Ct. App. 2012) (“All decisions to plead guilty are heavily influenced by difficult questions as to the strength of the prosecution’s case and the likelihood of securing leniency.”).

\textsuperscript{16} See, e.g., United States v. Adam, 296 F.3d 327, 330 (5th Cir. 2002) (observing that defendant attempting to withdraw his plea asserted that his defense counsel pressured him into pleading guilty); Commonwealth v. Randolph, 718 A.2d 1242, 1243 (Pa. 1998) (recalling that appellant later stated he only pleaded guilty to follow advice of his counsel); Commonwealth v. Forbes, 299 A.2d 268, 270 (Pa. 1973) (acknowledging that defense counsel threatened to withdraw from representing defendant if he attempted to withdraw his guilty plea); Commonwealth v. Moseley, 423 A.2d 427, 428 (Pa. Super. Ct. 1980) (indicating that defendant asserted that his defense counsel coerced him into entering guilty plea).

\textsuperscript{17} See, e.g., State v. Munroe, 45 A.3d 348, 351 (N.J. 2012) (observing that defendant admitted guilt, but later attempted to withdraw his guilty plea, stating that while he killed victim, he acted in self-defense); Commonwealth v. Katonka, 33 A.3d 44, 46 (Pa. Super. Ct. 2011) (en banc) (observing that defendant originally stated in his withdrawal motion that he did not fully understand his guilty plea, and later asserted his innocence); Commonwealth v. Cole, 564 A.2d 203, 203 (Pa. Super. Ct. 1989) (en banc) (noting that defendant sought to withdraw his plea by stating he was innocent and that his plea was not voluntarily tendered). For a further discussion of cases where defendants seeking to withdraw their guilty pleas asserted that their defense counsel pressured them into making their pleas, see \textit{supra} note 16 and accompanying text.

\textsuperscript{18} Compare Commonwealth v. Gordy, 73 A.3d 620, 628 (Pa. Super. Ct. 2013) (emphasizing, in context of pre-sentence guilty plea withdrawal motions, right to trial as one of “the most fundamental and obvious constitutional protections that all courts must join in protecting”), \textit{with} Commonwealth v. Turiano, 601 A.2d 846, 852 (Pa. Super. Ct. 1992) (discussing how squandering of judicial resources was inherent in any rule that liberally allows guilty plea withdrawals before sentencing), \textit{and} Weaver, \textit{supra} note 4, at 273 (“Because of the overwhelming number of criminal cases processed through plea bargaining, courts are unquestionably reluctant to permit defendants to withdraw from their plea agreements once approved by the court.”); see also State v. Slater, 966 A.2d 461, 467 (N.J. 2009) (describing competing interests of finality of pleas for both state and victims versus basic rights and protections for criminal defendants). The \textit{Slater} court expressly acknowledged
a guilty plea would be significantly diminished if such pleas could be withdrawn as an automatic right.\textsuperscript{19}

The American Bar Association has codified and continually updated model standards to guide states in handling requests to withdraw guilty pleas.\textsuperscript{20} Under these standards, when defendants seek to withdraw their pleas after sentencing, they must prove that a manifest injustice would occur if they were not permitted to do so.\textsuperscript{21} However, these standards state that if the defendant’s withdrawal request is made before sentencing, withdrawal should be permitted for “any fair and just reason.”\textsuperscript{22} The drafters noted that there is wide variation concerning how a fair and just reason is determined among different state and federal jurisdictions.\textsuperscript{23}

In 1964, based on the prevailing ABA Standards, Pennsylvania adopted Rule of Criminal Procedure 320, which sought to indicate when

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\textsuperscript{19} See United States v. Buckles, 843 F.2d 469, 472–73 (11th Cir. 1988) (“Guilty pleas would be of little value to the judicial system if a defendant’s later conclusory assertion of innocence automatically negated his plea.”); Slater, 966 A.2d at 471 (“If a defendant represented by counsel were permitted to withdraw a guilty plea which he voluntarily and knowingly entered . . . the efficient and orderly administration of justice would be impeded. Criminal calendars would become increasingly congested and the State’s efforts to effectively prosecute lawbreakers would be seriously hampered by the delays.” (quoting State v. Herman, 219 A.2d 413, 416 (N.J. 1966))); Weaver, supra note 4, at 273 (“For if such agreements are readily open to second-guessing by defendants, the purpose of plea bargaining—the efficient adjudication of criminal cases—would be severely undermined.”).


\textsuperscript{21} See id. § 14-2.1(b), at 81 (“After a defendant has been sentenced pursuant to a plea of guilty or nolo contendere, the court should allow the defendant to withdraw the plea whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.”). Examples of a manifest injustice include: ineffective assistance of counsel, a plea not authorized by the defendant or someone representing him, a plea that was involuntary or entered without knowledge of the potential resulting sentence, or if the defendant did not receive the concessions promised by the prosecution as part of a plea agreement. See id.

\textsuperscript{22} See id. § 14-2.1(a) (“After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason.”) Furthermore, “[i]n determining whether a fair and just reason exists, the court should also weigh any prejudice to the prosecution caused by reliance on the defendant’s plea.” Id.

\textsuperscript{23} See id. cmt., at 85–89 (discussing multitude of factors taken into consideration by trial judges in adjudicating motions to withdraw guilty pleas before sentencing, ultimately noting that many states place final decisions within sound discretion of trial judges).
guilty pleas may be withdrawn. In 1973, the Pennsylvania Supreme Court addressed what constitutes a fair and just reason for plea withdrawal in Commonwealth v. Forbes, which is now considered Pennsylvania’s seminal decision concerning pre-sentence guilty plea withdrawal motions. Under the standard for plea withdrawals developed in Forbes and later extended by the Pennsylvania Supreme Court in Commonwealth v. Randolph, criminal defendants do not need to offer an explanation or pertinent facts to support their plea withdrawal motions, but rather a bare assertion of innocence suffices to provide the requisite fair and just reason. Therefore, unless the prosecution can prove it would be prejudiced by a defendant’s plea withdrawal, defendants may withdraw their guilty pleas before sentencing by merely stating they are innocent, despite expressly contradicting their original plea taken under oath. However, while many state and federal jurisdictions follow either an identical rule of criminal procedure or some similar variation, the majority of these jurisdictions put the burden on defendants to provide either a plausible explanation of inno-

24. See Pa. R. Crim. P. 591(A) (“At any time before the imposition of sentence, the court may, in its discretion, permit, upon motion of the defendant, or direct, sua sponte, the withdrawal of a plea of guilty or nolo contendere and the substitution of a plea of not guilty.”); Commonwealth v. Forbes, 299 A.2d 268, 271 (Pa. 1973) (indicating that Pennsylvania’s Rule of Criminal Procedure was in complete harmony with prevailing ABA Standards at that time).


28. See id. at 1244–45 (holding that defendant’s testimony at withdrawal hearing that he was “not guilty” provided fair and just reason for withdrawal, despite later making other contradictory statements); Commonwealth v. Gordy, 73 A.3d 620, 629 (Pa. Super. Ct. 2013) (“Nevertheless, an assertion of innocence, even though it conflicts with a plea-hearing admission of guilt, can be raised in a motion to withdraw a guilty plea and will normally serve as a fair and just reason for pre-sentence plea withdrawal.”); Commonwealth v. Unangst, 71 A.3d 1017, 1023 (Pa. Super. Ct. 2013) (“It is settled law that a simple assertion of innocence, standing alone, is considered a fair and just reason to withdraw [a defendant’s] plea prior to sentencing.” (alteration in original) (internal quotation marks omitted)); Commonwealth v. Pardo, 35 A.3d 1222, 1229–30 (Pa. Super. Ct. 2011) (acknowledging “the well-established principle that the mere articulation of innocence is a ‘fair and just’ reason for withdrawal of a guilty plea.”); Katonka, 33 A.3d at 49 (holding that defendant’s two assertions of innocence, despite coming after prompting from prosecutor, sufficiently provided fair and just reason for plea withdrawal); Kirsch, 930 A.2d at 1285 (holding that defendant need not make “bold assertion of innocence,” but rather any assertion of innocence will suffice).

29. See Gordy, 73 A.3d at 624 (noting that proving prejudice focuses on Commonwealth’s ability to try its case, rather than on inconvenience to complainants); Kirsch, 930 A.2d at 1286 (noting that prejudice requires prosecution to affirmatively prove its ability to establish its case would be weakened if defendant were able to withdraw guilty plea).
ence or facts indicating why they should be allowed to withdraw their pleas, rather than merely accepting a bare assertion of innocence.\textsuperscript{30}

This Note argues that the \textit{Forbes} rule minimizes the significance of a guilty plea in Pennsylvania and recommends that the Commonwealth adopt an alternative approach that requires a showing of facts or explanation for the withdrawal of a guilty plea.\textsuperscript{31} Part II traces the controversial development of Pennsylvania’s jurisprudence on allowing guilty plea withdrawals before sentencing, with a particular focus on case law following the \textit{Forbes} decision.\textsuperscript{32} Part III describes recent decisions in the Pennsylvania Superior Court (Superior Court) and the current state of Pennsylvania law on guilty plea withdrawals.\textsuperscript{33} Part IV examines the jurisprudence of neighboring jurisdictions, both at a micro- and macro-level, in order to illustrate alternative methods of handling pre-sentence requests to withdraw guilty pleas.\textsuperscript{34} Part V argues that the \textit{Forbes} rule can no longer be justified by its original policy rationale and results in the wasting of scarce judicial resources.\textsuperscript{35} Part VI concludes by suggesting an alternative framework for handling pre-sentence requests to withdraw guilty pleas that more appropriately balances the competing interests.\textsuperscript{36}

\section*{II. The Turbulent Development of Guilty Plea Withdrawal Jurisprudence in Pennsylvania Since \textit{Commonwealth v. Forbes}}

Although Pennsylvania’s current jurisprudence clearly dictates that, under \textit{Forbes}, a pre-sentence assertion of innocence provides a sufficient

\textsuperscript{30} For an extended comparison of Pennsylvania’s pre-sentence guilty plea withdrawal jurisprudence with that of other jurisdictions, see \textit{infra} notes 85–138 and accompanying text.

\textsuperscript{31} For a further discussion of how the \textit{Forbes} rule reduces the significance of guilty pleas in Pennsylvania and results in the wasting of scarce judicial resources, see \textit{infra} notes 139–59 and accompanying text. For a further discussion of a suggested alternative analytical framework for pre-sentence plea withdrawal motions, see \textit{infra} notes 160–70 and accompanying text.

\textsuperscript{32} For a further discussion of the facts, holding, and rationale of \textit{Forbes}, see \textit{infra} notes 41–57 and accompanying text. For a further discussion of the development of Pennsylvania’s jurisprudence on pre-sentence guilty plea withdrawals after \textit{Forbes}, see \textit{infra} notes 58–95 and accompanying text.

\textsuperscript{33} For a further discussion of the current state of Pennsylvania law regarding the allowance of guilty plea withdrawals before sentencing, see \textit{infra} notes 85–95 and accompanying text.

\textsuperscript{34} For a further discussion of the various approaches used by courts in other jurisdictions for adjudicating pre-sentence guilty plea withdrawal motions, see \textit{infra} notes 96–138 and accompanying text.

\textsuperscript{35} For a further discussion of why the \textit{Forbes} rule can no longer be justified by its original policy rationale and results in the wasting of scarce judicial and prosecutorial resources, see \textit{infra} notes 139–59 and accompanying text.

\textsuperscript{36} For a further discussion of a suggested alternative framework for handling pre-sentence requests to withdraw guilty pleas, see \textit{infra} notes 160–70 and accompanying text.
reason for plea withdrawal, the law has not always been this clear.\textsuperscript{37} In \textit{Forbes}, the Pennsylvania Supreme Court quickly adjudicated the facts at issue and allowed the defendant to withdraw his plea; however, subsequent court decisions interpreted \textit{Forbes} as providing a blanket rule, matching Pennsylvania’s current jurisprudence.\textsuperscript{38} Yet during the late 1980s and 1990s, the Superior Court regularly evaded the dictates of the \textit{Forbes} rule and openly criticized it, going as far as expressly urging that it be overruled.\textsuperscript{39} However in \textit{Randolph}, the Pennsylvania Supreme Court not only reaffirmed that \textit{Forbes} does create a blanket rule allowing for pre-sentence plea withdrawals upon an assertion of innocence, but also vehemently criticized the Superior Court for failing to follow precedent, and in doing so set the stage for Pennsylvania’s current plea withdrawal jurisprudence.\textsuperscript{40}

A. Forbes: A Relatively Straightforward Case Creates Lasting Precedent

The Pennsylvania Supreme Court’s decision in \textit{Forbes} laid the groundwork for the state’s current jurisprudence allowing guilty pleas to be liberally withdrawn before sentencing.\textsuperscript{41} It has become a point of contention whether the Pennsylvania Supreme Court actually intended to create such a broad rule from its \textit{Forbes} ruling.\textsuperscript{42} Still, the \textit{Forbes} decision has had a lasting impact on Pennsylvania’s jurisprudence regarding guilty plea with-
drawals, and has separated Pennsylvania’s approach from a majority of neighboring state and federal courts.\textsuperscript{43}

In \textit{Forbes}, the defendant Robert Forbes pleaded guilty to numerous crimes in connection with the 1969 death of a woman in Philadelphia.\textsuperscript{44} The trial court conducted an on the record guilty plea colloquy, after which it expressed satisfaction that the defendant’s pleas were “voluntarily and understandingly made.”\textsuperscript{45} Roughly two months after his original plea, Forbes sought to withdraw his plea, stating: “I don’t want to plead guilty to nothing I didn’t do.”\textsuperscript{46} At a subsequent hearing, held approximately two months later, defendant Forbes abandoned his request to withdraw his plea.\textsuperscript{47} It later came to light that his defense counsel threatened to withdraw from the case if he were to proceed with his plea withdrawal motion.\textsuperscript{48} Nevertheless, the trial court proceeded with Forbes’s original plea and sentenced him to life imprisonment.\textsuperscript{49} On appeal, Forbes argued that the trial court erred in failing to grant his original plea withdrawal request made before sentencing.\textsuperscript{50}

After holding that counsel’s threat to withdraw rendered Forbes’s abandonment of his plea withdrawal request involuntary, the Pennsylvania Supreme Court then turned to the issue of pre-sentence guilty plea withdrawals generally.\textsuperscript{51} The court began its analysis by noting that although

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\item \textsuperscript{43} For a further discussion of subsequent cases built on the foundation of precedent started in \textit{Forbes} and expanding upon its holding, see \textit{infra} notes 71–95 and accompanying text. For a further discussion on how the \textit{Forbes} rule differentiates Pennsylvania’s guilty plea withdrawal jurisprudence from that of other jurisdictions, see \textit{infra} notes 85–138 and accompanying text.
\item \textsuperscript{44} \textit{See Forbes}, 299 A.2d at 269 (noting that defendant pleaded guilty to murder, burglary, aggravated burglary, larceny, receiving stolen goods, and conspiracy).
\item \textsuperscript{45} \textit{See id.} (discussing trial court’s compliance with Pennsylvania Rule of Criminal Procedure 319(a), which requires that on record colloquies are conducted before admitting guilty pleas of defendants). It should be noted that Pennsylvania Rule of Criminal Procedure 319(a) has been renumbered as Pennsylvania Rule of Criminal Procedure 590. \textit{See Pa. R. Crim. P.} 590.
\item \textsuperscript{46} \textit{See Forbes}, 299 A.2d at 269 (noting that Forbes’s indications of his desire to withdraw his plea came after three judges were empaneled to handle case). After defendant Forbes expressed his desire to withdraw his plea, the court continued the matter until a hearing could be held on his request. \textit{See id.}
\item \textsuperscript{47} \textit{See id.} at 269–70 (noting that trial court panel then scheduled degree of guilt hearing for one week later).
\item \textsuperscript{48} \textit{See id.} at 270 (concluding, after testimony during degree of guilt hearing, that defendant only abandoned his plea because of defense counsel’s threat to withdraw from case).
\item \textsuperscript{49} \textit{See id.} (noting that defendant’s sentence was for first degree murder charge and that his sentence was suspended for all other charges).
\item \textsuperscript{50} \textit{See id.} (arguing that defendant’s efforts to withdraw his guilty plea were obstructed by his counsel’s threat to withdraw).
\item \textsuperscript{51} \textit{See id.} (“These circumstances rendered involuntary appellant’s decision to abandon his withdrawal request and continue with his original guilty plea. What plea to enter is a decision which must be made voluntarily and intelligently, [b]y the accused.”). Additionally, the court emphasized that appellant was only sixteen years old and appeared confused throughout the proceeding. \textit{See id.} at 271.
\end{itemize}
there is no absolute right to withdraw a guilty plea, requests made before sentencing should be liberally allowed.\textsuperscript{52} The court then laid out the framework for handling guilty plea withdrawal requests as follows:

Thus, in determining whether to grant a pre-sentence motion for withdrawal of a guilty plea, ‘the test to be applied by the trial courts is fairness and justice.’ If the trial court finds ‘any fair and just reason’, withdrawal of the plea before sentence should be freely permitted, unless the prosecution has been ‘substantially prejudiced.’\textsuperscript{53}

The court did not elaborate further on what constitutes a fair and just reason, but it noted that the “efficient administration of criminal justice” was an important policy rationale supporting the liberal allowance of plea withdrawals.\textsuperscript{54}

After laying out this general framework, the court quickly decided—with seemingly little difficulty and limited factual analysis—that the trial court should have allowed Forbes to withdraw his guilty plea.\textsuperscript{55} The ease with which the Pennsylvania Supreme Court came to a decision on these particular facts is perhaps most clearly exhibited by its statement: “Obviously, appellant, by this assertion of innocence—so early in the proceedings—offered a ‘fair and just’ reason for withdrawal of his plea.”\textsuperscript{56} Notably, the court did not proffer a blanket rule that any assertion of innocence provides a per se fair and just reason for plea withdrawal; rather, it quickly adjudicated these unique facts where fairness required that Forbes be able to withdraw his plea.\textsuperscript{57}

\textsuperscript{52} See id. (emphasizing that defendant Forbes requested to withdraw his plea well before sentencing was set to occur). While the court’s statement that plea withdrawals should be liberally allowed before sentencing essentially restated the corresponding Pennsylvania Rule of Criminal Procedure, it cited several Third Circuit cases and the American Bar Association’s Project on Minimum Standards for Criminal Justice. See id. at 271 (citing United States \textit{ex rel.} Culbreath v. Fundle, 466 F.2d 730 (3d Cir. 1972); United States v. Young, 424 F.2d 1276 (3d Cir. 1970); United States v. Stayton, 408 F.2d 559 (3d Cir. 1969); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 2.1(b) (Approved Draft, 1968)).

\textsuperscript{53} Id. (citation omitted) (noting that this view is in “complete harmony” with prevailing ABA Minimum Standards for Criminal Justice).

\textsuperscript{54} See id. (quoting United States v. Young, 424 F.2d 1276, 1279 (3d Cir. 1970)) (explaining that liberal withdrawal rule reduces number of appeals that claim pleas were not knowingly and voluntarily made, avoids difficulties of handling such claims, and ensures defendants are not denied their right to trial unless they clearly waive it).

\textsuperscript{55} See id. at 272 (“Applying these standards to the facts presented, it must be concluded that the trial court should have allowed withdrawal of appellant’s guilty plea. Appellant stated, as his reason for the request . . . prior to adjudication and sentence, ‘I don’t want to plead guilty to nothing I didn’t do.’”).

\textsuperscript{56} Id. (stating in addition that record revealed no indication that prosecution would be prejudiced by withdrawal of Forbes’s plea).

\textsuperscript{57} See Commonwealth v. Cole, 564 A.2d 203, 207–08 (Pa. Super. Ct. 1989) (en banc) (McEwen, J., concurring) (“It has long been my position that the Su-
However, subsequent decisions from the Pennsylvania Supreme Court fueled the notion that a pre-sentence assertion of innocence always constitutes a fair and just reason for plea withdrawal under *Forbes*.58 The Superior Court, however, provided the first express statement that an assertion of innocence before sentencing constitutes a per se fair and just reason for plea withdrawal.59 Likewise, in the early 1980s, the Superior Court continued to recognize that *Forbes* mandated that any assertion of innocence must be considered a per se fair and just reason to allow a guilty plea to be withdrawn.60

**B. The Superior Court Fights Back: Ongoing Criticism and Movement Away from the Forbes Rule**

In the 1980s and 1990s, the continued validity of the *Forbes* rule became unclear because the Superior Court strongly criticized its rationale and displayed reluctance to follow precedent.61 Generally, the Superior Court often looked for any distinguishing factor it could find to avoid applying the *Forbes* rule and having to allow defendants to withdraw their pleas.62 Some Superior Court judges argued that *Forbes* did not actually preclude Court in [*Forbes*] . . . did not proclaim as a principle, applicable to all such presentence motions, that the assertion of innocence is per se a ‘fair and just’ reason to permit withdrawal of a guilty plea.”).

58. *See Commonwealth v. Santos*, 301 A.2d 829, 831 (Pa. 1973) (stating generally that any trial court abuses its discretion by not allowing guilty pleas to be freely withdrawn before sentencing unless prejudice would inure to prosecution); Commonwealth v. Woods, 307 A.2d 880, 881–82 (Pa. 1973) (holding that appellant’s pre-sentence assertion of innocence, though four months after pleading guilty, obviously provided fair and just reason for withdrawal of his plea). *But see Woods*, 307 A.2d at 883 (Pomeroy, J., dissenting) (“If we mean that ‘any fair and just reason’ will support a withdrawal (provided no substantial prejudice to the Commonwealth), that must mean something other than a complete retraction of everything the defendant had previously stated under oath in response to meticulous questioning.”).

59. *See Commonwealth v. Boofer*, 375 A.2d 173, 174 (Pa. Super. Ct. 1977) (“An assertion of innocence is a ‘fair and just reason’ for permitting withdrawal of a guilty plea. Under these circumstances, the lower court’s denial of the request for withdrawal was an abuse of discretion.” (citations omitted)).


61. For a further discussion of the Superior Court’s heavy criticism and reluctance to follow the *Forbes* rule throughout the 1980s and 1990s, see *infra* notes 62–70 and accompanying text.

62. *See, e.g.*, Commonwealth v. Turiano, 601 A.2d 846, 853 (Pa. Super. Ct. 1992) (“The Siren song of the *Forbes* standard lures criminal defense attorneys into the false hope that the guilty plea colloquy does not for all practical purposes finalize the proceedings, only to dash these hopes on the rocks of our reluctance to
mandate that all assertions of innocence be considered a per se fair and just reason for withdrawal, but instead posited that Forbes left room for trial judges to weigh the totality of the circumstances and determine if a defendant’s assertion of innocence was credible.\footnote{See Cole, 564 A.2d at 206 (‘‘Under the circumstances of this case, the bald assertion of innocence appearing in appellant’s petition did not constitute a fair and just reason for allowing appellant to withdraw his plea of guilty.”).} Other panels of the Superior Court bemoaned the fact that the Forbes rule diminished the gravity of the guilty plea colloquy, which was supposed to be a solemn admission of guilt.\footnote{See Commonwealth v. Miller, 639 A.2d 815, 819 (Pa. Super. Ct. 1994) (noting that facts suggested defendant’s plea withdrawal efforts were attempting to play “fast and loose” with guilty plea process); Commonwealth v. Iseley, 615 A.2d 408, 414 (Pa. Super. Ct. 1992) (“Appellant’s assertion of innocence at this late stage smacks of little other than a self-serving attempt to improperly manipulate the system, and provides perhaps an apothecary to illustrate the reason for rejecting a rule which allows withdrawal under such circumstances.”); Cole, 563 A.2d at 206 (noting that allowing defendant to withdraw his plea would have allowed him to make mockery of guilty plea process).} The Superior Court made its disdain for the Forbes rule well-known and specifically argued that the increased extensiveness of the guilty plea colloquy better served the original policy goal of the Forbes rule—the efficient administration of criminal justice.\footnote{See Commonwealth v. Rish, 606 A.2d 946, 948 n.6 (Pa. Super. Ct. 1992) (“The developments in the guilty plea colloquy have successfully fulfilled the policy concerns underlying Forbes.”); Turiano, 601 A.2d at 852 (“We submit that, given the developments in the thoroughness of the guilty plea colloquy, the efficient administration of justice is no longer served by the Forbes standard.”); Cole, 563 A.2d at 206 (emphasizing that many safeguards already exist to ensure guilty pleas are voluntarily and knowingly made, thus defendants should not be able to merely recant their admissions of guilt made during extensive guilty plea colloquies).} A common complaint proffered by the Superior Court was that the Forbes rule opened the door to gamesmanship and allowed defendants to make a mockery of their guilty plea colloquy. Some Superior Court panels argued that the “manifest injustice” standard should be applied to pre-sentence withdrawal requests—the same heightened standard applied to such requests made after sentencing. Other judges advocated for an approach that would have given trial follow it.”; Cole, 564 A.2d at 206 (‘‘The Supreme Court, in either of these decisions, could well have stated—but did not—that the assertion of innocence by itself offered a ‘fair and just’ reason for withdrawal.’’); id. (Kelly, J., concurring) (“I believe that it is for the trial court to determine whether a post-guilty plea claim of innocence and the explanation for the inconsistent plea (or any other purported ‘just cause’ to withdraw a plea) are credible and genuine.”).

63. See Cole, 564 A.2d at 208 (McEwen, J., concurring) (“The Supreme Court, in either of these decisions, could well have stated—but did not—that the assertion of innocence by itself offered a ‘fair and just’ reason for withdrawal.”); id. (Kelly, J., concurring) (“I believe that it is for the trial court to determine whether a post-guilty plea claim of innocence and the explanation for the inconsistent plea (or any other purported ‘just cause’ to withdraw a plea) are credible and genuine.”).

64. See Turiano, 601 A.2d at 854 (“We should also recognize that the Forbes standard, if anything, emasculates the significance of a guilty plea colloquy and encourages defendants dissatisfied with their plea to contradict their confession of guilt sworn to under oath.”); Cole, 564 A.2d at 206 (positing that allowing defendants to withdraw guilty pleas upon bald assertions of innocence would allow them to “make a mockery of the guilty plea hearing process”).

65. See Commonwealth v. Rish, 606 A.2d 946, 948 n.6 (Pa. Super. Ct. 1992) (“The developments in the guilty plea colloquy have successfully fulfilled the policy concerns underlying Forbes.”); Turiano, 601 A.2d at 852 (“We submit that, given the developments in the thoroughness of the guilty plea colloquy, the efficient administration of justice is no longer served by the Forbes standard.”); Cole, 563 A.2d at 206 (emphasizing that many safeguards already exist to ensure guilty pleas are voluntarily and knowingly made, thus defendants should not be able to merely recant their admissions of guilt made during extensive guilty plea colloquies).

66. See Commonwealth v. Miller, 639 A.2d 815, 819 (Pa. Super. Ct. 1994) (noting that facts suggested defendant’s plea withdrawal efforts were attempting to play “fast and loose” with guilty plea process); Commonwealth v. Iseley, 615 A.2d 408, 414 (Pa. Super. Ct. 1992) (“Appellant’s assertion of innocence at this late stage smacks of little other than a self-serving attempt to improperly manipulate the system, and provides perhaps an apothecary to illustrate the reason for rejecting a rule which allows withdrawal under such circumstances.”); Cole, 563 A.2d at 206 (noting that allowing defendant to withdraw his plea would have allowed him to make mockery of guilty plea process).

67. See Turiano, 601 A.2d at 854 (recommending that all attempts to withdraw properly entered guilty pleas be adjudicated under manifest injustice standard);
courts more authority to weigh the totality of the circumstances and available evidence, and assess the credibility of a defendant’s proffered reason for withdrawal.68 Regardless, several Superior Court opinions expressly urged the Pennsylvania Supreme Court to abolish the Forbes rule.69 At the time, these decisions provided rather unclear precedent for practitioners, given the Superior Court’s heavy criticism of the Forbes rule and the Supreme Court’s silence since 1973.70

C. How Dare You Question Our Precedent: The Pennsylvania Supreme Court Scolds the Superior Court in Commonwealth v. Randolph

While Forbes is still considered the seminal case in Pennsylvania regarding pre-sentence plea withdrawals, the Pennsylvania Supreme Court’s reaffirmation of Forbes in Commonwealth v. Randolph has arguably had a more important and lasting effect on plea withdrawal jurisprudence.71 The defendant in Randolph, after confessing to committing various burglaries, pleaded guilty in open court to multiple crimes.72 The court accepted Randolph’s plea after an on the record colloquy and deferred

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68. *See* Iseley, 615 A.2d at 414 (contending that approach allowing trial judges to evaluate plea withdrawal motions in light of totality of surrounding circumstances “would more wisely serve reason, not to mention the citizenry, without intruding upon the fundamental rights of those defendants who present a valid basis for withdrawal”); *Cole*, 563 A.2d at 208 (McEwen, J., concurring) (suggesting that trial courts should “consider the totality of the circumstances reflected by the record, and that a pre-sentence assertion of innocence may compose the required ‘fair and just reason’ provided that the totality of circumstances reflected by the record does not establish otherwise.”); *id.* (Kelly, J., Concurring) (opining that trial courts should have discretion to decide whether post plea claims of innocence or other explanations for withdrawal motions are credible).

69. *See*, e.g., Rish, 606 A.2d at 948 n.6 (noting court’s agreement with colleagues who had suggested Forbes rule should be overturned in light of extensive guilty plea colloquies better serving rules underlying policy goals); Turiano, 601 A.2d at 854 (“[W]e urge that our Supreme Court reverse the standard set forth in Forbes and subsequent cases . . . . “).

70. *See* Turiano, 601 A.2d at 855 (“The Forbes standard, as perhaps this case indicates, is a trap for lawyers not thoroughly acquainted with our reluctance to adhere to it.”); *Cole*, 563 A.2d at 206 (defying Forbes rule and holding that under specific circumstances of case at hand, bald assertion of innocence would not suffice to provide requisite fair and just reason for plea withdrawal).

71. For a further discussion of the facts, holding, and rationale of Randolph, see *infra* notes 72–84 and accompanying text. For a further discussion of the lasting impact of Randolph on subsequent Pennsylvania Superior Court jurisprudence, see *infra* notes 85–95 and accompanying text.

72. *See* Commonwealth v. Randolph, 718 A.2d 1242, 1242 (Pa. 1998) (noting specifically that defendant pleaded guilty to thirteen counts of burglary, one count of aggravated assault, and one count of carrying firearms without license).
sentencing to a later date.\textsuperscript{73} On the day scheduled for sentencing, the defendant’s counsel informed the court that the defendant now wished to withdraw his guilty plea.\textsuperscript{74}

After the trial court questioned Randolph as to why he wished to withdraw his plea, he stated that he was not guilty of the crimes to which he originally pleaded guilty.\textsuperscript{75} After questioning the defendant, the trial court decided to deny his motion to withdraw his guilty plea, and proceeded to sentence him to twenty-one to forty-two years of incarceration.\textsuperscript{76} During a subsequent hearing held to supplement the record for appeal, Randolph indicated that the major reason he pleaded guilty was because of the advice of his counsel.\textsuperscript{77} At this hearing, the defendant admitted that he was not innocent of all the burglary charges, but out of the thirteen burglary charges, he had only committed four or five of them.\textsuperscript{78} On appeal, the Superior Court affirmed the trial court’s withdrawal denial under the rationale that “appellant should not be permitted to withdraw his guilty pleas by stating ‘I am not guilty of some of the crimes’ when his plea is supported by an extensive colloquy where he expressly admitted guilt.”\textsuperscript{79}

After discussing the \textit{Forbes} decision in great detail, the Pennsylvania Supreme Court proceeded to address the instant circumstances.\textsuperscript{80} The court labeled the Superior Court’s rationale as “spurious,” given that Randolph clearly asserted his innocence during his initial hearing in front of the trial court.\textsuperscript{81} The \textit{Randolph} court then proceeded to expressly declare that the court had never abandoned or altered the \textit{Forbes} rule and held

\begin{footnotesize}
\textsuperscript{73} See id. (noting that trial court informed defendant that if he wanted to withdraw his plea he should do it before sentencing because his right to do so would be severely limited after sentencing).
\textsuperscript{74} See id. (observing that defense counsel made this motion despite noting that he did not think plea withdrawal was in defendant’s best interests).
\textsuperscript{75} See id. at 1243 (including that defendant also claimed he gave his original confessions under duress because police were withholding medical treatment from him until he answered their questions).
\textsuperscript{76} See id. (detailing trial court’s focus on fact that defendant was in good health when he expressly admitted his guilt in open court during original guilty plea colloquy).
\textsuperscript{77} See id. (specifying that defendant pinpointed representations made by his counsel in regards to potential sentences he could receive after trial).
\textsuperscript{78} See id. (noting that defendant only admitted his partial guilt for first time on cross examination).
\textsuperscript{79} Id. at 1244 (quoting Commonwealth v. Randolph, No. 00683 PHL 96, slip op., at 9 (Pa. Super. Ct. Sept. 16, 1996) (noting that Superior Court acknowledged that it is bound by \textit{Forbes}, but distinguished instant circumstances on basis of defendant’s partial admittance of guilt).
\textsuperscript{80} See id. at 1243–44 (discussing facts and holding of \textit{Forbes}). For a further discussion of the facts, holding, and rationale of \textit{Forbes}, see supra notes 41–57 and accompanying text.
\textsuperscript{81} See Randolph, 718 A.2d at 1244–45 (suggesting that given liberal standard articulated in \textit{Forbes}, defendant’s partial admission of guilt should not have defeated his withdrawal request).
\end{footnotesize}
that Randolph should have been able to withdraw his plea after his initial request.\footnote{82. See id. at 1245 (“We wish to make it clear that we do not now, nor have we ever, abandoned, altered or modified the standard articulated in Forbes regarding a defendant’s ability to withdraw a guilty plea prior to sentencing.”).}

In addition to its reaffirmation of a strict Forbes rule, the Randolph court also offered a stinging rebuke to the Superior Court for its reluctance to follow the Forbes rule:

Consequently, we are troubled, to say the least, by the Superior Court’s cavalier disregard of the Forbes standard, which appears to be motivated not by the facts of this case, but instead by the Superior Court’s steadfast disagreement with this Court’s rationale set forth therein. . . . [T]he Superior Court [has] noted its reluctance to follow Forbes and its desire to abandon the standard set forth therein based upon its belief that the standard has become obsolete. We take this opportunity to admonish the Superior Court that it is obligated to apply and not evade our decisions. It is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court.\footnote{83. Id. (emphasis added) (citation omitted).}

Superior Court jurisprudence since this stinging rebuke suggests that this harsh criticism may have had an even stronger effect on the Superior Court’s subsequent jurisprudence than the reaffirmation of the Forbes rule itself.\footnote{84. See, e.g., Commonwealth v. Kirsch, 930 A.2d 1282, 1285 (Pa. Super. Ct. 2007) (“Although it is apparently an extremely unpopular rule with prosecutors and trial courts, since Forbes, case law has continuously upheld an assertion of innocence as a fair and just reason for seeking the withdrawal of a guilty plea.” (citing Commonwealth v. Randolph, 718 A.2d 1242 (Pa. 1998))).}

III. THE SUPERIOR COURT LEARNS ITS LESSON: THE CURRENT STATE OF PRE-SENTENCE PLEA WITHDRAWAL JURISPRUDENCE IN PENNSYLVANIA AFTER COMMONWEALTH V. RANDOLPH

Since Randolph was decided in 1998, the Superior Court has consistently reiterated that it must follow the Forbes rule and in many respects has extended the Forbes rule even further.\footnote{85. For a further discussion of recent Pennsylvania jurisprudence on pre-sentence guilty plea withdrawals and extension of the Forbes doctrine, see infra notes 86–95 and accompanying text.}

The Superior Court has made it clear that a defendant need not make a bold assertion of innocence to qualify as a fair and just reason for withdrawal, but rather, any assertion of innocence will suffice.\footnote{86. See Kirsch, 930 A.2d at 1285 (holding that trial court erred by denying defendant’s motion to withdraw his plea for failing to make bold assertion of innocence); Commonwealth v. Clinger, 833 A.2d 792, 795 (Pa. Super. Ct. 2003) (holding that defendant’s statement that he felt he did not commit criminal conspiracy was sufficient expression of innocence to constitute fair and just reason for plea withdrawal under Forbes).} It has also developed difficult standards to meet
in order for the prosecution to prove that it would be prejudiced by a defendant’s withdrawal.\footnote{See Commonwealth v. Gordy, 73 A.3d 620, 624 (Pa. Super. Ct. 2013) (stressing that prejudice prong focuses on Commonwealth’s ability to try its case, not inconvenience to complainants); Kirsch, 930 A.2d at 1286 (holding that to show prejudice, prosecution must show that it has become more difficult to prove its case due to events subsequent to defendant’s plea withdrawal request).} However in \textit{Commonwealth v. Tennison},\footnote{969 A.2d 572 (Pa. Super. Ct. 2009).} the Superior Court appeared to once again call into doubt the central thrust of the \textit{Forbes} rule, that any assertion of innocence constitutes a per se fair and just reason for withdrawal.\footnote{See id. at 578 (holding that denial of plea withdrawal motion is proper when evidence available to trial court belies reason offered by defendant for withdrawal).} Although the \textit{Tennison} decision appeared to openly circumvent the dictates of \textit{Forbes}, the Superior Court later backtracked by stating that \textit{Tennison} had to be limited to its unique facts.\footnote{See Commonwealth v. Katonka, 33 A.3d 44, 48 (Pa. Super. Ct. 2011) (en banc) (asserting that \textit{Tennison} court limited its holding to that case’s specific, unique facts). The \textit{Katonka} court also indicated that the trial court in the case at hand, which denied the defendant’s motion to withdraw his plea, erred by relying specifically on the line of reasoning employed in \textit{Tennison}. See id. at 49.}

The Superior Court has recently stated that trial courts are not allowed to make credibility determinations as to a defendant’s assertion of innocence at the motion to withdraw stage.\footnote{See Gordy, 73 A.3d at 629 (“[A] credibility determination as to innocence is not a proper basis for rejecting a pre-sentence request to withdraw a plea.”); Commonwealth v. Unangst, 71 A.3d 1017, 1022 (Pa. Super. Ct. 2013) (“[T]he trial court was not permitted to make a determination regarding the sincerity of Appellant’s unambiguous claims that he did not commit theft or reckless endangerment.”); Katonka, 33 A.3d at 49 (“[T]he trial court undertook the same type of analysis condemned by the Supreme Court in \textit{Randolph}, i.e., rendering a credibility determination as to the defendant’s actual innocence.”).} Additionally, the Superior Court recognized that while appellate review of this issue is under an abuse of discretion standard of review, such discretion is automatically abused when defendants proffer their innocence and the trial court refuses to find a fair and just reason for withdrawal.\footnote{See Commonwealth v. Pardo, 35 A.3d 1222, 1227 (Pa. Super. Ct. 2011) (“An abuse of discretion exists when a defendant shows any ‘fair and just’ reason for withdrawing his plea absent ‘substantial prejudice’ to the Commonwealth.”). The \textit{Pardo} court proceeded to reaffirm “the well-established principle that ‘the mere articulation of innocence is a fair and just reason’ for withdrawal of a guilty plea.” Id. at 1229–30.}

One recent decision has indicated that it is an abuse of discretion for a trial court to conclude that a defendant’s withdrawal efforts are simply aimed at playing games with the system.\footnote{See Unangst, 71 A.3d at 1022 (“[A]ny time a defendant moves to withdraw a guilty plea prior to sentencing, he could be accused of engaging in a dilatory tactic to avoid sentencing. Thus, if we were to permit this type of reasoning . . . we . . . , the trial court would have been correct to determine that the defendant’s request was simply an abuse of discretion.”).} In another recent Superior Court decision, the court discussed the importance of the \textit{Forbes} rule in protecting the core constitu-
tional right to trial—a justification that was never before raised in *Forbes* and its progeny. 94 Ultimately, *Forbes, Randolph*, and subsequent Superior Court cases all strongly establish that defendants in Pennsylvania may withdraw their guilty pleas as an automatic right any time before sentencing, as long as no prejudice inures to the prosecution. 95

IV. A GLANCE AT PENNSYLVANIA’S NEIGHBORS: AN ABUSE OF DISCRETION STANDARD IN BOTH NAME AND SUBSTANCE

Case law from other jurisdictions reveals that the *Forbes* rule is by far the minority approach to pre-sentence plea withdrawal requests. 96 Most states operate under a rule of criminal procedure similar to Pennsylvania’s Rule 591(a), which allows withdrawal of a guilty plea for any “fair and just reason,” and have likewise developed bodies of case law interpreting the rule. 97 Federal Rule of Criminal Procedure 32(d) also closely mirrors Pennsylvania’s Rule 591(a). 98 Furthermore, in accordance with the prevailing ABA Standards, most courts look to whether the movant has provided a fair and just reason and whether the prosecution would be prejudiced by a defendant’s plea withdrawal. 99 Despite these similarities,

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94. See Gordy, 73 A.3d at 630 (chastising trial court for displaying “a dismissive attitude toward bedrock constitutional rights”).

95. For a further discussion of Pennsylvania case law indicating that defendants may withdraw their pleas before sentencing, essentially rendering such withdrawal an automatic right, see supra notes 41–95 and accompanying text.


97. See, e.g., *Cal. Penal Code § 1018* (West 2013) (“On application of the defendant at any time before judgment . . . the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice.”); *Me. R. Crim. P. 32(d)* (“A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed.”), *N.J. Cr. R. 3:9-3(e)* (“If at the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel . . . the court may vacate the plea or the defendant shall be permitted to withdraw the plea.”).

98. Compare *Fed. R. Crim. P. 32(d)* (“If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed . . . the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.”), *with Pa. R. Crim. P. 591(A)* (“At any time before the imposition of sentence, the court may, in its discretion, permit, upon motion of the defendant, or direct, *sua sponte*, the withdrawal of a plea of guilty or *nolo contendere* and the substitution of a plea of not guilty.”).

99. See, e.g., United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2003) (noting that under Federal Rule of Criminal Procedure 32(e), defendants must provide fair and just reason in order to withdraw any guilty plea); Chavous v. State, 953 A.2d 282, 285 (Del. 2008) (noting that under Delaware Superior Court Criminal Rule 32(d), defendants seeking to withdraw guilty pleas have burden of proving
most courts depart from Pennsylvania’s approach in interpreting what constitutes such a “fair and just reason” for plea withdrawal and give trial judges more discretion to weigh the credibility of an assertion of innocence when deciding on a motion by considering the totality of the circumstances.100

A. A Macro-Level View: Pennsylvania’s Per Se Approach to Plea Withdrawals Is an Outlier

A brief glance at the jurisprudence of neighboring jurisdictions reveals that in the majority of such forums, unlike Pennsylvania, a bare assertion of innocence is not sufficient in itself to allow defendants to withdraw their guilty pleas before sentencing.101 In fact, the vast majority of jurisdictions put the burden on the moving defendant to proffer a plausible theory of innocence that is buttressed by facts of record.102 Strikingly, fair and just reason for doing so); State v. Malivo, 98 P.3d 285, 287 (Haw. Ct. App. 2004) (observing generally that under Hawaii Rule of Penal Procedure 32(d), “[t]he court should grant the motion if the defendant has presented a fair and just reason for his request and the State has not relied upon the plea to its substantial prejudice”); State v. Watkins, 672 S.E.2d 43, 50 (N.C. Ct. App. 2009) (asserting that defendants are generally accorded right to withdraw guilty pleas if they can establish any fair and just reason).

100. For a further discussion of the greater amount of discretion afforded to trial judges in most other jurisdictions when adjudicating motions for pre-sentence plea withdrawal, see infra notes 101–12 and accompanying text.

101. See United States v. Chavers, 515 F.3d 722, 725 (7th Cir. 2008) (“‘[B]are protestations of innocence’ are insufficient to withdraw a guilty plea, particularly after a knowing and voluntary plea made in a thorough Rule 11 colloquy. Rather, the defendant must produce some credible evidence of his innocence.”); United States v. Brown, 250 F.3d 811, 818 (3d Cir. 2001) (“Bald assertions of innocence, however, are insufficient to permit a defendant to withdraw her guilty plea.”); United States v. Salgado-Ocampo, 159 F.3d 322, 326 (7th Cir. 1998) (“However, claims of innocence alone do not mandate permission to withdraw a plea.”) (internal quotations omitted)); United States v. Buckles, 843 F.2d 469, 472 (11th Cir. 1988) (“A mere declaration of innocence does not entitle a defendant to withdraw his guilty plea.”); White v. United States, 863 A.2d 839, 842 (D.C. 2004) (“The mere assertion of a defense is insufficient to allow withdrawal of a plea, and withdrawal will not be permitted where the defense, even if legally cognizable, is ‘unsupported by any other evidence.’”); State v. Lambert, 775 A.2d 1140, 1142–43 (Me. 2011) (“The mere presence of the assertion of innocence ‘does not necessarily entitle a defendant to withdraw his plea of guilty.’”); State v. Munroe, 45 A.3d 348, 356 (N.J. 2012) (noting that requirement of colorable claim of innocence requires more than “a bare assertion of innocence”).

102. See Chavers, 515 F.3d at 724 (“Because the defendant’s statements at the plea colloquy are presumed to be true, the defendant bears a heavy burden of persuasion in showing that such a fair and just reason exists. A defendant faces an uphill battle in seeking to withdraw a guilty plea after a thorough plea colloquy.”) (citation omitted)); Brown, 250 F.3d at 818 (explaining that defendants seeking to withdraw their pleas must point to facts of record supporting their claims of innocence and must provide reasonable explanations for earlier contradictory statements in plea proceedings); Salgado-Ocampo, 159 F.3d at 326 (“Assertions of innocence must be buttressed by facts in the record which support a claimed defense.”); People v. Breslin, 140 Cal. Rptr. 3d 906, 910 (Cal. Ct. App. 2012) (“The defendant has the burden to show, by clear and convincing evidence, that there is
these jurisdictions give trial judges a great deal more discretion to weigh the credibility of the statements presented by such movants and to observe the totality of the relevant circumstances and evidence in ruling on such withdrawal motions.103

While observing this key difference, it is important to emphasize that Pennsylvania courts review trial court rulings on plea withdrawal motions for abuse of discretion.104 Yet under *Forbes*, any discretion is essentially

103. See *Buckles*, 843 F.2d at 472 (“The good faith, credibility and weight of a defendant’s assertions in support of a motion under Rule 32(d) are issues for the trial court to decide.”); *Breslin*, 140 Cal. Rptr. 3d at 910 (“The decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court.”); *White*, 863 A.2d at 842 (“The judge is permitted to compare the two conflicting versions of events, and to credit one over the other. As with other credibility determinations entrusted to the trial court, we defer to the trial judge’s assessment.”); *State v. Guileau*, 52 So. 3d 310, 312–13 (La. Ct. App. 2010) (“The withdrawal of a guilty plea is within the broad discretion of the trial court, and is subject to reversal only if that discretion is abused or arbitrarily exercised.”); Commonwealth v. Hunt, 900 N.E.2d 121, 124 (Mass. App. Ct. 2009) (stating that motions to withdraw guilty pleas are addressed to sound discretion of trial judges and will not be disturbed absent manifestly unjust decision); *Munroe*, 45 A.3d at 356 (“The authority to grant a plea withdrawal is vested in the sound discretion of the court.”); *Jacob*, 942 N.Y.S.2d at 628 (“The decision as to whether to permit a defendant to withdraw a previously entered plea of guilty rests within the sound discretion of the court and generally will not be disturbed absent an improvident exercise of discretion.”); Jackson v. State, 273 P.3d 1105, 1111 (Wyo. 2012) (emphasizing that decisions on whether to allow defendants to withdraw guilty pleas are entirely discretionary); see also Alperin, supra note 96, § 4 (“[V]irtually all the cases . . . either expressly or impliedly recognize that a defendant does not have an absolute right to withdraw a plea of guilty . . . prior to sentencing, but that the granting of such a motion is discretionary with the trial court. . . .”)

abdicated the moment movants assert their innocence, unless there is a
clear showing that the prosecution would be prejudiced by withdrawal of
the defendant’s plea. Indeed, very few jurisdictions take a comparable
approach to Pennsylvania, which essentially allows defendants to withdraw
their pleas as an automatic right. New Jersey courts in particular have
expressly emphasized that liberality in allowing withdrawal motions before
sentencing does not mean the trial judge must completely abdicate all
discretion.

The majority approach in other jurisdictions exhibits that, while a de-
fendant’s assertion of innocence is an important factor to consider, such
an assertion should not itself be dispositive. In fact, a colorable claim of
innocence is most often one of several important factors that are all con-
sidered together when ruling on a defendant’s motion to withdraw a guilty
plea. The high courts of both New Jersey and Maine, along with the

guilty plea prior to sentencing should be freely permitted for any fair and just
reason . . . there is no absolute right to withdraw such a plea, and we will not
disturb the trial court’s decision in such a matter absent an abuse of discretion.”
(citations and internal quotation marks omitted)).

dissenting) (asserting that while withdrawal motions are nominally reviewed for
abuse of discretion, Pennsylvania Supreme Court’s rule simultaneously takes away
any such trial judge discretion once defendants assert their innocence).

has the right to withdraw a guilty plea up until the time the trial judge pronounces
a sentence.”); Justus v. Commonwealth, 645 S.E.2d 284, 289 (Va. 2007) (“[T]he
withdrawal of a guilty plea should not be denied in any case where it is in the least
evident that the ends of justice will be subserved by permitting not guilty to be
pleaded in its place.” (internal quotation and citation omitted)).

In addition, several state jurisdictions sentence defendants immediately after
their pleas are entered, thus avoiding the pre-sentencing versus post-sentencing
distinction addressed by the states referred to in this article, and only adopting one
uniform standard for plea withdrawal. See, e.g., People v. Feldman, 948 N.E.2d
1094, 1097 (Ill. App. Ct. 2011) (noting that defendant entered negotiated guilty
plea on November 14, 2008 and was sentenced that same day); State v. Hughes,
758 N.W.2d 577, 579 (Minn. 2008) (noting that defendant pleaded guilty to one
count of robbery on March 19, 2004 and was then sentenced in accordance with
his plea); Sherrod v. State, 784 So. 2d 256, 258 (Miss. Ct. App. 2001) (observing
that defendant pleaded guilty to robbery and assault on March 13, 1997 and was
immediately sentenced to two consecutive ten year terms).

107. See, e.g., Munroe, 45 A.3d at 355–56 (“[L]iberality in exercising discretion
does not mean an abdication of all discretion and, accordingly, any plea-with-
drawal motion requires a fact-specific analysis.” (internal quotations and citations
omitted)).

108. See United States v. Santiago-Miranda, 654 F.3d 130, 136 (1st Cir. 2011)
(describing several important factors to consider in adjudicating plea withdrawal
motions, one of which was whether defendants present “a serious claim of actual
innocence”); White, 863 A.2d at 842 (“Although a claim of innocence is an im-
portant factor in the court’s determination of whether it will allow a defendant to
withdraw a guilty plea, this claim is not dispositive.” (internal quotations omitted)).

109. See United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001) (noting that
whether defendant has made assertion of innocence is only one prong of three-
factor test in evaluating such motions to withdraw); State v. Lambert, 775 A.2d
1140, 1142 (Me. 2011) (noting that defendant’s assertions of innocence consti-
United States Court of Appeals for the D.C. Circuit, have pointed out the fundamental problem with treating an assertion of innocence as being dispositive, specifically stating that such a legal standard would make plea withdrawal an automatic right. Other courts, including the Eleventh Circuit Court of Appeals, have noted that making withdrawal an automatic right would fail to provide due deference to the other competing interests arising in the context of plea withdrawals: the rights of victims to move on from traumatic incidents and the judicial system’s interest in finality. Whatever the reasoning of the various state and federal courts, a review of these authorities reveals that the Forbes rule makes Pennsylvania’s approach to pre-sentence plea withdrawals quite the outlier.

B. A Micro-Level View: Case Studies of Noteworthy Approaches to Pre-sentence Plea Withdrawal Requests in Other Jurisdictions

The sheer number of jurisdictions that handle pre-sentence plea withdrawal motions differently than Pennsylvania is in itself striking, yet a deeper substantive look at these different approaches perhaps best highlights some viable alternatives to the Forbes rule. Both the New Jersey constituted one prong of four-factor test defendant must satisfy in order to withdraw guilty plea); *Munroe*, 45 A.3d at 356 (listing four-factor test defendants must meet in order to be able to withdraw their guilty pleas, one of which was “whether the defendant has asserted a colorable claim of innocence”); State v. Phelps, 329 S.W.3d 436, 447 (Tenn. 2010) (holding that “[w]hether the defendant has asserted and maintained his innocence” is one of five non-exclusive factors to be weighed in adjudicating plea withdrawal motions).

110. See United States v. Barker, 514 F.2d 208, 221 (D.C. Cir. 1975) (“Were mere assertion of legal innocence always a sufficient condition for withdrawal, withdrawal would effectively be an automatic right. There are few if any criminal cases where the defendant cannot devise some theory or story which, if believed by a jury, would result in his acquittal.”); *Lambert*, 775 A.2d at 1143 (“[W]here mere assertions of legal innocence always a sufficient condition for withdrawal, withdrawal would effectively be an automatic right.”); State v. Slater, 966 A.2d 461, 468 (N.J. 2009) (noting that if defendants did not have to present plausible theories of innocence supported by facts of record, “trial judges would automatically be required . . . to grant plea withdrawal motions, and would be stripped . . . of any discretion in the matter.” (internal quotations omitted)).

111. See United States v. Buckles, 843 F.2d 469, 472–73 (11th Cir. 1988) (“Guilty pleas would be of little value to the judicial system if a defendant’s later conclusory assertion of innocence automatically negated his plea.”); *Slater*, 966 A.2d at 467 (discussing important competing interests of state, victims, and defendants arising in context of motions to withdraw guilty pleas).

112. Compare Commonwealth v. Kirsch, 930 A.2d 1282, 1285 (Pa. Super. Ct. 2007) (“Although it is apparently an extremely unpopular rule with prosecutors and trial courts, since Forbes, caselaw has continuously upheld an assertion of innocence as a fair and just reason for seeking the withdrawal of a guilty plea.” (citing Commonwealth v. Randolph, 718 A.2d 1242 (Pa. 1998))), with *Brown*, 250 F.3d at 818 (holding that defendants will not be permitted to withdraw their guilty pleas upon bald assertions of innocence), and *Munroe*, 45 A.3d at 356 (requiring defendants to proffer more than bare assertions of innocence).

113. For a further macro-level discussion of how the jurisprudence of a majority of state and federal courts significantly departs from Pennsylvania’s Forbes rule.
Supreme Court and the United States Court of Appeals for the Third Circuit employ non-exclusive multi-factor tests that seek to appropriately balance the important competing interests arising in the context of plea withdrawal motions.114

1. **A Short Trip Across the Border to New Jersey: State v. Slater**

The Pennsylvania courts need not look far for an alternative approach to pre-sentence guilty plea withdrawal requests. In *State v. Slater,*115 the Supreme Court of New Jersey set forth a standard that appropriately balances the competing interests raised by such motions.116 The *Slater* court adopted an approach that considers four factors in ruling on motions for plea withdrawal: 

- (1) whether the defendant has asserted a colorable claim of innocence;
- (2) the nature and strength of defendant’s reasons for withdrawal;
- (3) the existence of a plea bargain; and
- (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused.”117 The New Jersey Supreme Court has continued to provide guidance on evaluating these factors, but has reminded trial courts that each case requires a fact-specific analysis.118

In *Slater,* the defendant reached a plea agreement with the prosecution, pleading guilty to second-degree possession of a controlled substance with intent to distribute.119 Only twelve days after pleading guilty in open court, Slater filed a pro se motion to withdraw his guilty plea, stating: “I had no control over the drugs that was found in [sic] motel room therefore I should not be punished.”120 The trial court denied his motion for

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114. For a further discussion of the New Jersey Supreme Court’s application of a non-exclusive multi-factor test to pre-sentence plea withdrawal motions, see *supra* notes 96–112 and accompanying text.


116. For a further discussion of how a nonexclusive multi-factor test, like the one adopted by the New Jersey Supreme Court in *Slater,* more effectively addresses the competing interests aroused by a plea withdrawal request, see *infra* notes 160–70 and accompanying text.

117. *Slater,* 966 A.2d at 468 (explaining that these factors should be weighed and balanced in light of totality of circumstances and evidence before evaluating court).

118. See *State v. Munroe,* 45 A.3d 348, 355–56 (N.J. 2012) (noting that in close cases, scales should tip in favor of allowing defendant to withdraw plea).

119. See *Slater,* 966 A.2d at 464–65 (noting that officers found Slater in motel room when they were searching for two other men and subsequently found drugs in this motel room after Slater willingly allowed them to come inside).

120. *Id.* at 465 (internal quotation marks omitted) (noting that Slater’s motion indicated further that his brother-in-law had rented this specific motel room and brought him there). The court also noted that before Slater initially entered his plea, he expressed some dissatisfaction with his attorney, but he subsequently indicated that those problems were eventually resolved. See *id.*
plea withdrawal, noting that “changing your mind” was not a sufficient basis for plea withdrawal, and the appellate division affirmed this denial.\textsuperscript{121}

The New Jersey Supreme Court’s analysis of its four-factor balancing test in \textit{Slater} distinguishes its approach to plea withdrawal motions from Pennsylvania’s in several ways, the first of which is its express acknowledgment of the competing interests of all parties involved.\textsuperscript{122} While the court similarly noted that pre-sentence withdrawal requests should be liberally construed in favor of defendants, it emphasized that the burden rests on defendants to present plausible factual bases for such withdrawal requests.\textsuperscript{123} Unlike the prevailing standard in Pennsylvania, the \textit{Slater} court expressly stated that: “A bare assertion of innocence is insufficient to justify withdrawal of a plea. Defendants must present specific, credible facts and, where possible, point to facts in the record that buttress their claim.”\textsuperscript{124} Furthermore, unlike in Pennsylvania, New Jersey courts are encouraged to evaluate the defendant’s claim of innocence in light of evidence that was available to both parties through discovery at the time the plea was entered.\textsuperscript{125} In a similar vein, the \textit{Slater} approach tasks courts with

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\item[121.] See id. at 465–66 (adding that trial court sentenced Slater to five years in prison in accordance with his plea agreement).
\item[122.] See id. at 467 (“To begin with, a defendant’s application to retract a plea must be considered in light of the competing interests of the State and the defendant. Our case law has long recognized the important interest of finality to pleas.” (internal quotations omitted)). The Court further elaborated that: [T]he State’s strong interest . . . is in having criminal wrongdoers account and in the finality of that accounting. The victims of an offense also have an obvious interest in the finality of criminal proceedings. At the same time, defendants are entitled to fairness and protection of basic rights. \textit{Id.}
\item[123.] See id. at 467–68 (observing further that if defendants were not required to explain their requests, then trial judges would be required to grant plea withdrawal motions as matter of right and would be stripped of all discretion). The \textit{Slater} court went on to state that “[l]iberality in exercising discretion does not mean an abdication of all discretion.” \textit{Id.} at 468. The court also noted that meeting this burden must entail more than a simple change of heart and that trial courts will need to undertake a fact-specific analysis in each case to determine whether a defendant has met their burden. See id.
\item[124.] Id. at 468–69 (describing what defendants must prove to establish first factor of four-factor test, whether “the defendant has asserted a colorable claim of innocence”).
\item[125.] Compare Commonwealth v. Katonka, 33 A.3d 44, 50 (Pa. Super. Ct. 2011) (en banc) (“[E]vidence in this case, including Katonka’s confessions to the police, is not relevant in determining whether his assertion of innocence was credible.”), with \textit{Slater}, 966 A.2d at 469 (“When evaluating a defendant’s claim of innocence, courts may look to evidence that was available to the prosecutor and to the defendant through our discovery practices at the time the defendant entered the plea of guilt.”). The \textit{Slater} court noted further that: “In some cases, the proffered evidence may serve to rebut the assertion of innocence; in others, it may move a court to vacate the plea to the end that justice be done.” \textit{Slater}, 966 A.2d at 469.
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determining the nature and strength of the defendant’s reasons for withdrawal, especially in light of the record.\textsuperscript{126}

As to the third factor, whether the plea was entered as part of a plea bargain, the court suggested that this is the least important of the three factors.\textsuperscript{127} The fourth factor is, much like in Pennsylvania, whether the state would be unfairly prejudiced by the defendant’s withdrawal.\textsuperscript{128} Perhaps most importantly, \textit{Slater} indicates that even under this more balanced standard, deserving defendants can, and often do, prevail on their motions to withdraw their pleas before sentencing, as the defendant did in that particular case.\textsuperscript{129} This multi-factor test seeks to do justice while simultaneously screening for defendants who try to game the system or proffer theories of innocence that are entirely inconsistent with the evidence of record.\textsuperscript{130}

2. \textit{A Look to Pennsylvania’s Federal Courts: The Third Circuit’s Approach in United States v. Brown}

Given the similarities between Pennsylvania Rule of Criminal Procedure 591(A) and its federal counterpart governing plea withdrawal motions, the Third Circuit provides another ideal comparison to

\textsuperscript{126} See \textit{Slater}, 966 A.2d at 469–70 (providing several examples of situations where defendants have presented requisite fair and just reasons for plea withdrawal). The court also noted that the timing of the attempted plea withdrawal is an extremely important factor in determining the strength of a defendant’s assertion of innocence, emphasizing that “the longer the delay in raising a reason for withdrawal, or asserting one’s innocence, the greater the level of scrutiny needed to evaluate the claim.” \textit{Id.} at 470.

\textsuperscript{127} See \textit{id.} at 470 (noting that under New Jersey’s case law, defendants must meet heavier burden when seeking to withdraw pleas that were entered from plea bargaining process). However the New Jersey Supreme Court went on to stipulate that it “recognize[d] that the vast majority of criminal cases are resolved through plea bargains and [it does] not suggest this fact be given great weight in the balancing process.” \textit{Id.}

\textsuperscript{128} See \textit{id.} (“The critical inquiry in those and other situations is whether the passage of time has hampered the State’s ability to present important evidence.”).

\textsuperscript{129} See \textit{id.} at 471–72 (applying four-factor test to defendant’s motion to withdraw, noting that his explanation for his withdrawal request found support in evidence of record, and holding that trial court abused its discretion in denying his motion to withdraw his plea); \textit{see also} State v. Munroe, 45 A.3d 348, 359 (N.J. 2012) (applying four-factor \textit{Slater} test to defendant’s plea withdrawal motion and holding that trial court abused its discretion for failing to grant withdrawal motion, ultimately sending defendant’s case back for trial). Much of the \textit{Munroe} court’s analysis emphasized the fact that defendant Munroe’s reason for plea withdrawal, a self-defense claim, found support in the facts of record. \textit{See id.} at 358–59.

\textsuperscript{130} See \textit{Munroe}, 45 A.3d at 356 (“A court should evaluate the validity of the reasons given for a plea withdrawal with realism, understanding that some defendants will be attempting to game the system, but not with skepticism, for the ultimate goal is to ensure that legitimate disputes about the guilt or innocence of a criminal defendant are decided by a jury.”).
Pennsylvania’s jurisprudence. In *United States v. Brown*, the Third Circuit applied a much stricter standard to plea withdrawals than the Pennsylvania courts. The Third Circuit applied a three-factor test in evaluating the defendant’s motion to withdraw her plea, evaluating “(1) whether the defendant asserts her innocence; (2) whether the government would be prejudiced by the withdrawal; and (3) the strength of the defendant’s reason to withdraw the plea.”

After rejecting the defendant’s first two arguments that her plea was rendered involuntary by the surrounding circumstances, the court found that her bare assertion of legal innocence was insufficient to allow her to withdraw her plea. The court then expressly stated that such bare assertions of innocence are not sufficient to permit a defendant to withdraw a guilty plea. It further elaborated that a defendant seeking plea withdrawal must point to facts on the record that corroborate their assertions of innocence and explain why a contradictory position was taken before the district court. *Brown* thus serves as an example of how applying a stricter standard of evaluation to plea withdrawal motions can filter out claims that amount to nothing more than defendants changing their minds or later realizing their dissatisfaction with a plea.

131. For a further discussion of the similarities between Pennsylvania’s rule governing plea withdrawals and its federal counterpart, see supra note 98.
132. 250 F.3d 811 (3d Cir. 2001).
133. See id. at 815 (holding that defendant Brown, who sought to withdraw her plea one week before scheduled sentencing, failed to provide fair and just reason for withdrawal).
134. Id. (requiring defendant to show reason behind motion to withdraw plea).
135. See id. at 817–18 (noting that while defendant asserted government could not prove her to be guilty, she never asserted her factual innocence to alleged crimes). Defendant Brown’s first two claims, asserting that her plea was rendered involuntary, were based on her allegations that the government both excluded exculpatory evidence and changed its theory of the case during the plea colloquy. See id. at 815–16. The court’s opinion systematically addressed these initial claims and held that there was no support in the record for either assertion. See id.
136. See id. at 818 (finding that defendant Brown failed to point to any supporting evidence of record tending to corroborate her bare assertion of innocence).
137. See id. (noting that defendant Brown failed to explain why she originally pleaded guilty before district court and never suggested that she did not illegally purchase firearms or conspire to do so).
138. See id. at 815 (“A shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty.”).
V. CRITICAL ANALYSIS: THE FORBES RULE SUBVERTS ITS ORIGINAL POLICY OBJECTIVES

The Forbes rule undermines the significance of guilty pleas in Pennsylvania courts, thwarts the policy goal of efficient administration of criminal justice, and results in the wasting of scarce judicial resources. Pennsylvania’s jurisprudence has expanded to a point where pre-sentence plea withdrawals are far more freely allowed than was likely ever intended by the state supreme court’s decision in Forbes. Much to the chagrin of victims, trial courts, and prosecutors alike, the Forbes rule continues to elevate the interests of criminal defendants above all else, rather than seeking an appropriate balance of all the competing interests.

It is crucial to recall that the underlying policy rationale that the Forbes court used to justify liberal allowance of plea withdrawals was the efficient administration of criminal justice. Ironically, the rule’s subsequent expansion has subverted this original policy goal, as a defendant’s guilty plea brings little finality to a criminal proceeding. In fact, it can be withdrawn at the defendant’s whim before sentencing. Trial courts also continue to regularly defy Forbes and deny motions for plea withdrawals in situations where there is overwhelming evidence that the defendant’s assertion of

139. For a further discussion of the negative impact the Forbes rule has on the efficiency of the criminal justice system, see infra notes 140–59 and accompanying text.

140. For a further discussion of the expansion of plea withdrawal jurisprudence after Forbes and Randolph, resulting in Pennsylvania’s modern day plea withdrawal jurisprudence, see supra notes 85–95 and accompanying text. For a further discussion of the straightforward nature of the Forbes decision and arguments that the court never intended to lay down a hard and fast rule, see supra notes 41–60 and accompanying text.


142. See Commonwealth v. Forbes, 299 A.2d 268, 271–72 (Pa. 1973) (“The liberal rule for withdrawal of a guilty plea before sentence is consistent with the efficient administration of criminal justice. It reduces the number of appeals contesting the ‘knowing and voluntariness’ of a guilty plea, and avoids the difficulties of disentangling such claims.” (quoting United States v. Young, 424 F.2d 1276, 1279 (3d Cir. 1970))).

143. See Turiano, 601 A.2d at 852 (“The Forbes standard accordingly undermines the guilty plea colloquy by giving the impression that a pre-sentence plea can be liberally withdrawn.”); see also United States v. Barker, 514 F.2d 208, 221 (D.C. Cir. 1976) (“Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant’s whim.”).
innocence is not credible, yet such rulings are routinely reversed by the Superior Court on appeal.\textsuperscript{144}

\textit{Forbes} was decided before Pennsylvania had any formal requirement for an on the record colloquy or for the inquiries made during one.\textsuperscript{145} Pennsylvania Rule of Criminal Procedure 590 now sets mandatory minimum requirements for such on the record pleas, where the trial judge must ensure there is a factual basis for the plea and that it is voluntarily and understandingly tendered.\textsuperscript{146} Requiring an extensive on the record colloquy serves the interests of efficiency in the criminal justice system better than the \textit{Forbes} rule.\textsuperscript{147} In fact, spending time and effort ensuring that guilty pleas are made both voluntarily and knowingly seems rather super-

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\item 145. See \textit{Turiano}, 601 A.2d at 852 (“[T]he essential elements of the colloquy as we know it were not molded by our Supreme Court until the mid-seventies.” (citing Commonwealth v. Willis, 369 A.2d 1189 (Pa. 1977))). However, the \textit{Turiano} court noted that “as early as 1963 there existed a lenient rudimentary requirement in our Commonwealth that pleas be taken in open court and that a judge ascertain whether the plea was knowingly and understandingly tendered . . . .” \textit{Id.}

\item 146. See Commonwealth v. Cole, 564 A.2d 203, 206 (Pa. Super. Ct. 1989) (en banc) (“The entry of a guilty plea is a protracted and comprehensive proceeding wherein the court is obliged to make a specific determination after extensive colloquy on the record that a plea is voluntarily and understandingly tendered.”) The \textit{Cole} court then proceeded to list several mandatory inquiries that a trial judge must make of the defendant before accepting a guilty plea. See \textit{Id.} at 206–07. For a further discussion of the specific inquiries that trial judges are currently required to make before accepting a guilty plea under Pennsylvania Rule of Criminal Procedure 590, see supra note 5 and accompanying text.

\item 147. See \textit{Turiano}, 601 A.2d at 852 (“[T]he developments in the guilty plea colloquy have so successfully fulfilled the policy concerns underlying \textit{Forbes} that the standard itself is obsolete. An extensive guilty plea colloquy undoubtedly is more effective in conserving judicial resources than the \textit{Forbes} standard.”); Commonwealth v. Rish, 606 A.2d 946, 948 n.6 (Pa. Super. Ct. 1992) (“We note that we are in agreement with many of our colleagues who have expressed dissatisfaction with the standard set out in \textit{Forbes}. The developments in the guilty plea colloquy have successfully fulfilled the policy concerns underlying \textit{Forbes}.”); \textit{Cole}, 564 A.2d at 208 n.1 (McEwen, J., concurring) (“Such a colloquy not only insures that the plea is voluntarily and understandingly entered, but also enables more perceptive study, in the event that the accused subsequently seeks to withdraw the guilty plea, of whether ‘fair and just reason’ to withdraw the plea has been presented.”).
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fluorous when defendants can later withdraw their pleas at will. Thus, the *Forbes* rule wastes scarce judicial resources on a procedure that is anything but final. The continued resistance of trial courts toward following the *Forbes* rule in situations where doing so would defy common sense leads to further judicial resources being squandered on numerous appeals challenging such determinations. Furthermore, in an era of tight state budgets, limited state prosecutorial resources are often stretched thin by a policy of freely allowed plea withdrawals.

The current *Forbes* rule has also skewed the legislative intent behind both the original ABA Standard and the corresponding Pennsylvania Rule of Criminal Procedure. The ABA Standard, upon which the *Forbes* rule is based, seeks to appropriately balance the defendant’s right to a jury trial with the judicial system’s interest in finality.

148. See *Turiano*, 601 A.2d at 852 (“Judicial resources, additionally, are expended every time a defendant is given a colloquy, which can be quite extensive. The *Forbes* standard thus results in the expenditure of precious time on a procedure that is not, for all intents and purposes, final.”); Commonwealth v. Isley, 615 A.2d 408, 414 (Pa. Super. Ct. 1992) (noting that state’s criminal dockets are already too overburdened to allow pleas to be withdrawn a second time).

149. For a sampling of recent cases displaying the reluctance of several trial courts to follow the *Forbes* rule, causing them to deny withdrawal motions, see *supra* note 144. The number of appeals contesting trial court denials of withdrawal motions is surely much greater than this sampling indicates however, as roughly 95% of Pennsylvania Superior Court decisions take the form of unpublished memorandum decisions. See Admin. Office of the Pa. Courts, Dep’t of Research & Statistics, 2012 Caseload Statistics of the Unified Judicial System of Pennsylvania 5 (July 24, 2013), available at http://www.pacourts.us/assets/files-setting-768/file-2598.pdf?cb=52fe30 (providing that 4,612 of the 4,889 (94%) Pennsylvania Superior Court decisions filed in 2012 were unpublished memorandum decisions, while only 277 (6%) were published opinions); Admin. Office of the Pa. Courts, Dep’t of Research & Statistics, 2011 Caseload Statistics of the Unified Judicial System of Pennsylvania 5 (Mar. 1, 2012), available at http://www.pacourts.us/assets/files-setting-768/file-1764.pdf?cb=1fe78a (providing that 4,879 of the 5,157 (95%) Pennsylvania Superior Court decisions filed in 2011 were unpublished memorandum decisions, while only 278 (5%) were published opinions); see also 210 Pa. Cons. Stat. Ann. § 65.37 (West 1990) (noting that publication decisions require approval of all judges sitting on panel for particular case).

150. See, e.g., State v. Slater, 966 A.2d 461, 471 (N.J. 2009) (noting difficulties inherent in assembling witnesses and preparing prosecution for trial and concluding that “it is neither fair nor just to compel the State to repeat this procedure as to the same defendant when the first trial is terminated by the defendant’s own guilty plea given freely and understandingly.” (quoting State v. Herman, 219 A.2d 413, 416 (N.J. 1966))). But see Commonwealth v. Kirsch, 930 A.2d 1282, 1287–88 (Pa. Super. Ct. 2007) (asserting that plea withdrawals simply result in negation of favorable break to prosecution, and withdrawals force prosecution to do what it would have been required to do all along—prove its case).


152. See id. (“Standard 14-2.1 accommodates these competing values by allowing presentence withdrawal of pleas ‘for any fair and just reason’ but providing
statutory construction of Pennsylvania Rule of Criminal Procedure 591, stating that “[a]t any time before the imposition of sentence, the court may, in its discretion, permit . . . the withdrawal of a plea of guilty,” it hardly seems that the legislature intended to create such an automatic right to withdrawal.\(^{153}\) Likewise, if the Pennsylvania Supreme Court had originally wanted to create a rule where any assertion of innocence before sentencing automatically provides a fair and just reason for plea withdrawal, it would have expressly said so in Forbes, rather than quickly disposing of the simple facts at hand.\(^{154}\)

The rule calling for liberal allowance of plea withdrawals intended to give trial courts discretion rather than force them to completely ignore relevant evidence.\(^{155}\) However, the Forbes rule, as presently interpreted, seriously undermines the significance of guilty pleas by allowing defendants to routinely contradict their sworn statements.\(^{156}\) The rule has

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\(^{153}\) PA. R. CRIM. P. 591(A) (emphasis added). The comment accompanying this rule also expressly states that trial judges have the discretion to decide that a defendant has failed to present a fair and just reason for plea withdrawal. See id. cmt. (“If the court finds that there is not a fair and just reason, then the motion should be denied, and the court should proceed to sentencing.”).

\(^{154}\) See Commonwealth v. Cole, 564 A.2d 203, 208 (McEwen, J., concurring) (discussing opinion that Forbes court did not lay down hard and fast rule applicable to all pre-sentence withdrawal motions). Judge McEwen opined:

The Supreme Court found that “fair and just reason” was presented in those benchmark cases only by the assertion of innocence together with the fact that it was made so early in the proceedings. The Supreme Court, in either of these decisions, could well have stated—but did not—that the assertion of innocence by itself offered a “fair and just” reason for withdrawal.

Id.

\(^{155}\) See id. (“The admonition of Forbes and Woods that a presentence request to withdraw a guilty plea be ‘construed liberally’ in favor of the accused, is not a direction to blithely ignore the obvious, or to heedlessly abandon reason.”). For a further discussion of how the text of Pennsylvania Rule of Criminal Procedure 591(A) calls for trial judges to exercise their discretion in ruling on plea withdrawal motions, see supra note 153 and accompanying text.

\(^{156}\) See Commonwealth v. Turiano, 601 A.2d 846, 854 (Pa. Super. Ct. 1992) (“We should also recognize that the Forbes standard, if anything, emasculates the significance of a guilty plea colloquy and encourages defendants dissatisfied with their plea to contradict their confession of guilt sworn to under oath.”); Cole, 564 A.2d at 207 n.6 (“As it pertains to a presentence motion to withdraw, it diminishes
opened the door to gamesmanship where defendants attempt to abuse the automatic right to withdraw their pleas.\textsuperscript{157} The \textit{Forbes} rule also allows defendants to further terrorize their victims by withdrawing their pleas and moving to trial after victims already sought closure by approving a plea deal. This risk is particularly acute in the context of rape and sexual assault cases.\textsuperscript{158} Ultimately, the \textit{Forbes} rule can lead to some genuinely head scratching results: a trial judge presiding over a withdrawal motion cannot consider the evidence of record or surrounding circumstances in making a determination and therefore defendants whose subsequent assertions of innocence are completely and utterly contradicted by the record can still withdraw their pleas by merely stating, “I am innocent.”\textsuperscript{159}

the gravity of the entry of a guilty plea . . . to allow the plea to be withdrawn prior to sentencing upon a bald assertion of innocence.”); \textit{id.} at 208 (Kelly, J., concurring) (“Otherwise, a disingenuous incantation of the words ‘I now claim I am innocent’ by judicial alchemy would become magic words with which to evade the legitimate requirement of ‘just cause’ for withdrawal of the plea.”).

\textsuperscript{157.} \textit{See} Commonwealth v. Kirsch, 930 A.2d 1282, 1289 (Pa. Super. Ct. 2007) (McEwen, J., concurring) (“[A]s I see it, appellant’s assertion of innocence was but a contrived ploy, tantamount to the incantation of ‘magic words,’ all of which, in my view, should fall short of a fair and just reason to warrant the withdrawal of the guilty plea.”); Commonwealth v. Iseley, 615 A.2d 408, 413–14 (Pa. Super. Ct. 1992) (asserting that \textit{Forbes} rule was not meant to encourage “gamesmanship and cyclical manipulation” that would result if defendants could withdraw their guilty pleas multiple times); \textit{Cole}, 564 A.2d at 207 n.6 (discussing gamesmanship encouraged by \textit{Forbes} rule and noting that defendant in this particular case attempted to use plea withdrawal strategically to prevent prosecution from obtaining key witness). The \textit{Iseley} court noted further that the “[a]ppellant’s assertion of innocence at this late stage smacks of little other than a self-serving attempt to improperly manipulate the system, and provides perhaps an apotheosis to illustrate the reason for rejecting a rule which allows withdrawal under such circumstances.” \textit{Iseley}, 615 A.2d at 414.

\textsuperscript{158.} \textit{See} Commonwealth v. Gordy, 73 A.3d 620, 628 (Pa. Super. Ct. 2013) (noting that trial court denied defendant’s withdrawal motion and stated its belief that complainant sexual assault victims were being “abused by the legal system”); Commonwealth v. Mosley, 423 A.2d 427, 430 (Pa. Super. Ct. 1980) (“Rape is one of the most, if not the most, psychologically devastating crimes committed. [The trial court], in [its] desire to protect the defendant’s interests, has unjustifiably ignored the victim.”). The \textit{Mosley} court proceeded to further elaborate on how victims’ interests are often subverted by an approach freely allowing plea withdrawals in cases involving sexual assault victims:

The justice system protects us all from violence. Defendants must not be permitted to recruit the justice system to further harm their victims. This case illustrates the actual harm that our courts can inflict on a victim of crime by application of a contrived and purely formal analysis of the ‘rights’ of the defendant unrelated to the ultimate interests and stakes at risk. The lower court has ‘protected’ a speculative interest of the defendant to the harm of the hapless victim whose protection is the first aim of criminal justice.

\textit{Id.} at 430 (discussing trial court’s allowance of plea withdrawal despite psychiatric testimony suggesting that victim was emotionally unstable and may commit suicide if forced to relive brutal rape she suffered by testifying at trial).

\textsuperscript{159.} For a further discussion of Pennsylvania case law indicating that trial judges may not consider evidence of record, the surrounding circumstances, or
VI. BALANCING THE COMPETING INTERESTS: A SUGGESTED ALTERNATIVE APPROACH TO WITHDRAWAL MOTIONS

The time has come for the Pennsylvania Supreme Court to reevaluate the *Forbes* rule because its current application continues to defy goals of both efficiency and finality in the criminal justice system. A glance at neighboring federal and state jurisdictions reveals that Pennsylvania clings in lonely fashion to the notion that a bare assertion of innocence should justify plea withdrawal. Perhaps more importantly, the jurisprudence of these neighboring courts and the criticism of past members of Pennsylvania’s judiciary provide common sense solutions to this important issue.

Pennsylvania should adopt the following four-factor test for evaluating plea withdrawal motions: (1) whether the defendant has made a colorable assertion of innocence; (2) whether the defendant’s assertion contradicts the record or finds support in it; (3) the length of time between entry of the plea and the motion to withdraw; and (4) whether withdrawal would unfairly prejudice the prosecution. The first two factors reflect the judgment that a bare assertion of innocence should not suffice to allow for plea withdrawal, and that defendants should be required to proffer a plausible basis for any assertion of innocence and draw support from facts of record. Moreover, trial judges must be able to consider the totality of the circumstances and make credibility determinations in ruling on these motions. The third factor reflects the idea that if a make credibility determinations when ruling on a plea withdrawal motion, see *supra* note 91 and accompanying text.

160. *See Turiano*, 601 A.2d at 852 (asserting that *Forbes* rule results in pleas that bring little finality to criminal proceedings, despite abundance of time spent on ensuring that guilty pleas are knowingly and understandingly tendered); Weaver, *supra* note 4, at 273 (explaining that major goal of plea bargaining—efficient administration of criminal justice—cannot be accomplished if pleas are subject to open second-guessing at whim of defendants); *see also* State v. Smullen, 571 A.2d 1305, 1309 (N.J. 1990) ("All plea-bargaining jurisprudence recognizes the important interest of finality to pleas.").

161. For a further discussion of the large amount of states that give their trial judges significantly more discretion than Pennsylvania judges have in ruling on plea withdrawal motions, see *supra* notes 96–112 and accompanying text.

162. For a further discussion of past Pennsylvania Superior Court jurisprudence advocating for a more balanced approach than the *Forbes* rule, see *supra* notes 61–70 and accompanying text. For a further discussion of a suggested alternative approach to the *Forbes* rule incorporating these Superior Court opinions and the case law of other state and federal jurisdictions, see *infra* notes 163–70 and accompanying text.

163. For a further discussion of why a non-exclusive four-factor test for plea withdrawal motions better serves the competing policy interests aroused by pre-sentence plea withdrawal motions, see *infra* notes 164–70 and accompanying text.

164. For a detailed discussion of the numerous jurisdictions that require defendants attempting to withdraw their pleas to proffer a plausible theory of innocence supported by facts of record, see *supra* note 102 and accompanying text.

165. *See United States v. Nostratis*, 321 F.3d 1206, 1211 (9th Cir. 2003) (noting that in ruling on plea withdrawal motions, district courts are free to credit
defendant seeks to withdraw a plea soon after it is entered, the plea was likely entered into hastily, whereas withdrawal motions occurring closer to the scheduled sentencing date more often reflect strategic decisions or changes of heart. 166 Finally, the fourth factor would remain largely unchanged from the current rule and would address circumstances where the prosecution’s ability to prove its case would be severely hampered. 167

This multi-factor test would stay true to the policy goal of liberally allowing pre-sentence plea withdrawals, by permitting defendants with a remotely reasonable assertion of innocence to withdraw their pleas and proceed to trial. 168 Yet this standard would also allow trial judges to deny withdrawal motions that are completely unsupported by the record, or smack of buyer’s remorse and gamesmanship. 169 Such an approach
would allow trial courts to appropriately exercise more discretion and give due deference to the competing interests of defendants’ rights and the efficient administration of criminal justice, while simultaneously providing concrete, measurable criteria to prevent a large disparity of outcomes.\footnote{170}

\section{Conclusion}

Pennsylvania’s 	extit{Forbes} rule essentially gives criminal defendants the automatic right to withdraw guilty pleas before sentencing, absent a clear showing of prejudice to the prosecution.\footnote{171} While this standard seeks to protect a criminal defendant’s basic right to a trial, it undermines the important role that guilty pleas play in an overburdened criminal justice system—ensuring the efficient administration of criminal justice.\footnote{172} Furthermore, it undermines the role of guilty pleas at the expense of tra-

\footnote{170}{See 	extit{Iseley}, 615 A.2d at 413 (asserting that approach allowing trial judges to weigh totality of circumstances in handling plea withdrawal motions “would more wisely serve reason, not to mention the citizenry, without intruding upon the fundamental rights of those defendants who present a valid basis for withdrawal”); 	extit{Rowe, supra} note 169, at 685 (“[B]y setting out a non-exhaustive and multi-factor test for determining when ‘any fair and just reason’ has been presented, the Tennessee Supreme Court correctly limited trial court discretion in this matter without completely eliminating it.”). Much of 	extit{Rowe}’s article discusses the Tennessee Supreme Court’s handling of this identical issue when faced with it as a matter of first impression. \textit{See generally} 	extit{Rowe, supra} note 169.

\footnote{171}{See, e.g., 	extit{Commonwealth v. Randolph}, 718 A.2d 1242, 1244–45 (Pa. 1998) (holding that trial court abused its discretion by denying defendant’s plea withdrawal motion when defendant offered reason that he was not guilty, despite later admissions that he may have only committed some of burglaries charged); 	extit{Commonwealth v. Forbes}, 299 A.2d 268, 272 (Pa. 1973) (holding that defendant’s assertion of innocence soon after his plea was entered obviously constituted fair and just reason for plea withdrawal).

\footnote{172}{See 	extit{Commonwealth v. Turiano}, 601 A.2d 846, 854 (Pa. Super. Ct. 1992) (observing that 	extit{Forbes} rule severely diminishes significance of guilty pleas and suggests to defendants that pleas can be freely withdrawn at any point); 	extit{Cole}, 564 A.2d at 207 n.6 (noting that 	extit{Forbes} rule diminishes gravity of guilty pleas and allows criminal defendants to make mockery of plea process); \textit{id.} at 208 (Kelly, J., concurring) (“Such a construction of our Supreme Court’s precedents would constrain trial courts to reward rather than sanction the most disingenuous of such claims, and the most brazen of perjuries.”); 	extit{Weaver, supra} note 4, at 273 (noting generally that when plea agreements are readily open to second guessing, that policy goal of such agreements—efficient administration of justice—is severely undermined).}
matized victims who have given their blessing to plea agreements, in order to move on from traumatic crimes.\footnote{173} The Pennsylvania Supreme Court should reevaluate the continued vitality of this one-sided rule and adopt a non-exhaustive multi-factor test that allows plea withdrawals where a defendant’s assertions do not contradict the record, while still maintaining trial court discretion to deny motions that smack of strategic gamesmanship or attempts to abuse victims.\footnote{174} This multi-factor test would provide a common sense solution that appropriately balances the truly important competing interests raised by plea withdrawal motions.\footnote{175}

\footnote{173. For a further critique of how the Forbes rule overlooks the interests of victims in its one-sided focus on the rights of criminal defendants, see supra notes 141, 158 and accompanying text.}

\footnote{174. For a further discussion of the advantages of adopting a non-exclusive multi-factor approach to addressing plea withdrawal motions, see supra notes 160–70 and accompanying text.}

\footnote{175. See State v. Slater, 966 A.2d 461, 471–72 (N.J. 2009) (stating that motions to retract guilty pleas must be analyzed in light of states’ interest in finality, victims’ interest in closure, and criminal defendants’ fundamental rights and protections).}
THE FIFTH CIRCUIT BURES INTRASTATE ECONOMIC PROTECTIONISM IN ST. JOSEPH ABBEY v. CASTILLE

ANTONIOS ROUSTOPOULOS*

“[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”

I. INTRODUCTION

For many, nothing embodies the American Dream more than the freedom to pursue economic opportunities of one’s choosing. In recent decades, state and local governments have imposed arbitrary and protectionist licensing requirements that threaten this version of the American Dream in many occupations. Although states require the licensing of certain professionals—doctors, lawyers, and emergency responders—to protect citizens from physical harm or malpractice, the proliferation of protectionist licensing laws has increased tremendously over the last half-century. One possible explanation for this increase is the rise of special

* J.D. Candidate, 2015, Villanova University School of Law. I would like to thank my colleagues on the Villanova Law Review for their diligent work and support. I would also like to thank Professor Lanctot for her helpful comments and insight. Lastly, I would like to thank my parents and grandparents—who came to the United States chasing the American Dream—for their continued love and support.

1. Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).
4. See Morris M. Kleiner & Alan B. Krueger, The Prevalence and Effects of Occupational Licensing: 48 BRIT. J. OF INDUS. REL. 676, 678 (providing statistics from Department of Labor and U.S. Census showing increase of licensure from five percent of American work-force in 1950s to twenty-nine percent by 2006); Simon,
interest groups that seek to stifle competition in their respective industries.\footnote{5}

Protectionist licensing legislation bars competitors from entering the market, raises prices, and ultimately harms consumers.\footnote{6} Three recent cases centering on the funeral industry have allowed courts to consider Fourteenth Amendment challenges to protectionist licensing laws that favor a few industry groups at the expense of consumers and potential competitors.\footnote{7} After analyzing the constitutionality of similar licensing


\footnote{5.}{\textit{See Roger V. Abbott, Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?}, 62 Cath. U. L. Rev. 475, 499–500 (2013) (“Where interest groups are able to obtain a competitive advantage by lobbying for special privileges, and where the costs created by those privileges are distributed broadly, the rationally ignorant voter is unlikely to even know about, let alone fight against, protectionist regulations.”); \textit{see also Milton Friedman, Capitalism and Freedom} 139 (1962) (stating that legislatures pass many licensing laws on behalf of “producer groups” and noting absurdity of licenses for occupations such as “dealers in scrap tobacco,” “tile layers[,] and potato growers”; cf. Merrifield v. Lockyer, 547 F.3d 978, 991 (9th Cir. 2008) (concluding that California pest control licensing scheme was designed to “favor economically certain constituents at the expense of others similarly situated”); Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002) (“[W]e invalidate only the . . . naked attempt to raise a fortress protecting the monopoly rents that [one industry participant] extract[s] from consumers.”).

\footnote{6.}{\textit{See St. Joseph Abbey v. Castille}, 712 F.3d 215, 226 (5th Cir. 2013) (“[Granting one marketplace participant] an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices.”). \textit{But see Powers}, 379 F.3d at 1213 n.10 (noting debate in funeral industry over whether increased competition in casket sales market will decrease overall funeral costs when funeral homes can simply raise other fees to make up difference). Indeed, the funeral industry has been scrutinized by federal regulators because of the risk that funeral home owners may use deceptive practices when selling their services to grieving families. \textit{See Funeral Industry Practices}, 47 Fed. Reg. 42,260, 42,260 (Sept. 24, 1982) (codified at 16 C.F.R. § 453) \textit{[hereinafter Funeral Rule]} (noting that funeral is third largest expenditure for many consumers after house and car). Uncompetitive in-state markets for funeral services allowed funeral homes to take advantage of consumers by increasing prices and bundling services, forcing consumers to buy services they may not have wanted. \textit{See id. (listing practices by funeral providers that restrict “consumer’s ability to make informed, independent choices”). Because state funeral licensing boards could not be trusted to change these practices due to their domination by funeral directors, the Federal Trade Commission promulgated a rule that prevented funeral homes from forcing consumers to buy bundled services and required them to provide an itemized price list for each service provided. \textit{See id.} at 42,289 (“The effects of current industry practices on funeral consumers are sufficiently serious that action is warranted now.”).

\footnote{7.}{For a discussion of how protectionist laws in the funeral industry have been challenged under the Fourteenth Amendment, see \textit{infra} notes 63–122 and accompanying text. The Fourteenth Amendment provides, in pertinent part:

\textit{No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive...}
laws, the Sixth and Tenth Circuits differed on whether protection of an intrastate industry may survive substantive due process and equal protection challenges.\(^8\) In the midst of this split, the Fifth Circuit was faced with a similar challenge of a protectionist licensing law in the funeral industry.\(^9\)

In this most recent case, \textit{St. Joseph Abbey v. Castille},\(^{10}\) the Fifth Circuit held that a Louisiana law requiring casket retailers to obtain a funeral director’s license was unconstitutional.\(^{11}\) In doing so, the Fifth Circuit sided with the Sixth Circuit’s decision in \textit{Craigmiles v. Giles},\(^{12}\) where the court struck down a nearly identical statutory scheme and held that “privileg[ing] certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose.”\(^{13}\) In contrast, the Tenth Circuit upheld a similar Oklahoma law in \textit{Powers v. Harris},\(^{14}\) dealing a blow to economic freedom by holding that mere intrastate economic protectionism is a legitimate state interest.\(^{15}\)

This Note analyzes the development of economic substantive due process and equal protection under the Fourteenth Amendment and argues that the Fifth Circuit in \textit{St. Joseph Abbey} correctly held that mere intrastate economic protectionism is not a legitimate state interest. Part II discusses the evolution of economic substantive due process and equal protection, and provides the standard of review that is applied to constitutional challenges.\(^{16}\) Part III describes the current circuit split over intrastate economic protectionism and discusses how the Sixth and Tenth Circuits, purporting to apply the same standard of review, came to opposite conclusions.\(^{17}\) Part IV provides an overview of the facts and reasoning of \textit{St. Joseph Abbey}.

\begin{enumerate}
\item \textit{U.S. Const. amend. XIV, § 1.}
\item \textit{Compare St. Joseph Abbey, 712 F.3d at 226–27 (finding Louisiana law requiring licensing of casket retailers to be in violation of Due Process and Equal Protection clauses), and Craigmiles, 312 F.3d at 229 (finding same of nearly identical Tennessee law), with Powers, 379 F.3d at 1225 (“We hold that intrastate economic protectionism . . . is a legitimate state interest and that the [challenged law] is rationally related to this legitimate end . . . .”).}
\item For a discussion of the circuit split over whether laws that protect an intrastate industry are constitutional, see \textit{infra} notes 63–94 and accompanying text.
\item 712 F.3d 215 (5th Cir. 2013).
\item \textit{See id. at 226–27 (invalidating Louisiana licensing law).}
\item 312 F.3d 220 (6th Cir. 2002).
\item \textit{Id. at 229.}
\item 379 F.3d 1208 (10th Cir. 2004).
\item \textit{See id. at 1221 (“[F]avoring one intrastate industry over another is a legitimate state interest.”).}
\item For a discussion of the standard of review applied to challenges of protectionist state laws and an overview of economic substantive due process and equal protection, see \textit{infra} notes 27–53.
\item For a discussion of the circuit split that preceded \textit{St. Joseph Abbey}, see \textit{infra} notes 63–94 and accompanying text.
\end{enumerate}
seph Abbey. Part V argues that the Fifth Circuit was justified in protecting Louisiana casket retailers from state regulation. Part V also argues that protectionist laws should always fail rational basis review unless they reasonably further a cognizable public interest and that St. Joseph Abbey provided a workable framework for evaluating protectionist laws under a rational basis standard. Part VI concludes by emphasizing that “transparently anticompetitive” laws do not serve a legitimate governmental purpose; they protect discreet interest groups at the expense of others and therefore cannot pass even the low threshold of rational basis review.

II. THE LIFE, DEATH, AND REVIVAL OF ECONOMIC SUBSTANTIVE DUE PROCESS

Today, economic legislation that does not discriminate against suspect classes or restrict fundamental rights receives the lowest form of scrutiny when facing a constitutional challenge, but this was not always so. In the early twentieth century, before the Supreme Court articulated a two-tiered constitutional review of Fourteenth Amendment claims, laws that restricted an individual’s economic liberty drew relatively demanding scrutiny. Since the Court’s bifurcation of constitutional scrutiny, however, economic regulations have fallen squarely under the imprecise and sometimes contradictory rational basis review. This section details the

18. For a further discussion of the facts and reasoning of the court in St. Joseph Abbey, see infra notes 98–122 and accompanying text.
19. For a critical analysis of why the Fifth Circuit came to the correct conclusion in St. Joseph Abbey, see infra notes 126–56 and accompanying text.
20. For a discussion of why St. Joseph Abbey provides an excellent framework for analyzing the constitutionality of state protectionist laws, see infra notes 157–71 and accompanying text.
22. For a discussion of the applicable standard of review for protectionist legislation, see infra notes 27–37 and accompanying text.
23. For a discussion of how protectionist laws were reviewed in the early twentieth century, see infra notes 38–53 and accompanying text.
evolution of the doctrine of economic substantive due process and the ever-changing standard of review under which it falls. This section also summarizes the current state of economic substantive due process.

A. Preliminary Matters: Definitions and Standards of Review

The Due Process Clauses of the Fifth and Fourteenth Amendments protect individuals from governmental deprivation of “life, liberty, or property, without the due process of law.” The Equal Protection Clause of the Fourteenth Amendment guarantees the “equal protection of the laws” to all people within a state’s jurisdiction. Although litigants commonly combine equal protection and substantive due process claims together when challenging state licensing laws, each clause protects “distinctly different interests.”

25. For a discussion of the evolution of the doctrine of economic substantive due process and the evolving standard of review under which it falls, see infra notes 27–62 and accompanying text.

26. For a discussion of the current state of economic substantive due process, see infra notes 54–62 and accompanying text.


28. See U.S. Const. amend XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

29. See Powers v. Harris, 379 F.3d 1208, 1214–15 (10th Cir. 2004) (noting different interests that each claim represents). Substantive due process “provides heightened protection against governmental interference with certain fundamental rights and liberty interests.” Id. at 1215 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)). This protection applies “even when the challenged regulation affects all persons equally.” Id. Equal protection on the other hand, only applies when a “state treats two groups, or individuals [who are otherwise similarly situated], differently.” Id. Nevertheless, plaintiffs commonly assert both claims simultaneously and courts frequently do not distinguish between the two when reviewing a challenged law under rational basis review. See, e.g., St. Joseph Abbey v. Castille, 712 F.3d 215, 223–27 (5th Cir. 2013) (holding simply that law bore no rational relation to legitimate government interest rather than addressing
Even though each clause protects different interests, laws challenged under either one will receive “strict scrutiny” or “rational basis” review. Substantive due process claims alleging government interference with certain “fundamental rights,” trigger strict scrutiny review, whereby the government bears the burden of proving that the regulation is “narrowly tailored” to advance a “compelling state interest.” Courts apply the same strict scrutiny analysis to equal protection claims when government regulation employs a “suspect classification,” such as race or ethnicity. Laws that do not infringe on fundamental rights or employ suspect classifications are reviewed under a much more deferential rational basis stan-
Rational basis review simply requires that a law be “rationally related to a legitimate state interest.”

The Supreme Court has consistently held that laws that do not employ suspect classifications or limit fundamental rights may discriminate among groups as long as “there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” Indeed, rational basis review gives great deference to legislatures and presuming the constitutionality of laws, a presumption that plaintiffs can overcome only by showing that the law is “unreasonable or arbitrary.” The Court applies this same standard to equal protection and substantive due process claims, employing largely the same language for both.

33. See Abbott, supra note 5, at 482 (discussing levels of judicial scrutiny). The Supreme Court has also applied a flexible, “intermediate scrutiny” to “quasi-suspect” classifications based on gender and illegitimacy. See id. at 481–82 (summarizing intermediate scrutiny). This type of review is more stringent than rational basis but less stringent than strict scrutiny. See id. at 482 (describing intermediate scrutiny). Moreover, intermediate scrutiny presumes a law invalid and requires a showing that a classification is “substantially related to a significant government purpose.” See id. (same).

34. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (addressing low threshold for upholding statute against equal protection challenge when court applies rational basis review); see also Chemerinsky, supra note 24, at 694 (offering different articulations of rational basis standard).


36. See Nebbia v. New York, 291 U.S. 502, 530 (1934) (concluding that challenged law under rational basis review was not “unreasonable or arbitrary”); accord Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (“[T]he classification must be reasonable, not arbitrary.”); see also Chemerinsky, supra note 24, at 695 (discussing requirement of unreasonableness or arbitrariness); Abbott, supra note 5, at 482 n.40 (same).

37. Compare Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (noting that “a legitimate legislative purpose furthered by rational means” suffices for substantive due process under rational basis (citing Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984))), with Pennell v. San Jose, 485 U.S. 1, 14 (1988)) (explaining that laws violate equal protection only if they are “so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational” (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979))); see also Chemerinsky, supra note 30, at 73 (addressing substantive due process and equal protection jurisprudence as one unit under rational basis review).
B. Economic Substantive Due Process

The doctrine of economic substantive due process posits that the Due Process Clause protects certain liberty and property interests, such as the freedom of contract and the right to enjoy property from unnecessary government intrusion. Initially, the Supreme Court applied a fairly rigorous scrutiny to laws that restricted economic rights. Economic substantive due process enjoyed a period of broad support in the early twentieth century, but was ultimately abandoned in the late 1930s and only exists in an attenuated form today.

1. The Height of Economic Substantive Due Process and Its Fall from Grace

The height of economic substantive due process jurisprudence occurred during the “Lochner era” between 1897 and 1937. In perhaps the most noteworthy case during that period, *Lochner v. New York*, the Supreme Court rejected New York’s “unreasonable, unnecessary, and arbitrary interference with the right of the individual . . . to enter into those

38. See Black’s Law Dictionary 575 (9th ed. 2009) (defining doctrine of economic substantive due process); see also Phillips, supra note 27, at 269 (discussing history of economic substantive due process).

39. See Mugler v. Kansas, 123 U.S. 623, 661 (1887) (stating that courts must protect public from “palpable invasion of rights secured by the fundamental law”).

40. See Phillips, supra note 27, at 269–70 (discussing rise and fall of economic substantive due process).

41. See Abbott, supra note 5, at 480 (discussing history of economic substantive due process). Scholars commonly cite to the seminal case of *Allgeyer v. Louisiana* as the beginning of this era. See id. (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)). In a unanimous decision, the Court in *Allgeyer* struck down a Louisiana law on freedom of contract grounds and explicitly recognized the freedom to “enter into all contracts which may be proper, necessary, and essential” to carry out a person’s business. *Allgeyer*, 165 U.S. at 589. In doing so, the Supreme Court concluded that the Constitution protected the liberty of contract and limited the government’s power to enact economic regulations. See Bernard H. Siegan, Economic Liberties and the Constitution 111 (1980) (discussing Allgeyer). The constitutional protection of an individual’s freedom of contract died a slow death in the 1930s with its ultimate demise in *West Coast Hotel v. Parrish*, where the Court upheld a minimum wage law for women that was challenged as a restriction on the freedom of contract. See W. Coast Hotel v. Parrish, 300 U.S. 379, 398–400 (1937) (upholding minimum wage law). Scholars have observed that the Supreme Court’s about-face was influenced by the view that the freedom of contract had devolved into a tool used by powerful parties with superior bargaining power to limit the liberty of people who needed government protection. See Phillips, supra note 27, at 281 (asserting that inequalities perpetuated by abuse of economic substantive due process led to its demise). Workers, women, and others with inferior bargaining power needed the government to intervene and prevent abuses of the freedom of contract. See id. (describing rationale for abandoning strict adherence to economic substantive due process); see also West Coast Hotel, 300 U.S. at 398–99 (“The Legislature was entitled to adopt measures to reduce . . . the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition.”).

contracts . . . which may seem to him appropriate or necessary." Accordingly, the Fourteenth Amendment limited a state’s power of economic regulation to laws "relat[ing] to the safety, health, morals and general welfare of the public." In determining whether a regulation violated the Constitution, the Court asked whether the legislature furthered an interest within its power to regulate.

43. Id. at 56. In *Lochner*, the Supreme Court struck down a state law that prohibited bakery workers from working more than ten hours a day. See id. at 53 (invalidating state’s labor law). The state argued that it enacted the law to preserve the health of bakers who worked in a potentially unhealthy environment. See id. at 57 (discussing state’s proffered rationale). The Court rejected that reasoning, stating that a baker’s job may be less healthy than some occupations, but was certainly more healthy than many and did not warrant unnecessary intrusion into workers’ and employers’ freedom of contract. See id. at 59 (“We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract . . . .”).

44. Id. at 53. Even today, under rational basis review, restrictive government regulation must advance some legitimate purpose generally in the interest of some public good. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 305–06 (1976) (upholding city ordinance allowing only food cart vendors with greater than eight year tenure to operate in French Quarter and accepting preservation of touristic French Quarter as legitimate interest). The majority in *Lochner* strayed from its own standard by discounting the state’s concerns for bakers’ health. See *Lochner*, 198 U.S. at 57 (analyzing state’s proffered rationale). In doing so, the Court prioritized the freedom of contract over public health concerns. See id. at 57 (“It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract.”). Even then, people were aware of the health concerns related to working long hours in bakeries. See *People v. Lochner*, 69 N.E. 373, 382 (N.Y. 1904) (Vann, J., concurring) (recognizing shortened life expectancy for bakers and confectioners who spent long hours breathing air filled with flour and sugar particles). rev’d by *Lochner*, 198 U.S 45 (1905), overruled in part by *Ferguson v. Skrupa*, 372 U.S. 726 (1963); see also Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & L 404, 407 (2005) (discussing bakers’ exposure to flour dust and gas fumes, and tendency to contract “white lung” disease and tuberculosis). The reality of bakers’ working conditions contradicted the Court’s view of the occupation. See *Lochner*, 198 U.S. at 57 (discounting bakers’ health concerns).

45. See *Lochner*, 198 U.S. at 57 (rejecting state’s conclusion that reducing bakers’ work hours benefited public health); see also Abbott, supra note 5, at 480 (discussing *Lochner* Court’s method of evaluating legislation). Today, legislatures need not employ means that directly relate to the desired end, they need only “bear some rational relation to a legitimate interest,” an exceedingly low and murky standard. See Craigmiles v. Giles, 312 F.3d 220, 223–24 (6th Cir. 2002) (“Even foolish and misdirected provisions are generally valid if subject only to rational basis review.”). For that reason, courts and scholars have criticized the *Lochner* Court most heavily for its weighing of policy decisions and acting as a “superlegislature,” deciding on its own whether a law directly advanced a public good. See Phillips, supra note 27, at 278 (noting criticism of *Lochner* Court); *Ferguson*, 372 U.S. at 729–30 (criticizing *Lochner* Court for making policy determinations). According to the Constitution, the legislature “decide[s] on the wisdom and utility of legislation” because of its accountability to the voting public; courts may only invalidate a law for patent unconstitutionality. See *Ferguson*, 372 U.S. at 729 (“[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”). Nevertheless, courts today generally make the same inquiry, asking
By the 1950s, the Court eliminated any vestige of *Lochner*-style scrutiny of restrictive economic regulations and presumed the constitutionality of such legislation unless it was "arbitrary or capricious."46 One case in particular, *Williamson v. Lee Optical of Oklahoma, Inc.*,47 articulated a standard at the opposite end of the spectrum from *Lochner*.48 In *Williamson*, the Court considered an Oklahoma law that forbade anyone other than an optometrist or ophthalmologist from fitting lenses without a prescription.49 The law effectively precluded opticians from fitting lenses without a prescription from an optometrist or ophthalmologist.50 In upholding the law, the Court did not consider the legislature’s *actual* arguments, but instead articulated justifications that the legislature *might have* offered.51 The Court deferred to the legislature and concluded that a law need only have a conceivable rational relation to a legitimate government interest.52 Although this standard affords great deference to legislatures and is limi-

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46. See *W. Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937) (stating that Court need only decide whether enacted legislation was arbitrary or capricious); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–90 (1955) (affording great deference to legislature in determining necessity of legislation). Even before the 1950s the Court alluded to a fundamental dichotomy of rational basis review under the Fourteenth Amendment in *United States v. Carolene Products*. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 (1938) ("[L]egislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."). In a famous footnote, the Court turned away from the aggressive review of state economic regulation typical of the *Lochner* era while suggesting a more searching approach to facially discriminatory regulations. See id. at 152 n.4 (describing types of government restrictions that might warrant a more searching review). This footnote would later become the foundation for the development of strict scrutiny and rational basis review. See CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 665 (4th ed. 2013) (calling footnote 4 in *Carolene Products* "the Rosetta stone" for understanding justification for tiered level of judicial review).

47. 348 U.S. 483 (1955).

48. See id. at 487–88 ([T]he law need not be in every respect logically consistent with its aims to be constitutional.").

49. See id. at 485–86 (describing Oklahoma law).

50. See id. at 486 (noting disadvantage to opticians).

51. See id. at 487–88, 490 (justifying statute by considering reasons that legislature "might have concluded" were necessary (emphasis added)).

52. See id. at 488 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); see also *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 108–09 (2003) ("Judicial review is ‘at an end’ once the court identifies a plausible basis on which the legislature may have relied." (citing United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))).
ited only by “the Court’s power of imagination,” it still allows for the invalidation of economic legislation under rational basis review.\textsuperscript{53}

2. \textit{The Survival of Economic Substantive Due Process Today}

The Supreme Court has not invalidated a law on economic substantive due process grounds since 1936, in the twilight of the \textit{Lochner} era.\textsuperscript{54}

Lower federal and state courts, however, have increasingly considered, and in some cases, have struck down protectionist economic legislation.\textsuperscript{55}

Yet, cases in which the courts have upheld protectionist laws against substantive due process and equal protection claims far outnumber successful challenges.\textsuperscript{56}

Nonetheless, many of the courts that have overturned economic legislation on constitutional grounds have explicitly stated that

\textsuperscript{53} See Abbott, \textit{supra} note 5, at 483 (noting that rational basis gives latitude to judges); see Sanders, \textit{supra} note 21, at 669 (discussing possibility of overturning economic legislation under rational basis review after \textit{Williamson}).

\textsuperscript{54} See Morehead v. New York \textit{ex rel.} Tipaldo, 298 U.S. 587, 618 (1936) (invalidating minimum wage law for women on economic substantive due process grounds), \textit{overruled in part by Olsen v. Nebraska \textit{ex rel.} W. Reference & Bond Ass'n, 313 U.S. 236, 244 (1941). Since 1936, however, the Court has found economic legislation in violation of the Equal Protection Clause even under the minimum scrutiny of rational basis review. \textit{See, e.g.}, Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n, 488 U.S. 336, 343–46 (1989) (invalidating land taxation scheme under Equal Protection Clause for not being applied uniformly); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 882–83 (1985) (finding no legitimate state interest in imposing higher tax rate on insurance companies incorporated outside of particular state); Williams v. Vermont, 472 U.S. 12, 21–27 (1985) (holding that car-tax credit offered to state residents but denied to nonresidents did not relate to legitimate state interest). The Court’s reluctance to revisit economic substantive due process since the \textit{Lochner} era likely relates to the harsh criticism of the “activist Court” during that time period. \textit{See} Phillips, \textit{supra} note 27, at 278 (discussing criticism of \textit{Lochner} Court).

\textsuperscript{55} See Michael J. Phillips, \textit{The Slow Return of Economic Substantive Due Process}, 49 \textit{Syraucuse L. Rev.} 917, 926 (1999) (“[F]ederal and state courts have become increasingly prone to examine the substantive fairness of economic regulations . . . .”). Most of these cases are brought under Title 42, Section 1983 of the United States Code. \textit{See, e.g.}, Craigmiles v. Giles, 312 F.3d 220, 220 (6th Cir. 2002) (noting that suit was filed under Section 1983). Section 1983 reads in relevant part:

\begin{quote}
Every person who, under color of any statute . . . of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .
\end{quote}


\textsuperscript{56} See Phillips, \textit{supra} note 55, at 926 (discussing disparity between successful and unsuccessful claims).
those laws failed rational basis review because they advanced illegitimate interests, such as the mere protection of a particular intrastate industry. 57

For example, in Santos v. City of Houston, 58 the United States District Court for the Southern District of Texas considered substantive due process and equal protection challenges to a city ordinance that banned the use of jitneys. 59 The court observed that it has been “consistently held that the opportunity to pursue one’s livelihood is a constitutionally protected liberty interest, which may not be arbitrarily denied.” 60 The state defended its ban by claiming it was protecting public safety, but the court swiftly rejected that argument, pointing to the ordinance’s stated purpose: protecting streetcars from competition. 61 Accordingly, the court invalidated Houston’s ban on jitneys because it advanced an illegitimate interest and arbitrarily prevented individuals from pursuing an otherwise lawful livelihood. 62

57. See, e.g., Santos v. City of Houston, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (“The purpose of the statute was economic protectionism in its most glaring form, and this goal was not legitimate.”); cf. Wilkerson v. Johnson, 699 F.2d 325, 328–29 (6th Cir. 1983) (affirming district court ruling that city denied barber shop licensee due process to eliminate competition).


59. See id. at 603 (discussing factual background). Jitneys are small busses designed to carry passengers over a fixed route for a flat fee. See id. at 603 n.1 (defining “jitney”). The court noted that the city ordinance was the result of pressure from streetcar companies in the early 1900s. See id. (analyzing legislative history). When the city enacted the ordinance, its stated objective was “to protect streetcar companies from competition.” Id.

60. Id. at 607 (citing Cowan v. Corley, 814 F.2d 223, 227 (5th Cir. 1987)). The court noted that statutes based purely on favoritism or economic protectionism cannot survive a constitutional challenge. See id. at 607–08 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981)) (discussing unconstitutionality of protectionist legislation). Finally, the court enunciated the standard of review applied to statutes that single out a particular class or that make “distinctions in the treatment of business entities engaged in the same business activity.” See id. at 608 (“[A statute] must bear a reasonable relationship to the underlying purpose of the statute, and that purpose must be legitimate.” (emphasis added) (citing City of New Orleans v. Dukes, 427 U.S. 297, 301–05 (1976))).

61. See id. at 608 (“[T]hese alleged [objectives] were far from the minds of city officials at the time of enactment . . . .”). The city argued that the ordinance preserved the flow of traffic and prevented accidents by keeping small transportation vehicles that made frequent stops off of the street. See id. (arguing that ordinance improved traffic flow). In rejecting the city’s argument, the court delved into the ordinance’s legislative history to find the illegitimate purpose of economic protectionism. See id. at 603, 608 (discussing ordinance’s original purpose). Nevertheless, even if the court accepted the city’s safety rationale, the ordinance bore no rational relation to it because the fifteen-passenger limit did not affect traffic safety. See id. at 608 (“The record further establishes that the 15 passenger limit has no substantial relationship to traffic safety.”). Moreover, the court found that the city arbitrarily enforced the ordinance, banning jitneys but allowing the operation of other small transportation vehicles, such as airport and hotel courtesy vans. See id. (listing other similarly situated businesses permitted to operate).

62. See id. (granting plaintiff’s summary judgment motion).
III. GRAVE DISAGREEMENT: WHETHER ECONOMIC PROTECTIONISM IS A VALID STATE INTEREST

The increased scrutiny that some courts have given protectionist laws has divided federal courts. In two recent cases, the Sixth and Tenth Circuit Courts of Appeals considered the validity of a law favoring one intrastate industry over another, but arrived at opposite conclusions. This section examines how two circuit courts, purporting to apply the same rational basis standard of review, came to dramatically different rulings.

A. The Sixth Circuit Rules That Intrastate Economic Protectionism Is Not a Legitimate State Interest

In Craigmiles v. Giles, the Sixth Circuit Court of Appeals held that a Tennessee law requiring casket retailers to obtain a funeral director’s license violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment because it bore no rational relation to the state’s purported health or consumer protection justifications. After finding no rational relation to a legitimate state interest, the court explained that the Tennessee licensing law was “very well tailored” to a “more obvious illegitimate purpose”: protecting licensed funeral directors from competition in casket sales.

63. Compare Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002) (declaring protection of licensed funeral directors from competition within particular state illegitimate purpose), with Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) (finding intrastate economic protectionism legitimate state interest).

64. See Craigmiles, 312 F.3d at 224 (applying rational basis review and finding law unconstitutional); see also Powers, 379 F.3d at 1215 (applying same standard of review and finding nearly identical law constitutional).

65. For a discussion of the divergent conclusions of the Craigmiles and Powers courts, see infra notes 66–94 and accompanying text.

66. See Craigmiles, 312 F.3d at 228–29 (invalidating state licensing law). The court also briefly addressed, and then dismissed, the plaintiffs’ claim that the licensing law violated the Privileges and Immunities Clause of the Fourteenth Amendment. See id. at 229 (dismissing privileges and immunities claim). The Privileges and Immunities Clause states, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV, § 1. In dismissing the privileges and immunities claim, the court noted that the Supreme Court restricted the scope of the Privileges and Immunities Clause shortly after the ratification of the Fourteenth Amendment to “very limited rights of national citizenship.” See Craigmiles, 312 F.3d at 229. Of particular relevance, the Supreme Court specifically held that the Privileges and Immunities Clause “did not protect an individual’s right to pursue an economic livelihood against his own state.” Id. Nevertheless, the court’s dismissal of the privileges and immunities claim in Craigmiles was not fatal to the plaintiffs’ case because the equal protection and due process claims supported the district court’s findings. See id. (“Because the plaintiffs’ Equal Protection and Due Process arguments are sufficient to support the district court’s injunction, we do not reach [the Privileges and Immunities] argument.”).

67. See Craigmiles, 312 F.3d at 228 (discussing scope of licensing law). Interestingly, Tennessee did not argue that economic protectionism was a legitimate state interest. See id. at 225–28 (arguing that licensing law promoted consumer protec-
petition, the law “harm[ed] consumers in their pocketbooks.”68 Moreover, the court explained that protecting funeral directors at the expense of consumers and potential competitors was not a legitimate state interest and therefore, the law could not satisfy the highly deferential rational basis review.69

When the Tennessee legislature originally enacted the licensing law in 1951, the statutory definition of funeral directing did not include the sale of caskets.70 Twenty years later, the legislature amended the licensing law to include “the selling of funeral merchandise.”71 Under judicial review, Tennessee argued that the licensing requirement, in the context of selling funeral merchandise, was supported by public health and consumer protection justifications.72 However, the Sixth Circuit disagreed, colorfully

-68. See id. at 225 (discussing impact of law on consumers).
-69. See id. at 229 (“This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.”).
-70. See id. at 222 (recounting legislative history of Tennessee funeral director licensing law). The 1951 version of the law only contemplated “arranging of funeral ceremonies, burial, cremation, and embalming.” Id. To become a licensed funeral director in Tennessee, a person—even someone who intended to sell just caskets—was required to complete one of two paths of study: (1) a two year apprenticeship under a licensed funeral director, followed by an examination; or (2) one year of course work at an accredited mortuary school, followed by a one year apprenticeship and an examination. See id. (describing requirements of Tennessee licensing law). The curriculum at the only accredited mortuary school in Tennessee consisted of “eight credit hours in embalming, three in ‘restorative art,’ and twenty-one in ‘funeral service.’” Id. At trial, “students testified that casket and urn issues constituted no more than five percent” of the curriculum and evidence demonstrated that “[o]nly 37 of the 250 questions on the Tennessee Funeral Arts Exam concern[ed] funeral merchandising, including various casket options, FTC regulations regarding the sale of funeral merchandise, and merchandise display.” Id. The same Tennessee law also established a seven-member Board of Funeral Directors and Embalmers, which consisted of six licensed funeral directors and one person from outside the funeral industry, to administer the law. Craigmiles v. Giles, 110 F. Supp. 2d 658, 660 (E.D. Tenn. 2000) (discussing board composition), aff’d, 312 F.3d 220 (6th Cir. 2002).
-72. See id. at 225 (analyzing Tennessee’s argument supporting its licensing law). Tennessee argued that its law ensured that casket retailers properly handled corpses, led to higher quality caskets, and minimized the spread of disease from corpses. See id. (addressing public health and safety arguments). Tennessee also argued that mandatory training would increase a casket retailer’s ability to advise consumers on purchasing the right type of casket, better train retailers to accommodate grieving customers, and prevent fraud. See id. at 226–28 (describing consumer protection arguments). The court, however, rejected each of Tennessee’s
stating that Tennessee’s justifications for the amendment struck it “with ‘the force of a five-week-old, unrefrigerated dead fish,’ a level of pungence almost required to invalidate a statute under rational basis review.”

In its analysis, the Sixth Circuit relied on Supreme Court precedent that stood for two different, but related, propositions. First, the Supreme Court has “repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.” Second, the Court “has been suspicious of a legislature’s circuitous path to legitimate ends when a direct path is available.” The precedent cited by the Craigmiles court, however, did not specifically address intrastate economic legislation. The court relied heavily on one case in particular, City of Cleburne v. Cleburne Living Center, in which the Supreme Court struck down a law discriminating against the mentally

_justifications and stated that the licensing requirement “bears no rational relationship to increasing the quality of burial containers.” See id. at 226._

_73. Id. (citation omitted) (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001)). Ultimately, Tennessee’s decision to apply its licensing law to casket retailers was fatal to the law’s constitutionality. See id. at 227 (finding that legislation was suspicious). Reviewing the legislative history of the law, the court concluded that the “specific action of requiring licensure . . . appears [to be] directed at protecting licensed funeral directors from retail price competition.” Id. The court noted that although rational basis review “does not require the best or most finely honed legislation,” the law’s legislative history, combined with the state’s “weak” justifications, exposed the legislation’s true intent: the protection of a discrete industry from competition. See id. at 225, 227 (“The weakness of Tennessee’s proffered explanations indicates that the 1972 amendment adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition.”).

_74. For a discussion of the Supreme Court precedent on which the Craigmiles court relied, see infra notes 75–80 and accompanying text._


_76. Craigmiles, 312 F.3d at 227 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985))._


_78. 473 U.S. 432 (1985)._
As this author will later argue, the Sixth Circuit reached the correct conclusion—that pure economic protectionism is not a legitimate state purpose—even though it was heavily criticized by the Tenth Circuit.

B. The Tenth Circuit Rejects Craigmiles and Holds That Intrastate Economic Protectionism Is a Legitimate State Interest

In *Powers v. Harris*, the Tenth Circuit Court of Appeals upheld a similar Oklahoma law, which required casket retailers to obtain a license from the state Board of Embalmers and Funeral Directors. The court briefly considered the state’s proffered reason for the licensing requirement—consumer protection—before asserting that intrastate economic protectionism, on its own, is a legitimate state interest. To reach this conclusion, the Tenth Circuit employed an extremely deferential form of rational basis review and directly addressed the Sixth Circuit’s *Craigmiles* decision.

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79. See id. at 435 (holding that Cleburne was in violation of Equal Protection Clause).


81. See *Powers*, 379 F.3d at 1221 (finding that Oklahoma’s licensing law “constitutes a legitimate state interest”). Under the Oklahoma licensing law anyone “engaged in the sale of funeral-service merchandise” must be a licensed funeral director and operate “out of a funeral establishment.” *Id.* at 1211 (discussing OKLA. STAT. tit. 59, § 396.2(2)(d), (3), (10) (2013)). “The [Oklahoma licensing law] effectively require[d] that both a funeral director’s license and a funeral establishment license be obtained from the Board before a person or entity may lawfully sell caskets.” *Powers v. Harris*, No. 01-445-F, 2002 WL 32026155, at *11 (W.D. Okla. Dec. 12, 2002), aff’d, 379 F.3d 1208 (10th Cir. 2004). The Oklahoma law was more taxing than the law in *Craigmiles* because it required a licensed establishment to operate out of a “fixed physical location” and maintain a “preparation room” that met high standards for embalming bodies. Compare *Powers*, 379 F.3d at 1212–13 (“[A] business must have a fixed physical location, a preparation room that meets the requirements for embalming bodies, . . . and adequate areas for public viewing of human remains.”), with *Craigmiles*, 312 F.3d at 222–23 (articulating no embalming facilities requirement). Additionally, Oklahoma’s licensing law required applicants to complete sixty credit hours of undergraduate training—only a fraction of courses related to casket sales—and a one-year apprenticeship in which an applicant was required to embalm at least twenty-five bodies. See *Powers*, 379 F.3d at 1212 (describing requirements of licensing law). Finally, an applicant had to pass two examinations before obtaining a license. See *Powers*, 379 F.3d at 1212 (noting examination requirement). See OKLA. ADMIN. CODE §§ 255:10-1-2, 10-3-2 (2013) (describing requirements under licensing statute).

82. See *Powers*, 379 F.3d at 1215–21 (discussing Oklahoma’s justifications and issue of economic protectionism).

83. See *id.* at 1217–20 (discussing standard of review and addressing *Craigmiles* at length).
Although the Tenth Circuit applied the same rational basis test as the *Craigmiles* court, the Tenth Circuit emphasized that more deference should be given to the legislature. The court explained that the Supreme Court has consistently held that great deference must be given to legislatures and that courts should seek out any “conceivable reasons for validating [a state law].” Thus, the court had the freedom to not only consider the state’s proffered consumer protection justification, but could also consider on its own whether intrastate economic protectionism could be a legitimate state interest.

Of particular importance, the Tenth Circuit did not uphold Oklahoma’s licensing requirement based on a rational relation to the state’s consumer protection justification. Instead, the court considered Supreme Court precedent that, in its view, suggested that states could simply favor one intrastate industry over another. According to the *Powers* majority, the Supreme Court has “consistently held that protecting or favoring one particular intrastate industry, absent a federal constitutional or statutory violation, is a legitimate state interest.” As a result, the court articulated the view that mere intrastate economic protectionism is a valid state interest. The *Powers* court went on to criticize the *Craigmiles* court

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84. See id. at 1217–18 (addressing standard of review). The court went on to articulate three reasons why legislative deference is important. See id. at 1218 (explaining importance of deference to legislature) First, courts would “paralyze state governments” if they probed into each of their actions and continually struck down laws. See id. Second, because “the definition of the public good changes with the political winds,” courts have no place substituting their view of what is “good” for the legislature’s. See id. Third, matters of federalism require the federal courts to view and respect states as “separate sovereigns.” See id. But cf. Abbott, supra note 5, at 498–501 (discussing tendency of state legislatures to be “captured” by special interests that seek economic regulation to curb or eliminate competition).

85. *Powers*, 379 F.3d at 1217 (quoting Starlight Sugar, Inc. v. Soto, 253 F.3d 127, 146 (1st Cir. 2001)).

86. See id. at 1218 (analyzing whether states may legitimately protect intrastate businesses).

87. See id. at 1216, 1225 (upholding Oklahoma’s law under theory of legitimate interest in intrastate economic protectionism rather than in consumer protection).

88. See id. at 1218–22 (recognizing legitimate state interest in protecting intrastate industries).

89. Id. at 1220.

90. See id. at 1220–21 (discussing Supreme Court’s history of finding legitimate state interest when laws favor particular intrastate industries); see also Fitzgerald v. Racing Ass’n of Cent. Iowa, 539 U.S. 103, 110 (2003) (upholding Iowa statute taxing slot machine revenues on riverboats at lower rate than those at racetracks); Nordlinger v. Hahn, 505 U.S. 1, 18 (1992) (upholding California property taxation scheme favoring long-term property holders over new purchasers); City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976) (per curiam) (rejecting Equal Protection Clause challenge to New Orleans ordinance that prohibited food cart vendors in French Quarter but exempted vendors with continuous operations for eight or more years); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) (upholding Oklahoma statute prohibiting anyone other than optometrist or oph-
for applying a more stringent form of rational basis review when, in the Tenth Circuit’s opinion, a rational basis review calls for more deference to legislatures than the *Craigmiles* court allowed.91

In a concurring opinion, however, Judge Tymkovich disagreed with the majority’s conclusion that economic protectionism alone is a legitimate state interest.92 Judge Tymkovich asserted that instead of arbitrarily supporting one economic actor over another, the Supreme Court has “insisted that the legislation advance some public good.”93 Nevertheless, the concurrence agreed that the Oklahoma licensing law, however imperfectly, purported to advance consumer protection interests and whether it truly did was a “battle [to] be fought in the Oklahoma legislature,” not the judicial system.94

91. *See Powers*, 379 F.3d at 1223 (criticizing *Craigmiles* decision). The *Powers* court disagreed with the Sixth Circuit on three specific points. First, the *Powers* court believed that the *Craigmiles* court’s analysis focused too “heavily on the . . . actual motives of the Tennessee legislature.” *Id.* Second, the *Powers* court disagreed with the Sixth Circuit’s conclusion that protecting intrastate industries from competition is not a legitimate state interest. *See id.* (disagreeing over whether protecting intrastate industries is a legitimate governmental interest). Third, the court found the Sixth Circuit’s emphasis on the less deferential form of rational basis review found in *Cleburne* to be “misplaced.” *See id.*

92. *See id.* at 1225 (Tymkovich, J., concurring) (“Where I part company with the majority is its unconstrained view of economic protectionism as a ‘legitimate state interest.’”).

93. *Id.* at 1226. The concurrence addressed each of the Supreme Court cases that the majority cited in support of its conclusion and pointed to some “public good” that the Court believed each respective legislature was advancing. *See id.* (“None of these cases overturned the principle that the Equal Protection Clause prohibits invidious state interests; to the contrary, they ratified the principle.”). Judge Tymkovich explained that in *Williamson*, the Court accepted a consumer safety and health interest rationale “over a claim of pure economic parochialism.” *Id.* The Court in *Fitzgerald* “invoked economic development and protect[ed] the reliance interests of river-boat owners.” *Id.* In *Dukes* and *Nordlinger*, the Court invoked historical and neighborhood preservation, respectively. *See id.* (describing interests protected in *Dukes* and *Nordlinger*).

94. *Id.* at 1226–27. Although the concurrence upheld the licensing law, it suggested that the restrictions could hurt consumer interests in practice. *See id.* at 1227 (“Consumer interests appear to be harmed rather than protected . . . .”). The concurrence further stated, just as the *Craigmiles* court asserted, that general state consumer protection laws already addressed the state’s impetus for requiring casket retailers to apply for licensure. *See id.* (“[G]eneral consumer protection laws appear to be a more adequate vehicle to allow consumer redress of abusive marketing practices.”). Nevertheless, in the interests of federalism and deference to the legislature the concurrence concluded that the law was constitutional. *See id.* (concluding that license law satisfies rational basis review).
IV. Economic Liberty: Alive and Kicking in the Fifth Circuit After
St. Joseph Abbey v. Castille

In St. Joseph Abbey, the Fifth Circuit unanimously held that economic protectionism alone is not a legitimate state interest.95 The court explained that Louisiana’s licensing law, which closely resembled the statutes in Craigmiles and Powers, was enacted for the sole purpose of protecting funeral directors from competition.96 In striking down the law, the Fifth Circuit rejected Powers and joined the Sixth Circuit in defending economic liberty from arbitrary government interference.97

A. St. Joseph Abbey v. Castille: The Facts

For generations, the monks of St. Joseph Abbey made simple wooden caskets to bury their brothers.98 After losing their main source of income to Hurricane Katrina, the monks recognized that they could generate new revenue by selling their simple caskets to the public.99 Seizing this opportunity, the Abbey invested $200,000 and opened St. Joseph Woodworks.100

Shortly after the Abbey began selling its caskets, the Louisiana State Board of Embalmers and Funeral Directors (Board) ordered the Abbey to cease its casket selling operations, claiming that the business violated state

95. See St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) (“[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose . . . .”).

96. See id. at 226–27 (“The principle we protect from the hand of the State today protects [a] . . . vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as ‘economic’ protection of the rulemakers’ pockets.”).

97. See id. at 222 (declaring “mere economic protection of a particular industry” illegitimate government interest); Craigmiles v. Giles, 312 F.3d 220, 228–29 (6th Cir. 2002) (same).

98. See St. Joseph Abbey, 712 F.3d at 217 (providing history of monks at St. Joseph Abbey making caskets).

99. See id. (explaining monks’ reasons for building and selling caskets). Before Hurricane Katrina, the Abbey harvested timber on its property for income. See id. (discussing history of St. Joseph Abbey). After the hurricane destroyed the Abbey’s forested land, the monks were forced to find other sources of revenue. See id. (same). The monks noticed that public interest in their caskets increased after two bishops were buried in them in the 1990s. See id. (noting rise in consumer interest for caskets made by monks). Faced with financial distress and an apparent demand for their caskets, the monks decided to enter the casket retail business. See id. (describing St. Joseph Abbey’s entry into casket market).

100. See id. (discussing St. Joseph Woodworks business startup and operations). The monks offered simple wooden caskets in two models, both priced significantly lower than caskets sold in funeral homes. See id. (comparing St. Joseph Abbey’s casket prices to funeral home casket prices). The Abbey only constructed caskets and did not offer funeral services or prepare the deceased for burial. See id. (explaining that Abbey only constructed and sold caskets). The monks only participated in funeral services as pastors. See id. (noting monk’s limited participation in funeral services).
In Louisiana, only licensed funeral directors were permitted to sell caskets. Over the next two years, the Abbey petitioned the Louisiana legislature to exclude the retail of caskets from its licensing statute. Two bills to amend the law were drafted; although they faced no public opposition, the bills never made it out of committee.

Finding no solace in the state legislature, the Abbey sued the Board in the United States District Court for the Eastern District of Louisiana. The Abbey alleged that the Board denied the Abbey equal protection and due process under the Fourteenth Amendment by restricting intrastate casket sales to licensed funeral directors. The district court ruled for the Abbey, finding the law to be protectionist and without a rational relation to a legitimate state interest.

B. The Fifth Circuit Finds No Legitimate Interest in Economic Protectionism

On appeal, the Board argued that pure economic protection of a discrete industry is a valid state interest and, alternatively, that the law was rationally related to the state’s interest in consumer protection and public health. The Fifth Circuit first addressed the Board’s novel argument.

101. See id. at 219 (describing Board’s actions against Abbey). The nine-member Board consisted of “four licensed funeral directors, four licensed embalmers, and just one representative not affiliated with the funeral industry.” Id. According to the court, the Board’s main purpose in regulating caskets consisted of restricting intrastate casket sales to funeral homes. See id. at 218 (stating Board’s purpose in regulating caskets). Louisiana did not regulate the use of caskets in any other way. See id. at 217–18 (“[Louisiana] has no requirements for the construction or design of caskets; and does not require that caskets be sealed. Individuals may construct their own caskets . . . or purchase caskets from out-of-state suppliers via the internet. Indeed, no Louisiana law even requires a person to be buried in a casket.”).

102. See id. at 218 (acknowledging Board’s argument that only state-licensed funeral directors may sell caskets at state-licensed funeral homes). Louisiana’s license law created several hurdles for retailers to jump over before selling their caskets. See id. (outlining Louisiana statute). The statute first required a hopeful casket retailer to become a licensed funeral home with a “layout parlor” for thirty people, a display room with no less than six caskets, an arrangement room, and embalming facilities. See id. (identifying building requirements for licensed funeral homes). Second, the funeral home was required to “employ a full-time funeral director.” Id. A funeral director needed to pass thirty credit hours at an accredited college and complete an apprenticeship followed by an examination to become licensed. See id. (explaining that neither mandatory training nor examination related to caskets or burial practices).

103. See id. at 219 (discussing Abbey’s efforts to influence legislature).

104. See id. (noting attempts to amend Louisiana’s license law).

105. See id. at 220 (recounting procedural history of case).

106. See id. (discussing Abbey’s claims).

107. See id. (“[T]he district court issued judgment for the Abbey . . . finding that this brand of economic protectionism is not a legitimate state interest and finding no rational relationship between the challenged law and Louisiana’s interests in consumer protection, public health, and public safety.”).

108. See id. at 221 (recognizing Board’s alternative arguments). In arguing for a legitimate interest in the economic protection of an in-state industry, the
for unbridled power to protect a favored industry, and ultimately found that “neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose.” The court then turned to the Board’s public health and consumer protection justifications, but found no rational relation between the licensing scheme and the Board’s stated interests. Accordingly, the Fifth Circuit affirmed the district court’s ruling.

In finding intrastate economic protectionism to be an illegitimate government interest, the Fifth Circuit analyzed the Powers court’s position and the Supreme Court precedents that it used. The Fifth Circuit criticized the Powers court for overstating the proposition for which the Supreme Court cases stood. Rather than condoning pure economic protection of a specific industry, the precedents indicated that protectionism is a legitimate interest if it is incidental to furthering a legitimate public interest or the general welfare. To bolster this view, the Fifth Circuit pointed to Judge Tymkovich’s concurrence in Powers, which stated the same proposition. Without some other legitimate purpose, Louisiana Board pointed to the Tenth Circuit’s decision in Powers. See id. at 221–22 (addressing Board’s argument regarding validity of protecting discrete intrastate industry). In response, the Abbey pointed to the Sixth Circuit’s decision in Craigmiles. See id. at 222 (noting opposite outcome in two circuits). The court explained that “Craigmiles and Powers rest on their different implicit answers to the question of whether the state legislation was supportable by rational basis.” Id.

109. See id. at 222 (rejecting Board’s argument). The Board argued “that pure economic protection of a discrete industry is an exercise of a valid state interest.” Id. at 221.

110. See id. at 223–26 (finding no rational relation to consumer protection or public health interests).

111. See id. at 227 (affirming judgment of district court).

112. See id. at 221–23 (analyzing Board’s economic protection argument by reviewing Powers decision).

113. See id. at 222 (“[N]one of the Supreme Court cases Powers cites stands for that proposition.”). The Powers court believed that “the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest.” Id. (quoting Powers v. Harris, 379 F.3d 1208, 1220 (10th Cir. 2004)). The Fifth Circuit emphasized that a legislature’s efforts to protect an in-state industry must have a rational relation to some legitimate interest. See id. (noting public interest requirement for protection of in-state industries).

114. See id. (“[T]he cases [that the Powers court cites to] indicate that protecting or favoring a particular intrastate industry is not an illegitimate interest when protection of the industry can be linked to the advancement of the public interest or general welfare.”).

115. See Powers, 379 F.3d at 1226 (Tymkovich, J., concurring) (“Rather than hold that a government may always favor one economic actor over another, the Court, if anything, insisted that the legislation advance some public good.” (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955))). For a further discussion of the Powers concurrence, see supra notes 92–94 and accompanying text.
could not favor a discreet industry merely for the sake of protecting it from competition.\textsuperscript{116} 

After finding no legitimate interest in pure economic protectionism, the court turned to the Board’s consumer protection and public safety arguments.\textsuperscript{117} The Board argued that the licensing statute protected consumers because it “restrict[ed] predatory sales practices by third-party sellers” and prevented the sale of faulty caskets.\textsuperscript{118} The court thoroughly rejected this argument.\textsuperscript{119} By pointing to the undisputed facts on the re-

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\textsuperscript{116}. See St. Joseph Abbey, 712 F.3d at 222 (finding no legitimate government interest in mere economic protectionism). The Fifth Circuit concluded its analysis of economic protectionism by stating that a “post hoc perceived rationale” could support the law if it related to a legitimate interest. See \textit{id}. at 222–23 (“[E]conomic protection, that is favoritism, may well be supported by a post hoc perceived rationale . . . .”). Without a relation to some public interest or general welfare objective, protectionist statutes are merely a “naked transfer of wealth.” \textit{Id}. at 223. To illustrate this point the court described Greater Houston Small Taxicab Co. Owners Ass’n \textit{v}. City of Houston, where a Houston city ordinance favored large cab companies over small ones. See \textit{id}. (“Recently, we upheld against similar challenge a Houston taxi cab permitting scheme that disfavored small cab companies.” (citing Greater Hous. Small Taxicab Co. Owners Ass’n \textit{v}. City of Houston, 660 F.3d 235 (2012))). Although the record indicated that Houston was motivated by protectionism, the court noted that the law was upheld because it indisputably benefited consumers. See \textit{id}. (“[T]here is no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test.” (quoting Greater Hous. Small Taxicab Co., 660 F.3d at 240)). Unlike defendant Houston, the Board could not show that the Louisiana licensing statute was rationally related to a legitimate government interest regardless of its protectionist objective. See \textit{id}. (noting necessity for actual relation to legitimate interest under rational basis review).

\textsuperscript{117}. See \textit{id}. at 223–27 (addressing consumer protection and public safety arguments).

\textsuperscript{118}. See \textit{id}. at 223 (describing Board’s consumer protection argument).

\textsuperscript{119}. See \textit{id}. at 223–26 (analyzing consumer protection justification). The court explained that funeral directors’ expertise was irrelevant to Louisiana’s justification for making them the exclusive sellers of caskets because the state did not regulate the size, design, and price of caskets. See \textit{id}. at 224 (“Given that Louisiana does not . . . [impose] requirements on any intrastate seller of caskets . . . regarding casket size, design, material, or price, whatever special expertise a funeral director may have in casket selection is irrelevant to it being the sole seller of caskets.”). Additionally, the court found no evidence of significant fraud or deceptive sales practices by third-party casket retailers. See \textit{id}. at 225 (addressing how FTC declined to apply Funeral Rule to third-party casket retailers due to insufficient evidence of consumer injury). On the contrary, the FTC acknowledged that funeral homes bundling their products presents a risk that the casket prices might become excessively marked up. See \textit{id}. (discussing federal funeral home regulations). Additionally, Louisiana already regulated deceptive trade practices and unfair competition, thus, requiring licensure of casket retailers was irrelevant to protecting consumers. See \textit{id}. at 225–26 (“In short, Louisiana’s consumer protection regime reaches the sales practices of all intrastate sellers of caskets and can strike at any unfair practices . . . .”). Lastly, the court dismissed the Board’s public health and safety argument and stated that of the “rationale . . . eludes the realities of Louisiana’s regulation of caskets and burials.” \textit{Id}. at 226 (emphasis added). For example, “Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be
cord, the court explained that the consumer protection and public safety justifications were "nonsensical explanations for regulation." The Fifth Circuit could not even imagine a rational basis for restricting casket sales to licensed funeral directors. Accordingly, the court invalidated the law as a protectionist measure and put an end to "the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as ‘economic’ protection of the rulemakers’ pockets."

V. PUTTING THE NAILS IN THE COFFIN FOR PROTECTIONIST LICENSING LAWS

The Fifth Circuit was correct in striking down Louisiana’s licensing requirement for casket retailers. In its analysis, the Fifth Circuit confined itself exclusively to cases that considered purely economic regulations, while the Craigmiles court relied heavily on Cleburne—a case involving discrimination of the mentally handicapped—and drew criticism from the Powers court. As a result the Fifth Circuit has provided an exemplary framework for reviewing state occupational licensing laws.

sealed before burial, and does not require funeral directors to have any special expertise in caskets . . . .”  Id.

120. See id. at 226 (“The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation.”).

121. See id. at 227 (“The funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none.”).

122. See id. at 226–27 (invalidating Louisiana law).

123. See id. at 227 (affirming judgment of district court).

124. Compare id. at 221–23 (applying only cases involving economic regulations, such as Williamson v. Dukes, and Greater Hous. Small Taxicab Co.), with Craigmiles v. Giles, 312 F.3d 220, 227 (6th Cir. 2002) (applying Cleburne in economic protection analysis); see also Powers v. Harris, 379 F.3d 1208, 1223 (10th Cir. 2004) (finding Craigmiles’s emphasis on Cleburne misplaced); Florman, supra note 80, at 765 (noting Tenth Circuit’s criticism of Craigmiles). But see Sanders, supra note 21, at 693 (praising Craigmiles for relying on Cleburne). The Powers court also criticized the Craigmiles court for relying on cases that addressed interstate economic protectionism instead of intrastate economic protectionism. See Powers, 379 F.3d at 1219 (asserting that precedent relied on by Craigmiles court “is plainly directed at state regulation that shelters its economy from the larger national economy, i.e., violations of the ‘dormant’ Commerce Clause”). Although the Sixth Circuit reached the correct conclusion by invalidating a protectionist law that did not further a legitimate state interest, the Powers court appropriately pointed out Craigmiles’s flaws. See id. at 1218–20 (criticizing Sixth Circuit’s reasoning). However, Powers was not without its own flaws. See Jim Thompson, Powers v. Harris: How the Tenth Circuit Buried Economic Liberties, 82 DENV. U. L. REV. 585, 602 (2005) (criticizing Powers for misinterpreting precedent).

125. Compare St. Joseph Abbey, 712 F.3d at 222 (“[T]he cases indicate that protecting or favoring a particular intrastate industry is not an illegitimate interest when . . . linked to advancement of the public interest or general welfare.”), with Powers, 379 F.3d at 1220 (“[T]he Supreme Court has consistently held that protecting or favoring one particular intrastate industry . . . is a legitimate state interest.”).
A. Arbitrary Occupational Licensing Laws Suppress Competition and Ultimately Hurt Consumers

Requiring licensure in any profession raises barriers by making entry into that profession more costly.\textsuperscript{126} Raised barriers consequently stifle competition within a given field and increase prices.\textsuperscript{127} Whether intended or not, these conditions routinely coincide with licensing laws.\textsuperscript{128} Therefore, legislatures should only consider restricting entry to professions that truly affect the health, safety, or general welfare of the public.\textsuperscript{129}

\textsuperscript{126} See S. David Young, \textit{Occupational Licensing}, LIRB. ECON. \& LIBERTY (2002), http://www.econlib.org/library/Enc/OccupationalLicensing.html ("The argument in favor of licensing always has been that it protects the public from incompetents, charlatans, and quacks. The main effect, however, is simply to restrict entry and reduce competition in the licensed occupation."). Although some economists bemoan the slightest occupational regulation, many others see the value of requiring capable professionals vetted by a regulator in certain industries. \textit{Compare id.} (suggesting that occupational regulations have failed consumers), \textit{with} Kleiner \& Krueger, \textit{supra} note 4, at 2 (discussing optimistic view of licensing, perceiving "a costless supply of unbiased, capable gatekeepers and enforcers"). Exactly which occupations deserve regulation, however, is a topic of much debate as legislatures have passed protectionist licensing laws in favor of certain "pet" industries. See \textit{Powers}, 379 F.3d at 1221 ("[D]ishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."); \textit{see also} Sandefur, \textit{supra} note 2, at 1035 ("Economic protectionism, in fact, is a constant occupation of legislatures . . . .").

\textsuperscript{127} See Walter Gellhorn, \textit{The Abuse of Occupational Licensing}, 44 U. CHI. L. REV. 6, 16 (1976) ("Occupational licensing has typically brought higher status for the producer of services at the price of higher costs to the consumer . . . ."); \textit{see also} Simon, \textit{supra} note 3 (citing studies estimating additional $116 billion per year to cost of services due to occupational licensing). According to the "Cadillac effect," consumers in need of a licensed professional will either purchase the services of the best practitioners at a high price or purchase no services at all. See Young, \textit{supra} note 126 (describing Cadillac effect). As a result, consumers pay a premium for a specific service or resort to do-it-yourself methods. \textit{See id.} (discussing consumer behavior). Unsurprisingly, states with highly restrictive licensing laws in professions such as electricians and plumbers see more incidents of electrocutions and plumbing accidents because of consumers who forgo the artificially high rates for professionals and opt for do-it-yourself methods. \textit{See id.} (recounting evidence of higher consumer injury in states with restrictive licensing laws).

\textsuperscript{128} See Young, \textit{supra} note 126 ("Occupational regulation has limited consumer choice, raised consumer costs, increased practitioner income, limited practitioner mobility, and deprived the poor of adequate services . . . ."); \textit{cf.} Morris M. Kleiner \& Hwiwon Ham, \textit{Regulating Occupation: Does Occupational Licensing Increase Earnings and Reduce Employment Growth?}, FED. TRADE COMM’N 1 (June 7, 2005), http://www.ftc.gov/be/seminardocs/050515kleiner.pdf ("The granting of licenses is generally placed with state licensing boards that usually consist of individuals in the occupation and they have an understandable incentive to restrict entry.").

\textsuperscript{129} See Simon, \textit{supra} note 3 (noting certain professions such as electricians, tree trimmers, and tattoo artists should be monitored to protect people from harm); \textit{see also} \textit{Let a Thousand Florists Bloom: Uprooting Outrageous Licensing Laws in Louisiana}, INST. FOR JUST., http://www.ij.org/economic_liberty/la_florists/back grounder.html (last visited Jan. 7, 2014) [hereinafter \textit{Let a Thousand Florists Bloom}] ("R[e]gulation of our livelihoods should be limited to only those restrictions that protect public health and welfare."). \textit{But see} Friedman, \textit{supra} note 5, at 139 (lamenting licensure of occupations such as tree surgeons); \textit{see also} Young, \textit{supra} note
In the funeral industry, for example, one can draw a clear distinction between the potential hazards of operating a funeral home and selling caskets. No doubt, funeral directors that constantly come in contact with corpses can spread diseases if they do not properly handle them. Casket retailers, on the other hand, face no such concerns because, put bluntly, the retailers simply sell a box to a consumer who then takes that box to a licensed funeral home to finish the job. Arbitrarily requiring licenses of casket retailers under the guise of consumer protection and safety invariably hurts consumers by restricting competition and raising prices at a time when they are least likely to scrutinize the bill or shop around: when buying a casket for a loved one.

126 (suggesting that licensure has no effect on quality of service provided). The Fifth Circuit made the same point by requiring an occupation to have some effect on general welfare for a state to properly require licensure. See St. Joseph Abbey, 712 F.3d at 222–25 (concluding that protectionist regulations can be justified through rational relation to some public interest). The court recognized the anticompetitive effects of licensing laws and found a balance, requiring some public benefit regardless of the legislature’s intent. See id. at 223 (noting that even protectionist legislation can survive rational basis review if rationally related to legitimate governmental purpose). Moreover, the court unequivocally stated “that naked economic preferences are impermissible to the extent that they harm consumers.” Id. (quoting Greater Hous. Small Taxicab Co. Owners Ass’n v. City of Houston, 660 F.3d 235, 240 (5th Cir. 2011)).

130. See Sanders, supra note 21, at 686–87 (outlining differences between casket retailers and licensed funeral directors who are “trained in protecting the public from the effects of dead bodies”).


132. See Craigmiles, 312 F.3d at 225–26 (“There is no evidence in the record that licensed funeral directors were selling caskets that were systematically more protective than those sold by independent casket retailers.”): cf. Funeral, COSTCO WHOLESALE, http://www.costco.com/funeral.html (last visited Jan. 13, 2014) (selling funeral merchandise, including caskets, over internet); Funeral, WALMART, http://www.walmart.com/cp/Funeral/1058564 (last visited Jan. 13, 2014) (same).

133. See Craigmiles, 312 F.3d at 224 (noting that funeral home operators mark up casket prices by 250 to 600%); Regulatory Review of the FTC Funeral Rule, 73 Fed. Reg. 13,740, 13,745 (Mar. 14, 2008) (codified at 16 C.F.R. § 453) (“Indeed, third-party retailers have a strong economic incentive to display their prices to the public at large because offering a lower price is the primary way they compete against funeral providers for sales of . . . caskets.”). The Federal Trade Commission discussed the adverse consequences of licensing casket retailers in its amicus brief to the Fifth Circuit in St. Joseph Abbey. See Brief for Federal Trade Commission as Amicus Curiae Supporting Neither Party, St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013) (No. 11-30756) (“Recognizing that the best way to protect bereaved consumers from unfair trade practices is by promoting informed choice and reducing barriers to competition, the Commission consistently has opposed laws that prohibit persons other than licensed funeral directors from selling caskets or urns.”). Although the FTC did not take a position on the plaintiff’s constitutional claims, it vehemently opposed any law that restricted consumer choice and information, noting that doing so gave funeral directors an unfair buffer from competition. See id. at 13 (“The practical effect of [Louisiana’s funeral director licensing law] is to limit a consumer’s choice of funeral merchandise providers,
Unfortunately, arbitrary and protectionist licensing laws are not
unique to the funeral industry.134 States require licensure of practitioners
in other occupations that do not actually affect the public’s general wel-
fare, such as African hair braiders, shampoo specialists, boxing promoters,
interior designers, and florists.135 Legislatures normally pass these laws
intending to protect the public, but the laws routinely insulate entrenched
businesses from competition with no public benefit.136 Why, then, do

thereby insulating the funeral service industry in Louisiana from in-state competi-
tion.”). The FTC argued that allowing casket vendors to sell their products without
licensing requirements would lower prices by increasing the supply of caskets
in the market and increasing competitive pressures on existing suppliers to lower
their prices. See id. at 14 (“In short, independent casket retailers are likely to pro-
vide more choices at lower prices—precisely the type of pro-competitive benefit to
consumers that the Funeral Rule seeks to promote.”).

134. See, e.g., Dick M. Carpenter II, Blooming Nonsense: Experiment Reveals Louisi-
ana’s Florist Licensing Scheme as Pointless and Anti-competitive, INST. FOR JUST. (Mar.
2010), http://www.ij.org/blooming-nonsense-experiment-reveals-louisianas-florist-
licensing-scheme-as-pointless-and-anti-competitive (noting “complete dearth of evi-
dence” for Louisiana florist licensing law’s benefit to anyone other than incum-
bent licensed florists). For a further discussion of the negative effects of licensing
laws, see infra note 136 and accompanying text.

135. See Valerie Bayham, A Dream Deferred: Legal Barriers to African Hairbraiding
Nationwide, INST. FOR JUST., http://ij.org/a-dream-deferred (last visited Jan. 7,
2014) (commenting on licensing requirements for aspiring hair braiders enacted
by certain state licensing laws). In a particularly telling example, Louisi-
ана requires that florists obtain a professional license. See Let a Thousand Florists
Bloom, supra note 129 (exploring absurdity of florist licensing law). Prospective
florists obtain licenses by passing a one-hour written examination and, until 2010,
a three-hour performance examination, which tested subjective criteria such as the
“harmony” and “unity” of flower arrangements. See id. (discussing license examina-
tion). A panel of the hopeful licensee’s future competitors—licensed florists—
judged the subjective examination. See id. Unsurprisingly, less than fifty percent
of the test takers passed. See id. When the law was challenged in district court, the
court held that it was rationally related to the government’s interest in public wel-
fare and safety because it helped prevent “exposed [thorns],” “broken wire[s],”
and “flower[s] [with] some type of infection, like, dirt.” See Meadows v. Odom, 360
constitutional under rational basis review), vacated as moot, No. 05-30450 (5th Cir.
Aug. 1, 2006). Although the Eastern District of Louisiana upheld the law as a
public welfare measure, the law was transparently anti-competitive and protection-
ist. See Leslie Turk, Jindal Strikes Down Blooming Nonsense, IND. MEDIA GRP. (July
blooming-nonsense (“The law, by any measure, was an anti-competitive, anti-con-
sumer scheme . . . .”). Ultimately, the Louisiana legislature abolished the subject-
ive portion of the examination in 2010 but left the rest of the law intact, taking a
small but significant step toward greater economic liberty. See id. (discussing devel-
opments in florist licensing law).
legislatures enact such protectionist legislation?\textsuperscript{137}

B. \textit{Incumbent Industry Professionals Seeking Licensure Wield Greater Powers of Persuasion with State Legislatures}

Although legislatures occasionally impose licensing requirements on industries, more often industry participants willingly seek licensing regulations.\textsuperscript{138} This is always done “on the purported ground that licensure protects the uninformed public . . . but invariably with the consequence that members of the licensed groups become protected against competition from newcomers.”\textsuperscript{139} For example, industry groups seeking licensing regulations often include grandfather clauses in their proposals so that incumbent businesses may continue to operate unhindered while new entrants face burdensome hurdles.\textsuperscript{140}

Long-standing industry groups are in a better position to influence legislatures and, because of their superior ability to organize and lobby, often dominate newcomers and consumers in the political process.\textsuperscript{141}

\textsuperscript{137} For a discussion of the reasons why legislatures enact protectionist laws, see infra notes 138–48 and accompanying text.

\textsuperscript{138} See Gellhorn, supra note 127, at 11 (discussing willingness of industry participants to seek licensure); George J. Stigler, \textit{The Theory of Economic Regulation}, 2 Bell J. Econ. & Mgmt. Sci. 3, 5 (1971) (“[E]very industry or occupation that has enough political power to utilize the state will seek to control entry.”), available at http://www.rasmusen.org/zg601/readings/Stigler.1971.pdf.

\textsuperscript{139} Gellhorn, supra note 127, at 11 (addressing disparity between purpose and reality of occupational licensure); see also supra Part III (discussing cases that address funeral director licensing laws that insulate funeral directors from competition in funeral merchandise sales).

\textsuperscript{140} See Rottenberg, supra note 4, at 6 (“[I]n a single session of the New Jersey legislature practitioners asked that licensure be required for bait-fishing boats, beauty shops, chain stores, florists, insurance adjusters, photographers, and master painters, and that usually grandfather’s clauses appeared in the draft proposals.”); cf. Pennsylvania Department of State Reminds Massage Therapists of Licensing Deadline, PR Newswire (July 14, 2011), http://www.prnewswire.com/news-releases/pennsylvania-department-of-state-reminds-massage-therapists-of-licensing-deadline-125584083.html (reminding massage therapists to obtain licenses under grandfather clause within proper time frame).

\textsuperscript{141} See Gellhorn, supra note 127, at 12 (claiming that industry professionals who support new licensing laws “constitute a more effective political force than the citizens who, if aware of the matter at all, have no special interest which moves them to organize in opposition”). According to Nobel Prize-winning economist, Milton Friedman, the disproportionate power to organize arises because the interests of “producer groups” far outweigh the “casual” interests of consumers: “People in the same trade, like barbers or physicians, all have an intense interest in the specific problems of this trade and are willing to devote considerable energy to doing something about them. On the other hand, those of us who use barbers at all, get barbered infrequently and spend only a minor fraction of our income in barber shops. Our interest is casual. Hardly any of us are willing to devote much time going to the legislature in order to testify against the iniquity of restricting the practice of barbering . . . . The public interest is widely dispersed. In consequence, in the absence of any general arrangements to offset the pressure of special interests, producer groups will invariably have a much
“Rationally ignorant” voters usually choose not to pay the costs associated with organizing and opposing protectionist legislation because the costs created by such laws are broadly distributed in the form of higher prices across a broad base of consumers who do not recognize the incremental effects. Likewise, potential competitors are ill-suited to lobby against such legislation because of similar organizational problems. Well-established industry participants, on the other hand, stand to gain much from increased prices and reduced competition.

Given the perfect storm of powerful industry interests and voters’ rational ignorance, the old rationale of correcting bad policies at the voting booth is ineffective. While some state legislatures are vulnerable to special interests because they are simply at their mercy, others intentionally protect certain industries for political gain. Voters affected by arbitrary licensing requirements cannot compete with an industry’s lobbying efforts and self-interested politicians, whereas those who remain unaffected logistically have stronger influence on legislative action and the powers that be than will the diverse, widely spread consumer interest.

142. See Abbott, supra note 5, at 500 (discussing rationally ignorant voter’s role in protectionist legislation); see also Bryan Caplan, The Myth of the Rational Voter: Why Democracies Choose Bad Policies 3 (2007), available at http://www.cato.org/sites/cato.org/files/pubs/pdf/pa594.pdf (discussing rationally ignorant voters generally). Additionally, organizing a diffuse citizenry with vastly different desires proves prohibitively costly. See Stigler, supra note 138, at 10 (describing inefficiencies of “political decision processes”). To be effective, a large number of voters must make a decision simultaneously on a specific issue. See id. (“The condition of simultaneity imposes a major burden upon the political decision process.”). Unfortunately, a majority of the voters remain uninterested in opposing licensing laws because a single law does not affect most voters. See id. at 11 (“The democratic decision process must involve ‘all’ the community, not simply those who are directly concerned with a decision.”).

143. See Abbott, supra note 5, at 500 (“[P]otential competitors not yet in the market are poorly situated to lobby against [protectionist] legislation.”).

144. See id. (noting competitive advantage gained by interest groups seeking “special privileges”); see also Rottenberg, supra note 4, at 13 (describing how incumbent businesses gain from licensing and giving examples).


146. See Sanders, supra note 21, at 694 (“In many fields of regulation, but particularly in occupational licensing, governments often impose requirements simply to protect entrenched economic interests.”); see also Powers, 379 F.3d at 1221 (“[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”); Abbott, supra note 5, at 503 (“Empirical studies ... have bolstered the contention that industries often shape the manner in which they are regulated to their own advantage.”).
cally do not enter the fight.\textsuperscript{147} Thus, as long as incumbent professionals can lobby their legislatures for protectionist legislation under the guise of public welfare, arbitrary licensing laws will continue to plague consumers and entrepreneurs alike.\textsuperscript{148}

This cycle can end with greater judicial involvement.\textsuperscript{149} A judge’s position as a neutral arbiter allows legislation to be reviewed without the taint of special interests.\textsuperscript{150} Yet, judges should proceed with caution to avoid being accused of invoking a \textit{Lochner}-esque substitution of their preferences over the legislature.\textsuperscript{151} Courts can avoid such criticism by employing rational basis review in a manner that takes a closer look at whether a licensing law’s proffered justifications are actually related to legitimate interests.\textsuperscript{152} Indeed, the Fifth Circuit provided an excellent blueprint for applying such review.\textsuperscript{153}

\textbf{C. A Call to Reason: Invalidating Protectionist Licensing Laws Using the Rationale in St. Joseph Abbey}

The framework presented in \textit{St. Joseph Abbey} properly disposes of a protectionist licensing law without changing the standard that courts have used since the end of the \textit{Lochner} era.\textsuperscript{154} First, the court stated that an

\begin{itemize}
  \item \textsuperscript{147} See Gellhorn, \textit{supra} note 127, at 12 n.19 (“[M]en who are behind any interest always unite in organization, and the danger in every country is that these special interests will be the only things organized, and that the common interest will be unorganized against them.” (quoting 2 \textsc{Woodrow Wilson}, \textsc{Public Papers of Woodrow Wilson} 422 (Ray Baker & William Dodd eds., Harper Bros. 1925))).
  \item \textsuperscript{148} See \textit{St. Joseph Abbey v. Castille}, 712 F.3d 215, 226 (5th Cir. 2013) (denouncing “the taking of wealth and handing it to others when it [does not come] as economic protectionism in service of the public good”).
  \item \textsuperscript{149} See \textit{Abbott, supra} note 5, at 503 (“\textit{C}omplete judicial abstention . . . is inappropriate due to the institutional weaknesses of the political process and the vulnerability of regulators to political capture.”); \textit{see also} Cass R. Sunstein, \textsc{Naked Preferences and the Constitution}, 84 \textsc{Columbia L. Rev.} 1689, 1696 (1984) (stating that judicial decision can constrain illegitimate government behavior by prohibiting “pure transfer of wealth”).
  \item \textsuperscript{150} \textit{Cf.} Stigler, \textit{supra} note 138, at 5–6 (examining multiple ways that special interests can use legislatures to achieve goals such as “entry control” or restriction of competition).
  \item \textsuperscript{151} See \textit{supra} notes 41–45 and accompanying text.
  \item \textsuperscript{152} See Phillips, \textit{supra} note 55, at 965 (“By [continuing to apply minimal scrutiny, judges] can blunt the standard criticisms of economic substantive due process . . . while preserving some ability to strike down government’s more outrageous interferences with economic rights.”).
  \item \textsuperscript{153} For a further discussion of how the analysis in \textit{St. Joseph Abbey} can be applied to future cases, see \textit{infra} notes 154–71 and accompanying text.
  \item \textsuperscript{154} See \textit{Abbott, supra} note 5, at 502–05 (calling for heightened rational basis review for protectionist state laws); \textit{see also} Siegan, \textit{supra} note 41, at 324 (advocating for intermediate scrutiny where government bears burden of proving that “the legislation serves important governmental objectives,” that “the restraint imposed . . . is substantially related to achievement of these objectives,” and that “a similar result cannot be achieved by a less drastic means”); Florman, \textit{supra} note 80, at 767 (stating same).
\end{itemize}
economic regulation must have a rational relation to some public purpose regardless of the legislature’s intent. Second, the court combated the extreme deference to state legislatures exemplified in Powers by stating that “[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation.”

In effect, the Fifth Circuit called for rational basis review of economic legislation coupled with reasonable legislative deference on a case-by-case basis. This simple test examines whether a particular licensing law truly furthers the public welfare or arbitrarily shelters a special interest from free market competition, and does so within the traditional bounds of rational basis review. Under this test, a court will still defer to the legislature’s judgment as to how the law protects the public interest, but the court will not accept pretextual arguments that are controverted by facts on the record. Ultimately, the St. Joseph Abbey test strikes the ideal balance between the extreme deference of the Powers court, where the state always wins, and the heightened scrutiny of Craigmiles, where the court employed something more than minimal scrutiny.

155. See St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013) (stating that even protectionist legislation can be supported by legitimate government interest and that “without [such support] it is aptly described as a naked transfer of wealth”).
156. See id. at 226.
157. See id. at 221–23 (examining individual cases and finding laws animated by legitimate state interest in some public interest).
158. See id. at 226–27 (stressing “great deference” to legislatures but insisting that “regulation not be irrational”).
160. Compare Craigmiles v. Giles, 312 F.3d 220, 227 (6th Cir. 2002) (using analysis ordinarily reserved for laws discriminating against historically unpopular groups), with Powers, 739 F.3d at 1221–22 (implying that courts owe legislatures deference in legislative decisions for fear of harming state industries). The deference owed to legislatures, however, must have some limit. See Lochner v. New York, 198 U.S. 45, 56 (1905) (noting necessity for limit to police power of states), overruled in part by Ferguson v. Skrupa, 372 U.S. 726 (1962). Otherwise legislatures would have “unbound power” to pass any law they deem necessary to advance whatever interest they like. See id. The Lochner Court stated this proposition persuasively:

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and
The type of review applied in *St. Joseph Abbey* does not rise to heightened scrutiny because it still searches for a legitimate interest to support a law rather than requiring a close fit between the means and the stated end.\(^{161}\) Additionally, the court would not be allowed to substitute its policy preferences over those of the legislature.\(^{162}\) Unlike *Lochner*, a court reviewing a licensing law under the *St. Joseph Abbey* standard does not inject its own theory of what is economically right into the analysis.\(^{163}\) The standard articulated in *St. Joseph Abbey* simply ensures that legislators do not arbitrarily protect a particular industry from competition, which is an illegitimate interest.\(^{164}\)

Those who advocate for heightened scrutiny point to cases like *Cleburne*, where the Supreme Court applied a stringent form of rational basis review to legislation challenged under the Equal Protection Clause.\(^{165}\) Although the Court in *Cleburne* applied a heightened rational basis review, it did so to strike down "invidious discrimination" of "politically unpopular groups," not to address economic protectionism.\(^{166}\) The *Powers* court correctly pointed out that the Supreme Court has not articulated the factors that justify heightened rational basis review, thus there is "no principled foundation for determining when more searching inquiry is to be invoked."\(^{167}\)

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\(^{161}\) See *St. Joseph Abbey*, 712 F.3d at 227 ("The funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none."); cf. Florman, supra note 80, at 744–45 (defining and describing heightened rational basis scrutiny).

\(^{162}\) See *St. Joseph Abbey*, 712 F.3d at 227 ("We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise.").

\(^{163}\) For a brief discussion of the analysis in *Lochner*, see supra notes 41–45 and accompanying text.

\(^{164}\) See *St. Joseph Abbey*, 712 F.3d at 222–23 (proclaiming that economic protectionism has no legitimate governmental purpose where it harms consumers without advancing some type of public interest).

\(^{165}\) See Sanders, supra note 21, at 693 (advocating application of heightened rational basis scrutiny to protectionist economic regulation).

\(^{166}\) See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (refusing to apply intermediate scrutiny to law discriminating against mentally handicapped but noting that such refusal "does not leave them entirely unprotected from invidious discrimination"); see also Romer v. Evans, 517 U.S. 620, 654–55 (1996) ("[T]he constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (quoting Dep’t of Agriculture v. Moreno, 413 U.S. 528, 534 (1973))).

\(^{167}\) Powers v. Harris, 379 F.3d 1208, 1224 (5th Cir. 2004) (quoting *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part and dissenting in part)).
Supreme Court, lower courts should confine heightened rational basis scrutiny to laws discriminating against politically unpopular groups. \footnote{168}{See id. at 1224–25 (noting that Supreme Court has never applied “Cleburne-style” rational basis review to economic issues, but rather to “correct perceived inequities unique” to cases like \textit{Cleburne}).}

In cases involving arbitrary and onerous economic regulation such as Louisiana’s casket retailer licensing scheme, courts should apply the \textit{St. Joseph Abbey} analysis. \footnote{169}{For a discussion of why courts should apply the \textit{St. Joseph Abbey} test, see supra notes 138–53 and accompanying text.} By searching for a rational relation to a legitimate purpose while simultaneously considering the entire record, the Fifth Circuit viewed a complete picture of the Louisiana licensing law. \footnote{170}{See \textit{St. Joseph Abbey v. Castille}, 712 F.3d 215, 223 (5th Cir. 2013) (“Mindful that a hypothetical rationale, even post hoc, cannot be fantasy, and that the State Board’s chosen means must rationally relate to the state interests it articulates, we turn to the State Board’s proffered rational bases for the challenged law. . . . [W]e will examine the State Board’s rationale informed by the setting and history of the challenged rule.”).} With that complete picture, the court concluded that not only was the legislation motivated by protectionism, but it also furthered no legitimate governmental purpose. \footnote{171}{See id. at 226–27 (concluding that law “protect[s] the rulemakers’ pockets” and bears no rational relation to legitimate interest).}

\section{VI. Conclusion}

The Fifth Circuit correctly invalidated a protectionist state licensing law that disadvantaged consumers and entrepreneurs. \footnote{172}{For a further discussion of the court’s reasoning in \textit{St. Joseph Abbey}, see supra notes 112–22.} In doing so, the court rejected intrastate economic protectionism, branding it an illegitimate state interest. \footnote{173}{For a further discussion of the holding of \textit{St. Joseph Abbey}, see supra notes 108–11.} The holding in \textit{St. Joseph Abbey} reinforces the need for the Supreme Court to explicitly rule on whether mere intrastate economic protectionism is a legitimate state interest and explain how lower courts should review such legislation. \footnote{174}{For a discussion of why heightened rational basis review is unlikely to be extended to economic protectionist laws, see supra notes 165–68 and accompanying text.}

However, the blind deference to state legislatures employed in \textit{Powers} renders rational basis scrutiny a useless tool. \footnote{175}{For a critique of the holding in \textit{Powers}, see supra note 156 and accompanying text.} The \textit{St. Joseph Abbey} frame-
work can thus provide valuable guidance for courts to evaluate and invalidate protectionist legislation within the bounds of rational basis scrutiny.\footnote{For a further discussion of how the reasoning in \textit{St. Joseph Abby} can serve as a model for other courts, see \textit{supra} notes 154–60 and accompanying text.}
“ALL” IS NOT EVERYTHING: THE PENNSYLVANIA SUPREME COURT’S RESTRICTION OF NATURAL GAS CONVEYANCES IN BUTLER v. CHARLES POWERS ESTATE EX REL. WARREN

MARK T. WILHELM*

“[Pennsylvanians] have been plagued with the ‘Dunham problem’ when drafting attorneys . . . were not aware of the Dunham decision and proceeded under the nearly universal assumption that a reservation of mineral rights included reservation of oil and gas interest in the land.”

I. EXCAVATING THE TRUE MEANING OF MINERALS: AN INTRODUCTION TO MINERAL RIGHT CONVEYANCES

In late 2008, Bill Hartley leased the mineral rights below his family farm in rural southwestern Pennsylvania to Range Resources, a natural gas production company. The Amwell Township resident received a six-figure cash payment and a royalty percentage for the right to drill for the natural gas trapped deep under his property in Marcellus shale. Hartley, like many other Pennsylvania residents, is now realizing the immense value of the natural gas beneath his feet.

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3. See id. (noting while Hartley was unwilling to disclose specific amount he has received from natural gas well on his property, his cash bonus for signing lease totaled over $110,000); see also ANTHONY ANDREWS ET AL., CONG. RESEARCH SERV., UNCONVENTIONAL GAS SHALES: DEVELOPMENT, TECHNOLOGY, AND POLICY ISSUES 1, 28 (2009), available at http://energy.wilkes.edu/PDFFiles/Library/CRS%20Report%20on%20Shale%20Gas%20Issues.pdf (stating that in Pennsylvania, signing bonuses for natural gas leases have skyrocketed from highs of $35 per acre in 2002 to $2,900 per acre in 2008).

4. See Griswold, supra note 2 (explaining Hartley is proponent of drilling for Marcellus shale gas). But see James Loewenstein, Ward: Gas Company Financing Is Preventing Residents from Getting Mortgages, DAILY REVIEW (Aug. 1, 2011), http://thedailyreview.com/news/ward-gas-company-financing-is-preventing-residents-from-getting-mortgages-1.1182565 (explaining mortgage recording confusion that prevents some landowners from receiving mortgages on surface estate because natural gas companies have mortgaged mineral estate); Andrew Maykuth, Drilling and
payments from natural gas companies are helping everyday Pennsylvanians to make ends meet.\(^5\) However, these payments would not be possible without the ability of private individuals like Hartley to profit from their mineral right ownership.\(^6\)

Pennsylvania has a long, rich history of commercial drilling for oil and natural gas.\(^7\) The state today maintains a unique position in the drilling industry as it sits atop the Marcellus Shale Formation.\(^8\) The Marcellus


\(^6\) See Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (Pa. 1893) (“Mining rights are peculiar, and exist from necessity, and the necessity must be recognized . . . .”); see also Erich Schwartzel, Pennsylvania Landowners Can Get Cash for Mineral Rights, PITTSBURGH POST-GAZETTE (May 19, 2013, 12:05 AM), http://www.post-gazette.com/stories/local/marcellusshale/pennsylvania-landowners-can-get-cash-on-spot-for-mineral-rights-688190/ (explaining how some landowners who have leased mineral rights and already received signing bonuses are also selling their rights to royalty payments in exchange for upfront, lump sum payments).


\(^8\) See U.S. DEP’T OF ENERGY, OFFICE OF FOSSIL ENERGY & NAT’L ENERGY TECH. LAB., MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER 21 (2009) [hereinafter U.S. DEP’T OF ENERGY, MODERN SHALE GAS], available at http://www.gwpc.org/sites/default/files/Shale%20Gas%20Primer%202009.pdf (detailing Marcellus Shale Formation that stretches from New York to northern Tennessee and includes significant portions of Pennsylvania). The Formation “covers an area of 95,000 square miles at an average thickness of 50 ft to 200 ft.” Id. (citations omitted). See generally Kristin M. Carter et al., Unconventional Natural Gas Resources in Pennsylvania: The Backstory of the Modern Marcellus Shale Play, 18 ENVTL. GEOSCI-
Shale, a rock formation approximately one mile beneath the Earth’s surface, naturally contains large deposits of natural gas.\(^9\) However, drilling for Marcellus shale gas has only recently become both commercially and technologically practical.\(^{10}\) This new abundance of harvestable energy resources, in the form of Marcellus shale gas, has led to the development of widespread commercial drilling for natural gas throughout Pennsylvania.\(^{11}\) Supporters of drilling note that commercial production of natural gas yields massive economic benefits for the state.\(^{12}\) Yet, drilling critics point to environmental concerns relating to the use of certain natural gas drilling techniques, especially hydraulic fracturing (fracking).\(^{13}\)

\(^{9}\) See Kevin Colosimo, Natural Gas Boom a Blessing for Pa., PHILA. INQUIRER (Aug. 5, 2013, 1:08 AM), http://www.philly.com/philly/news/local/20130805_Natural_gas_boom_a_blessing_for_Pa_.html (stating Marcellus Shale Formation is second largest natural gas reserve in world). To the extent this Note discusses the formation at large, it refers to it as the “Marcellus Shale.” To the extent this Note discusses the sedimentary rock and the gas therein, it refers to it as “Marcellus shale” or “Marcellus shale gas.” See Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 898 (Pa. 2013) (clarifying terminology used by court).

\(^{10}\) See U.S. DEP’T OF ENERGY, MODERN SHALE GAS, supra note 8, at 21 (explaining first commercially viable drilling in Marcellus Shale Formation occurred in Pennsylvania in 2003, employing both horizontal drilling and hydraulic fracturing techniques).

\(^{11}\) See Traditional Oil & Gas Industry, supra note 7 (stating Pennsylvania lands contain over 350,000 oil and gas wells, with at least 70,000 active wells); see also Andrew Maykuth, Pa.’s Natural Gas Rush, PHILA. INQUIRER (Apr. 3, 2011), http://articles.philly.com/2011-04-03/business/29377352_1_marcellus-formation-marcellus-shale-coalition-drilling (listing geographic areas of Marcellus shale gas development and major natural gas companies operating within Pennsylvania).


\(^{13}\) See Stephen G. Osborn, Aver Vengosh, Nathaniel R. Warner & Robert B. Jackson, Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing, 108 PROC. NAT’L ACADEM. SCI. U.S.A. 8172, 8172 (2011), http:// www.ncbi.nlm.nih.gov/pmc/articles/PMC3100993/ (arguing that fracking is responsible for, among other things, flammable tap water due to increased methane levels); see also Will Bunch, Money, Politics and Pollution in Fracking Country, PHILA.
Natural gas companies have historically bought, sold, and leased the mineral rights of Pennsylvania lands for traditional natural gas drilling. With the recent technological availability of Marcellus shale gas, these natural gas companies have increased their efforts to secure the rights to Pennsylvania’s subsurface minerals. Landowners who still own their mineral rights have the option to sever mineral rights from the surface by splitting ownership of the surface estate and mineral estate. Given the commercial desirability of natural gas, in recent years, natural gas companies have executed thousands of deeds and leases with landowners that convey the landowners’ mineral rights. This effort on the part of natural


gas companies to increase their rights to Marcellus shale gas has resulted in lucrative lease and royalty payments to Pennsylvania landowners.\(^\text{18}\)

Of course, the promise of economic gains has revived disputes regarding newly valuable mineral rights across Pennsylvania.\(^\text{19}\) The recent economic opportunity in natural gas has generated competition within the state’s energy industry.\(^\text{20}\) Further, the lure of drilling for natural gas may cause conflict between the surface owner and the owner of the mineral estate.\(^\text{21}\) These disputes are often complicated by historical title defects to the rights in question.\(^\text{22}\)

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22. See, e.g., Michael K. Vennum & Grant H. Hackley, *Recognizing New Issues Arising out of the Marcellus Shale Development—Avoiding Pitfalls—A Primer for Diligent Oil and Gas Title Attorneys*, 84 PA. B. ASS’N Q. 25, 31–33 (2013) (discussing process of title washing where surface estate and mineral estate have been recombined after being initially separated that can spur disputes to good title).
One of the main concerns regarding a transfer of mineral rights is identifying which minerals are contemplated by the conveyance.\textsuperscript{23} Broadly drafted mineral conveyances routinely give rise to disputes regarding ownership of certain minerals.\textsuperscript{24} States vary as to their presumptive inclusion of natural gas in the blanket term mineral.\textsuperscript{25} \textit{Butler v. Charles Powers Estate ex rel. Warren}\textsuperscript{26} provides an example of a dispute over ownership of rights in natural gas.\textsuperscript{27} In \textit{Butler}, the legal question was whether a deed conveying the blanket term minerals, absent any evidence as to the intent of the parties, presumptively included natural gas.\textsuperscript{28} The Pennsylvania Supreme Court held that natural gas trapped in the Marcellus Shale was not presumptively included in a conveyance of all minerals.\textsuperscript{29} In doing so, the Supreme Court reaffirmed the Dunham Rule, which it considered a longstanding rule of property in the state.\textsuperscript{30}

This Note examines the Pennsylvania Supreme Court’s opinion in \textit{Butler} and argues that the court examined the incorrect line of cases in its analysis.\textsuperscript{31} Further, this Note argues that the Commonwealth should now adopt a new definition of minerals that is more in line with the vast majority of jurisdictions.\textsuperscript{32} Part II explains the conceptual background of mineral rights and the two approaches to mineral right presumptions in the United States.\textsuperscript{33} Part III addresses how the Supreme Court of Pennsylvania arrived at its decision in \textit{Butler} and explains how the state supreme court misapplied past precedent in favor of a traditional scheme that sup-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{23} See generally Ronald W. Polston, \textit{Mineral Ownership Theory: Doctrine in Disarray}, 70 N.D. L. Rev. 541 (1994) (detailing theories of mineral ownership and arguing for reclassification of mineral interests as incorporeal interests).
\item \textsuperscript{24} See generally K.A.D., Annotation, \textit{Severance of Title or Rights to Oil and Gas in Place from Title to Surface}, 146 A.L.R. 880 (1943) (detailing numerous cases involving disputes related to separating surface estate from mineral estate across United States).
\item \textsuperscript{25} See generally A.S.M., Annotation, \textit{What Are “Minerals” Within Deed, Lease, or License}, 17 A.L.R. 156 (1922) (detailing case law regarding presumptive inclusion and exclusion of certain substances in conveyance across jurisdictions in United States).
\item \textsuperscript{26} 65 A.3d 885 (Pa. 2013).
\item \textsuperscript{27} See id. at 886 (stating allowance of appeal for question of whether reservation of one-half minerals includes natural gas).
\item \textsuperscript{28} See id. at 887 (acknowledging mineral rights were conveyed in 1881 with no evidence to parties’ intent except for actual reservation).
\item \textsuperscript{29} See id.
\item \textsuperscript{30} See id. (upholding longstanding Dunham Rule, which presumptively excludes natural gas from broad conveyance of minerals).
\item \textsuperscript{31} For a discussion of a line of Pennsylvania cases calling the Dunham Rule into question, see \textit{infra} notes 140–50 and accompanying text.
\item \textsuperscript{32} For a discussion of the need to adopt the majority approach to presumptive conveyances of natural gas, see \textit{infra} notes 151–60 and accompanying text.
\item \textsuperscript{33} For a further discussion of mineral rights and the different jurisdictional approaches to the presumptive inclusion of natural gas in a conveyance of minerals, see \textit{infra} notes 37–84 and accompanying text.
\end{enumerate}
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ports natural gas companies. Part IV examines the questionable status of the Dunham Rule as a rule of property in Pennsylvania and the need for departing from the Rule. Finally, Part V explains how Pennsylvania citizens and practitioners can navigate the Butler decision in past and future land transactions.

II. Uncovering a Rule for Conveyances: The Role of Natural Gas as a Presumptive Mineral

Traditionally, by virtue of owning the surface of a parcel of land, a landowner had an interest in a section of the Earth extending directly from the surface of the property to the core. Yet, over time, states began to move toward a more comprehensive understanding of property rights in real estate. Pennsylvania, for example, now recognizes three different estates in a given parcel of land: a surface estate, a mineral estate, and a right to subjacent support. Each of these estates is separable, and an

34. For a further discussion of the facts, holding, and rationale of Butler, see infra notes 85–116 and accompanying text.
35. For a discussion of precedent calling into question the Dunham Rule and an argument for departure from the Rule, see infra notes 138–60 and accompanying text.
36. For a discussion of the means to navigate the impact of Butler, see infra notes 161–85 and accompanying text.
37. See Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 60 (1898) (“The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the states and territories of the United States . . . .”); John G. Sprankling, Owning the Center of the Earth, 55 UCLA L. Rev. 979, 980–81 (2008) (discussing role of ad coelem et ad inferos doctrine, concept of owning to heavens and to core of earth, in developing theories of land ownership in United States). Individual ownership of minerals located beneath the surface is somewhat unique to the United States’ law. See Eugene Kuntz, Law of Oil & Gas § 2.1 (2013) (explaining that under civil law concepts, sovereign retained rights to subsurface minerals). However, federal statutes granting individuals actual ownership of mineral rights developed relatively slowly. See Del Monte Mining, 171 U.S. at 61 (“For nearly a century there was practically no legislation on the part of congress for the disposal of mines or mineral lands.”).
38. See Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (Pa. 1893) (“Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata.”)
owner may sell or lease the interest in an individual estate, independent of the other estates.\textsuperscript{40}

Pennsylvania common law broadly defines the general term “mineral.”\textsuperscript{41} Consequently, while parties may intend to transfer rights to a certain estate, ambiguity regarding which substances are contained in a given estate routinely gives rise to disputes.\textsuperscript{42} Especially problematic are conveyances that simply transfer the blanket term “minerals.”\textsuperscript{43} Given the rapidly increasing interest in Marcellus shale natural gas as a commercially viable substance, parties are now scrutinizing vague deeds executed decades ago to determine rights to natural gas.\textsuperscript{44} Absent specific language contemplating a difference, courts treat oil and natural gas similarly due to their similar nature and properties.\textsuperscript{45} But courts in different jurisdictions have come to conflicting opinions regarding how to approach the question of whether natural gas and oil are presumptively included in a broad conveyance of mineral rights.\textsuperscript{46} The minority approach, generally

\textsuperscript{40} See Lillibridge v. Lackawanna Coal Co., 22 A. 1035, 1036 (Pa. 1891) (noting that different strata beneath earth create different estates and each estate may have separate owner); Hetrick v. Apollo Gas Co., 608 A.2d 1074, 1078 (Pa. Super. Ct. 1992) (“As with any estate in land, the owner of the mineral estate may convey his entire bundle of rights in fee or may grant a mere portion thereof via leasehold.”). See generally Hallie Seegal, \textit{In North Carolina, Fracking Rights Rise to Surface}, \textit{Reuters} (Feb. 8, 2013), http://blogs.reuters.com/events/2013/02/08/in-north-carolina-fracking-rights-rise-to-surface/ (stating concept of split estate was based on sixteenth century English law that preserved monarch’s right to gold and silver deposits beneath all land in kingdom).

\textsuperscript{41} See Griffin v. Fellows, 81 1/2 Pa. 114, 124 (1873) (“The term ‘minerals’ embraces everything not of the mere surface, which is used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils, are comprehended within it.” (citations omitted)).


\textsuperscript{43} See C.V.V., \textit{supra} note 42 (discussing rules for interpreting “a conveyance or exception of ‘minerals’ in a deed, lease, or license”).

\textsuperscript{44} See generally Leo N. Smith et al., \textit{Title Examination of Mineral Interests in Fee Lands}, 5C \textit{ROCKY MTN. MIN. INST.} 13 (1977) (detailing terms, processes, and instruments involved in mineral conveyances in United States).

\textsuperscript{45} See, e.g., Silver v. Bush, 62 A. 832, 833 (Pa. 1906) (relying on absence of petroleum in mineral conveyance to demonstrate absence of natural gas); \textit{Kuntz}, \textit{supra} note 37, § 13.3 (grouping oil and natural gas for purposes of analyzing mineral conveyances).

termed the “Pennsylvania Approach,” presumptively excludes natural gas from the term “minerals.” Conversely, the majority approach presumptively includes natural gas in the term “minerals.”

A. Minority (Pennsylvania) Approach to a Conveyance of “Minerals”

The minority approach to the presumptive contents of a mineral estate is that the estate does not contain natural gas absent clear evidence that the contracting parties intended to convey natural gas. Courts routinely recognize Dunham v. Kirkpatrick as the seminal case regarding the presumptive exclusion of natural gas in a conveyance of minerals. In Dunham, the Pennsylvania Supreme Court addressed whether reservation of “all minerals” included oil. The court held that oil was presumptively excluded from a reservation of all minerals because oil was not found in the popular usage of the term minerals at the time of the conveyance. Subsequent courts applied the Dunham Rule to natural gas as well, noting the similarities between oil and natural gas. Modern courts applying the minority rule generally point to the rule’s objective of interpreting contracts as intended at the time of the conveyance. However, critics of the

47. See Millard F. Ingraham, Comment, Meaning of Minerals in Grants and Reservations, 30 Rocky Mt. Min. L. Inst. 343, 345–46 (1957) (listing numerous jurisdictions rejecting Dunham Rule and stating “[t]he Dunham Rule has found little support in other jurisdictions”).


49. See generally A.S.M., supra note 25 (treating Pennsylvania separately for purposes of natural gas and oil due to its unique opinion regarding presumptive exclusion of natural gas and oil in vague mineral conveyance).

50. 101 Pa. 36 (1882).


52. See Dunham, 101 Pa. at 37 (“In the article of agreement, and also in the deed, was inserted . . . ‘[e]xcepting and reserving all the timber suitable for sawing; also, all minerals; also, the right of way to take off such timber and minerals.’”).

53. See id. at 44 (“Certainly, in popular estimation petroleum is not regarded as a mineral substance any more than is animal or vegetable oil, and it can, indeed, only be so classified in the most general or scientific sense.”). The Dunham court further suggested that the drafters of the conveyance “should have known that they were using that word [minerals] in a manner not sanctioned by the common understanding of mankind.” Id.

54. See, e.g., Silver v. Bush, 62 A. 832, 833 (Pa. 1906) (relying on absence of petroleum in mineral conveyance to demonstrate absence of natural gas); Kuntz, supra note 37, § 13.3 (grouping oil and natural gas for purposes of analyzing mineral conveyances).

55. See Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 898 (Pa. 2013) (citing Schuylkill Nav. Co. v. Moore, 2 Whart. 477, 493 (Pa. 1837)) (“[W]hen interpreting private deeds and contracts, the ‘question is to be determined not by principles of science, but by common experience directed to the discovery of intention.’”).
minority approach point to courts reaffirming the *Dunham* Rule as simply reinforcing the Rule’s status as an outdated rule of property.\footnote{56} 

**B. Majority Approach to a Conveyance of “Minerals”**

The vast majority of jurisdictions consider a transfer of all minerals presumptively to include natural gas, unless the conveying instrument as a whole produces ambiguity.\footnote{57} Initially, many courts throughout the country applied the *Dunham* Rule to mineral disputes.\footnote{58} However, as the oil and gas industry developed, states quickly moved away from applying the *Dunham* Rule.\footnote{59} Over sixty-five years ago, courts began to note the vast rejection of the *Dunham* Rule in favor of a more inclusive view of minerals.\footnote{60} 

These later courts generally adopted one of two approaches to support the notion that natural gas and oil are included in the meaning of the word minerals.\footnote{61} First, some courts applied a standard referring to the

56. *See id.* at 900 n.1 (Saylor, J., concurring) (“Pennsylvania post-*Dunham* decisions have ‘adhered to that view, not so much because the court was sure that in its ordinary sense the term ‘minerals’ did not include oil and gas, but because the previous decision had become a rule of law on which land titles in that state were based.’” (quoting 1A NANCY SAINT-PAUL, SUMMERS OIL & GAS § 7:16 (3d ed. 2012))). 

57. *See SUMMERS OIL & GAS, supra* note 56, § 7:16 (explaining whether grant or exception of minerals includes oil and gas); C. C. Marvel, Annotation, *Oil and Gas as “Minerals” Within Deed, Lease, or License*, 37 A.L.R.2d 1440 (1954) (surveying acceptance of oil and gas as minerals within different jurisdictions throughout United States). 

58. *See, e.g.*, McKinney’s Heirs v. Cent. Ky. Nat. Gas. Co., 120 S.W. 314, 315–16 (Ky. 1909) (citing *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 (1882)) (holding natural gas not presumptively included in conveyance of minerals); Huie Hodge Lumber Co. v. R.R. Lands Co., 91 So. 676, 678 (La. 1922) (applying *Dunham* Rule and holding, due to circumstances of conveyance, natural gas and oil were not included in conveyance); Detlor v. Holland, 49 N.E. 690, 692–93 (Ohio 1898) (applying *Dunham* Rule and holding natural gas and oil were not presumptively included in conveyance). 

59. *See, e.g.*, Scott v. Laws, 215 S.W. 81, 82 (Ky. 1919) (recognizing “all minerals” as “all inorganic substances which can be taken from the land”), *overruling McKinney’s Heirs, 120 S.W. 314*; Warren v. Clinchfield Coal Corp., 186 S.E. 20, 21 (Va. 1936) (“The weight of authority is to the effect that petroleum, oil and gas are minerals, though there is respectable authority upholding what is known as the ‘Pennsylvania Doctrine,’ which lays down a contrary rule.”); Williamson v. Jones, 19 S.E. 436, 441 (W. Va. 1894) (“[A]uthorities now very generally—universally . . . hold petroleum to be a mineral, and as much a part of the realty as timber, coal, or iron ore, except that in proper cases its mobility as a subterranean liquid must be taken into consideration . . . .”). 

60. *See Branham v. Minear, 199 S.W.2d 841, 846 (Tex. Civ. App. 1947)* (“[T]hat the term ‘minerals’ includes oil and gas is so well settled as to need no citation of authorities . . . .”). 

61. *See, e.g.*, Lovelace v. Sw. Petroleum Co., 267 F. 513 (6th Cir. 1920) (interpreting Kentucky law and holding that natural gas and oil are presumptively included in conveyance of minerals unless language of grant indicated anything less than transfer of all minerals); Nephi Plaster & Mfg. Co. v. Juab Cnty., 93 P. 53, 55 (Utah 1907) (“[M]inerals, prima facie at least, are not confined to the metals.”).
ordinary meaning of the word, which can be derived from readily available resources such as dictionaries. Second, other courts suggested a more scientific approach to defining the word minerals that would also include oil and natural gas. In either case, courts generally adopted a definition of mineral that includes any inorganic substance for which mining or drilling is commercially profitable. Critics of the majority approach generally claim courts applying the majority rule are contravening the intent of the contracting parties because if the parties intended to include natural gas, the conveyance would have specifically contemplated the substance.

C. Pennsylvania’s Application of Mineral Rules

Given Pennsylvania’s status as the birthplace of commercial oil and gas drilling, its courts decided some of the earliest mineral disputes. Based on the Dunham decision in 1882, Pennsylvania common law has developed the Dunham Rule. The Dunham Rule interprets a general conveyance of all minerals to presumptively exclude oil and natural gas, unless contradicted by parol evidence. However, through the years,

62. See Murray v. Allard, 43 S.W. 355, 359 (Tenn. 1897) (suggesting that definition of minerals is most appropriate when taken from dictionaries and other similar authorities, and finding that “bulk of mankind” does not view “minerals” as only including metals).

63. See, e.g., Matthews v. Dep’t of Conservation, 96 N.W.2d 160, 164 (Mich. 1959) (considering definition of minerals based on division of all matter into “animal, mineral, and vegetable kingdoms”); Sult v. Hochstetter Oil Co., 61 S.E. 307, 311 (W. Va. 1908) (“Legally and scientifically oil and gas are universally held to be minerals.”); cf. Armstrong v. Lake Champlain Granite Co., 61 S.E. 307, 311 (W. Va. 1895) (considering whether granite is mineral ore for purposes of conveyance and noting that, scientifically, granite is not mineral ore).

64. See, e.g., Robinson v. Wheeling Steel & Iron Co., 129 S.E. 311, 312 (W. Va. 1925) (“‘Minerals,’ when used in a deed, may include every inorganic substance which can be extracted from the earth for profit.”); accord Horse Creek Land & Mining Co. v. Midkiff, 95 S.E. 26, 27 (W. Va. 1918) (“The term ‘mineral,’ when employed in conveyancing in this state, is understood to include every inorganic substance which can be extracted from the earth for profit. . . .”).

65. See, e.g., Dunham v. Kirkpatrick, 101 Pa. 36, 44 (1882) (“[W]e may be very sure that when [the parties] made their contract . . . they did not intend to reserve the mineral oil that might afterward be found in the land, otherwise that intention would have been expressed in no doubtful terms.”).

66. See Abbott & Bagnell, supra note 19, at 661 (stating that Pennsylvania courts have some of “oldest jurisprudence” in United States relating to oil and gas).

67. For a discussion of the development of the Dunham Rule, see supra notes 50–54 and accompanying text. Some courts note that the historical origin of the Dunham Rule may actually stretch as far back as 1836. See Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 889 (Pa. 2013) (noting that Dunham line of cases began in Gibson v. Tyson, 5 Watts 34 (Pa. 1836)).

68. See Highland v. Commonwealth, 161 A.2d 390, 398 (Pa. 1960) (citing Dunham, 101 Pa. at 44) (“[I]f, in connection with a conveyance of land, there is a reservation or an exception of ‘minerals’ without any specific mention of natural gas or oil, a presumption, rebuttable in nature, arises that the word ‘minerals’ was not intended by the parties to include natural gas as oil.”).
Pennsylvania courts have not always applied the Dunham Rule consistently and have instead regularly utilized the majority approach to conveyance interpretations.  

1. Applying the Dunham Rule: The Minority Approach

The line of Pennsylvania cases spawned by the Dunham decision relies on the transfer of minerals as a common law interpretation of a contract. Courts begin their analyses with the notion that the term “minerals” should be read according to the understanding of the parties at the time of the agreement. Therefore, to understand the parties’ intent, the specific language used in the conveyance should be interpreted in light of the everyday usage of its terms. If the parties’ intent or understanding is unclear from the language of the conveyance, parol evidence may be used to overcome the presumption that natural gas is not included in the transfer of mineral rights.

2. An Inconsistent Application: The Majority Approach

Pennsylvania courts have not always been consistent in refusing to recognize natural gas as a mineral. Before the Dunham decision, Pennsylvania courts found that oil was a mineral based on the common
understanding of the substance.74 Further, following the Dunham decision, Pennsylvania courts continued to recognize oil as a mineral.75 This interpretation quickly extended to natural gas as well.76 Consistent with the majority approach, courts justified natural gas and oil as minerals because of their nature as inorganic, commercially viable substances.77 This line of cases carried such weight that the Supreme Court of the United States even cited these Pennsylvania decisions as support for the concept that oil and natural gas were minerals.78

The landmark decision, U.S. Steel Corp. v. Hoge,79 also nudged Pennsylvania toward the majority interpretation of natural gas as a mineral.

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74. See, e.g., Appeal of Stoughton, 88 Pa. 198, 201 (1879) (citing Funk v. Halldeman, 53 Pa. 229, 248–49 (1866) (declaring, in certain terms, mineral includes oil)); Funk, 53 Pa. at 248–49 (noting that until science advanced, oil was considered mineral as future courts would likely agree).


76. See Westmoreland & Cambria Natural Gas Co. v. Dewitt, 18 A. 724, 725 (Pa. 1889) (recognizing validity of natural gas as mineral based on master’s finding). The Westmoreland court qualified the classification of natural gas as a mineral because natural gas, like oil, is a mineral “feroe naturoe.” See id. A landowner therefore only had an interest in natural gas and oil as long as it remained under the landowner’s property. See id. (noting when property owner had interest in natural gas and oil); accord Hamilton, 116 A. at 52; see also Barnard v. Monongahela Natural Gas Co., 65 A. 801, 802 (Pa. 1907) (discussing analogy between ownership of wild animals and ownership of oil and gas, stating, “[t]his may not be the best rule; but neither the Legislature nor our highest court has given us any better”).

77. See Gill, 1 A. at 923 (“[Petroleum] is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may, with propriety, be called mining lands.”); cf. Hendler v. Lehigh Valley R.R. Co., 58 A. 486, 487 (Pa. 1904) (examining whether word mineral includes sand, explaining, “[a mineral] may be defined as any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses”), rev’d on other grounds by Hall v. Del., Lackawanna & W. R.R. Co., 113 A. 669 (Pa. 1921); see also PACPO, Inc. v. United States, 814 F. Supp. 2d 477, 494 (W.D. Pa. 2011) (interpreting Pennsylvania law regarding whether mineral includes sandstone, stating, “[w]hen the parties intend to define minerals by its commercial sense, substances included within this definition have their own value that is apart from the rest of the land”).

78. See Burke v. S. Pac. R.R. Co., 234 U.S. 669, 677 (1914) (citing Gill, 1 A. at 923; Funk, 53 Pa. at 248–49). The Court subsequently held that “[p]etroleum lands are mineral lands within the meaning of that term” as it relates to railroad land grants. Id. at 711; see also Luse v. Boatman, 217 S.W. 1096, 1099–1101 (Tex. Civ. App. 1919) (discussing history of Pennsylvania’s mineral rights decisions, including Dunham, and noting that Pennsylvania now recognizes natural gas and oil as minerals before holding both substances are minerals).

79. 468 A.2d 1380 (Pa. 1983). Several courts have referred to this Hoge decision as “Hoge II.” See Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 888 (Pa. 2013) (referring to Hoge as Hoge II). For the purposes of this Note, the decision will be referred to as the Hoge decision.
through the court’s analysis of the ownership of natural gas trapped in a stream of coal.\textsuperscript{80} In \textit{Hoge}, the Pennsylvania Supreme Court held that the owner of a stream of coal also owned the coalbed gas situated inside of the coal stream, despite the fact that ownership of the coal stream had been separated from the immediately adjacent strata.\textsuperscript{81} The court reasoned that because coal was unequivocally a mineral, substances trapped within the conveyed mineral were also conveyed by the mineral grant.\textsuperscript{82} The owner of any other strata had no right to access the coalbed gas, and therefore, the coalbed gas belonged to the owner of the coal.\textsuperscript{83} This ownership theory applies even if the owner of the coal did not explicitly receive a conveyance of the coalbed gas trapped inside of the coal.\textsuperscript{84}

III. \textit{Butler v. Charles Powers Estates ex rel. Warren: Burying the Question to Preserve Tradition}

The Pennsylvania Supreme Court in \textit{Butler} decided that the \textit{Dunham} Rule is still the law of Pennsylvania and, consequently, that natural gas is presumptively not a mineral for the purpose of private conveyances.\textsuperscript{85}

The court was asked to decide whether a deed executed in 1881 conveying

\textsuperscript{80} See \textit{Hoge}, 468 A.2d at 1384–85 (holding, generally, that coalbed gas was conveyed through deed conveying all minerals). The \textit{Hoge} decision was the first major court case involving ownership of coalbed gas in the United States. See Sarah Kathryn Farnell, \textit{Methane Gas Ownership: A Proposed Solution for Alabama}, 33 Ala. L. Rev. 521, 525–26 (1982) (discussing court’s decision in \textit{Hoge} that “coalbed methane is a separate substance from coal”). One commentator argues that the \textit{Hoge} holding may have been largely based on public policy concerns rather than some underlying legal framework. See Nancy P. Regelin, Comment, \textit{Coalbed Gas Ownership in Pennsylvania—A Tenuous First Step with U.S. Steel v. Hoge}, 23 Duq. L. Rev. 735, 736 (1985) (examining, in-depth, \textit{Hoge} decision and its possible underlying motives).

\textsuperscript{81} See \textit{Hoge}, 468 A.2d at 1383 (holding owner of individual strata also has right to minerals located inside of particular strata). The court also explained that coalbed gas was scientifically similar to natural gas, with the main difference between the two substances being the different strata in which they were located. See \textit{id.} at 1382 (“The gas which has commonly been referred to as ‘natural gas’ is generally found in strata deeper than coal veins, though it shares many of the characteristics of coalbed gas.”). \textit{Contra} Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 880 (1999) (holding, for federal lands, coalbed gas is not included in conveyance of coal in which coalbed gas is located).

\textsuperscript{82} See \textit{Hoge}, 468 A.2d at 1383 (citing Kier v. Peterson, 41 Pa. 357 (1861)) (“[A]s a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting.”).

\textsuperscript{83} See \textit{id.} (“[S]uch gas as is present in coal must necessarily belong to the owner of the coal, so long as it remains within his property and subject to his exclusive dominion and control.”).


\textsuperscript{85} For a discussion of the reasoning of the \textit{Butler} court, see \textit{infra} notes 99–116 and accompanying text.
the broad term “minerals” contemplated or included natural gas trapped in Marcellus shale. The court’s decision rested on a centuries-old tradition of recognizing the Dunham Rule’s application to mineral estates and continued the Commonwealth’s support of commercial gas production.

A. Facts and Procedure

John and Mary Butler owned a 244-acre parcel of land in Susquehanna County. A predecessor in title to the property took title from Charles Powers by deed in 1881. The deed in question contained a reservation of one half of “the minerals and Petroleum Oils” to Charles Powers, but the language of the reservation did not specifically contemplate natural gas.

The Butlers filed a complaint in quiet title alleging ownership of all minerals beneath the property, including natural gas, through adverse possession. In response, William and Craig Pritchard, the rightful heirs to Charles Powers’s estate, sought a declaratory judgment that the original reservation included one-half of the natural gas trapped in Marcellus shale beneath the property.

The Butlers filed a preliminary objection, in the form of a demurrer, to the request for a declaratory judgment, arguing that in Pennsylvania a deed reserving the general term “minerals” does not

86. For a discussion of the facts of the Butler case, see infra notes 88–98 and accompanying text.

87. For a discussion of Pennsylvania’s judicial and legislative preference for mineral laws and rulings favoring commercial producers over landowners, see infra notes 117–36 and accompanying text.


89. See id. (discussing history of deed).

90. See id. The language of the deed read as follows: [O]ne-half the minerals and Petroleum Oils to said Charles Powers his heirs and assigns forever together with all and singular the buildings, water courses, ways, waters, water courses, rights, liberties, privileges, hereditaments, and appurtenances, whatsoever there unto belonging or in any wise appertaining and the reversions and remainders rents issues and profits thereof; And also all the estate right, title interest property claimed and demand whatsoever there unto belonging or in any wise appertaining in law equity or otherwise however of in to or out of the same. Id. (alteration in original).

91. See id. (claiming full ownership of mineral rights as opposed to ownership of one-half of mineral rights as conveyed by deed). The Butlers originally filed their claim in the Susquehanna Court of Common Pleas. See id. (discussing procedural history of case).

92. See id. at 887–88 (discussing appellee’s response to appellant’s complaint). At first, there was some difficulty in locating the heirs of Charles Powers Estate. See id. at 887 (noting Pritchards came forward as heirs to Charles Powers Estate on September 21, 2009). It is not unusual for the owner of the surface estate and the owner of the mineral estate to be complete strangers. See Christopher S. Kulander, Common Law Aspects of Shale Oil and Gas Development, 49 Idaho L. Rev. 367, 369 (2013) (“Over time, in many places . . . the mineral estate owner and the surface estate owner would be completely unknown to one another.”).
presumptively include natural gas. The trial court sustained the demurrer and denied the Pritchards’ request for declaratory relief. The Pritchards appealed to the Superior Court of Pennsylvania.

The Superior Court overturned the trial court’s decision and remanded several evidentiary issues to the trial court including whether natural gas trapped in Marcellus shale can be considered a mineral. The Butlers appealed to the Supreme Court of Pennsylvania for a review of whether the remand for an evidentiary hearing was proper. The Supreme Court held that the Dunham Rule continued to be the valid rule in Pennsylvania, that natural gas trapped in Marcellus shale is presumptively not a mineral, and that a remand for an evidentiary hearing was unnecessary.

B. Burying Unfavorable Precedent in Favor of an Archaic Rule

In Butler, the Pennsylvania Supreme Court began its analysis by quickly deciding that the Dunham Rule continues to govern mineral conveyances in Pennsylvania. The court reasoned that the Dunham Rule has never been explicitly questioned, and therefore it continues to be a longstanding rule of property in the state. Since no party offered justifica-

93. See Butler, 65 A.3d at 888 (relying on holding from Highland v. Commonwealth, 161 A.2d 390 (Pa. 1960)).
94. See id. (explaining trial court sustained demurrer because of Dunham Rule, Pennsylvania’s longstanding rebuttable presumption that natural gas is not presumptively included in conveyance of “minerals”).
96. See Butler, 65 A.3d at 888 (explaining that Superior Court remanded issues of (1) whether Dunham Rule applies to Marcellus shale gas, (2) whether Marcellus shale is mineral, and (3) whether Marcellus shale is similar enough to coal that Hoge applies).
97. See id. at 888–89 (discussing appellant’s appeal after adverse decision in Pennsylvania Superior Court). The Pennsylvania Supreme Court was asked to decide:

In interpreting a deed reservation for ‘minerals,’ whether the Superior Court erred in remanding the case for the introduction of scientific and historic evidence about the Marcellus [S]hale and the natural gas contained therein, despite the fact that the Supreme Court of Pennsylvania has held (1) a rebuttable presumption exists that parties intend the term ‘minerals’ to include only metallic substances, and (2) only the parties’ intent can rebut the presumption to include non-metallic substances. Butler v. Charles Powers Estate ex rel. Warren, 41 A.3d 854, 854 (Pa. 2012) (per curiam) (alteration in original) (granting allowance of appeal).
98. See Butler, 65 A.3d at 887 (“[W]e respectfully hold that the Superior Court erred in ordering the remand for an evidentiary hearing and reinstate the order of the trial court.”).
99. See id. at 897 (“[W]e reaffirm that the [Dunham R]ule continues to be the law of Pennsylvania.”).
100. See id. (“[W]e recognize that the Dunham Rule has now been an unaltered, unavering rule of property law for 131 years; indeed its origins actually
tions for overturning the Dunham Rule, the supreme court simply reaffirmed it. 101

Next, the court turned to whether the Dunham Rule applies to natural gas trapped inside of the Marcellus Shale Formation. 102 The court held that the application of the Dunham Rule properly applies to Marcellus shale gas. 103 Additionally, the supreme court held that under the Dunham Rule, it is not possible for Marcellus shale gas to be classified as a mineral, offering two principles upon which it made this decision. 104 First, in Pennsylvania, only substances of a metallic nature constitute a mineral for the purpose of a private deed. 105 Second, private deeds are contracts that must be interpreted based on the intent of the parties to the contract. 106 Therefore, the court held that the remand for an evidentiary hearing was unnecessary because evidence of whether Marcellus shale is a mineral could not possibly aid in ascertaining the parties’ initial intent in the conveyance. 107

The Butler court next reversed the Superior Court’s decision regarding Hoge and held that Hoge was not controlling in regards to natural gas trapped within the Marcellus Shale. 108 The supreme court began by noting that Hoge in no way limited or overruled the Dunham Rule, despite date back to the Gibson decision, placing the rule’s age at 177 years.”). The Butler court further noted that “[a] rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice.” See id. (quoting Highland v. Commonwealth, 161 A.2d 390, 399 n.5 (Pa. 1960)).

101. See id. (“We see no reason, nor has any party or court provided us with one, to depart from this entrenched rule.”).

102. See id. (determining that it must “next examine whether the Dunham Rule applies to this appeal”).

103. See id. (stating that court “readily hold[s]” that Dunham Rule applies).

104. See id. at 897–98 (“We hold that the Superior Court erred in ordering the remand and further that Marcellus shale natural gas cannot, consistent with the Dunham Rule, be considered a mineral for private deed purposes.”).

105. See id. at 898 (citing Gibson v. Tyson, 5 Watts 34, 41–42 (Pa. 1836)) (“[A]nything of a non-metallic nature would not be considered a mineral for private deed purposes . . . .”).

106. See id. (“[W]hen interpreting private deeds and contracts, the ‘question is to be determined not by principles of science, but by common experience directed to the discovery of intention.’” (quoting Schuylkill Nav. Co. v. Moore, 2 Whart. 477, 493 (Pa. 1837))).

107. See id. (“[T]o the extent the Superior Court ordered an evidentiary hearing with expert testimony concerning Marcellus shale natural gas, and the scientific nature thereof, such an order violated the Dunham jurisprudence.”). According to the Pennsylvania Supreme Court, the Dunham Rule certainly applies to some private deeds executed prior to the Dunham decision. See id. at 898 n.9 (rejecting argument that because deed in question was executed in 1881, prior to creation of Dunham Rule in 1882, Dunham Rule is inapplicable). It is not entirely clear whether the Dunham Rule applies to deeds executed prior to 1870. See id. (noting Dunham Rule was created based on deed executed in 1870).

108. See id. at 898 (“[W]e disagree with the Superior Court that because the natural gas at issue in this case is contained within the Marcellus Shale, the Hoge II decision . . . become[s] relevant or controlling.”).
Hoge’s holding that coalbed natural gas is a mineral. The Butler court put forth two reasons why the Hoge decision only concerned the right to coal and the right to ventilation of natural gas trapped in the coal. First, the Hoge decision concerned the right to ventilate coal, which naturally only applies to coal. Second, the Hoge court inherently distinguished coalbed gas from natural gas because the Hoge court upheld a landowner’s right to drill through coal to obtain non-coalbed natural gas. Because no party advanced an argument that suggested natural gas trapped in Marcellus shale was different from natural gas contemplated by the Dunham Rule, the Butler court held that the Dunham Rule applies to Marcellus shale gas and that Marcellus shale gas is not a mineral.

Finally, the Butler court explained that even though the methods used to extract Marcellus shale gas are exactly the same as those used to extract coalbed gas, this fact had no impact on the court’s Dunham Rule analysis. To the Pennsylvania Supreme Court, regardless of whether

109. See id. (noting Hoge court held natural gas as mineral “without discussing the Dunham Rule”). Therefore, the supreme court found “no merit to any averment that Hoge II sub silentio abrogated the Dunham Rule.” See id. However, the Hoge court was aware of the Dunham Rule as the court cited the Dunham decision “for a general pronouncement of the rules of deed and contract construction.” See id. at 898 n.10 (suggesting that had Hoge court intended to overrule Dunham Rule, it would not have cited to Dunham to support its holding).

110. See id. at 898 (noting distinction is critical for two reasons: safety and inherent legal distinction between substances). Until the 1970s, coalbed gas was a dangerous waste product from coal mining that was not commercially or technologically viable. See generally Romeo M. Flores, Coalbed Methane: From Hazard to Resource, 35 INT’L J. COAL GEOLOGY 3 (1998) (discussing history of coalbed gas and its transition from waste product to valuable resource).

111. See Butler, 65 A.3d at 899 (noting also that Hoge court recognized scientific, chemical similarities between coalbed gas and natural gas). Contra U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1384 (Pa. 1983) (“The potential for reversion of the situs, however, does not diminish the character of the coal as property of its grantee, or of the gas contained therein as a mineral ferae naturae resting inside the coal owner’s property and falling within the dominion and control of the coal estate.”). See generally Wendy B. Davis, Coalbed Methane: Degasification, Not Ventilation, Should Be Required, 2 APPALACHIAN J.L. 25 (2003) (arguing against ventilation of coalbed gas due to gas’s environmental impact and commercial potential).


113. See Butler, 65 A.3d at 899 (“Appellants . . . explicitly note that Marcellus shale natural gas is merely natural gas that has become trapped within the Marcellus Shale . . . .”).

114. See id. (citing Gibson v. Tyson, 5 Watts 34, 41 (Pa. 1836)) (recognizing fracking is used to “obtain both coalbed gas and Marcellus shale natural gas,” and explaining that Dunham Rule addresses “the common understanding of the substance itself, not the means used to bring those substances to the surface”). In other contexts, courts have considered whether a deed allows certain types of min-
Marcellus shale is a mineral, and regardless of whether natural gas is trapped within Marcellus shale, natural gas remains a non-mineral.\(^\text{115}\) Because the \textit{Dunham} Rule was controlling and the \textit{Hoge} analysis did not apply, the supreme court reinstated the order of the trial court and sustained the Butlers’ preliminary objections regarding the reservation to Charles Powers.\(^\text{116}\)

C. Maintaining an Old Rule to Protect Commercial Producers

The \textit{Butler} court’s holding reinforced two consistent themes regarding Pennsylvania oil and gas litigation. First, the \textit{Butler} court followed Pennsylvania tradition in upholding the \textit{Dunham} Rule as a longstanding rule of property.\(^\text{117}\) Second, the \textit{Butler} decision continued the more modern Pennsylvania tradition of tailoring oil and gas law to the benefit of commercial producers.\(^\text{118}\)

1. Butler Upholds Outdated Tradition

The \textit{Butler} decision was largely based on upholding a nineteenth-century tradition rather than upholding the logic underlying the \textit{Dunham} Rule.\(^\text{119}\) Pennsylvania courts that have examined the \textit{Dunham} Rule consistently highlight the fact that it is a longstanding rule of property within the state.\(^\text{120}\) This trend continued with the \textit{Butler} court, which emphasized


\(^{116}\) See id. (“[W]e find no reason to apply \textit{Hoge II} to this appeal, and, thus, no need to remand this case for fact-finding.”).

\(^{117}\) For a discussion of the \textit{Butler} court’s analysis of the \textit{Dunham} Rule focusing on the traditional acceptance of the rule, see infra notes 119–23 and accompanying text.


\(^{119}\) For a discussion of Pennsylvania’s pattern of extending the \textit{Dunham} Rule, see infra notes 120–23 and accompanying text.

\(^{120}\) See, e.g., Highland v. Commonwealth, 161 A.2d 390, 398–99 (Pa. 1960) (noting, impliedly, that \textit{Dunham} Rule had been law of Pennsylvania for seventy-seven years); Bundy v. Myers, 94 A.2d 724, 726 (Pa. 1953) (citing Silver v. Bush, 62 A. 832, 833 (Pa. 1906)) (“[\textit{Dunham} Rule] has now been the law of this State for seventy years and is still no less a rule of property which is not to be disturbed.”); Preston v. S. Penn Oil Co., 86 A. 203, 204 (Pa. 1913) (“[\textit{Dunham} Rule] has been the law of this State for 30 years, and very many titles to land rest upon it.”); \textit{Silver}, 62 A. at 833–34 (“[\textit{Dunham} Rule] was part of the law of the state when the deeds in question were made, and to some extent at least, as was said by the learned judge
the longstanding tradition of the Dunham Rule.\textsuperscript{121} The Butler court’s analysis of whether the Dunham Rule remained viable in Pennsylvania focused entirely on the continuous use of the Rule since the nineteenth century.\textsuperscript{122} It appears that the Butler court’s reaffirmation of the Dunham Rule was heavily influenced by the age of the Rule as opposed to its logic, its practical application, or the general understanding of the word “mineral” today.\textsuperscript{123}

2. Butler Favors Commercial Producers

Traditionally, common law understandings of mineral rights have placed Pennsylvania landowners at a disadvantage as compared to commercial producers of natural gas.\textsuperscript{124} Further, the Pennsylvania legislature has historically adopted statutes that support commercial production.\textsuperscript{125} below, it had become a rule of property on which many titles in Western Pennsylvania rested.

\textsuperscript{121} For a discussion of the Butler court’s determination that the Dunham Rule is a longstanding rule of property, see supra notes 99–101 and accompanying text.

\textsuperscript{122} See Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 897 (Pa. 2013) (reasoning for viability of Dunham Rule in modern application). The court held that “neither the Superior Court nor Appellees have provided any justification for overruling or limiting the Dunham Rule and its longstanding progeny that have formed the bedrock for innumerable private, real property transactions for nearly two centuries.” Id.

\textsuperscript{123} See id. at 899 (Saylor, J., concurring) (“Since Dunham has effectively served to establish a governing rule of property law in Pennsylvania for over a century, too many settled expectations rest upon it for the courts to upset it retroactively.”). Even Justice Saylor found the rationale for the original Dunham decision questionable when examined in a modern light. See id. (“I find the original, nineteenth-century rationale for the Dunham Rule to be cryptic, conclusory, and highly debatable.”).

\textsuperscript{124} See Thomas A. Mitchell, The Future of Oil and Gas Conservation Jurisprudence: Past as Prologue, 49 Washburn L.J. 379, 417 (2010) (“The Pennsylvania courts have largely sided with producers in holding that the Oil and Gas Act preempts local land-use regulation which could be used to address the impacts to roads and community infrastructure from development and production.”); Webb, supra note 84, at 35 (noting negative impact of Hoge decision on Pennsylvania landowners).

In recent years, as natural gas drilling and production have increased, Pennsylvania’s courts have become more actively involved in mineral disputes, consistently favoring commercial producers over landowners.\textsuperscript{126} Recently, Pennsylvania appellate courts have increased profits for natural gas companies at the expense of landowners and upheld a grant of power to commercial producers.\textsuperscript{127} In one decision, the Pennsylvania Supreme Court shifted the burden of production costs associated with the development of natural gas to landowners by charging the costs against the landowners’ contractual royalty.\textsuperscript{128} This decision effectively understate and significantly decrease drilling operations. See id. (offering criticism of Bill). Many states have successfully implemented similar dormant mineral statutes. See, e.g., CAL. CIV. CODE § 883.220 (West 2013) (allowing reclamation of mineral rights after twenty year period without production); MICH. COMP. LAWS ANN. § 554.291 (West 2013) (declaring mineral rights abandoned after twenty years of inactivity and allowing reclamation by surface owner); NEB. REV. STAT. ANN. § 57-229 (West 2013) (declaring mineral abandoned after twenty three years without public expression of ownership); OKLA. STAT. ANN. tit. 84, § 271.1 (West 2013) (providing for judicial sale of minerals abandoned for period of fifteen years). See generally John M. Smith, The Prodigal Son Returns: Oil and Gas Drillers Return to Pennsylvania with a Vengeance Are Municipalities Prepared?, 49 DUQ. L. REV. 1 (2011) (analyzing regulatory scheme of Pennsylvania and its relationship to return of commercial drilling to state).


mines the statutory provision granting landowners a minimum royalty percentage from natural gas recovered from their mineral estate. The supreme court has also recently affirmed natural gas companies’ right to continue drilling by permitting these companies to retain their rights to minerals in certain leases so long as a well is producing any profit, regardless of how small. Finally, the intermediate appellate court upheld a Pennsylvania law that gave certain natural gas companies the power of eminent domain.

The Butler decision was an extension of Pennsylvania’s tendency to favor the commercial production of oil and natural gas. Pennsylvania’s natural gas companies overwhelmingly expressed their interest in main-

129. See Press Release, State Reps. Matthew Baker, Garth D. Everett, Sandra Major & Tina Prickett, Area Lawmakers Drafting Measure to Clarify Minimum Royalty Payments (June 29, 2013), available at http://www.reppickett.com/NewsItem.aspx?NewsID=17889 (“Long before the Marcellus Shale was discovered as a major natural gas deposit, a 1979 state law guaranteed a minimum royalty payment of one-eighth for oil, natural gas, or gas of any other designation. This was enacted to ensure fairness and protect landowners from deceptive leases.”).

130. See T.W. Phillips Gas & Oil Co. v. Jedlicka, 42 A.3d 261, 277–78 (Pa. 2012) (holding that if natural gas well pays profit, however small, profit will be considered producing in paying quantities and continue certain gas leases); see also Caldwell v. Kriebel Res., Co., 72 A.3d 611, 615–16 (Pa. Super. Ct. 2013) (holding oil and gas leases impose no duty to produce paying quantities unless explicitly contemplated by lease). Recently, whether natural gas companies have a right to extend oil and gas leases has been the subject of frequent litigation. See, e.g., Stewart v. SWEPI, LP, 918 F. Supp. 2d 333, 340–41 (M.D. Pa. 2013) (finding installation of well immediately prior to natural termination of lease may be for speculation as opposed to profit); Heasley v. KSM Energy, Inc., 52 A.3d 341, 345 (Pa. Super. Ct. 2012) (holding “oil and gas lease calling for a flat rental as opposed to a percentage royalty” after initial term constitutes tenancy at will).

131. See Robinson Twp. v. Commonwealth, 52 A.3d 463, 487–88 (Pa. Commw. Ct. 2012) (upholding 58 Pa. CON. STAT. ANN. § 3241, which grants certain corporations limited power of eminent domain in conjunction with drilling operations). However, the Robinson court also declared several legislative actions granting natural gas companies special treatment unconstitutional. See, e.g., id. at 480–85 (overturning 58 Pa. CON. STAT. ANN. § 3304, which mandated certain zoning requirements in accordance with statute).

132. See e.g., 4 Pa. CODE § 6.432(1)(ii) (2013) (stating Governor’s Marcellus Shale Advisory Commission shall recommend policies regarding “[e]fforts necessary to promote the efficient, environmentally sound and cost-effective development of Marcellus Shale and other unconventional natural gas resources”); cf. W. VA. CODE ANN. § 5B-2H-2(b) (West 2013) (“The Legislature declares that facilitating the development of business activity directly and indirectly related to development of the Marcellus shale serves the public interest of the citizens of this state by promoting economic development and improving economic opportunities for the citizens of this state.”).
taining the *Dunham* Rule as the law of Pennsylvania.133 These companies claimed that thousands of oil and gas leases across the Commonwealth could be in jeopardy if the *Dunham* Rule was overturned.134 Specifically, they claimed that in conjunction with the purchase and lease of oil and gas rights, natural gas companies routinely conduct extensive title searches with the *Dunham* Rule in mind.135 Natural gas companies claimed that if the supreme court overturned the *Dunham* Rule, their right to certain mineral estates might be in jeopardy and would certainly become the subject of litigation.136 Therefore, in upholding the *Dunham* Rule, the Pennsylvania Supreme Court maintained the strong position of commercial gas producers and denied landowners the potential opportunity to reclaim their rights to Marcellus shale gas.137

IV. THE CANARY IN THE MINE: UNDERSTANDING THE IMPACT OF BUTLER

The Pennsylvania Supreme Court’s decision in *Butler* continues the longstanding tradition of upholding the *Dunham* Rule, despite a line of Pennsylvania cases that find oil and natural gas to be minerals.138 In order for Pennsylvania to return property rights to landowners, it should adopt the majority approach and declare natural gas a mineral.139


134. See supra note 133.

135. See id.


137. See supra note 133.

138. For a discussion of precedent that calls into question the *Butler* decision and the validity of the *Dunham* Rule, see infra notes 140–50 and accompanying text.

139. For a further discussion of why Pennsylvania should disregard the *Dunham* Rule, see infra notes 151–60 and accompanying text.
A. The Pennsylvania Supreme Court Adopts the Wrong Precedent

The Pennsylvania Supreme Court decided Butler incorrectly on two grounds. First, the Dunham Rule should be overruled because of subsequent Pennsylvania decisions. Second, even if the Dunham Rule is alive and well, the Butler court incorrectly dismissed the Hoge decision in its analysis.

1. Pennsylvania Courts Recognize Natural Gas as a Mineral

Pennsylvania courts have consistently reiterated their commitment to upholding longstanding rules of property to maintain legal predictability. However, even after the Dunham decision in 1882, numerous Pennsylvania courts have concluded that oil and natural gas are in fact minerals. Further, courts outside of Pennsylvania have long considered

140. For a discussion of a line of Pennsylvania cases discussing oil and natural gas as minerals, see infra notes 142–46 and accompanying text.
141. For a discussion of Hoge’s application to Marcellus Shale, see infra notes 147–50 and accompanying text.
143. See, e.g., White v. N.Y. State Natural Gas Corp., 190 F. Supp. 342, 346–48 (W.D. Pa. 1960) (“Once severed from the reality, however, gas and oil, like other minerals, become personal property.”); In re Bruner’s Will, 70 A.2d 222, 224 (Pa. 1950) (“Oil in place, being a mineral, is part of the reality, and it is like coal or any other natural product which in situ forms part of the land.”) (citing In re Stoughton, 88 Pa. 198 (1878)); McIntosh v. Ropp, 82 A. 949, 955 (Pa. 1912) (“[I]t is settled in this state that oil and gas contained in or obtainable through the land are minerals.”) (citing Marshall v. Mellon, 36 A. 201 (Pa. 1897); Westmoreland & Cambria Natural Gas Co. v. DeWitt, 18 A. 724 (Pa. 1889); Gill v. Weston, 1 A. 921 (Pa. 1885); Stoughton, 88 Pa. 198); Kelly v. Keys, 62 A. 911, 913 (Pa. 1906) (referencing oil as mineral); Blakley v. Marshall, 34 A. 564, 565 (Pa. 1896) (“[O]il in place is a mineral, and, being a mineral, it is part of the reality.”); Guthrie v. Guthrie, 7 A.2d 137, 139 (Pa. Super. Ct. 1939) (“[O]il in place is a mineral. . . .” (citing Stoughton, 88 Pa. at 201)); Rockwell v. Keefer, 39 Pa. Super. Ct. 468, 476 (1909) (“[W]e have established the proposition that oil and gas are minerals. . . .”); In re McLean’s Estate, 85 Pa. D. & C. 129, 132 (Orphans’ Ct. Wash. Cnty. 1952) (“Oil in place, being a mineral, is part of the reality, and it is like coal or any other natural product which in situ forms part of the land.”) (citing Stoughton, 88 Pa. 198); McManus v. Acklin, 62 Pa. D. & C. 527, 530 (Ct. Com. Pl. 1947) (“It is well settled in this State that oil and gas contained in or obtained through the land are minerals. This mineral is confined in certain underlying strata and is a part of the land in the same manner as underlying coal or other minerals.”) (citations omitted) (citing Marshall, 36 A. 201; Westmoreland, 18 A. 724; Gill, 1 A. 921; Stoughton 88 Pa. 198); Thornbury v. Forbes, 7 Pa. D. & C. 184, 185 (Ct. Com. Pl. 1925) (“In Stoughton’s Appeal, following the well-known case of Funk v. Haldeman, it is held that oil is a mineral. . . .” (citations omitted)); In re Forestry Reservation Commission, 28 Pa. C.C. 145 (Pa. Att’y Gen. 1903) (stating definition of minerals which implicitly includes petroleum “was expressly approved by the [Pennsylvania] Supreme Court” (citing Griffin v. Fellows,
the *Dunham* decision overruled based on subsequent Pennsylvania decisions.144 Interestingly, even the court in *Butler* noted that several Pennsylvania statutes included natural gas in their definition of minerals.145

81 1/2 Pa. 114 (1873)); Appeal of Moore, 4 Pa. D. 703, 705 (Ct. Com. Pl. 1895) (“Oil is a mineral.” (citations omitted) (citing *Gill*, 1 A. 921; *Dunham v. Kirkpatrick*, 101 Pa. 36, 43 (1882); *Stoughton*, 88 Pa. at 201; *Funk v. Haldeman*, 53 Pa. 229 (1866)). For further discussion of Pennsylvania cases finding that oil and natural gas are minerals, see *supra* notes 74–84 and accompanying text.

144. See, e.g., N. Pac. R.R. v. Soderberg, 188 U.S. 526, 534–35 (1903) (discussing petroleum as mineral, stating, “[t]he cases are far too numerous for citation, and there is practically no conflict in them” (citing *Westmoreland*, 18 A. 724); *Gill*, 1 A. 921; *Funk*, 53 Pa. 229; Gibson v. Tyson, 5 Watts 34 (Pa. 1836)); Ohio Oil Co. v. Indiana, 177 U.S. 190, 203–04 (1900) (noting Pennsylvania’s acceptance of petroleum as mineral (citing *Westmoreland*, 18 A. 724)); Lovelace v. Sw. Petroleum Co., 267 F. 504, 509 (E.D. Ky. 1919) (“[A]ccording to the popular sense of the word, ‘minerals’ includes petroleum . . . . [T]he cases are unanimous that it does [include petroleum], except the case of *Dunham v. Kirkpatrick* . . . .”, aff’d, 267 F. 513 (6th Cir. 1920); see also McCombs v. Stephenson, 44 So. 867, 886–69 (Ala. 1907) (noting Pennsylvania courts have deviated from *Dunham* Rule (citing *Hendler v. Lehigh Valley R.R. Co.*, 58 A. 486, 487 (Pa. 1904); *Gill*, 1 A. 921; Murray v. Allred, 43 S.W. 355, 359 (Tenn. 1897)); Mo. Pac. R.R. Co. v. Strohacker, 152 S.W.2d 557, 562 (Ark. 1941) (discussing *Dunham* Rule, stating, “[s]ubsequent[ ] Pennsylvania courts treated gas and oil as minerals”); *People ex rel. Carrell v. Bell*, 86 N.E. 593, 594 (Ill. 1908) (“In some of the states petroleum forms a very valuable part of the natural wealth and has been given careful consideration by the courts, and they have uniformly held, so far as the authorities we have examined show, that it should be classed as a mineral.” (citing *Stoughton*, 88 Pa. 198)); *Grain v. West*, 229 S.W. 51, 52 (Ky. 1921) (“Oil in place in the land is a mineral and part of the land itself, and, so far as it relates to the questions to be considered, is similar to coal, iron, lead, or other solid mineral substances which may be in lands.” (citing *Funk*, 53 Pa. at 249); *Stoughton*, 88 Pa. 198)); *Barker v. Campbell-Ratcliff Land Co.*, 167 P. 468, 469 (Oklk. 1917) (noting that Pennsylvania recognizes natural gas as mineral and stating that *Dunham* Rule had been overruled in Pennsylvania by later Pennsylvania decisions (citing *Gill*, 1 A. 921)); *Texas Co. v. Daugherty*, 176 S.W. 717, 719 (Tex. 1915) (“It is no longer doubted that oil and gas within the ground are minerals.”); *Carothers v. Mills*, 233 S.W. 155, 157 (Tex. Civ. App. 1921) (stating “the more recent Pennsylvania cases” have held oil and natural gas presumptive minerals); *Nephi Plaster & Mfg. v. Juab Cnty.*, 93 P. 53, 55 (Utah 1907) (listing numerous cases for proposition that term minerals is not limited to metallic ores (citing *Gill*, 1 A. 921; *Griffin*, 81 1/2 Pa. 114)); State *ex rel. Atkinson v. Evans*, 89 P. 565, 568 (Wash. 1907) (noting Pennsylvania’s acceptance of oil and gas as minerals (citing *Gill*, 1 A. 921; *Funk*, 53 Pa. 229)).

145. See *Butler v. Charles Powers Estate* *ex rel.* Warren, 65 A.3d 885, 897 (Pa. 2013) (refusing to recognize statutes defining natural gas as mineral, such as Municipalities Planning Code, as sufficient authority to overrule *Dunham* Rule). The Municipalities Planning Code, adopted by the Pennsylvania legislature, defines minerals as:

> [A]ny aggregate or mass of mineral matter, whether or not coherent. The term includes, but is not limited to, limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite and clay, anthracite and bituminous coal, coal refuse, peat and crude oil and natural gas.

Yet, the Butler decision itself failed to cite, consider, or reject a single Pennsylvania case that recognized oil and natural gas as minerals.146

2. Hoge Analysis Applies to the Marcellus Shale

Even if the line of Pennsylvania cases finding natural gas to be a mineral fails, the logic of the Hoge court should still apply to Marcellus shale gas. According to the Hoge court, for natural gas to be presumptively included in a conveyance of minerals, it does not need to be explicitly contemplated in the conveyance as long as it is trapped inside of a mineral that is conveyed.147 Assuming Marcellus shale is a mineral, under the Hoge analysis, when Marcellus shale is conveyed, it logically follows that the natural gas trapped in the shale should also be conveyed.148

The Butler court stated that it was examining the question of whether the Hoge decision would apply to natural gas trapped inside of Marcellus shale.149 Yet, the court dismissed this argument by simply stating that natural gas trapped inside of Marcellus shale is scientifically no different than traditional natural gas.150 Consequently, the court incorrectly shifted the issue from whether Marcellus shale is a mineral itself to whether natural gas trapped inside of Marcellus shale is a mineral. As a result of this shift, the supreme court failed to actually answer the question of whether Marcellus shale itself is a mineral, which would implicate a Hoge analysis.

146. See Butler, 65 A.3d at 897 (claiming that no reason has been provided to justify departing from Dunham Rule). The Butler court additionally stated, “neither the Superior Court nor Appellees have provided any justification for overruling or limiting the Dunham Rule and its longstanding progeny that have formed the bedrock for innumerable private, real property transactions for nearly two centuries.” Id. See Coolspring Stone Supply Inc. v. Cnty. of Fayette, 929 A.2d 1150, 1157 n.9 (Pa. 2007) (noting Pennsylvania cases cited in support of argument that oil is mineral).


149. See Butler, 65 A.3d at 896 (claiming Hoge “is distinguishable and inapplicable”). For a further discussion of Hoge, see supra notes 79–84 and accompanying text.

150. See Butler, 65 A.3d at 896. Ironically, the Butler court explained that Marcellus shale gas is scientifically similar to ordinary natural gas for purposes of discrediting Hoge, yet earlier in the opinion rejected the argument that whether natural gas is a mineral should be determined by science.
B. Pennsylvania Should Adopt the Majority Approach

In its decision, the Butler court implicitly rejected a holding that would end the Dunham Rule for any future conveyance, but maintain the Rule for any conveyance prior to the change. The court simply reasoned that the Dunham Rule is a longstanding rule of property, and therefore many conveyances have been based on this Rule. This reasoning is in accordance with Pennsylvania's legal tradition that longstanding rules of property should not be disturbed.

Nevertheless, departing from the Dunham Rule would benefit the state of Pennsylvania. Application of the Hoge standard to Marcellus shale would be best for Pennsylvania citizens because it would allow them to claim the financial benefits associated with the natural gas beneath the land. Additionally, a change in the Dunham Rule would benefit practicing attorneys by making the natural gas presumption consistent with the popular understanding of minerals. Pennsylvania should take this opportunity.
portunity to correct its misapplication of common law decisions through the *Dunham* Rule, and presumptively declare natural gas a mineral.

Critics of the change argue that rejecting the *Dunham* Rule would destabilize oil and gas law across the state. But, in instances where the law has been misapplied, Pennsylvania courts have questioned whether the misapplication should continue, despite their strong commitment to stare decisis. Furthermore, in some cases, departures from longstanding property laws are necessary to adapt to a dynamic world and economy. In support of the change, at least one author has noted that overruling the *Dunham* Rule would not have a significant negative impact on the Commonwealth or its property owners.

V. NAVIGATING THE *DUNHAM* RULE: A GUIDE FOR PRACTICING ATTORNEYS

For the foreseeable future, Pennsylvania attorneys will undoubtedly face challenges associated with the *Dunham* Rule. To address *Dunham* Rule litigation regarding past conveyances, attorneys should either raise or anticipate the issue of Pennsylvania’s second line of *Dunham* Rule cases and be prepared to clarify whether the application of the *Hoge* decision to

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157. *See PA Supreme Court Upholds Dunham Rule on Mineral Rights, ERG ENERGY RES. GROUP* (May 28, 2013), http://pa-erg.com/2013/05/28/pa-supreme-court-upholds-dunham-rule-on-mineral-rights/ (“Removing the *Dunham* rule from the books would have caused chaos in the state’s drilling industry and been disastrous to the thousands of leases and royalty agreements already in place.”).

158. *See Schriver v. Meyer, 19 Pa. 87, 93 (1852)* (“If the law was totally misapplied in that case . . . must we therefore continue to misapply it as often as the other shares come up for discussion? Because we or our predecessors have wronged one man by our blunders, must we therefore wrong forty-three others for the sake of our own consistency?”). *But see AG Serv., Inc. v. T.W. Phillips Gas & Oil Co., No. CIV.A. 91-0650, 1994 WL 762150, at *13* (W.D. Pa. Jan. 19, 1994) (“Even if a state court ruling appears to be outdated and obsolete, a federal court must follow that ruling unless the court has sufficient evidence for believing that the state’s highest court would no longer adhere to that rule.”).

159. *See Troy A. Rule, Property Rights and Modern Energy, 20 GEO. MASON L. REV. 803, 803 (2013)* (detailing current topics in property rights and explaining need for development and adaptation of property laws to keep pace). Pennsylvania courts have also recognized a need to develop common law regarding mineral rights as new disputes arise. *See, e.g., Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (Pa. 1893)* (“It is the crowning merit of the common law, however, that it is not composed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise.”).

160. *See Dale A. Tice, Opening Pandora’s Box? Calling Shale Gas Rights into Question, 34 PA. L. W. 24, 27* (Mar.–Apr. 2012) (“Various commentators have expressed opinions as to the ultimate outcome of *Butler v. Powers*, generally suggesting that concerns about the potential for this case to upset well-settled property law have been exaggerated.”).

Marcellus shale is appropriate.\footnote{162} To prevent disputes that may invoke the Dunham Rule, when drafting mineral conveyances today, Pennsylvania attorneys should consider including meticulously specific language in the conveying instrument to clarify the exact intent of the parties involved.\footnote{163}

A. Past Conveyances

The Butler decision, while arguably intending to avoid litigation, may actually bring to light more issues to be litigated in Pennsylvania courts.\footnote{164} Litigation as a result of the Butler decision will likely continue to focus on the definition of all minerals in a past conveyance.\footnote{165} Further, the Butler decision calls into question whether natural gas trapped in different strata may be subject to different conveyance rules based on its location.\footnote{166}

1. Deeds Conveying “All Minerals”

In Pennsylvania, a deed conveying some derivative of the term “all minerals” is currently subject to the Dunham Rule.\footnote{167} However, in reaffirming the Dunham Rule, the Pennsylvania Supreme Court failed to recognize, discuss, or distinguish a line of Pennsylvania cases that considered natural gas a mineral.\footnote{168} These cases both provide a potentially viable alternative to the Dunham Rule and meet the Butler court’s requirement that the court would not disturb a longstanding rule of property.\footnote{169}

\footnote{162. For a discussion of approaching litigation regarding the Dunham Rule post-Butler, see infra notes 164–81 and accompanying text.}

\footnote{163. For a discussion of drafting considerations in a future mineral conveyance, see infra notes 182–85 and accompanying text.}

\footnote{164. See, e.g., Burcat & Bockis, supra note 148 (discussing potential questions raised by Butler decision). Federal courts are also likely to decline jurisdiction over mineral rights issues. See, e.g., Shychuck v. Chesapeake Appalachia, LLC, No. 13-373, 2013 WL 2558161, at *1–3 (W.D. Pa. June 11, 2013) (declining jurisdiction over action seeking declaratory judgment regarding rights under oil and gas lease); Cabot Oil & Gas Corp. v. Jordan, 698 F. Supp. 2d 474, 479 (M.D. Pa. 2010) (declining jurisdiction over action seeking declaratory judgment regarding validity of oil and gas lease, recognizing “broader context in which the dispute at issue arises,” and recommending adjudication in state court).}

\footnote{165. For a discussion of how to approach litigation regarding a conveyance of all minerals, see infra notes 167–77 and accompanying text.}

\footnote{166. For a discussion of the types of natural gas contemplated by a conveyance of natural gas, see infra notes 178–81 and accompanying text.}

\footnote{167. See Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 897 (Pa. 2013) (“[T]he Dunham rule continues to be the law of Pennsylvania.”).}

\footnote{168. For a list of Pennsylvania cases finding that natural gas is a mineral, see supra note 143 and accompanying text. For a list of non-Pennsylvania cases referencing Pennsylvania courts finding that natural gas is a mineral, see supra note 144 and accompanying text.}

\footnote{169. See generally New Shawmut Mining Co. v. Gordon, 43 Pa. D. & C.2d 477, 483–96 (Ct. Com. Pl. 1963) (discussing parol evidence under Dunham Rule), aff’d, 254 A.2d 426 (Pa. 1967) (per curiam). A practicing attorney should also consider whether a landowner entering into a conveyance with a company that is widely known to commercially produce natural gas is sufficient evidence of a landowner’s intent to include natural gas in the conveyance. The Gordon court found that a}
The *Hoge* decision provides a second argument for departing from the *Dunham* Rule in the case of Marcellus shale gas.\(^{170}\) Instead of arguing that a conveyance includes Marcellus shale gas, an attorney should argue that the conveyance includes Marcellus shale itself and then prove that Marcellus shale is a mineral.\(^{171}\) While this argument was raised in *Butler*, the Pennsylvania Supreme Court did not actually address the issue.\(^{172}\) However, if Marcellus shale is a mineral, it follows by analogy that the *Hoge* analysis should apply to Marcellus shale: i.e., *whoever owns the shale owns the gas.*\(^{173}\)

Finally, Pennsylvania law is concerned with understanding the intent of the parties in a mineral conveyance.\(^{174}\) Nevertheless, the nature of most conveyances is not centered on a list of specific minerals.\(^{175}\) Instead, conveyances are meant to preserve and realize the value of substances trapped beneath the ground.\(^{176}\) If Pennsylvania courts are attempting to discern the intent of parties to a conveyance, they should examine what value the parties understood was being exchanged instead of what detailed list of minerals was potentially conveyed.\(^{177}\)

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\(^{170}\) For a discussion of the *Hoge* decision, see *supra* notes 79–84 and accompanying text.


\(^{172}\) For a discussion of the *Butler* court’s analysis of whether Marcellus shale is a mineral, in which it actually analyzed whether Marcellus shale gas is a mineral, see *supra* notes 108–13 and accompanying text.


\(^{175}\) For a discussion of the analysis of the intent of parties in a mineral conveyance in Pennsylvania, see *supra* notes 70–73 and accompanying text.

\(^{176}\) *See Stewart Title Guar. Co. v. Owlett & Lewis, P.C.*, No. 4:12–CV–00770, 2013 WL 3784126, at *2 (M.D. Pa. July 18, 2013) (“[D]uring the last half of the Nineteenth Century and first half of the Twentieth Century, it was common and customary practice for property owners in this region to reserve all, or a portion, of the oil, gas, and mineral rights when conveying property . . . . ”).

\(^{177}\) *See In re Conveyance of Land Belonging to City of DuBois*, 335 A.2d 352, 357 (Pa. 1975) (“A deed is to be interpreted in light of the conditions existing when it was executed. The entirety of the language is to be considered.”); *see also Trout Run Hunting & Fishing Club v. Hochberg*, No. 10–02400, 2012 WL 7659263
2. **Deeds Conveying “Natural Gas”**

The *Butler* court clearly stated that the origin of natural gas, and its method of extraction, was immaterial to natural gas’s classification as a non-mineral.\(^{178}\) If landowners have conveyed their mineral rights and expressly included natural gas, the conveyance could include one of three currently commercially viable forms of natural gas: traditional natural gas, coalbed gas, and Marcellus shale gas.\(^ {179}\) Therefore, a blanket conveyance of natural gas includes all forms of natural gas.\(^ {180}\) This interpretation is consistent with a recent Pennsylvania statute that allows natural gas com-

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\(^{178}\) See Butler v. Charles Powers Estate *ex rel.* Warren, 65 A.3d 885, 899 (Pa. 2013) (“[T]he basis of the Dunham Rule lies in the common understanding of the substance itself, not the means used to bring those substances to the surface.”).


\(^{180}\) See Hoffman v. Arcelormittal Pristine Res., Inc., No. 11CV0322, 2011 WL 1791709, at *5–6 (W.D. Pa. May 10, 2011) (rejecting argument that deed conveying natural gas, executed decades prior to viable commercial production of Marcellus shale gas, should not be included in grant because Marcellus shale gas was unknown and therefore could not have been contemplated by drafting parties). The *Hoffman* court further stated that all the words in the deed should be interpreted to understand the full meaning of the conveyance. *See id.* at *id.* (“The fact remains that the language of the Deed is clear and unambiguous and it reserves the rights to all oil and gas . . . .”). Some authors have suggested that the *Hoffman* decision is contrary to the Dunham Rule in that *Hoffman* does not expressly seek to interpret the intention of the parties to the conveyance. *See Joel R. Burcat & George Asimos, “What Keeps You up at Night?*, SAUL EWING LLP: OIL & GAS PRACT. GROUP (Sept. 2011), http://www.saul.com/media/alert/2593_pdf_3034.pdf (discussing potential application of Hoffman decision to Dunham Rule); see also Brief for Appellant at 10–13, Kowcheck v. Pittsburgh Terminal Realization Corp., 64 A.3d 34 (table) (Pa. Super. Ct. 2012) (No. 1936 WDA 2011), 2012 WL 6059216 (arguing Marcellus shale gas could not be conveyed under intent analysis). The lower court rejected this argument, stating, the “deed clearly reserves ‘all oil and gas under said tracts of land’ in the grantor.” Kowcheck v. Pittsburgh Terminal Realization Corp., No. 2009-4328, 2011 WL 9753960 (Pa. Ct. Com. Pl. Nov. 14, 2011).
panies to extract Marcellus shale gas when the conveyance only contemplates natural gas.\footnote{181}

**B. Future Conveyances**

For the foreseeable future, the *Dunham* Rule will continue to reflect the law of natural gas conveyances in Pennsylvania.\footnote{182} Fortunately, parties to an oil and gas conveyance have the opportunity to limit the impact of the *Dunham* Rule and *Butler* decision.\footnote{183} To avoid future *Dunham* Rule implications, parties should explain, in detail, the minerals included in the written conveyance.\footnote{184} Parties should also consider including limiting language in the conveyance to reinforce the specific intention of the parties as to which minerals are to be conveyed. Additionally, as the final step of any natural gas conveyance, the conveyance should be properly recorded to avoid any subsequent title disputes.\footnote{185}


182. See *Butler*, 65 A.3d at 900 (Saylor, J., concurring) (“[T]oo many settled expectations rest upon [the *Dunham* Rule] for the courts to upset it retroactively.”).

183. See id. (“[P]arties certainly have the ability to negate the impact of the *Dunham* decision by making their intentions clear on the face of the written instrumentation.”). See generally Krista Weidner, *Natural Gas Exploration: A Landowners Guide to Financial Management*, PENN ST. EXTENSION (2009), available at http://pubs.cas.psu.edu/FreePubs/pdfs/ui394.pdf (explaining, for landowners, important considerations before signing natural gas lease).


185. See 21 Pa. Cons. Stat. § 356 (requiring recordation of “[a]ll agreements in writing relating to real property situate in this Commonwealth”). Landowners severing the mineral estate from the surface estate must also report the severance to local taxing authorities. See 72 Pa. Cons. Stat. § 5020-409 (codifying common law land ownership reporting requirements); Hutchinson v. Kline, 49 A. 312,
VI. Conclusion

For landowners like Bill Hartley, mineral rights provide a viable means to maintain their standard of living. However, in order to preserve landowners’ interest in their properties, Pennsylvania needs to reject the Dunham Rule in favor of a more comprehensive understanding of a conveyance of minerals. The purpose of the Dunham Rule is to interpret a conveyance in accordance with the understanding between the parties, which the Rule, due to changing times, fails to do. Instead, the decisions perpetuating the Dunham Rule rely on years of outdated tradition. Today, Pennsylvania landowners and attorneys must structure conveyances to avoid the pitfalls of this outdated rule of property.


187. For a discussion of why Pennsylvania should depart from the Dunham Rule, see supra notes 142–60 and accompanying text.

188. For a discussion of the Butler court’s role in Pennsylvania’s tradition of perpetuating the Dunham Rule, see supra notes 119–37 and accompanying text.

189. For a discussion of how to navigate the Dunham Rule after the Butler decision, see supra notes 161–85 and accompanying text.