Article

THE RIGHTS OF SHAREHOLDERS IN AUTHORIZING CORPORATE PHILANTHROPY

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I. CORPORATE PHILANTHROPY IN THE UNITED STATES

Corporate philanthropy is on the rise as United States corporations donated an estimated $20.1 billion to charities in 2013.1 This record level of charitable donations seems to dispute the notion that a corporation exists “primarily for the profit of stockholders.”2 Despite any misimpressions to the contrary, corporate statutes do not dictate that directors have a singular duty to pursue profit-maximizing activities.3 Instead, corporate statutes specify activities for which directors are able to use corporate profits, including provisions allowing corporate donations for social goals.4 In determining whether a public company’s board of directors has acted in its shareholders’ best interests, courts scrutinize directors’ decisions based on the directors’ fiduciary duties and thus apply the “business judgment” rule, which accords directors very deferential treatment.5 The business

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2. See Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (expressing position that profits should be primary goal of managers); see also A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (1994) ("[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." (citation omitted)).


4. See id. (“To the contrary, every state has enacted a corporate statute giving managers explicit authority to donate corporate funds for charitable purposes.”).

judgment rule prevents courts from finding directors at fault if they relied on “any rational business purpose” when making their decision.\(^6\)

A corporation contributes to nonprofit organizations as a way to expand its marketing, create positive public relations, serve community needs in the hope of generating consumer loyalty, provide tax benefits for the corporation, and elicit “the applause and approval of business peers and local philanthropic elites.”\(^7\) The most direct economic benefits that companies reap from corporate philanthropy are the tax incentives that the United States Internal Revenue Service (IRS) allows.\(^8\) These tax allowances reduce a corporation’s taxable base or provide the corporation with state and local government tax credits to reduce a company’s tax liability.\(^9\) To claim a tax deduction, the IRS requires that a company’s board of directors authorize the charitable contribution.\(^10\) Presumed benefits of corporate philanthropy that do not produce direct economic benefits—and cannot prove their worth as direct line items—can cause consternation among a corporation’s shareholders and may prompt shareholder demands for reconsideration of the corporation’s charitable donations.\(^11\)

In certain circumstances, directors are able to donate their company’s philanthropic funds in personally beneficial ways.\(^12\) The public profiles of board members and company executives are raised frequently by news media appearances that praise corporate philanthropy, while simultaneously increasing their personal stature, fame, recognition, and board seats.\(^13\) In light of the discretion given to boards of directors in determining corpo-

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\(^9\) See, e.g., North Dakota’s Income Tax Credit, N.D. CMTY. F OUND., http://www.ndcf.net/Information/NDtaxCredit.asp (last visited Jan. 30, 2015) (providing tax credit for specific gifts to North Dakota charities under senate bill 2160); see also Idaho Code Ann. § 63-3029A (West 2014) (providing tax credit limit of fifty percent of contributions and up to ten percent of total income or tax liability).


\(^11\) Of the four major tax choices available for domestic and international corporate philanthropy—direct corporate giving, company foundation grants, donor-advised fund grants, and promotional or marketing expenses—direct corporate giving was chosen as the focus of this Article to help improve clarity and thoroughness.

\(^12\) See Barnard, supra note 7, at 1148 (commenting on notion of corporate directors using corporate funds to subsidize “pet projects”).

\(^13\) See id. at 1160–64 (supporting notion that philanthropic actions carried out by corporate executives are highlighted from many angles).
rate philanthropic donations of stockholder funds, this research was conducted to understand board powers and the legal constraints in place to protect shareholder rights and interests.

A. An Overview of Extant Law

Before the mid-1950s, the prevailing law did not grant corporations the authority to make philanthropic contributions unless the contributions were directly related to the purposes of the corporation. Currently, all fifty states have statutes providing for corporate authority to make philanthropic contributions. Additionally, the American Bar Association Committee on Business Corporations passed a resolution “empowering corporate donations to charitable, scientific, religious and educational institutions.” Authorized contributions include corporate donations to promote goodwill for the company and charities, which are important to the welfare of the communities where the donor does business.

Most states have enacted statutes that provide guidelines specifying whose interests directors must consider in making corporate philanthropic decisions. While some states require directors to place disproportionate weight on shareholder interests, other states require directors to consider additional interested parties, such as employees, suppliers, customers, and local communities. For instance, Delaware directs boards of directors to consider primarily shareholders’ interests or to make deci-


15. See Brown, Helland & Smith, supra note 14, at 859 (“Twenty-four states, including Delaware, have adopted phrasing that enables corporations ‘to make donations for the public welfare or for charitable, scientific or educational purposes.’ Nineteen have a two-provision statute that allows contributions for either ‘furthering the business affairs of the corporation’ or for ‘charitable purposes.’ The remaining seven authorize contributions ‘irrespective of corporate benefits.’”).


17. See Greene Cnty. Nat’l Farm Loan Ass’n v. Fed. Land Bank of Louisville, 57 F. Supp. 783, 789 (W.D. Ky. 1944) (finding it well-established that substantial contributions meant to promote goodwill of company are permitted), aff’d, 152 F.2d 215 (6th Cir. 1945).


19. See Brown, Helland & Smith, supra note 14, at 859 (acknowledging states now provide guidelines for whose interests must be considered during decision making process).

20. See id. at 859–60 (“Delaware imposes a ‘shareholder primacy’ criterion on managers (managers must place shareholders’ interests first). Other states allow managers to consider broader constituencies . . . .”).
sions about charitable donations in accordance with the business judgment rule.21

Shareholders rarely have opportunities to provide input on corporate philanthropy decisions.22 There are no laws that expressly allow or require shareholders to receive disclosures of corporate donations or to participate in the decision making process such that they would be able to help choose the recipient organizations and the amounts donated.23

B. Tax Policy

The United States government supports corporate philanthropy through its tax policy.24 In 1935, Congress encouraged corporate contributions to “eleemosynary causes” by allowing a tax deduction for such donations.25 This encouragement is codified in section 170 of the Internal Revenue Code.26 The federal policy is also reflected in the tax deductions at the state level; since 1955, over eighty percent of states also allow charity-related tax deductions.27

II. Substantive Review of Case Law

Four cases are especially relevant to corporate philanthropic activities.28 These cases provide examples of shareholders’ views and arguments in attempting to overrule management’s decisions on corporate philanthropy.

21. See id. at 860 (“[T]here are three different formulations currently in place: Delaware’s shareholder primacy statute, Connecticut law, which requires consideration of non-shareholder interests, and ‘other constituency statutes,’ which indicate whose interests may be considered. The latter states give broad discretion to consider non-shareholder interests, and are used in 26 states. The remaining 22 states have not enacted specific laws, but instead follow the ‘business judgment rule,’ which holds that directors’ decisions are presumed to be informed decisions, made in good faith, and in the belief that they are in the interest of the shareholders.”).

22. See id. at 861–62 (discussing how many managers and directors will conceal philanthropic activity, evidencing that many shareholders are not given opportunities to participate in these decisions).

23. See id. at 861 (“There is no legal requirement for firms to disclose their charitable giving.”).


A. A. P. Smith Manufacturing Co. v. Barlow

The A. P. Smith Manufacturing Company ("A. P. Smith"), a New Jersey company incorporated in 1896, engaged in the manufacture and sale of valves, fire hydrants, and special equipment, mainly for the water and gas industries. Over the years, A. P. Smith made regular contributions to the local community chest and occasionally to Upsala College and Newark University. In July 1951, “[A. P. Smith’s] board of directors adopted a resolution which set forth that it was in [A.P. Smith’s] best interests to join with others in the 1951 Annual Giving to Princeton University . . . .” The board of directors appropriated the sum of $1,500 to be contributed to Princeton University for its maintenance.

A. P. Smith’s stockholders questioned this donation and sought a declaratory judgment, leading to a trial. During the trial, A. P. Smith’s president explained that the contribution at issue was a “sound investment” because the public expected corporations to donate money to philanthropic and benevolent institutions. In return, corporations receive community goodwill and a favorable environment in which to conduct business. Princeton University’s President also testified to the benefit of donations to private institutions.

The shareholders did not dispute A. P. Smith’s testimony on the importance of donating to private higher learning institutions, such as Princeton, and did not object to the legislation and public policy in favor of corporate contributions. However, the shareholders argued that A. P. Smith’s certificate of incorporation did not expressly authorize contribu-

29. See A. P. Smith Mfg. Co., 98 A.2d at 582. The company was located in East Orange and Bloomfield, New Jersey, and it had approximately 300 employees. See id.

30. See id. Upsala College was located in East Orange and Newark University is now a part of Rutgers, the State University. See id.

31. Id. (discussing board resolution relating to Annual Giving to Princeton University).

32. See id. (noting amount of contribution given to Princeton University).

33. See id. (recounting procedural history).

34. See id. at 582–83 (quoting A. P. Smith president’s testimony on contributions to Princeton). Additionally, A. P. Smith’s president stated that by “contributing to liberal arts institutions, corporations were furthering their self-interest in assuring the free flow of properly trained personnel for administrative and other corporate employment.” Id. at 583. Moreover, the chairman of the board of the Standard Oil Company of New Jersey testified that “corporations are expected to acknowledge their public responsibilities in support of the essential elements of our free enterprise system.” Id. In addition, he indicated that disappointing reasonable and justified public expectations was a bad business practice, as was “taking substantial benefits from their membership in the economic community while avoiding the normally accepted obligations of citizenship in the social community.” Id.

35. See id. (providing Princeton President’s testimony arguing for need to maintain non-governmental sources of knowledge and philanthropic aid).

36. See id. (noting that shareholders did not object to testimony presented on public policy reasons for corporate contributions).
tions and that, under common law, A. P. Smith did not possess any implied or incidental power to make philanthropic contributions. Further, the shareholders argued that the New Jersey statutes expressly authorizing contributions did not apply to A. P. Smith because the company was formed before the statutes were enacted. The trial court ruled for A. P. Smith, stating that the company’s decision to donate was within its corporate power, *intra vires*, and the shareholders appealed.

The appellate court agreed, finding that A. P. Smith’s authority to make charitable donations was valid. The court held that A. P. Smith was permitted to make donations when the activity supported by the gift promoted the goodwill of the corporation’s business. The appellate court stated that A. P. Smith’s modest donation to a preeminent institution of higher learning was well within the limitations imposed by the statute, and the donation was voluntarily made with reasonable belief that it would aid the public welfare and advance the company’s interest as a private corporation in the community in which the company operated.

B. Union Pacific Railroad Co. v. Trustees, Inc.

Plaintiff Union Pacific Railroad Co. (“Union Pacific”) was incorporated in 1897 to operate a railroad. Union Pacific’s charter “gave no express power of contribution, there was no legislation authorizing it, and none existed until and unless it was provided by the 1955 legislation.” In 1955, four shareholders challenged Union Pacific’s authority to make charitable contributions from corporate funds and threatened to commence litigation. The next day, Union Pacific filed a lawsuit seeking a declaratory judgment against these four shareholders.

37. See id. (providing shareholders’ first position in challenging A. P. Smith’s contribution).
38. See id. (presenting shareholders’ second argument against A. P. Smith’s contribution).
39. See id. at 582.
40. See id. at 590 (presenting holding of court in A. P. Smith’s favor).
41. See id. at 584. Under New Jersey law, corporations can make charitable donations, provided that the contributions are not made to donee institutions that own more than ten percent of the voting stock of the donor and that the contributions do not exceed one percent of capital and surplus, unless one of these prohibited donations are authorized by the stockholders. See N.J. STAT. ANN. § 14A:3-4(1) (West 2014) (authorizing contributions by corporations and providing requirements).
42. See A. P. Smith Mfg. Co., 98 A.2d at 590 (providing court’s additional reasoning in finding A. P. Smith’s contribution valid).
44. Id. (discussing Union Pacific’s authority to make philanthropic donations).
45. See id. (explaining shareholders’ desire to “test” donation by filing suit before Union Pacific filed declaratory judgment suit).
46. See id. (stating Union Pacific’s declaratory judgment appeared “to have been one of the speediest, most understanding corporate responses to benevolent shareholder belligerency on record”).
During the hearing, Union Pacific’s directors testified that the new concept of corporate responsibility through philanthropy was “conceived in a shifting socio-economic atmosphere[,] was born of new corporate business policy, [and] . . . seems to be nurtured by legislative, corporate and judicial thinking.” They further stated that “[a] reasonable percentage of corporate income . . . should be earmarked for worthy [philanthropic] causes, as a necessary and proper item of business expense . . . .” The chairperson of Union Pacific’s board of directors testified that corporate donations are beneficial to the shareholders in the long run, and that the public expects businesses to support worthwhile local and national causes.

The lower court ruled that Union Pacific’s resolution authorizing a $5,000 contribution of corporate funds to its foundation—a non-profit corporation organized by Union Pacific and dedicated to charitable, scientific, religious, and educational purposes—was ultra vires. Further, the lower court stated that Union Pacific did not have the statutory authority to make contributions of corporate funds for public welfare or for charitable, scientific, religious, or educational purposes.

On appeal, the Supreme Court of Utah concluded that the corporation made the donation in the best interest of the shareholders and the company. The court found that such a corporate contribution should rest on the “sound discretion of management” and was a legitimate exercise of “implied authority in the ordinary course of the company’s business.” The court stated that the implied powers of a corporation provide

47. Id. at 401 (providing context for Union Pacific’s decision to make philanthropic donation).
48. Id. (quoting testimony to lend further policy support for corporate giving).
49. See id. (emphasizing donation decision was made with shareholders in mind). Other directors testified that corporate donations create goodwill in the community and positive reflection from the public to corporate generosity. See id. (discussing other benefits of corporate donations). The court echoed this testimony by recognizing the goodwill benefit received by Union Pacific when it shipped 1,600 carloads of food and material, contributed $200,000 in cash, and evacuated a quarter of a million people at no charge following the San Francisco earthquake in 1906. See id. at 400 (highlighting this act as illustrative of implied corporate power that, although not profitable, was not “priceless” due to resulting community goodwill).
50. See id. at 399 (providing procedural background of case).
51. See id. (summarizing lower court’s finding that precluded Union Pacific from making philanthropic donation absent authority).
52. See id. at 401 (“If [directors’] personal judgment was unsound, it is not reflected in this record, in the expressed national and state legislative encouragement of such practice, in the expressed opinions and thinking of members of legal groups concerned with the matter, nor by the mushrooming statistics dating from 1940 that clearly reflect an ever-increasing belief on the part of those who manage and run institutions flying a corporate ensign that it is sound business to contribute to agencies fostering charity, church, science and school.”).
53. Id. at 401–02 (likening donation to sponsoring baseball teams, subsidizing students with intent to hire them later, giving to community chests, paying public
the authority to contribute “reasonable amounts to selected charitable, scientific, religious or educational institutions, if they appear reasonably designed to assure a present or foreseeable future benefit to the corporation . . . .” The court also held that in making a charitable contribution, the management’s decisions “should not be rendered impotent unless arbitrary and unreasonably indefensible, or unless countermanded or eliminated by action of the shareholders at a proper meeting.”

C. Theodora Holding Corp. v. Henderson

The Theodora Holding Corporation (“Theodora”) was formed in 1967 as a holding company of Alexander Dawson, Inc. Theodora’s shareholder filed a derivative action against the corporation and the corporation’s president, who was also a majority shareholder, seeking an appointment of a liquidating receiver. The shareholder alleged that, through several separate transactions, the president mismanaged the corporation and engaged in several expenditures for his own benefit and to the corporation’s detriment. The lawsuit demanded an accounting by individual defendants for losses allegedly sustained and improper gains received by the defendants because of certain transactions, such as the purchase of a seat on the New York Stock Exchange and the donation of monies to a charitable trust.

Theodora donated stock, valued in excess of $525,000, to the charitable trust. The court stated that the donated amount was within the limits of federal tax provisions pertaining to deductible corporate gifts under sections 170(b)(2) and 545(b)(2) of the Internal Revenue Code of 1954. The court also stated that the charitable trust was legitimate, as it operated exclusively in the fields of religious, charitable, scientific, literary, or educational salaries, sponsoring newspaper or television programs, or conducting advertising programs.

54. Id. at 402 (finding directors’ decision rooted in common sense).
55. Id.
57. See id. (“[T]he basic relief sought by plaintiff after trial is the appointment of a liquidating receiver for the corporate defendant, such application being based on the alleged wrongs suffered by the corporate defendant at the hands of the individual defendants, which wrongs, according to plaintiff, if permitted to continue, threaten the very existence of such corporation.”).
58. See id. at 399–400 (noting plaintiff’s argument that such wrongs threatened existence of Alexander Dawson, Inc.).
59. See id. at 399 (“[T]he basic relief sought by plaintiff after trial is the appointment of a liquidating receiver . . . .”).
60. See id. at 402 (noting that donations had been made to Alexander Dawson Foundation since 1957, and shareholders had unanimously approved all gifts including tract of land worth $467,750).
61. See id. at 404–05 (framing gift as percentage of revenue).
Before rendering its decision, the court considered contemporary decisions from other jurisdictions—which recognized a corporation’s obligations to philanthropic, educational, and artistic causes—and current statutory law supporting the same. The court held that a reasonableness test should apply to philanthropic donations and that the Internal Revenue Code should furnish a helpful guide pertaining to charitable gifts by corporations.

The court denied the request for a receiver and stated that none of the separate transactions “demonstrate gross mismanagement or a threat to [Theodora’s] existence as a viable business entity . . . .” Although the gift of $528,000 was significant, Theodora’s total income was $19.1 million, thus placing the donation well within the federal deduction limitation, which was five percent of a corporation’s income pursuant to the Internal Revenue Code of 1954. Accordingly, the court held that the shareholders in this case failed to prove that Theodora’s transactions, separately or cumulatively, demonstrated corporate perversion or self-dealing, but instead showed reasonable corporate acts within the business judgment rule.

This case signifies court adoption of the reasonableness standard for corporate philanthropic donations and the use of the Internal Revenue Code to decide if a donation is in fact reasonable. In this decision, the court limited shareholders’ rights to challenge corporate donations by validating corporate donations as long as they are reasonable in amount, regardless of the total dollar figure donated, and follow the standards prescribed by tax statutes. This case also expressly extended the applica-

62. See id. at 404 (citing Del. Code Ann. tit. 8, § 122) (finding that, under Delaware law, “Every corporation . . . shall have the power to . . . make donations for the public welfare or for charitable, scientific or educational purposes . . . .”)
64. See id. at 405 (noting cost to shareholders per contribution dollar was only fifteen cents because of favorable tax provisions).
65. See id. at 406 (explaining that liquidation should only be forced upon showing of “a failure of corporate purpose, a fraudulent disregard of the minority’s rights, or some other fact which indicates an imminent danger of great loss resulting from fraudulent or absolute mismanagement”).
66. See id. at 405.
67. See id. at 406.
69. See id. at 1205 (noting that while shareholders could make those contributions on their own, firm can do so at lower cost).
tion of the business judgment rule to corporate philanthropic activities. Finally, the decision signifies the extension of previously established precedent and the power of a corporation to make charitable donations.

D. Kahn v. Sullivan

Occidental Petroleum Corporation (“Occidental”) was a Delaware corporation with corporate headquarters located in Los Angeles, California that had approximately 290 million shares of stock outstanding and 495,000 shareholders at the time of the case. Armand Hammer, Occidental’s chief operating officer and chairman of its board of directors, was an art collector at the time of his death. Both personally and with his foundation, Hammer owned three major collections of art valued at $300 to $400 million. For many years, Occidental’s board of directors determined that it was in the corporation’s best interest to support and promote the acquisition and exhibition of the art collection. Occidental’s financial support and sponsorship allowed the art collection to be loaned to sponsors in more than twenty-five American cities and at least eighteen foreign countries, the majority of which were countries where Occidental had business “operations or was negotiating business contracts.” Occidental’s annual report described the “benefits and good will which [the art collection] attributes to the financial support that Occidental has provided for the Art Collection.”

The Los Angeles County Museum of Art (LACMA) had an ongoing relationship with Hammer, through which he donated numerous paintings and funds to LACMA for the purchase of additional art. For his contributions, LACMA named one of its wings after Hammer. For nearly twenty years, Hammer expressed his intention to donate the art collection to LACMA, but neither party entered into an agreement to that

70. See id. (explaining that protection of business judgment rule allows company, instead of its shareholders, “to take the lead in choosing the objects and amounts of corporate charity”).

71. See id. (noting that Theodora court explained that there could be instances when certain philanthropic actions add more utility to manager than firm, which might not fall within this role).


73. See id. (“The Art Collection, valued at $300–$400 million included: ‘Five Centuries of Art,’ more than 100 works by artists such as Rembrandt, Rubens, Renoir and Van Gogh; the Codex Hammer, a rare manuscript by Leonardo da Vinci; and the world’s most extensive private collection of paintings, lithographs and bronzes by the French satirist Honore Daumier.”).

74. See id.

75. See id. (explaining that more than six million people have viewed collection in total).

76. Id.

77. See id. at 51–52 (describing relationship that spanned several decades).

78. See id. at 52 (“Nevertheless, LACMA named one of its buildings the Frances and Armand Hammer Wing in recognition of Dr. Hammer’s gifts.”).
Occidental approved Hammer’s decision to display the art collection permanently at LACMA and made “substantial financial contributions to facilitate that display.” When LACMA and Hammer attempted to formalize the donation through a binding agreement, the negotiations broke down, and Hammer concluded that he would make arrangements for permanent display of the art collection at a place other than LACMA.

Consequently, Hammer proposed to Occidental that the company construct a museum for the art collection. Occidental’s executive committee decided that it was in the corporation’s best interest to accept the proposal, approving the construction of the art museum on the corporate premises. In its annual report, Occidental informed its shareholders of the preliminary plans to construct the art museum.

Prior to approving the proposal, the board of directors conducted and participated in multiple due diligence processes. First, the board hired outside legal and accounting firms to examine all issues relevant to the final proposal for the museum. These external professional firms rendered their opinions pertaining to the museum proposal. Second, the board appointed a special committee comprised of eight independent directors to review the proposal. After deliberating and relying on the

79. See id. (explaining that Hammer presented LACMA with thirty-nine page proposed agreement, but they were unable to agree on terms).
80. See id. (providing example of Occidental’s $2 million payment to expand and refurbish the Hammer wing at LACMA in 1982).
81. See id. (noting Hammer had stated in letter that he “decided to create [his] own museum to house” collection).
82. See id. (explaining plan to use space of existing employee parking lot for museum).
83. See id. (noting executive committee approved negotiations for design and construction of museum after discussing company’s history with art collection).
84. See id.
85. See id.
86. See id. (noting that one law firm was retained to examine proposal and address issues relevant to board’s consideration, and another law firm was retained to represent newly formed entity that would be necessary for museum proposal).
87. See id. (explaining that law firm examining proposals relevant to board’s consideration “provided each member of the Board with a ninety-six page memorandum,” which “contained a definition of the Museum proposal and the anticipated magnitude of the proposed charitable donation by Occidental”). The memorandum:

[R]eviewed the authority of the Board to approve such a donation and the reasonableness of the proposed donation” and “included an analysis of the donation’s effect on Occidental’s financial condition, the potential for good will and other benefits to Occidental, and a comparison of the proposed charitable contribution by Occidental to the charitable contributions of other corporations.

Id. at 52–53. The second law firm also provided a tax opinion. See id. at 53 (“The presentation reviewed again the directors’ standard of conduct in considering the Museum proposal, as well as the financial and tax consequences to Occidental as a result of the donation.”).
88. See id. (listing board members, who collectively accounted for approximately eighty years of service on Occidental’s board).
reports prepared by outside legal and accounting consultants, the special committee concluded that establishing the museum on Occidental’s corporate property would provide benefit to the corporation and would establish a "new cultural landmark for the City of Los Angeles." As a result, the special committee unanimously approved the museum proposal subject to several conditions, which required additional substantial expenditures and numerous procedural compliances.

After Occidental reported its approval of the museum proposal to its shareholders via a proxy statement, three shareholder lawsuits challenged the Occidental board’s actions to make charitable donations to construct

89. See id. at 54 (describing decision-making process as including many questions, extensive discussions, and reliance on expert opinions).
90. See id. at 54–55. The proposal approved by the Special Committee included the following provisions:

1. Occidental would construct a new museum building, renovate portions of four floors of its adjacent headquarters for use by the Museum, and construct a parking garage beneath the museum for its own use for a total cost of approximately $50 million.
2. Occidental would lease the Museum building and the four floors of its headquarters to the Museum rent-free for a term of thirty years. Occidental would continue to pay the property taxes, and the Museum would pay the utilities and maintenance expenses;
3. Occidental would purchase a thirty-year annuity at an estimated cost of $35.6 million to provide for the funding of the Museum’s operations during its initial years;
4. Occidental would grant the Museum an irrevocable option to purchase the Museum building, the parking garage, and the Occidental headquarters building in thirty years for $55 million;
5. Dr. Hammer and the Foundation would transfer the Art Collection entirely to the Museum;
7. Occidental would have representation on the board of directors of the Museum;
8. Occidental would receive public recognition for its role in establishing the Museum, for example, by the naming of the courtyard, library, or auditorium for Occidental and Occidental would have the right to use the Museum, and be entitled to “corporate sponsor” rights.  

Id. at 54. Additionally, the approval of the proposal was subject to the following conditions:

1. The incorporation of the Museum as a non-profit corporation under Delaware law;
2. The determination by the Internal Revenue Service that the Museum would be a tax-exempt entity under the Internal Revenue Code;
3. The receipt of supplementation of the [ ] opinion letters to reflect tax issues discussed at the meeting, including the question of self-dealing; and
4. The execution of the necessary documents relating to (a) the lease of the Museum facilities, (b) the Museum’s option to purchase Occidental’s headquarters, (c) Occidental’s lease-back rights if the option was exercised, and (d) an agreement for the transfer of the Collection from the Foundation and Dr. Hammer to the Museum, including a full inventory of the art.  

Id. at 54–55.
and fund an art museum.\textsuperscript{91} Occidental’s board, by unanimous written consent, delegated full authority to a special committee to settle the shareholder litigation.\textsuperscript{92} One group of shareholders agreed to a settlement of their class and derivative actions, subject to approval by the Court of Chancery.\textsuperscript{93} After Occidental’s special committee authorized the settlement, the shareholders in the other two lawsuits objected and decided to challenge the proposed settlement.\textsuperscript{94}

The Court of Chancery concluded that under the circumstances of this litigation, the terms of the settlement were fair and reasonable, and it

\begin{itemize}
  \item \textsuperscript{91} See id. at 50, 55 (describing timeline of Kahn, Sullivan, and Stepak actions).
  \item \textsuperscript{92} See id. at 56 (reviewing process of special committee drafting agreement).
  \item \textsuperscript{93} See id. at 50, 56–57. The Settlement and Release Agreement presented to the Court of Chancery provided for the following:
    \begin{enumerate}
      \item The Museum building shall be named the “Occidental Petroleum Cultural Center Building” with the name displayed appropriately on the building.
      \item Occidental shall be treated as a corporate sponsor by the Museum for as long as the Museum occupies the building.
      \item Occidental’s contribution of the building shall be recognized by the Museum in public references to the facility.
      \item Three of Occidental’s directors shall serve on the Museum’s Board (or no less than one-third of the total Museum Board) with Occidental having the option to designate a fourth director.
      \item There shall be an immediate loan of substantially all of the art collections of Dr. Hammer to the Museum and there shall be an actual transfer of ownership of the collections upon Dr. Hammer’s death or the commencement of operation of the Museum—whichever later occurs.
      \item All future charitable contributions by Occidental to any Hammer-affiliated charities shall be limited by the size of the dividends paid to Occidental’s common stockholders. At current dividend levels, Occidental’s annual contributions to Hammer-affiliated charities pursuant to this limitation could not exceed approximately three cents per share.
      \item Any amounts Occidental pays for construction of the Museum in excess of $50 million and any amounts paid to the Foundation upon Dr. Hammer’s death must be charged against the agreed ceiling on limitations to Hammer-affiliated charities.
      \item Occidental’s expenditures for the Museum construction shall not exceed $50 million, except that an additional $10 million may be expended through December 31, 1990 but only if such additional expenditures do not enlarge the scope of construction and if such expenditures are approved by the Special Committee. Amounts in excess of $50 million must be charged against the limitation on donations to Hammer-affiliated charities.
      \item Occidental shall be entitled to receive 50% of any consideration received in excess of a $55 million option price for the Museum property or 50% of any consideration the Museum receives from the assignment or transfer of its option or lease to a third party.
      \item Plaintiffs’ attorneys’ fees in the Sullivan action shall not exceed $1.4 million.
    \end{enumerate}
  \item Id. at 57.
  \item \textsuperscript{94} See id. at 50, 57 (noting that Kahn, Stepak, and California Public Employees Retirement System (“CalPERS”) appeared to oppose settlement).
\end{itemize}
approved the settlement. Specifically, the court concluded that the shareholders’ claims were likely to be dismissed before or after the trial. The court also stated that the benefit to be received from the settlement “was meager” and that “it was adequate considering all facts and circumstances” surrounding this litigation.

An appeal followed in which the shareholders contended that the Court of Chancery abused its discretion in approving the settlement. Specifically, the shareholders presented three arguments. First, shareholders argued that the court “erred in holding that it was ‘highly probable’ that the protection of the business judgment rule would successfully apply to the actions taken by the directors of Occidental who had been named as defendants.” Second, the shareholders argued that the court abused its discretion in finding that “plaintiffs’ claims of corporate waste were weak.” Third, the shareholders stated that the court “abused its discretion in approving the settlement because the consideration for the settlement was inadequate in view of the strength of the claims” against the defendant.

After reviewing the facts and law underlying this action, the Supreme Court of Delaware affirmed the Court of Chancery’s decision and held against the objecting shareholders. As to the shareholders’ first argument, the Delaware Supreme Court affirmed the lower court’s conclusion that “it was highly probable in deciding a motion to dismiss, a motion for summary judgment, or a post-trial motion, the actions of ‘the Special Committee would be protected by the presumption of propriety afforded by the business judgment rule.’” The Delaware Supreme Court agreed with the Court of Chancery regarding its conclusion that the record of Occidental’s actions, relying on outside and independent directors to make informed decisions regarding the approval of charitable donations, supported the disposition of the lawsuit.

As to the shareholders’ second argument accusing Occidental of corporate waste, the court affirmed the dismissal of that claim, finding that Occidental acted within the bounds of Delaware law and that the corpora-

95. See id. at 51, 58 (noting that in reviewing settlement, Chancery Court was bound by business judgment rule in determining reasonableness).
96. See id. at 58, 61 (describing reasoning in approving settlement).
97. See id. at 58.
98. See id. at 51 (stating California Public Employees Retirement System was permitted to intervene as shareholder plaintiff and appeared in opposition to proposed settlement).
99. See id. (introducing objectors’ arguments).
100. See id.
101. See id.
102. See id.
103. See id. at 63 (affirming Court of Chancery’s approval of settlement).
104. See id. at 61 (restating Court of Chancery’s reasoning as to shareholders’ first argument).
105. See id.
tion was expressly authorized by law to make charitable contributions. The donation was reasonable, permissible, and not excessive given Occidental’s net worth, net income before taxes, and the tax benefits received because of the donation. As a result, the court agreed with the Court of Chancery’s determination that the objecting shareholders’ claim of waste would fail. Finally, the court held that the lower court’s determination as to the strength of the objecting shareholders’ claim was appropriate.

III. CURRENT LAW APPLICABLE TO CORPORATE PHILANTHROPY

A. Federal Law

While the United States Securities and Exchange Commission (SEC) does not require companies to disclose information about charitable contributions, other governing organizations—like the New York Stock Exchange (NYSE), the National Association of Securities Dealers Automated Quotations (NASDAQ), and the IRS—regulate this area. In 2002, the NYSE and NASDAQ requested that the SEC comment on certain rules the exchanges wished to adopt. These rules require independence from the companies registered on the respective exchanges to deal with potential conflicts of interest when boards make charitable contributions to non-profits. The SEC approved these rules on November 4, 2003.

Specifically, the SEC approved NYSE Section 303A, which requires that listed NYSE companies have a board of directors that is composed in the majority of “independent” directors. In defining “independent,” the NYSE excludes directors who are now or within the past three years have been employees or whose family members are now or have been executive directors of companies that receive payments from the listed company of the greater of $1 million or two percent of the listed company’s consolidated gross revenues.

106. See id. (affirming authorization of Occidental to make charitable donations).
107. See id. (endorsing Court of Chancery’s waste analysis).
108. See id. (affirming Court of Chancery’s finding that “it was ‘reasonably probable’ that plaintiffs would fail on their claim of waste”).
109. See id. (holding this determination “the product of an orderly and logical deductive process”).
111. See id. (outlining rules).
113. See NYSE LISTED COMPANY MANUAL § 303A.02 (2013) (setting forth rules for listed companies on independent boards of directors).
114. See id. (defining exclusions for independent directors).
The SEC approved very similar NASDAQ rules concerning the requirement for a majority of the board of directors of a listed company to be independent.\textsuperscript{115} The NASDAQ rules are slightly stricter, however, and disqualify a director from being classified as independent if the director or a family member is an executive officer of a charitable organization and receives the greater of $200,000 or five percent of its revenues from the listed company.\textsuperscript{116}

Companies make cash or non-cash contributions directly to charitable organizations, or indirectly through company-run foundations.\textsuperscript{117} If a company wishes to contribute through a private foundation, it needs to establish the foundation as a separate legal entity to operate as a section 501(c)(3) organization.\textsuperscript{118} The IRS requires the disclosure of the amount and purpose of a corporate foundation’s contributions to a non-profit company.\textsuperscript{119} This requirement, however, provides an exception whereby a corporation can avoid disclosure by giving directly to the non-profit and then deducting that amount from its taxable federal income under the Internal Revenue Code.\textsuperscript{120} While the IRS requires board of director approval before a company can deduct such contributions, it does not require disclosure.\textsuperscript{121} In the pharmaceutical context, the United States federal government has imposed regulations on corporate philanthropy to curb widespread abuses in “continuing education” grants.\textsuperscript{122} In response to calls for industry-wide disclosure and regulation of charitable and educational contributions, the Patient Protection and Affordable Care Act integrated the Physician Payment Sunshine provision, which requires public

\begin{enumerate}
\item[115.] See NASDAQ Listing Rules § 5605(D) (outlining board of director requirements).
\item[116.] See id. § 5605(a)(2)(D) (defining independent).
\item[120.] See I.R.C. § 170 (2012) (prescribing charitable giving).
\item[121.] See Private Foundations, supra note 119 (discussing tax deduction requirements).
\end{enumerate}
disclosure of funds provided to physicians and teaching hospitals, including charitable donations.  

Beginning on May 31, 2013, all applicable manufacturers that pay out any sum of money or transfer other value to a covered recipient must disclose the name of the recipient, the value of the payment or transfer, the date of payment, and a description of the nature of the payment to the Secretary of Health and Human Services. The failure to report could result in fines of up to $150,000 annually, and up to $1 million annually if the violations are intentional failures. The information reported to the Department of Health and Human Services is publicly displayed on a website.

Since federal regulations on corporate philanthropy present in the Physician Payment Sunshine provision pertain only to pharmaceutical firms, the federal government has yet to address disclosure requirements on charitable contributions in all other industries, despite the similar potential for conflicts of interest in directors’ decision making.

B. State Laws

Both public and non-public companies look to their state-specific corporation laws to determine what constitute legal business activities, including the power to make charitable donations; but across states, there are generally three distinct charitable giving provisions:

1. Nineteen states authorize donations under two provisions:
   (a) to further the business and affairs of the corporation, and
   (b) for “charitable purposes.”

124. See id. § 1320a-7(h)(2) (defining “applicable manufacturer” as “a manufacturer of a covered drug, device, biological, or medical supply which is operating in the United States, or in a territory, possession, or commonwealth of the United States”).
125. See id. § 1320a-7(h)(6) (defining “covered recipient” as either physician or teaching hospital, but providing exception for physicians who are employees of applicable manufacturer).
126. See id. § 1320a-7(h)(a) (defining payments and transfers of value).
127. See id. § 1320a-7(h)(b)(1) (providing that each reporting failure shall result in fine between $1,000 and $10,000, but total amount of such payments shall not exceed $150,000 annually); id. § 1320a-7(h)(b)(2) (providing that each knowing reporting failure shall result in fine between $10,000 and $100,000, but total amount of such payments shall not exceed $1 million annually). The term “knowingly” is given the same meaning as that found in section 3729(b) of title 31, United States Code. See 31 U.S.C. § 3729(b) (2012).
128. See 42 U.S.C. § 1320a-7(c)(1)(C) (guaranteeing information that is received from applicable manufacturers will be communicated clearly to public via website).
129. See Brown, Helland & Smith, supra note 14, at 859 (“[N]ineteen [states] have a two-provision statute that allows contributions for either ‘furthering the business affairs of the corporation’ or for ‘charitable purposes.’”)

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2. Twenty-four states, including Delaware and Texas, only authorize “donations for the public welfare or for charitable, scientific, or educational purposes.”

3. Seven states, including California and New York, authorize donations “irrespective of corporate benefits.”

These state law provisions complicate corporate philanthropy by failing to provide unambiguous guidelines for donations and contribution limits. When assessing a company’s particular contributions, courts apply a reasonableness standard. The reasonableness standard is constructed around the Internal Revenue Code’s provisions relating to charitable contributions. In interpreting the reasonableness of a contribution, a court considers factors such as whether the contribution fell within the tax deduction limitations of the Internal Revenue Code and the associated tax considerations.

C. Fiduciary Duties of Directors

In reviewing whether directors have fulfilled their fiduciary duties with respect to a decision, courts will apply the business judgment rule, which presumes “that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.”

130. See id.

131. See id. (“The remaining seven [states] authorize contributions ‘irrespective of corporate benefits.’”).

132. See, e.g., Kahn v. Sullivan, 594 A.2d 48, 61 (Del. 1991) (citing Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969)) (holding test to be applied when considering whether contribution was “waste” is reasonableness standard similar to that used in Internal Revenue Code).


134. See Theodora Holding Corp., 257 A.2d at 405 (articulating “test to be applied in passing on the validity of a [charitable] gift”).

135. 3A FLETCHER CYC. CORP. § 1036 (2014) (detailing history and precedents of business judgment rule generally); see, e.g., CAL. CORP. CODE § 207(e) (West 2014) (granting corporations power to “[m]ake donations, regardless of specific corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic, or similar purposes”); DEL. CODE ANN. tit. 8, § 122(9) (2013) (granting corporations power to “[m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof”); N.Y. BUS. CORP. LAW § 202(a)(12) (McKinney 2014) (granting corporations power “[t]o make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof”); TEX. BUS. ORGS. CODE ANN. § 2.101(18) (West 2014) (granting domestic entities power to “[m]ake donations for the public welfare or for a charitable, scientific, or educational purpose”).
This rule serves to insulate directors from personal liability for losses suffered by the corporation because of their decisions.136

The business judgment rule introduces a rebuttable presumption, which places a burden on the agent of change in the business’s operations to rebut the presumption that the rationale for the status quo is true.137 For example, if a board of directors makes charitable donations from a corporation’s profits, the contributions are presumed by the court to be truly in the corporation’s best interest. If some stockholders (plaintiffs) want the board to stop making these donations, they face the difficult requirement of proving that the donations are not in the best interest of the corporation.

If the plaintiffs succeed in discrediting the presumption, the responsibility shifts to the board to prove that the decision to make the donations was entirely fair to the shareholders.138 The defendant’s need to prove entire fairness rests on two elements: fair price and fair dealing.139 To reach a determination on fair price, a court looks at all financially related aspects of the decision.140 In determining fair dealing, a court looks at issues of disclosure, structure, negotiation, and timing.141

State laws generally govern the fiduciary duties of directors of corporations. However, because more than half of the publicly traded companies in the United States, and more than sixty percent of the Fortune 500 companies, are incorporated in Delaware, the laws affecting United States corporations in general can often be best understood by focusing on Delaware law.142 In Delaware, a director of a corporation owes several fiduciary duties to the corporation, including the duty of obedience, the duty of loyalty, the duty of care, and the duty of good faith.143

The duty of obedience requires directors not to engage in external illegal acts or in ultra vires acts, such as acts that they cannot perform

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136. See 3A FLETCHER CYC. CORP., supra note 135, § 1056 n.10 (discussing benefits of business judgment rule).
137. See BALOTTI & FINKELSTEIN, supra note 6, § 419(B)(1).
139. See BALOTTI & FINKELSTEIN, supra note 6, § 4.19(B)(1) (describing what defendants must establish to prove donation decision was entirely fair).
140. See id. (“Directors with the burden of proving fairness have two elements to prove—fair price and fair dealing—but the test ‘is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.’” (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983))).
141. See id.
143. See In re Walt Disney Co., 906 A.2d at 47 (describing fiduciary duties).
under the company’s bylaws and articles of incorporation. The duty of loyalty requires directors to act on behalf of the corporation and not engage in acts that constitute self-dealing or benefiting improperly from their positions, to the detriment of shareholders. The duty of loyalty also mandates that directors avoid conflicts of interest, which can be a basis for shareholder action against directors when they contribute to charities with which the directors are affiliated. The duty of care requires that a director perform duties in good faith, as a reasonably prudent person, and in a manner perceived to be in the best interests of the corporation. It also demands that directors use corporate assets in a way that is not wasteful—a requirement that shareholders can use in litigating claims against directors for the charitable contributions that they sponsor.

In 2011, a shareholder derivative action brought in Delaware alleged that nine members of Goldman Sachs’s board of directors were neither independent nor disinterested because the Goldman Sachs Foundation contributed to charities with which the directors were affiliated. For example, one of the Goldman directors, John Bryan, was a trustee for the University of Chicago, and in that capacity, he engaged in fundraising campaigns to raise money for donations to the University. Goldman donated at least $200,000 to the University over a two-year period. However, the shareholders failed to prove that the amounts Goldman donated influenced Bryan’s decision making process. The shareholders made similar accusations against the other eight directors. However, because of a lack of proof that the financial contributions caused the directors to become “disinterested,” the allegations were dismissed as to those claims.

146. See id. (“The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.”).
148. See id. (clarifying duty toward shareholders and responsibilities owed to corporation).
150. See id. at *9 (providing shareholders’ concerns about lack of independence).
151. See id. (describing defendant’s donations to University of Chicago).
152. See id. (noting that University affiliate did not receive salary for his “philanthropic roles”).
153. See id. at *9–12 (outlining shareholders’ remaining allegations).
154. See id. at *8–12.
IV. PROPOSED LEGISLATION

For stockholders who are not absolutely opposed to corporate philanthropy, one approach to addressing their concerns is to allow shareholder participation in the board’s decision to donate money and provide shareholders with information about the donations. Spurred by this idea, the House Committee on Commerce asked the SEC to study the feasibility of two related bill proposals in 1997. The bills would apply to public companies, corporate issuers, and investment companies, such as mutual funds.

Under the legislation, the SEC would have the authority to adopt rules granting exemptions from disclosure requirements and permitting shareholder participation. The potential exemptions may also apply to gifts of tangible personal property, such as products produced by the company, gifts to public or private nonprofit educational institutions, and gifts to local charities.

A. Corporate Disclosure

House of Representatives Bill 944 (H.R. 944) introduced on March 5, 1997, by Representative Paul Gillmor, sought to amend the Securities and Exchange Act of 1934 (Exchange Act) to require improved disclosure of corporate charitable contributions. H.R. 944 would allow the SEC to enhance the level of disclosure required for charitable donations, requiring such disclosures to include the name of the recipient and the amount of the donation. It would also provide for certain exemptions such as “gifts of tangible personal property, gifts to public or private nonprofit educational institutions, and gifts to local charities, consistent with the public interest, [and] the protection of investors . . . .” On March 14, 1997, H.R. 944 was referred to the House Subcommittee on Finance and Hazardous Materials, but the bill never made it out of the subcommittee.

B. Shareholder Participation

House of Representatives Bill 945 (H.R. 945), introduced on March 5, 1997, sought to amend the Exchange Act to allow shareholders the oppor-
tunity, on the basis of their proportional number of shares, to participate in deciding the recipients of charitable donations.\textsuperscript{163} H.R. 945 would not limit the authority of management to designate additional recipients for charitable donations, but it would provide access to the process for interested shareholders.\textsuperscript{164}

C. Corporate Charitable Disclosure Acts

Several “Charitable Disclosure Acts” have been proposed but have not passed through Congress. The Corporate Charitable Disclosure Act of 2002 (CCDA) was referred to the House Committee on Financial Services. It called for the disclosure of both the amount and the beneficiary of charitable donations by those companies required to report under the Exchange Act or the Investment Company Act of 1940.\textsuperscript{165} The CCDAs of 2003,\textsuperscript{166} 2005,\textsuperscript{167} and 2007\textsuperscript{168} all died in the House Committee on Financial Services.

D. Sarbanes-Oxley Act

An early version of the Sarbanes-Oxley Act, discussed in the House of Representatives, would have required disclosure of the interrelationships of directors and their affiliations with non-profit companies, specifically if any directors or their family members were board members or executives of non-profits.\textsuperscript{169} This version would have also required disclosure of company contributions and contributions of company officers to non-profits in excess of $10,000.\textsuperscript{170} This dollar limit provision was dropped in the final bill, and the provisions relating to corporate disclosure on insider trading were reduced to a prohibition on loans to executives, as well as enhanced disclosures of transactions between management and principal stockholders.\textsuperscript{171} The philanthropic disclosure provisions were removed.


\textsuperscript{169} See Improvements in Reporting on Insider Transactions and Relationships, H.R. 3763, 107th Cong. § 7(a)(2) (2002) (stating bill objectives of providing transparency to investors); see also Venkat, supra note 110, at 2 (describing earlier version of Sarbanes-Oxley Act).

\textsuperscript{170} See H.R. 3763 (introducing disclosure threshold).

after the House of Representatives’ Sarbanes-Oxley bill was reconciled with the Senate’s Sarbanes-Oxley bill.\textsuperscript{172}

V. PROVEN SOLUTIONS AND BEST PRACTICES

Corporations commonly face dilemmas posed by the decision to engage in corporate philanthropy. Thus, in making their decision, boards can often glean insights from the approaches that other firms have already taken. Such a search for best practices can produce an option that represents the wisest course of action for a particular company. In this section, two illustrative approaches are discussed: new corporate governance models and modifications to existing governance structures.

A. New Corporate Governance Models

Because corporations, through their boards of directors, have discretion in deciding when, how much, and to whom charitable donations will be given, some corporations have espoused new models of corporate governance to deal with the philanthropic issues. Two high profile models originated at Google.org and Berkshire Hathaway.

1. Google.org

Google Inc. created a philanthropic arm of its public company to “develop[] technologies to help address global challenges and support[] innovative partners through grants, investments and in-kind resources.”\textsuperscript{173} Named Google.org, this arm of the company was started with a grant of $2 billion in Google Inc. shares during Google’s initial public offering.\textsuperscript{174} Google.org runs the Google Foundation, which has the main responsibility for Google Inc.’s philanthropic efforts, as a for-profit division of Google Inc.\textsuperscript{175} Google Inc.’s for-profit philanthropy model allows it to avoid many conflict of interest issues by completely disclosing all of its grants and investments.\textsuperscript{176} Simultaneously, the model allows Google Inc.’s directors to fulfill their fiduciary duties by investing in social projects that might have future economic value for shareholders.\textsuperscript{177} The fiduciary duties of loyalty and care are met because Google Inc.’s directors are protected by the def-

\textsuperscript{172} See H.R. 3763 EAS, 107th Cong. (2d Sess. 2002).


\textsuperscript{176} See id. at 2468 (explaining disclosure “provides Google Inc. a strong defense to any claim that Google.org breaches protections for investors”).

\textsuperscript{177} See id. (summarizing “traditional responses” with which Google could “easily defend[]” itself against shareholder opposition).
erential standard of the business judgment rule and need only to be informed and act in good faith.\textsuperscript{178}

Google.org accepts considerable risk for a slight chance at great rewards because it invests in businesses with social missions.\textsuperscript{179} For example, Google.org invests in renewable energy research, climate change, health analytics companies, and social development initiatives.\textsuperscript{180} It also makes grants to non-profits, such as funding groups that track diseases in developing countries.\textsuperscript{181} Google.org also has access to Google Inc.’s proprietary technology and resources, which it employs on its projects.\textsuperscript{182} For example, Google.org gives in-kind grants to non-profit organizations that seek to advertise on the Google.com search page by listing them on its site for a period free of charge.\textsuperscript{183}

The Google for-profit model does not allow for the favorable charitable tax treatment that is normally afforded tax-exempt 501(c)(3) organizations.\textsuperscript{184} However, by not seeking tax-exempt status, Google.com has greater flexibility in making investments and in going outside of its stated purpose, including making political contributions.\textsuperscript{185} By not seeking tax-exempt status, and instead keeping an in-house, for-profit business division, Google Inc. removes many of the legal challenges that would interfere with its social mission.\textsuperscript{186} This freedom to operate is necessary for Google.org because of the legal limitations of: (1) self-dealing between a tax-exempt organization and a contributor (e.g., Google Inc.), (2) the limited ability to invest in varied companies without worrying if it is outside its tax-exempt purpose, and (3) lobbying efforts by tax-exempt organizations that would not apply to Google.org.\textsuperscript{187} For these reasons, the for-profit

\textsuperscript{178}. See id. at 2469 (noting business judgment rule “would generally protect decisions by for-profit directors and managers to pursue social ends”).

\textsuperscript{179}. See id. at 2451 (describing how Google initiatives “target areas of operation to maximize philanthropic impact”).


\textsuperscript{182}. See Reiser, supra note 175, at 2458 (describing Google.org’s access to Google resources and technology).


\textsuperscript{184}. See Reiser, supra note 175, at 2453–54 (exploring tax advantages of using non-profit entities for philanthropy and noting Google chose for-profit model).

\textsuperscript{185}. See id. at 2459–62 (discussing obstacles Google would have faced to engage in political activities with non-profit model).

\textsuperscript{186}. See id. at 2452 (listing Google.org’s for-profit benefits, including “greater freedom to invest, direct access to Google Inc.’s resources, and more ability to engage in political activities”).

\textsuperscript{187}. See id. at 2453–62 (generalizing advantages of for-profit model).
model of Google.org can operate in ways a tax-exempt organization cannot, thereby expanding the options available to Google Inc. to achieve success for its shareholders.\footnote{See id.}

In summary, if a corporation is willing to forego an opportunity for major tax deductions, the Google model is a viable way for a for-profit company to be transparent in its charitable giving while satisfying its board of directors’ fiduciary duties.\footnote{See id.}

2. Berkshire Hathaway

In 1981, Berkshire Hathaway instituted a program that allowed shareholders of Berkshire Class A shares to choose up to three charities to receive donations.\footnote{See Press Release, Berkshire Hathaway (July 3, 2003), available at http://www.berkshirehathaway.com/news/jul0303.pdf (announcing termination of “shareholder-designated contributions program”).} Each shareholder’s vote was multiplied on a per share basis.\footnote{See id.} The Berkshire Hathaway board had no control over where the money was donated.\footnote{See id.} This program was in force until 2003 and donated over $197 million to approximately 3,500 charities.\footnote{See id.}

The program was dismantled soon after Berkshire Hathaway acquired The Pampered Chef in 2002.\footnote{See id.} The Pampered Chef faced harsh criticism and the threat of a boycott because of Berkshire’s charitable donations to pro-choice organizations.\footnote{See Charles Storch, Feeling the Heat, Warren Buffett Gives in on Giving, Chi. TRIBUNE (July 25, 2003), http://articles.chicagotribune.com/2003-07-25/features/0307250164_1_pampered-chef-warren-buffett-planned-parenthood.} Pressured by The Pampered Chef’s CEO, the CEO and Chairman of Berkshire Hathaway, Warren Buffett, made the decision to end the program.\footnote{See id.}

This innovative program could be a model for other companies, but the pressure from special interest groups shows an important vulnerability in any system that discloses the recipients of corporate philanthropy and the amounts that they receive.\footnote{See id.}

B. Modifications to Existing Governance Structures

Both shareholder proposals and executive-initiated action supported by the board of directors can initiate modifications to a corporation’s governance structure. A shareholder proposal is a document that is formally submitted to a publicly traded company requesting a shareholder vote at

\begin{enumerate}
\item See id.
\item See id. at 2469 (discussing how for-profit companies can defend against claims that philanthropic activities violate fiduciary duties).
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id. (describing interest group reaction to and effective campaign against philanthropic activities they opposed).
\end{enumerate}
the company’s annual meeting on a specific course of action. The public vote, which is often non-binding, is designed by change agents to persuade management to accept an action that they may be otherwise inclined to oppose.

1. **Shareholder Proposals**

Shareholder proposals are a vehicle by which shareholders can amend their corporation’s governance to ensure disclosure of the company’s charitable contributions. They allow shareholders to propose amendments to a company’s articles of incorporation or bylaws at an annual meeting. Rule 14a-8 governs shareholder proposals, and it is the first SEC rule to be created in a question and answer format to ensure that shareholders can easily understand its contents. For companies that are required to register with the SEC under the Exchange Act, Rule 14a-8 provides that a security holder of either $2,000 or 1% of a company’s voting stock may make a shareholder proposal at an annual meeting. The proposer must follow the individual company’s bylaws, articles of incorporation, and proxy statement. The company must receive the proposal 120 days prior to its annual meeting. In addition, under Rule 14a-8, a company has the power to exclude a shareholder proposal, if:

1. It is improper under state law because the proposal is not “a proper subject for action by shareholders,”
2. It lacks relevance because it relates “to operations which account for less than 5 percent of the company’s total assets,” or importantly,
3. It deals with a very broad category of management functions that relates to “the company’s ordinary business operations.”

The National Legal and Policy Center (NLPC) sponsored shareholder proposals that would have required PepsiCo to disclose its charitable donations and provide a business rationale for each donation. The

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199. See id. (describing procedure for shareholder proposals).
200. See id. (presenting thirteen questions and answers addressing common shareholder inquiries).
201. See id. § 240.14a-8(b) (providing shareholder eligibility to make proposals).
202. See id. § 240.14a-8(i) (providing that failure to comply with such requirements warrants grounds for exclusion).
203. See id. § 240.14a-8(e) (providing proposal submission deadline).
204. See id. § 240.14a-8(i) (outlining bases for excluding shareholder proposals from annual meeting).
NLPC’s proposals were in response to PepsiCo’s decision to fund activist groups that promoted gay marriage. Shareholder proposals have been a very popular route for shareholders to attempt to require disclosure of philanthropic contributions, as companies such as General Electric, Home Depot, Starbucks, Target, and Wells Fargo have received such proposals. Companies excluded several such shareholder proposals from their annual meetings under the very broad management function exclusion in Rule 14a-8. However, shareholder proposals directed solely at disclosure of charitable contributions are “extraordinary in nature,” and the SEC will allow them to be voted on at an annual meeting. Once a shareholder proposal reaches the annual meeting and passes by a majority vote of shareholders, it is still within the discretion of the board of directors to decide whether to implement the proposal. While most shareholder proposals have been unsuccessful, they are one of the main routes for activist shareholders who want to force the disclosure

2009/04/26/pepsi%E2%80%99s-politicized-charitable-giving-again-under-fire (describing backlash by opponents of gay marriage rights).

206. See id.


211. See Wells Fargo & Co., SEC No-Action Letter (Feb. 19, 2010), available at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/humanlife021910-14a8.pdf (disallowing exclusion of shareholder proposal, which called for disclosure of charitable contributions over $5,000 to be listed on company website, because it is “matter of corporate policy which is extraordinary in nature and beyond a company’s ordinary business operations”).


213. Compare 17 C.F.R. § 240.14a-8(i)(7) (2014) (providing companies may exclude shareholder proposals that “deal[] with a matter relating to the company’s ordinary business operations”), with Wells Fargo & Co., SEC No-Action Letter, supra note 211 (disallowing exclusion of shareholder proposal, which called for disclosure of charitable contributions over $5,000 to be listed on company website, because it is “matter of corporate policy which is extraordinary in nature and beyond a company’s ordinary business operations”).

of charitable contributions, and they have been used more than twenty-
three times since 2006.215

2. Executive-Initiated Action

When a company’s top management team is intent on controlling the
firm’s charitable giving, including retaining the ability to conceal its list of
philanthropic recipients and the amounts they receive, it can institute
public governance provisions in their company’s articles of incorporation
or bylaws.216 Such provisions, which require the support of the company’s
board of directors, can serve as evidence to shareholders that there are
internal controls on corporate philanthropy.217

Companies can create a hierarchical approach to reaching decisions
on corporate philanthropy.218 The internal procedure can categorize
contributions according to dollar amount thresholds and require different
approvals for each category.219 Companies can also establish a cap on the
total amount of charitable contributions they can make annually. For
example, Automatic Data Processing, Inc. (ADP) has such a cap, which limits
the ADP donation of a board member who is an employee, officer, or
director of the charity to the “lesser of $100,000 or one percent of the total
contributions the [recipient] non-profit receives annually” in
donations.220

VI. Fortifying Corporate Philanthropy Initiatives

For stockholders who hold intermediate positions on the desirability
of corporate philanthropy, it may be helpful to gauge the impact of chari-
table contributions on the giver and the recipients. There are three ap-
proaches to evaluating “work hardened” charitable activities that may
enable stockholders to feel better informed and more comfortable with
boards of directors managing a part of their personal giving: strategic phi-
lanthropy, measuring achievement, and leveraging donations by contrib-
uting “what we do.”

215. See Proxymonitor, http://www.proxymonitor.org (last visited Jan. 30,
2015) (using “Advanced Search” tab, using “Show Advanced Filter”, using “Propo-
sal Types”, using “Social Policy”, selecting “Other”, viewing results, searching “Ti-
tle” column using Ctrl+F search function for “charitable contributions”).

216. See Kahn, supra note 14, at 604 (describing how modern state corpora-
tion law accords corporate directors “extraordinary power and discretion” over
charitable contributions).

217. See id.

218. See Simpson Thatcher & Bartlett LLP, supra note 118, at 11 (explain-
ing that companies may structure authority for charitable giving).

219. See id. (suggesting approval process wherein grants above $250,000 must
be approved by committee, grants between $100,000 and $250,000 can be ap-
proved by two officers and then ratified by committee, and grants below $100,000
can be delegated to staff, and then ratified by committee).

220. See Venkat, supra note 110.
A. Strategic Philanthropy

One widespread justification for corporate philanthropy appeals to “moral and social obligations” arising from “the notion of the corporation as a ‘member’ of society . . . .”221 It follows that corporations are privileged entities that owe something special in return for those privileges, with corporate philanthropy being a primary means by which they can meet their obligations.222

The increase in corporate philanthropy speaks to its rise in both the popularity of satisfying these obligations and its importance to the consumer. Corporate philanthropy is a factor in how a firm is viewed by potential customers. A survey for the Boston College Center for Corporate Community Relations reported that more than seventy-five percent of respondents evaluate a company’s philanthropic record when deciding whether to do business with it, and eighty percent of respondents said they had decided to do business with a company because of its involvement in community improvement activities.223 Some corporations, in turn, use philanthropy as a form of investment in public relations and advertising or an approach to branding through cause-related marketing.224 Empirical academic research provided some early evidence of the increase in popularity of cause-related marketing by showing that United States corporate spending on cause-related marketing increased from $125 million in 1990, to an estimated $828 million in 2002.225 The belief underlying this philanthropy is that it blends economic and social goals, thereby helping to assure the long-term survival of the firm.226

B. Measuring Achievement

The relative benefits of corporate philanthropy—compared to saving the money to distribute to shareholders, thereby allowing shareholders to make independent charitable donations using the increased returns—depend on the strength of the connections between the donor and the charity. Research suggests that measuring this strength can be beneficial for all parties.227 First, when the corporate donor works directly with the re-

222. See id. (exploring concept of corporation as “specially privileged entity”).
224. See Brudney & Ferrell, supra note 221, at 1193 (describing corporate practice of making charitable contributions to improve public image).
226. See id.
227. See id. (stressing importance of monitoring results of collective corporate philanthropy).
recipient, the charity should become measurably more effective for an extended period. Second, charitably engaged corporate representatives bring a diverse set of expertise that the charity would be unable to secure for itself, creating the opportunity for the charitable organization to access sophisticated services at measurably reduced costs. Third, companies engaged in philanthropic activities in multiple settings are capable of transferring knowledge among their recipients to help improve the operations of the charitable organizations in measurable ways.

By measuring the benefits of their philanthropy periodically and systematically, supporters and detractors can come to an improved agreement on the merits of corporate contributions. Such an assessment can provide often-elusive evidence to the process of improving charitable engagements.

C. Contributing “What We Do”

Corporations have three basic options when making philanthropic contributions. Traditionally, they have donated cash. Alternatively, they contribute goods that they normally produce for commercial sale. Known as in-kind contributions, the donated items may include overruns, items specially produced for the charity with inputs normally used for commercial products, inventory that is nearing its expiration date, end-of-season items, or production and computer related access. Alternatively, corporations have collaborated with non-profit organizations that they can benefit by providing employee expertise, time, and talent.

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228. See id. (discussing impact of corporate donors closely working with specific charities on effectiveness).

229. See id. (discussing sophisticated “nonmonetary assistance,” including expertise, that corporations can provide charities at reduced cost).

230. See id. (discussing examples of coordinated corporate philanthropic activities across multiple charities).


233. See M. Todd Henderson & Anup Malani, Corporate Philanthropy and the Market for Altruism, 109 COLUM. L. REV. 571, 573 (2009) (“The conventional, narrow definition of corporate philanthropy is cash donations by corporations to non-profit organizations, which then use the cash to help others.”).


235. See id. at 158 (discussing in-kind donation of drugs by pharmaceutical companies as one of most popular forms of corporate in-kind donations).

236. See Pearce & Doh, supra note 232, at 32–33 (discussing collaborative model, which draws on expertise and resources of corporation in working with charity to meet common goals).
Philanthropic donations of cash are the most popular option for corporations.\textsuperscript{237} Although money can be used to address a wide spectrum of needs, donations of products or expertise can be far more valuable because they could be almost prohibitively expensive for charitable organizations to access in the marketplace.\textsuperscript{238} When donors contribute “what we do,” they contribute the benefits of their competitive proficiency, which is difficult for any charity to duplicate and very expensive to purchase in the marketplace.\textsuperscript{239} For example, America’s Second Harvest relies heavily on corporate donors like ConAgra Foods, Inc. to volunteer the use of extremely high-cost refrigeration trucks to make its food deliveries possible.\textsuperscript{240} These are important donations because the high cost of purchasing and maintaining such trucks would require America’s Second Harvest to eliminate other priority programs.\textsuperscript{241}

Therefore, when corporations share with the charity the core capabilities that make the corporations’ operations successful, the corporations are able to leverage their donations, thereby increasing the positive effects of philanthropy. Such contributions maximize the benefits of the company’s contributions with minimal disruption to its commercial operations, much to the likely approval of shareholders.

VII. THE LAW SUPPORTS CORPORATE PHILANTHROPY

The reality that not all stockholders view corporate philanthropy as a close substitute for personal giving complicates the decision about its desirability. Consequently, boards of directors can reasonably expect some stockholders to support corporate philanthropy and others to prefer to make individual charitable donations, ostensibly from their investment gains.\textsuperscript{242} In line with this theory, an empirical study focused on investor preferences for corporate philanthropy relative to personal private charity.\textsuperscript{243} The study concludes that if a “non-negligible fraction” of investors consider corporate social responsibility and private charity as imperfect

\textsuperscript{237.} See Kahn, supra note 14, at 588 (“Cash predominates as the most popular currency for corporate contributions. Cash transfers have typically constituted more than 80% of the total value of corporate contributions, with the remainder representing donations of products, property, and equipment.”).

\textsuperscript{238.} See Pearce & Doh, supra note 232, at 34 (contending corporate donations of products and services “maximize” benefits of corporate philanthropy).

\textsuperscript{239.} See id.

\textsuperscript{240.} See id. at 35, 37 (discussing ConAgra’s philanthropic collaboration with America’s Second Harvest).

\textsuperscript{241.} See id.

\textsuperscript{242.} See David P. Baron, Corporate Social Responsibility and Social Entrepreneurship, 16 J. ECON. & MGMT. STRATEGY 683 (2007) (discussing how “social satisfaction” from corporate giving varies among shareholders); Markus Kitzmueller & Jay Shimshack, Economic Perspectives on Corporate Social Responsibility, 50 J. ECON. LIT. 51, 61 (2012) (discussing different attitudes toward corporate giving among shareholders).

\textsuperscript{243.} See Joshua Graff Zivin & Arthur Small, A Modigliani-Miller Theory of Altruistic Corporate Social Responsibility, 5 TOPICS ECON. ANALYSIS & POL’Y (2005) (discuss-
substitutes, a positive level of corporate philanthropy is necessary to maximize shareholder value. This conclusion is bolstered by research that indicates that, “[w]hen corporate social giving is an imperfect substitute for personal giving, firms that practice [corporate social responsibility] have a lower market value than profit-maximizing firms.”

Thus, while stockholder and board of director support for philanthropy is mixed, and its benefits are uncertain, the law on corporate giving is clear. Corporate law does not restrict corporate philanthropy that promotes corporate goals, even if there is no evidence of direct and immediate economic benefits to the corporation. Furthermore, there are only a few major requirements placed on the donor corporation when it seeks a tax benefit from its giving. Namely, the recipient must be a qualified non-profit charitable organization, the corporate donor cannot deduct contributions in excess of ten percent of its taxable income, and, in the case of an international donation, the recipient must have been created and organized in the United States. With very few exceptions and limitations, when a corporation’s board of directors, duly elected by the shareholders, agrees on philanthropic donations, the law exists to support their decisions.

However, legal might can be a problematic basis for resolving a corporation’s internal disagreements. Fortunately, to reduce the level of dissenting stockholder antagonism in response to corporate philanthropy, corporate leaders have meaningful options. As discussed in this Article, new corporate governance models can facilitate investor input into philanthropic decisions, as the approaches of Google.org and Berkshire Hathaway have shown. Alternatively, legal modifications to governance structures introduced through shareholder proposals and executive-initiated action can formalize the inclusion of shareholders in existing decision making processes on corporate charity, to facilitate stockholder participation and corporate transparency. Finally, corporate leaders can optimize the benefits of philanthropic initiatives and thereby attempt to lower resistance to the redirection of stockholder funds in three ways. Boards of directors and their corporate executives can demonstrate the economic utility of philanthropy by providing evidence of its strategic value, by measuring its benefits to recipients, and by maximizing the leveraging potential of their contributions through donations of goods and services generated by its operations and loans of their productive resources rather than cash.

244. See id.
245. Baron, supra note 242, at 685.
246. See I.R.C. § 170(c) (2012).
247. See id. § 170(c)(2)(A).
THE DISTRICT COURT TRIED TO MAKE ME GO TO REHAB, THE ELEVENTH CIRCUIT SAID “NO, NO, NO”: THE DIVIDE OVER REHABILITATION’S ROLE IN CRIMINAL SENTENCING AND THE NEED FOR REFORM FOLLOWING UNITED STATES v. VANDERGRIFT

KRISTEN ASHE*

“The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind.”1

I. UNDERSTANDING THE STALEMATE: AN INTRODUCTION TO CRIMINAL SENTENCING AND CURRENT CONCERNS

The United States holds five percent of the world’s population, yet it incarcerates twenty-five percent of the world’s prisoners.2 Within the United States, one in every thirty-five adults lives in a correctional supervision facility, which, in the aggregate, costs the country seventy billion dollars each year.3 Sixty-seven percent of people released from prison in the

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2. See Criminal Justice Fact Sheet, NAACP, http://www.naacp.org/pages/criminal-justice-fact-sheet (last visited Feb. 3, 2015) (describing current trends in criminal justice system, including “Incarceration Trends in America,” “Racial Disparities in Incarceration,” and “Drug Sentencing Disparities”); see also, Karina Kendrick, Note, The Tipping Point: Prison Overcrowding Nationally, in West Virginia, and Recommendations for Reform, 113 W. VA. L. REV. 585, 586 (2011) (“Due to the fact that the United States imprisons its citizens at a higher rate than any country in the world it should be of little surprise that there is a current state of disarray within America’s prison system.” (footnote omitted)).

United States will return to prison within three years. In the United States, prisons operating over capacity are the norm.

Recently, the growing American prison population has become a controversial and significant issue. The root of the problem is the criminal

4. See Recidivism, Nat’l Inst. of Justice (June 17, 2014), http://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx [hereinafter Recidivism] (“Within three years of release, about two-thirds (67.8 percent) of released prisoners were rearrested. Within five years of release, about three-quarters (76.6 percent) of released prisoners were rearrested.”). Currently, “revocations of parole and supervised release are the fastest growing category of prison admissions.” Project Hope Alabama: Ex-Offender Re-Entry Initiative, U.S. Attorney’s Office: S. Dist. Ala., justice.gov/usao/als/rei.html (last visited Feb. 3, 2015). The concept of returning to prison is known as recidivism. See Recidivism, supra (defining recidivism and commenting “[r]ecidivism is measured by criminal acts that resulted in rearrest, revocation or return to prison with or without a new sentence during a three-year period following the prisoner’s release”); see also Gregory L. Little et al., Twenty-Year Recidivism Results for MRT-Treated Offenders, Cognitive Behavioral Treatment Rev., First Quarter 2010, at 1, available at http://www.moral-reconation-therapy.com/Resources/CBTR-%202010%20Released.pdf (“Recidivism measures whether or not a given individual returns to performing an undesirable behavior after a treatment is applied. Within criminal justice, recidivism is typically measured by a follow-up of released offenders’ criminal records at a given time period.”).


6. See Kendrick, supra note 2, at 588 (explaining controversial nature of issue of prison reform). This is a controversial issue because the “majority of society does not seem sympathetic” to prisoners’ situations and therefore sees no need for reform. See id. Despite the concerns falling on deaf ears, the overcrowding in American prisons has created deplorable and sometimes dangerous conditions for the inmates. See id. at 588–89 (“[S]evere overcrowding in some prisons is a threat to the physical and mental health of its inhabitants and the people who work there—with the likelihood of transmission of infectious disease increased and the propensity for violence greater in such overpopulated common areas.”). Further, the Bureau of Prisons, an agency responsible for federal inmates and prison administration, found a positive correlation between overcrowding and misconduct. See James, supra note 5 (noting correlation between overcrowded prisons and violence as reason for legislators to step in and reform current situation).

For a discussion of how the current overcrowded prison situation is significant to the legal profession, see ABA, COMM’N ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 58 (2007) [hereinafter Second Chances], available at http://www.pardonlaw.com/materials/rev_2ndchance(3).pdf (criticizing legal profession for not “pay[ing] sufficient attention to corrections and prisons” and
sentencing guidelines, which are in grave need of reform. One proposed solution is providing inmates with rehabilitative services while in prison, in the hopes of decreasing recidivism rates.


Rehabilitative in this context is not limited to substance abuse programs, but rather includes programs that aim to assist prisoners in many aspects of their lives. See generally Stephanie Stravinskas, Lower Crime Rates and Prisoner Recidivism (May 1, 2009) (unpublished Honors College Thesis, Pace University, Pforzheimer Honors College), available at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1079&context=honorscollege_theses (illustrating how rehabilitative programs assist people in getting jobs, pursuing higher education, and are not limited to substance abuse programs). For a complete list of rehabilitative programs offered by the Bureau of Prisons, see A Directory of Bureau of Prisons’ National
The concept of sending offenders to prison to receive rehabilitative services is a heavily litigated issue that, unsurprisingly, made its way to the United States Supreme Court.9 In *Tapia v. United States*,10 the Supreme Court disapproved of the district court’s decision to sentence the defendant to fifty-one months in prison for the purpose of completing “the Bureau of Prison’s Residential Drug Abuse Program.”11 The Court held, “sentencing courts [are precluded] from imposing or lengthening a prison term to promote an offender’s rehabilitation.”12 Courts subsequently referred to the inappropriate consideration of rehabilitative needs as *Tapia* error.13 Because the opinion did not provide a framework for lower courts to follow or define the scope of *Tapia’s* application, circuit courts disagree in their interpretations of *Tapia*.14

In *United States v. Vandergrift*,15 the Eleventh Circuit weighed in on the *Tapia* debate as a matter of first impression.16 The court considered the issue of whether a defendant’s rehabilitative needs could be taken into

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9. For a further discussion of a fraction of the litigation that has taken place over this issue, see *infra* notes 52–66 and accompanying text.


11. See *id.* at 2385 (recounting district court judge’s rationale for Tapia’s sentence); *id.* at 2393 (“[A] court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.”). Alejandra Tapia, the defendant, was “convicted of, *inter alia*, smuggling unauthorized aliens into the United States . . . .” *Id.* at 2385. The judge stated, “the sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program.” *Id.* (quoting district court opinion) (explaining why Tapia’s sentence was greater than sentence recommended in Sentencing Guidelines).


12. *Tapia*, 131 S. Ct. at 2391 (rejecting earlier distinction between considering rehabilitation when choosing *form* of punishment and *length* of imprisonment).


14. See Kimberly L. Patch, Note, *The Sentencing Reform Act: Reconsidering Rehabilitation as a Critical Consideration in Sentencing*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 165, 166 (2013) (“However, the Supreme Court [in *Tapia*] did not explicitly delineate the scope of the rule, and the circuit courts of appeals have subsequently disagreed on [Tapia’s] appropriate application.”); see also Tapia, 131 S. Ct. at 2391 (relying not on framework, but on “text, context, and history . . . [that] precludes sentencing courts from imposing or lengthening a prison term to promote an offender’s rehabilitation”). For a further discussion of the circuit split, see *infra* notes 52–66 and accompanying text.

15. 754 F.3d 1303 (11th Cir. 2014).

16. See *id.* at 1309 (explaining novel issue Eleventh Circuit confronted because “[t]his court has not decided whether *Tapia* applies in the context of resentencing upon the revocation of supervised release”).
consideration at a revocation of supervised release hearing. The Vandergrift court rejected the muddled Tapia interpretations adopted by other circuits in favor of a bright-line rule. After Vandergrift, the Eleventh Circuit prohibited sentencing judges from considering defendants’ rehabilitative needs when determining imprisonment sentences.

This Note asserts that the Eleventh Circuit’s decision to preclude judges from considering rehabilitation marks a step in the right direction for criminal sentencing because it properly limits judicial power. Yet, this Note also recognizes the advantages that rehabilitative services offer prisoners and thus urges the federal Sentencing Commission (Commission) to reexamine rehabilitation’s role in the Sentencing Guidelines. Evidence-based research indicates that rehabilitation lowers recidivism rates, and therefore, could serve as a solution to overcrowding in America’s prisons.

Part II of this Note sets forth a brief history of criminal sentencing and discusses the legal landscape surrounding United States v. Vandergrift. Part III provides the facts, procedural history, and holding of the Eleventh Circuit’s decision in Vandergrift. Part IV recognizes the rationale for prohibiting judges from considering defendants’ rehabilitative needs, but suggests an alternative solution to the pressing issue of overcrowding in America’s prisons.

17. See id. (presenting issue Eleventh Circuit decided on appeal).
18. See id. at 1309–13 (comparing other circuits’ interpretations of Tapia before rejecting them in favor of its holding). For a further discussion of other circuit interpretations, see infra notes 60–63 and accompanying text.
19. See id. at 1510 (deciding not to “limit Tapia to [certain] situations,” but instead to find Tapia error whenever “the district court considers rehabilitation when crafting a sentence of imprisonment”).
20. For a further defense of the Eleventh Circuit’s framework, see infra notes 113–34 and accompanying text.
22. For a further discussion of the latest conclusions by social scientists on rehabilitation’s role in reducing recidivism, see infra notes 139–53 and accompanying text.
23. For a further discussion of how the stalemate developed among the circuit courts, see infra notes 27–66 and accompanying text.
24. For a further discussion of the facts, holding, and rationale in Vandergrift, see infra notes 67–103 and accompanying text.
prisons. Part V concludes by asserting the necessity of amending the Sentencing Guidelines to reconsider rehabilitation.

### II. The Development of the Deadlock: An Overview of Criminal Sentencing, Tapia, and the Circuit Standoff

The current deadlock over defendants’ rehabilitative needs originates from federal legislation and subsequent interpretations of this legislation by courts. Until Congress passed the Sentencing Reform Act (“the Act”) in 1984, judges enjoyed untethered discretion and authority in determining a criminal’s punishment. Beginning in the 1950s, concern over the disparities in sentencing motivated Congress to pass the Act. Although

25. For a further discussion of the limited powers of the judiciary to control defendants’ receiving rehabilitative services, see infra notes 104–34 and accompanying text. For a further discussion of alternative solutions to the overcrowding problem, see infra notes 135–72 and accompanying text.

26. For a further discussion of the need to reconsider rehabilitation as a possible solution for the overcrowding problem, see infra notes 173–78 and accompanying text.


the Act attempted to create more uniform sentences, the legislation was unclear in terms of the role of rehabilitative needs and whether such needs could influence a defendant’s sentence.\footnote{For a further discussion of the prior circuit split over varying interpretations of the Act, see infra notes 52–56 and accompanying text.} In 2011, the Supreme Court made an effort to clarify the role of defendants’ rehabilitative needs in Tapia v. United States.\footnote{See Tapia, 131 S. Ct. at 2388–91 (acknowledging varying circuit interpretations and concluding rehabilitative needs cannot influence defendant’s sentence).} Clarification has yet to be truly achieved however, as the circuit courts are split in their interpretations of Tapia.\footnote{For a further discussion of the circuit split post-Tapia, see infra notes 57–66.}

\section*{At the Court’s Discretion: The History of Criminal Sentencing}

Prior to Congressional intervention in 1984, judges had almost complete discretion in deciding a defendant’s criminal sentence.\footnote{See Borges, supra note 28, at 143–45 (explaining “how federal sentences were imposed before and after the Guidelines”); see also William B. Mateja, Sentencing Reform, The Federal Criminal Justice System, and Judicial Prosecutorial Discretion, 18 Notre Dame J.L. Ethics & Pub’l Pol’y 319, 321 (2004) (“The system of sentencing in place before the sentencing reform of the 1980s [...] was almost entirely discretionary. Choosing a sentence for those convicted of most felony offenses was left to the unfettered discretion of judges and essentially was ungoverned by law.”); Scott A. Schumacher, Sentencing in Tax Cases After Booker: Striking the Right Balance Between Uniformity and Discretion, 59 Vill. L. Rev. 563, 565–70 (2014) (detailing sentencing prior to federal Sentencing Guidelines). Judges did not have total discretion because Congress set maximum sentences for offenses. See Borges, supra note 28, at 144 (explaining how judges did not have absolute discretion). Another element of judicial discretion at this time was the lack of appellate review of the district court’s sentencing. See Stith & Koh, supra note 28, at 226 (providing background of criminal sentencing prior to Sentencing Reform Act).} As a result of such discretion, sentences varied depending on the specific facts and circumstances of each case because judges relied on “any evidence that [they] felt was an important factor . . . .”\footnote{See id. (providing rationale behind judge’s sentences); see also New Directions in the Rehabilitation of Criminal Offenders 5 (Susan E. Martin et al., eds., 1981) (“Rehabilitation was formally adopted as the goal of penology by the First Prison Congress in 1870 . . . . [T]he belief that rehabilitation rather than punishment should be the goal of correctional policy stood virtually unchallenged for the first half of the twentieth century.”); Andrea Avila, Note, Consideration of Rehabilita-}
By the mid-1970s, concern over widespread sentencing disparities and frustration with the rehabilitation model reached a breaking point, bringing the judges' free reign to a halt. In response to the dissatisfaction, Congress passed the Sentencing Reform Act in October 1984, to serve as a framework for judges, with the ultimate goal of facilitating more uniform sentences.

There are four rationales for imprisonment: retribution, deterrence, incapacitation, and rehabilitation, with rehabilitation being the most prominent before the Sentencing Reform Act. See Avila, supra, at 406 (providing overview for different models of punishment). Retribution aims to have the punishment and the crime be proportionate to one another. See Jennifer Edwards Walsh, Three Strikes Laws 2–3 (2007). The deterrence theory suggests "people commit crime because it gives them some sort of benefit," and therefore, courts can lower this "attractiveness [by] increasing the associated costs and consequences . . . ." Id. at 2. Supporters of incapacitation believe "some people are incorrigible," and they need to be placed away from society to avoid any social harm. Id. at 3. Finally, rehabilitation, also referred to as the medical model, is premised on the idea that "people break the law because of external influences or internal impulses . . . ." Id. at 1–2. Emphasis on rehabilitation during sentencing is also known as the rehabilitative model. See Brown, supra note 29, at 383 (providing example of use of phrase "rehabilitation model"). This Note will use both terms for the model.

Several prominent people spoke out against judges' absolute discretion. See Brown, supra note 29, at 383–84 (stating "several notable organizations and commissions made proposals for reform" and providing examples of academics' responses). One of "the most prominent and staunch critic[s]," Marvin E. Frankel (a federal district court judge himself) believed judges' absolute discretion was "'terrifying and intolerable for a society that professes devotion to the rule of law.'" Id. at 384 (quoting Marvin E. Frankel, Criminal Sentences: Law Without Order 5 (1972)) (providing example of critic to rehabilitation model who helped pave way for reform). One judge, Justice Henry McCardie, summarized the problem well, stating, "'[a]nyone can try a criminal case . . . . The real problem arises when the judge has to decide what punishment to award.'" James R. Thompson & Gary L. Starkman, Book Review, Criminal Sentences: Law Without Order, 74 Colum. L. Rev. 152, 152 (1974) (reviewing Frankel, supra) (quoting Charles E. Wyzanski, Jr., A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1291 (1952) (providing statement of Justice McCardie)) (illustrating distrust even among judges during this time period about lack of sentencing standards).
B. An Attempt at Conformity: The Sentencing Reform Act

Recognizing the disappointment with the rehabilitation model and the need for uniformity, Congress passed the Sentencing Reform Act in October 1984. The Act aimed to hold judges more accountable for their sentences and ultimately changed the laws of criminal sentencing in three ways.

First, the Act created the Sentencing Commission, a federal agency responsible for promulgating federal Sentencing Guidelines. While the Supreme Court later concluded that these Guidelines were only advisory, the Court also instructed district courts to reference them when sentencing. To properly sentence an offender, judges refer to a sentencing table for each offense and select a sentence within the provided range. These Guidelines are considered “evolutionary,” and therefore, the Commission has the “duty to monitor federal sentencing law... and to revise the guidelines accordingly.”


38. See Tapia v. United States, 131 S. Ct. 2382, 2387 (2011) (asserting disapproval of rehabilitation model prompted Congress to pass Sentencing Reform Act); Mistretta, 488 U.S. at 365 (reporting that questioning of rehabilitative model lead to Sentencing Reform Act); see also Avila, supra note 35, at 408 (citing concerns of public regarding sentence disparities and rehabilitation model that “laid the groundwork for the sentencing reform movement”).

39. See Borges, supra note 28, at 146–48 (discussing substantive changes Sentencing Reform Act had on laws of criminal sentencing). For a further discussion of these substantive changes, see infra notes 40–51 and accompanying text.


41. See United States v. Booker, 543 U.S. 220, 264 (2005) (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”); see also Schumacher, supra note 33, at 575–81 (discussing Supreme Court’s decision in Booker that rendered the Guidelines merely advisory, rather than mandatory).

42. See Borges, supra note 28, at 149–50 (providing step-by-step process for sentencing judge using Guidelines). Once the judge knows the range, there are other factors that need to be considered. See 18 U.S.C. § 3553(a) (2012) (stating factors “to be considered in imposing a sentence”). Should the judge decide to go outside the range provided, “[t]he judge must also make a statement describing the reasons for the specifics of the sentence and any deviation from the Guidelines.” Avila, supra note 35, at 410 (describing how judges create sentences).

43. See MANUAL, supra note 37, at 2, 14 (establishing Commission’s role “to monitor sentencing practices”). For a further discussion regarding the responsibility of the Commission to amend the Sentencing Guidelines, see infra note 135 and accompanying text. See generally Rita v. United States, 551 U.S. 338, 350–51 (2007).
Second, the Act eliminated the Parole Commission, an agency that previously played a significant role in sentencing. Before the Act, parole boards undermined judicial sentencing by granting defendants early release. In stripping parole boards of this authority, the Act aimed to consolidate the power to determine sentences in the judiciary.

Third, the Act curtailed the role of rehabilitation in criminal sentencing. This change was in direct response to the overwhelming frustration with the rehabilitation model at this time. Relying on studies by social scientists, Congress decided that "imprisonment is not an appropriate means of promoting correction and rehabilitation." While judges could consider rehabilitation in other contexts, they could no longer allow reha-


45. See Borges, supra note 28, at 144–45 (detailing Parole Commission’s power to release an offender after serving “one-third” of sentence).

46. See id. at 147 (“The Senate wanted to make sure that the ‘sentence imposed by the judge [would] be the sentence actually served.’” (alteration in original) (quoting S. REP. NO. 98-225, at 3239)).

47. See 18 U.S.C. § 3582(a) (“[R]ecognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”); 28 U.S.C. § 994(k) (2012) (instructing Commission to “insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant”); see also Borges, supra note 28, at 147–48 (explaining new goal of sentencing following Sentencing Reform Act was determinate sentencing which advocated for retribution, not rehabilitation).

48. For a discussion of the frustration with the rehabilitation model, see supra notes 33–37 and accompanying text.

49. See 18 U.S.C. § 3582(a) (prohibiting courts from considering rehabilitation when sending offender to prison); see also Brown, supra note 29, at 383 (noting studies done by social scientists that contributed to rehabilitation model’s decline). One of the bigger factors that contributed to the rehabilitation model’s decline was a study conducted by Robert Martinson. See id. (explaining conclusions of social scientists that led to decline of rehabilitation model). Martinson’s work, unofficially titled Nothing Works, concluded “[w]ith few and isolated exceptions, the rehabilitative efforts that [had] been reported . . . had no appreciable effect on recidivism” and “there was ‘little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation.” See id. (alterations in original) (quoting Robert Martinson, What Works?—Questions and Answers About Prison Reform 6 (1974)); see also Jerome G. Miller, The Debate on Rehabilitating Criminals: Is It True that Nothing Works?, WASH. POST (Mar. 1989), available at http://www.prisonpolicy.org/scans/rehab.html (explaining media titled Martinson’s work Nothing Works).
bilitative needs to affect their decisions regarding prison sentences. Although the Act instructed courts not to consider rehabilitation when “imposing a term of imprisonment,” a circuit split emerged over whether judges could consider rehabilitative needs when determining an appropriate sentence length.

C. A Standoff Between the Circuits: Tapia and Its Mixed Interpretations

The Supreme Court resolved the initial circuit split over the consideration of defendants’ rehabilitative needs in Tapia v. United States. In Tapia, the Court scrutinized two provisions of the Act that seemed to be at odds with one another. One provision stated, “imprisonment is not an appropriate means of promoting correction and rehabilitation.” Yet, another provision instructed judges to consider “provid[ing] the defendant with needed educational or vocational training [e.g., rehabilitative services].” The Court concluded that the Sentencing Reform Act “precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation.”

Ironically, rather than uniting the circuits, the Supreme Court’s decision in Tapia soon became the source of yet another disagreement among the circuits. Today, the circuits are divided as to the method by which courts are to “measure Tapia error.” With each circuit advocating a dif-

50. See Brown, supra note 29, at 386 (explaining rehabilitation can be taken into consideration when deciding the form of offenders’ punishment (e.g., imprisonment, fine, probation), but not “a term of imprisonment”).

51. See Avila, supra note 35, at 405 (indicating point of contention among circuits that led to initial circuit split).

52. See Tapia v. United States, 131 S. Ct. 2382, 2391 (2011) (holding rehabilitative needs cannot be taken into consideration when “imposing or lengthening a prison term”).

53. Compare 18 U.S.C. § 3582(a) (listing “Factors to be considered in imposing a term of imprisonment . . . recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”), with id. § 3553(a)(2) (instructing courts to consider “the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”). “The Sixth, Eighth, and Ninth Circuits” allowed courts to extend a sentence based on rehabilitative needs whereas the “Third and D.C. Circuits . . . prohibit[ed] sentencing courts from using rehabilitation as a justification . . . .” See Brown, supra note 29, at 388–89 (discussing circuit split over above quoted provisions).


55. Id. § 3553(a)(2)(D).

56. See Tapia, 131 S. Ct. at 2385, 2391 (concluding no distinction existed between decision to choose imprisonment as form of punishment and decision of length of imprisonment in terms of rehabilitation consideration).

57. For a comparison of the tests used by other circuits, see infra notes 60–63 and accompanying text.

58. See id.
different method, the question of how *Tapia* should be implemented remains unanswered.\(^{59}\)

The various methods of measuring *Tapia* error can be condensed into two different tests.\(^{60}\) The first test analyzes the role rehabilitative needs played when sentencing the defendant.\(^{61}\) Provided it is not the “dominant factor,” consideration is allowed.\(^{62}\) The second test assess whether the judge *explicitly linked* the defendant’s rehabilitative needs with the length of the sentence.\(^{63}\)

While the Eleventh Circuit previously ruled on the issue of defendants’ rehabilitative needs, *Vandergrift* was the Eleventh Circuit’s first opportunity to rule on this issue post-*Tapia*.\(^{64}\) Prior to *Tapia*, the Eleventh Circuit allowed judges to “consider a defendant’s rehabilitative needs when imposing” a sentence.\(^{65}\) In *Vandergrift*, the Eleventh Circuit weighed in on the *Tapia* debate.\(^{66}\)

\(^{59}\) See id.

\(^{60}\) See United States v. Vandergrift, 754 F.3d 1303, 1309–11 (11th Cir. 2014) (describing other circuits’ interpretations of *Tapia*).

\(^{61}\) See, e.g., United States v. Walker, 742 F.3d 614, 616 (5th Cir. 2014) (allowing consideration of rehabilitation when *secondary factor* to judge’s analysis); United States v. Garza, 706 F.3d 655, 660 (5th Cir. 2013) (explaining Fifth Circuit precedent as creating “distinction between legitimate commentary and inappropriate consideration as whether rehabilitation is a ‘secondary concern’ or ‘additional justification’ (permissible) as opposed to a ‘dominant factor’ (impermissible) informing the district court’s decision”). In Garza, the Fifth Circuit relied heavily on the record of the district court’s decision and determined that “the record makes clear that Garza’s rehabilitative needs were the dominant factor in the court’s mind.” Id. at 661–62; see also United States v. Replogle, 678 F.3d 940, 943 (8th Cir. 2012) (upholding district court’s sentence because “[d]eterrence, respect for the law, and protection of the public were the dominant factors in the district court’s analysis” (emphasis added)).

\(^{62}\) See Garza, 706 F.3d at 660 (citing cases that used dominant factor analysis in determining *Tapia* error).

\(^{63}\) See, e.g., United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013) (determining no *Tapia* error because “there is no indication in the record that the district court based the length of Lifshitz’s sentence on his need for treatment”); United States v. Gilliard, 671 F.3d 255, 260 (2d Cir. 2012) (finding no explicit link between rehabilitative needs and defendant’s sentence); see also United States v. Deen, 706 F.3d 760, 769 (6th Cir. 2013) (finding no *Tapia* error because “the record in [the] case permits no conclusion but that the length of his prison sentence was fixed to promote his rehabilitation”).

\(^{64}\) See United States v. Brown, 224 F.3d 1237, 1240 (11th Cir. 2000) (“[A] court may consider a defendant’s rehabilitative needs when imposing a specific incarcerative term following revocation of supervised release.”).

\(^{65}\) See Vandergrift, 754 F.3d at 1309 (acknowledging “that *Tapia* abrogates [Ninth Circuit’s] holding in *United States v. Brown*”).

\(^{66}\) See id. (recognizing new test set forth by Supreme Court in *Tapia* that governs Vandergrift’s appeal).
III. AT AN IMPASSE: THE ELEVENTH CIRCUIT REMAINS UNSWAYED BY OTHER CIRCUITS AND TAKES AN ORIGINAL STANCE IN VANDERGRIFT

The Eleventh Circuit faced a novel issue in Vandergrift because it had to decide whether the Supreme Court’s holding in Tapia applied to sentencing hearings following revocation of supervised release. Vandergrift therefore presented the Eleventh Circuit with an opportunity to interpret the much-debated Tapia decision. By holding that Tapia error occurs whenever judges contemplate rehabilitative needs in sentencing determinations, Vandergrift launched the Eleventh Circuit into the growing circuit split. The court’s decision reflects yet another possible interpretation of Tapia and highlights the growing need for a determination of the role of rehabilitation in criminal sentencing.

A. Facts and Procedure

Walter Henry Vandergrift was convicted for “the possession and distribution of child pornography.” After serving prison time, Vandergrift began a supervised release program. However, before completing the program, his probation officer alleged Vandergrift “violated the condi-

67. See id. (stating Eleventh Circuit had not decided whether Tapia applied to revocation of supervised release hearings, but for present case would rely upon sister circuits’ conclusion that Tapia applied).

68. See id. at 1309–11 (detailing different Tapia interpretations adopted by other circuits). For a further discussion of the debate regarding varying Tapia interpretations, see supra notes 52–66 and accompanying text.

69. See id. at 1310 (acknowledging that decision rejected approaches taken by other circuits); see also Hugh Kaplan, Consideration of Rehabilitation at Sentencing Is Dealt with Differently in Different Circuits, U.S. L. Week (June 24, 2014), available at https://www.bloomberglaw.com/document/XCVBC6D000000000?jsr=dk%253Abna%2520a0f2a0a0c9#cite (reporting Eleventh Circuit decision widened circuit split on consideration of rehabilitation in criminal sentencing).

70. See Vandergrift, 754 F.3d at 1310 (asserting Eleventh Circuit holding properly interpreted Tapia after “declin[ing] to limit Tapia to [certain] situations”).

71. See id. at 1305 (providing facts of Vandergrift’s initial conviction).

72. See id. (explaining Vandergrift’s sentence from initial conviction). Vandergrift spent ninety-seven months in prison before beginning his supervised release of three years. See id. For an explanation of supervised release programs, see Harold Baer, Jr., The Alpha & Omega of Supervised Release, 60 Ala. L. Rev. 267, 269 (1996) ("Supervised release is a form of government supervision after a term of imprisonment."). Whereas parole “reduce[s] the stated term of imprisonment,” supervised release is “in addition to, and following, a term of imprisonment imposed by a court.” Id. (articulating difference between these two sentencing options). For more information on supervised release programs under the federal Sentencing Guidelines, see MANUAL, supra note 37, at 413–20.
tions of his supervised release . . . ." 73 These allegations triggered a preliminary and final revocation hearing. 74

The United States District Court for the Middle District of Alabama determined Vandergrift had indeed violated the terms of release and "subsequently revoked his supervised release." 75 Once a defendant’s supervised release status is revoked, the court has the authority to sentence a defendant to a term of imprisonment. 76

When deciding the length of Vandergrift’s imprisonment sentence, the judge “consider[ed] all factors set out in 18 U.S.C. Section 3553 . . . the safety of the public . . . the example set to others . . . [and] what’s best for the defendant . . . ." 77 The judge relied heavily on Vandergrift’s ex-

73. See Vandergrift, 754 F.3d at 1305 (illustrating process by which supervised release may be revoked). The probation officer did so by filing a petition with the district court. See id. (describing process that follows alleged violation of supervised release). The judgment provided the standard conditions of supervision as well as special conditions of Vandergrift’s supervision. See Judgment in a Criminal Case, United States v. Vandergrift, No. 2:04cr033-WHA, at *3–4 (M.D. Ala. May 30, 2012), available at http://ia600705.us.archive.org/23/items/gov.uscourts.almd.11361/gov.uscourts.almd.11361.76.0.pdf.

The petition for revocation alleged Vandergrift:

(1) fail[ed] to obtain lawful employment; (2) fail[ed] to obey instructions to search for and obtain employment; (3) knowingly [gave] false information to a probation officer when questioned about the whereabouts of his roommate; (4) possess[ed] or [had] access to a pornographic DVD and a Maxim magazine, both of which contained sexually stimulating material; and (5) violat[ed] 18 U.S.C. § 1001, which prohibits making materially false statements to a federal agent . . . . Vandergrift, 754 F.3d at 1305–06.

74. See Baer, supra note 72, at 285 (discussing procedural steps that occur after defendant violates supervised release). “The purpose of the preliminary hearing is to determine whether there is probable cause to hold the defendant for a revocation hearing.” Id. at 286 (providing rights of defendants for preliminary hearings). The revocation hearing is governed by Federal Rule of Criminal Procedure 32.1(b)(2) and requires the government to prove by a preponderance of the evidence that the offender violated conditions of supervised release. See id. at 287–89 (explaining procedural elements of revocation hearings).

75. See Vandergrift, 754 F.3d at 1306 (concluding government met burden and proved by preponderance of evidence that Vandergrift violated conditions of supervised release).

76. See 18 U.S.C. § 3583(e)(3) (2012) (explaining court’s authority when supervised released is revoked). “If a court revokes a defendant’s term of supervised release, the court may sentence the defendant to a term of imprisonment for all or part of the term of supervised release authorized by statute for the offense that resulted in the term of supervised release . . . .” Baer, supra note 72, at 292 (footnote omitted) (describing judicial authority to sentence offenders following revocation of supervised release provided sentence does not violate “maximum terms of imprisonment set forth in 18 U.S.C. § 3583(e)(3)”). The Sentencing Guidelines Manual provides a framework for judges to reference when deciding how long to sentence an offender following revocation of supervised release. See MANUAL, supra note 37, at 485–88 (providing revocation table to serve as reference when creating terms of imprisonment).

77. Vandergrift, 754 F.3d at 1306 (reciting rationale of district judge when creating Vandergrift’s sentence). Under the Sentencing Reform Act, if the judge
pert witness, a psychologist, who testified to \textit{“the difficulty in finding, outside the prison system, any vocational training and help that might assist the defendant.”} Following the hearing, the judge sentenced Vandergrift to \textit{“24 months’ imprisonment to be followed by one year of supervised release.”}

Vandergrift subsequently appealed to the Eleventh Circuit Court of Appeals, arguing that the district court committed \textit{Tapia} error when deciding his sentence.\footnote{See id. at 1306–07 (summarizing issue on appeal in front of Eleventh Circuit). Vandergrift also alleged that the district court erred in revoking his supervised release and created an unreasonable sentence by using incorrect sentencing factors. \textit{See id.} at 1307–10 (discussing Vandergrift’s allegations of district court error). The Eleventh Circuit determined the district court properly revoked Vandergrift’s supervised release status and dismissed the allegation of impermissible sentencing factors because Vandergrift was unable to show “plain error as to this issue.” \textit{See id.} at 1307, 1309 (dismissing briefly Vandergrift’s other allegations in order to focus on alleged \textit{Tapia} error).}

\textbf{B. Refusing to Budge: The Eleventh Circuit Rejects Sister Circuits’ Approaches and Creates New Tapia Interpretation}

The Eleventh Circuit agreed with Vandergrift that the district court erred when creating the sentence because it considered his rehabilitative needs.\footnote{\textit{Id.} at 1311 (characterizing actions by district court as \textit{“improper”} and \textit{“procedural error”}). For a further discussion of the district court’s analysis, see \textit{supra} notes \textit{71–73, 75,} and \textit{77–80} and accompanying text.} Nonetheless, the court affirmed the district court’s holding because Vandergrift could not prove the \textit{Tapia} error “substantially affected” his rights at the revocation hearing.\footnote{\textit{See id. at 1311–12} (upholding decision of district court \textit{“despite [the] finding of \textit{Tapia} error”}). For a further discussion of how Vandergrift failed to meet the burden to prove procedural error, see \textit{infra} notes \textit{101–03} and accompanying text.} The court initially analyzed a matter of first impression for the Eleventh Circuit, deciding that \textit{Tapia} did in sentences a defendant to a greater sentence than the Guidelines recommend, the judge must explain the judge’s reasoning. \textit{See} 18 U.S.C. § 3553(c) \textit{(The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . (2) is not of the kind, or is outside the range . . . the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons . . . .”)}.  

\footnote{\textit{Id.} at 1306 (quoting testimony from revocation hearing). The psychologist, Dr. Kirkland, believed Vandergrift had bipolar disorder, which could \textit{“be helped in some way in the prison system.”} \textit{Id.} (quoting testimony of psychologist at revocation hearing that indicated Vandergrift would do better in prison environment). The judge stated his hopes that Vandergrift’s imprisonment sentence would \textit{“put him on a better course”} and \textit{“could also help save the defendant’s life.”} \textit{Id.} (explaining reasoning behind judge’s decision to sentence Vandergrift to twenty-four months’ imprisonment).}  

\footnote{\textit{Id.} (quoting testimony of psychologist at revocation hearing that indicated Vandergrift would do better in prison environment). The judge stated his hopes that Vandergrift’s imprisonment sentence would \textit{“put him on a better course”} and \textit{“could also help save the defendant’s life.”} \textit{Id.} (explaining reasoning behind judge’s decision to sentence Vandergrift to twenty-four months’ imprisonment).}
fact apply to revocation of supervised release hearings. Next, the court rejected other circuits’ interpretations of Tapia, ultimately finding that any consideration of rehabilitation constitutes Tapia error.

1. **A Point of Agreement: Like Its Sister Circuits, the Eleventh Circuit Applies Tapia to Revocation Hearings**

   In Vandergrift, the court was presented with the novel issue of whether Tapia applied to revocation of supervised release hearings. In making its determination, the Eleventh Circuit relied on its sister circuits’ analyses of the Act and their previous determinations that Tapia applied to sentencing following revocation of supervised release. While the Eleventh Circuit did not adopt the other circuits’ methods of detecting Tapia error, the court was persuaded by their rationales in deciding that Tapia applied to Vandergrift’s revocation hearing for two reasons.

   First, relying on section 3582(a), the Court in Tapia “made clear that prison is not to be viewed by sentencing judges as rehabilitative.” Section 3582(a) of the Act states Congress’s position that rehabilitation should not be the goal of imprisonment. This same provision instructs judges to “consider the factors set forth in section 3553(a)” when deciding a term of imprisonment. Because section 3553(a) applies to sentencing

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83. For a further discussion of the court’s decision to apply Tapia to revocation hearings, see infra notes 85–94 and accompanying text.

84. *See Vandergrift*, 754 F.3d at 1310 (rejecting tests used by other circuits and concluding that Tapia error occurs when judge considers rehabilitation at sentencing phase). For a further discussion of the Eleventh Circuit’s analysis, see infra notes 95–103 and accompanying text.

85. See *Vandergrift*, 754 F.3d at 1309 (recognizing different fact pattern in Vandergrift than in Tapia). It is important to distinguish that Tapia dealt with initial sentencing, whereas Vandergrift dealt with revocation of supervised release. See Tapia v. United States, 131 S. Ct. 2382, 2385 (2011) (addressing question of whether courts may consider rehabilitation when “imposing or lengthening a prison term”).

86. See *Vandergrift*, 754 F.3d at 1308–09 (referring to sister circuits that previously determined Tapia applies to revocation of supervised release hearings). For a complete list of circuits the Eleventh Circuit cited to, see infra note 93.

87. See *Vandergrift*, 754 F.3d at 1309 (“This court has not decided whether Tapia applies in the context of resentencing upon the revocation of supervised release. But we agree with our sister circuits and today hold that it does.”).

88. *Id.* (describing how Tapia abrogated precedential case, *United States v. Brown*, 224 F.3d 1237, 1240 (11th Cir. 2000)); see also *Tapia*, 131 S. Ct. at 2389 (“Under standard rules of grammar, § 3582(a) says: A sentencing judge shall recognize that imprisonment is not appropriate to promote rehabilitation . . . .”).

89. See 18 U.S.C. § 3582(a) (2012) (“[R]ecognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

90. See *id.* (“The court . . . in determining the length of the term, shall consider the factors set forth in section 3553(a) . . . .”); see also id. § 3553(a) (listing “[f]actors to be considered in imposing a sentence”). The judge considers: [T]he need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and
following revocation of supervised release, courts reason that section 3582 extends to revocation hearings as well.\textsuperscript{91} Second, when section 3582 states, “imprisonment is not an appropriate means of promoting correction and rehabilitation,” courts have determined that this language does not restrict application only to sentences following an original conviction.\textsuperscript{92}

In applying this same analysis, six circuits have held that \textit{Tapia} applies to revocation of supervised release hearings.\textsuperscript{93} In similar fashion, the Eleventh Circuit found \textit{Tapia} governed over the circumstances presented in \textit{Vandergrift}.\textsuperscript{94}

2. \textit{Forging Its Own Path: The Court Rejects Sister Circuits’ \textit{Tapia} Interpretations}

The Eleventh Circuit analyzed the approaches taken by other circuits to measure \textit{Tapia} error before rejecting them and creating its own test.\textsuperscript{95}

\textit{(D)} to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

\textit{Id.} § 3553(a)(2).

\textsuperscript{91} See, \textit{e.g.}, United States v. Garza, 706 F.3d 655, 658 (5th Cir. 2013) (“[T]he phrasing in § 3582(a) that prohibits consideration of rehabilitative needs applies to a prison term imposed upon revocation of supervised release.”).

\textsuperscript{92} See 18 U.S.C. § 3582(a); see also Garza, 706 F.3d at 659 (asserting that \textit{Tapia}’s holding applies “where actual incarceration is involved”).

\textsuperscript{93} See United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013) (arguing that if rehabilitation is not proper for “initial sentencing” then “logic requires extending such reasoning to sentencing on revocation of supervised release”); Garza, 706 F.3d at 657 (allowing \textit{Tapia} to apply to revocation hearings after government’s concession); United States v. Bennett, 698 F.3d 194, 197–98 (4th Cir. 2012) (relying on language in Sentencing Reform Act and logic behind \textit{Tapia} decision to apply \textit{Tapia} to “revocation context too”); United States v. Mendiola, 696 F.3d 1033, 1041–42 (10th Cir. 2012) (relying on Judge Holloway’s logic in another Tenth Circuit case where he “argued \textquoteleft[t]he Supreme Court’s reliance on Congress’s declination to grant judicial authority to control a prisoner’s rehabilitation extinguishes any . . . distinction between [initial sentencing under] § 3582 and [revocation sentencing under] § 3583” and agreeing with his logic that \textit{Tapia} applied to revocation hearings (alterations in original) (quoting United States v. Collins, 461 F. App’x 807, 812 (10th Cir. 2012) (Holloway, J., dissenting))); United States v. Taylor, 679 F.3d 1005, 1006–07 (8th Cir. 2012) (relying on Justice Souter’s explanation “in \textit{United States v. Molignaro}, there is no ‘hint in the Court’s exposition’ that the prohibition on imposing or lengthening a sentence for rehabilitation purposes would not extend to ‘resentencing after violation of release conditions’” (citation omitted) (quoting United States v. Molignaro, 649 F.3d 1, 5 (1st Cir. 2011))); \textit{Molignaro}, 649 F.3d at 4–5 (rejecting parsing of Act’s language and concluding \textit{Tapia} applies to revocation hearings).

\textsuperscript{94} See United States v. Vandergrift, 754 F.3d 1303, 1309 (11th Cir. 2014) (establishing that \textit{Tapia} will govern court’s decision and apply to Vandergrift’s revocation of supervised release hearing).

\textsuperscript{95} See id. at 1309–11 & n.5 (“We believe our sister Circuits have taken an unnecessarily narrow view of \textit{Tapia} for the reasons discussed throughout.”). For a full analysis of the other circuits’ holdings, see \textit{supra} notes 60–63 and accompanying text.
The court decided, "Tapia error occurs where the district court considers rehabilitation when crafting a sentence of imprisonment." To determine whether the district court considered rehabilitation, the Eleventh Circuit examined the sentencing transcript from the revocation hearing. At the hearing, most notably, the district court judge stated:

I've also got to consider what's best for the defendant as a factor in the equation. [V]ocational training for a period of time in the prison system not only would benefit the public . . . but could also help save the defendant's life. . . . The sentence is being imposed in excess of the guidelines at 24 months . . . for the benefit of the defendant.

The Eleventh Circuit found that this language demonstrated that the judge considered rehabilitative needs in determining Vandergrift's sentence. Therefore, the Eleventh Circuit concluded that the district court judge committed Tapia error.

Finding Tapia error was just the first step in the Eleventh Circuit's review of the district court's sentence. The next step in its analysis re-
quired Vandergrift to prove that the error affected his substantial rights or, in other words, “‘affected the outcome of the district court proceedings.’” Vandergrift could not meet this burden, and therefore, despite the Tapia error, the Eleventh Circuit affirmed the district court’s holding.

IV. CRITICAL ANALYSIS: SENTENCING COMMISSION, NOT JUDGES, SHOULD SAY “YES” TO REHABILITATION

In Vandergrift, the Eleventh Circuit adhered to the objectives of the Sentencing Reform Act and provided a more definitive framework for the legal profession. Tapia sparked a wide range of interpretations, which spoiled the goal of sentencing uniformity and fostered disparate treatment of offenders throughout the United States. In Vandergrift, the Eleventh Circuit provided more equal treatment for offenders.

The appellate court then looks to see whether “the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.” Id. (alteration in original) (quoting United States v. Cotton, 535 U.S. 625, 631 (2002)) (elaborating on plain error analysis).

Here, the Eleventh Circuit determined that the district court erred and assumed the error was plain. See id. at 1312 (determining Vandergrift met first two prongs of plain error analysis). The only other requirement was for Vandergrift to show that it affected his substantial rights. See id. (stating Vandergrift had to prove last prong of plain error analysis).

102. See id. (quoting Olano, 507 U.S. at 734) (providing standard of review to measure if plain error affected substantial rights).

103. See id. (“Vandergrift has failed to show that his sentence would have been different but for the court’s consideration of rehabilitation.”). Looking to the role the rehabilitation consideration played, the Eleventh Circuit concluded it “constituted only a minor fragment of the court’s reasoning” because “[t]he court’s primary considerations were for the safety of the public and deterring others from similar conduct.” Id. (quoting United States v. Bennett, 698 F.3d 194, 201 (4th Cir. 2012)) (considering role rehabilitation played in district court’s decision and declining to find error affected substantial rights).

104. For a complete discussion of the objectives of the Sentencing Reform Act, see supra notes 38–51 and accompanying text. For a further discussion of the legal profession’s need for a bright-line test, see infra notes 130–34 and accompanying text.

105. For a discussion of Tapia’s varying interpretations, see supra notes 52–66 and accompanying text. Compare Tapia v. United States, 131 S. Ct. 2382, 2385 (2011) (overruling district court’s sentence of fifty-one months because court improperly considered rehabilitation), with United States v. Gilliard, 671 F.3d 255, 257–60 (2d Cir. 2012) (declining to find error with district court’s sentence of ninety-six months because there was no explicit link in opinion, despite judge stating: “[H]e’s important . . . that you be sentenced in such a way that you . . . have access to facilities and care that will enable you to deal with these problems. So that’s something, obviously, I take very, very seriously, and will, in fashioning my sentence.”).

106. See Vandergrift, 754 F.3d at 1310 (“From this language and rationale, it is clear that Tapia prohibits any consideration of rehabilitation when determining whether to impose or lengthen a sentence of imprisonment.” (emphasis added))). The decision treats offenders equally in the sense that the Eleventh Circuit created
The Eleventh Circuit’s decision is properly decided given the lack of authority delegated to judges to ensure defendants actually participate in rehabilitative services. While acknowledging the importance of the limitations restricting federal judges from considering rehabilitation in sentencing, there is persuasive evidence showing that rehabilitative programs effectively reduce recidivism rates. As such, rehabilitation should not be overlooked as a valid solution to overcrowding in America’s prisons.

A. Judges’ Hands Are Tied: Statutory Authority Says “No, No, No” to Judges’ Consideration of Rehabilitation

The Eleventh Circuit properly decided Vandergrift and provided a more appropriate framework that other circuits should adopt for two reasons. First, the Sentencing Reform Act makes very clear that Congress did not intend for judges to consider rehabilitation when deciding terms of imprisonment. Second, the Bureau of Prisons, not sentencing judges, has the sole power to actually place a defendant into a prison rehabilitation program.

1. Line in the Sand: Congress Purposely Chose Not to Grant Judges Authority to Consider Rehabilitation

The Sentencing Reform Act, enacted to curtail judicial discretion, clearly allocates specific authority to sentencing judges. As a result, courts properly concluded that, in the absence of such explicit statutory authority permitting judges to consider rehabilitation when imposing or lengthening a prison sentence, sentencing judges did not have that a bright-line test that provides a more straightforward, consistent framework for courts to use.

107. For a full analysis of the statutory authority and legislative history, see infra notes 113–29 and accompanying text.
108. For a full discussion regarding the latest studies on rehabilitation’s relationship to recidivism rates, see infra notes 139–53 and accompanying text.
109. For a full discussion advocating rehabilitation as a solution to the current overcrowded prison problem, see infra notes 154–72 and accompanying text.
110. For a complete discussion of the two reasons, see infra notes 113–29 and accompanying text.
111. For a full discussion of the statutory authority, see infra notes 113–22 and accompanying text.
112. For a full discussion regarding the statutory authority afforded to the Bureau of Prisons, see infra notes 123–29 and accompanying text.
113. See 18 U.S.C. § 3582 (2012) (stating, very clearly, powers judges have when creating sentence of imprisonment); see also Tapia v. United States, 131 S. Ct. 2382, 2390 (2011) (explaining that Congress was very clear when drafting Sentencing Reform Act); Stith & Koh, supra note 28, at 243 (theorizing Congress had to be strict when granting judges power in order to limit likelihood they would rely on their discretion when sentencing).
Both the unambiguous statutory language and legislative history of the Act confirm this conclusion.\footnote{See Tapia, 131 S. Ct. at 2390 (commenting on “statutory silence [and] the absence of any provision granting courts the power to ensure that offenders participate in prison rehabilitation programs”). The Tapia Court saw this silence as proof of Congress’s outright decision not to give judges this power. See id. (“For when Congress wanted sentencing courts to take account of rehabilitative needs, it gave courts the authority to direct appropriate treatment for offenders.”).}

First, Congress explicitly provided factors judges should consider when crafting sentences.\footnote{See 18 U.S.C. § 3553(a) (providing “factors to be considered in imposing sentence”). The statute instructs judges to consider:

(2) the need for sentence imposed—
(A) to reflect the seriousness of the offense . . .
(B) to afford adequate deterrence to criminal conduct,
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Id.}

An accompanying provision adds a limitation, stating, “[i]mprisonment is not an appropriate means of . . . rehabilitation.”\footnote{See id. § 3582(a) (“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.” (emphasis added)); see also Tapia, 131 S. Ct. at 2389–90 (summarizing key provisions of Sentencing Reform Act, while noting Congress’s express disapproval of using imprisonment as means of rehabilitation).}

Congress had the option, but chose not to embed consideration of rehabilitation within the judges’ list of enumerated powers.\footnote{See Tapia, 131 S. Ct. at 2390 (“If Congress had similarly meant to allow courts to base prison terms on offenders’ rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs.”). The Tapia Court saw this decision to not include rehabilitation as a deliberate, significant sign of congressional intent. See id. (noting Congress was very clear about when judges could take rehabilitative needs into account and therefore in absence of such authority, judges must not have that power).}

The relevant Senate report further clarifies the role Congress wanted rehabilitation to have in sentencing.\footnote{See generally S. REP. NO. 98-225 (1983), available at http://www.fd.org/docs/select-topics—sentencing/SRA-Leg-History.pdf (explaining role of rehabilitation following Sentencing Reform Act).}

Instead of completely doing away with rehabilitation, Congress limited the use of rehabilitation to deciding the type of punishment courts could hand down; examples of such punishments include supervised release, parole, and fines.\footnote{See Tapia, 131 S. Ct. at 2390 (“The [Sentencing Reform Act] instructs courts, in deciding whether to impose probation or supervised release, to consider whether an offender could benefit from training and treatment programs.”). The Tapia Court called this “statutory silence” “[e]qually illuminating.” Id. (commenting on congressional silence regarding allowing consideration of rehabilitation at sentencing and suggesting it indicated lack of congressional intent to give judges this power).}

The report states,
“the purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case.”121

Therefore, based on the statutory language and legislative history of the Act, the Eleventh Circuit correctly established a bright-line test determining that Tapia error occurs whenever judges consider rehabilitation while creating a sentence of imprisonment.122

2. Blockade to Judicial Power: The Bureau of Prisons Has Authority Under the Act to Determine Place of Imprisonment

A second statutory provision also supports the Eleventh Circuit’s decision, by allocating the power to place prisoners in rehabilitative programs to the Bureau of Prisons (Bureau).123 The provision states, “[a]ny order, recommendation, or request by a sentencing court . . . shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person.”124 This language means that while judges have the ability to sentence offenders, once sentenced, offenders are placed within the Bureau’s custody.125

The Bureau then has the power to choose the “place of the prisoner’s imprisonment.”126 Therefore, any judicial order for an offender to receive rehabilitative services does not actually mean the offender will re-

121. S. REP. NO. 98-225, at 76–77 (emphasis added); see also Tapia, 131 S. Ct. at 2391 (“Instead [of completely eliminating rehabilitation], Congress barred courts from considering rehabilitation in imposing prison terms, but not in ordering other kinds of sentences.” (citations omitted)).

122. See United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014) (concluding decision was “faithful to Tapia’s reasoning” and therefore was appropriate framework).


124. See 18 U.S.C. § 3621(b) (authorizing Bureau to make final determination on prisoners’ placements in rehabilitation services).

125. See id. § 3621(a) (“A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.”).

126. See id. § 3621(b) (“The Bureau of Prisons shall designate the place of the prisoner’s imprisonment.”). When determining placement, the Bureau considers:

1. the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence—(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

Id.
ceive said services. However, judges’ recommendations have been “almost always honored by [the Bureau].” Nonetheless, these blatant limitations support the decision not to have judges consider rehabilitation in sentencing because judges cannot guarantee offenders will actually be placed in the programs.

3. Although It Deepens the Circuit Split, the Eleventh Circuit’s Test Is Necessary to Provide Courts with a Clear Framework

Aside from honoring the above statutory analysis, the Eleventh Circuit’s test provides a bright-line rule for lower courts. Other circuit approaches are too imprecise, lenient, and suggest judges are taking rehabilitation into consideration. Those judges avoid the Tapia holding by not explicitly writing rehabilitation language into their opinions. Without a proper framework or mode of analysis, circuit courts are at a loss to determine what constitutes considering a defendant’s rehabilitative needs.

127. See Tapia v. United States, 131 S. Ct. 2382, 2390–91 (2011) (“A sentencing court can recommend that the [Bureau of Prisons] place an offender in a particular facility or program.”). An example of an offender being sentenced to receive rehabilitative services, but not receiving them, is Tapia, the defendant in Tapia v. United States. See id. at 2391 (“[Tapia] was not admitted to RDAP [the Bureau of Prison’s Rehabilitation Program], nor even placed in the prison recommended by the district court.” (first alteration in original)). The Supreme Court in Tapia thought this “incapacity speaks volumes[] indicat[ing] that Congress did not intend that courts consider offenders’ rehabilitative needs when imposing prison sentences.” Id. (reasoning lack of congressional authority illustrated that judges lacked power to consider rehabilitation).

The defendant in Tapia is not the only offender to not be placed in a prison program. See Avila, supra note 35, at 429 (referring to United States v. Story, 635 F.3d 1241 (10th Cir. 2011), where defendants “were never enrolled in the programs for which their sentences were lengthened” and highlighting again “[i]t is up to prison administrators to make these programs available”).

128. See Borges, supra note 28, at 142, 173 (“The [Bureau of Prisons] places great emphasis on the judicial recommendation, and it is reported that the [Bureau of Prisons] complies with judicial recommendations about eighty percent of the time it receives them . . . .”); see also U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 12 (2014), available at http://www.bop.gov/resources/publications.jsp (“While every effort is made to comply with the court’s recommendation, conflict with [Bureau of Prisons] policy and sound correctional management may prevent honoring the court’s recommendation.”).

129. See Tapia, 131 S. Ct. at 2390–91 (highlighting importance of statutory authority in determining Supreme Court’s prohibition of judges’ consideration of rehabilitative services).

130. See United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014) (creating bright-line test by declining to “limit Tapia to [certain] situations”).

131. See, e.g., United States v. Gilliard, 671 F.3d 255, 257 (2d Cir. 2012) (citing defendant’s substance abuse problems and need for “facilities and care” when determining defendant’s sentence).

132. See id. at 260 (concluding judge relied on “other permissible reasons” and finding no explicit link to rehabilitation). There are other examples of courts skirting the Tapia holding. See, e.g., United States v. Lifshitz, 714 F.3d 146 (2d Cir. 2013); United States v. Garza, 706 F.3d 655 (5th Cir. 2013).
needs. The Eleventh Circuit answered the call by providing a framework that would benefit other courts as well as prisoners.

### B. Solution to the Gridlock?

While this Note agrees with the Eleventh Circuit’s ultimate decision, it urges the circuit courts, and more specifically the Sentencing Commission, to reconsider their views on rehabilitation. An upward trend in prison population and frustration with the lack of results discredited the rehabilitation model in the 1980s. Today, as prison populations and recidivism rates continue to rise, both state and federal officials are rethinking their focus on retribution and instead giving the rehabilitation model a second glance. New studies showcasing the positive effects of rehabilitation and the successful implementation of rehabilitative services in some states make the rehabilitation model worth reconsidering.

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133. This confusion as to what constitutes considering a defendant’s rehabilitative needs can be seen in the interpretations of *Tapia*. See supra notes 62–66 and accompanying text; see also Chanenson, supra note 27, at 224 (commenting that inconsistency amongst circuits in interpreting guidelines indicates need for better framework).

134. See generally Vandergrift, 754 F.3d 1303 (providing framework that requires courts to examine whether district court judge considered rehabilitation in determining an imprisonment sentence).


136. See S. REP. NO. 98-225, at 40 (1983) (“We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.”). For an analysis of the discussion that brought about rehabilitation’s decline, see supra notes 33–37 and accompanying text.

137. See Flatow, supra note 7 (reporting “federal prison population has ballooned 790 percent since 1980,” indicating need of reform). For an example of the federal government’s actions in rethinking the Guidelines, see id. ("[P]ublic officials—most prominently Attorney General Eric Holder—are now acknowledging that ‘too many Americans go to too many prisons for far too long . . . .’"). In 2005, “the Justice Kennedy Commission reported that ‘many prosecutors, judges, defense counsel and legislators who have differing attitudes toward crime and punishment share a feeling that more incarceration and longer sentences are not always in the public interest.’” See Second Chances, supra note 6, at 10. For a full discussion on the state’s efforts, see infra notes 154–72 and accompanying text.

138. For a full discussion of the new look at the rehabilitation model, see infra notes 154–72 and accompanying text.
1. Rehabilitating the Rehabilitation Model

One of the main reasons why the rehabilitation model was discredited was because it was difficult to measure the effects rehabilitation had on prisoners. Today, evidence-based research and meta-analysis of rehabilitation programs can provide more accurate conclusions about the effects of rehabilitation. Some social scientists have since concluded that rehabilitative programs can reduce recidivism rates. These findings, coupled with the prisoners’ need to receive rehabilitative services, provide a strong argument for reconsidering the rehabilitation model.

The benefit of a meta-analysis is that it allows social scientists to determine certain characteristics that make rehabilitation programs effective at reducing recidivism rates. While studies identify numerous principles that make rehabilitation programs effective at reducing recidivism rates, it is particularly significant that one leading critic of the rehabilitation model retracted his earlier conclusion that the rehabilitation model did not work. It is particularly significant that one leading critic of the rehabilitation model retracted his earlier conclusion that the rehabilitation model did not work. It is particularly significant that one leading critic of the rehabilitation model retracted his earlier conclusion that the rehabilitation model did not work. See Patch, supra note 14, at 186 n.209 (citing critic’s retraction that stated “[n]ew evidence . . . leads me to reject my original conclusion . . . .” (second and third alterations in original) (quoting Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 Hofstra L. Rev. 243, 252 (1979))). Further, previous studies have been declared “misleading and methodologically unsound.” Id. at 186 (noting weaknesses in previous conclusion that rehabilitation was ineffective).

For a further discussion of prisoners’ need for rehabilitative services, see infra notes 148–51 and accompanying text.

See Rehabilitation, supra note 141 (recognizing those who participated in rehabilitation programs that conformed to the principles of effective intervention had significantly lower recidivism rates than control group); see also Doris Layton Mackenzie, Nat’l Criminal Justice Reference Ctr., Sentencing and Corrections in the 21st Century: Setting the Stage for the Future 29–32 (July 2001), available at https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf (summarizing characteristics of successful rehabilitation programs that reduce recidivism rates); Patch, supra note 14, at 188–89 (advocating three characteristics that contribute to rehabilitation program’s success)
or characteristics, three are common among successful programs.\textsuperscript{144} First, the program needs to identify and focus its attention on “high-risk offenders.”\textsuperscript{145} Second, the program should aim to “reinforce prosocial attitudes and behavior[s].”\textsuperscript{146} Third, the program should be adjusted to accommodate each offender’s learning capabilities.\textsuperscript{147}

In addition to the success of the rehabilitation model, it is equally important to look at prisoners’ needs for rehabilitation.\textsuperscript{148} One report explained that prisoners do not have the skills necessary to be successful after leaving prison, which ultimately leads to their return.\textsuperscript{149} For instance, “forty percent of inmates are functionally illiterate,” compared to twenty-one percent of the United States population.\textsuperscript{150} By participating in the successful rehabilitative programs described above, prisoners, once released, should have better opportunities and hopefully will not return to prison.\textsuperscript{151}

The Sentencing Commission should fulfill its statutory obligations under the Sentencing Reform Act and use this new research as a reason to amend the Guidelines to incorporate rehabilitative services.\textsuperscript{152} Certain states have incorporated the rehabilitation model into sentencing practices and serve as examples of the success that could be achieved in other states.\textsuperscript{153}

\begin{footnotes}
\item[144] For a complete list of effective principles, see \textit{Mackenzie}, supra note 143, at 25; \textit{Patch}, supra note 14, at 188–89; \textit{Rehabilitation}, supra note 141.
\item[145] \textit{See} \textit{Patch}, supra note 14, at 188 (“[H]igher levels of treatment should be directed toward high-risk offenders . . . .”).
\item[146] \textit{See} \textit{Rehabilitation}, supra note 141 (noting second goal of rehabilitation).
\item[147] \textit{See} \textit{Mackenzie}, supra note 143, at 126 (including factors such as IQ levels, learning disabilities, etc.).
\item[148] \textit{See} \textit{Second Chances}, supra note 6, at 61 (urging renewed commitment to defendants’ rehabilitative needs). Former President George W. Bush commented, “[w]e know from long experience that if [the released prisoners] can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison. . . . America is the land of second chance—and when the gates of the prison open, the path ahead should lead to a better life.” \textit{Id.} (advocating need for defendants to receive services they need to avoid returning to prison).
\item[149] \textit{See} \textit{Stravinskas}, supra note 8, at 3 (reasoning that offenders’ lack of skills, particularly in employment arena, is directly related to why they return to prison).
\item[150] \textit{Id.} at 3–6 (explaining need for prisoners to receive some type of training while in prison and why these needs contribute so much to recidivism rates). “Without the tools to build a successful life and with the stress of trying to ‘make ends meet,’ many prisoners resort to crime.” \textit{Id.} at 3 (highlighting importance of providing support to prisoners when they are in prison, in hopes of reducing recidivism rates).
\item[151] \textit{See} \textit{Second Chances}, supra note 6, at 27 (explaining importance of training and rehabilitative programs in prison because “those who are unable to get a job are three times more likely to return to prison”).
\item[152] \textit{See} \textit{28 U.S.C. § 994(o)} (2012); \textit{see also} \textit{supra} note 135.
\item[153] For a further discussion of the success of these programs, see \textit{infra} notes 154–72 and accompanying text.
\end{footnotes}
2. **A Second Chance for Rehabilitation: Will Pennsylvania and Delaware Follow in New Jersey’s Footsteps?**

Giving the rehabilitation model a second chance paid off in New Jersey, a state seemingly more committed to reducing recidivism rates than its neighbors, Pennsylvania and Delaware.\(^{154}\) New Jersey’s success is due to the current administration’s belief in the rehabilitation model and the availability of programs statewide.\(^{155}\) Based on their staggering prison budgets, it would behoove Pennsylvania and Delaware to follow New Jersey’s lead.\(^{156}\)


\(^{154}\) For example, compare New Jersey’s recidivism rate of 42.7%, with Pennsylvania’s at 59.9% and Delaware’s at 75%. See New Report, supra note 8 (reporting New Jersey’s recidivism rate); [Sam Dolnick, Pennsylvania Study Finds Halfway Houses Don’t Reduce Recidivism, N.Y. Times (Mar. 24, 2013)](http://www.nytimes.com/2013/03/25/nyregion/pennsylvania-study-finds-halfway-houses-dont-reduce-recidivism.html?pagewanted=all&k=r=0) (reporting Pennsylvania has thirty-eight halfway houses that “cost[ ] more than $110 million annually”). This effort was supposed to be a big push for Pennsylvania to lower recidivism rates, however, based on the current studies, it appears Pennsylvania has more work to do. See id. (indicating need for more reform in Pennsylvania after recidivism rates remain unchanged).


\(^{157}\) See Sam Dolnick, *Pennsylvania Study Finds Halfway Houses Don’t Reduce Recidivism*, N.Y. Times (Mar. 24, 2013), [http://www.nytimes.com/2013/03/25/nyregion/pennsylvania-study-finds-halfway-houses-dont-reduce-recidivism.html?page wanted=all&k=r=0](http://www.nytimes.com/2013/03/25/nyregion/pennsylvania-study-finds-halfway-houses-dont-reduce-recidivism.html?page wanted=all&k=r=0) (reporting Pennsylvania has thirty-eight halfway houses that “cost[ ] more than $110 million annually”). This effort was supposed to be a big push for Pennsylvania to lower recidivism rates, however, based on the current studies, it appears Pennsylvania has more work to do. See id. (indicating need for more reform in Pennsylvania after recidivism rates remain unchanged). One member of Community Education’s board of directors even commented, “We looked at quality indicators in our study. They were all poor. There were almost
sending offenders to halfway houses before release has proved mildly successful, with no real effect on recidivism rates.\footnote{158}{A recent study by the Pennsylvania Department of Corrections “found that [sixty-seven] percent of inmates sent to halfway houses were rearrested or sent back to prison within three years.”\footnote{159}{This result is disappointing, especially considering how much money Pennsylvania has dedicated to this cause in the recent past.\footnote{160}{As a result, Pennsylvania is now offering financial incentives in order to improve performance.\footnote{161}{Delaware is one of six states that has a “unified correctional system,” which means the state (through the Delaware Department of Corrections) operates the entire prison system.\footnote{162}{Officials in Delaware only recently realized the problematic effect that the growing prison population has on its state’s budget.\footnote{163}{In response, Delaware commissioned its first report no positive results.” \cite{Id. (quoting Professor of Criminology, Edward Latessa) (illustrating Pennsylvania’s need to reform its current rehabilitation programs).}  

\footnote{158}{See PA. DEPT’ OF CORRS., RECIDIVISM REPORT 2013 (2013), available at https://www.portal.state.pa.us/portal/server.pt/document/1324154/2013_pa_doc_recidivism_report_pdf (providing results of recidivism research which showed “mixed picture” of success in reducing recidivism rates). The current administration acknowledges “we have a lot of work to do to improve outcomes in our [community corrections center] system.” \cite{Id. (agreeing with other reports that halfway houses need reform to better reduce recidivism rates). For more information about community correction centers, see What Is a Community Corrections Center?, 69 PAPPC J., Spring 2012, at 5, available at http://www.pappc.org/docs/Feb%202012%20Journal%20FINAL%20lo%20res.pdf (explaining halfway houses are referred to as community correction centers).}  

\footnote{159}{See Dolnick, supra note 157 (reporting “[sixty-seven] percent of inmates sent to halfway houses were rearrested or sent back to prison within three years, compared with [sixty] percent of inmates who were released to the streets”); \cite{see also Editorial, Halfway Back to Society, N.Y. TIMES (Mar. 29, 2014), http://www.nytimes.com/2014/03/30/opinion/sunday/halfway-back-to-society.html?_r=1 (“[I]nmates sent to halfway houses were actually more likely to reoffend than those released directly into society . . . .” (emphasis added)).}  

\footnote{160}{See Dolnick, supra note 157 (noting halfway house programs cost Pennsylvania approximately “$110 million annually”).}  

\footnote{161}{See Ward, supra note 154 (providing details of Pennsylvania’s new plan to incentivize rehabilitation programs to reduce levels of recidivism). According to the Pennsylvania Department of Corrections, “[u]sing the recidivism report as a baseline, the facilities that win contracts must meet at least the minimum recidivism rate—60 percent—to continue their relationship with the state.” \cite{Id. (illustrating Pennsylvania’s new strategy to incentivize rehabilitation programs in order to help reduce recidivism rates).}  

\footnote{162}{See RECIDIVISM IN DELAWARE, supra note 154, at iv (explaining how Delaware’s prison system differs from those across United States). Each prison is run by the State, compared to other states that choose to have county agencies run prisons. \cite{See id.}  

\footnote{163}{See Cris Barrish, Study: 8 in 10 Released Inmates Return to Del. Prisons, WILMINGTON DEL. NEWS J. (July 31, 2013, 4:16 PM), available at http://www.usatoday.com/story/news/nation/2013/07/31/delaware-prison-recidivism/2603821/ (explaining that new research on Delaware’s recidivism rates “was a necessary initial step to evaluating the effectiveness of the state’s justice system”).}
analyzing prison populations and recidivism rates throughout the state.\footnote{164. \textit{See Recidivism in Delaware}, supra note 154 (referring to 2012 initiative that required Delaware to submit report about prison populations and recidivism rates).} This report found that slightly more than seventy-five percent of those released would be re-arrested.\footnote{165. \textit{See id.} (reporting statistics of inmates who will return to Delaware prisons within three years of their release).} Delaware public officials have taken a firm stance on the need to start implementing programs in order to control the unsettling recidivism rate.\footnote{166. A number of public officials, including the Delaware Attorney General and Public Defender, have commented about the seriousness of the recent report. \textit{See Barrish, supra note 163} (“Delaware Attorney General Beau Biden said in a written statement that the report ‘highlights an alarming rate of recidivism that needs to be addressed by the criminal justice system.’”).}

Unlike its neighbors, New Jersey has been commended for its work in reducing recidivism rates state-wide.\footnote{167. \textit{See Press Release, N.J. Office of the Gov., Governor Chris Christie Takes Action to Help Offenders Successfully Re-Enter Society and Lead Productive Lives} (Nov. 28, 2011), available at http://www.state.nj.us/governor/news/news/552011/approved/20111128c.html [hereinafter Governor Christie Press Release] (“Today, New Jersey is widely recognized as a national leader in reducing incidents of recidivism and reducing its prison population.”).} New Jersey’s success is credited to the current administration’s emphasis on rehabilitative programs.\footnote{168. \textit{See id.} (‘New Jersey has a strong record of helping rehabilitate offenders and providing the services they need to be successful in society, significantly decreasing their likelihood of reoffending and improving public safety.’” (quoting Governor Chris Christie)); \textit{see also New Report, supra note 8} (indicating that recidivism is “priority” of Governor, and that “New Jersey is head[ed] in the right direction”’ (quoting James Plousis, Chairman of the New Jersey State Parole Board)).} State-wide, there are several programs aimed at assisting offenders, beginning in prison and extending to after their release.\footnote{169. \textit{See Funding for Criminal Justice and Offender Reentry Programs and Services, Nicholson Found.}, http://thenicholsonfoundation-newjersey.org/programs/cj/NicholsonFoundationReentryGrantSummary.pdf (last visited Feb. 6, 2015) (describing many different programs available to New Jersey offenders). Examples of some of the programs offered to New Jersey offenders include Computer-Based Learning from Prison to Community, a License Reinstatement Program, and the New Careers Project. \textit{See id.} (providing list of diverse programs offered to New Jersey offenders).}

In addition to New Jersey’s successful programs, its governor recently expanded New Jersey’s focus on recidivism rates in four ways: (1) expanding the Drug Court program, (2) appointing an “Office Coordinator for Prisoner Reentry” to continue the successful work and “implement the Governor’s vision,” (3) creating and appointing a “Task Force for Recidivism Reduction,” and (4) providing for “Ongoing Program Assessment and Measurement” and “Real-Time Recidivism Rates,” both of which aim to track which programs are most successful. \textit{See Governor Christie Press Release, supra note 167} (illustrating ways New Jersey is continuing to move forward while providing rehabilitation services to inmates, as example to other states).
Jersey’s rehabilitative programs is impressive and illustrative. In fact, New Jersey recently reported that sixty-seven percent of its inmates did not return to prison post-release, making its current recidivism rate “below the national average.” By following New Jersey’s lead, Pennsylvania and Delaware can drastically reduce prison overcrowding and recidivism rates.

V. Conclusion

As former Senator Jim Webb commented, “‘either [Americans] are home to the most evil people on earth or we are doing something different—and vastly counterproductive. Obviously, the answer is the latter.’” Here, the problem facing the American prison system is the Sentencing Guidelines that are in need of reform. For the sake of inmates and taxpayers alike, the Sentencing Commission must step in to amend the Guidelines.

Adopting Sentencing Guidelines that emphasize rehabilitation will result in a more uniform application of the law and ultimately help the 6,937,600 individuals in correctional facilities avoid returning to prison. Further, American taxpayers are forced to bear the burden of supporting the growing prison population. Each year, prison expenses cost taxpayers $39 billion. As one inmate who participated in a prison rehabilita-

170. See New Report, supra note 8 (recognizing New Jersey for being one of six states to reduce recidivism rates, which is credited to its rehabilitation programs).

171. See Frequently Asked Questions, STATE OF N.J., DEPT. OF CORRS., OFFICE OF TRANSITIONAL SERVS., http://www.state.nj.us/corrections/SubSites/OTS/OTS_faq.html (last visited Feb. 6, 2015) (providing recidivism rates for offenders leaving state prison in New Jersey); see also New Report, supra note 8 (“New Jersey’s recidivism rate, 42.7 percent, was below the national average of 43.3 percent.”).


174. For a further discussion of why the Guidelines are in need of reform and should be amended, see supra notes 4, 139–72 and accompanying text.

175. See GLAZE & HERBERMAN, supra note 3 (providing total number of offenders in “U.S. adult correctional systems”).


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Program stated, "'[i]t makes me feel like a better man. This program, it works. It really works.'"178

SHUT THE STATE COURT'S DOORS: DIVERSITY JURISDICTION 
OVER NATIONAL BANKS IN THE NINTH CIRCUIT'S 
ROUSE v. WACHOVIA MORTGAGE, FSB 

MELISSA SIRAVO HENSINGER*

“One might think that 150 years after Congress established national 
banks in 1863, the question of their citizenship for purposes of diversity 
jurisdiction would be well established. Not so.”

I. A TREASURY OF INFORMATION: AN INTRODUCTION TO DIVERSITY 
JURISDICTION OVER NATIONAL BANKS

Congress first established national banks over 150 years ago, yet ques-
tions still exist over where national banks are domiciled for purposes of 
diversity jurisdiction. Originally, federal district courts had jurisdiction 
over any action dealing with national banks. However, this practice

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of this Note. 

1. Rouse v. Wachovia Mortg., FSB, 747 F.3d 707, 708 (9th Cir. 2014).

2. See Paul E. Lund, National Banks and Diversity Jurisdiction, 46 U. LOUISVILLE 
L. REV. 73, 77–81 (2007) (describing general development of national banks in 
United States); see also Joseph Lam, Note, Where Are National Banks “Located”? 
tent/uploads/2013/01/4-UPRBLJ-1-Joseph-Lam-Where-Are-National-Banks-Loca 
ted-2013.pdf (tracing historical background of national banks and section 1348). 

(1963) (noting that national banks were allowed “to sue and be sued in the federal 
district and circuit courts solely because they were national banks, without regard 
to diversity, amount in controversy or the existence of a federal question in the 
usual sense”); see also Petri v. Commercial Nat’l Bank of Chi., 142 U.S. 644, 648–49

(315)
changed in the late 1880s, when Congress decided to put national and state banks on equal footing regarding access to the federal courts. For national banks, bringing cases to federal court generally creates more favorable outcomes. Currently, 28 U.S.C. § 1348 governs diversity jurisdiction of national banks, but there is a conflict as to whether “citizens of the States in which they are respectively located” means only a bank’s main office or both a bank’s main office and principal place of business.

(1892) (stating state-chartered banks were only allowed to sue in federal court on basis of diversity jurisdiction or federal question jurisdiction). When Congress first authorized national banks, it also provided “suits, actions, and proceedings by and against [them could] be had” in federal court. First Nat’l Bank of Canton, Pa. v. Williams, 252 U.S. 504, 510 (1920) (quoting Act of Feb. 25, 1863, § 59, 12 Stat. 665, 681).

4. See Wachovia Bank v. Schmidt, 546 U.S. 303, 310 (2006) (citing Petri, 142 U.S. at 649) (stating that national banks lost power to automatically sue and be sued in federal court due to their origin); see also Leather Mfrs.’ Natl Bank v. Cooper, 120 U.S. 778, 780 (1887) (noting that Congress changed statute in order to put national banks “on the same footing as the banks of the state where they were located”). Diversity jurisdiction for state-chartered banks and other corporations is governed by 28 U.S.C. § 1332(c)(1), and under this provision, state banks and corporations are citizens of both their state of incorporation and principal place of business. See 28 U.S.C. § 1332(c)(1).


6. 28 U.S.C. § 1348 (2012). The text of section 1348 reads “[a]ll national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.” Id.; see also Amy L. Levinson, Developments in Diversity Jurisdiction, 37 LOY. L.A. L. REV. 1407, 1427 (2004) (“A national bank is organized under federal law pursuant to the National Banking Act. As a result, national banks have no state of incorporation, and Congress enacted a statute to specifically address their citizenship.” (footnote omitted)).

7. Compare Rouse v. Wachovia Mortg., FSB, 747 F.3d 707, 715 (9th Cir. 2014) (holding “located” means national banks’ main office only), and Wells Fargo Bank, N.A. v. WMR e-Pin, LLC, 655 F.3d 702, 709 (8th Cir. 2011) (same), with Horton v. Bank One, N.A., 387 F.3d 426, 429 (5th Cir. 2004) (holding “located” refers to both national bank’s principal place of business and main office), and Firstar Bank, N.A. v. Faul, 253 F.3d 982, 986 (7th Cir. 2001) (same). The principal place of business test is used under section 1332(c)(1) as part of determining the citizenship of corporations. See 28 U.S.C. § 1332(c)(1). Congress originally enacted this provision to relieve the federal courts’ caseload and prevent federal courts from hearing cases from local corporations who satisfy complete diversity solely because they have a different state of incorporation. See Kelly v. U.S. Steel Corp., 284 F.2d 850, 852 (3d Cir. 1960) (discussing purpose of section 1332(c)(1)); S. REP. NO. 85–1830 (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3101–02 (“This fiction of stamping a corporation a citizen of the state of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the federal courts simply because it has obtained a corporate charter from another state.”).
However, conflicting interpretations of the statute have resulted in it being applied inconsistently.\textsuperscript{8} Certain jurisdictions have held that a national bank is a citizen of only the state in which its main office is located.\textsuperscript{9} Other jurisdictions say that a national bank is a citizen of both the state in which its main office is located and the state of its principal place of business.\textsuperscript{10} National banks are frequently sued, and this inconsistency can create problems during litigation.\textsuperscript{11} While the circuit conflict is not an issue for national banks that have their main office and principal place of business located in the same state, many national banks’ principal places of business and main offices are located in different states.\textsuperscript{12}

Recently, in \textit{Rouse v. Wachovia Mortgage, FSB},\textsuperscript{13} the Ninth Circuit held that a national bank is only a citizen of the state where its main office is located for purposes of diversity jurisdiction.\textsuperscript{14} In this case, the Ninth Circuit joined the Eighth Circuit in holding that a national bank is only a citizen of the state in which its main office is located.\textsuperscript{15} Conversely, both the Fifth Circuit and the Seventh Circuit have held that a national bank is a citizen of both the state in which its main office is located and where its principal place of business is located.\textsuperscript{16}

\begin{enumerate}
\item \textsuperscript{8} Compare \textit{Rouse}, 747 F.3d at 715 (holding “located” means national banks’ main office only), and \textit{WMR e-Pin}, 653 F.3d at 709 (same), with \textit{Horton}, 387 F.3d at 429 (holding “located” refers to both national bank’s principal place of business and main office), and \textit{Firstar Bank}, 253 F.3d at 986 (same).
\item \textsuperscript{9} See, e.g., \textit{Rouse}, 747 F.3d at 715 (holding national bank is only citizen of state where its main office is located); \textit{WMR e-Pin}, 653 F.3d at 709 (rejecting assertion that national bank is citizen of state where its main office is located and citizen of state where its principal place of business is located).
\item \textsuperscript{10} See, e.g., \textit{Horton}, 387 F.3d at 436 (“We hold that the definition of ‘located’ is limited to the national bank’s principal place of business and the state listed in its organization certificate and its articles of association.”); \textit{Firstar Bank}, 253 F.3d at 994 (holding national bank is located in state where “principal place of business is found and the state listed on its organization certificate”).
\item \textsuperscript{11} See Kevin M. Clermont & Theodore Eisenberg, \textit{Xenophilia in American Courts}, 109 Harv. L. Rev. 1120, 1142 (1996) (noting main conflict is in which court system bank will be sued in). Generally, defendants get more favorable outcomes in federal forums. \textit{See id.} According to Clermont and Eisenberg, “[a]n out-of-state corporation suing a corporation either incorporated or having its principal place of business in the forum state has a win rate of 84.47%, whereas an in-state corporation suing an out-of-state corporation has only a 66.66% win rate.” \textit{Id.}
\item \textsuperscript{12} See, e.g., \textit{Rouse}, 747 F.3d at 715 (noting that Wells Fargo Bank’s principal place of business is located in California, while its main office is in South Dakota); \textit{Excelsior Funds, Inc. v. JP Morgan Chase Bank, N.A.}, 470 F. Supp. 2d 312, 313 (S.D.N.Y. 2006) (noting that Chase’s principal place of business is located in New York and its main office is located in Ohio).
\item \textsuperscript{13} 747 F.3d 707 (9th Cir. 2014).
\item \textsuperscript{14} \textit{See id.} at 715 (“[U]nder § 1348, a national banking association is a citizen only of the state in which its main office is located . . . .”).
\item \textsuperscript{15} \textit{See id.; see also} Wells Fargo Bank, N.A. v. WMR e-Pin, LLC, 653 F.3d 702, 709 (8th Cir. 2011) (holding the word “located” in section 1358 means national banks’ main office as designated by its articles of association).
\item \textsuperscript{16} \textit{See Horton v. Bank One, N.A.}, 387 F.3d 426, 426 (5th Cir. 2004) (holding “located” refers to national banks’ principal place of business and main office);
This Note argues that the Ninth Circuit incorrectly decided *Rouse* because its decision restricts citizens’ access to state courts and is contrary to both historical and recent Supreme Court precedent. Part II of this Note traces the development and scope of the legal landscape of diversity jurisdiction for national banks. Part III describes the facts of *Rouse* and analyzes the Ninth Circuit’s holding that national banks are only citizens of the state in which the bank’s main office is located. Part IV argues that *Rouse* incorrectly gives national banks greater access to federal courts, thereby restricting citizens’ access to the state court system. Part V concludes with a discussion of the likely impact of the Ninth Circuit’s decision.

II. **Emptying the Vault: The Historical Background of National Banks, Section 1348, and the Meaning of “Located”**

Under the original diversity statute, Congress intended national banks to have greater access to federal courts than their state counterparts. However, Congress subsequently amended the diversity statute to place national banks on equal footing with state banks. What remains unclear is the meaning of the word “located” in section 1348, and whether Congress intended to continue jurisdictional parity when it did not amend section 1348 after mandating that state banks and other banks are citizens of their state of incorporation and principal of business. This section traces the evolution of national banks’ diversity jurisdiction, pursuant to amendments to section 1348, and summarizes the current legal landscape.

Firstar Bank, N.A. v. Faul, 253 F.3d 982, 982 (7th Cir. 2001) (holding national bank is citizen of both state in which its main office is located and where its principal place of business is located).

17. For a further discussion of the need to reject the Eighth and Ninth Circuits’ approach and adopt a different reading of section 1348 regarding the diversity jurisdiction of national banks, see infra notes 135–77 and accompanying text.

18. For a further discussion of the development and legal landscape of diversity jurisdiction for national banks, see infra notes 22–101 and accompanying text.

19. For a further discussion of the Ninth Circuit’s holding and rationale in *Rouse*, see infra notes 102–34 and accompanying text.

20. For a critical analysis of the federalism issues presented by *Rouse* and other similar decisions, see infra notes 135–77 and accompanying text.

21. For a further discussion of the likely impact and reach of *Rouse*, see infra notes 178–81 and accompanying text.

22. For a discussion of the original National Banking Act, see infra notes 30–31 and accompanying text.

23. For a discussion of the 1882, 1887, and 1948 amendments to section 1348, see infra notes 32–34 and accompanying text.

24. For a discussion of the controversy concerning the concept of jurisdictional parity, see infra notes 49–90 and accompanying text.

25. For a discussion of the statutory evolution of section 1348 and the current legal landscape, see infra notes 26–101 and accompanying text.
A. Account History: The Historical Development of National Banks in the United States

The precursor to national banks was the First Bank of the United States, which was chartered by the United States Congress in 1791.26 Alexander Hamilton was the most well-known proponent of the Bank of the United States.27 Hamilton believed a national bank was necessary to establish financial order and credit in the new nation.28 After the charter for the Second Bank of the United States expired in 1836, former Treasury Secretary Samuel P. Chase was the first to propose “a national banking system under which commercial banks chartered by the federal government would be authorized to issue federal bank notes secured by government bonds.”29 In response, Congress passed Chase’s proposal in 1863, and thus authorized the creation of national banks.30


27. See Thomas Jefferson, The Complete Anas of Thomas Jefferson 30 (Franklin B. Sawvel ed., 1903); see also Felsenfeld, supra note 26, at 7–8 (describing opposing views of Jefferson, Madison, and Hamilton). Hamilton faced opposition from Thomas Jefferson and James Madison who believed that the centralization of power away from local banks to the national government was dangerous. See Jefferson, supra, at 30–31.


29. Lund, supra note 2, at 76–77 (discussing failure of Second Bank of United States and discussing 1863 Act that created national banks); see also Podolsky, supra note 5, at 1451 (discussing Samuel Chase’s proposal to develop national banking system).

30. See Lund, supra note 2, at 76; see also Wells Fargo Bank, N.A. v. WMR e-Pin, LLC, 653 F.3d 702, 706 (8th Cir. 2011) (discussing Congress’s authorization and noting that originally national banks could be sued in federal courts solely because they were national banks and did not need either diversity or federal question jurisdiction); Comment, Expanding Concepts of Federal Jurisdiction over National Banks, 59 IOWA L. REV. 1030, 1034 (1974) (discussing scope and statutory language of Act of 1863).
Under the National Bank Act of 1863, Congress allowed national banks to have access to federal courts merely by being established as a national bank.\footnote{See National Bank Act of 1863, ch. 58, \S\ 59, 12 Stat. 665, 681 (codified at 28 U.S.C. \S\ 1348 (2012)). The National Bank Act reads “suits, actions, and proceedings by and against any association under [the] act may be had in any circuit, district, or territorial court of the United States . . . .” Mercantile Nat’l Bank at Dallas v. Langdeau, 371 U.S. 555, 567–68 (1963) (quoting National Bank Act of 1863, 12 Stat. 668) (discussing that under original statute, national banks had access to federal courts solely because they were national banks and did not need either diversity or federal question jurisdiction); see also Jill Holly, Comment, The Circuit Split over the Citizenship of National Banks for Diversity Jurisdiction Purposes Under 28 U.S.C. \S\ 1348, 46 SANTA CLARA L. REV. 205, 212–13 (2005) (noting that original statute gave national banks national corporate powers including right to sue and be sued); Lam, supra note 2, at 37–39 (discussing purpose of original statute and inequality of access to federal courts by state banks); Michelle E. O’Leary, Note, The Preservation of Diversity Jurisdiction for National Banks, 10 N.C. BANKING INST. 133, 140–41 (2006) (discussing National Bank Act and automatic entry of national banks to federal courts).}

Subsequently, in 1882, Congress enacted the forerunner to the modern diversity jurisdiction statute for national banks and made national banks’ access to federal courts no greater than that of state courts.\footnote{See Act of July 12, 1882, ch. 290, \S\ 4, 22 Stat. 162. The 1882 amendment reads: [T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed. }\footnote{See Act of Mar. 3, 1887, ch. 373, \S\ 4, 24 Stat. 552, 554, amended by Act of Aug. 13, 1888, ch. 866, \S\ 25, 25 Stat. 433, 436. The 1887 amendment reads: That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit} In 1887, Congress amended the law to deem national banks “citizens of the States in which they are respectively located.”\footnote{See Act of Mar. 3, 1887, ch. 373, \S\ 4, 24 Stat. 552, 554, amended by Act of Aug. 13, 1888, ch. 866, \S\ 25, 25 Stat. 433, 436. The 1887 amendment reads: That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit
most recent amendment to section 1348 was made, but the integral language from the 1887 amendment remains in the present-day statute.34

While diversity jurisdiction of national banks is controlled by section 1348, diversity jurisdiction of state banks and other corporations is governed by 28 U.S.C. § 1332(c)(1).35 Pursuant to section 1332, state banks and corporations are citizens of the state in which they are incorporated and where their principal place of business is located.36 Originally, under section 1332, state banks and corporations were citizens of only the state in which they were incorporated.37 In 1958, section 1332 was amended to add principal place of business citizenship for the first time.38 Congress amended section 1332 because the previous version gave corporations regular access to federal courts.39 Under the previous statutory scheme, a corporation that carried on all of its business in one state could remove a case to federal court based on diversity against local parties, merely be-

**Langdeau**, 371 U.S. at 571 (quoting Act of Mar. 3, 1887, 24 Stat. 552). This addition to the Act has been interpreted by the Supreme Court to maintain jurisdictional parity between state banks and national banks. See id. at 555–56 (stating 1887 amendment limited national banks’ access to federal courts); see also Robert C. Eager & C. F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21, 27 (2004) (discussing history of jurisdictional parity between national and state banks).


36. See id. (“[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . .”).


38. See Pub. L. No. 85-554, § 2, 72 Stat. 415 (1958) (amending statute to include “where it has its principal place of business”).

39. See Murphy, *supra* note 37, at 307 n.3 (discussing necessity of 1958 amendment in order to restrict access to federal courts); see also Richard A. Simon, Note, *Attributing Too Much: The Fifth Circuit Perverts the Scope of Diversity Jurisdiction*, 19 CARDOZO L. REV. 1857, 1863 (1998) (noting that 1958 amendment prevented corporation whose principal place of business is located in one state from removing based on diversity because they were incorporated in another).
cause it was incorporated in another state. 40 This amendment to section 1332 occurred ten years after the last amendment to section 1348. 41 While it may seem like a minor detail, this ten-year difference becomes vastly important when courts debate the issue of congressional intent regarding jurisdictional parity between the two statutes. 42

Under the original National Banking Act, Congress prohibited national banks from operating any branch offices. 43 Pursuant to the National Banking Act, only state banks that converted to national banks could keep their local branches. 44 It was not until Congress enacted the McFadden and Glass-Steagall Acts, over seventy years later, that national banks were allowed to operate branches. 45 However, these Acts limited a national bank’s operation of branches to only its “home State.” 46 It was not until 1994, with the enactment of the Riegle-Neal Interstate Banking and Efficiency Act, that national banks were allowed to establish and acquire branches in other states. 47 In the years that followed, bank branches rapidly flourished throughout the nation. 48

40. See Murphy, supra note 37, at 307 n.3 (noting “[t]his was viewed as an abuse of diversity jurisdiction”); Simon, supra note 39, at 1863 (discussing “misuse of diversity jurisdiction by corporations truly nondiverse from their adversaries”).


42. For a discussion of jurisdictional parity, see infra notes 49–101 and accompanying text.


44. See Lund, supra note 2, at 79 n.38 (noting exception was created by Act of Mar. 3, 1865, ch. 78, § 7, 13 Stat. 469, 484).

45. See Glass-Steagall Act, ch. 89, § 23, 48 Stat. 162, 189–90 (1933); McFadden Act, ch. 191, § 7(c), 44 Stat. 1224, 1228 (1927); Lund, supra note 2, at 79 n.38 (“These acts were intended to bring about a ‘policy of competitive equality’ . . .”).

46. See Wachovia Bank v. Schmidt, 546 U.S. 303, 307 n.2 (2006) (observing that under McFadden and Glass-Steagall Acts, national banks were only allowed to bank in other states under grandfather provisions). Under the McFadden Act, there were three requirements for branches:

(1) The national bank had to be located in a state which by law expressly authorized state banks to have branches . . . (2) The national bank had to be located in a city having a population of 25,000 or more . . . [and]

(3) The branch or branches could not be established outside of the limits of the city, town, or village where the main office was located.

Development of Branch Banking Authority, supra note 43.


48. See Ross, supra note 47, at 208–09 (“Between 1994 and 2004 [the number of] bank offices grew eight percent in non-metropolitan areas, slightly lower than the eleven percent growth . . . in metropolitan areas.”). In 1900, a mere 87 banks
B. Valuable Assets: The Legal Landscape Prior to the Supreme Court’s Decision in Wachovia Bank v. Schmidt

Prior to 2006, the circuit courts were split as to whether national banks were considered citizens of every place they operated a branch.49 The First and Fourth Circuits have held that national banks are citizens of every state in which they operate branches.50 Conversely, the Fifth and Seventh Circuits have held that a national bank is a citizen of only the states in which its main office and principal place of business are located.51

1. Citizens of Every State Where the Bank Operates a Branch

The Second Circuit was the first federal appellate court to hold that a national bank is “located” in every state in which the bank operates a branch; however, it did not provide the reasoning behind its decision.52 The Fourth Circuit, in Wachovia Bank v. Schmidt,53 also held that national banks in the United States had more than one branch. See id. In 1920, only “530 of the 29,087 banks had more than a single office.” Id. By 2004, 9,066 banks operated 89,814 offices throughout the country. Id.


50. See, e.g., Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414 (4th Cir. 2004) (concluding national banks are citizens of each state in which branch is located), rev’d, 546 U.S. 303 (2006); World Trade Ctr. Props., LLC v. Hartford Fire Ins. Co., 345 F.3d 154 (2d Cir. 2003) (holding national bank should be citizen of every state in which it has branch).

51. See, e.g., Horton, 387 F.3d at 426 (holding, for purposes of section 1348, national bank is citizen of state of its principal place of business and state listed in its organization certificate); Firstar Bank, N.A. v. Faul, 253 F.3d 982, 994 (7th Cir. 2001) (holding, for diversity jurisdiction purposes, “located” means state where national bank’s principal place of business is and state listed in its organization certificate).

52. See World Trade Center Properties, 345 F.3d at 154. The Second Circuit did not expand upon its reasoning, and it merely stated that a national bank “by statute is deemed to be a citizen of every state in which it has offices.” Id. at 161. In World Trade Center Properties, holders of various property interests in the World Trade Center sued insurance companies over recovery after the destruction of the World Trade Center on September 11, 2001. See id. Wells Fargo was one of the many defendants in the case. Id. Ultimately, the court concluded that even if Wells Fargo was a citizen of several unidentified states, it did not make a difference because SR International Business Insurance, one of the plaintiffs/counter-defendants in the case, was a foreign party. See id.

53. 388 F.3d 414 (4th Cir. 2004), rev’d, 546 U.S. 303 (2006). Two years after the Fourth Circuit decision, the Supreme Court granted certiorari and subsequently reversed the decision. See Schmidt, 546 U.S. at 319. The Supreme Court rejected the Fourth Circuit’s holding that national banks were citizens of every state in which they operated a branch, holding instead that they were citizens of only the state where the main office was located. See id. at 312–15.
banks are citizens of every state in which the bank operates a branch.\textsuperscript{54} But unlike the Second Circuit, the Fourth Circuit expanded upon its reasoning and focused on the use of “located” and “establish” in section 1348.\textsuperscript{55} First, the court found that “establish” is used in the context of enjoining the Comptroller of Currency or his receiver under chapter 2 of title 12, and it “grants the district courts jurisdiction over ‘any banking association established in the district’ . . . .”\textsuperscript{56} Second, the court found that “located” is used in the context of general jurisdictional purposes and says, “national banks shall be ‘deemed citizens of the States in which they are respectively located.’”\textsuperscript{57}

The Fourth Circuit determined that a national bank is originally and permanently established at its main office, which cannot be moved more than thirty miles.\textsuperscript{58} After a bank is established, it is permanently located at its main office and temporarily located at its branch offices, which it has the freedom to move.\textsuperscript{59} The Fourth Circuit also reasoned that “located” must be construed in accordance with its ordinary meaning of “physical presence,” and thus, it naturally follows that a bank is located in any state where it operates a branch.\textsuperscript{60}

To further support its reasoning, the Fourth Circuit invoked the Supreme Court’s decision on a venue statute in \textit{Citizens and Southern National Bank v. Bougas}.\textsuperscript{61} In \textit{Bougas}, the Supreme Court determined that, for venue purposes in state court, the word “located” means anywhere the bank maintains a branch.\textsuperscript{62} The Fourth Circuit also rejected the argu-

\textsuperscript{54} See \textit{Schmidt}, 388 F.3d at 432 (holding Wachovia is citizen of South Carolina because it operates branch in state).

\textsuperscript{55} See \textit{id}. at 419 (explaining meanings of “located” and “established” in section 1348).

\textsuperscript{56} See \textit{id}. (quoting 28 U.S.C. § 1348) (discussing meaning of “established” as place national bank designates in its organizational certificate).

\textsuperscript{57} See \textit{id}. (quoting 28 U.S.C. § 1348) (defining “located” as place or places where it has physical presence).

\textsuperscript{58} See \textit{id}. (noting, even when moved thirty miles, location change of main office must still be approved by two-thirds of shareholders and Comptroller of Currency).

\textsuperscript{59} See \textit{id}. (mentioning that this meaning of “established” is in unison with its ordinary meaning, which is defined as “‘to place, install, or set up \textit{in a permanent or relatively enduring position} . . . .’” (quoting \textsc{Webster’s Third New International Dictionary} 778 (reprint 1993) (1981))).

\textsuperscript{60} See \textit{id}. at 432 (holding word “located” must be interpreted with its ordinary meaning of “presence” and, as result, “located” in section 1348 means “any state where it operates branch”).

\textsuperscript{61} 434 U.S. 35 (1977); see also \textit{Schmidt}, 388 F.3d at 419–20 (discussing holding in \textit{Bougas}).

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ment that diversity jurisdiction was meant to prevent “bias in the courts of the states,” stating there was not “a shred of evidence” to support this claim.63 Based upon analysis of the statutory language and the Supreme Court’s holding in *Bougas*, the Fourth Circuit determined that “located,” for diversity purposes, means anywhere the bank operates a branch.64

2. The Fifth and Seventh Circuits: Citizens of States Where Main Office and Principal Place of Business Are Located

The Fifth and Seventh Circuits disagreed with the Second and Fourth Circuits’ line of reasoning, instead finding that a national bank is a citizen only of the states in which its main office and principal place of business are located.65 In *Firstar Bank, N.A. v. Faul*,66 the Seventh Circuit looked at principles of statutory interpretation and prior precedent to determine that “located” referred to a more limited number of jurisdictions.67

63. See *Schmidt*, 388 F.3d at 424–25. In rejecting this claim, the Court stated: The notion that Congress believed that national banks that actively conduct business in a state cannot get a fair adjudication of state-law claims in that state’s courts is rank speculation, as even the dissent would have to acknowledge. In fact, if one were to engage in surmise, it would be just as defensible to conclude that Congress believed it entirely reasonable in such circumstances to deny national banking associations resort to the federal courts, over the courts of the states in which the banks have chosen to locate branch offices; for it might have appeared unseemly to permit the national banks to seek and receive the trust and business of a state’s citizens, but at the same time to permit them to refuse, out of distrust of those citizen-customers, to subject themselves to the courts created by those citizens to protect their rights against those who seek, receive, and breach their trust reposed. In all events, we certainly would not indulge the former inference as to congressional belief where there is absolutely no evidence of such belief and the language chosen by Congress all but confirms the contrary.

Id.

64. See *id.* at 432 (holding statutory interpretation and case law weigh in favor of national bank being citizen of every state where it operates branch); see also *id.* at 421 (“In sum, if Congress wishes to specify principal place of business and thereby exclude branch locations, it can easily do so. And in fact it has done so elsewhere.”).

65. Compare *Horton v. Bank One, N.A.*, 387 F.3d 426, 436 (5th Cir. 2004) (“We hold that the definition of ‘located’ is limited to the national bank’s principal place of business and the state listed in its organization certificate and its articles of association.”), and *Firstar Bank*, 253 F.3d at 994 (holding, for diversity jurisdiction purposes, “located” means state where national bank’s principal place of business is found and state listed in its organization certificate), with *Schmidt*, 388 F.3d at 432 (holding national bank should be citizen of every state in which it has branch), and *World Trade Ctr. Props., LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2005) (same).

66. 253 F.3d 982 (7th Cir. 2001).

67. See *id.* at 988 (stating “[m]oving away from generalized or specialized definitions, other principles of statutory construction weigh heavily in favor of construing ‘located’ in more limited manner than every state in which it operates branch).
The Seventh Circuit, recognizing that the term “located” is ambiguous, looked to the statute’s historical meaning to determine the background against which Congress amended the law. Applying this statutory interpretation, the court concluded that Congress intended “jurisdictional parity” between state and national banks. The court found the re-use of the phrase “be deemed citizens of the States in which they are respectively located,” throughout the statutory amendments to section 1348, to be persuasive. Furthermore, at the time Congress enacted the 1948 amendment, jurisdictional parity between state and national banks had existed for more than sixty years. The Seventh Circuit held that the history of jurisdictional parity constituted “interpretive background” that colored the language of the statute. The court also believed that the language had a “settled meaning through judicial interpretation” prior to the recodification of the statutory language in 1948. Using these canons of statutory interpretation, the court held that “located” under section 1348 means the state in which the bank’s principal place of business is located and the state listed on the bank’s organization certificate.

Subsequently, the Fifth Circuit, in *Horton v. Bank One, N.A.*, also held that a national bank is a citizen of both the state in which its principal place of business is located and the state in which its main office is located.

68. See id. (“Statutory words or phrases ambiguous in their common or contextual definitions can achieve settled meaning through judicial interpretation.”). This canon of statutory interpretation is known as *pari materia*, meaning “in the same matter.” See *BLACK’S LAW DICTIONARY* (9th ed. 2009) (“It is a canon of construction that statutes that are in pari materia may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”); see also Holly, supra note 31, at 210 (discussing use of *pari materia* in statutory interpretation).

69. See *Firstar Bank*, 253 F.3d at 988 (discussing use of same phrase throughout subsequent amendments); see also Petri v. Commercial Nat’l Bank of Chi., 142 U.S. 644, 650–51 (1892) (holding Congress intended jurisdictional parity between national and state banks).

70. Compare *Firstar Bank*, 253 F.3d at 988–89 (noting long time period over which phrase has been used), with *Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554, amended by Act of Aug. 13, 1888, ch. 866, § 25, 25 Stat. 433, 436 (codified at 28 U.S.C. § 1348); see also Ross, supra note 47, at 207 (noting courts “had established and followed the doctrine of jurisdictional parity for over sixty years” when section 1348 was adopted).

71. See *Firstar Bank*, 253 F.3d at 988–89 (“Thus, Congress passed 28 U.S.C. § 1348 against an interpretive background which assumed that national banks were to have the same access to the federal courts as state banks and corporations.”).

72. See id. at 988 (“[W]e assume that Congress intended these words to have the same meaning as was given to them in [the earlier cases that] provided that national banks were to be treated the same as any other corporation for diversity purposes.”).

73. See id. at 989 (noting if Congress intended to alter established background, it would have added language recognizing or suggesting it).

74. 387 F.3d 426 (5th Cir. 2004).
The court in Horton primarily employed the same reasoning as the Seventh Circuit in Firstar Bank. In addressing the concept of jurisdictional parity, the Fifth Circuit noted that to render a national bank a citizen of every state in which it operates a branch would restrict national banks’ access to federal courts to a much greater extent than state banks and other corporations. The Fifth Circuit’s decision in Horton solidified the circuit split that would ultimately be resolved by the Supreme Court.

C. Wachovia Bank v. Schmidt: Divesting One Circuit Split, Funding Another

In Wachovia Bank v. Schmidt, the United States Supreme Court granted certiorari to resolve the then-existing circuit split regarding whether a national bank is a citizen of every state in which the bank operates a branch. In Schmidt, the Supreme Court resolved this issue, concluding that Wachovia Bank was only a citizen of South Carolina, where its main offices were located. In reaching its decision, the Supreme Court reasoned that making a national bank a citizen of every state in which it operates a branch would unfairly restrict national banks’ access to federal courts compared to other corporations. Additionally, the Supreme Court stated that Congress would not have intended such an unequal outcome.

Further, the Supreme Court rejected the Fourth Circuit’s reasoning that Bougas applied to the interpretation of section 1348. The Court noted that under the canons of statutory construction, statutes addressing

75. See id. at 436 (holding that “located” under section 1348 means state of principal place of business and state where bank’s main office is located).

76. See id. at 429 (“We follow Firstar’s holding that a national bank is not ‘located’ in, and thus not a citizen of, every state in which it has a branch.”).

77. See id. at 433 (noting plaintiff’s view “would lead to a narrow concept of ‘parity’” and only way “a national bank would enjoy access to diversity jurisdiction . . . [is] when sued by or suing a citizen of a state in which the bank maintains no branch at all”).


80. See id. at 309 (“We granted certiorari to resolve the disagreement among Courts of Appeals on the meaning of § 1348.”).

81. See id. at 312–15 (rejecting Fourth Circuit’s reasons as to why national banks are citizens of every state in which they operate branches).

82. See id. at 307 (discussing how national banks’ access to federal forum would be “drastically curtailed” compared to that of state courts and other corporations).

83. See id. at 319 (holding Congress would not intend to create such “incongruous outcome” that “rendered national banks singularly disfavored corporate bodies with regard to their access to federal courts”).

84. See id. at 315 (holding Bougas and its interpretation of now-repealed revenue statute does not apply to section 1348).
the same subject matter should be read together. The Court noted that venue is a matter of convenience, while subject matter jurisdiction is a mandatory consideration. Based on this distinction, the Court found that subject matter jurisdiction and venue are separate concepts, and thus Bougas did not apply.

The Court did not address the issue of whether a national bank can be a citizen of both the states in which its main office and principal place of business are located. Instead, the Court merely mentioned in a footnote that, in most cases, the distinction would not make a difference because the locations are almost always the same. The Supreme Court did not address the Fifth and Seventh Circuits’ approach, which remain good law after Schmidt, thus leaving the issue ripe for yet another circuit split.

D. The Eighth Circuit’s Approach in Wells Fargo Bank v. WMR e-Pin, LLC: Heisting Access to State Courts

The Eighth Circuit was the first federal court of appeals to address the issue left open by the Supreme Court in Schmidt. In Wells Fargo Bank v. WMR e-Pin, LLC, the appellants challenged the district court’s finding of a lack of diversity jurisdiction, arguing that Wells Fargo was a citizen of both South Dakota and California, the respective locations of its main office and principal place of business. The Eighth Circuit, however, rejected the appellants’ argument and concluded that Wells Fargo was a citizen only of South Dakota, the location of its main office.

85. See id. (noting differences between section 1348 and now-repealed revenue statute 12 U.S.C. § 94 (1976)).
86. See id. at 316 (“Subject-matter jurisdiction [ ] does not entail an assessment of convenience. It poses a ‘whether,’ not a ‘where’ question: Has the Legislature empowered the court to hear cases of a certain genre?”).
87. See id. (noting “[v]enue is largely a matter of litigational convenience” that can be waived, while subject matter jurisdiction is more weighty and must be considered by court regardless of whether party raises objection).
88. See Rouse v. Wachovia Mortg., FSB, 747 F.3d 707, 711 (9th Cir. 2014) (noting Schmidt “did not address whether a national bank is also a citizen of the state where it has its principal place of business”).
89. See Schmidt, 546 U.S. at 317 n.9 (noting this issue “may be of scant practical significance for, in almost every case . . . the location of a national bank’s main office and of its principal place of business coincide”).
90. See Wells Fargo Bank, N.A. v. WMR e-Pin, LLC, 655 F.3d 702, 707–08 (8th Cir. 2011) (discussing Schmidt’s failure to address issue and noting Horton and Fistar are not overruled). But see Hicklin Eng’g, L.C. v. Bartell, 439 F.3d 346, 348 (7th Cir. 2006) (reading Schmidt to reject First Bank’s proposition that national bank’s principal place of business is independent basis for citizenship).
91. See WMR e-Pin, 653 F.3d at 708 (noting case at hand was “outlier scenario” described in footnote nine of Schmidt).
92. 653 F.3d 702 (8th Cir. 2011).
93. See id. at 704 (noting appellant’s challenge and argument on appeal).
94. See id. at 709 (holding district court did not err in determining that it had diversity jurisdiction over this matter).
In reaching its decision, the court first analyzed the term “located” as it reads in section 1348.95 Noting that the meaning of “located” in the realm of banking law changes depending on its context, the court determined that an analysis of the statutory history was needed.96 The main issue was whether Congress intended there to be jurisdictional parity between nationally-chartered and state-chartered banking institutions after it amended the statute governing diversity jurisdiction for state banks and corporations in 1958.97

The Eighth Circuit concluded that, had Congress intended jurisdictional parity between the two statutes, it would have amended section 1348 to include the principal place of business test when it amended section 1332(c)(1).98 Based upon this historical statutory analysis, the court determined that Congress intended to put national and state banks on the “same footing,” by restricting national banks’ access to the federal court system.99 As a result, the court held that, for purposes of diversity jurisdiction, national banks are citizens of only the state in which they are incorporated.100 This result laid the foundation for the Ninth Circuit’s holding in Rouse.101

III. CRACKING THE SAFE: ROUSE V. WACHOVIA MORTGAGE, FSB

In Rouse v. Wachovia Mortgage, FSB, the Ninth Circuit, relying on the Eighth Circuit’s reasoning in WMR e-Pin, decided that national banks are citizens of only the state in which their main office is located.102 Again,

95. See id. at 706 (noting that every court that has addressed this issue has begun with analysis of word “located”).
96. See id. (noting located “is a chameleon word; its meaning depends on the context in and purpose for which it is used” (quoting Wachovia Bank v. Schmidt, 546 U.S. 303, 318 (2006)) (internal quotation marks omitted)).
97. See id. at 707 (quoting 28 U.S.C. § 1332(c)(1)). Section 1332(c)(1) reads that a corporation (which includes state banks) is a “citizen of every State . . . by which it has been incorporated and of the State . . . where it has its principal place of business.” 28 U.S.C. § 1332(c)(1) (2012).
98. See WMR e-Pin, 653 F.3d at 707 (noting conclusion is not derived from statutory text, nor is it derived from any canon of statutory interpretation). The last amendment to section 1348 was in 1948, ten years prior to Congress creating the principal place of business test for corporations. See id. (reconciling sections 1348 and 1332(c)(1)). Alternatively, the court noted that Congress could have included the incorporation by reference that section 1348’s predecessors used. See id. at 709 (noting jurisdiction for suits involving bank associations “shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States” (quoting Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163)).
99. See id. at 706 (demonstrating three predecessors to section 1348 all show Congress’s intent to put state and national banks on equal footing).
100. See id. at 707 (discussing satisfaction of diversity jurisdiction).
101. See Rouse v. Wachovia Mortg., FSB, 747 F.3d 707, 709 (9th Cir. 2014) (adopting reasoning of Eighth Circuit in WMR e-Pin).
102. See id. (“The dispositive issue in this appeal is whether, under 28 U.S.C. § 1348, a national bank is a citizen of both the state in which its principal place of
the court was asked to decide the meaning of the word “located” as used in section 1348. Ultimately, the court’s decision hinged on whether the legislature intended jurisdictional parity between national banks and state banks and other corporations under sections 1348 and 1332 respectively.

A. Facts and Procedural History

In Rouse, Robert and Victoria Rouse sued Wells Fargo Bank, its Wachovia Mortgage division, and NDeX West in California state court, claiming state and federal causes of action relating to their deed and home mortgage. In response, Wells Fargo removed the case to federal court, claiming subject matter jurisdiction under both section 1332 (diversity of citizenship) and section 1331 (federal question jurisdiction). The district court granted Wells Fargo and NDeX’s motions for failure to state a claim and dismissed the complaint, allowing the Rouses leave to amend. Subsequently, the Rouses re-filed the complaint, claiming only issues of state law.

The district court subsequently remanded the case back to the California Superior Court due to a lack of diversity jurisdiction. In doing so, “the district court held that national banks are citizens of the state where their principal place of business is located as well as of the state where their main office is located as designated in their articles of association.” The district court reasoned that while Wells Fargo’s main office is located in South Dakota, its principal place of business is located in California. The court also determined that the Rouses were domiciled in California. As a result, diversity of citizenship was destroyed and the

103. See id. at 710 (deciding that because “located” was facially ambiguous, court must look beyond ordinary meaning).
104. See id. at 713 (discussing concept of jurisdictional parity between section 1348 and section 1332).
105. See id. at 709 (noting background and causes of action brought in Rouses’ lawsuit).
106. See id. (describing Wells Fargo’s removal to district court).
107. See id. (discussing district court’s granting of Wells Fargo’s motion to dismiss).
108. See id. (noting, in their decision to re-file, Rouses did not include any federal law claims in order to prevent Wells Fargo from removing case to district court for second time).
109. See id. (discussing district court’s decision to remand case back to state court system).
110. Id. (explaining district court’s reasoning for remanding).
111. See id. (describing holding of district court in applying section 1348 to suit).
112. See id. (describing district court’s analysis in deciding that it did not have subject matter jurisdiction).
district court was unable to hear the case.\(^{113}\) Wells Fargo appealed to the Ninth Circuit.

**B. The Ninth Circuit’s Decision in Rouse: Embezzling Congress’s Intent**

On appeal, the Ninth Circuit reversed the district court’s decision to remand the case back to state court due to a lack of diversity jurisdiction.\(^{114}\) In reaching this decision, the court concluded that although Schmidt dealt with a slightly different question, it nevertheless addressed and rejected the issue of whether a national bank is also a citizen of the state in which its principal place of business is located.\(^{115}\) Next, the Ninth Circuit determined that principal place of business citizenship was not appropriate because Congress did not intend for there to be jurisdictional parity between the two statutes.\(^{116}\) Therefore, the Ninth Circuit held that a national bank is only a citizen of the state in which its main office is located.\(^{117}\)

1. Schmidt Contemplated Whether the Principal Place of Business Test Is Applicable

The Ninth Circuit began its analysis by looking to the text of section 1348.\(^{118}\) In Schmidt, the Supreme Court held that the word “located” is facially ambiguous.\(^{119}\) Because the Supreme Court in Schmidt found the text of section 1348 to be ambiguous, the Ninth Circuit was required to look beyond the ordinary meaning of the text and apply other canons of statutory construction to determine the meaning of “located.”\(^{120}\)

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\(^{113}\) See id. (describing district court’s decision that it did not have subject matter jurisdiction to hear case).

\(^{114}\) See id. (reversing decision of district court to remand case back to state court).

\(^{115}\) See id. at 711 (deciding that Supreme Court’s recognition of principal place of business argument in footnote meant that it did not overlook issue).

\(^{116}\) See id. at 714–15 (analyzing statutory amendments to and congressional intent behind section 1348).

\(^{117}\) See id. at 715 (holding national bank “is a citizen only of the state in which its main office is located”).

\(^{118}\) See id. at 709 (noting that national banks’ citizenship is governed under section 1348).

\(^{119}\) See id. at 710.

\(^{120}\) See id. (discussing Schmidt Court’s conclusion that “located” is “chameleon word” and is facially ambiguous, thus requiring court to look beyond plain text and ordinary meaning). The Ninth Circuit was the first federal appellate court to interpret the meaning of the word “located” as used in 28 U.S.C. § 41, the statutory predecessor to section 1348. See Am. Sur. Co. v. Bank of Cal., 133 F.2d 160, 161–62 (9th Cir. 1943) (“[A] logical interpretation of the phraseology of 28 U.S.C.A. § 41 (16) leads to the conclusion that the ‘States in which they (national banking associations) are respectively located’ are those states in which their principal places of business are maintained.”).
Next, the court analyzed the Supreme Court’s reasoning in *Schmidt* regarding diversity jurisdiction over national banks.121 In *Schmidt*, the Supreme Court held that a national bank is not located in every state in which it operates a branch, but instead is only located in the state in which its main office is situated, as designated under its articles of incorporation.122 The Ninth Circuit concluded that because the Supreme Court mentioned principal place of business citizenship, but did not include it in the clear-cut rule, the Court in *Schmidt* intended to limit national bank citizenship to the state of incorporation only.123 In support of this notion, the court first determined that the main purpose behind *Schmidt* was to protect national banks’ access to federal courts.124 Moreover, the court determined that because the Supreme Court mentioned national banks’ principal place of business in a footnote, it “did not overlook the issue . . . .”125

2. Congress Did Not Intend Jurisdictional Parity Between National and State Banks

Lastly, the court analyzed the historical landscape and legislative history to determine Congress’s intent in enacting section 1348.126 The main issue the court addressed in its historical analysis was whether Congress intended to keep jurisdictional parity between the current versions of section 1348 and section 1332.127 The Ninth Circuit’s primary observation was that the most recent version of section 1348 was amended in 1948, when state banks and corporations were citizens only of their state of incorporation.128 The principal place of business provision was not included in section 1332 until 1958, a full decade after the amendments to section 1348.129 The court decided that, since Congress did not subsequently amend section 1348 to reflect the changes to section 1332, it did not intend for a national bank to be a citizen of the state of its principal

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121. See *Rouse*, 747 F.3d at 709 (discussing issue decided in *Schmidt*).
122. See id. at 710 (stating holding of Supreme Court in *Schmidt*).
123. See id. at 711 (analyzing Supreme Court’s reasoning in *Schmidt*).
124. See id. (holding that although issue was not directly addressed, *Schmidt* was decided to protect “right of national banks to remove cases to federal courts”).
125. See id. (deciding Supreme Court’s recognition of principal place of business argument in footnote: “[S]trongly suggest[s] that the Court did not overlook the issue of whether a national bank is a citizen of both the state in which its main office is located and the state where it maintains its principal place of business in crafting its clear and unqualified statement limiting citizenship for diversity jurisdiction purposes to a national bank’s main office.”).
126. See id. at 712–13 (discussing historical backdrop and congressional intent behind section 1348).
127. See id. at 714 (comparing language and time of last amendments to section 1348 and section 1332).
128. See id. (noting last time section 1348 was amended was in 1948, prior to change of section 1332, to include principal place of business).
129. See id. (discussing 1958 amendment to section 1332(c)(1), adding principal place of business component).
place of business. Therefore, the court reasoned that Congress did not intend to keep jurisdictional parity between the two statutes. As a result, the Ninth Circuit held that a national bank is only a citizen of the state in which its main office is located.

Judge Gould dissented, arguing that Wells Fargo should be viewed as a citizen of both South Dakota and California for diversity jurisdiction purposes. He rejected the majority’s conclusion that the holding in Schmidt meant that a bank is a citizen only of the state in which its main office is located. Instead, Judge Gould argued that the majority’s holding “places national banks on superior footing,” contrary to the underlying intent of Schmidt. Judge Gould also noted that there are policy and federalism implications inherent in allowing Wells Fargo to remove a matter to federal court, even though the bank most closely identified with California.

IV. CRITICAL ANALYSIS: ROUSE ROBS STATE BANKS AND NATIONAL BANKS’ ADVERSARIES OF ACCESS TO STATE COURTS

By holding that a national bank is a citizen of only the state in which its main office is located, the Ninth Circuit created an unfair advantage for national banks, to the detriment of both their litigation adversaries and state banks. First, concerns over state court bias, a primary reason be-

130. See id. (rejecting claim of jurisdictional parity and noting that “[n]o principle of statutory interpretation suggests that we should look to a later-passed statute not involving national banks to divine congressional intent regarding a completely different statute passed ten years earlier”); id. at 715 (noting Congress began with treatment of jurisdictional parity, but then deleted it from statute, stating “[n]othing in the current version of the statute or in its history suggests that Congress intended to revive the principle of jurisdictional parity between state-chartered banks and national banks”).

131. See id. (“[A] national banking association is a citizen only of the state in which its main office is located.”).

132. See id. at 715–16 (Gould, J., dissenting) (asserting that district court’s decision should be affirmed).

133. See id. (“It is one thing to say that a national bank is not a citizen of every state where it has any branch operations. It is quite another to say what the majority says here: that a bank is only a citizen of the state designated as its main office.” (footnote omitted) (citation omitted)).

134. See id. at 716 (discussing policy implications of allowing national banks to rule out state courts in their principal place of business where they are “closely identified and understood to operate,” and noting federalism concerns of not “giv[ing] state courts a say in resolving their residents’ disputes”).

135. See Podolsky, supra note 5, at 1482–83 (“It is inequitable to allow national banks to invoke diversity jurisdiction in states where they have the most ties simply to statistically lower the plaintiffs’ chances of winning, to burden plaintiffs and to reduce the value of potential settlements.”); Seth M. Gerber, Ninth Circuit Holds that a National Bank Is “Located” Only in the State of its Main Office for the Purposes of Diversity Jurisdiction, BINGHAM MCCUTCHEON LLP (Apr. 9, 2014), http://www.bingham.com/Alerts/2014/04/Ninth-Circuit-Holds-that-a-National-Bank-Is-Located-Only-in-the-State-of-its-Main-Office (discussing implications for litigation and advantage to national banks by hearing case in federal forum).
hind the need for diversity jurisdiction, are not implicated. 136 Secondly, the Ninth Circuit’s approach encourages national banks to forum shop and remove matters to federal court in order to gain advantages from federal procedural law. 137 Additionally, this approach is contrary to historical precedent and the Supreme Court’s holding in Schmidt regarding Congress’s intention to put national and state banks on equal jurisdictional footing. 138 Finally, original concerns surrounding the inclusion of diversity jurisdiction in the Constitution, about state court bias and harmony among the states, are not implicated because a national bank is familiar with the state where its principal place of business is located. 139

A. Concerns over State Court Bias Are Not Implicated

While the Supreme Court in Schmidt wanted to protect national banks’ right to access the federal courts, the approach used by the Eighth and Ninth Circuits gives national banks greater access to federal courts than their state-chartered peers and thus goes too far in the opposite direction. 140 Under the First and Second Circuit’s approach before Schmidt, it would be nearly impossible for national banks to gain access to federal courts. 141 This restrictive access gave an unfair advantage to the opposing party. 142 According to one commentator, “[t]he generally accepted reason for diversity jurisdiction in the Constitution is fear that state courts would unduly favor local citizens, whereas federal courts . . . would be less


137. See Gerber, supra note 135 (discussing procedural advantages gained by removing to federal court, including unanimous jury, mandatory disclosures, and more limited discovery process).

138. See Wachovia Bank v. Schmidt, 546 U.S. 303, 319 (2006) (explaining that if national banks were citizens of every state in which they operated branches it would “render[ ] national banks singularly disfavored corporate bodies with regard to their access to federal courts”).


140. See Ross, supra note 47, at 240 (noting that this approach gives national banks jurisdictional advantage over state counterparts and fails to account for “trend toward consolidation and merger,” where increasing number of banks will have different locations for their main office and principal place of business).

141. See Schmidt, 546 U.S. at 318–19 (discussing incongruous outcome of denying national banks access to federal courts if they were citizens of every state where they operated branch and concluding that “[t]he language of § 1348 does not mandate that incongruous outcome”).

142. See O’Leary, supra note 31, at 147 (noting largest national banking branch network has branches in thirty states, meaning bank would only be able to remove for diversity in twenty-one states). One banking expert states, “state courts are too prone to large verdicts and don’t have tight controls on awards and damages, and perhaps even let suits carry on and sustain a life of their own . . . [sic] It’s more of a known commodity in federal courts. State courts are often a crapshoot.” See id. at 148 (alteration in original) (quoting Karen Krebsbach, What Would All the Lawyers Do?, U.S. Banker, Mar. 1, 2005, at 20, 2005 WLNR 3098738).
inclined to be biased in favor of local citizens." 143 Diverse parties were concerned about unfair treatment in an unfamiliar state court forum. 144 Under removal statutes, such as 28 U.S.C. § 1441, 145 defendants are able to remove actions to federal court if they meet the diversity requirements of section 1332 or section 1348, in order to flee this potential local bias. 146 When a national bank has its principal place of business in one state and main office in another, like Wachovia Mortgage in *Rouse*, this concern of bias is not a problem. 147 When a corporation or national bank has established a principal place of business within a state, there is no bias because it is familiar with the state law, the courts, and the potential juror pool. 148

B. *The Ninth Circuit’s Approach Encourages Forum Shopping*

Forum shopping occurs on a fairly regular basis, and as long as it is done in accordance with the statutory rules, it is a legitimate and widely accepted litigation strategy. 149 However, the current system gives national

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144. See Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 OKLA. L. REV. 269, 284 (2012) (“The key aspect of the bias argument is that state courts (and legislatures) could potentially be prone to bias against out-of-state parties when entertaining suits involving their own residents.”).


146. See id. § 1441(a) (“Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”).

147. See Flynn v. Teak Associated Invs. No. 2, Inc., 98 F. Supp. 2d 1081, 1085 (E.D. Mo. 2000) (“Congress’ intent in including principal place of business in diversity statute was to give effect to reality that a corporation that conducted business in a state was as much of a local in that state as in the state where it filed its papers . . . .” (citing Caribbean Mushroom Co., Inc. v. Gov’t Dev. Bank, 980 F. Supp. 620, 625 (D.P.R. 1997))).

148. See id. (describing lack of reason for bias).

149. See Emily L. Buchanan, *A Comity of Errors: Treading on State Court Jurisdiction in the Name of Federalism*, 55 S. TEX. L. REV. 1, 1–2 (2013) (discussing frequency and legitimacy of forum shopping in litigation). The practice of forum shopping arises because state and federal courts have concurrent jurisdiction over certain cases. See Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (“We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state
banks an unfair advantage over their adversaries.\textsuperscript{150} Under this system, plaintiffs are able to choose their forum by carefully selecting which claims to plead.\textsuperscript{151} Defendants may be able to remove the case to federal court based upon diversity. This is precisely what occurred in \textit{Rouse}.\textsuperscript{152} The Rouses decided to sue in state court and wanted the case to remain there. Once Wells Fargo removed the action to federal court based upon both federal question and diversity jurisdiction, the Rouses decided to re-file their suit and dropped the federal law claim, in order to ensure that a state court would hear the case. Wells Fargo then countered by claiming diversity, and the case was removed to federal court.

Under \textit{Erie Railroad Co. v. Tompkins},\textsuperscript{153} removal to federal court does not escape the application of state law.\textsuperscript{154} Nevertheless, the problem presented in \textit{Rouse}, and in other cases involving national banks, is not trying to escape state substantive law, but rather gaining access to more bank-friendly, federal procedural law.\textsuperscript{155} Under federal procedural law, national bank defendants benefit from “mandatory disclosures, more limited discovery and a requirement that jury verdicts are unanimous.”\textsuperscript{156} These procedural benefits, along with the unbalanced economic resources that favor national banks, create an unfair balance of power in favor of

courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”\).

\textsuperscript{150} See Podolsky, \textit{supra} note 5, at 1482–83 (discussing current system and how it gives unfair advantage to national banks over adversaries and state banks).

\textsuperscript{151} See Scimone \textit{v. Carnival Corp.}, 720 F.3d 876, 882 (11th Cir. 2013) (“[P]laintiffs are ‘the master of the complaint’ and are ‘free to avoid federal jurisdiction,’ by structuring their case to fall short of a requirement of federal jurisdiction.” (citation omitted) (quoting Hill \textit{v. BellSouth Telecomms., Inc.}, 364 F.3d 1308, 1314 (11th Cir. 2004))).

\textsuperscript{152} For a further discussion of the procedural history and facts of Rouse, see \textit{supra} notes 105–13 and accompanying text.

\textsuperscript{153} 304 U.S. 64, 78–80 (1938) (acknowledging absence of federal common law and therefore applying state law to actions in federal court).

\textsuperscript{154} \textit{See id.} at 77–78 (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”). The issue in \textit{Erie} concerned whether state law is applied in federal court. \textit{See id.} at 71 (detailing issue before Supreme Court). Under the “twin aims” of \textit{Erie}, a federal court must apply the “forum state[’s] law if it is necessary to avoid ‘forum shopping’ and ‘the inequitable administration of the laws.’” \textit{See Michael Steven Green, The Twin Aims of Erie, 88 Notre Dame L. Rev. 1865, 1865} (2013) (analyzing \textit{Erie} doctrine).

\textsuperscript{155} \textit{See Neal Miller, An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction, 41 Am. U. L. Rev.} 369, 400 (1992) (highlighting rationale behind forum selection for both plaintiff and defense attorneys). According to this study, defense attorneys reported that judge qualities (85.4%), jury impact (57.6%), and court rules (60.4%) were the biggest outcome determinative factors in forum selection. \textit{See id.} (reporting top factors defense attorneys take into consideration when forum shopping).

\textsuperscript{156} Gerber, \textit{supra} note 135 (discussing favorable aspects to banks in federal courts).
banks. Essentially, the Ninth Circuit’s approach is encouraging banks to forum shop into a more favorable court system.

C. Federalism Implications

The Ninth Circuit’s approach also acts contrary to the Founding Fathers’ desire to preserve harmony among the states and infringes upon a state’s right to have its citizens’ claims adjudicated in the state’s court system. The purpose of diversity jurisdiction—according to statements made by delegates at the Constitutional Convention and subsequently illustrated in the Federalist Papers—was to ensure harmony among the states, and thus keep the union between the states at peace.

157. See Podolsky, supra note 5, at 1482–83 (noting inequitable results produced in favor of national banks under one-state approach).

158. See Lyle Washowich, National Banks Beware: Your Branches May Carry Greater Risk than You Realize, 122 BANKING L.J. 699, 700 (2005) (“In litigation of state law claims, the strategic option of removing an action to federal court serves as a weapon to diluting those claims.”); see also Louise Weinberg, Against Comity, 80 GEO. L.J. 55, 71 (1991) (“Liigation has little neutral ground. A single litigation is a zero-sum game.”). Furthermore, national banks may take unfair advantage of their greater access to federal courts. See Ross, supra note 47, at 299. As Ross notes:

[N]ational banks may take unfair advantage of their limited citizenship. As aforementioned, a national bank’s “main office” is a legal construction with no business significance. A national bank may assign its main office to a state where it is usually less involved in litigation. Thus, the bank could assure a federal forum based on diversity in states where it experiences high volumes of litigation.

Id. at 240 (footnote omitted).

159. For a further discussion of the goal of ensuring harmony among the states, see infra notes 160–64 and accompanying text. For a further discussion of states’ concern over their citizens’ claims, see infra notes 165–70 and accompanying text.

160. See Taylor Simpson-Wood, Has the Seductive Siren of Judicial Frugality Ceased to Sing?: Dataflux and Its Family Tree, 53 DRAKE L. REV. 281, 289 (2005) (discussing creation of federal judiciary during Constitutional Convention). At the Constitutional Convention, the creation of a federal judiciary was important to many Founding Fathers, since it was one of the major downfalls of the Articles of Confederation. See Douglas G. Smith, An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution, 34 SAN DIEGO L. REV. 249, 269 n.59 (1997). One founder, Edmund Randolph, stated:

[The judiciary’s] next object is to perpetuate harmony between us and foreign powers. . . . Harmony between the States is no less necessary than harmony between foreign states and the United States. Disputes between them ought, therefore, to be decided by the federal judiciary.
Founding Fathers were concerned that, once a party lost in state court, it would blame the state and it would produce ill will toward the state courts, therefore disrupting the harmony. 161 This rationale is also a reason why removal statutes are narrowly construed. 162 This situation presents the issue of federal courts infringing upon a state court’s right to hear a case within its jurisdiction. 163 Additionally, almost any removal under diversity jurisdiction takes away a state’s sovereign right to adopt and develop issues interpreting its laws. 164

The Ninth’s Circuit’s approach in Rouse also frustrates principles of federalism involving a state’s right to have “a say in resolving [its] residents’ disputes . . . .” 165 Since the inception of the Constitution, there have been concerns over states’ rights versus the rights of the federal gov-

“power[ ] of the judicial department” meant to provide “harmony and proper intercourse among the States.” The Federalist No. 42, at 235 (James Madison). In Federalist No. 80, Hamilton explained that diversity jurisdiction was required to address “practices [that] may have a tendency to disturb the harmony between the States . . . .” The Federalist No. 80, at 445–46 (Alexander Hamilton).

161. See Marsh, supra note 139, at 201 n.22 (“[I]ts purpose was, to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State . . . .”) (second alteration in original) (quoting Scott v. Sandford, 60 U.S. 393, 580 (1856)).


163. See Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va. L. Rev. 1671, 1675–84 (1992) (critiquing current diversity system that forces federal courts to make “Erie guesses,” where federal courts sitting in diversity often incorrectly guess how state supreme courts would resolve novel issues); see also Buchanan, supra note 149, at 2–3 (discussing “Erie guesses” and tension between state and federal courts in diversity cases).

164. See Sloviter, supra note 163, at 1671 (“[T]he maintenance of state law claims in federal court merely because the parties are from different states . . . results in the inevitable erosion of the state courts’ sovereign right and duty to develop state law as they deem appropriate.”); see also E. Farish Percy, Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder, 91 Iowa L. Rev. 189, 201 (2005) (“Diversity jurisdiction ensures that a ‘state’s judicial power is less extensive than its legislative power’ because federal courts are authorized to decide cases based on state law without the possibility of review by the state’s highest court.” (quoting ALI, Study of the Division Between State and Federal Courts 99 (1969))).

165. See Rouse v. Wachovia Mortg., FSB, 747 F.3d 707, 716 (9th Cir. 2014) (Gould, J., dissenting).
This debate has carried over to the division of powers between the federal and state judiciaries as well. While most of this debate centers on the ability of federal courts to hear state court claims and vice versa, states still have an interest in having their citizens’ claims heard in state court, especially where state law claims are concerned. The main federalism issue arising out of diversity jurisdiction is that it “ensures that a ‘state’s judicial power is less extensive than its legislative power’ because federal courts are authorized to decide cases based on state law without the possibility of review by the state’s highest court.” Although, in Rouse, the state court was in a better position to decide the case because the only claims revolved around state law.

D. Pursuant to Historical Beliefs and Schmidt, National Banks and State Banks Should Be Placed on Even Footing

The Ninth Circuit’s approach in not finding jurisdictional parity between section 1332 and section 1348 is completely contrary to the congressional intent that state and national banks should be put on equal footing. With each of the amendments to section 1348, and the allowance of branches under the Glass-Steagall and (more broadly) under the Riegle-Neal Acts, it becomes clear that each change was made in order to


167. See Percy, supra note 164, at 191 (“It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism.”) (quoting ALI, supra note 164, at 1)).

168. See James P. George, Jurisdictional Implications in the Reduced Funding of Lower Federal Courts, 25 Rev. Litig. 1, 42 (2006) (“Abstaining from interference with state interests is yet another grounds for declining jurisdiction and thereby denying plaintiff’s choice of forum.”). One of the main aspects of the dual judicial system in America is “preserv[ing] the state courts’ role as the primary judicial body” and the creation of a federal judiciary with limited subject matter jurisdiction. See id. at 26 (explaining how Constitution set up judiciary).

169. See Percy, supra note 164, at 201 (quoting ALI, supra note 164, at 99).

170. See Rouse, 747 F.3d at 709 (noting plaintiffs only filed state law claims when re-filing after court granted defendants’ 12(b)(6) motion).

171. See Am. Sur. Co. of N.Y. v. Bank of Cal., 44 F. Supp. 81, 83 (D. Or. 1941) (explaining Congress intended “to confer upon a national bank the right to come into or remove a cause to a United States court in common with private corporations invested with powers by the several states”), aff’d, 133 F.2d 160 (9th Cir. 1943); see also Ross, supra note 47, at 239 (“The Court has repeatedly found that Congress intended to put national banks and state banks on ‘equal footing’ when it passed section 1348’s predecessors.”).
give national banks the same rights as their state counterparts. The Ninth Circuit’s approach completely rejects this historical significance.

The Supreme Court in Schmidt acknowledged that, beginning with the 1882 amendment to section 1348, Congress intended national and state banks to have the same access to state and federal courts. Under section 1332, state banks and other corporations are citizens of multiple states: the state of incorporation and the state in which their principal place of business is located. To keep state banks on equal footing with national banks, the logical conclusion is to interpret section 1348 to mean that a national bank can also be a citizen of more than one state: the state in which its main office is located and the state in which its principal place of business is located. Further, against this historical backdrop, if Con...
gress no longer intended for there to be jurisdictional parity, it would have subsequently amended section 1348 after the 1958 amendment to section 1332, in order to reflect this principle.177

V. CONCLUSION: INVESTING IN THE FUTURE

The Ninth Circuit’s ruling in Rouse makes it easier for national banks to gain access to federal courts.178 This has important litigation implications since there are advantages for national banks in federal courts, including “mandatory disclosures, more limited discovery and a requirement that jury verdicts are unanimous.”179 With a growing circuit split regarding the citizenship of national banks, the only likely resolution for this issue is for the Supreme Court to hear and decide the issue.180 Based upon the federalism implications and historical background of section 1348, the Supreme Court should adopt a dual citizen approach, al-

177. See Helvering v. Griffiths, 318 U.S. 371, 389 (1943) (stating that if Congress intended to pass act challenging well-known decision of Court, there would at least be clear statement of that purpose). In the present case, the context behind section 1348 shows that Congress intended parity between state and national banks. See Holly, supra note 31, at 227–28 (“When and if Congress determines that equal footing is no longer appropriate, it will expressly make its intent clear.”); see also Bradley J. Johnson & George Brandon, National Banks and Diversity Jurisdiction Revisited: More Authority for Remaining in Federal Court, 122 BANKING L.J. 879, 897 (2005) (“For more than 100 years, consistent with [the Schmidt] holding and the terms of the statute, courts routinely held that diversity jurisdiction was available to national banks.”). But see Rouse, 747 F.3d at 715 (“However, should Congress wish to link the jurisdiction for national and state banks, the statute can easily be amended.”); Wells Fargo Bank, N.A. v. WMR e-Pin, LLC, 653 F.3d 702, 709 (8th Cir. 2011) (“Had Congress wished to retain jurisdictional parity in 1958, it could have unequivocally done so. It did not, and consequently the concept no longer applies. Whether it ought to be revived is a policy question for Congress, not the federal courts.”).

178. See Podolsky, supra note 5, at 1483 (noting this approach grants national banks greater access to federal courts “in the states where they have the most ties and the least justification” for being in federal forum).

179. See Gerber, supra note 135 (describing procedural advantages for defendants in federal court); see also Sue Ostrowski, How Moving Your Case to Federal Court Could Benefit Your Business, SMART BUS. (Apr. 1, 2012, 1:01 AM), http://www.sbnonline.com/article/how-moving-your-case-to-federal-court-could-benefit-your-business/ (describing benefits of federal court including higher quality judges, more structured discovery, mandatory disclosures, and requirement that jury verdicts be unanimous).

180. See Ruth Bader Ginsburg, Workways of the Supreme Court, 25 T. JEFFERSON L. REV. 517, 521 (2003) (“[The Supreme Court] take[s] cases primarily to keep federal law fairly uniform, to resolve strong disagreements—splits not likely to heal—among federal or state tribunals over the meaning of a federal statute or executive regulation, or constitutional provision. Currently, about 70 percent of the cases [the Court] agree[s] to hear involve deep divisions of opinion among federal courts of appeals or state high courts.”).
following a national bank to be a citizen of the state in which its main office is located and the state of its principal place of business.\textsuperscript{181}

\textsuperscript{181} For a further discussion of the historical background and federalism concerns implicated by the Ninth Circuit’s approach, see \textit{supra} notes 159–70 and accompanying text.
SIT . . . STAY . . . NOW BEG FOR ME: A LOOK AT THE COURTHOUSE DOGS PROGRAM AND THE LEGAL STANDARD PENNSYLVANIA SHOULD USE TO DETERMINE WHETHER A DOG CAN ACCOMPANY A CHILD ON THE WITNESS STAND

MATTHEW KAISER

I. THE PILLARS OF JUSTICE NOW HAVE FOUR LEGS ON WHICH TO STAND: AN INTRODUCTION TO THE COURTHOUSE DOGS PROGRAM

Douglas Lare “felt ‘betrayed by all people,'” but when he took the stand to testify, Ellie, a “yellow Labrador-Golden Retriever mix,” sat right beside Douglas, comforting him through his emotional testimony.1 Prosecutors in several states have begun to utilize facility “courthouse” dogs to assist emotionally fragile witnesses in testifying, particularly children and developmentally disabled individuals.2 At the forefront of this movement,

1. Melanie D.G. Kaplan, Court Tails: Gathering Testimony Gets Easier with Four Legs, in NOMADEDITIONSGOOD DOG, at 3 (July 13, 2011), available at http://www.melaniedgkaplan.com/DOGS_articles_files/CourtTails.pdf (explaining calming presence of Ellie). Douglas Lare and Alesha Lair, Douglas’s neighbor, will be identified throughout this Note by their first names, in order to avoid confusion due to the similarity of their last names, just as the court did in State v. Dye (Dye II), 309 P.3d 1192, 1194 n.2 (Wash. 2013). Douglas, a Washington State resident, is a developmentally disabled individual with the mental competency of a six- to twelve-year old, though he in his late fifties. See Kaplan, supra, at 3. Douglas was the victim of a scam and a stream of burglaries over a two-year span, starting in 2007 and culminating with the most recent burglary in 2008. See Dye II, 309 P.3d at 1194–95 (providing details of case).

2. See Where Facility Dogs Are Working, COURTHOUSE DOGS FOUND. (Jan. 29, 2015), http://www.courthousedogs.com/settings_where.html (listing courthouses in each state that utilize courthouse dogs); see also Casey Holder, Comment, All Dogs Go to Court: The Impact of Court Facility Dogs as Comfort for Child Witnesses on a Defendant’s Right to a Fair Trial, 50 HOUS. L. REV. 1155, 1157 (2013) (“analyze[ing] the benefits and challenges of incorporating dogs in traditional legal settings, like the courtroom”). Holder details the current laws in place to accommodate child witnesses on the stand, the present state of courthouse dog programs throughout the United States, and the legal support for implementing a courthouse dog program. See id.; see also Marianne Dellinger, Using Dogs for Emotional Support of Testifying Victims of Crime, 15 ANIMAL L. 171, 171 (2009) (explaining benefits of and legal support for permitting dogs to accompany adults and children to witness stand in order to provide them with emotional support). However, Dellinger also identifies potential practical problems with having dogs in the courthouse, including “allergies, fear, and delay of jury selection;” the appearance of a “’gimmicky’ effect;” and potential civil liability arising out of having a dog present. See id. at 188–89.

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Pennsylvania was the first state on the East Coast to adopt a courthouse dogs program for victims entangled in the legal system. Pennsylvania’s program will likely become increasingly active over the next several years, specifically for child abuse cases, because Pennsylvania lawmakers are adamant about changing the current child abuse reporting policies in the wake of the Jerry Sandusky child sex abuse scandal. Consequently, with more children potentially testifying in the future about their traumatizing experiences, these courthouse dogs might be the best way to alleviate their anxiety and help them testify against their abusers.


4. See Charles Thompson, Bills Would Change Child Abuse Reporting Requirements in Pa., Defining Who Reports and How, PENNLIVE (Apr. 4, 2014, 6:15 AM), http://www.pennlive.com/midstate/index.ssf/2014/04/bills_beeing_up_child_abuse_r .html (“Lawmakers have already modernized the definition of abuse, and approved measures that strengthen law enforcement and child welfare response.”); see also Child Protection Legislation Overview, PA. H. REPUBLICAN CAUCUS, http://www .pahousegop.com/ChildProtectionMeasures.aspx (last visited Feb. 9, 2015). The Pennsylvania General Assembly has passed several laws in response to the Jerry Sandusky child sexual abuse scandal. See id. First, it has updated and strengthened the definition of “child abuse” by lowering “the injury threshold for what is considered physical abuse, allow[ing] certain grooming activities to be considered sexual abuse, and includ[ing] a variety of abusive behaviors that cannot be substantiated as ‘child abuse’ under current law.” Id. Second, the Assembly has increased penalties for athletic coaches engaged in sexual activities with a “child-athlete.” See id. Finally, it has improved “child abuse reporting” by “expedit[ing] appeals of indicated child abuse reports.” Id. (citation omitted); see also James Boyle, Corbett Signs Updates to Child Abuse Laws, Upper Southampon Patch (Dec. 19, 2013, 12:14 PM), http://patch.com/pennsylvania/uppersouthampton/corbett-signs-updates-to-child-abuse-laws-uppersouthampton (reporting new child abuse legislation Governor Tom Corbett signed). In 2013, Governor Corbett signed into law several new “pieces of child abuse legislation” that will “‘help[ ] . . . transform [Pennsylvania] into a state with several of the stiffest penalties for child abuse in the nation.’” Id. (quoting then-Governor Tom Corbett). These new bills strengthen Pennsylvania’s child abuse prevention laws by “[a] mend[ing] the definition of child abuse to lower the threshold from serious bodily injury to bodily injury,” holding an individual liable for “failing to act when child abuse is being committed,” and “[b]roaden[ing] the definition of perpetrator to include” more individuals who “have regular contact” with the child. Id.

5. See Holder, supra note 2, at 1155 (identifying benefits of facility dogs to child witnesses and judicial system); Noreal Weems, Note, Real or Fake: Animals Can Make a Difference in Child Abuse Proceedings, 2 Mid-Atlantic J.L. & PUB. POL’Y 117, 123–30 (2013) (describing differences and similarities between using stuffed or real animals as well as case law assessing use of witness support items); see also Dellinger, supra note 2, at 171 (“analyz[ing] the legal foundations supporting the use of service dogs for emotional support of complaining witnesses in open court”). Dellinger also explains how dogs can relieve witnesses’ anxiety: a dog’s “presence helps divert [ ] participants’ attention away from the negative forces that are consuming them.” Id. at 178–79 (quoting Andrew Leaser, Note, See Spot Mediate: Utilizing the Emotional and Psychological Benefits of “Dog Therapy” in Victim-Offender Mediation, 20 OHIO ST. J. DIS. RES. 943, 955 (2005)) (internal quotation marks omitted); see also Lawrence Robinson & Jeanne Segal, The Health Benefits of Pets, HELPGUIDE.ORG (Dec. 2014), http://www.helpguide.org/articles/emotional-
preme Court has yet to specifically address whether service dogs are permitted to accompany individuals to the witness stand, as the Washington Supreme Court recently did in *State v. Dye (Dye II)*.  

This Note assesses whether such accommodations would be permitted in Pennsylvania courts and recommends a standard for such accommodations. Part II examines the use of courthouse dogs in Pennsylvania and discusses the jurisdictions that have explicitly addressed the use of dogs as accommodations for witnesses. Part III analyzes the statutes that courts have used to permit dogs to accompany witnesses to the stand and subsequently compares these statutes to Pennsylvania’s statutes to assess the admissibility of courthouse dogs in the Pennsylvania legal system. Part IV examines the legislative history of and amendments to Pennsylvania’s child victims and witnesses statutes and finds further evidence that courthouse dogs would be an appropriate accommodation. Part V argues that the Washington Supreme Court’s standard, as set forth in *Dye II*, is the standard Pennsylvania courts should adopt in determining whether a courthouse dog accommodation is permissible. Part VI compares the use of courthouse dogs to the use of closed-circuit television, explains how the courthouse dogs program aligns with the policy of accommodating children in the legal system, and adds further support for the argument that Pennsylvania should adopt the Washington Supreme Court’s legal standard. Part VII concludes with a reiteration of the evidence supporting the appropriate legal standard that Pennsylvania courts should utilize.
when addressing the issue of accommodating a child witness with a courthouse dog.13

II. STAY, FIDO: A LOOK AT THE CURRENT STATE OF COURTHOUSE DOGS

Pennsylvania has already established a foundational courthouse dogs program in many of its counties; however, with little guidance from statutes and precedent, the proper legal standard for determining the admissibility of courthouse dogs remains unclear.14 The Washington Supreme Court, the highest court to explicitly address the admissibility of dogs in the courtroom, analyzed the various standards jurisdictions have used to assess the permissibility of special courtroom accommodations.15 Additionally, courts in New York and California have recently ruled on the use of dogs in the courthouse.16 The variety of standards implemented in these cases, combined with a breadth of sources and liberal statutory interpretation, demonstrate the options Pennsylvania courts have to make courthouse dogs a staple accommodation in the Commonwealth’s legal system.17

A. An Unknown Breed: Pennsylvania Has Yet to Establish a Specific Legal Standard for Courthouse Dogs

On December 30, 2009, Princess joined Pennsylvania’s Centre County District Attorney’s Office.18 Faith Schindler, a Victim Witness Advocate in Centre County, and Judge Brad Lunsford are the pioneers for the program in Pennsylvania, which became the first state on the East Coast to

13. For a conclusion and summary of evidence supporting the adoption of the Washington standard in Pennsylvania, see infra notes 192–97 and accompanying text.


15. See Dye II, 309 P.3d at 1196–1200 (analyzing various standards); see also infra notes 46–57 and accompanying text (explaining current standards and Supreme Court of Washington’s analysis).


17. For a discussion and analysis of Pennsylvania’s options, see infra notes 127–70 and accompanying text.

utilize a courthouse dog with a child on the witness stand at trial.\footnote{See E-mail from Faith E. Schindler, \textit{supra} note 3 (identifying early uses of courthouse dogs program in Pennsylvania).} After seeing a news video about a district attorney’s office in San Diego using a dog to accompany a child victim to court, Judge Lunsford and Ms. Schindler recognized the program’s potential and believed both Pennsylvania’s witnesses and judicial system would benefit tremendously from its use.\footnote{See E-mail from Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney’s Office, to Author (Oct. 3, 2014, 10:03 AM EST) (on file with author) (identifying event that prompted recognition of courthouse dogs program). Ms. Schindler subsequently contacted the founders of the courthouse dogs program to better understand the challenges and requirements for replicating the program in Pennsylvania and to ensure the program started off on the right paw. \textit{See id.}} Subsequently, Ms. Schindler worked with Canine Partners for Life, an organization “dedicated to training service dogs . . . to assist individuals who have a wide range of physical and cognitive disabilities,” to get a suitable dog; and, in late 2009, Princess officially became a member of the District Attorney’s Office.\footnote{See About Us: Mission and History, CANINE PARTNERS FOR LIFE, \url{http://k94life.org/about/history/} (last visited Feb. 9, 2015) (providing description of organization). Located in Cochranville, Pennsylvania, Canine Partners for Life has been in existence for about twenty-five years. \textit{See id.} Currently, it has “placed over 600 service and home companion dogs in 45 states.” \textit{Id.} The dogs at Canine Partners for Life are each taken through a “two-year, comprehensive and customized training program to meet the specific needs of its human partner.” \textit{About Us: Our Programs, CANINE PARTNERS FOR LIFE, \url{http://k94life.org/about/programs/}} (last visited Feb. 9, 2015) (describing training program for dogs). The specialized programs train dogs for a variety of uses—alerting seizure, cardiac, and diabetes patients, as well as to be residential companion dogs. \textit{See id.} Ms. Schindler chose to work with Canine Partners for Life because of its status as an accredited organization with a thorough dog-training process. \textit{See E-mail from Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney’s Office, to Author (Oct. 1, 2014, 08:23 AM EST) (on file with author).} Ms. Schindler chose such a well-established organization because the courthouse dogs that assist in Centre County’s courthouse “will have [to be] temperament tested and trained very thoroughly . . . .” \textit{Id.} Ms. Schindler further explained, “[t]o go with any dog would be a big mistake in regards to child safety and [ ] liability. . . . [B]ut the dogs from an accredited agency such as Canine Partners for Life are tested . . . and trained in many [ ] different environments,” thus bolstering the dogs’ versatility to handle any situation they might encounter inside the courthouse, which in turn, minimizes potential problems. \textit{Id.}}

Since joining Ms. Schindler’s team, Princess has helped in a variety of settings, both inside and outside the courthouse, including visiting homes to assist children preparing for trial, lying beside children during pre-trial hearings, and accompanying children to the witness stand at jury trials.\footnote{See Telephone Interview with Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney’s Office (Sept. 3, 2014) (explaining Princess’s various responsibilities).} The program’s success in Centre County has prompted others—including superior court judges and other victim advocates around the state and beyond—to ask Ms. Schindler for assistance in establishing their own pro-
grams.23 As evidence of the program’s success in Pennsylvania, the Lancaster County and York County Courthouses have recently joined Pennsylvania’s “dog pound.”24

23. See id. (stating others have requested help to establish their own courthouse dogs programs, even from other states, such as Connecticut, New Mexico, and Colorado); see also E-mail from Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney’s Office, to Author (Dec. 21, 2014, 5:43 AM EST) (on file with author) (describing people who have asked Ms. Schindler for information about courthouse dogs program: superior court judge, victim advocates, child advocacy centers, and district attorneys).

24. See Emilie Lounsberry, Dogs Helping Ease Children’s Trauma of Testifying, PHILA. INQUIRER (Aug. 14, 2011), http://articles.philly.com/2011-08-14/news/29886555_1_therapy-dogs-half-dozen-dogs-courthouses. Linda McCrillis and Bucks County Court of Common Pleas Judge Robert J. Mellon worked together to “develop[ a] program using therapy dogs to calm the nerves of children summoned to court after being removed from parental custody . . . .” Id. McCrillis has found it even more important to minimize the emotional trauma of those testifying in court because of the United States Supreme Court’s ruling in Crawford v. Washington, 541 U.S. 36 (2004), which “reaffirmed defendants’ right to directly confront their accusers in court rather than through videotaped testimony or closed-circuit TV,” and a 2011 “Pennsylvania Supreme Court ruling . . . [requiring] children who have been removed from parental custody [to] appear in court at least once a year so a judge can monitor their well-being.” Id.; see also Liz Evans Scolforo, York County’s Newest Treatment Court Employee a Dogged Worker, If a Bit Furry, YORK DISPATCH (June 18, 2013, 9:39 AM), http://www.yorkdispatch.com/ci_23479755/york-countys-newest-treatment-court-employee-dogged-worker (providing stories of other courthouse dogs). Buster, the first facility dog in York County, joined the York County justice system in mid-2013. See id..

Buster’s primary role will be to work with adults and juveniles in the county’s treatment courts, including drug court, mental-health court, DUI court and veterans court. Such dogs can help calm veterans with post-traumatic stress disorder and people with mental-health issues and addictions . . . . The dogs can [also] help ease depression and improve self-esteem . . . .

Id.

Andrew Franz, a former probation officer in York County, Pennsylvania, who worked as a Treatment Court Administrator, created the courthouse dogs program in York County and has explained how impactful these courthouse dogs can be on all stakeholders involved in the judicial system. See id.; E-mail from Andrew Franz, Dog Trainer for Susquehanna Serv. Dogs, to Author (Sept. 2, 2014, 1:06 PM EST) (on file with author). Before the courthouse dogs program began in York County, other methods were tested to help individuals in the courthouse relieve stress. See id. Mr. Franz said, “we tried a few group sessions where we introduced relaxing music [and] tried to get the participant to do something like[ ] guided mediation.” Id. However, the methods proved unsuccessful, because “as probation officers, we never really did anything to help the person feel at ease. In fact, what I would hear is how the probation officer made [these individuals] feel . . . [subordinate] by belittling them, constantly threaten[ing] jail,” and overall, not respecting them as people. Id. Unfortunately, “[t]his was [ ] typical. Very few probation officers really cared about [others’] feelings and emotion[s].” Id. Once the courthouse acquired a service dog, however, the atmosphere changed: “Having the dog . . . simply helped break barriers. It would place a smile on a face.” Id. Though there were opponents of the courthouse dogs program, they quickly recognized the benefits of the program, changing their perspective on the role dogs could play in the judicial system. See id.
Though Princess only became part of the Centre County staff about five years ago, dogs have been utilized in the litigation process elsewhere for years. Courthouse dogs' principal purpose is to assist “individuals with physical, psychological, or emotional trauma due to criminal conduct.” Consequently, these companions have helped in a variety of settings, including family court, probation court, criminal court, and forensic interviews. But it is in the context of criminal cases that critics are ex-
pressing concerns about maintaining a fair legal process. Without explicit guidance from the legislature or courts, the proper legal standard to assess the admissibility of dogs in Pennsylvania courtrooms remains open.

B. A Genetically Engineered Breed: Washington Creates Its Own Legal Standard

Douglas Lare is a developmentally disabled individual with a “mental age ranging from 6 to 12 years old,” who required Ellie’s assistance at the witness stand after the latest of a series of burglaries committed against him. In 2005, Douglas “became romantically involved with his neighbor Alesha Lair,” who Douglas did not know was also dating Timothy Dye, the defendant. In 2007, Alesha and several members of her family moved in with Douglas, at which point Alesha began to take further advantage of him: she opened credit cards in Douglas’s name, charging “them to their limits;” withdrew retirement funds from his personal account; and kept “a key to [Douglas’s] apartment with her.” With a key and access to Douglas’s funds, Alesha and Dye were able to take items and money worth thousands of dollars from Douglas. Dye, in parliament court participants through their recovery, visiting “juveniles in detention facilities,” and greeting courthouse staff and jurors to “lift [their] spirits.”

28. See Defense Objections and Outline for Trial Brief, COURTHOUSE DOGS FOUND. (2014), http://www.courthousedogs.com/legal_brief.html (providing outline of trial brief for making motion to permit facility dog to accompany witness while testifying). In addition, to better prepare the prosecution for argument, the foundation also lists the defense’s potential objections to the presence of a dog in court, such as “[t]he dog will distract the jury,” “[t]he child will be distracted by the dog,” “[j]urors that like dogs will like the witness more than the defendant,” and “[t]he presence of the dog bolsters the credibility of the witness.”

29. See supra note 14 (illustrating dearth of clear legal support in Pennsylvania for determining admissibility of dogs inside courtrooms).

30. See Dye II, 309 P.3d 1192, 1194–95 (Wash. 2013) (describing facts of case in detail). The defense categorized Douglas’s mental capacity as being even younger than the prosecution did; the defense claimed that Douglas’s mental age was between that of a two-and-a-half- and eight-and-a-half-year old. See id. at 1194 n.1.; see also Kaplan, supra note 1, at 3 (describing experience of Douglas with courthouse dog). Douglas recounted his experience in the courtroom, “I was there with the judge and the person doing the crime.” He told Kaplan that “[i]t was scary,” but Ellie was able to calm him down.


32. Dye II, 309 P.3d at 1194. With Douglas’s money, Alesha “furnish[ed] her new apartment” and bought “herself and her family clothing, shoes, computers, beer, cigarettes, a DVD [ ] player, and cell phones.”

33. See id. at 1194–95 & n.3 (stating Alesha “pleaded guilty to theft in the first degree with the aggravating circumstance that [Douglas] was a particularly vulnerable victim,” and in total, she “borrowed approximately $42,000 against the credit
ticular, burglarized Douglas’s apartment several times.34 Thus, over a two-year span, Dye and Alesha ultimately swindled Douglas out of about $100,000.35

After Douglas reported this latest burglary to the police, the State charged Dye for residential burglary, and Douglas’s testimony against Dye would be important to convict Dye.36 Douglas was significantly anxious “regarding his upcoming testimony,” so “[t]he State moved to allow Ellie to accompany [Douglas] during his testimony,” arguing that Douglas’s diminished mental capacity and distraught state supported the need for Ellie’s assistance.37 Rejecting the defendant’s objections of extreme prejudice, the Washington trial court permitted Ellie to sit next to Douglas while he testified because the judge believed courts should try to accommodate developmentally disabled individuals when possible.38 The judge “found that Ellie would be ‘very unobtrusive, [and would] just simply be next to the individual, not [ ] lying in his lap . . . .’”39 With Ellie by his side, Douglas testified, ultimately leading to Dye’s conviction.40

After Washington’s Court of Appeals affirmed the conviction, the Supreme Court of Washington granted review and was asked to determine “whether a court may allow a witness to be accompanied by a comfort animal, here a dog, when testifying during trial.”41 After identifying abuse cards” she created under Douglas’s name and “withdrew $59,000 from [Douglas’s] retirement account”).

34. See id. at 1195 (explaining extent of Dye’s transgressions against Douglas). With Douglas’s key, Dye entered Douglas’s apartment and, over two days, took numerous items such as DVDs, “a shelving unit,” a “television, VCR, DVD player, microwave, and a collectible knife . . . .” Id.

35. See Kaplan, supra note 1 (totaling value of things stolen from Douglas by defendants). Dye admitted, in a telephone interview with a police detective, to pawning Douglas’s “DVD player but claimed that [Douglas] had voluntarily offered it to him,” and “[a]fter the detective stopped the recording, Dye told [the detective] that [Dye] didn’t have anything to worry about because his name wasn’t on any of the pawn slips and so there was no way to pin it on him.” Dye II, 309 P.3d at 1195.


37. Dye II, 309 P.3d at 1195. The prosecution also informed the judge that Douglas “was a ‘complete dog fan’ and that Ellie had provided [Douglas] ‘tremendous comfort’ during the previous interview.” Id.

38. Id. (“[W]e can accommodate somebody who has a developmental disability when they’re testifying in the courtroom I think it’s appropriate to do so.” (quoting trial court)).

39. Id. at 1199 (third alteration in original) (quoting trial court and providing its reasoning).

40. See id. at 1196 (stating outcome of case). Though Dye was convicted of residential burglary, the jury “did not find that [Douglas] was a vulnerable victim.” Id.

41. Id. at 1194. The Court of Appeals held “that [Ellie’s] presence did not compromise Dye’s right of cross-examination, . . . that the trial court properly balanced [Douglas’s] special needs against the possibility of prejudice, and that there was no prejudice in the first instance.” Id. at 1196.
of discretion as the proper standard of review, the court analyzed the applicable legal standard for determining whether a dog could accompany a testifying witness to the stand. 42 Because this was an issue of first impression, the court examined applicable cases from other jurisdictions, as well as Washington’s precedent for permitting child witnesses to hold a comfort item or to be accompanied by an individual while on the stand. 43 The Washington Supreme Court found almost all of the courts that actually permitted “a child witness to use a comfort item or support person” required the presence of “highly egregious facts” and evaluated the permissibility of the accommodation using an “abuse of discretion standard.” 44 However, the court noted that, in these types of cases, jurisdictions “are split on whether the prosecution must prove that the special measure is necessary to secure the witness’s testimony.” 45

The Washington Supreme Court found three distinct legal standards that courts have used to determine the appropriateness of special measures for testifying victims. 46 First, courts “have declined to require that the prosecution make a showing of necessity, instead putting the onus on the defendant to prove prejudice or impropriety.” 47 Second, two states,

42. See id. (“We have consistently reviewed courtroom procedures—allegedly prejudicial or not—for abuse of discretion standard, and Dye presents no reason for us to depart from that standard now.”).
43. See id. at 1197. The Washington Supreme Court cited a New York case and a California case directly addressing the use of courthouse dogs to assist a testifying victim of a crime. See id. at 1196–97 (citing People v. Tohom, 969 N.Y.S.2d 123 (App. Div. 2014); People v. Spence, 151 Cal. Rptr. 3d. 374 (Ct. App. 2012)). As jurisdictional support for permitting the use of comfort items during testimony, the Washington Supreme Court cited State v. Hakimi, 98 P.3d 809, 811 (Wash. Ct. App. 2004). In Hakimi, “the two witnesses were young girls who had been allegedly molested by their babysitter, Morteza Hakimi.” Dye II, 309 P.3d at 1197. The children brought dolls with them “while testifying at their child hearsay hearings.” Hakimi, 98 P.3d at 811. The trial court denied Hakimi’s motion to prohibit the children from holding the dolls while they testified in front of a jury after weighing “the interests of the witnesses against the potential prejudice to Hakimi” because “[c]hildren do present different issues and different considerations in terms of being witnesses in different cases. They have a peculiar need to find some security in an otherwise insecure setting . . . . I don’t think the doll un undue prejudices, to the extent it prejudices anyone at all . . . .” Dye II, 309 P.3d at 1197 (quoting Hakimi, 98 P.3d at 811).
44. Dye II, 309 P.3d at 1198 (noting requirement of “highly egregious facts”); Hakimi, 98 P.3d at 811 (applying abuse of discretion standard).
45. Dye II, 309 P.3d at 1198 (noting division in other jurisdictions and classifying jurisdictions’ analyses into three main legal standards).
46. See id. (identifying legal standards analyzed by Washington Supreme Court). For a description and analysis of the three classes of standards, see infra notes 47–49 and accompanying text.
47. Dye II, 309 P.3d at 1198 (describing burden on defendant). The first group of cases the Supreme Court of Washington cited were those where courts required defendants to prove that the special accommodations granted for child witnesses are prejudicial and therefore affecting defendants’ right to a fair trial. In one, the defendant was convicted of kidnapping, raping, and sodomizing a seven-year-old child. See State v. Dickinson, 337 S.W.3d 733, 744 (Mo. Ct. App. 2011). At trial, the judge permitted the child to hold a teddy bear while testifying. See id.
Although the prosecution did not show that the teddy bear was necessary for the child to be able to testify, on appeal, the Missouri Court of Appeals found “there was nothing to suggest that the toys were used to engender the sympathy of the jurors,” or that the teddy bear prejudiced the client in any other fashion. \[48\] The court also found “[t]he trial court balanced the benefit the comfort item would provide [the child] ... against any potential prejudice it might cause [the] defendant.” \[Id. at 744.\] Therefore, on appeal, the court ruled against the defendant’s argument that the trial court abused its discretion. \[Id. at 746; see also State v. Powell, 318 S.W.3d 297, 304 (Mo. Ct. App. 2010) (holding trial court did not abuse its discretion by permitting eleven and sixteen-year-olds to carry teddy bears with them to witness stand).\]

The Court of Appeals of Texas similarly denied a defendant’s arguments that the “trial court committed error in allowing the child-victim ‘to testify before the jury while holding a teddy bear, not her own . . . .’” \[Sperling v. State, 924 S.W.2d 722, 725 (Tex. Ct. App. 1996).\] The only mention of the teddy bear in the trial court’s record was when the prosecutor briefly talked to the child about it while she was on the stand. \[See id.\] The Court of Appeals held, “[w]ith nothing more in the record, we cannot conclude that the teddy bear constituted demonstrative evidence which engendered sympathy in the minds and hearts of the jury, validated the child-victim’s unimpeached credibility, or deprived appellant of his constitutional right of confrontation.” \[Id. at 726.\] The Court of Appeals held that the use of the teddy bear was reasonable “in an effort to minimize the psychological, emotional and physical trauma to the child-victim caused by her participation in the prosecution, including her face-to-face confrontation with the prosecutor.” \[Id. However, the appellate court refused to address whether the trial court had to “make a finding of necessity for allowing the child-victim to cuddle a teddy bear while testifying” because the defendant did not raise the complaint with the trial court. \[Id.\] Four years later, the Texas Court of Appeals addressed this issue, finding “article 38.071, section 10 does not require the trial court to make such a finding [of necessity].” \[In re D.T.C., 30 S.W.3d 43, 47 (Tex. Ct. App. 2000).\]

48. \[Dye II, 309 P.3d at 1198 (noting standard used in other jurisdictions).\] The Washington Supreme Court cited precedent from Delaware and Hawaii to demonstrate how some jurisdictions have required a finding that the child witness has a “compelling necessity” for the “special measure,” such as holding a teddy bear. \[See id.\]

In one case, an uncle was convicted of raping his niece when she was five-years-old. \[See Gomez v. State, 25 A.3d 786, 787 (Del. 2011).\] At the time of the trial, the niece was nine-years-old. \[Id. at 792.\] Considering the victim’s age and her testimony’s subject matter, the prosecutor moved to “allow the [child’s] mother” to accompany the girl while testifying on the witness stand. \[Id. at 788.\] In addition to permitting the mother to sit with the child, the trial judge also allowed the child “to hold a teddy bear while she testified.” \[Id.\]

On appeal, the defendant claimed the trial court abused its discretion and “committed plain error in permitting [the child] to hold a teddy bear during her testimony.” \[Id. at 798–99.\] The Supreme Court of Delaware first examined the policy behind Delaware’s “Child Victims and Witnesses” statutes. \[See id. at 799. Section 5131, under title 11 of Delaware’s Code, stated that child victims and witnesses are different than adults, and thus, should be provided “with additional consideration and different treatment than that usually required for adults.” \[Id. quoting Del. Code Ann., tit. 11, § 5151.\] To assess the statute’s legislative intent for permitting special accommodations to child witnesses, the Supreme Court of Delaware cited its previous analysis. \[See id. (citing Czech v. State, 945 A.2d 1088 (Del. 2008)).\] Based on its analysis in Czech, the Delaware Supreme Court reaffirmed its “substantial need” standard: “In the absence of extraordinary circum-
Third, other states have demanded "a record that clearly indicate[s] that the witness would have difficulty testifying in the absence of the comfort item or support person."49

stances . . . , a trial judge should not make special accommodations sua sponte. We hold that such special accommodations should only be made if it has been determined, upon motion, that the requesting party has demonstrated a 'substantial need' for their implementation." Id. at 799 (alteration in original) (quoting Czech, 945 A.2d at 1094). Using this standard, the prosecutor properly "demonstrated a substantial need" for the child's mother to be present at the witness stand; however, the court found the trial judge did not "require[ ] the prosecutor to demonstrate a substantial need for the additional special accommodation of the teddy bear." Id. Consequently, because the court had already reversed and remanded the case on other grounds, it cautioned the trial judge to require the prosecutor to demonstrate a substantial need for the teddy bear's use. See id.

A similar "substantial need" standard was articulated in Hawaii. See State v. Palabay, 844 P.2d 1, 2 (Haw. Ct. App. 1992). There, the Intermediate Court of Appeals of Hawaii found that the prosecution had not provided a "compelling necessity" for permitting the child witness to hold a teddy bear while testifying. See id. at 7. In Palabay, the defendant was convicted of sexually assaulting his neighbor's eleven-year-old daughter. Id. at 5. A year later, at trial, the daughter testified while holding a teddy bear without consent from the trial judge. See id. On appeal, the defendant argued the teddy bear was prejudicial and a "blatant prosecutorial ploy to make the child even more appealing and attractive . . . ." Id. Because the use of inanimate comfort objects was an issue of first impression, the Intermediate Court of Appeals stretched its "compelling necessity" standard for accommodating special measures to include inanimate objects such as the teddy bear. Id. at 7. Though the Intermediate Court found that the trial court erred for allowing the child to "testify while holding a teddy bear," because the prosecutor never proved there was a compelling need for such accommodation, the Intermediate Court affirmed the conviction because the court found that the "jury's verdict was [not] swayed by the brief presence of the stuffed animal." Id. at 10–11.

49. See Dye II, 309 P.3d at 1198 (articulating standard that requires record to show witness would have difficulty testifying without comfort item). The last standard the Washington Supreme Court examined came from jurisdictions that never explicitly required the prosecution to show necessity "but nevertheless relied on a record that clearly indicated that the witness would have difficulty testifying in the absence of the comfort item or support person." Id.

In one such case, a child-victim carried a doll with her to the witness stand. See State v. Cliff, 782 P.2d 44, 46 (Idaho Ct. App. 1989). The trial judge called a hearing, and the prosecution presented evidence that the child needed the doll. See id. "The court-appointed guardian ad litem for the child testified that during the preliminary hearing the victim started to have dry heaves while on the stand . . . ." Id. The victim wrung her hands and chewed on her nails when she got upset, so the guardian believed "that being able to hold the doll would give the child something to do with her hands." Id. The trial court "concluded that the benefit of having coherent testimony from the witness outweighed any possible prejudice to the defendant," and the Court of Appeals of Idaho subsequently deferred to the trial court's decision to permit the child's use of a teddy bear. See id. at 47.

Oregon is another jurisdiction following this third standard. See State v. Dompier, 764 P.2d 979 (Or. Ct. App. 1988). The Court of Appeals of Oregon did not explicitly require the prosecution to show necessity, but relied, instead, on the circumstances to determine if special accommodation was needed. See id. During trial, the child-victim could only answer a few basic questions while she was on the stand before she started to cry and became unresponsive. See id. at 980. The trial court ordered a recess and asked the child to take the stand alone again once the court reconvened. See id. After the child became upset and was unable to answer
The Washington Supreme Court declined to follow any of these three standards, opting instead to establish its own standard in *Dye II*.

In breaking from the traditional approach, the court cited *State v. Foster*, where the Supreme Court of Washington adopted both the reasoning and questions the second time, “the prosecutor indicated that [the child] had a physical fear of her father which made testifying difficult for her . . . [and] renewed his suggestion that the child be allowed to sit with her foster mother” on the stand. *Id.* The trial court permitted the seven-year-old girl to sit on her mother’s lap while she testified. *See id.* To minimize the potential biased image, the judge “gave the jury the standard instruction not to allow bias, sympathy or prejudice any place in their deliberations.” *Id.* The Court of Appeals of Oregon affirmed the defendant’s conviction and did not assess the required necessity of a special accommodation; instead, the court deferred to the trial court’s “discretion to control the examination of witnesses.” *Id.*

50. See *Dye II*, 309 P.3d at 1199 (finding “confrontation clause analysis” and “fair-trial analysis” from Washington case law suggest different legal standard for assessing permissibility of special accommodations for testifying witnesses).

51. 957 P.2d 712 (Wash. 1998) (en banc). In *Foster*, the defendant was convicted of molesting a six-year-old girl after the girl testified via one-way closed-circuit television. *See id.* at 714–17. In order to assess whether the child was competent to testify, the trial court held two competency hearings. *See id.* at 714. During the first hearing, the child had trouble answering questions satisfactorily because when she was asked “whether she would tell the truth about what happened,” she only responded with “‘I might’ and ‘I don’t know.’” *Id.* at 714–15. Consequentially, the trial court determined the child was not competent. *See id.* at 715. At the second hearing, the child was permitted to testify by one-way closed-circuit television. *See id.* Because she could not see the defendant, she was much more responsive and asserted that she was able to tell the truth. *See id.* at 715–16. Following the second hearing, the trial court determined that the child was competent to testify and permitted her to testify via closed-circuit television because she would “suffer serious emotional or mental distress that would prevent her from reasonably communicating at trial” if she were forced to testify in the defendant’s presence. *Id.* at 716.

The defendant subsequently appealed his conviction, objecting to the constitutionality of the closed-circuit statute. *See id.* at 717. To determine whether the statute permitting testimony via closed-circuit television was constitutional, the Washington Supreme Court assessed what guarantees were provided to the defendant under Washington’s Constitution. *See id.* at 719. As part of its analysis, the Washington Supreme Court examined case law and the relevant United States Supreme Court decision. *See id.* at 719–24 (citing Maryland v. *Craig*, 497 U.S. 836 (1990)) explaining *Craig Court’s* confrontation clause analysis (comparing protection afforded defendants under Washington’s Constitution with that offered under federal Constitution). The Washington Supreme Court found, similar to the *Craig Court*, that “the right to confront accusing witnesses face to face under the Washington constitution has not been interpreted to be absolute,” particularly for “cases involving young children alleged to have been the victims of sexual abuse.” *Id.* at 725. The Washington Supreme Court consequently held that Washington’s statute permitting, under specific circumstances, a child to testify via one-way closed-circuit television did not “violate [the] defendant’s right to confront the witnesses against him or her . . . .” *Id.* at 727. Based on the child’s reaction and statements during the first hearing, the Washington Supreme Court held there was sufficient evidence showing that the “child would be traumatized, not by the courtroom generally, but by the presence of the defendant,” meaning the trial court properly permitted the child to utilize the closed-circuit statute. *Id.* at 721. The Washington Supreme Court affirmed the defendant’s conviction. *See id.* at 729.
rule from the United States Supreme Court’s decision in *Maryland v. Craig*. The issue presented to the United States Supreme Court in *Maryland v. Craig* was “whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant’s physical presence, by one-way closed circuit television.” *Id.* at 840. This issue arose when the Maryland trial court permitted a six-year-old girl, who was the victim of several sexual offenses, as well as several other child witnesses, to testify via one-way closed-circuit television because there was sufficient evidence that they would suffer “serious emotional distress” such that each of these children would be “unable to ‘reasonably communicate’” if required to testify in front of the defendant. *Id.* at 841.

The majority found that the Confrontation Clause has never guaranteed “criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.” *Id.* at 844. However, it listed three other guarantees under the Confrontation Clause, apart from a “personal examination,” specifically: a guarantee that the witness will testify under oath, the defendant will be able to cross-examine the witness, and the jury retains the ability to “observe the demeanor of the witness,” while the witness is testifying. *Id.* at 845–46. In total, the majority found these four elements serve “the purposes of the Confrontation Clause” because they ensure “that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing . . . .” *Id.* at 846. “Thus, in certain narrow circumstances, ‘competing interests, if closely examined, may warrant dispensing with confrontation at trial.’” *Id.* at 848 (quoting Ohio v. Roberts, 448 U.S. 56, 64 (1980)). Recognizing that “the Confrontation Clause reflects [only] a preference for face-to-face confrontation at trial,” the majority explained that this preference “must occasionally give way to considerations of public policy and the necessities of the case.” *Id.* at 849 (quoting Roberts, 448 U.S. at 63; Mattox v. United States, 156 U.S. 237, 243 (1895)).

The majority recognized that states had a compelling interest in protecting “minor victims of sex crimes from further trauma and embarrassment” and in assuring “the physical and psychological well-being” of child abuse victims. *Id.* at 852–53 (quoting Globe Newspapers Co. v. Super. Ct. for Norfolk Cnty., 457 U.S. 596, 607 (1982)). However, the Court did hold that each case is fact-specific: “[s]o long as a trial court makes [ ] a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case.” *Id.* at 860. But see *Crawford v. Washington*, 541 U.S. 36, 53–54, 69 (2004) (finding “the Framers [of the Constitution] would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination,” and subsequently holding out-of-court tape-recorded testimonial statements against defendant violated Sixth Amendment Confrontation Clause because witness was available to testify and defendant did not have opportunity to cross-examine witness).

However, according to the National District Attorney’s Association, “the Confrontation issue addressed in *Craig* is distinct from the issue addressed in *Crawford v. Washington*, and survives the *Crawford* analysis.” Nat’l Dist. Attorneys Ass’n, Closed-Circuit Television Statutes 1 (Aug. 2012), available at http://www.ndaa.org/pdf/CCTV%20(2012).pdf (citation omitted); see also Commonwealth v. Williams, 84 A.3d 680, 690 & n.1 (Pa. 2014) (Saylor, J., dissenting) (acknowledging existing debate over *Crawford*’s impact on *Craig*, but opining “the Supreme Court ultimately will not overrule *Craig*” however, recognizing “that *Craig*-based decisions to override constitutionally favored face-to-face confrontation are important, high-stakes determinations”).
room generally, but by the presence of the defendant.’”53 Using Craig as support, combined with Washington’s “confrontation clause” and “fair-trial” analyses, the Washington Supreme Court concluded that the other standards were inadequate because the onus should be on the prosecution to prove the need for a special accommodation, but neither Craig nor Washington case law suggested a “compelling need” requirement.54 Consequently, the court developed a new legal standard: “it is not the defendant’s burden to prove that he or she has been prejudiced, but the prosecution’s burden to prove that a special dispensation for a vulnerable witness is necessary . . . However, we do not require a showing of ‘substantial need’ or ‘compelling necessity’ . . . .”55

Under this new legal standard, the Washington Supreme Court held that the trial court did not abuse its discretion and acted under the appropriate legal standard.56 Because the trial court found “Ellie’s presence would be helpful in reducing [Douglas’s] anxiety and eliciting his testimony,” and because the trial court limited any potential bias the dog could cause through appropriate jury instructions, the Washington Supreme Court found the defendant’s rights were not violated and that the trial court had proper authority to grant this special accommodation.57

C. The Mutts: New York and California’s Approaches Permitting Courthouse Dogs

While the Supreme Court of Washington relied primarily on precedent to decide both the permissibility of courthouse dogs and the related legal standard, other courts have cited specific statutes addressing accommodations for child witnesses.58 In People v. Tohom,59 the New York Supreme Court relied on both state law and case precedent to permit the use

53. Dye II, 309 P.3d at 1198–99 (quoting Craig, 497 U.S. at 856) (agreeing explicitly with Foster court’s “reasoning in full”).
54. See id. at 1199 (citing State v. Finch, 975 P.2d 967 (Wash. 1999); Foster, 957 P.2d at 712).
55. Id. (articulating new standard).
56. See id. at 1200 (finding Dye “failed to establish that his fair trial rights were violated,” and trial court was within its power to permit courthouse dog to accompany Douglas because “[b]oth the general trend of courts to allow special procedural accommodations for child witnesses and the deference built into the abuse of discretion standard require [the state’s Supreme Court] to respect the trial court’s decision in how to structure its own proceedings”).
57. See id. (affirming trial court ruling). The Supreme Court of Washington did caution, however, that “a facility dog may incur undue sympathy,” so the trial court must, as it did in this case, balance “the benefits and the prejudice involved . . . .” Id. at 1200–01.
of a courthouse dog.60 New York Executive Law section 642-a “‘directs the Judge presiding . . . to be sensitive to the psychological and emotional stress a child witness may undergo when testifying.’”61 Consequently, the New York Supreme Court’s Appellate Division found that live animals, not just inanimate comfort items, fell under this statute’s purview.62

Though Tohom was decided before Dye II, the New York court, like the Washington Supreme Court, required the prosecution to prove a need for the accommodation.63 Similar to the Dye II court, the New York court rejected the compelling need standard but found that the prosecutor must show “that such animal can ameliorate the psychological and emo-

60. See id. at 131–32 (analyzing N.Y. EXEC. LAW § 642-a(4)) (citing People v. Gutkaiss, 614 N.Y.S.2d 599 (App. Div. 1994) (holding Executive Law § 642-a(4) permits “a child witness to hold a ‘comfort item’”)), in Tohom, the defendant was convicted of “predatory sexual assault against a child and endangering the welfare of a child” based on evidence he “engaged in multiple acts of sexual misconduct . . . with his daughter . . . who was under the age of 18 years.” Id. at 128. The defendant impregnated her twice and had her abort the child both times. See id. The prosecution motioned to allow Rose, a therapy assistance animal, to accompany the minor, then fifteen-years-old, on the witness stand. See id. at 126. According to a licensed social worker, who testified to the child’s fragile emotional state, the minor was experiencing post-traumatic stress disorder from the sexual abuse. See id. The social worker noted that when Rose was with the child “during at least three 30–45 minute therapy sessions . . . . ‘[The child was] a lot more verbal . . . .’” Id.

The trial court found that having the dog sit by the child during her testimony would be less prejudicial than having a support person because “‘there’s a far greater chance that a person can be deemed to be influencing the child’s testimony than the dog, who can’t speak, who can’t speak to the child, [and] the child can’t speak back to the dog.’” Id. at 127 (alteration in original) (quoting trial court). Applying the relevant New York statute, the trial court granted the prosecution’s motion “to permit Rose to accompany [the child]” during her testimony. Id. (citing N.Y. EXEC. LAW § 642-a (McKinney 2012)). After the trial judge provided jury instructions to minimize the potential prejudice, the jury convicted the defendant. See id. at 128.

The defendant appealed his conviction, arguing that the New York statute does not permit a courthouse dog to accompany a child witness to the stand and that the dog’s presence “impaired his right to confront witnesses against him.” Id. at 129. After analyzing the purpose of the relevant law, and other jurisdictions’ case law regarding the use of dogs in the courtroom, the appellate court upheld the defendant’s conviction, finding that the trial court properly balanced the child’s needs with the defendant’s rights and that Rose did not interfere with the proceeding or appear to prejudice the defendant in front of the jury. See id. at 131–38.

61. Id. at 132 (quoting Gutkaiss, 614 N.Y.S.2d at 631).

62. See id. (finding “no rational reason why, as per the broad dictate of Executive Law § 642-a(4), a court’s exercise of sensitivity should not be extended to allow the use of a comfort dog”).

63. See id. (stating court can exercise sensitivity towards child and permit comfort dog to accompany child “where it has been shown that such animal can ameliorate the psychological and emotional stress of the testifying child witness” (emphasis added)). Here, the appellate court found that the social worker’s testimony “provided ample evidence that Rose’s presence alleviated [the child’s] anxiety and allowed her to more easily discuss the conduct which was perpetrated against her . . . .” Id. at 133.
tional stress of the testifying child witness.” Even then, the trial court must balance “the right of the accused to a fair trial and the need to mitigate the intimidating environment for some child witnesses.”

In *People v. Chenault*, the California Court of Appeal relied on California Evidence Code section 765 to allow child witnesses to have a “therapy or support dog” by their side while they testify. The Court of Appeal found that the statute granted courts discretion to “control the [courtroom] proceedings,” specifically in regards to accommodating child witnesses. The court stated that, as part of the determination process, it must balance the defendant’s constitutional rights to a fair trial and to

64. *Id.* (“Executive Law § 642-a(4) does not set forth any ‘necessity’ criterion for a court to adopt measures intended to address the stress which a child witness may experience on the witness stand.”).

65. *Id.* (quoting *State v. Brick*, 163 Wash. App. 1029, n.5 (Ct. App. 2011)) (concluding trial court properly balanced child’s need for Rose with potential prejudice that might arise against defendant).

66. 175 Cal. Rptr. 3d 1 (Ct. App. 2014).

67. *See id.* at 9 (citing Evidence Code section 765 as legal support for permitting use of support dog). A jury convicted Chenault “on 13 counts of lewd acts on a child under 14 years of age and two counts of forcible lewd acts on a child under 14 years of age.” *Id.* at 3 (footnote omitted) (citations omitted). He then appealed his conviction, contending that “the trial court abused its discretion by allowing a support dog to be present during the testimony of two child witnesses without individualized showings of necessity” and that the dog’s presence violated his right to confront the witnesses. *Id.* at 3–4 (footnote omitted).

The California Court of Appeal held that “a trial court has authority under Evidence Code section 765 to allow the presence of a therapy or support dog during a witness’s testimony,” and a trial court did not need to find individualized necessity in order to retain the services of a support dog. *Id.* at 9. In addition, the appellate court rejected the defendant’s argument that California should adopt the legal standard the Washington Supreme Court created in *Dye II* and also declined to accept “the standard that requires the prosecution to show a ‘need’ or ‘necessity’ for the presence of the support dog.” *Id.* at 11 & n.8. Instead, the Court of Appeal followed the third category of legal standards, which allowed the trial court to determine, based on the circumstances, whether permitting the dog to accompany the child witness “would assist or enable that witness to testify without undue harassment or embarrassment and provide complete and truthful testimony.” *Id.* at 11. Because the trial court made implicit findings that the dog, Asta, “would assist or enable [the child witnesses] to testify completely and truthfully without undue harassment or embarrassment,” the Court of Appeal upheld the defendant’s conviction and found that the trial court did not abuse its discretion. *Id.* at 14, 17.

68. *Id.* at 9. (“A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice.”). Evidence Code section 765 reads, in pertinent part:

(a) The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment.

(b) With a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions.

*CAL. EVID. CODE § 765* (West 2014).
confront witnesses” with the likelihood that the dog’s presence will “enable the individual witness to give complete and truthful testimony . . . .”69 With this consideration in mind, the Court of Appeal chose to follow the standard that permitted the court to assess, based on both the circumstances of the case and observation of the child witness, whether the dog’s presence will ease the child’s emotional distress associated with testifying.70 Consequently, the court upheld the defendant’s conviction for two reasons: first, the “trial court made implicit findings that the presence of [ ] the support dog[ ] would assist [the child witnesses] to testify completely and truthfully;” and second, the trial court properly weighed the benefits the dog gave the children against the potential that the dog would prejudice the defendant and affect his right to a fair trial.71

As both the New York and California courts have demonstrated, statutory law is just as important as precedential case law when determining whether special accommodations should be permitted.72 Therefore, to bolster support for courthouse dogs in Pennsylvania, a comparison between Pennsylvania’s child victims and witnesses statutes and the statutory provisions relied upon in the above Washington, California, and New York cases is instructive.73

III. STATUTES, SOME COURTS’ BEST FRIENDS

As demonstrated above, statutes have been integral to granting trial courts discretion to permit the use of courthouse dogs.74 Compared to

69. Chenault, 175 Cal. Rptr. 3d at 12 (noting that if prejudice against defendant “cannot be eliminated, or at least reduced to a level that does not infringe on the defendant’s constitutional rights . . . the court generally should . . . deny[ ] the request for the presence of a support dog”).

70. See id. at 11, 15 (rejecting both compelling need and Washington Supreme Court’s legal standards and permitting court to decide whether dog’s presence will help child’s testimony).

71. Id. at 14 (holding defendant did not prove trial court abused its discretion under Evidence Code section 765).

72. See, e.g., id. at 9 (holding presence of support dog did not prejudice defendant after finding trial court had “authority under Evidence Code section 765 to allow the presence of a therapy or support dog during a witness’s testimony”); People v. Tohom, 969 N.Y.S.2d 123, 133, 138 (App. Div. 2013) (affirming defendant’s conviction after finding Executive Law section 642-a permits child witnesses to use comfort dogs during trial).

73. For a comparison between Pennsylvania’s child victims and witnesses statutes and the statutory provisions used in the Washington, California, and New York cases described in Part II, see infra notes 74–112 and accompanying text.

other states that have addressed the issue of courthouse dogs, Pennsylvania has scant statutory support for the use of special accommodations such as comfort items and support persons during testimony.75 However, some of Pennsylvania’s current laws are similar to laws in other states that support the use of courthouse dogs as a viable accommodation for child witnesses.76

In Dye II, the Washington Supreme Court relied on Rule 611 of Washington’s Rules of Evidence as the sole statutory support for permitting a mentally disabled victim to testify with a courthouse dog present.77 Pennsylvania has an almost identical rule that provides the same authority to courts: Pennsylvania Rule of Evidence 611.78 In order to protect witnesses from harassment and emotional distress while testifying, and to ensure that the truth is elicited, both states’ rules give courts broad discretion to manage the examination process.79 Thus, because both Washington and Pennsylvania’s rules of evidence are designed to protect those who testify, and because the Washington Supreme Court permitted the trial court (under Rule of Evidence 611) to allow a dog to accompany a witness at the stand, Pennsylvania courts should likewise be permitted to use courthouse dogs when needed.80

75. See supra note 14 (demonstrating dearth of statutory support in Pennsylvania for special accommodations).
76. For a discussion of Pennsylvania statutes and rules that are similar to laws in other states that support the use of courthouse dogs, see infra notes 77–112 and accompanying text.
77. See Dye II, 309 P.3d at 1196 (finding trial court has broad discretion to determine appropriate “‘mode and order of interrogating witnesses and presenting evidence’” (quoting WASH. R. EVID. 611(a))). Washington Rule of Evidence 611(a) states the following:

   Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

WASH. R. EVID. 611(a).

78. Pennsylvania’s Rule of Evidence 611(a) states the following: Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

   (1) make those procedures effective for determining the truth;
   (2) avoid wasting time; and
   (3) protect witnesses from harassment or undue embarrassment.

PA. R. EVID. 611(a).

79. See id.; see also WASH. R. EVID. 611.
80. See Dye II, 309 P.3d at 1201 (holding trial court did not abuse its discretion by permitting dog to accompany witness as part of protecting witness); c.f. Commonwealth v. Conde, 822 A.2d 45, 48–50 (Pa. Super. Ct. 2003) (affirming trial court’s decision to remove spectators for “making faces and inappropriate gestures at the witnesses and jurors” because trial court has discretion to control its court-
Similarly, in Tohom, the Appellate Division of the New York Supreme Court held that Executive Law section 642-a gave the trial court discretion over its proceedings, specifically to accommodate child victims and child witnesses. Executive Law section 642-a directs “the Judge presiding at a trial . . . to be sensitive to the psychological and emotional stress a child witness may undergo when testifying.” Moreover, the statute’s “clear mandate . . . is to render the judicial process less threatening to child victims who necessarily become engaged in that process.” Although the statute does not directly address comfort items or dogs, the court found “precedent for interpreting Executive Law [section] 642-a(4) to permit a child witness to hold a ‘comfort item,’ such as a teddy bear, while testifying in order to alleviate the child’s psychological and emotional stress.” In addition, the court found “no rational reason” for excluding courthouse dogs under this section, as long as “it has been shown that such animal can ameliorate the psychological and emotional stress of the testifying child witness.”

Although no Pennsylvania statute directly addresses the use of dogs in the courtroom, there are provisions in some Pennsylvania laws that are nearly identical to several subsections of New York Executive Law section 642-a. For example, Executive Law sections 642-a(5)–(7) describe specific ways the court can relieve a child’s anxiety and trauma while the child testifies in court. In particular, New York courts can permit child wit-
nesses to testify through closed-circuit television, to be accompanied by a support person, and to use anatomically correct dolls or drawings.88

Pennsylvania has enacted statutes that similarly seek to reduce a child witness’s emotional distress.89 Just like New York Executive Law sections 642-a(5), (7)—which permit closed-circuit television testimony and anatomically correct dolls, respectively—Pennsylvania Consolidated Statutes sections 5985 and 5987 provide for the same accommodations.90 In fact, with regard to section 5987—which permits child witnesses to use anatomically correct dolls—the Pennsylvania law is phrased in a way that benefits the witness more significantly than New York’s section 642-a(7).91 Pennsylvania’s section 5987 dictates that “the court shall permit the use of” the doll, whereas New York’s law leaves use of the doll to “the discretion of the court.”92

As both New York and Pennsylvania’s statutes illustrate, courts are expected to make accommodations for testifying child witnesses—assuming such assistance is necessary.93 Moreover, Pennsylvania courts should permit an expansive reading of these sections because the policy articulated in section 5981 does not have any limiting language—just like the relevant statute in Tohom.94 Consequently, in light of the Pennsylvania courts’ broad discretion to control courtroom procedure and the similarity between New York and Pennsylvania’s legislation involving child witnesses,

88. See Tohom, 969 N.Y.S.2d at 132 (describing “specific ways” statute accomplishes its purpose of assisting child witnesses while testifying).
89. See, e.g., 42 Pa. Cons. Stat. Ann. §§ 5985, 5987 (permitting child witness who is experiencing serious emotional distress to testify outside of courtroom and to use anatomically correct dolls to help explain child’s injury).
91. For a comparison of the statutes’ text, see infra note 92 and accompanying text.
93. See, e.g., 42 Pa. Cons. Stat. Ann. § 5985(a.1) (“Before the court orders the child victim . . . to testify by a contemporaneous alternative method, the court must determine . . . that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant’s presence will result in the child victim . . . suffering serious emotional distress that would substantially impair the child victim’s . . . ability to reasonably communicate.”); Tohom, 969 N.Y.S.2d at 133 (rejecting requirement to find “compelling-need” but also holding that trial courts must balance rights of defendant and needs of child witness in order to elicit truthful and coherent testimony).
94. See Tohom, 969 N.Y.S.2d at 132 (concluding that specific measures listed in Executive Law section 642-a were not intended to be ‘sole means by which the court could accommodate a child witness’). Pennsylvania’s section 5981 reads:

In order to promote the best interests of the residents of this Commonwealth who are under 18 years of age, especially those who are material witnesses to or victims of crimes, the General Assembly declares its intent, in this subchapter, to provide, where necessity is shown, procedures which will protect them during their involvement with the criminal justice system.

courts in Pennsylvania can make the logical step to include courthouse dogs as another accommodation for child witnesses and victims while they testify in court.95

Finally, in *Chenault*, California’s Court of Appeal cited Evidence Code section 765 to support a trial court’s authority “to allow the presence of a therapy or support dog during a witness’s testimony.”96 Similar to New York’s statute, the language of section 765 explicitly requires courts to “take special care to protect [the child witness] from undue harassment or embarrassment . . . ”97 The *Chenault* court, like the New York court in *Tohom*, required evidence to show the courthouse dog would be useful to the children.98

In addition to section 765, to further accommodate the witness, California Penal Code section 868.5 states that a prosecuting witness, including a child, “shall be entitled, for support,” to two people of the witness’s choice, one of which “may accompany the witness to the witness stand.”99 The *Chenault* court reaffirmed the court’s decision in *People v. Spence*,100 holding that section 868.5 did not apply to courthouse dogs—meaning a dog could accompany a child on the stand, along with a support person.101 Although the statute itself was not applicable to dogs, the court applied the statute’s policy of permitting support persons to accommodate

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95. For a discussion on Pennsylvania courts’ broad discretion regarding courtroom procedure, see supra notes 77–80 and accompanying text. For a discussion of the similarities between Pennsylvania and New York’s statutes relating to child-witness accommodations, see supra notes 81–94 and accompanying text.

96. *See People v. Chenault*, 175 Cal. Rptr. 3d 1, 9 (Ct. App. 2014) (citing *People v. Spence*, 151 Cal. Rptr. 3d 374, 404 (Ct. App. 2012)).


98. *See Chenault*, 175 Cal. Rptr. 3d at 14 (upholding trial court’s implicit finding that courthouse dog “would assist or enable [the child witnesses] to testify completely and truthfully”).

99. *Cal. Penal Code § 868.5 (a) (West 2014).* Regarding a witness of a crime involving a sexual offense, section 868.5(a) states the following: [They] shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, one of whom may be a witness, at the preliminary hearing and at the trial, or at a juvenile court proceeding, during the testimony of the prosecuting witness. Only one of those support persons may accompany the witness to the witness stand, although the other may remain in the courtroom during the witness’ testimony.

Id.

100. 151 Cal. Rptr. 3d 374, 406 (Ct. App. 2012) (affirming defendant’s conviction after finding defendant was not prejudiced by presence of therapy dog accompanying child on witness stand).

101. *See Chenault*, 175 Cal. Rptr. 3d at 9 (citing *Spence*, 151 Cal. Rptr. 3d at 404–05); *see also Spence*, 151 Cal. Rptr. 3d at 404–05 (concluding that because “subdivision (b) of section 868.5 refers to the court’s duty to give admonitions . . . that the advocate must not sway or influence the witness, we cannot imagine that the Legislature intended that a therapy dog be so admonished, nor could any dog be sworn as a witness in this context”). The *Spence* court also stated, “it is easy to conclude that therapy dogs are not ‘persons’ within the meaning of section 868.5, setting limitations on the number of ‘persons’ who may accompany a witness to the witness stand.” Id. at 405.
child witnesses to courthouse dogs. The court ultimately held that
the dog’s presence was similar to the presence of a support person, and thus
not “inherently prejudicial” to the defendant.102 Therefore, both Califor-
nia laws illustrate the extent to which courts can accommodate children
on the witness stand.103

Though not mentioned in Chenault, there are other California stat-
utes that are directed at assisting child witnesses.104 One example is Cali-
fornia Penal Code section 1347.105 This statute explicitly grants courts the
“discretion to employ alternative court procedures to protect the rights of
a child witness, the rights of the defendant, and the integrity of the judi-
cial process.”106 Just as the Chenault court required the trial court to weigh
the benefits and prejudices of having a dog accompany the child witness to
the stand, section 1347 similarly requires a balancing assessment to deter-
mine whether the use of closed-circuit television, an alternative court pro-
cedure, is appropriate during a child witness’s testimony.107

Pennsylvania’s child victims and witnesses statutes are similar to the
California statutes mentioned above, which further supports the admissi-
bility of courthouse dogs in the Pennsylvania court system.108 First, both
states’ statutes direct the courts to weigh the proposed accommodation’s
harms and benefits to both parties.109 Additionally, statutes in both states
provide the courts with broad discretion to accommodate children in the

102. See Chenault, 175 Cal. Rptr. 3d at 10 (comparing presence of support
person with presence of dog and concluding courthouse dog is “not inherently
prejudicial and does not, as a matter of law, violate a criminal defendant’s federal
constitutional rights to a fair trial and to confront witnesses against him or her”).
103. See Spence, 151 Cal. Rptr. 3d at 405-06 (holding policies in Penal Code
section 868.5, in conjunction with broad discretion granted under Evidence Code
section 765, permitted trial court to allow courthouse dog to accompany child wit-
ness while testifying).
104. See, e.g., CAL. PENAL CODE § 1347 (permitting use of alternative court
procedures for child witnesses and explaining specific findings court must make to
allow such accommodations).
105. See id.
106. Id. (permitting court to use closed-circuit television and video recording
for testifying child witness upon determining child’s need for alternative
procedures).
107. See Chenault, 175 Cal. Rptr. 3d at 12 (requiring court to determine
whether prejudice to defendant can be eliminated when addressing issue of court-
house dog accommodation); see also CAL. PENAL CODE § 1347 (“[T]he court neces-
sarily will be required to balance the rights of the defendant or defendants against
the need to protect a child witness and to preserve the integrity of the court’s
truthfinding function.”).
108. For an analysis of the similarities between Pennsylvania’s child victims
and witnesses statutes and California Penal Code sections 765, 868.5, and 1347, see
infra notes 109–12 and accompanying text.
declares its intent, in this subchapter, to provide, where necessity is shown, pro-
cedures which will protect them during their involvement with the criminal justice
system.”); see also CAL. PENAL CODE § 1347 (stating courts must balance parties’
rights to determine whether to employ alternative courtroom procedure).
courtroom, such as by the use of alternative methods of testifying. However, unlike California, Pennsylvania does not have a statute that explicitly allows a support person to accompany a child on the witness stand, but precedent exists in Pennsylvania for this type of accommodation and there are statutes that let a support person accompany a child who testifies outside of the courtroom. Therefore, because Pennsylvania—like California—grants its courts broad discretion to manage courtroom procedures, allows children to testify by using alternative methods, and permits support persons to accommodate child witnesses, allowing courthouse dogs would be a permissible accommodation for child witnesses when necessary.

IV. FETCH ME SOME SUPPORT: ADDITIONAL EVIDENCE WHY COURTHOUSE DOGS SHOULD BE ALLOWED IN PENNSYLVANIA

Are the similarities between Pennsylvania law and the law in jurisdictions that allow courthouse dogs enough to get Pennsylvania courts to roll over? As mentioned previously, section 5981 of Pennsylvania’s Consolidated Statutes describes the policy behind special accommodations and procedures for child victims and child witnesses. The General Assembly wants to protect these vulnerable individuals “during their involvement with the criminal justice system.” However, section 5981 emphasizes that such protection should only be granted when “necessity is shown.”

110. See Pa. R. Evid. 611(a) (granting court “reasonable control over the mode and order of examining witnesses and presenting evidence”); see also Cal. Evid. Code § 765 (“The court shall exercise reasonable control over the mode of interrogation of a witness . . . .”); Cal. Penal Code § 1347(b) (“[T]he court . . . may order that the testimony of a minor . . . be taken by contemporaneous examination and cross-examination in another place [other than the courtroom] by means of closed-circuit television . . . .” (emphasis added)); 42 Pa. Cons. Stat. Ann. § 5985 (“[T]he court may order that the testimony of the child victim or child material witness be taken under oath . . . in a room other than the courtroom . . . .” (emphasis added)).

111. See Commonwealth v. Pankraz, 554 A.2d 974, 980 (Pa. Super. Ct. 1989) (holding trial court did not abuse its discretion by letting child sit on grandmother’s lap while child testified); see also 42 Pa. Cons. Stat. Ann. § 5985 (“[A]ny person whose presence would contribute to the welfare and well-being of the child victim or child material witness . . . may be present in the room with the child during his testimony.”); id. § 5984.1 (same, but relating to recording child victim’s or child material witness’s testimony for presentation in court).

112. For evidence supporting the permissibility of courthouse dogs in Pennsylvania courtrooms, because of the similarities between Pennsylvania’s laws and other states’ laws that have allowed this accommodation, see supra notes 80, 89–95, 108–11 and accompanying text.

113. For further evidence supporting the permissibility of courthouse dogs in Pennsylvania courtrooms, see infra notes 114–26 and accompanying text.


115. Id. (describing purpose of Pennsylvania’s child victims and witnesses statutes).

116. See id. (qualifying when accommodations are permissible).
Therefore, courts are required to balance the interests of both parties before allowing any divergent procedure or accommodation.\textsuperscript{117} However, the legislative history for sections 5981, 5985, and 5987, and their subsequent amendments, provide insight into the General Assembly’s deep concern for child witnesses.\textsuperscript{118}

Act 1986-14 amended title 42 of the Pennsylvania Consolidated Statutes to include Pennsylvania’s child victims and witnesses statutes.\textsuperscript{119} During a session of the Pennsylvania House of Representatives in 1986, weeks before Act 1986-14 was passed, Representative David Sweet countered Representative Allen Kukovich’s suggestion to narrow the qualifications of those who could be child advocates, which would have limited the type of individuals who could have made a motion for the child to testify via closed-circuit television and who could have accompanied the child during closed-circuit testimony.\textsuperscript{120} Representative Sweet stated that “drawing a job description” for a qualified child advocate would “only allow[ ] a certain number of professionals to serve in this capacity,” which would run counter to the statute’s purpose of having someone there to serve “as the child’s friend [and] advocate . . . .”\textsuperscript{121} The House of Representatives

\textsuperscript{117.} See id. Section 5981 also cautions “the news media to use significant restraint” when dealing with child witnesses and victims and “urges” that the media withhold publishing information about the child’s name or address in order to better protect the child from the emotional distress associated with the justice system. \textit{See id.}

\textsuperscript{118.} For a discussion of the legislative history of sections 5981, 5985, and 5987, see \textit{infra} notes 119–22 and accompanying text. For a discussion of amendments to these sections, see \textit{infra} notes 123–25 and accompanying text.

\textsuperscript{119.} See 1986 Pa. Laws 41–44.

\textsuperscript{120.} See \textit{H.R. GEN. ASSEM. LEGIS. J.}, 170-176, 8th Sess., at 138–41 (Pa. 1986). For a discussion of the details of this debate, see \textit{infra} note 121 and accompanying text.

\textsuperscript{121.} See id. at 140. Mr. Kukovich proffered an amendment to Senate Bill 176, which provided certain rights and accommodations for child victims and witnesses. He narrowed the type of people who could assist the child witnesses, primarily leaving the responsibility to qualified child advocates. The amendment inserted the following lines, specifying who may accompany a child witness, into the proposed act:

\begin{quote}
[\textit{P}ersons certified by the court as having commensurate experience and training in child advocacy and victim witness assistance or possessing education, experience and training in child sexual abuse and a basic understanding of the criminal justice system. By virtue of their mandatory training program, sexual assault counselors shall have the preference of appointment in cases of rape or other sexual offenses.]
\end{quote}

\textit{Id.} at 138. In addition, Kukovich explained to the General Assembly what the amendment was intended to address in the following statement:

\begin{quote}
What this amendment does is address the issue of the qualifications of the child advocate. The way the bill is now drafted, it is intentionally left a little ambiguous and open to try to reach out, I guess, to the broadest amount of people who might serve as child advocate. After my consultations with the Pennsylvania Coalition Against Rape, they had decided that they would like the definition more narrowly drawn. That is what [this amendment] does, to make the restrictions on who the trial judge would appoint as child advocate more narrow so those who are acting as child
\end{quote}
agreed with Representative Sweet and rejected Representative Kukovich’s proposed amendment to the bill.\textsuperscript{122}

The 2004 Amendment to the Act also illustrates the Legislature’s desire to support child witnesses.\textsuperscript{123} In 2004, when the most recent amendment to Pennsylvania’s child victims and witnesses statutes was enacted, the legislature changed the term “closed-circuit” to “contemporaneous alternative method.”\textsuperscript{124} This change expands the potential accommodations available to traumatized children, demonstrating the Legislature’s intent to further alleviate children’s anxieties associated with testifying.\textsuperscript{125} Thus, all these abovementioned pieces of legislative history further suggest that courthouse dogs could easily fit within this chapter of title 42 as an appropriate tool for prosecutors to use in order to assist child witnesses in testifying.\textsuperscript{126}

advocates would have more training experience and more consistency in who acts as child advocate.
\textit{Id.} at 140. Despite Mr. Kukovich’s defense of the amendment, there were still those who opposed it. \textit{See id.}

Representative Michael Bortner spoke out against Mr. Kukovich’s amendment. \textit{See id.} Speaking in agreement with Representative Sweet, and others who opposed the amendment, Mr. Bortner made the following statement:

I think a court can best determine, under the circumstances of each case, who is going to be the most appropriate person to provide the counseling. If the counseling requires a better understanding of the legal proceedings and the legal nature of the case, maybe that is a lawyer. If it concerns the psychological aspects of the victim, maybe that should be a psychologist; perhaps it should be a sexual assault counselor, but I think in each case that ought to be determined based on the facts of that particular case, and the judge is going to be in the best position to determinate that.
\textit{Id.}

\textsuperscript{122.} \textit{See id.} (stating House rejected amendment by vote of 169–21).
\textsuperscript{123.} \textit{See 42 PA. CONS. STAT. ANN. §§ 5981–87 (2014)} (amending sections to further benefit child witnesses and victims).
\textsuperscript{124.} \textit{Id.} The legislative history demonstrates an effort to give judges more discretion as how best to accommodate a child witness.

\textsuperscript{125.} \textit{See H.R. GEN. ASSEMB. LEGIS. J., 188, 50th Sess. (Pa. 2004).} In a statement supporting the 2004 Amendment, Representative Blaum argued that, “[t]his legislation allows children in the most horrible of cases to testify outside of the courtroom setting via closed-circuit television, be it whatever system the judge may direct.” \textit{Id.} Senator Greenleaf spoke in front of the state senate about the bill as well, stating that “[h]e urged] an affirmative vote [on the amendment] so the Pennsylvania courts can finally provide child witnesses and victims who need it with an opportunity to testify free from fear and intimidation.” \textit{S. GEN. ASSEMB. LEGIS. J., 188-979, 48th Sess. (Pa. 2004)}.

\textsuperscript{126.} For a discussion of how courthouse dogs are much more beneficial to the legal system as compared to closed-circuit television, see \textit{infra} notes 172–83 and accompanying text.
V. “COPY CAT?” NO, MORE LIKE “COPY DOG”: PENNSYLVANIA SHOULD BORROW THE WASHINGTON SUPREME COURT’S LEGAL STANDARD WHEN ASSESSING ACCOMMODATIONS FOR CHILD WITNESSES

The proper legal standard for Pennsylvania trial courts to follow to determine whether a courthouse dog may accompany a child witness to the stand should be the one the Washington Supreme Court created in *Dye II*; the prosecution should have the “burden [of proving] that a special dispensation for a vulnerable witness is necessary. . . . However . . . a showing of ‘substantial need’ or ‘compelling necessity’” should not be required.127 Four factors support the use of this standard: Pennsylvania courts’ commitment to protecting defendants’ rights; Pennsylvania’s precedent involving accommodations for testifying child witnesses; amendments to Act 1986-14; and case law subsequent to the enactment of Act 1986-14.128

A. A Defendant’s Best Friend Is Still the Court: Pennsylvania’s Protection of Defendants’ Rights

In Pennsylvania, both the Legislature and the courts have sought to protect defendants’ constitutional rights—especially their right to confront their accuser.129 A year before Act 1986-14 was enacted, Senator James Kelley addressed the Pennsylvania Senate and said he had concerns that the Act contradicted article 1, section 9 of the Pennsylvania Constitution, because permitting a child witness to testify through videotaping (section 5984, later repealed) would prevent the defendant from meeting the witness face-to-face—a specific guarantee in section 9.130 His concern

127. *See Dye II*, 309 P.3d 1192, 1199 (Wash. 2013) (stating legal standard used to determine whether courthouse dog may be permitted).

128. For a discussion on Pennsylvania courts’ commitment to protecting defendants’ rights, see *infra* notes 129–41 and accompanying text. For a discussion of Pennsylvania’s precedent involving accommodations for testifying child witnesses, see *infra* notes 142–53 and accompanying text. For an examination of the amendments to Act 1986-14, see *infra* notes 154–62 and accompanying text. And for a discussion of the case law subsequent to the enactment of Act 1986-14, see *infra* notes 163–70 and accompanying text.


Mr. President, the concern I have about [the bill] is not the objective of the bill at all. I share and concur in the objective of the bill, but I am very concerned about the language and what this bill purports to do in our criminal process in relationship to the Constitution of this Commonwealth. [The Constitution of the Commonwealth] talks about the rights of an accused and specifically it says, ‘In all criminal prosecutions the
was not shared by a majority of the senate, however, and the bill was passed, over his lone dissenting vote.\footnote{131}

The courts have similarly been concerned with protecting a defendant’s rights.\footnote{132} Before the Pennsylvania Constitution was amended in 2004, article I, section 9 of the Commonwealth’s Constitution stated, “In all criminal prosecutions the accused hath a right to . . . meet the witnesses face to face . . . .”\footnote{133} Because of this language, the Pennsylvania Supreme Court had struck down many of the laws permitting children to testify outside the physical presence of the accused for violating article 1, section 9’s “face to face” clause—the exact claim Senator Kelley had made years earlier.\footnote{134}

The 2004 Amendment replaced “meet the witnesses face to face” with “be confronted with the witnesses against him.”\footnote{135} The Legislature’s principal reason for proposing this amendment was that, unlike the Penn-
sylvania Supreme Court, the United States Supreme Court had upheld “laws permitting children to testify in criminal proceedings outside the physical presence of the accused” via closed-circuit television. 136 Thus, 


In Ludwig, the defendant was convicted of rape, incest, endangering the welfare of children, and other sexual offenses against his five-year-old daughter. See Ludwig, 594 A.2d at 282. During the preliminary hearing, the child became “unresponsive to further questioning.” Id. After the State presented a psychologist to testify regarding the child’s fragile emotional and psychological state, the court granted the State’s petition to allow “the child to testify by way of closed circuit television” for both the second preliminary hearing and the actual trial. See id. The Supreme Court of Pennsylvania emphasized the fact that the Pennsylvania Constitution “guarantee[d] an accused the right to meet his accusers,” highlighting in the constitution that, “the accused hath a right . . . to meet the witnesses face to face . . . .” Id. (quoting PA. CONST. art. 1, § 9). The court further cited and agreed with Justice Scalia’s dissent in Maryland v. Craig, which argued against a child using closed-circuit television while testifying, and rejected the Craig majority’s “balancing analysis” to find such accommodation was permissible. See id. at 283. Finding the trial court erred in permitting the child to testify via closed-circuit television solely on the basis of “subjective fears,” the Supreme Court of Pennsylvania stated, “[w]e are cognizant of society’s interest in protecting victims of sexual abuse. However, that interest cannot be preeminent over the accused’s constitutional right to confront the witnesses against him face to face.” Id. at 285. Consequently, the court reversed the defendant’s conviction. See id.

In Louden, the Supreme Court of Pennsylvania “address[ed] the issue left unresolved in [its] recent decisions of” Ludwig and Lohman, “the constitutionality of 42 Pa.C.S. §§ 5984 or 5985(a) since both sections were adopted subsequent to the trials in Ludwig and Lohman.” Louden, 638 A.2d at 953–54. The defendants, who were owners of a daycare center, were convicted for “endangering the welfare of a child.” Id. at 955. Upon finding “good cause,” the trial court permitted the three child-victims to have their testimony videotaped outside the courtroom. See id. The defendants “were not present” in the room with the children but “could observe the child witness and the events from a closed circuit television.” Id. “The videotapes were then shown to the jury during the Commonwealth’s case in chief.” Id. Relying on the analysis and precedent established in Ludwig, the court held: “Because we find that §§ 5984 and 5985(a) fail to limit the use of video tape in closed circuit television to those instances in which the accused’s right to face to face confrontation has been otherwise satisfied, we must hold both provisions unconstitutional.” Id. at 954.

Finally, both Lohman and Ludwig address the same issue: “whether a child sex abuse victim, without appearing in the courtroom, may testify against a defendant via closed-circuit television without violating the confrontation clauses of the United States Constitution and the Pennsylvania Constitution.” Lohman, 594 A.2d
because the amended section 9 is identical to the Sixth Amendment of the United States Constitution, it should permit the Pennsylvania General Assembly to enact laws and allow the Pennsylvania Supreme Court to institute rules permitting alternative methods of testimony for children.\footnote{137}

In \textit{Bergdoll v. Commonwealth},\footnote{138} the constitutionality of this amendment was contested.\footnote{139} The Commonwealth Court of Pennsylvania cited \textit{Craig} in support of the amendment:

“\textit{[A]}lthough face-to-face confrontation forms ‘the core of the values furthered by the Confrontation Clause,’ we nevertheless recognized that it is not the \textit{sine qua non} of the confrontation right.”

Hence, the removal of the ‘face to face’ language from our State Constitution per se does not result in an infringement of federally protected rights.\footnote{140}

at 291. In \textit{Lohman}, the defendant was charged with raping his fourteen-year-old stepdaughter, as well as committing other sexual offenses against his fourteen-year-old son. \textit{Id.} In two separate trials, both the son and daughter testified via closed-circuit television while both the jury and defendant watched from other rooms. \textit{Id.} at 291–92. As part of the accommodation, the defendant was in a separate room with a telephone line directly connected to his counsel. \textit{Id.} The majority, based on its prior holding in \textit{Ludwig}, reversed the defendant’s conviction and held that the testimony presented through closed-circuit television violated the defendant’s rights under the Pennsylvania Constitution’s Confrontation Clause. \textit{See id.} at 292. Repeating its reasoning in \textit{Ludwig}, the court recognized the state’s interest in protecting children involved with sexual abuse but found that it was not a compelling enough interest to permissibly abridge the defendant’s “‘right to confront the witnesses against him face to face.’” \textit{Id.} (quoting \textit{Ludwig}, 594 A.2d at 285).

\footnote{137. See \textit{Bergdoll}, 858 A.2d at 191 (removing face-to-face confrontation requirement in some circumstances). The General Assembly’s explanation for seeking to change the Confrontation Clause in the Pennsylvania Constitution was described in a supplement to the ballot. \textit{See id.} at 190. Besides the Confrontation Clause question, there was a second ballot question asking voters if the Pennsylvania Constitution should be amended to enable the General Assembly to “enact laws regarding the manner by which children may testify in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television” because only the Pennsylvania Supreme Court, under the state’s constitution, was authorized “to make rules governing practice and procedure in the Pennsylvania courts.” \textit{Id.} at 191–92 (quoting, respectively, \textit{Ballot Question 2 (Pa. 2003); Plain English Statement of the Attorney General of Pennsylvania, Ballot Question 2 (Pa. 2003)}). The second question similarly passed and was subsequently added to article V, section 10(c). \textit{See id.} at 189–90. These two questions, and their approval, illustrate that the Pennsylvania Legislature and Pennsylvania’s citizens wanted to protect children involved in the legal system, especially those who experience sexual abuse and other emotionally unnerving incidents.}


\footnote{139. \textit{See id.} at 202 (upholding constitutionality of amendment to Constitution of Pennsylvania, stating “the removal of the ‘face to face’ language from our State Constitution per se does not result in an infringement of federally protected rights”).}

\footnote{140. \textit{Id.} at 202 (quoting \textit{Craig}, 497 U.S. at 847) (explaining that defendants’ rights are still protected after removal of face-to-face clause).}
As the Pennsylvania Supreme Court’s affirmation of the trial court’s analysis illustrates, the amendment still provides defendants with the constitutional right to confront accusers, but it balances this right against the public policy of accommodating children in the judicial system.141

B. New Dog Learning Old Tricks: Pennsylvania Precedent for Court Accommodations

There are numerous Pennsylvania cases in which a child was permitted to testify out of court; however, there are very few Pennsylvania cases that have addressed a testifying child’s use of comfort items or support persons while on the witness stand.142 One such case is Commonwealth v. Pankraz.143 In Pankraz, the defendant was found guilty of corruption of a minor, endangering the welfare of a child, and other offenses, after he sexually abused his daughter repeatedly.144 At the time of trial, the daughter was four-years-old and was permitted “to give testimony while sitting in the lap of” her grandmother.145 Because this was an issue of first impression, the Superior Court of Pennsylvania examined case law from other jurisdictions to evaluate the permissibility of this action.146

In terms of the standards articulated in Dye II, the Pennsylvania Superior Court followed the first type, namely, requiring the defendant to prove prejudice.147 Similar to the cases that the Dye II court cited and categorized under the first legal standard, the Pennsylvania Superior Court found no prejudice in allowing the girl to sit on her grandmother’s lap.148 The Pankraz court neither discussed the prosecutor’s evidence for

141. See id. (finding protection of children favors removal of face-to-face clause).
142. See Commonwealth v. Pankraz, 554 A.2d 974, 979 (Pa. Super. Ct. 1989) (“Moreover, while our research has disclosed no case law in this Commonwealth which passes upon the propriety of allowing a child witness to give testimony while sitting in the lap of an adult, the courts of other jurisdictions have said that in cases involving a child witness, ‘an attendant may be permitted to sit upon the witness stand near the witness, where the attendant is admonished that he [or she] is not permitted to make suggestions to the witness.’” (alteration in original) (quoting LAURA DIETZ ET AL., 81 AM. JUR. 2D, Witnesses § 416)).
144. See id. at 975 (noting defendant was sentenced to two and a half to five years in prison for his crimes). The defendant was also found guilty of “simple assault, indecent assault . . . [and] recklessly endangering another person . . . .” Id. (footnotes omitted).
145. See id. at 979 (upholding conviction because no evidence that grandmother influenced child’s testimony).
146. See id. (examining case law from other jurisdictions, including Nebraska, Texas, Utah, and Indiana).
147. See id. at 980 n.6 (“[T]he record fails to disclose that [defendant] was prejudiced or that the witness’ testimony was influenced by the presence of the grandmother.”).
148. See id.; see also Sperling v. State, 924 S.W.2d 722, 726 (Tex. Ct. App. 1996) (finding child holding teddy bear did not deprive defendant of his constitutional
requesting the child to sit with her grandmother nor examined the record for clear evidence of need. Instead, the court reached its determination because the defendant failed to prove that any of his rights were violated. Thus, due to the child’s young age, the court’s broad discretion, and the difficulty of the topic at issue, the Superior Court held that the trial court did not abuse its discretion in permitting the child to sit on her grandmother’s lap while the child testified. However, the Superior Court cautioned that even though it did not find an abuse of discretion, this did not mean that a child would always be permitted to sit on an adult’s lap in the future. Thus, in Pankraz, it was the defendant’s burden to prove that such special accommodation prejudiced him.

C. A New Breed: Amendments to Act 1986-14 and Subsequent Case Law Bolster Support for Child Witnesses

Even though Pankraz suggests Pennsylvania places the onus on defendants in witness accommodation situations, three events suggest a different standard: (1) the 1996 Amendment to Act 1986-14; (2) the 2004 amendment to the Pennsylvania Constitution; and (3) subsequent case law upholding the Pennsylvania Constitution’s 2004 amendment and denying an absolute right to face-to-face confrontation.

1. Amendments to Act 1986-14 and the Pennsylvania Constitution

In 1996, the Pennsylvania General Assembly amended several of Act 1986-14’s sections, suggesting a shift of burden from the defendant to the prosecution. In particular, section 5981, which describes the policy right of confrontation because “nothing . . . in the record” illustrated teddy bear had any effect on “minds and hearts of the jury”).

149. See Pankraz, 554 A.2d at 979 (finding child’s testimony was uninfluenced by grandmother’s presence).

150. See supra note 147 (describing defendant’s rights were not violated).

151. See Pankraz, 554 A.2d at 979–80 (relaying on fact that “[t]he child at all times was visible to the Court, the jury and the defendant, and at no time did the grandmother speak to the child”).

152. See id. at 980 n.6 (“[W]e do not thereby place this Court’s imprimatur on a general practice which permits children to testify while sitting in the lap of an adult. Such a practice is fraught with danger and is not to be encouraged.”).

153. See id. at 980 (noting burden was not met because “[n]o rights of the defendant were infringed upon”).

154. Pankraz was decided in 1989, the year before Craig and just three years after Pennsylvania’s child victims and witnesses statutes were enacted. Thus, with the advent of the Craig court’s analysis, which developed a more “practical” balancing test to determine the permissibility of special accommodations, the Pennsylvania Legislature’s movement to protect child witnesses, and the Act’s associated amendments, one can see the “shedding” of prior reasoning for analysis more in line with the Dye II court’s reasoning. See Commonwealth v. Williams, 84 A.3d 680, 695 (Pa. 2014) (comparing Supreme Court’s analysis in Craig and Crawford and describing approach used in Craig as “more pragmatic” and “balancing-based”).

155. See Child Victims and Witnesses Act, S.B. 1322, 1996 Pa. Legis. Serv. Act 1996-161 (West) (adding both a “necessity” prerequisite to be proven before spe-
The section in the child victims and witnesses statutes, was amended to include a “necessity” prerequisite—the court could only allow special procedures to protect testifying children when “necessity [was] shown.” To prove this necessity element under the amended act, the prosecution had to present evidence that the child witness was suffering from serious emotional distress.

Then, in 2004, the Pennsylvania Constitution was amended to replace the face-to-face clause with the federal-equivalent “confronted with the witnesses” clause. With subsequent cases, such as Commonwealth v. Charlton and Commonwealth v. Williams, the Pennsylvania courts have shifted the burden from the defendant, as apparent in Pankraz, to the prosecution. However, just like the Washington Supreme Court, the

156. See id. § 5981 (West amended 2004) (”[T]he General Assembly declares its intent . . . to provide [children who are material witnesses to or victims of crimes], where necessity is shown, procedures which will protect them during their involvement with the criminal justice system.”).

157. See id. § 5985(a.1) (describing process to determine if child will suffer serious emotional distress when testifying in courtroom).

158. For a further discussion of the 2004 Amendment, see supra notes 135–41 and accompanying text.

159. 902 A.2d 554 (Pa. Super. Ct. 2006) (allowing child to testify via closed-circuit television). The defendant in Charlton was arrested and subsequently found guilty of several sexual offenses against his daughter over approximately a three-year span. See id. at 559. The court held a pre-trial hearing to determine whether the child “should be permitted to testify via a contemporaneous alternative method.” Id. To prove the emotional distress the child would experience if required to testify in open court, “the Commonwealth presented the expert testimony” from a psychotherapist who had interacted with the child previously. Id. The psychotherapist testified that the child “suffered from depression, suicidal thoughts, and post-traumatic stress disorder which likely would impact her ability to testify effectively” and having her testify in front of the defendant “pose[d] a significant risk for her emotional wellbeing.” Id. The Superior Court held that the evidence was sufficient to prove the “‘closed circuit television testimony was both necessary and a reasonable alternative.’” Id. (quoting trial court opinion).


161. See id. at 691 (finding child testimony via closed-circuit television to be appropriate for preliminary hearing). In Williams, the Commonwealth charged the defendant with several sexual offenses for his alleged actions upon an eight-year-old girl. See id. at 682. The child “indicated that she would be too afraid of [the defendant] to talk about what had happened to her if he were present in the courtroom,” so the Commonwealth moved to permit the child to testify by closed-circuit television. Id. at 682–83. At the preliminary hearing, the trial court requested, and the prosecution presented, a licensed psychologist to proffer her opinion about the girl’s emotional state. See id. at 683. Based on the conversations the psychologist had with the child, the psychologist “opined that the child would not be able to testify in the presence of [the defendant] . . . .” Id. The defense wanted to confirm the child’s emotional distress with his own expert. See id. The Commonwealth argued that section 5985 did not give the defendant a right to present evidence “‘to rebut the Commonwealth’s evidence in support of its motion . . . to allow a child witness to testify in a room separate from courtroom
Pennsylvania courts have not imposed a “substantial need” hurdle for witness accommodations.\textsuperscript{162}

2. Commonwealth v. Williams

Subsequent to the changes in article 1 of the Pennsylvania Constitution, and keeping the United States Supreme Court’s \textit{Craig} analysis in mind, Pennsylvania courts began permitting child witnesses to testify through closed-circuit television.\textsuperscript{163} Recently, in \textit{Williams}, the Supreme Court of Pennsylvania thoroughly examined section 5985 and described both the policy behind the section and the proper procedure for deter-

\textit{proceedings[.]”}\footnote{Id. at 684 (quoting Commonwealth v. Williams, 47 A.3d 1173, 1173 (Pa. 2012) (per curiam) (granting allowance of appeal)).} The Supreme Court of Pennsylvania analyzed section 5895, Pennsylvania case law, and the United States Supreme Court’s \textit{Craig} decision in \textit{Craig} to determine the rights a defendant had under the Pennsylvania Constitution. \textit{See id.} at 684–87. Once again, the Pennsylvania Supreme Court applied the \textit{Craig} Court’s interpretation of the Confrontation Clause to the Pennsylvania Constitution, specifically reaffirming that important public policy considerations can supersede the defendant’s right to face-to-face confrontation, demonstrating the Pennsylvania Supreme Court’s acceptance of alternative methods of testimony when adequate need is shown. \textit{See id.} at 684–85. Thus, addressing the issue at hand, the Pennsylvania Supreme Court determined that the defendant’s “right to be confronted at the preliminary hearing by the minor victim would not be violated by her testifying under oath via closed-circuit television because [the defendant] retain[ed] the opportunity to cross-examine her via his counsel” and both the defendant and jury were still able to observe the child “throughout her testimony.” \textit{Id.} at 687. Consequently, the court held that “a defendant does not have a right to present informed expert testimony to rebut the Commonwealth’s evidence in support of its motion pursuant to 42 Pa.C.S. § 5895 to allow a child witness to testify in a room separate from courtroom proceedings.” \textit{Id.} at 691. As \textit{Williams} demonstrates, by only requiring the prosecution to show necessity for an alternative mode of testimony for the child, and prohibiting the defense from “probing” to rebut the prosecution’s evidence, the court wants to protect child witnesses and minimize their stress from being involved in the criminal justice system as much as possible.

162. In \textit{Williams}, the Supreme Court of Pennsylvania recognized that the trial court must find “necessity” in order to allow a child to testify via contemporaneous alternative method” but never explicitly requires a “substantial” need as found in \textit{Gomez v. State}, 25 A.3d 786 (Del. 2011) and \textit{State v. Palabay}, 844 P.2d 1 (Haw. Ct. App. 2013). Illustrative of this \textit{less than compelling need} standard, the Pennsylvania Supreme Court specifically noted that section 5985 does not require expert testimony “to establish a finding of ‘serious emotional distress’” in order to permit the child to testify via alternative mediums. \textit{Williams}, 84 A.3d at 688. Instead, the court can perform its own investigation, and it can also hear testimony from the “child’s parent or custodian or any other person” about the emotional distress the child would experience if required to testify in front of the defendant. \textit{Id.}

163. \textit{See, e.g., Charlton}, 902 A.2d at 559 (agreeing that child-victim was permitted “to testify via closed-circuit television” after court determined such accommodation was “necessary and a reasonable alternative” (quoting trial court opinion)); \textit{see also Commonwealth v. Kemmerer}, 33 A.3d 39, 41 (Pa. Super. Ct. 2011) (finding testifying via contemporaneous alternative method to be proper because child would “suffer serious emotional distress that would substantially impair his ability to reasonably communicate” if required to testify in defendant’s presence).
mining if a child should be permitted to testify through closed-circuit television. The Pennsylvania Supreme Court found the “confrontation elements” necessary to ensure a defendant’s right to a fair trial when a child testifies from outside the courtroom, as articulated in Craig, were present in section 5985. The court continued to didactically analyze section 5985 and concluded that the statute properly required the court to balance the state’s interest in protecting the child with the defendant’s right to confront the child witness.

In response to the defendant’s argument that “he had the right to present testimony of an expert witness to rebut the Commonwealth’s evidence,” which supported its motion to permit the child to testify outside the presence of the defendant, the court announced, “[i]t is of no small import that expert testimony is not required to establish a finding of ‘serious emotional distress.’” Following the Craig Court’s analysis, the Pennsylvania Supreme Court emphasized that the right to face-to-face confrontation was not absolute when important public policy considerations, especially those involving children, were “at stake.” Consequently, the court held the “defendant [did] not have a right to present informed expert testimony to rebut” the prosecutor’s evidence in support of a section 5985 motion to permit a child witness to testify via closed-circuit television.

164. See Williams, 84 A.3d at 689 (“Section 5985 sets forth circumstances under which face-to-face confrontation of child victims/witnesses may be eliminated, but it preserves the crucial confrontation elements of oath, full cross-examination, and observation by judge, jury, and defendant.”).

165. See id. (“The interests of the accused are protected by Section 5985’s mandates preserving the crucial confrontation elements of oath, full cross-examination, and observation of the child witness by judge, jury, and defendant.”).

166. See id. at 688 (finding section 5985 “balances the state’s interest in protecting a child who is the victim of a crime against the constitutional interest of the accused in confronting the witnesses against him or her”).

167. See id. at 681–82, 688 (“[T]he General Assembly employed the term ‘serious emotional distress’ in its plain, common sense, lay meaning, and did not intend to imply a specific mental health diagnosis, condition, or prognosis which could only be established by the testimony of a psychologist, psychiatrist, or other mental health expert.”). The Pennsylvania Supreme Court explained that the trial court must first “engage in a practical inquiry” and then reach a decision based “on evidence presented to it.” Id. at 688 (quoting 42 Pa. Cons. Stat. § 5985(a.1)). Moreover, section 5985(a.1) describes the “evidentiary options” a judge has to determine whether a contemporaneous alternative method of testimony is proper under the circumstances. See id. In particular, the statute permits the judge to both “observe and question the child” and “[h]ear testimony of a child’s parent or custodian or any other person” who could provide clear evidence supporting the need for the particular child to testify outside the defendant’s presence, such as a “medical professional or therapist.” Id. at 682, 688.

168. See id. at 689 (“[T]he preference for face-to-face confrontation must give way to public policy considerations and the necessities of the case when important public policy concerns, such as the protection of children, are at stake, and the reliability of the testimony in question is otherwise assured.”).

169. See id. at 691 (allowing child testimony to take place “in a room separate from courtroom proceedings”).
Taking into consideration the Pennsylvania courts' commitment to protecting a defendant’s right to a fair trial, Pennsylvania’s precedent involving accommodations for child witnesses while at the witness stand, amendments to Act 1986-14, and subsequent case law, the proper legal standard trial courts should use when assessing the permissibility of courthouse dogs at the witness stand is the Washington Supreme Court’s standard created in Dye II.\(^\text{170}\)

VI. WHY PENNSYLVANIA COURTS SHOULD ROLL OVER FOR THE LESS STRINGENT STANDARD

Besides the abovementioned reasons for using the legal standard the Washington Supreme Court established in Dye II to assess the courthouse dog accommodation for a child witness, further support can be garnered for this standard by comparing closed-circuit television to courthouse dogs and by also examining how the program would further current legislative policy.\(^\text{171}\)

A. Comparing the Courthouse Dog Program to the Closed-Circuit System

The legal standard for permitting dogs with a testifying child should be less onerous on the prosecution than when the prosecution moves for testifying via closed-circuit television because of courthouse dogs’ unique qualities as tools for the judicial system.\(^\text{172}\) Closed-circuit television directly interferes with the defendant’s right to face his accuser, and courts have to balance the interests of both sides before deciding if the alternative medium of testimony is appropriate.\(^\text{173}\) Upon adequate proof that a child witness will be unable to testify inside the courtroom in front of the defendant, the child is taken to a separate room where the child’s testimony is broadcast via closed-circuit television to the courtroom, where the jury and defendant remain.\(^\text{174}\) Many defendants believe this practice

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170. For a description of the Washington Supreme Court’s legal standard for permitting special accommodations for witnesses, see supra notes 50–57 and accompanying text.

171. For a comparison of closed-circuit television to courthouse dogs, see infra notes 172–83 and accompanying text. For a discussion about how the program would further current legislative policy, see infra notes 184–91 and accompanying text.

172. See Holder, supra note 2, at 1178 (describing why defendant may prefer courthouse dog to closed-circuit television or another alternative method of testimony); Weems, supra note 5, at 126 (same).

173. See 42 Pa. Cons. Stat. Ann. § 5985 (West 2014); see also Holder, supra note 2, at 1182 (inferring closed-circuit television prevents defendants from confronting witnesses face-to-face).

174. See Closed-Circuit Television Statutes, supra note 52, at 1 (describing how closed-circuit television accommodations work).
abridges their rights to face their accusers directly, regardless of whether the closed-circuit television is one-way or two-way.\textsuperscript{175}

Even though the Williams court approved the statutory construction of section 5985, the idea of dismissing a constitutional right is unsettling.\textsuperscript{176} In his dissent, Pennsylvania Supreme Court Justice Thomas G. Saylor identified a more recent United States Supreme Court decision that reasserted the defendant’s right to physical confrontation with the accuser, Crawford v. Washington.\textsuperscript{177} In Crawford, “the Supreme Court entirely revamped the judicial understanding of [the Confrontation Clause] . . . in favor of the more formalistic reading of the Sixth Amendment provision,” instead of “the more pragmatic, balancing-based approach applied” in Craig.\textsuperscript{178} The Supreme Court in Crawford “explain[ed] that the constitu-


\textsuperscript{176} See Commonwealth v. Williams, 84 A.3d 680, 695–96 (Pa. 2014) (Saylor, J., dissenting) (“[T]here is much uncertainty in Sixth Amendment Confrontation Clause jurisprudence . . . . [Moreover,] there should be little question that statutory provisions delineating methods for propounding testimony against an accused other than via face-to-face confrontation operate in a very sensitive area of constitutional law.”).

\textsuperscript{177} See Crawford v. Washington, 541 U.S. 36 (2004) (barring out-of-court testimonial statements made by defendant’s wife). The defendant in Crawford “stabbed a man who allegedly tried to rape his wife . . . .” Id. at 38. Because of the state of Washington’s marital privilege, “which generally bars a spouse from testifying without the other spouse’s consent,” the defendant’s wife did not have to testify against her husband. Id. at 40. However, because the State considered the wife “unavailable” due to the marital privilege, “the State sought to introduce [the wife’s] tape-recorded statements to the police as evidence that the stabbing was not in self-defense,” contrary to the husband’s claims. Id. The trial court admitted the recorded statements, and the defendant was ultimately convicted of assault. See id. at 40–41. Examining the historical purpose behind the Sixth Amendment, the United States Supreme Court followed a strict interpretation of the Sixth Amendment: “The historical record [ ] supports . . . that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Id. at 53–54. The Supreme Court thus reversed the defendant’s conviction and held that the admission of the wife’s recorded statements violated the defendant’s confrontation rights under the Sixth Amendment. See id. at 68. The majority concluded, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Id. at 68–69. Some scholars fear that this interpretation could limit the alternative methods of testimony children can use during the legal process. See, e.g., Holder, supra note 2, at 1162 (addressing effect Crawford can have on child witnesses). But see, e.g., Closed-Circuit Television Statutes, supra note 52 (distinguishing Crawford from Craig).

\textsuperscript{178} Williams, 84 A.3d at 695–96 (Saylor, J., dissenting) (“[T]he Supreme Court entirely revamped the judicial understanding of [the Confrontation Clause] in Crawford, jettisoning . . . pragmatism . . . in favor of the more formalistic reading of the Sixth Amendment provision.”).
tional text ‘is most naturally read as a reference to the right of confronta-
tion at common law,’ with ‘[t]he common-law tradition [being
understood as] one of live testimony in court subject to adversarial
testing.’”

Despite potential difficulties in accommodating child witnesses after
the United States Supreme Court’s decision in Crawford, the direct con-
frontation concern addressed in Crawford is mitigated with the use of
courthouse dogs. Importantly, the child witness can remain inside the
courtroom because the child feels comfortable testifying with the dog by
his or her side. Using a courthouse dog thus meets all of the Confron-
tation Clause’s essential requirements described in both Craig and Craw-
ford and also permits the defendant to face the accuser physically, meaning
these dogs offer less interference with defendants’ rights than closed-cir-
cuit television or alternative contemporaneous transmission methods.
Therefore, with Williams in mind, the standard of acceptance for cour-
thouse dogs should not be any more stringent than the test used to permit
closed-circuit television testimony.

B. Man and Man’s Best Friend Align: Courthouse Dogs Further the Policy of
the Child Victims and Witnesses Statutes

One last reason why Pennsylvania should use the Dye II standard is
because it is aligned with the overall policy stated in section 5981. The
Pennsylvania Legislature’s purpose behind the child witness and victims
statutes is to protect individuals under eighteen years old “during their

179. See id. at 696 (alterations in original) (quoting Crawford, 541 U.S. at 43,
54) (reaffirming importance of face-to-face confrontation at trial).
180. See Holder, supra note 2, at 1178 (describing why defendant may prefer
courthouse dog to closed-circuit television or another alternative method of testi-
mony); Weems, supra note 5, at 126 (same).
181. See Dellinger, supra note 2, at 176–78 (explaining calming effect dogs
can have on testifying children and how using courthouse dogs can enable chil-
dren to be “present and testify in open court”); Holder, supra note 2, at 1179 (“Un-
like closed-circuit television or videotaped testimony, court facility dogs allow a
witness to testify in court and face the defendant.”); Weems, supra note 5, at
126–29 (describing how dogs can comfort children while testifying).
182. See Crawford, 541 U.S. at 68 (holding no opportunity to cross-examine
witness is “alone [ ] sufficient to make out a violation of the Sixth Amendment”);
that serve[ ] the purposes of the Confrontation Clause[;]” witness must be phys-
ically present, take statements under oath, be subject to cross-examination, and be
observable “by the trier of fact”); Holder, supra note 2, at 1162 (identifying two key
elements under Crawford to permit out-of-court statements: “witness is unavailable
to testify in court” and “defendant previously had an opportunity for cross-
examination”).
183. See supra note 182 (providing reasons why courthouse dogs are less detri-
mental to defendants’ rights than other alternative accommodations).
184. See supra note 94 (providing text of statute, which describes the policy of
Pennsylvania’s child victims and witnesses statutes).
involvement with the criminal justice system." As a result, children are given unique privileges and assistance that adults are not similarly entitled to, such as creating “an exception to the hearsay rule” and alternative mediums for testifying. This idea was even codified in the first version of Act 1986-14, in section 5981, when the General Assembly included a clear distinction that children required different treatment than that of adults; however, that language was later removed.

In addition, the 2004 Amendment to the Act replaced the word “closed-circuit television” with “contemporaneous alternative method.” By rephrasing the term, courts now have more ways to make a testifying child feel comfortable, which will hopefully make it easier for the child to provide more truthful, coherent testimony. This amendment demonstrates how Pennsylvania’s Legislature is forward thinking and willing to adapt to changes in society. Overall, the use of courthouse dogs would fit neatly into this subsection of title 42 because the dogs would be an additional resource to effectively protect children within the criminal justice system.

185. 42 PA. CONS. STAT. ANN. § 5981 (West 2014) (describing why Legislature implemented corresponding statutes to accommodate child victims and witnesses).

186. See Commonwealth v. Louden, 803 A.2d 1181, 1185 & n.5 (Pa. 2002) (describing legislative effort to protect and help child victims); see also 42 PA. CONS. STAT. ANN. § 5985 (permitting alternative methods of testimony for children in certain circumstances); id. § 5986 (providing hearsay exception for children); supra note 111 (describing statutes that allow support persons to accommodate children outside of courtroom).


In order to promote the best interests of the children of this Commonwealth and in recognition of the necessity of affording to children who are material witnesses to or victims of crimes additional consideration and different treatment from that of adults, the General Assembly declares its intent, in this subchapter, to provide these children with additional rights and protections during their involvement with the criminal system.


188. See supra notes 124–25 and accompanying text (describing change between terms).

189. See Holder, supra note 2, at 1164 (“Courts consistently conclude that the benefit of clear and coherent testimony outweighs any potential prejudicial effect of a comfort item on the defendant’s right to a fair trial.”).

190. See supra note 125 and accompanying text (describing how changing term further protects and helps testifying children).

191. See Debra S. Hart-Cohen, Canines in the Courtroom, GP SOLO MAGAZINE, July/Aug. 2009, at 55, available at https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/caninesincourtroom .html (“[P]rosecutors and judges are finding that the presence of a well-trained dog aids witness testimony by providing the victim with emotional support and comfort both in the witness room and in the courtroom.”).
VII. CONCLUSION: WAG MORE, CRY LESS

Courthouse dogs have been used in Pennsylvania for many years in various capacities; however, one of their more controversial uses has been in the context of a criminal trial. Defendants have argued about prejudice, interference with their rights under the confrontation clause, distraction, and legislative decision-making when the state has sought to use a courthouse dog. In the recent Pennsylvania Supreme Court case of Williams, the court approved the current procedure that permits closed-circuit television testimony. Using more of a balancing test than a strict analysis of the confrontation clause, the court emphasized the need to ensure the policy goal of protecting children involved in the criminal justice system. As a result of the analysis articulated in Williams, combined with amendments to the Pennsylvania Constitution and Act 1986-14, the proper legal standard Pennsylvania courts should use is the one that the Washington Supreme Court implemented in Dye II, which requires the prosecution to prove that the courthouse dog would be necessary, but not to the extent of a "compelling need," for the child to testify in the courtroom. Because the policy behind enacting Act 1986-14 was to further protect and assist children potentially overwhelmed and terrified in the judicial system, courthouse dogs would be a beneficial tool to further this end and still protect the defendant’s rights to a fair trial.

192. See supra note 28 and accompanying text (providing discussion on controversy surrounding use of courthouse dogs in trial setting).
193. See Holder, supra note 2, at 1169–74 (describing claims defendants have brought against use of courthouse dogs).
195. See id. at 689 (“[T]he preference for face-to-face confrontation must give way to public policy considerations and the necessities of the case when important public policy concerns, such as the protection of children, are at stake, and the reliability of the testimony in question is otherwise assured.”).
196. For a discussion of the legal standard the Washington Supreme Court created in Dye II, see supra notes 50–57.
197. See 42 PA. CONS. STAT. ANN. § 5981 (West 2014) (describing policy of statutes that accommodate child victims and witnesses); Hart-Cohen, supra note 191, at 57 (“And victims are not the only ones benefiting from these new programs. Judges, lawyers, victim advocates, and court staff—all those who deal on a daily basis with the often-horrible consequences of crime—can find their morale boosted through the presence of dogs in court.”).
WHAT TO EXPECT WHEN SOMEONE IS EXPECTING FOR YOU:
NEW JERSEY NEEDS TO PROTECT PARTIES TO
GESTATIONAL SURROGACY AGREEMENTS
FOLLOWING IN RE T.J.S.

MELISSA RUTH*

“Today, it is not uncommon for couples unable to conceive a child to
turn to assisted-reproductive technology. The promise of this new tech-
nology, to be sure, comes with the potential for its abuse. The State un-
questionably is empowered to regulate this area of human affairs.”1

I. CONCEIVING NEW WAYS TO BE A PARENT: AN INTRODUCTION TO
SURROGACY AGREEMENTS

Technological advancements in reproductive technology have pro-
pelled surrogacy into the public eye as an option for those who would not
otherwise be able to have children, including same-sex couples and heter-
osexual couples facing either infertility problems or potential high risk
pregnancies.2 Surrogacy gives these couples the option to have children
to whom they have a genetic connection.3 While surrogacy is a growing

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Pennsylvania State University. I would like to thank all of my family and friends
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publication of this Note.

omitted) (discussing surrogacy agreements).

2. See Caitlin Conklin, Note, Simply Inconsistent: Surrogacy Laws in the United
States and the Pressing Need for Regulation, 35 WOMEN’S RTS. L. REP. 67, 67 (2013)
(explaining surrogacy has become mainstream due to celebrities using surrogates,
as well as television shows and books representing surrogacy in pop culture).

Doctors at fertility clinics treat “plumbers, schoolteachers and lawyers” as
well as patients whose desire for children has been hampered by psycho-
logical problems, life-threatening diseases, or crippling accidents.
Among the fastest growing clientele are single mothers, lesbians, and
gays—driven less by infertility than by the absence of a willing or viable
reproductive partner.

J. Herbie Difonzo & Ruth C. Stern, The Children of Baby M., 39 CAP. U. L. REV. 345,
351 (2011) (footnote omitted).

HUFFINGTON POST (June 20, 2012, 11:53 AM), http://www.huffingtonpost.com/
fred-silberberg/surrogacy_b_1610804.html (“Surrogacy affords the opportunity of
a dream-come-true for couples and individuals hoping to become parents but face
the burdens of infertility or other health issues which make pregnancy and delivery
dangerous or impossible. It enables you to welcome a child into the world who is
truly your own and continue the miracle of your family lines.”).
practice, it remains highly unregulated, or at least very inconsistently regulated. 4

Surrogacy is frequently featured in headlines for both positive and negative experiences. 5 News stories often share many joyful experiences with surrogacy, including many notable celebrities who have taken part in the growing fertility option. 6 Unfortunately, some people face difficulties with surrogacy agreements where regulations are lacking or nonexistent. 7

Despite some negative attention, when properly regulated, surrogacy can be a great opportunity to start families for those who cannot conceive.

4. See Conklin, supra note 2, at 68–69 (discussing various state laws on surrogacy throughout the country). Conklin asserts that surrogacy laws vary greatly from state to state within the United States. See id. (discussing laws from state to state). She finds three categories of regulation: states that have no statute regarding surrogacy agreements, have a complete ban on surrogacy agreements, or have a statute limiting enforcement of the agreements to gestational carrier agreements. See id. (finding three categories of laws states use to deal with surrogacy).

5. See, e.g., Kirthana Ramisetti, Sherri Shepherd’s Surrogate Gives Birth to Baby Boy: Report, N.Y. DAILY NEWS (Aug. 5, 2014, 5:22 PM), http://www.nydailynews.com/entertainment/gossip/sherri-shepherd-surrogate-birth-report-article-1.1892957 (explaining divorce dispute regarding surrogacy arrangement). Sherri Shepherd recently gained media attention due to her messy divorce and a dispute with her husband regarding the surrogacy agreement that the couple entered into during their marriage. See id. Despite reports that Shepherd did not want to be listed as the child’s mother, and did not seek custody over the child, her ex-husband nevertheless sought child support from her for the child. See id.

6. See, e.g., Leigh Blickley, Celebrities Who’ve Used Surrogates to Conceive (PHOTOS), HUFFINGTON POST (Feb. 6, 2013, 4:28 PM), http://www.huffingtonpost.com/2013/02/06/celebrities-who-have-used-surrogates_n_2624998.html (listing celebrities who have used surrogates to have children and report great experiences with surrogacy process, including Giuliana Rancic, Elton John, and Sarah Jessica Parker). Additionally, surrogacy has been featured in popular culture, such as in the television show The New Normal, which has also helped make surrogacy seem more commonplace. See Conklin, supra note 2, at 67 (discussing ways surrogacy has become more mainstream).


First, in July, Thai media publicized that a couple from Australia abandoned one of their twins born from a surrogate in Thailand because the baby, “Baby Gammy,” had Down syndrome, but the couple nonetheless took the healthy twin home. See id. (discussing couple’s choice to use surrogate in Thailand due to Australia’s prohibition on surrogacy). Most recently, reports of a twenty-four-year-old Japanese man fathering up to sixteen babies through surrogacy caused international outrage. See id. (stating that motivation for man entering surrogacy agreements was unknown). Due to the numerous problems, Thailand put a temporary ban on surrogacy, and surrogate children were thus unable to leave the country with their intended parents. See id. (discussing actions taken to prevent more problems in future).
on their own. Estimates suggest that over 22,000 children have been born through surrogates so far in America, many of which fortunately occur without dispute.

There are two different types of surrogacy agreements: traditional and gestational. In traditional surrogacy, the surrogate is artificially inseminated using her own egg and the intended father’s sperm (or in some situations, a donor sperm). In gestational surrogacy, the surrogate is impregnated through in vitro fertilization, so she has no genetic connection to the child. Therefore, in a typical gestational surrogacy situation, there can be as many as five different people with potential parental rights

8. See Difonzo & Stern, supra note 2, at 348 (discussing how use of reproductive technologies has changed how families are started).

9. See id. at 359 (discussing bond between intended parents and gestational carriers). Difonzo and Stern explain that “[w]hen treated with ‘respect, honor and care,’ surrogates find that it is their bond with the intended parents, not with the baby, that is of the utmost value.” Id. (footnote omitted) (quoting Karen Busby & Delaney Vun, Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Motherhood 32 (2009) (unpublished manuscript), available at http://claradoc.gpa.free.fr/doc/329.pdf) (describing relationship between intended parents and surrogates). They also point out that surrogate mothers typically want to have good relationships with the intended parents to make the experience more rewarding and to have what she is doing for the couple “‘celebrated and acknowledged.’” See id. at 358 (quoting LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 136 (2007)) (discussing intended parents’ relationships with their surrogate mothers).

10. See Mark Hansen, As Surrogacy Becomes More Popular, Legal Problems Proliferate, ABA J. (Mar. 1, 2011, 11:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/ (stating not many reliable statistics exist on surrogacy due to lack of studies or tracking, but at least one statistic suggests as many as 22,000 children have been born using surrogacy); see also Difonzo & Stern, supra note 2, at 356 (“Although surrogates admit that separating from the baby ‘is still the hardest part of the job,’ they rarely refuse to relinquish a child after giving birth.” (footnote omitted) (quoting Lorraine Ali & Raina Kelley, The Curious Lives of Surrogates, NEWSWEEK (Apr. 7, 2008))).

11. See Leora I. Gabry, Note, Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme, 45 COLUM. J.L. & SOC. PROBS. 415, 418–19 (2012) (“In a traditional surrogacy arrangement, the surrogate’s egg is fertilized using artificial insemination, resulting in a genetic relationship between the carrier and the child. . . . Gestational surrogacy, which involves implanting the surrogate with an embryo via in vitro fertilization (IVF), eliminates the biological relationship between the surrogate and the child.”).


13. See Gabry, supra note 11, at 419 (finding gestational surrogacy more commonly used today). For in vitro fertilization, fertilization of the egg occurs outside of the body, and the embryo is subsequently implanted in the uterus. See Garrison, supra note 12, at 848–49. Thus, the carrier does not necessarily have a genetic connection to the child. See id. (explaining how in vitro fertilization works).
to a child: the intended parents (the person or couple who plans to keep and raise the child), people with a genetic relation to the child (a sperm donor and/or an egg donor), and the surrogate mother who carries the child to term.\textsuperscript{14}

When problems arise regarding surrogacy agreements, state legislatures and a non-existent regulatory framework are usually to blame.\textsuperscript{15} With potentially five different people involved in bringing a child into the world, courts have struggled to determine who should be the legal parents of these children.\textsuperscript{16} Some laws, like New Jersey’s, remain unchanged by advancing technology and only allow the woman who gives birth to a child to be the child’s legal mother.\textsuperscript{17}

In In re T.J.S.,\textsuperscript{18} the New Jersey Supreme Court, in a divided decision, failed to give any clear guidance on the matter.\textsuperscript{19} In T.J.S., the court reinforced New Jersey’s law, finding compensated surrogacy agreements unen-

\begin{itemize}
  \item \textsuperscript{14} See Craig Dashiell, Note, From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy, 65 RUTGERS L. REV. 851, 855 (2013) (listing all individuals who can be considered in determining parental rights as part of gestational surrogacy agreement). Intended parents, genetic parents, and the birth mother can all potentially assert parental rights to the child. \textit{See id.} (discussing confusion over who to name as legal parents).
  \item \textsuperscript{15} See In re T.J.S., 54 A.3d 263, 266 (N.J. 2012) (Hoens, J., concurring) (explaining that Legislature, instead of courts, should address surrogacy issues). As a general matter, gestational surrogacy remains highly unregulated. \textit{See Dashiell, supra} note 14, at 859–60. No federal statute or case law exists to provide guidance, and the state laws vary significantly. \textit{See id.} (asserting that issue of surrogacy is ripe for Supreme Court’s review).
  \item \textsuperscript{17} \textit{See N.J. STAT. ANN. §} 9:17-41(a)–(b) (West 2013) (defining mother and child relationship based only on who gave birth to child). The statute specifies: “[t]he parent and child relationship between a child and [ ] [t]he natural mother, may be established by proof of her having given birth to the child, or under P.L. 1983 . . . .” \textit{See id.} § 9:17-41(a). The act proceeds to list the numerous ways that legal fatherhood can be determined, after listing only the birth mother as being proper to establish a mother and child relationship. \textit{See id.} § 9:17-41(a)–(b) (providing multiple ways that men can be deemed legal fathers but only one way for women to be recognized as legal mothers).
  \item \textsuperscript{18} 54 A.3d 263 (N.J. 2012) (per curiam).
  \item \textsuperscript{19} \textit{See id.} at 263 (affirming Appellate Division’s ruling due to equally divided court). The Appellate Division found no violation of the New Jersey Constitution’s Equal Protection Clause in the differences between the presumptions of paternity and maternity. \textit{See In re T.J.S.}, 16 A.3d 386, 393 (N.J. Super. Ct. App. Div. 2011) (dismissing equal protection claims). “Where, however, only one of the spouses is infertile, an equal protection claim has not been articulated because their respective situations are not parallel and the Legislature is entitled to take these situational differences into account in defining additional means of creating parenthood.” \textit{Id.} at 398. The Appellate Division also found that, under the Par-
forceable. The court also dismissed claims of gender discrimination, allowing a presumption of parentage for infertile men but not for infertile women. Further, Governor Chris Christie vetoed a bill that would have allowed and regulated gestational surrogacy agreements, a few months prior to the Supreme Court’s decision in T.J.S. 

This Note disagrees with the New Jersey Supreme Court’s dismissal of gestational surrogacy agreements under the New Jersey Parentage Act, and it argues that legislation must be passed to enforce and regulate gestational carrier agreements and to alleviate the state’s public policy concerns. Part II provides an overview of surrogacy law in New Jersey.
leading up to the case of T.J.S. 24 Next, Part III sets out the facts and holdings of T.J.S. 25 Part IV then analyzes the court’s reasoning. 26 Part V concludes by asserting that legislation is needed in New Jersey to protect the rights of all parties involved in gestational surrogacy agreements. 27

II. PREPARING FOR THE NEW ARRIVAL: THE LAW LEADING UP TO T.J.S.

The law regarding the enforcement of surrogacy agreements in New Jersey prior to T.J.S. was ambiguous. 28 While no state law prohibits surrogacy, New Jersey courts have rarely enforced surrogacy agreements and have consistently refused to enforce compensated surrogacy agreements. 29 While many hoped the Legislature’s consideration of the issue in 2012 would provide a solution, Governor Christie vetoed the bill, stopping progress in its tracks. 30

A. Baby-proofing the State: Surrogacy Cases in New Jersey

First surfacing in the 1970s, surrogacy contracts proliferated, provoking questions regarding their legality.31 In In re Baby
the Supreme Court of New Jersey famously became the first court to consider the validity of surrogacy agreements. The Baby M case featured plaintiffs Mr. and Mrs. Stern, who entered into a traditional surrogacy agreement with Mrs. Mary Beth Whitehead, their surrogate. Mrs. Whitehead became pregnant through in vitro fertilization using Mr. Stern’s sperm and Mrs. Whitehead’s own egg.

The surrogacy agreement between the plaintiffs and the surrogate stated that Mrs. Whitehead would terminate her maternal rights after the child was born. Additionally, the agreement stipulated that Mr. Stern would pay Mrs. Whitehead $10,000 after the child was born and in his custody. The agreement also provided that Mr. Whitehead would rebut the presumption of paternity as her husband. While Mrs. Stern was not a party to the contract, the contract gave her custody of the child should anything have happened to Mr. Stern.

Once Baby Melissa (Baby M) was born in 1986, Mrs. Whitehead changed her mind about giving up her parental rights and wanted to keep

32. 537 A.2d 1227 (N.J. 1988).
33. See id. at 1234–35 (finding surrogacy contracts violate statutory law and public policy). The New Jersey Supreme Court addressed the issue for the first time when surrogacy first became more prominent in the 1980s. See id. at 1264 (becoming first court to address surrogacy contracts).
34. See id. at 1235 (noting Ms. Stern’s decision to pursue surrogacy upon learning of potential health risks she could face in pregnancy due to her multiple sclerosis diagnosis). The Sterns had considered other options to start a family, including adoption, but the couple determined surrogacy would be the best choice for them. See id. at 1236 (deciding to use surrogacy to have child). Additionally, having children was very important to Mr. Stern, who had lost much of his family in the Holocaust and wanted to further his family line. See id. at 1235 (discussing reasoning behind surrogacy choice).
35. See id. at 1235–36 (discussing use of traditional surrogacy). Traditional surrogacy gives the surrogate mother a genetic connection to the child, which frequently causes more legal problems if disputes arise. See id. (explaining surrogate’s genetic relationship to child). The genetic connection to the child gives more weight to the surrogate’s argument for parental rights. See id. (discussing genetic relationship).
36. See id. at 1235 (discussing necessity of terminating surrogate’s maternal rights so Mrs. Stern could proceed as child’s legal mother).
37. See id. (describing terms of contract). In another contract, Mr. Stern also agreed to pay the fertility clinic that arranged the agreement $7,500. See id. (discussing fees paid by Stern family regarding surrogacy agreement).
38. See id. (discussing surrogate’s husband as additional party to contract). Under New Jersey law, Mr. Whitehead could have attempted to assert paternal rights over the child because his wife gave birth to the child. See N.J. STAT. ANN. § 9:17-43(a)(1) (West 2013) (presuming husband as father of children to which his wife gives birth). Therefore, Mr. Whitehead declining to assert parental rights was important to this particular surrogacy agreement. See Baby M, 537 A.2d at 1235 (explaining that Mr. Whitehead promised to take action to rebut presumption of paternity).
39. See Baby M, 537 A.2d at 1235 (commenting that Mrs. Stern’s absence from surrogacy contract may have been to avoid New Jersey’s baby-selling statute that was relevant at that time).
Baby M. 40 The plaintiffs responded by filing a complaint seeking to restore custody of Baby M, at which point Mrs. Whitehead fled the state with the child. 41 The trial court found the surrogacy agreement between the parties valid and ordered the termination of Mrs. Whitehead’s parental rights over Baby M. 42 Mrs. Whitehead appealed the trial court’s decision, and the Supreme Court of New Jersey subsequently granted direct certification. 43 On appeal, the New Jersey Supreme Court ultimately overturned the trial court’s decision, holding that the surrogacy agreement was invalid because it conflicted with state statutes and public policy. 44

Moreover, in the 2000 case A.H.W. v. G.H.B., 45 the Superior Court of New Jersey (Chancery Division) declined to enforce a surrogacy agreement, even though both intended parents were genetically related to child. 46 Andrea and Peter, unable to conceive a child on their own, en-

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40. See id. at 1236 (noting Mrs. Whitehead’s realization that she did not want to part with child). Mrs. Whitehead initially remained true to the agreement and gave the child to the Sterns. See id. (honoring agreement at birth of child). The next day, Mrs. Whitehead expressed extreme despair over not having the child, so the Sterns agreed to let Mrs. Whitehead take the baby for a week, out of fear that Mrs. Whitehead might commit suicide. See id. at 1237 (describing Sterns’ fear regarding Mrs. Whitehead’s mental state). Mrs. Whitehead then refused to give the baby back, and the Sterns had the baby forcibly removed from Mrs. Whitehead. See id. at 1236 (stating baby had to be forcibly taken from Mrs. Whitehead).

41. See id. at 1237 (stating Mrs. Whitehead fled to Florida with child). After the order [seeking enforcement of the surrogacy agreement] was entered, ex parte, the process server, aided by the police, in the presence of the Sterns, entered Mrs. Whitehead’s home to execute the order. Mr. Whitehead fled with the child, who had been handed to him through a window while those who came to enforce the order were thrown off balance by a dispute over the child’s current name. See id. at 1238 (granting certification following appeal). The court granted continuation of visitation rights for Mrs. Whitehead during the appeal, contrary to the opinion of the lower court. See id.

42. See id. at 1237–38 (describing trial court’s determination that surrogacy contract was valid, thus allowing Mrs. Stern to adopt baby). The trial took over thirty-two days and included twenty-three witnesses, most of whom testified regarding what custody outcome would be in the child’s best interest—a question heavily focused on in the trial court’s opinion. See id. (noting that allowing Sterns to be child’s parents would be in that child’s best interest).

43. See id. at 1238 (granting certification following appeal). The court granted continuation of visitation rights for Mrs. Whitehead during the appeal, contrary to the opinion of the lower court. See id.

44. See id. at 1240 (finding surrogacy agreement in conflict with public policy and statutory provision). The New Jersey Supreme Court held that surrogacy agreements violated the New Jersey Parentage Act by requiring the birth mother to give up her parental rights. See id. at 1240, 1242 (finding violation of Parentage Act). Under the act, a mother was only defined as the “birth mother,” and the act does not allow someone to be compelled to terminate his or her parental rights. See id. at 1242 (defining legal mother only as birth mother). The court also held that the agreement conflicted with New Jersey public policy due to the potential for the degradation of women volunteering to be surrogate mothers and the separation of a child from its natural parent. See id. at 1246–50 (finding surrogacy agreements contrary to public policy).


46. See id. at 949 (invalidating gestational surrogacy agreement despite intended parents’ genetic relation to baby).
entered into an uncompensated gestational surrogacy contract with Andrea’s sister, Gina.\footnote{See id. at 949–50 (stating wife could not carry pregnancy to term, so Gina volunteered to serve as her sister’s surrogate).} An embryo created from Andrea’s egg and Peter’s sperm was implanted in Gina.\footnote{See id. (making both Andrea and Peter genetic parents of child).} The couple filed a complaint seeking a pre-birth order allowing them to be listed as the child’s parents on the child’s birth certificate.\footnote{See id. at 950 (arguing pre-birth orders could be entered in gestational surrogacy agreements as opposed to traditional surrogacy agreements, where such orders had been prohibited).}

The Superior Court of New Jersey denied the pre-birth order.\footnote{See id. at 949 (denying pre-birth order).} Instead, the court issued a separate order, allowing the couple to be listed as parents on the birth certificate, following a mandated 72-hour wait period after the child’s birth, so long as the certificate was filed before expiration of the required five-day deadline to file birth certificates.\footnote{See id. at 949–50 (stating wife could not carry pregnancy to term, so Gina volunteered to serve as her sister’s surrogate).} In its decision, the court urged the Legislature to clarify the issues surrounding gestational surrogacy.\footnote{See id. at 954 (supporting ability of Legislature to provide clarity on issues surrounding surrogacy).} Nevertheless, without such guidance, the court was bound by precedent, set by \textit{Baby M} and the applicable statutes, which required a 72-hour wait period before a birth mother could relinquish her parental rights.\footnote{See id. at 953–54 (finding surrogate still has connection to baby, even if not biologically, and as such, she cannot be forced to give up her rights to child prior to that child’s birth).}

child, but the court disagreed stating: “the genetic makeup of the infant as it relates to the birth mother was only mentioned once in Baby M.”

The A.G.R. court pointed to the same public policy considerations referred to in Baby M as being relevant to the case at hand. Once again noting the Legislature’s silence on the enforceability of surrogacy agreements, the court was limited to the definitions of “mother” and “father” provided in the New Jersey Parentage Act. The A.G.R. decision also reflected the court’s reluctance to terminate parental rights of the birth mother. Ultimately, the court upheld the parental rights of A.G.R. and found the gestational agreement void. The court, however, recognized S.H. as the legal father due to his genetic connection to the child. While A.G.R. initially gained parental rights after being deemed the children’s legal mother, S.H. subsequently won sole custody in 2011, when the court considered the children’s best interests. Nonetheless, D.R. was still left with no legal parental rights to the child he intended to raise with his husband.

“became depressed,” disappeared, “and lived in her car for three days . . . .” See id. (discussing issues that arose during pregnancy).

58. See A.G.R., 2009 N.J. Super. Unpub. LEXIS 3250, at *4–5, 7 (finding Baby M holding not limited to situations of traditional surrogacy). The court also compared New Jersey surrogacy laws to those of California. See id. at *11. The court stated that California law takes the position that it is “disrespectful toward women to not allow them to enter into agreements of this nature, whereas New Jersey law takes a clearly different position that agreements of this nature have a ‘potential for devastation’ to women.” See id. (citation omitted) (quoting In re Baby M, 537 A.2d 1227, 1250 (N.J. 1988)).

59. See id. at *9 (noting public policy concerns recognized in Baby M also apply to this case). The court suggested the Baby M decision still controlled the situation, even though the surrogate had no genetic connection to the child. See id. at *10 (relying on Baby M precedent).

60. See id. at *8 (finding Legislature’s silence following Baby M decision suggested deliberate choice not to recognize surrogacy).

61. See id. at *11–12 (discussing why surrogacy contracts “are directly contrary to the objectives of our laws” (quoting Baby M, 537 A.2d at 1250)).

62. See id. at *12–13 (finding consent to judgment of adoption void).

63. See id. at *13 (referencing New Jersey Parentage Act). The court declined to find both defendants as legal parents of the children, and it only made the determination in regards to S.H., who was the genetic father of the children. See id.

64. See Grossman, supra note 57 (explaining subsequent custody hearing). At this subsequent hearing, the court considered what was in the children’s best interest. See id. Following the initial court decision, A.G.R. returned to the Baptist faith and adopted negative views of homosexuality, which she shared with the twins while in their presence. See id. (discussing factors considered in custody decision). Considering A.G.R.’s views, among many other factors, the judge found S.H. more suited to deal with the unique needs of the twins. See id. (deciding custody dispute in favor of S.H.).

B. Governor Christie Refuses to Pacify Surrogacy Concerns by Vetoing Gestational Surrogacy Legislation

Hearing the outcry for guidance from the courts, in 2012, the New Jersey Legislature proposed a bill to regulate gestational surrogacy.66 The State Senate introduced the Gestational Carrier Agreement Act in February 2012, and passed the bill as amended on May 31, 2012.67 Less than one month later, the bill passed the Assembly on June 21, 2012.68 The Gestational Carrier Agreement Act, however, came to a standstill on August 9, 2012, when Governor Chris Christie vetoed the bill.69

The Gestational Carrier Act would have validated gestational surrogacy agreements and imposed regulations clarifying standards for enforceability.70 Under the act, gestational surrogacy agreements meeting the specific codified conditions would be presumed enforceable in New Jersey courts.71 First, the bill regulated which individuals could serve as a surrogate, specifying that the individual must be at least 21-years-old; have given birth to at least one other child; retained an attorney; and undergone a psychological and medical evaluation.72 Moreover, the intended parents would be required to undergo psychological evaluations and to retain independent counsel.73 The proposed act also required the agreement between the intended parents and the surrogate to be in writing.74

Notably, if an intended parent was married, in a civil union, or in a domestic partnership, the proposed act required both partners to enter

68. See N.J. S. 1599 (passing in New Jersey Assembly in June 2012).
69. See Christie, supra note 22 (explaining Governor’s veto of Gestational Surrogacy Act).
70. See N.J. S. 1599 (providing regulations for gestational surrogacy agreements).
71. See id. at 2 (declaring gestational surrogacy agreements to be in accordance with New Jersey public policy).
72. See id. at 4–5 (providing requirements as to who could serve as surrogate under legally enforceable agreements). The law would create a twenty-one-year-old age requirement, as well as medical and psychological requirements. See id. (listing requirements to qualify as surrogate).
73. See id. at 3, 5 (stating medical and psychological screenings must occur prior to any medical procedures to begin embryo implantation in surrogate). A requisite psychological evaluation is defined as “an evaluation and consultation by a clinical social worker, psychotherapist, or psychiatrist licensed by the State of New Jersey or licensed to practice in any one of the United States . . . .” Id. at 3.
74. See id. at 5 (specifying that agreements must be in writing to be enforceable).
into the surrogacy agreement. Further, the bill recognized that neither
the surrogate mother nor the spouse of a surrogate would be considered a
legal parent of the child. The intended parents would become the
child’s legal parents “immediately upon the birth of the child . . . .” The
proposed act also validated compensated surrogacy agreements, provided
the compensation was limited to “reasonable expenses in connection with
the agreement . . . .”

Ultimately, Governor Christie did not think New Jersey was ready to
be one of the first states regulating gestational surrogacy. Referring to
surrogacy agreements as “contracts for the birth of children” and “ar-
ranged births,” Governor Christie vetoed the Gestational Carrier Act,
claiming the questions and issues raised by gestational surrogacy agree-
ments had not been studied enough by the Legislature to justify passing
such a law.

75. See id. (stating any intended parent’s spouse must be included in surro-
gacy agreement and stipulate that both partners would become legal parents at
birth).

76. See id. at 6 (“[I]f the gestational carrier is married or in a civil union or
domestic partnership, the spouse or partner agrees to the obligations imposed on
the gestational carrier pursuant to the terms of the gestational carrier agreement
and to surrender custody of the child to the intended parent immediately upon
the child’s birth . . . .”).

77. See id. at 4 (stating intended parents become legal parents upon the birth
of child).

78. See id. at 6 (allowing only reasonable expenses as permissible compensa-
tion to gestational surrogate). The act defined “[r]easonable expenses” as:

[M]edical, hospital, counseling or other similar expenses incurred in
connection with the gestational carrier agreement, reasonable attorney
fees and costs for legal services in connection with the gestational carrier
agreement, and the reasonable living expenses of the gestational carrier
during her pregnancy including payments for reasonable food, clothing,
medical expenses, shelter, and religious, psychological, vocational, or
similar counseling services during the period of the pregnancy and dur-
ing the period of postpartum recovery.

Id. at 4. Additionally, the act clarified that these payments could be made directly
to the surrogate or to a third party supplying goods or services in relation to the
surrogacy agreement. See id. (specifying how payments could be made).

79. See Christie, supra note 22, at 2 (finding bill “would now make New Jersey
one of the few states in the nation that expressly authorize gestational carrier
agreements”).

80. See id. (claiming more in depth study on gestational surrogacy is needed).
Governor Christie noted that “[p]ermitting adults to contract with others regard-
ing a child in such a manner unquestionably raises serious and significant issues.”
Id. Governor Christie will most likely get another chance to review the legislation in the
upcoming year, however, because the New Jersey legislature has proposed
the Gestational Carrier Act again. See Susan K. Livio, N.J. Senate Approves Bill Exp-
anding Definition of Surrogate Parenting, STAR-LEDER (Feb. 5, 2015, 5:22 PM),
http://www.nj.com/politics/index.ssf/2015/02/nj_senate_approves_bill_expand-
ing_definition_of_su.html (discussing proposal of previously-vetoed bill). In Feb-
uary 2015, the bill passed in the New Jersey Senate, and the bill was sent to the
Assembly for further review. See id. (noting Assembly must vote on bill).
C. Taking a Peek into Surrogacy Laws in Other States

The advances in infertility technology over the past two decades, in particular regarding gestational surrogacy, have resulted in patchwork approaches to surrogacy agreements by the states. Due to the complications that arise when the surrogate mother is also the genetic mother of the child, as seen in Baby M, traditional surrogacy has been deemed unacceptable in most states. On the other hand, laws regarding gestational surrogacy, where the surrogate mother has no genetic connection to the child, vary from state to state. Some jurisdictions, including Arizona and the District of Columbia, completely ban surrogacy agreements. Alternatively, other states have no relevant statutes, or only ambiguous case law regarding the validity of surrogacy agreements. Further, other states put only partial bans on surrogacy.

California’s history with surrogacy agreements is much more progressive than New Jersey’s, as demonstrated by the Supreme Court of California’s decision in the 1993 case Johnson v. Calvert. In Johnson, the Supreme Court of California upheld a gestational surrogacy agreement and held that the intended mother was the legal mother of the child born as a result of a surrogacy agreement. The surrogate and the intended

82. See id. at 74–79 (noting that traditional surrogacy agreements are unenforceable in New Jersey and New York).
85. See Krista Sirola, Comment, Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania, 14 AM. U. J. GENDER SOC. POL’Y & L. 131, 141–42 (2006) (stating no Pennsylvania statutes exist regarding surrogacy). Pennsylvania has a policy for gestational surrogacy enacted by the Department of Health, which allows intended parents to be considered the legal parents of the child on the birth certificate. See id. (explaining surrogacy options in Pennsylvania). This policy “is not binding on the courts,” but at least fifteen counties have recognized the intended parents on birth certificates. See id. at 142 & n.68 (discussing Pennsylvania recognition of surrogacy).
88. See id. at 782 (upholding validity of gestational surrogacy agreement).
mother both presented acceptable claims as the child’s mother because the surrogate gave birth to the child, and the intended mother was the child’s genetic mother. The court analyzed the surrogacy agreement based on the parties’ intentions and found the intended mother had planned to both ensure the birth of the child and then raise the child as her own. Further, the court held that gestational surrogacy agreements were not contrary to public policy and found no constitutional rights at issue for the surrogate.

Following up on the court’s progressive attitude toward surrogacy, last year, California was among the first states to adopt a statute enforcing gestational surrogacy agreements. New York now has similar legislation proposed. The California and New York statutes are similar to the vetoed New Jersey legislation, as all three presume gestational carrier agreements to be valid while placing regulations on such agreements to protect all of the parties involved. Additionally, the California statute requires

89. See id. at 781 (finding both women presented proper evidence of mother-child relationship).
90. See id. at 782 (looking to parties’ intentions).
91. See id. at 785–86 (establishing intended parents as legal parents).
92. See CAL. FAM. CODE § 7962 (West 2014) (validating and regulating surrogacy agreements). The new California law validates gestational surrogacy agreements as long as the parties have separate counsel, have the agreement notarized, attest to their compliance with the agreement under penalty of perjury, and file the agreement with the court. See id. (explaining requirements of new law).
93. See Anemona Hartocollis, And Surrogacy Makes 3: In New York, a Push for Compensated Surrogacy, N.Y. TIMES (Feb. 19, 2014), http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?_r=0 (following New York state senator’s push for bill allowing gestational surrogacy). Brad Hoylman, a New York state senator, co-sponsored a bill to make compensated surrogacy legal and the agreements enforceable. See id. (discussing proposed surrogacy bill). The senator and his partner used a surrogate in California to start their own family, but the couple had to travel to California to find a surrogate because New York’s laws were so harsh. See id. (explaining personal experiences with surrogacy). Hartocollis discusses the extreme costs for New Yorkers of leaving the state to find surrogate mothers. See id. (discussing consequences of harsh surrogacy laws).
94. See Richard Moody, Updating NY’s Surrogacy Laws, LEGISLATIVE GAZETTE (Mar. 3, 2014), http://www.legislativegazette.com/Articles-Top-Stories-c-2014-03-03-111912-Updating-NYs-surrogacy-laws.html (expanding on proposed New York bill regarding surrogacy). Moody notes that the New York bill “legally defines several terms such as artificial insemination, assisted reproductive technology and providers, and collaborative reproduction.” Id. Furthermore, if passed, the bill “would also set new rules for determining the parentage of a child born through a surrogacy agreement. . . . allow[ing] parentage to be determined before birth but
that the parties each retain individual counsel and have the agreement notarized before embryo implantation occurs.95

III. NEW JERSEY LACKS MATERNAL INSTINCT BY ONLY SUPPORTING PRESCRIPTION OF FATHERHOOD IN T.J.S.

The New Jersey Supreme Court addressed the enforceability of a gestational surrogacy agreement in 2012, in T.J.S., refusing to validate the agreement and leaving the intended mother without legal rights to her child.96 The intended parents argued that New Jersey’s Parentage Act could be construed to presume parentage of the intended mother.97 The Supreme Court split on the issue in a per curiam opinion, resulting in the affirmation of the Appellate Division’s decision, which had declined to enforce the agreement. Still, the concurring and dissenting opinions thoroughly discussed both sides of the issues raised by the case.98

A. Facts and Procedure

T.J.S. and his wife, A.L.S., wanted to have a child but were unable to do so naturally.99 T.J.S. and A.L.S. entered into an agreement with A.F., an unrelated third party, to serve as a surrogate and carry a child for the couple.100 Through in vitro fertilization, the egg of an anonymous donor was fertilized with the husband’s sperm, and the resulting embryo was implanted in A.F.101 The agreement stated A.F. would relinquish parental rights to the child seventy-two hours after the child was born, not prior to birth.102

not take effect until after birth.” Id. Moreover, the bill would notably “define who would be allowed to petition for a judgment of the parentage of the child.” Id. 95. See Cal. Fam. Code § 7962 (regulating gestational surrogacy agreements). 96. See In re T.J.S., 54 A.3d 263, 264 (N.J. 2012) (Hoens, J., concurring) (declining to enforce gestational surrogacy agreement). 97. See id. (declining to enforce surrogacy agreement despite allegations of gender discrimination). 98. See id. at 263–80 (providing multiple opinions). 99. See id. at 264 (Hoens, J., concurring) (explaining A.L.S. was unable to carry pregnancy to term). New Jersey law presumes a pregnant woman’s husband to be the biological father of the child she gives birth to. See N.J. Stat. Ann. § 9:17-43(a)(1) (West 2013) (listing multiple ways men can be presumed to be child’s father). This provision, entitled “Presumptions,” lists over six different ways a man can be presumed to be a father, but does not address any presumptions regarding maternity. See id. § 9:17-43(a) (listing presumptions of paternity). 100. See T.J.S., 54 A.3d at 264 (Hoens, J., concurring) (noting A.F. was unrelated to intended parents or egg donor). 101. See id. (explaining use of in vitro fertilization). The anonymous egg donor had relinquished any and all rights to the eggs. See id. at 270 (Albin, J., dissenting) (stating egg donor “had relinquished her legal rights to the egg[ ]”). 102. See id. at 271 (noting anticipation of seventy-two hour wait period required by law). New Jersey law requires a seventy-two hour wait period before a biological mother can relinquish her rights to a child. See N.J. Stat. Ann. § 9:3-41(e). The statute provides that “[a] surrender of a child shall not be valid if taken prior to the birth of the child who is the subject of the surrender. A surrender by
In anticipation of A.F. relinquishing parental rights, A.L.S. and T.J.S., the “intended parents,” sought a pre-birth order from the New Jersey Superior Court (Chancery Division), stating that their names should be listed on the child’s birth certificate as the child’s legal parents upon A.F.’s renouncement of her parental rights. The pre-birth order was granted on July 2, 2009, and the child was born on July 7, 2009. As anticipated, A.F. relinquished all parental rights seventy-two hours after the baby’s birth, and a birth certificate was issued listing the intended parents, T.J.S. and A.L.S., as the parents of the newborn. Even though A.F. never tried to assert parental rights, the Department of Health and Human Services, Bureau of Vital Statistics filed a motion for the court to vacate the pre-birth order, which would remove A.L.S. from being listed as the child’s mother. The trial court granted the motion, and the Appellate Division ultimately affirmed that judgment.

On appeal, the couple argued that New Jersey’s Parentage Act violated the state constitution through gender-based discrimination. The couple asserted that the provisions of the New Jersey Parentage Act presuming husbands to be the fathers of children to whom their wives give birth should be read to construe a presumption of maternity for infertile wives as well. The couple claimed that the lack of a presumption of the birth parent of a child shall not be valid if taken within 72 hours of the birth of the child.”

Id.

103. See T.J.S., 54 A.3d at 271 (Albin, J., dissenting) (seeking pre-birth order by filing complaint in Chancery Division, Family Part in Camden County, requesting intended parents to be listed on birth certificate).

104. See id. (noting that Superior Court granted order that intended parents be listed as biological parents on child’s birth certificate).

105. See id. (listing A.L.S. and T.J.S. as parents of child). The surrogate relinquished her rights as agreed and never attempted to assert parental rights over the child. See id. (stating that surrogate gave up her parental rights to child).

106. See id. (stating Department had not received notice of pre-birth order). Further, a worker in the hospital had never seen a gestational surrogacy situation before and called the Bureau of Vital Statistics to make the office aware of the arrangement. See Kate Zernike, Court’s Split Decision Provides Little Clarity on Surrogacy, N.Y. Times (Oct. 24, 2012), http://www.nytimes.com/2012/10/25/nyregion/in-surrogacy-case-nj-supreme-court-is-deadlocked-over-whom-to-call-mom.html?pagewanted=all&_r=0 (explaining how Department became aware of surrogacy agreement).

107. See T.J.S., 54 A.3d at 264 (Hoens, J., concurring). The trial court, after considering the arguments raised on behalf of the plaintiffs and the Department, granted the Department’s application and vacated the order that had been entered prior to the child’s birth. The Appellate Division affirmed that judgment, rejecting both the statutory and constitutional arguments that plaintiffs raised on appeal.

Id.


109. See id. (arguing Parentage Act is discriminatory based on gender). See generally N.J. STAT. ANN. § 9:17-44(a) (West 2013) (presuming husbands of women who have been artificially inseminated with donor’s sperm to be fathers of children conceived through artificial insemination). The statute provides that:
maternity equal to the presumption of paternity constituted an equal protection violation because it treated similarly-situated infertile married men and infertile married women differently, without justification. Applying New Jersey’s “substantial relationship” test for equal protection claims, the Appellate Division found no fundamental right at stake and then rejected the equal protection claims, finding that the differences in the law were based upon “actual reproductive and biological differences.” Further, the Legislature had created the presumption of paternity for circumstances where a man is “highly likely to be the biological father of a child,” which the Appellate Division found irrelevant to infertile women because the women would not be biologically linked to the child.

These decisions had the effect of removing the intended mother, A.L.S., from the birth certificate, so she had no legal rights over the child until she could go through the lengthy and costly adoption process, as a stepparent to the child that was genetically related to her husband. In light of the appellate court’s decision, T.J.S. and A.L.S. appealed to the Supreme Court of New Jersey.

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband’s consent shall be in writing and signed by him and his wife.  

110. See T.J.S., 16 A.3d at 390 (explaining equal protection claims).
111. See id. at 398 (rejecting equal protection claims). The Appellate Division stated the “right to equal protection does not require us to scrutinize gender distinctions that are based on real physiological differences to the same extent we would scrutinize those distinctions when they are based on archaic, invidious stereotypes about men and women.” Id. at 393 (quoting State v. Chun, 943 A.2d 114, 143 (N.J. 2008)).
112. See id. at 393 (discussing purpose of statute). The court stated the purpose of the presumption of paternity was to ensure children received financial support from their biological fathers. See id. (explaining Legislature’s intent). The Legislature focused on the biological connection, which the court argued did not apply in situations with no maternal biological connection. See id. (finding written agreements not enough to establish maternity).
113. See In re T.J.S., 54 A.3d 263, 269 (N.J. 2012) (Albin, J., dissenting) (observing that court’s decision would require intended mother to go through adoption process even though agreement was never disputed by any relevant parties). The appellate opinion did not see the adoption process as costly or unnecessary for the plaintiffs. See T.J.S., 16 A.3d at 398 (discussing effects of adoption process on plaintiffs). The Appellate Division found this to be an “acceptable means of establishing parenthood” and implied that the plaintiffs were just looking for a more convenient method. See id. (finding adoption to be adequate method of obtaining parental rights).
114. See T.J.S., 54 A.3d at 263 (per curiam) (seeking certification to Supreme Court of New Jersey).
B. New Jersey Supreme Court Delivers Multiple Opinions

The New Jersey Supreme Court heard the case and issued its decision on October 24, 2012.\footnote{See id.} The court reviewed the constitutionality of the Parentage Act in light of the equal protection issues raised by T.J.S. and A.L.S.\footnote{See id.} The initial per curiam opinion provides no guidance on the matter and simply stated “[t]he judgment of the Appellate Division . . . is affirmed by an equally divided Court.”\footnote{See id. at 263 (per curiam) (affirming Appellate Division judgment through equally divided Supreme Court). Because the decision was equally divided, it had the effect of affirming the lower court. See id. (affirming lower court decision).} Both sides of the issue were thoroughly analyzed in the concurring and dissenting opinions.\footnote{See id. at 264–80 (providing concurring and dissenting opinion).} The concurring opinion heavily relied upon the Appellate Division’s decision finding no equal protection violation and declining to enforce the surrogacy agreement.\footnote{See id. at 264–69 (Hoens, J., concurring) (upholding appellate court decision). Justice Hoens wrote the concurring decision and agreed with the reasoning provided by the Appellate Division. See id. at 264–65 (agreeing with Appellate Division’s reasoning).} The dissent argued that the relevant provisions of the Parentage Act created an equal protection violation, and would have reversed the Appellate Division’s judgment.\footnote{See id. at 269–80 (Albin, J., dissenting) (finding New Jersey Parentage Act confers unequal rights to infertile men and infertile women). The dissent focused on the equal protection issues raised by the Parentage Act through the presumption of parentage for infertile men but not infertile women who choose surrogacy as a means to procreate. See id.}

1. The Concurrence Fosters Dated Notions of Parentage

The concurrence supported affirming the Appellate Division’s judgment, which refused to enforce the gestational surrogacy agreement.\footnote{See id. at 264–69 (Hoens, J., concurring) (reviewing constitutionality of Parentage Act).} First, the opinion agreed with the Appellate Division’s analysis of the language of the Parentage Act.\footnote{See id. at 264 (supporting maternity determination based upon genetic connection).} The statute provided that a biological or genetic connection to a child is the only way to become the child’s legal mother at birth; therefore, the concurrence agreed that a written document could not create a legal mother-child relationship.\footnote{See id. (citing N.J. STAT. ANN. § 9:17-41(a)) (discussing Parentage Act).}

Second, the concurring justices rejected the equal protection claims raised against the Parentage Act.\footnote{See id. at 264–65 (dismissing equal protection challenge).} The concurrence stated that a presumption of paternity does not automatically create a presumption of maternity, and the gender differentiations in the Parentage Act were based

\begin{itemize}
\item \footnote{See id.}
\item \footnote{See id. at 264 (Hoens, J., concurring) (reviewing constitutionality of Parentage Act).}
\item \footnote{See id. at 263 (per curiam) (affirming Appellate Division judgment through equally divided Supreme Court). Because the decision was equally divided, it had the effect of affirming the lower court. See id. (affirming lower court decision).}
\item \footnote{See id. at 264–80 (providing concurring and dissenting opinion).}
\item \footnote{See id. at 264–69 (Hoens, J., concurring) (upholding appellate court decision). Justice Hoens wrote the concurring decision and agreed with the reasoning provided by the Appellate Division. See id. at 264–65 (agreeing with Appellate Division’s reasoning).}
\item \footnote{See id. at 269–80 (Albin, J., dissenting) (finding New Jersey Parentage Act confers unequal rights to infertile men and infertile women). The dissent focused on the equal protection issues raised by the Parentage Act through the presumption of parentage for infertile men but not infertile women who choose surrogacy as a means to procreate. See id.}
\item \footnote{See id. at 264–69 (Hoens, J., concurring).}
\item \footnote{See id. at 264 (supporting maternity determination based upon genetic connection).}
\item \footnote{See id. (citing N.J. STAT. ANN. § 9:17-41(a)) (discussing Parentage Act).}
\item \footnote{See id. at 264–65 (dismissing equal protection challenge).}
\end{itemize}
upon physiological differences between men and women. 125 The concur-
renee also noted that intended mothers still had the option to become
legal mothers through the adoption process, and the desire for a faster,
more convenient process did not create a constitutional right to have
one. 126 Further, the intended parents argued that infertile men and infert-
ile women were similarly situated and deserved equal protection. 127 The
concurrence rejected this argument because the individuals in the infer-
tile couple were not the only parties to the agreement; the concurrence
alternatively stressed the significance of the agreement requiring a third
party, the surrogate mother, who also had rights. 128 The intended mother
had no fundamental or statutory parental right, but as the birth mother,
the surrogate mother had a constitutional and statutory parental right. 129
The concurrence would not recognize a parental right for the intended
mother due to the conflict with the birth mother’s established rights. 130

Last, the concurrence found that the legislative or executive branches
would be better suited to confront the concerns raised by the intended
parents. 131 The legislature would be better suited to make decisions re-
garding parentage because the legislature has the flexibility and time to
pursue a deeper inquiry into the issue. 132 The concurrence stated that
surrogacy was a social policy issue requiring an informed debate and con-
sideration of all parties involved, which is not a constitutional issue but
one for the legislature or executive. 133

2. Is It a Boy or a Girl? The Dissent Asserts Gender Discrimination

The dissenting justices alternatively found that the Parentage Act
treated “similarly situated infertile married women and infertile married
men” differently, thereby violating the state’s equal protection guaran-
te. 134 First, the dissent criticized the Appellate Division’s focus on hypo-

125. See id. at 264 (finding differences in statutes based upon physiological
gender differences).
126. See id. at 264–65 (supporting Appellate Division’s observation of process
already in place for intended mother).
127. See id. at 266 (explaining intended parents’ arguments).
128. See id. (rejecting plaintiffs’ characterization as infertile people). Justice
Hoens stressed the importance of a third person in surrogacy agreements to com-
bat claims that husbands and wives were being treated unequally. See id. (stating
child is still biologically connected to surrogate mother).
129. See id. (protecting rights of birth mother).
130. See id. (supporting birth mother’s rights over intended mother’s rights).
131. See id. at 267 (finding surrogacy would be better dealt with by executive
or legislative branch).
132. See id. at 268 (discussing consequences of having court decide issue
rather than Legislature).
133. See id. (stating issue requires consideration of all parties, including in-
tended parents and surrogates, and is not court’s role to determine).
134. See id. at 269 (Albin, J., dissenting) (stating case is about unequal treat-
ment of men and women).
The Appellate Division found the "surrogate mother whose parental rights are deemed worthy of protection... stand in the way of the infertile wife’s claim to automatic motherhood," but the dissent stressed the difference between such a hypothetical scenario and the case at hand, where the surrogate mother was cooperative and supportive of the intended parents. Thus, the Appellate Division’s conclusion was based upon a fictional scenario, not the facts of the case at hand.

Second, the dissent claimed that the concurrence’s analysis of the Parentage Act did not comport with the purpose of the statute. According to the dissent, the purpose of the Parentage Act was to ensure children receive the financial support due to them from their parents. The concurrence’s interpretation of the statute would, however, in a practical sense, leave a child born through a surrogacy agreement without a legal mother during the time it takes to complete the adoption process.

Third, the dissent analyzed the statute under the state’s “substantial relationship” equal protection test and reached a conclusion contrary to the Appellate Division’s decision. The state’s balancing test weighs “(1) the nature of the right at stake, (2) the extent to which the challenged [law] restricts that right, and (3) the public need for the statutory restriction.” The dissent recognized there was no fundamental right at issue, but the right for infertile wives to be legal parents, in the same way infertile husbands would, was substantial. Moving to the second prong of the test, the right was significantly restricted by forcing the intended

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135. See id. at 272 (disagreeing with concurrence’s reliance on Appellate Division’s hypothetical situation).
137. See id. at 273 (finding concurrence’s reliance on hypothetical situations unconvincing).
138. See id. (discussing purpose of Parentage Act).
139. See id. (stating Parentage Act “guarantees that children will receive the financial support that is rightfully due from their parents”).
140. See id. (finding result contrary to intended purpose of statute). The dissent explained that the purpose of the act is to ensure children are always financially cared for, not to allow the law to leave a child without two legal parents when they are available. See id. (describing decision as contrary to Parentage Act). “Indeed, denying the infertile wife the opportunity to assert a parental right, after the surrogate surrenders her parental interests, leads to a result completely contrary to the purpose of the Parentage Act—a child without a legal mother responsible for the child’s financial support.” Id. at 277.
141. See id. at 276 (applying New Jersey’s “substantial relationship” test).
142. Id. (alteration in original) (quoting Lewis v. Harris, 908 A.2d 196, 212 (N.J. 2006)) (internal quotation marks omitted) (explaining balancing test).
143. See id. (recognizing no fundamental right at issue). “The right at issue is that of an infertile married woman to ‘equality of treatment relative to comparable’ infertile married men.” See id. (quoting Lewis, 908 A.2d at 215).
mother to go through the costly and time-consuming adoption process.\textsuperscript{144}

The dissent then found no necessity or “legitimate public need” to create this disadvantage for intended mothers because New Jersey did not prohibit surrogacy agreements, and the parties entered into the agreement knowingly and voluntarily.\textsuperscript{145} Applying the balancing test, the dissent concluded that the Parentage Act violated the state’s equal protection guarantees by discriminating against infertile women.\textsuperscript{146}

Last, the dissent distinguished the case of \textit{T.J.S.} from the infamous case of \textit{Baby M}.\textsuperscript{147} The concurring opinion and the Appellate Division decision used \textit{Baby M} to support the affirmance of the trial court’s holding, but the dissent found that the facts at hand created very different circumstances from those in \textit{Baby M}.\textsuperscript{148} The surrogacy agreement in \textit{Baby M} was declared void because it was against public policy; however, the decision in \textit{Baby M} did not declare all surrogacy agreements void.\textsuperscript{149} The \textit{Baby M} court held that a surrogate’s parental rights could not be relinquished by contract or prior to birth.\textsuperscript{150} The agreement in \textit{T.J.S.} recognized A.F.’s ability to assert parental rights upon the birth of the child, but she did not do so.\textsuperscript{151} Additionally, the contract in \textit{Baby M} was void based upon public policy concerns, due to the compensation the surrogate received, but there was no evidence of compensation beyond costs relating to childbirth in \textit{T.J.S.}\textsuperscript{152} Therefore, the \textit{Baby M} decision was distinguishable from \textit{T.J.S.}\textsuperscript{153}

\begin{itemize}
  \item[144.] See id. (stating adoption can take two to three months). During this period, if the intended mother passed away, the child would be unable to benefit from worker’s compensation or Social Security benefits, and it would be unable to inherit from the mother if she would die intestate. See id. (discussing repercussions of refusing to recognize intended mother as legal mother of child).
  \item[145.] See id. at 277 (commenting that law disfavoring intended mothers actually acts in contrast to purpose of Parentage Act). The dissent asserted that the purpose of the Parentage Act was to ensure children had parents who were legally and financially responsible for the child, not to remove a potential legal parent. See id. (discussing purpose of Parentage Act).
  \item[146.] See id. at 278 (finding gender discrimination). “The disparate treatment of infertile wives based solely on their sex is not justified by any substantial government interest and is an arbitrary denial of A.L.S.’s right to equal protection of the laws.” Id.
  \item[147.] See id. (distinguishing facts of \textit{T.J.S.} from facts of \textit{Baby M}).
  \item[148.] See id.
  \item[149.] See id. (explaining \textit{Baby M} holding). Only compensated surrogacy agreements are against New Jersey public policy; the New Jersey courts never found any fault with uncompensated agreements, and surrogacy agreements are not illegal in the state. See id. (summarizing New Jersey surrogacy law).
  \item[150.] See id. (discussing holding of \textit{Baby M}).
  \item[151.] See id. (describing facts of \textit{T.J.S.}).
  \item[152.] See id. at 278–79 (stating record only suggests compensation for costs related to pregnancy and birth of child).
  \item[153.] See id. at 269–80 (finding presumption of paternity present under Artificial Insemination statute, but lack of presumption of maternity under Parentage Act, creating inequality of law).
\end{itemize}
IV. CRITICAL ANALYSIS: T.J.S. ILLUSTRATES THE OUTCRY FOR THE ADOPTION OF LEGISLATION TO PROTECT PARTIES TO GESTATIONAL SURROGACY AGREEMENTS

By failing to enforce gestational surrogacy agreements, the New Jersey Supreme Court halted the progress of infertility technology and limited New Jersey residents’ options for how to become parents.\textsuperscript{154} New Jersey courts have consistently refused to enforce surrogacy agreements.\textsuperscript{155} New Jersey courts could have followed California’s lead after \textit{Johnson} and upheld surrogacy agreements by distinguishing gestational surrogacy cases from \textit{Baby M}.\textsuperscript{156} Alternatively, the evenly divided \textit{T.J.S.} court also could have found that New Jersey’s Parentage Act violated the state’s equal protection guarantee with just one more vote; nevertheless, the equally split court upheld the lower courts’ decisions and continued New Jersey’s tradition of declining to enforce surrogacy agreements.\textsuperscript{157} The courts continually invalidate surrogacy agreements because the agreements are contradictory to the New Jersey Parentage Act and the state’s public policy.\textsuperscript{158} Because of the courts’ anti-enforcement stance on surrogacy agreements, the only effective option to protect parties to surrogacy agreements is through legislation, which the courts have frequently suggested as a remedy.\textsuperscript{159} Moreover, legislation would create guidelines to ease the public policy concerns associated with surrogacy and provide protection to the parties involved.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{154} See id. at 263 (per curiam) (failing to enforce surrogacy contract).
\item \textsuperscript{156} See \textit{Johnson v. Calvert}, 851 P.2d 776, 778 (Cal. 1993) (in bank) (upholding gestational surrogacy agreement).
\item \textsuperscript{158} See T.J.S., 54 A.3d at 263 (per curiam) (upholding lower courts’ decisions not to enforce surrogacy agreement).
\item \textsuperscript{159} See T.J.S., 54 A.3d at 263 (finding surrogacy agreements contradictory to New Jersey Parentage Act); see also Abby Brandel, \textit{Legislating Surrogacy: A Partial Answer to Feminist Criticism}, 54 Md. L. Rev. 488, 515 (1995) (supporting legislation as necessary reform to protect parties in surrogacy agreements). Brandel argues for legislation to protect the parties to these agreements due to the states’ highly inconsistent “patchwork of judicial precedent and legislative activity.” See id.
\item \textsuperscript{160} See, e.g., S. 1599, 215th Leg. (N.J. 2012) (enforcing gestational surrogacy agreements and providing regulation for surrogacy agreements).
\end{itemize}
A. Legislation Would Soothe Surrogacy’s Contradictions with the Parentage Act

The New Jersey Supreme Court missed its opportunity to bring New Jersey’s surrogacy law up to date, but the courts frequently suggest that it is the Legislature that should take up the issue.\(^{161}\) The concurrence in T.J.S. put a strong emphasis on why the Legislature would be more suited to handle the issue; and the courts in A.G.R. and A.H.W. also mentioned possible legislative intervention.\(^{162}\) Thus, while the courts have not found it appropriate to enforce these agreements, the Legislature should change the law to enforce them.\(^{163}\)

Legislation would resolve surrogacy agreements’ contradiction with the requirements of the Parentage Act.\(^{164}\) The proposed New Jersey bill, for example, would have amended the relevant parts of the New Jersey Parentage Act to properly allow for intended parents to be the legal par-

\(^{161}\) See, e.g., T.J.S., 54 A.3d at 266 (Hoens, J., concurring) (noting that Legislature would be better suited to handle issues surrounding surrogacy); Baby M, 537 A.2d at 1235 (stating its holding did not preclude Legislature from creating legislation to allow surrogacy); A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250, at *8 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (noting Legislature could have allowed surrogacy by statute but had not yet done so); A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (stating Legislature could weigh in on gestational surrogacy contracts, but courts must follow current law as closely as possible prior to legislative action). In each of these cases, the courts found that applicable statutory authority and case law precluded enforcement of compensated surrogacy agreements but acknowledged the ability of the legislative branch to change the statutory constraints on these agreements. See, e.g., T.J.S., 54 A.3d at 266 (Hoens, J., concurring) (discussing potential legislative action).

\(^{162}\) See T.J.S., 54 A.3d at 266 (Hoens, J., concurring) (finding Legislature better suited to consider issues surrounding surrogacy); A.G.R., 2009 N.J. Super. Unpub. LEXIS 3250, at *8 (suggesting Legislature could ascertain rights of parties to surrogacy agreements); A.H.W., 772 A.2d at 954. The concurrence in T.J.S. stated that the Legislature is “ordinarily the body vested with making decisions about such important social policies as this.” See T.J.S., 54 A.3d at 267 (Hoens, J., concurring). Additionally, the court in A.H.W. seemed to support legislative intervention that would create relief for the intended parents. See A.H.W., 772 A.2d at 954 (discussing possible ways to provide relief for parties involved). The A.H.W. court found that absent legislative action to decipher the rights of the involved parties, “[i]t is the most prudent course . . . to follow the current statutes as closely as possible while allowing the parties, to the maximum extent possible, the relief requested.” See id.

\(^{163}\) See T.J.S., 54 A.3d at 266 (Hoens, J., concurring) (finding other branches of government better suited to confront surrogacy); Baby M, 537 A.2d at 1235 (noting Legislature could create statutes to allow for surrogacy agreements within constitutional limits); A.G.R., 2009 N.J. Super. Unpub. LEXIS 3250, at *8 (recognizing that Legislature had not yet acted on issue of surrogacy); A.H.W., 772 A.2d at 954 (suggesting Legislature address issues surrounding surrogacy agreements).

\(^{164}\) See N.J. STAT. ANN. § 9:17-41(a) (West 2013) (establishing maternal rights for woman who gives birth to child). Surrogacy agreements currently contradict this law by attempting to recognize a woman who has not given birth to the child as the legal mother. See T.J.S., 54 A.3d at 264 (Hoens, J., concurring) (affirming lower courts’ findings and holding that agreement making intended mother also legal mother contradicts New Jersey Parentage Act).
ents of a child “immediately upon the birth of the child . . . ”. The statutory concerns would no longer be a barrier to intended parents. The statute would allow for both the intended father and the intended mother to be legal parents at birth, so the equal protection issues discussed by the dissent in T.J.S. would become moot.

Legislation would also ease the statutory concerns set forth by the Appellate Division. The T.J.S. concurrence favored the rights of the birth mother (the surrogate mother) over the intended mother because the Legislature had afforded the birth mother the presumption of maternity, while choosing not to grant intended mothers this right in any circumstances. A model surrogacy statute would enforce agreements so an intended mother could be the legal parent at birth and would remove the 72-hour wait period required according to the adoption statute.

B. Legislation Is Necessary to Calm Public Policy Concerns

Proper legislation would provide safeguards for all of the parties involved in surrogacy agreements. Legislation should create requirements for both surrogate mothers and intended parents, in order for an


166. See id. (allowing intended parents to become legal parents of child “immediately upon the birth of the child”). Contra N.J. Stat. Ann. § 9:3-41(e) (requiring seventy-two hour waiting period before birth mother can relinquish parental rights to child).


169. See N.J. Stat. Ann. § 9:17-41(a) (failing to create mother-child relationship through any means other than giving birth to child); see also T.J.S., 54 A.3d at 266 (Hoens, J., concurring) (stating birth mother has statutory and constitutional right to legal parent-child relationship and recognizing no constitutional or statutory right protecting intended parents in surrogacy agreements). The T.J.S. concurrence did not believe that refusing to terminate the surrogate’s parental rights interfered with the intended mother’s right because she could still adopt the child. See id. (recognizing rights of birth mothers). However, the dissent pointed out the numerous problems that the lengthy adoption process poses for the intended parents, including lack of protection or benefits should the mother die before the process concludes, as well as the costs and time constraints associated with adoption. See id. at 276–77 (Albin, J., dissenting) (discussing negative aspects of adoption process as opposed to enforcement of surrogacy agreements).

170. See, e.g., N.J. S. 1599 (creating legal parent-child relationship upon birth of child and removing seventy-two hour wait period before birth mother can relinquish rights).

171. See Brandel, supra note 159, at 489 (asserting well-planned legislation could protect all parties involved in surrogacy agreements).
agreement to be valid.172 These requirements would ensure the welfare of
the child during pregnancy and establish that the intended parents are fit
to raise a child.173 The statute would also provide protection for the child
by requiring the intended parents to remain legally responsible for the
child, even should the intended parents breach the surrogacy agreement
before the child is born.174 This provision ensures that the child is cared
for financially, even if the intended parents attempt to renge on the
agreement for any reason.175

Ideal legislation would only extend enforcement to gestational surro-
gagy contracts.176 Limiting the scope of legislation to regulating gesta-
tional surrogacy agreements reflects courts’ concerns regarding
traditional surrogacy contracts and would suggest that traditional surro-
gacy agreements should be avoided, because the legislation will not en-
force them.177 Limiting enforcement to gestational surrogacy agreements
alleviates the concerns initially set forth in Baby M, that enforcing tradi-
tional surrogacy agreements would separate children from their genetic
mothers.178 A traditional surrogate mother who is genetically related to
the child has a much more compelling argument for parental rights, as

172. See, e.g., N.J. S. 1599 (establishing requirements for parties entering into
surrogacy agreements). The act required a surrogate be at least twenty-one-years
old, have already given birth to at least one healthy child, complete psychological
and medical evaluations, and retain counsel independent from the intended par-
ents. See id. (requiring provisions be met before any woman can be eligible as
surrogate). The act also required intended parents to complete a psychological
evaluation and retain counsel independent from the surrogate. See id. (requiring
provisions be met by intended parents for surrogacy agreement to be valid).

173. See id. (demonstrating that child will be protected during pregnancy by
ensuring surrogate’s proper medical evaluations and prior pregnancies). The
child would further be protected by the creation of a legal relationship between
the intended parents and the child upon birth, so the child is taken care of finan-
cially. See id.

174. See id. (creating legal responsibility of intended parents immediately
upon child’s birth). “The breach of the gestational carrier agreement by the
intended parent shall not relieve the intended parent of the support obligations
imposed by the parent and child relationship . . . .” Id. Additionally, the act pro-
vided the basis for a child support action against an intended parent. See id. Such
a provision would clarify potential problems similar to those of Sherri Shepard, as
discussed above. See Ramisetti, supra note 5.

175. See N.J. S. 1599 (creating legal and financial responsibility for intended
parents immediately upon child’s birth).

176. See id. (declaring gestational carrier agreements in accordance with pub-
lic policy in New Jersey).

177. See id. (limiting enforcement to agreements involving “gestational car-
rier” who acts as surrogate “without the use of her own egg”).

178. See In re Baby M, 537 A.2d 1227, 1246 (N.J. 1988) (refusing to terminate
rights of surrogate who was also child’s genetic mother).
opposed to a gestational surrogate.\textsuperscript{179} Both the proposed New Jersey act and the current California statute only enforce gestational agreements.\textsuperscript{180}

Proper legislation would also limit the costs associated with surrogacy.\textsuperscript{181} Another common criticism of surrogacy agreements comes from comparisons to “baby-selling,” due to the compensation of surrogate mothers.\textsuperscript{182} Intended parents usually compensate surrogates in return for the surrogate’s services and pay for medical and other expenses throughout the pregnancy as well.\textsuperscript{183} Legislation should limit the compensation a surrogate would receive.\textsuperscript{184} The proposed New Jersey law limited compensation to “reasonable expenses,” which included medical expenses related to the pregnancy or birth of the child, expenses for counseling services, legal fees in regards to the surrogacy agreement, and reasonable living expenses.\textsuperscript{185} These expenses can add up quickly, but limiting the costs payable to necessities and expenses related to the pregnancy prevents couples from paying outrageous costs to use a surrogate.\textsuperscript{186}

\textsuperscript{179} See Difonzo & Stern, supra note 2, at 393 (discussing ways courts have distinguished traditional surrogacy from gestational surrogacy).

\textsuperscript{180} See N.J. S. 1599 (enforcing only gestational surrogacy agreements); see also CAL. FAM. CODE § 7962 (West 2014).

\textsuperscript{181} See CAL. FAM. CODE § 7962 (limiting costs paid to surrogate mothers).

\textsuperscript{182} See Baby M, 537 A.2d at 1241 (comparing surrogacy to “baby-bartering” and explaining evils associated with it). The Baby M court worried about baby-selling and found “[t]he negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother.” Id. at 1242.

\textsuperscript{183} See Brock A. Patton, Note, Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts, 79 UMKC L. Rev. 507, 513 (2010) (stating that intended parents enter into agreements to achieve reproduction goals while surrogates enter into same agreements for many different motivations, including associated fees). Patton enumerates different reasons that women agree to be surrogates, including connecting their employment to their domestic lives, simple goodwill in helping another couple, and also compensation. See id. (discussing motivation for women to become surrogate mothers). While the fees probably still play a large role in the decision, Patton suggests that many women do not name compensation as their motivation for entering into a surrogacy agreement. See id. (explaining motivational factors).

\textsuperscript{184} See N.J. S. 1599 (defining reasonable expenses). Reasonable expenses include:

\textit{[M]edical, hospital, counseling or other similar expenses incurred in connection with the gestational carrier agreement, reasonable attorney fees and costs for legal services in connection with the gestational carrier agreement, and the reasonable living expenses of the gestational carrier during her pregnancy including payments for reasonable food, clothing, medical expenses, shelter, and religious, psychological, vocational, or similar counseling services during the period of the pregnancy and during the period of postpartum recovery.}

\textit{Id.}

\textsuperscript{185} See id. (limiting expenses and costs surrogate mothers can receive as compensation in order for agreement to be enforced).

\textsuperscript{186} See id. (defining “reasonable expenses”).
Limiting the expenses also helps to combat the concerns about exploitation of the women serving as surrogates. The Baby M court expressed concern about degrading women and creating a class distinction between infertile couples and surrogates. However, as one commenter noted, surrogacy has the potential “both to exploit and to liberate women.” While the exploitation of women is a very legitimate concern, with proper regulation, surrogacy can be a key option for women who would otherwise be unable to have children or begin a family. By limiting the expenses surrogates can receive to reasonable wages and providing strict requirements as to who can serve as a surrogate, surrogacy is less likely to become an exploitative necessity for vulnerable women. Putting requirements and limitations on surrogacy will weed out many women who should not be surrogates and would enter into an agreement for the wrong reasons. Limitations created through legislation would help to ensure a mutually beneficial relationship for the intended parents and the surrogate mother and work to protect all of the parties to the agreement.

187. See Conklin, supra note 2, at 67 (noting that allowing regulation of compensation for surrogacy would aid in combatting exploitation of surrogate mothers).

188. See In re Baby M, 537 A.2d 1227, 1242, 1249 (N.J. 1988) (expressing concern with taking advantage of women’s circumstances). While the court recognized that “the Sterns [were] not rich and the Whiteheads not poor,” the court still worried about the potential class distinction created by the compulsion of a large fee for surrogacy. See id. at 1249 (discussing economic status of the parties). The court also asserted that “in a civilized society, [there are] some things that money cannot buy.” See id.

189. Brandel, supra note 159, at 489 (discussing potential harms of surrogacy agreements and possible solutions for such issues). Brandel asserts that “although critics have valid concerns about surrogacy and its implications, carefully drafted legislation can minimize the potentially exploitative aspects of surrogacy and protect the individuals who choose it as a reproductive option.” See id.

190. See id. at 516–19 (expressing concern over lack of regulation due to increased possibility for exploitation of women without restrictions). Brandel points out that without the proper medical and psychological examinations required by most gestational surrogacy statutes, the risk of exploiting vulnerable women remains significantly higher. See id. at 518–19 (stating need for regulation of surrogacy agreements).

191. See id. at 516–19 (discussing potential for exploiting women and statutory solutions to this risk); see also Abigail Lauren Perdue, For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy, 27 J. CONTEMP. HEALTH L. & POL’Y 279, 290–91 (2010) (arguing surrogacy does not risk exploitation any more than “exotic dancing, posing for pornographic magazines, donating gametes, or serving as a telephone sex operator” does).


193. See Difonzo & Stern, supra note 2, at 349–75 (discussing mutual benefits of surrogacy agreements). While surrogates tend to have lower incomes than the intended parents, there is no evidence that these women are typically in any economic crisis. See id. (discussing economic status of parties to surrogacy agreements). Compensation from gestational surrogacy agreements frequently serves to
Whether or not legislation enforcing gestational surrogacy agreements passes, New Jersey residents will continue to seek surrogate mothers as a way to start their families. Surrogacy agreements are not prohibited or illegal in New Jersey, and many fertility clinics continue to advertise for surrogates in New Jersey. Surrogacy agreements undoubtedly have and will continue to be utilized in New Jersey. If New Jersey does not see fit to ban surrogacy, the state must pass legislation to regulate the practice. As the practice of surrogacy continues to grow, New Jersey needs to provide guidance and protection for all of the parties involved, including the child, the intended parents, and the surrogate mother. Therefore, New Jersey needs legislation to regulate the practice of gestational surrogacy agreements within the state and protect intended parents like A.L.R.

“supplement” a surrogate’s income or to allow her to stay home, as surrogates usually have families of their own. See id. at 357–58.

194. See Susan K. Livio, Christie Vetoes Bill that Would Have Eased Tough Rules for Gestational Surrogates, STAR-LEDGER (Aug. 8, 2012, 12:23 PM), http://www.nj.com/politics/index.ssf/2012/08/christie_vetoes_bill_that_would.html (noting surrogacy continued to occur in New Jersey for decades, even after court’s decision in Baby M case). The attorney for the intended parents in T.J.S., Donald C. Cofsky, stated that “[g]estational carrier arrangements have been taking place in New Jersey for well over a decade, and are, and will remain, legal.” Id.

195. See Silberberg, supra note 3 (explaining how surrogacy allows infertile couples to have children who are still "truly [their] own").

196. See In re T.J.S., 54 A.3d 263, 279 (N.J. 2012) (Albin, J., dissenting) (explaining surrogacy agreements may be declared void but are not illegal). The dissent explained “[s]urrogacy agreements—such as the one in this case—are not uncommon in this State; no party has claimed otherwise or that they are illegal.” Id. at 278–79.

197. See Livio, supra note 194 (stating use of gestational carriers has increased 28% since 2007, according to American Society of Reproductive Medicine).

198. See id. (expressing concern that, due to lack of regulation, children born through surrogates could be left without legal parents). Because surrogacy is not illegal in New Jersey, these agreements will continue to happen. See id. However, without regulation, none of the parties involved receive any legal protection. See id. (discussing concerns due to vetoing of New Jersey bill).

199. See Brandel, supra note 159, at 515 (supporting legislation as necessary reform to protect parties in surrogacy agreements). Brandel asserts that proper legislation is necessary not only to protect the parties involved, but also to make surrogacy more predictable. See id. (discussing necessity of legislation on gestational surrogacy agreements).

THE FIRST CIRCUIT STRIKES OUT IN JONES v. CITY OF BOSTON:
A PITCH FOR PRACTICAL SIGNIFICANCE
IN DISPARATE IMPACT CASES

MICHAEL STENGER*

“Do not put your faith in what statistics say until you have
carefully considered what they do not say.”1

I. INTRODUCTION: COURTS ARE “STRIKING OUT”
IN DETERMINING SIGNIFICANCE

Despite their best efforts to comply with the law, modern employers
are likely to face allegations of unlawful discrimination.2 While most em-
ployers are aware that purposeful, overt discrimination is illegal, many fail
to realize the extent of liability potentially resulting from practices or poli-
cies that have the effect of discriminating against a protected class.3 Employ-
ers increasingly utilize statistics in hiring practices, collecting and
analyzing data about applicants and employees to determine who makes
the best employee.4 Employing “Moneyball”-type statistical analyses may
be useful to employers in amassing a more productive workforce, but it

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Hartwick College. I would like to thank my parents, Bill and Deb Stenger, my
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to the editors of the Villanova Law Review for their thoughtful insights and
assistance during the writing of this Note.

mystatistics.info/page0/page0.html (last visited Dec. 31, 2014) (quoting William
W. Watt).

2. See Arlene Switzer Steinfield & Andrew D. Peters, Dealing with Employees Who
.com/id=12026667031842 (noting many companies will face discrimination or har-
assment suits at one time or another); see also U.S. EEOC, Title VII of the Civil Rights
(last visited Dec. 31, 2014) (providing statistics on number of employment discrim-
ination charges filed with EEOC). In 2013, the EEOC received 67,558 complaints
of illegal discrimination under Title VII, of which 12,005 led to some sort of finan-
cial liability to employers. See id. Plaintiffs received $255.9 million in total dam-
ages, or about $21,316 per successful plaintiff. See id.

discrimination).

4. See Jamie Konn, Analytics and... Employment Law?, LABOR DISH (Sept. 15,
(describing how commercial employers have begun utilizing statistics to help make
hiring decisions).
also increases employers’ risk of exposure to disparate impact claims under 42 U.S.C § 1981.5

Since its inception in 1971, the disparate impact theory of employment discrimination has been arguably the most controversial and most inconsistently applied framework under which employers are held liable for discrimination.6 Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of “race, color, religion, sex, or national origin . . . .”7 Originally enacted to prevent outright acts of discrimination, Title VII was expanded to forbid employers from enacting facially neutral employment practices that disproportionately impact a protected group.8 Much of the inconsistency in the disparate impact con-

5. See id. (“There is a greater risk of a disparate impact claim when analytics are used in the hiring stage . . . .”). See generally MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2004) (telling story of Oakland Athletics General Manager Billy Beane and his revolutionary use of statistics in Major League Baseball). Employers have turned to statistics as a predictor of performance, much in the same way that Billy Beane and the Oakland Athletics have utilized “sabermetrics” in evaluating baseball prospects. See id. “Moneyball” refers to the assessment of baseball talent from a statistical, quantitative standpoint, rather than the traditional, subjective measures used by Major League franchises for much of the sport’s history. See id.

6. See Michael K. Grimaldi, Disparate Impact After Ricci and Lewis, 14 SCHOLAR 165, 166 (2011) (“The disparate-impact theory of employment discrimination has remained controversial since its inception.”); Herman N. Johnson, Jr., Disambiguating the Disparate Impact Claim, 22 TEMP. POL. & CIV. RTS. L. REV. 433, 434 (2013) (hinting disparate impact may receive “ominous reception” in future Supreme Court cases); Joseph A. Seiner, Plausibility and Disparate Impact, 64 HASTINGS L.J. 287, 295 (2013) (“[D]isparate impact has been marked with controversy since its inception.”); Michael Selmi, Was the Disparate Impact Theory a Mistake?, 53 UCLA L. REV. 701, 702 (2006) (arguing that disparate impact theory has attracted most attention and controversy within antidiscrimination law); see also Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (suggesting that disparate impact theory may be unconstitutional under Equal Protection Clause). Justice Scalia described the difficulty employers have in enacting policies that satisfy both the disparate treatment and disparate impact provisions of Title VII:

The difficulty is this: Whether or not Title VII’s disparate-treatment provisions forbid “remedial” race-based actions when a disparate-impact violation would not otherwise result . . . . it is clear that Title VII not only permits but affirmatively requires such actions when a disparate-impact violation would otherwise result . . . . Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to . . . make decisions based on (because of) [ ] racial outcomes.

Id.

7. 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin . . . .”).

8. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (interpreting Title VII to include disparate impact cause of action). The Supreme Court held that Congress’s intent in enacting Title VII was “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” Id. As such, the Court reasoned that Congress had forbidden “giving [testing or measuring procedures] controlling force unless they are demonstrably a reasonable measure of job performance.” Id. at 436.
text stems from the difficulty courts experience in determining whether plaintiffs have demonstrated a prima facie case.\textsuperscript{9} In order to demonstrate a prima facie case of disparate impact discrimination, a plaintiff must show that an employment practice or policy (1) is used by an employer and (2) causes an adverse impact on a protected class.\textsuperscript{10}

In order to prove the causation element, plaintiffs typically provide statistical analyses that compare the selection rates of majority and minority employees to demonstrate that the disparity adversely impacts the plaintiffs’ class.\textsuperscript{11} Judges must determine whether to assign weight to such statistical analyses, but they have done so in an arbitrary and unpredictable manner.\textsuperscript{12} Further, courts have wrestled with when to properly label a given sample as statistically significant, or when to take other factors into consideration.\textsuperscript{13}

Notably, there exists one “other” factor that some courts have incorporated into their disparate impact analyses: demonstration of practical significance.\textsuperscript{14} Nevertheless, many courts often choose to ignore the practical implications of a statistically significant sample, despite evidence that statistical significance is not, in all circumstances, an accurate measure of adverse impact.\textsuperscript{15} Although the Supreme Court has not yet addressed the practical significance requirement directly, several lower courts have taken

\textsuperscript{9} For discussion of a prima facie case and courts’ determination of the causation element, see infra notes 27–88 and accompanying text.
\textsuperscript{11} See D.H. Kaye, Is Proof of Statistical Significance Relevant?, 61 Wash. L. Rev. 1333, 1335 (1986) (describing how courts evaluating Title VII cases have come to expect standard deviation analysis); see also Moultrie v. Martin, 690 F.2d 1078, 1082 (4th Cir. 1982) (holding that all cases involving racial discrimination require application of standard deviation analysis). While not all circuits have demanded a showing of statistical analysis, it is incredibly rare for plaintiffs not to offer some sort of statistical evidence to support the causation prong of their case. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion) (suggesting that plaintiffs should establish causation by offering sufficient statistical evidence).
\textsuperscript{12} For a discussion of the inconsistent weight given to statistical evidence in the lower courts, see infra notes 53–55 and accompanying text.
\textsuperscript{13} See Kaye, supra note 11, at 1339–40 (describing evidentiary issue of allowing uncontroverted testimony of statistical experts to determine existence of prima facie case at trial); Allan G. King, “Gross Statistical Disparities” as Evidence of a Pattern and Practice of Discrimination: Statistical Versus Legal Significance, 22 Lab. Law. 271, 272 (2007) (“[L]ower courts frequently have turned to ‘statistical significance’ as the measuring rod.”); see also Tracy Bateman Farrell et al., Four-Fifths or 80% Rule, 45A Am. Jur. 2d Job Discrimination § 313 (describing four-fifths rule as useful benchmark in analyzing Title VII disparate impact testing cases).
\textsuperscript{14} See, e.g., Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370, 1376–77 (2d Cir. 1991) (citing Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC., 595 F.2d 621, 642 n.57 (D.C. Cir. 1978)) (holding that statistical significance is not indicative of “importance, magnitude, or practical significance” of presented disparity (emphasis added)).
\textsuperscript{15} See Kaye, supra note 11, at 1365 (calling into question ability of statistical significance testing to satisfy legal standards of proof).
the standard into consideration and are divided as to the necessity of a practical significance standard.16

Jones v. City of Boston,17 a recent First Circuit case, illustrates the difficulties that courts experience when it comes to determining the significance of statistical analyses in the face of practical objections.18 The First Circuit rejected the need for plaintiffs to demonstrate the practical significance of a statistically significant sample, despite strong evidence to suggest that such a showing was necessary in the case.19

This Note argues that the First Circuit was incorrect in rejecting the practical significance standard and proposes a workable framework for courts that incorporates both statistical and practical considerations.20 Part II provides an overview of disparate impact and examines the analytical progression courts undergo in a disparate impact claim.21 Part III traces the facts of Jones and explains the court’s reasoning in rejecting practical significance as a measure of disparate impact.22 Part IV presents arguments against the court’s holding in Jones, while Part V proposes a uniform two-part test for incorporating significance at the prima facie stage.23 Part VI concludes by discussing the impact of Jones within the First Circuit and beyond.24

II. STEPPING UP TO THE PLATE: THE HISTORY OF DISPARATE IMPACT

The disparate impact theory—though one of the most significant developments in employment discrimination jurisprudence—has evolved from a controversial history.25 Courts have addressed the theory by em-

16. For a discussion of the circuit split over the practical significance standard, see infra notes 73–88 and accompanying text.
17. 752 F.3d 38 (1st Cir. 2014).
18. See, e.g., id.
19. See id. at 55 (holding that demonstration of practical significance is not required by Title VII to prove prima facie case of disparate impact).
20. For a critical analysis of Jones, see infra notes 127–43 and accompanying text.
21. For a discussion of the history of disparate impact and practical significance, see infra notes 25–88 and accompanying text.
22. For a discussion of the facts of Jones and the court’s reasoning, see infra notes 89–126 and accompanying text.
23. For a critical analysis of the First Circuit’s holding in Jones, see infra notes 127–43 and accompanying text. For a discussion of the proposed two-part significance test, see infra notes 144–76 and accompanying text.
24. For a discussion of the impact of Jones, see infra notes 177–83 and accompanying text.
25. See Selmi, supra note 6, at 702–05 (describing disparate impact as controversial from its inception and having made no noticeable societal change). For a discussion of the history of disparate impact law in the Supreme Court, see infra notes 27–38 and accompanying text.
ploying different standards to determine the existence of disparate impact.26

A. Leveling the Playing Field: Griggs and the History of the Disparate Impact Doctrine

Title VII prohibits discrimination in the workplace on the basis of race, color, religion, sex, or national origin.27 During the seven years after the enactment of Title VII, courts interpreted this prohibition to include only intentional discrimination, such as refusing to hire or firing a person because of their membership in a protected class.28

In 1971, in a landmark case, the Supreme Court expanded the meaning of Title VII to include a more subtle form of discrimination: the use of facially-neutral practices or policies that adversely impact a protected class.29 In Griggs v. Duke Power Co.,30 a group of black plaintiffs challenged Duke Power’s policy that all employees must have a high school diploma and score satisfactorily on a general aptitude test, which served to preclude many black applicants from gaining employment or promotion within the company.31 The Court held that requirements such as those implemented by Duke Power violated Title VII because they were not related to successful job performance, and they disqualified black applicants at a much higher rate than white applicants.32 After Griggs,
the Court continued to expand and strengthen the disparate impact theory.\(^{33}\)

Nearly two decades after \textit{Griggs}, the Court, perhaps overzealously, attempted to significantly limit its expanded interpretation in \textit{Wards Cove Packing Co. v. Atonio}.\(^{34}\) In \textit{Wards Cove}, non-white plaintiffs alleged that their employer’s hiring practices caused a racial divide between white and non-white employees.\(^{35}\) In rejecting the plaintiff’s disparate impact claim, the Court held that employers need only provide a business justification for apparently discriminatory hiring practices.\(^{36}\) Subsequently, in passing the Civil Rights Act of 1991, Congress rejected the Court’s reasoning and statutorily superseded the Court’s \textit{Wards Cove} holding.\(^{37}\) Since the passage

\(^{33}\) See, e.g., \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 425–28 (1975) (establishing burden-shifting framework in disparate impact claims). In 1975, the Court fleshed out the prima facie case requirements and burden-shifting procedure in \textit{Albemarle Paper}. See \textit{id.}. The Court held that after a plaintiff makes out a prima facie case, the burden of proof shifts to the employer to show that the business practice was required by a business necessity. See \textit{id.} at 425. If the employer can demonstrate business necessity or “job relatedness,” the burden shifts back to the plaintiff to prove the existence of a less-discriminatory alternative practice that the defendant could have adopted. See \textit{id.} at 426. In \textit{Albemarle Paper}, the Court held that “it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’” \textit{Id.} at 425 (quoting \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792, 801 (1973)).

\(^{34}\) 490 U.S. 642, 658–59 (1989) (holding that “business justification” was appropriate defense to alleged discriminatory practice and that burden of proof in rebutting employer’s justification falls on plaintiffs). At the time of the decision, but before the Civil Rights Act of 1991 was passed, the \textit{Wards Cove} holding was the subject of much academic attention and was generally regarded as a misstep by the Supreme Court in its disparate impact jurisprudence. See, e.g., Michael K. Braswell, Gary A. Moore & Bill Shaw, \textit{Disparate Impact Theory in the Aftermath of Wards Cove: Burdens of Proof, Statistical Evidence, and Affirmative Action}, 54 \textit{ALB. L. REV.} 1, 1–2 (1989) (“The 1989 Supreme Court decision in \textit{Wards Cove} is a major ‘stride backwards’ concerning the use of disparate impact theory . . . . ” (footnotes omitted)); see also Grimaldi, \textit{supra} note 6, at 172 (describing disparate impact theory as having “near-death experience” in \textit{Wards Cove}).

\(^{35}\) See \textit{Wards Cove}, 490 U.S. at 646–48 (providing factual background). The employer, an Alaskan salmon cannery, had two general types of jobs: unskilled cannery positions and non-cannery managerial positions. See \textit{id.} at 647. Native Alaskans and Filipinos comprised a vast majority of the cannery positions, while their white coworkers held virtually all of the managerial positions. See \textit{id.}. The plaintiffs alleged that the disparity between white and non-white employees was caused by the company subjectively declining to offer non-whites the higher-paying non-cannery jobs. See \textit{id.} at 647–48.

\(^{36}\) See \textit{id.} at 658–59 (detailing business justification defense).


(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end of the following new subsection:

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

   (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on
of the 1991 amendments, the Court has expanded the disparate impact doctrine to include subjective hiring or promotional practices and has assigned liability where one of an employer’s many individual hiring practices has a disparate impact, despite the overall hiring process having no such impact.38

B. Here Comes the Curveball: Lower Courts’ Application of the Doctrine

Without definitive guidance from the Supreme Court on the issue, lower courts have struggled to come up with a workable solution for the most important stage of analysis in disparate impact cases: a plaintiff’s demonstration that there exists a causal connection between the selected employment practice and the alleged discriminatory impact.39 Generally, plaintiffs and defendants turn to three arguments to establish or disprove causation: statistical significance, the four-fifths rule, and practical significance.40

1. Statistical Significance

The most common, persuasive, and widely-accepted method that plaintiffs offer to demonstrate causation is the statistical significance analy-

the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

Id.

38. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (plurality opinion) (holding that subjective or discretionary employment policies may be challenged under disparate impact theory); see also Connecticut v. Teal, 457 U.S. 440 (1982). In Teal, a Connecticut state agency used a written examination as the first step in its promotion test, which black candidates passed at 68% the rate of white candidates. See id. at 443. Although the agency promoted black employees at a rate 170% higher than that of white employees, the Court still found that disparate impact existed in the agency’s testing procedures because the test eliminated an impermissibly high percentage of black applicants. See id. at 456. The Court thus rejected the “bottom line” defense to a prima facie showing of disparate impact discrimination because Title VII guarantees equality in hiring and promotion policies and practices. See id. Despite the Court’s expansion of the doctrine in these cases, scholars have suggested that the Court has begun to chip away at the disparate impact doctrine with its holding in Ricci v. DeStefano, 557 U.S. 557 (2009). See, e.g., Olatunde C.A. Johnson, The Agency Roots of Disparate Impact, 49 Harv. C.R.-C.L. L. Rev. 125, 128–33 (2014) (describing Supreme Court’s view of disparate impact as skeptical in recent rulings).


sis, also known as a standard deviation analysis. Although statistical analyses may vary in technical form, they all measure the probability that an observed disparity is the product of chance; in other words, a standard deviation analysis calculates how much a given sample differs from a different hypothetical sample which assumes equal opportunity. A difference of roughly two standard deviations equates to a 5% chance that the measured disparity was a result of chance.

The Supreme Court first turned to statistics as a measure of causation in the employment discrimination context in *International Brotherhood of Teamsters v. United States*. In *Teamsters*, the plaintiffs alleged that their employer had discriminated against African-American and Hispanic employees and offered a statistical analysis of the disparity in hiring and promotion rates between minority and white employees. The Court gave the plaintiffs’ statistical evidence substantial weight, noting that statistics can be especially probative in revealing imbalances in the racial composition of a work force. The Court confirmed that statistical analyses were probative in proving discrimination:

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.
the approved means of establishing causation in employment discrimination cases in *Hazelwood School District v. United States*. Relying on a jury selection discrimination case it had decided earlier that year, the Court held that statistical analyses revealing a disparity of “two or three standard deviations” reflected a “gross” statistical difference, such that illegal discrimination could be inferred.

The issue of statistical analyses being offered to prove causation arose again in *Watson v. Fort Worth Bank & Trust*. In a plurality opinion, the Court noted that lower courts had not been instructed to apply the *Hazelwood “two-to-three standard deviations” analysis in a mechanistic fashion.* Instead, the Court advised that lower courts should analyze statistical evidence on a case-by-case basis in light of the surrounding facts and circumstances. The Court has also noted recently that statistical significance may be enough to demonstrate a prima facie case.

Although not explicitly instructed to do so, lower courts have adopted the *Hazelwood* threshold in weighing the significance of a standard deviation analysis. Several circuits have even gone so far as to hold that any sample not rising to a disparity of at least two standard deviations is inadmissible as proof of causation. Other courts prefer statistical signifi-

*Id.* (second alteration in original) (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971)).


48. *Id.* at 308 n.14; see also *id.* at 307 (citing *Teamsters*, 431 U.S. at 339) (holding that “gross” statistical disparities alone may constitute prima facie case in certain circumstances). In *Hazelwood*, the plaintiff teachers brought suit against their school district alleging discrimination in the district’s employment patterns and practices. *See id.* at 301. The Court held that the proper groups to compare were not the percentage of black teachers in the school district and the percentage of black students in the district, as the district court had held, but rather the proper comparison was the racial composition of the district’s work force and the racial composition of the “qualified public school teacher population in the relevant labor market.” *Id.* at 308.


50. *See id.* at 995 n.3 (noting that Court had not suggested that set number of standard deviations can determine prima facie case). The Court noted that it had “emphasized the useful role that statistical methods can have in Title VII cases, but [had] not suggested that any particular number of ‘standard deviations’ can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination.” *Id.* (citing *Hazelwood*, 433 U.S. at 311 n.17).

51. *See id.* (holding that case-by-case approach is appropriate manner of analyzing standard deviations).


53. *See King*, *supra* note 13, at 276 (“[M]any lower courts have adopted the *Castaneda-Hazelwood* criterion of ‘two or three standard deviations’ as a bright-line rule.”).

54. *See, e.g.*, *Mems v. City of St. Paul*, Dep’t of Fire & Safety Servs., 224 F.3d 735, 741 (8th Cir. 2000) (rejecting small sample size due to lack of statistical significance); *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1062 (5th Cir. 1998) (holding that plaintiff failed to raise inference of discrimination after failing to
cance tests as evidence of disparate impact because they quantify the certainty with which it can be inferred that the impact is not a product of chance.55

Despite its mathematical nature, a standard deviation analysis is not without its weaknesses.56 The most notable weakness is its sensitivity to sample size: the larger the sample size, the more magnified differences appear in relation to standard deviation.57 Put simply, larger sample sizes are more conducive to a finding of statistical significance, even when actual differences are in fact small.58 In order to achieve a larger sample size—and hence a finding of statistical significance—plaintiffs typically aggregate data from numerous years in order to make their proffered sample statistically significant.59 Courts are generally willing to accept aggregation as a tool to achieve a sample size large enough to produce statistically significant results.60 However, some courts have also ques-
demonstrate statistical significance); Palmer v. Shultz, 815 F.2d 84, 95 (D.C. Cir. 1987) (rejecting plaintiff’s statistical analysis for lack of significance).

55. See, e.g., Carpenter v. Boeing Co., 456 F.3d 1183, 1292 (10th Cir. 2006) (“[A statistically significant] difference strongly indicates some influence on the results other than the operation of pure chance.”); Moultrie v. Martin, 690 F.2d 1078, 1082 (4th Cir. 1982) (holding that disparate impact cases require standard deviation analysis).

56. For a discussion of the weaknesses of standard deviation analyses, see infra notes 57–61 and accompanying text.

57. See Peresie, supra note 40, at 787 (“Statistical significance is also tremendously sensitive to sample size. . . . [T]he larger the number of applicants, the smaller the magnitude of difference that will be statistically significant . . . .”); Daniel L. Rubinfeld, Econometrics in the Courtroom, 85 COLUM. L. REV. 1048, 1067 (1985) (noting that large samples increase likelihood of finding statistical significance); Tom Tinkham, The Uses and Misuses of Statistical Proof in Age Discrimination Claims, 27 HOFSTRA LAB. & EMP. L.J. 357, 376 (2010) (noting that large sample sizes can disguise lack of practical significance).

58. See Rubinfeld, supra note 57, at 1067 (“[T]-statistics are quite sensitive to the size of the sample being studied. With a sufficiently large sample, the likelihood of getting a t-value greater than two can get large.”).

59. See Richard E. Biddle, Disparate Impact Analysis with Small Samples, CAL. LAB. & EMP. L. Q. (Fall 1995), available at http://www.biddle.com/documents/disparatesmall.htm (providing various aggregation methods plaintiffs use to increase sample size). The EEOC Guidelines accept several scenarios in which aggregation may be appropriate, including: aggregating data from the same test given for several jobs within the same company; aggregating data from similar tests given for the same job over many years; aggregating several years of data for one job; and aggregating data for more than one minority group. Id.

60. See, e.g., Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 313 (1977) (permitting aggregation because data for applicants from separate occupation census codes were similar enough for analytical purposes); Paige v. California, 291 F.3d 1141, 1148 (9th Cir. 2002) (“[I]t is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data.”); Eldredge v. Carpenters 46 N. Cal. Ctys., 833 F.2d 1334, 1340 n.8 (9th Cir. 1987) (allowing analysis of aggregated nine-year sample because it was most probative in light of surrounding circumstances); see also 29 C.F.R. § 1607.4 (1981). The Uniform Guidelines on Employee Selection Procedures also support aggregation in certain circumstances: “Where [ ] evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too
tioned the viability of aggregation by scrutinizing its probative value in light of other considerations.61

2. The Four-Fifths Rule

As an alternative to a showing of statistical significance, plaintiffs and defendants alike frequently turn to the Equal Employment Opportunity Commission’s (EEOC) “four-fifths” rule to prove or disprove the existence of disparate impact.62 The rule dictates that a selection rate (for promotions, hires, or related employment decisions) of a protected class that is less than four-fifths (or eighty percent) of the selection rate for the group with the highest selection rate will be considered actionable by the EEOC.63 Though the Supreme Court has labeled the four-fifths rule as nothing more than a rule of thumb for the courts, it has also noted that small to be reliable, evidence concerning the impact of the procedure over a longer period of time . . . may be considered in determining adverse impact.” Id.

61. See, e.g., Apsley v. Boeing Co., 722 F. Supp. 2d 1218, 1238 (D. Kan. 2010) (rejecting plaintiffs’ aggregation of data to make prima facie case of age discrimination); United States v. City of Yonkers, 609 F. Supp. 1281, 1288 (S.D.N.Y. 1984) (“A need to aggregate [data] to achieve statistical significance may lessen the probative force of the data . . . .”). In cases of employers with a large workforce, a standard deviation analysis based on aggregation of data from different departments within the company or from a number of years may not always be appropriate. See Peresie, supra note 40, at 787 (“[T]he statistical significance rule could be said to have a disparate impact on large employers because even a small disparity may achieve statistical significance.”).

62. See 29 C.F.R. § 1607.4(D). The relevant portion of the Code of Federal Regulations notes:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user’s actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.

Id.

63. See id. For example, a promotion test that 50 out of 100 men (50%) pass, but that 80 out of 100 women (80%) pass, would be considered evidence of discrimination because 50% is less than four-fifths of 80% (50% < 64%). See Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996, 11998 (Mar. 2, 1979) (providing formula for calculating four-fifths rule). To determine whether the four-fifths rule has been satisfied, one must use the following four-step process:

(1) [C]alculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from that group);

(2) [o]bserve which group has the highest selection rate;

(3) [a]lculate the impact ratios by comparing the selection rate for each group with that of their highest group (divide the selection rate for a group by the selection rate for the highest group);
EEOC guidelines deserve a measure of respect. With no clear guidance from the Supreme Court as to the weight that should be given to the rule, or when to properly apply it, circuits are split over parties using it to demonstrate or disprove impact. Federal district courts have also been divided over the rule’s use. Despite the courts’ skepticism of the four-fifths rule, several federal agencies have adopted the rule as a standard for determining when to act on a claim.

\((4)\) observe whether the selection rate for any group is substantially less (i.e., usually less than \(4/5ths\) or \(80\%\)) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances.

\(\text{Id.}\)

64. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988) (plurality opinion) (noting four-fifths rule “has not provided more than a rule of thumb for the courts”); see also Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399 (2008) (describing EEOC Guidelines as reflecting “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” “As such they are entitled to a measure of respect. . . .” (citations omitted) (internal quotation marks omitted)). Despite its history of distrust in the rule, recently the Court essentially changed the meaning of the above quote from Watson; in Ricci v. DeStefano the Court quoted only the last part of the Watson description, noting that the four-fifths rule “is ‘a rule of thumb for the courts.’” 557 U.S. 557, 587 (2009) (quoting Watson, 487 U.S. at 995 n.3).

65. See, e.g., Stagi v. Nat’l R.R. Passenger Corp., 391 F. App’x 133, 139 (3d Cir. 2010) (describing four-fifths rule as “non-binding” and refusing to use it as factor to determine existence of disparate impact); Allen v. City of Chicago, 351 F.3d 306, 317 (7th Cir. 2003) (holding police department liable for disparate impact because examination pass rates of minorities fell short of four-fifths rule); Boston Police Superior Officers Fed’n v. City of Boston, 147 F.3d 13, 21 (1st Cir. 1998) (using violation of four-fifths rule as one of many factors weighing into finding of disparate impact); Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370, 1379–80 (2d Cir. 1991) (finding violation of four-fifths rule, in combination with statistically significant disparity, as sufficient demonstration of disparate impact); Firefighters Inst. for Racial Equal. v. City of St. Louis, Mo., 616 F.2d 350, 356–57 (8th Cir. 1980) (utilizing four-fifths rule analysis in finding existence of disparate impact); Craig v. City of L.A., 626 F.2d 659 (9th Cir. 1980) (noting that defending employment practices is more difficult where EEOC guidelines have not been followed); Moore v. Sw. Bell Tel. Co., 593 F.2d 607, 608 (5th Cir. 1979) (holding that no disparate impact existed where pass rate for black applicants was 93% of pass rate of white applicants).


67. See Periesie, supra note 40, at 781 (providing list of agencies that have adopted four-fifths rule). The Department of Labor, the Department of Justice, and the Office of Personnel Management have adopted the rule as a measure of disparate impact. See id. The rule has also been adopted by the Office of Federal Contract Compliance Programs. See Eric M. Dunleavy, DCI Consulting Grp., A Consideration of Practical Significance in Adverse Impact Analysis (July 2010), available at http://dciconsult.com/whitepapers/PracSig.pdf (noting that Office of Federal Contract Compliance Programs has also adopted four-fifths rule).
Using the rule as a marker for disparate impact has some noted advantages, particularly its simplicity.68 Yet, despite being easy to understand, the rule has been extensively criticized by both courts and scholars alike as an improper measure of disparate impact.69 The greatest disadvantage is the rule’s impact on small employers: often times, the addition or subtraction of a small number of employees will have a substantial impact on the selection ratio between groups.70 Further, large disparities in impact may still exist but remain undetectable because of the rule’s strict cutoff.71 Such unreliable results and the noted weaknesses of the rule have undoubtedly led to inconsistencies among the lower courts.72

3. Practical Significance

Another measure courts turn to when deciding disparate impact cases is practical significance, an intuitive measure of substantive impor-

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68. See Peresie, supra note 40, at 783 (describing simplicity as primary advantage of four-fifths rule).


70. See Peresie, supra note 40, at 784 (“[A] small employer with a small absolute disparity . . . might face liability under the rule, while a large employer can have a much greater disparity and still comply with the four-fifths rule.”). Shoben, supra note 69, at 806–07 (performing four-fifths analysis and finding that selection rate is more sensitive in small samples than in large ones).

71. See Richard E. Biddle, Disparate Impact Reference Trilogy for Statistics, Lab. L.J. (1995), available at http://www.biddle.com/documents/disparatetrigoly.htm (“Smaller differences in selection rate [i.e., differences within the 80 percent limit, such as .81 or .95, etc.] may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms . . . .” (first alteration in original)). Further, the question over the appropriate “selection rate” often leads to inconsistent application of the rule. See, e.g., Council 31, Am. Fed’n of State, Cnty., & Mun. Emps., AFL-CIO v. Ward, 978 F.2d 373 (7th Cir. 1992) (providing example of confusion about selection rates). In Council 31, the employee-plaintiffs presented evidence that white employees were fired at 35% of the rate that black employees were. See id. at 379. Recognizing that this was in clear violation of the four-fifths rule, the employer offered statistics regarding retention, rather than termination, of employees, emphasizing that black employees were retained at 94% of the rate that white employees were. See id. at 379. The court adopted the plaintiffs’ presentation of the statistics, but the case is an example of how both sides in litigation attempt to frame the 80% requirement to their advantage.

72. See McKinley, supra note 69, at 176–77 (arguing that courts’ inconsistent application of four-fifths rule should prevent use of rule as guideline for employers).
A finding of practical significance means “the magnitude of the effect being studied is not de minimis—it is sufficiently important substantively for the court to be concerned.” Although it is not as well-defined in the legal context as the standard deviation analysis or the four-fifths rule, some courts have examined a proffered disparity with an eye toward its real-world meaning. For example, the First Circuit impliedly addressed practical significance in Boston Chapter, NAACP, Inc. v. Beecher. In Beecher, the First Circuit held that statistical evidence demonstrating that African-American and Hispanic applicants performed worse on a multiple-choice test than their white counterparts, in conjunction with other evidence, could demonstrate a prima facie case of disparate impact. The First Circuit expanded on this line of reasoning in Fudge v. City of Providence Fire Department, holding that the proper analysis in disparate impact claims involves an “intuitive judicial judgment” as to the substantiality of a statistically significant discrepancy.

74. Id. at 318; see also Hamer v. City of Atlanta, 872 F.2d 1521, 1524–26 (11th Cir. 1989) (describing practical significance as "the degree to which test scores relate to job performance"); Elizabeth Tippett, Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices, 29 Hofstra Lab & Emp. L.J. 433, 449 n.94 (2012) (“Practical significance refers to whether the statistical differences are meaningful in the real world.”).
75. See Frazier v. Garrison I.S.D., 980 F.2d 1514, 1526 (5th Cir. 1993) (holding 4.5% difference in selection rates was trivial where 95% of applicants were selected); Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370, 1379 (2d Cir. 1991) (citing Ottaviani v. State Univ. of N.Y. at New Paltz, 875 F.2d 365, 371 (2d Cir. 1989)) (noting that courts should take case-by-case approach that considers both statistical analyses and surrounding facts and circumstances); Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC, 595 F.2d 621, 642 n.57 (D.C. Cir. 1978) (Robinson, J., dissenting in part) (“[S]tatistical significance is not the same as practical significance because in isolation it tells nothing about the importance or magnitude of the differences.”); NAACP v. Fla. Dep’t of Corr., No. 5-00-cv-100-Oc-10GRJ, 2004 U.S. Dist. LEXIS 28548, at *54 (M.D. Fla. July 7, 2004) (rejecting statistically significant sample for lack of practical significance); Jones v. Pepsi-Cola Metro. Bottling Co., 871 F. Supp. 305, 313 n.25 (E.D. Mich. 1994) (noting that employers must demonstrate both statistical and practical significance in defending discriminatory test).
76. 504 F.2d 1017 (1st Cir. 1974).
77. See id. at 1021 n.7 (explaining that other factors are useful in determining validity of entrance exam). The First Circuit explained that non-statistical evidence, such as the fact that Boston firefighters were often recruited by relatives and friends, can be probative in determining whether or not a standardized test had an adverse impact on minority candidates. See id. (explaining that relatives and friends do not “invalidate the test [but] they are merely additional reasons for inquiring into its utility”).
78. 766 F.2d 650 (1st Cir. 1985).
79. See id. at 657–58 (holding that proffered statistical disparity was not sufficient to establish prima facie case). In Fudge, the plaintiffs offered evidence that a lower percentage of black applicants had passed a screening test as compared to white applicants, but they did not present any additional statistical analysis based
A practical significance consideration typically takes place after a plaintiff has introduced a statistical analysis that produced significant results. Though not binding on courts, the EEOC’s guidelines require evidence of both statistical and practical significance in order to prove disparate impact.

One glaring difficulty in adopting a practical significance standard is its lack of a solid definition. Another criticism comes in the form of subjectivity; since there is no set definition of practical significance, courts would have to perform a case-by-case analysis, which could lead to such arbitrary results as the four-fifths rule. Though not directly adopted by the Supreme Court, its line of cases surrounding the causation element of the prima facie case has hinted at what amounts to a consideration of practical significance.

on those figures. See id. at 657. The plaintiffs’ only evidence of disparate impact was that 4% of black applicants and 13% of white applicants had passed the screening test. See id.

80. See United States v. City of N.Y., 637 F. Supp. 2d 77, 94 (E.D.N.Y. 2009) (holding that plaintiffs’ showing of statistical significance was bolstered by demonstration of practical significance); EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1265, 1286 (N.D. Ill. 1986) (“To determine the practical significance of statistical results, a court must look at the theories and assumptions underlying the analysis and apply common sense.”).

81. See 29 C.F.R. § 1607.4(D) (1981) (requiring showing of both practical and statistical significance). The guidelines provide, in relevant part, that “[s]maller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user’s actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.” Id.

82. See Dunleavy, supra note 67, at 1–2 (noting difficulties in practical significance standard). Dunleavy, quoting an unpublished Office of Federal Contract Compliance report, identifies two potential problems with practical significance as a standard for disparate impact:

First, any standard of practical significance is arbitrary. It is not rooted in mathematics or statistics, but in a practical judgment as to the size of the disparity from which it is reasonable to infer discrimination. Second, no single mathematical measure of practical significance will be suitable to widely different factual settings.

83. See Fed. Judicial Ctr., Reference Manual on Scientific Evidence 192 n.34 (2d ed. 2000) (“There is no specific percentage threshold above which a result is practically significant. Practical significance must be evaluated in the context of a particular legal issue.”); see also King, supra note 13, at 201 (“[T]he standard for determining the sufficiency of statistical evidence should depend on the particular issue to which that evidence is addressed.”).

84. See Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 312 (1977) (noting that appropriate comparison figures in statistical analysis must be evaluated after further findings); Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 340
Practical significance as a measure of disparate impact has several advantages.\(^85\) When combined with a statistical significance analysis, courts can determine both the existence of a disparity and the consequences of the disparity.\(^86\) Further, a practical significance analysis has the effect of ruling out those cases where a statistically significant sample is mislabeled as dispositive due to its large sample size.\(^87\) Although not capable of a precise definition, scholars have noted the utility of adopting a practical significance standard and have suggested several procedures for evaluating the practical significance of a statistically significant sample.\(^88\)

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\(^85\) For a discussion of the advantages of adopting a practical significance standard, see infra notes 86–88 and accompanying text.

\(^86\) See Peresie, supra note 40, at 790 (noting that statistical and practical analyses serve two separate functions).

\(^87\) See Tinkham, supra note 57, at 362 (commenting on utility of practical significance analysis). Although a disparity of two or three standard deviations is enough to raise an inference of discrimination, a statistical analysis does not determine whether that disparity is practically significant. See id.

\(^88\) See, e.g., Biddle, supra note 59 (noting advantages to practical significance standard); Dunleavy, supra note 67, at 4–8 (arguing that practical significance is appropriate standard for an adverse impact analysis). One approach to quantifying practical significance requires the analyst (whether it be the court or an expert witness) to add two people from the “unfavorable” status (such as failing a drug test) to the “favorable” status (passing said test); if the change renders a once statistically significant sample as insignificant, then the results would not be practically significant. See id. at 4–8 (proposing approach). But see Kevin R. Murphy & Rick R. Jacobs, Using Effect Size Measures to Reform the Determination of Adverse Impact in Equal Employment Litigation, 18 Psychol. Pub. Pol’y & L. 477, 483 (2012) (suggesting that this method provides only marginal protection from trivial claims). Other scholars have suggested using difference in selection rates as a measure of practical significance. See, e.g., Peresie, supra note 40, at 801 (advocating for adoption of difference in selection rates as appropriate measure of practical significance). Peresie argues that “disparities with the same absolute magnitude should matter the same amount.” Id. Under this theory, a selection rate of 15% men and 10% women would indicate the same disparate impact as a rate of 75% men and 70% women. See id.

The social sciences have also recently adopted a showing of practical significance as necessary to validate studies, and they have considered a failure to do so a deficiency, although no precise definition exists in that sphere of academia. See, e.g., Dunleavy, supra note 67, at 6 (citing Sheldon Zedeck, Instructions for Authors, 88 J. Applied Psychol. 35 (2003)) (requiring authors to provide, among other things, showing of practical significance).
III. “YOU’RE OUT OF HERE!”: THE FIRST CIRCUIT EXPLICITLY REJECTS THE PRACTICAL SIGNIFICANCE REQUIREMENT IN JONES V. CITY OF BOSTON

In *Jones*, the First Circuit refused to consider practical concerns regarding the probative value of statistical evidence. The court’s holding turned on its acceptance of statistical evidence as sufficient to demonstrate a prima facie case. In reaching its holding, the court discounted the reasoning of the district court and refused to accept any practical considerations of the plaintiffs’ proffered statistically significant sample.

A. Covering the Bases: Facts and Procedure

In 1999, the Boston Police Department (the “Department”) began annually testing officers and cadets for illicit drug use. Specifically, the Department utilized a hair test to detect the existence of five different illegal drugs. Officers and cadets who failed the drug test were offered a second, more sensitive hair test and a medical review to determine if the first test was inaccurate. If neither of these steps exonerated offenders, the officers were given the option to remain at the Department so long as they agreed to seek rehabilitative treatment for drug abuse and accept a forty-five day unpaid suspension; if not, the offending officer or cadet was terminated, and any conditional offer of employment to a recruit would be withdrawn.

The plaintiffs were all black officers, applicants, and cadets who tested positive for the use of cocaine and failed the hair drug test. They alleged that the Department’s drug test violated Title VII because it caused a
disparate impact on the basis of their race.\textsuperscript{97} Although only a small number of black and white officers and cadets tested positive for cocaine between 1999 and 2006, black officers and cadets tested positive for cocaine at a higher rate than did their white colleagues.\textsuperscript{98} The district court granted summary judgment to the Department on all claims, holding that the plaintiffs’ proffered statistics, while statistically significant, were not practically significant and thus were insufficient to make a prima facie showing of racial discrimination.\textsuperscript{99}

B. \textit{That’s a Balk!: The First Circuit’s Reasoning in Jones}

In reversing the district court’s judgment, the First Circuit described the disparate impact analysis in conjunction with its views on the concept of statistical significance, and it applied those theories to the case at hand.\textsuperscript{100} The court then rejected the district court’s reasoning and held that Title VII did not require a showing of practical significance as to a plaintiff’s statistically significant sample.\textsuperscript{101}

1. \textit{“Lies, Damned Lies, and Statistics”}

The First Circuit began its analysis by briefly summarizing the disparate impact framework.\textsuperscript{102} The court explained that, in order to make a prima facie showing of disparate impact discrimination, a plaintiff must identify a specific employment practice that the employer actually uses and show that the identified practice causes a disparate impact on the ba-
sis of race.\textsuperscript{103} Much of the court’s analysis focused on the second step by noting that a disparate impact analysis essentially boils down to whether a plaintiff can offer a statistically significant disparity at the prima facie level.\textsuperscript{104}

The First Circuit explained the significance of statistical analyses in proving the causal link between the employment practice and the alleged disparate impact.\textsuperscript{105} Referencing Mark Twain’s famous quip that, “there are three kinds of lies: lies, damned lies, and statistics,” the court rejected the notion that the parties’ various briefs would be of any use in interpreting the meaning of a statistical analysis, and it instead gave deference to the objective, precise calculations of statisticians.\textsuperscript{106} Though statistical significance can be assessed by a variety of methods, the court deemed that a type of test known as a probability analysis was the most relevant for its present purposes.\textsuperscript{107} A probability analysis, the court described, determines the likelihood that a given sample was the result of chance, assuming that in a perfect world, both groups would receive equal treatment.\textsuperscript{108}


\textsuperscript{104} See id. (“[A] prima facie showing of disparate impact [is] ‘essentially a threshold showing of a significant statistical disparity . . . and nothing more.’” (second alteration in original) (quoting Ricci v. DeStefano, 557 U.S. 557, 587 (2009))); see also id. (“[A] prima facie case of disparate impact can be established where ‘statistical tests sufficiently diminish chance as a likely explanation.’” (quoting Fudge v. City of Providence Fire Dep’t, 766 F.2d 650, 658 n.8 (1st Cir. 1985))).

\textsuperscript{105} See id. at 43–45 (giving court’s summation of statistical significance and its application to case at hand).

\textsuperscript{106} See id. at 43 (giving deference to precise approach of statisticians). The court posited that, without any expertise in statistical analysis, the parties would be unable to persuade the court of the actual meaning of a statistical test and only offered “unhelpful types of competing characterizations of the numbers.” Id. The court made clear its preference for a statistician’s precise approach, whereby it may be determined whether a correlation between an employment practice and race exists, and if it does, whether that correlation exists as a product of chance. See id.; see also Mark Twain, The Autobiography of Mark Twain 195 (Charles Neider ed., 2000) (“Figures often beguile me, particularly when I have the arranging of them myself . . . There are three kinds of lies: lies, damned lies, and statistics.”). The court referenced part of the foregoing passage, which appropriately set the tone for the remainder of the court’s analysis. See Jones, 752 F.3d at 43.

\textsuperscript{107} See Jones, 752 F.3d at 43 (citing Paul Meier, Jerome Sacks & Sandy L. Zabell, What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule, 1984 Am. Bar Found. Research J. 139, 147 (1984)) (noting court’s reasoning for probability analysis). The court framed the probability test to the facts of Jones to illustrate its usefulness in assessing statistical significance. See id. (“In the approach most relevant here, statisticians may compare outcomes for two different groups (e.g., black employees and white employees) presuming that members of the two groups have the same likelihood of receiving a given outcome (e.g., a promotion).”).

\textsuperscript{108} See id. (observing that assumption of equal opportunity does not necessitate actual equal outcomes). The court noted that random variation may cause differences in a given outcome, and that the purpose of performing a probability
The court observed that when statisticians employ this test, they will deem results statistically significant if certain criteria are met, specifically if the tested sample deviates a certain amount from the expected outcome. Statisticians, the court noted, will reject the idea that the disparity between the groups was caused by chance when the probability test produces statistically significant results.

Applying this framework to the case at hand, the First Circuit found that the plaintiffs’ proffered analysis was statistically significant. Despite confessing its uncertainty as to whether to consider the data aggregated over eight years as a single sample, the court nevertheless held that it could “be almost certain that the difference in outcomes associated with race over that period cannot be attributed to chance alone.” The court then overruled several secondary objections raised by the Department, the most notable of which questioned the plaintiffs’ aggregation of data in its proffered statistical analysis.

Analysis is to determine the likelihood that the difference from the expected outcome was the result of random chance. See id. (citing Fed. Judicial Ctr., supra note 73, at 251). The probability of observing a difference equal to or greater than that which actually occurred is known as the “p-value.” See id. at 43–44. Courts generally accept a p-value of 5% as evidence of statistical significance. See id. (citing Fudge, 766 F.2d at 658 n.8).

109. See id. (describing concept of standard deviation). Standard deviation serves as a measure of the amount by which the given sample differs from an outcome resulting from equal opportunity. See id. at 44 (citing Fudge, 766 F.2d at 658 n.8). A standard deviation of 1.96 is equivalent to a p-value of 0.5 and is the level at which courts will recognize statistical significance. See id. (citing Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977)) (noting correlation between standard deviation, p-value, and statistical significance). The Supreme Court noted in Castaneda that “[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis . . . [of randomness] would be suspect to a social scientist.” Castaneda, 430 U.S. at 496 n.17.

110. See Jones, 752 F.3d at 43 (“Essentially, a finding of statistical significance means that the data casts serious doubt on the assumption that the disparity was caused by chance.”).

111. See id. at 44 (providing plaintiffs’ statistical analysis). The court noted that the presented analysis did not indicate whether the difference in outcomes was, on its face, large, but it indicated the extent to which the outcomes were attributed to something other than chance. See id. at 45 (“[T]he difference in outcomes associated with race over [the eight-year] period cannot be attributed to chance alone.”).

112. Id. (emphasis added). The court also noted that randomness could not be viewed as anything but “a very unlikely explanation for results in at least three of the years viewed in isolation.” Id.

113. See id. at 47 (describing Department’s objections). The Department’s concern over aggregation stemmed from the fact that many individual officers had been tested in several of the years given in the sample, which called into question the assumption that the test results for different years were independent events. See id. The court rejected this argument, noting that a demonstration that the plaintiffs’ analysis was skewed would be too complex. See id. at 48 n.11 (determining that Department’s analysis would “implicate[e] such factors as layoff and hiring practices and the probability that a person who tested negative in one year will test
2. Picked Off: The First Circuit Rejects the Practical Significance Standard

Most significantly, the First Circuit rejected the Department’s argument that Title VII requires a plaintiff to prove that a statistically significant sample also is practically significant in order to demonstrate a prima facie case.114 The court began by acknowledging that several of the Department’s arguments regarding sample size had merit, conceding that the larger the sample size, the more likely it is that even small differences between groups can be statistically significant.115 Further, the court recognized that statisticians regularly assess the practical significance of large, statistically significant samples due to the problems associated with those outcomes.116 The court also referenced the EEOC’s guidelines, which it described as being “reasonably read as interpreting Title VII to include a practical significance requirement.”117

Despite its willingness to concede these logical points brought up by the Department, the court forcefully rejected a practical significance requirement.118 The court’s first concern with such a requirement was a lack of any objective measure of practical significance, expressing apprehension at the idea of courts applying an “elusive, know-it-when-you-see-it standard.”119 The First Circuit next took the four-fifths rule to task, pointing out several flaws with using the rule as a measure of practical significance:

negative in a later year, as compared to the probability of a negative result for someone first tested in the later year”).

114. See id. at 48 (rejecting Department’s central argument). The district court had adopted the Department’s argument, holding that the plaintiffs could not establish a prima facie case based solely on a showing of two or more standard deviations in failure rates. See Jones v. City of Boston, No. 05-11832-Gao, 2012 WL 4530594, at *3 (D. Mass. Sept. 28, 2012) (“For these reasons, the defendants are correct that the plaintiffs have not satisfied the first step in making out a prima facie case.”).

115. See Jones, 752 F.3d at 48–49 (discussing problematic connection between statistical significance and large sample sizes). The court provided a useful example regarding large sample size and statistical significance:

For example, if you were to flip a coin a million times, and the coin were to land on tails exactly 50.1% of the time, the deviation from the expected result of 50% tails and 50% heads would be statistically significant, even though it amounts to just one flip per thousand.

Id. at 49.

116. See id. (“[S]tatisticians acknowledge that not all statistically significant results are practically significant, meaning “practically meaningful or important.”” (quoting Xitao Fan, Statistical Significance and Effect Size in Education Research: Two Sides of a Coin, 94 J. EDUC. RESEARCH 275, 277 (2001))).

117. See id. at 50. The court noted that the federal regulation that created the four-fifths rule considers both practical and statistical significance as relevant in determining whether disparate impact exists. See id. (discussing 29 C.F.R. § 1607.4(D)).

118. See id. at 50–53 (rejecting Department’s main argument).

119. See id. at 50–51 (discussing lack of objective measure of practical significance). The court described the concept of practical significance as “impossible to define in even a remotely precise manner.” Id. at 50.
Although other courts often use the four-fifths rule as a “rule of thumb,” the court noted that the Supreme Court and the EEOC have questioned the rule as a decisive tool. Further, the court found the rule to be flawed because it can lead to inconsistent results depending on how it is interpreted. Although the court recognized that the four-fifths rule may serve important goals in contexts outside of the courtroom, it dismissed the Department’s reliance on the rule as a measure of practical significance.

Similarly, the court recognized that, although there may be some “theoretical benefits” to requiring a showing of practical significance, it would simply be too difficult to define or enforce such a standard in any “principled and predictable manner.” Because it could not find an acceptably accurate measure of practical significance, the court chose to simply discard the requirement altogether. The court concluded its analysis by suggesting that plaintiffs must fulfill other requirements in proving a disparate impact case that indirectly satisfy the benefits a practical significance standard would yield.

120. See id. at 51–53 (describing flaws of four-fifths rule).
121. See id. at 51 (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 (1988) (plurality opinion)). But see id. (citing Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996, 11998 (Mar. 2, 1979)) (noting that four-fifths rule was not meant to be legal definition or controlling in all circumstances). The First Circuit also noted its own reluctance to rely on the rule in a past disparate impact case. See id. (citing Fudge v. City of Providence Fire Dep’t, 766 F.2d 650, 658 n.10 (1st Cir. 1985)) (describing four-fifths rule as inaccurate test of discriminatory impact). In Fudge, the court noted that the 4% passage rate of black applicants, as compared to the 13% passage rate of white applicants, fell well short of the four-fifths rule’s requirements, but it rejected the rule as a measure of impact because the sample size was too small. See Fudge, 766 F.2d at 656, 658 n.10 (noting that sample size of 248 applicants was not large enough to justify use of four-fifths rule).
122. See Jones, 752 F.3d at 51–52 (highlighting several flaws with four-fifths rule). The Jones court pointed out that a given sample may be deemed to meet the four-fifths requirement depending on which “selection rate” is chosen by the statistician; choosing a selection rate at which employees pass a test, as opposed to the rate at which employees fail a test, may lead to an entirely different conclusion. See id. at 52. Further, the court took issue with the rule’s strict 80% requirement, explaining that a court implementing the rule would put no greater weight on a policy that leads to termination of 100 in 900 black employees than it would to a policy that leads to the termination of one in nine black employees. See id.
123. See id. (rejecting application of four-fifths rule to determine practical significance of statistically significant sample).
124. Id. at 53. Having rejected the four-fifths rule, the court decided that there was no other mathematical measure of practical significance available for its consideration. See id. (“Ultimately, we find any theoretical benefits of inquiring as to practical significance outweighed by the difficulty of doing so in practice in any principled and predictable manner.”).
125. See id.
126. See id. (describing existing requirements imposed by Title VII on plaintiffs in disparate impact cases). The court construed the need for plaintiffs to show statistical significance as a filter that would preclude “small impacts” from making
IV. Swing and a Miss: The First Circuit Failed to Examine Practical Significance

In Jones, the First Circuit had the opportunity to set forth a new standard in disparate impact claims, but it instead fell into the same trap that courts have fallen into over the past thirty years: placing too much emphasis on a finding of statistical significance, while overlooking or ignoring the statistics’ practical meaning.127

The first misstep the court made was disregarding the potential influence of other circuit courts and scholarship on the subject, as the court dismissed case law from other circuits as “sparse” and unclear.128 The court’s claim is simply incorrect.129 Several courts have adopted a requirement of showing practical significance, which is typically added as a second tier of analysis in conjunction with statistical evidence.130 Further, it is well-established in the study of statistics that a showing of statistical significance is not dispositive, particularly when dealing with large sample sizes, as was the case in Jones.131 Moreover, the First Circuit implied that the concepts of statistical significance and practical significance are mutually exclusive, when, in fact, they are intertwined and most beneficial when used in tandem.132

The First Circuit also erred in misinterpreting its own precedent on practical significance.133 Although the court has not explicitly addressed it past the prima facie stage, because proving statistical significance with a small impact requires attaining often-unavailable large sample sizes. See id. Further, the court felt confident that the consequent steps in a disparate impact case would give a defendant ample opportunity to weed out insignificant or otherwise justifiable claims of impact. See id. (“[E]ven in cases like this one, in which the data is available, the subsequent steps required to successfully recover on a disparate impact theory offer an additional safeguard.”). Having rejected the Department’s proposal for a practical significance requirement, the First Circuit reversed the district court’s decision. See id. at 60 (“The plaintiffs have proven beyond reasonable dispute a prima facie case of disparate impact under Title VII . . . .”).

127. For an in-depth discussion of the court’s refusal to adopt a practical significance standard, see infra notes 128–43 and accompanying text.
128. See Jones, 752 F.3d at 50 (labeling case law from other federal circuit courts as “sparse” and unable to offer answers as to practical significance standard).
129. For a discussion of case law from other courts examining practical significance, see supra note 75 and accompanying text.
130. See, e.g., Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370, 1376 (2d Cir. 1991) (holding that case-by-case analysis of all facts and circumstances surrounding statistical disparities is appropriate consideration).
131. For a discussion on the First Circuit’s misinterpretation of its own precedent, see infra notes 134–37 and accompanying text.
“practical significance” as a standard, prior First Circuit cases can be read as having already deployed such an analysis in the disparate impact context.\textsuperscript{134} In \textit{Beecher}, the court determined that the plaintiffs’ use of “other evidence” in support of a disparate impact claim may be highly relevant.\textsuperscript{135} The First Circuit later expanded on the \textit{Beecher} ruling in \textit{Fudge}, where it held that the appropriate analysis in disparate impact claims includes consideration of both statistical and practical evidence.\textsuperscript{136} District courts within the First Circuit have also applied a similar analysis.\textsuperscript{137}

The court also misinterpreted the four-fifths rule as being the only viable measure of practical significance.\textsuperscript{138} Though the court noted that there are no other mathematical measures of practical significance, it failed to recognize that not all evidence in the employment discrimination context must be mathematical in nature.\textsuperscript{139} Although the four-fifths rule has been widely criticized, it is not the only measure of practical significance; as illustrated above, there are several suggestions on how to consistently calculate practical significance.\textsuperscript{140} In \textit{Jones}, the defendant’s expert witness offered such a suggestion to determine practical significance, but the First Circuit dismissed the recommendation without addressing it.\textsuperscript{141}

\begin{itemize}
  \item \textsuperscript{134} For a discussion of prior First Circuit cases considering practical significance, see \textit{supra} notes 76–79 and accompanying text.
  \item \textsuperscript{135} See Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1021 n.7 (1st Cir. 1974) (holding that other evidence may be probative where proffered sample size is small).
  \item \textsuperscript{136} See \textit{Fudge} v. City of Providence Fire Dep’t, 766 F.2d 650, 657 (1st Cir. 1985) (rejecting four-fifths rule as proper analytical tool where plaintiff offered no statistical evidence as to alleged disparity). In an important passage, the court held that: “In a case involving a claim . . . [of] disparate and adverse impact . . . the initial inquiry must be whether there is a discrepancy in the rate of passage . . . . If so, an intuitive judicial judgment must next be made whether the discrepancy is substantial.” \textit{Id.} (emphasis added).
  \item \textsuperscript{138} See \textit{Jones} v. City of Boston, 752 F.3d 38, 52 (1st Cir. 2014) (“Our rejection of the four-fifths rule as suitable to trump a showing of statistical significance leaves us with no statute, regulation, or case law proposing any other mathematical measure of practical significance.”).
  \item \textsuperscript{139} See, e.g., EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1533 (N.D. Ill. 1986) (holding that statistical disparities in hiring between men and women were attributed externally to women’s lack of interest rather than to internal discriminatory motive). In systemic disparate treatment cases, courts frequently take other, non-mathematical considerations into account when determining liability. See Tristin K. Green, \textit{The Future of Systemic Disparate Treatment Law}, 92 \textit{BERKELEY J. EMP. & LAB. L.} 395, 417 (2011) (commenting that statistical evidence of disparities is probative, but not dispositive, in employment discrimination context).
  \item \textsuperscript{140} For a discussion of proposed methods for determining practical significance, see \textit{supra} notes 85–88 and accompanying text.
  \item \textsuperscript{141} See Expert Report of Dr. Kathleen K. Lundquist at 4, \textit{Jones} v. City of Boston, No. 05-11832-Gao, 2012 WL 4530594 (D. Mass. Mar. 13, 2009), 2009 WL 8754866 (relying on EEOC Uniform Guidelines and applying statistical and practical significance tests). Lundquist, the defendant’s expert witness, demonstrated in
Finally, the court’s reasoning is overly broad in that it rejects the need for a showing of practical significance altogether.\footnote{For a discussion of the need for a practical significance standard in disparate impact cases, see supra notes 86–88 and accompanying text.} This holding flies in the face of supporting academic literature, and it defies sound logic proposed by other courts that the First Circuit seemed to simply ignore.\footnote{For a discussion of academic support for practical significance and other courts’ analyses of the standard, see supra notes 73–88 and accompanying text.}

V. Instant Replay: Proposal of a Two-Part Significance Framework and How Jones Should Have Played Out

Jones illustrates the need for a new framework in disparate impact analysis that adequately accounts for statistical and practical concerns.\footnote{For a critical analysis of Jones, see supra notes 127–43 and accompanying text.} Such a framework would more accurately address the concerns of Title VII by screening out employment practices that actually have a discriminatory effect on a given class.\footnote{See Peresic, supra note 40, at 792 (arguing that two-prong test at prima facie stage would more accurately measure existence of impact). For a discussion of a proposed two-part framework incorporating practical significance at the prima facie stage, see infra notes 147–65 and accompanying text.} Had the First Circuit used a framework that incorporated concerns of practical effects, the outcome in Jones would have been different.\footnote{For a discussion of the proposed two-part framework as applied to Jones, see infra notes 166–76 and accompanying text.}

A. Let’s Play Two!: A New Approach to Disparate Impact

Although the four-fifths rule may be a poor method of measuring disparate impact, the EEOC did accurately assess the need for some consideration of practical significance.\footnote{See Murphy & Jacobs, supra note 88, at 486 (advocating for federal enforcement agencies to define disparate-impact theory with both statistical significance and practical significance in mind); George Rutherford, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 Va. L. Rev. 1297, 1323 (1987) (noting that plaintiffs’ burden in demonstrating disparate impact should require more than statistically significant analysis).} Statistical significance and practical significance separately are useful tools to determine the existence of disparate impact.\footnote{See Dunleavy, supra note 67, at 4–8 (discussing benefits of using statistical significance and practical significance in conjunction).} However useful they may be, the two standards share a weakness: they both, individually, only measure one of two important in-
quiries in disparate impact cases. On the one hand, statistical significance allows plaintiffs to demonstrate that a particular practice causes some disparity between classes (the “disparate” prong of the inquiry); on the other, practical significance determines if that disparity is large enough to have real-world implications (the “impact” prong of the inquiry). Practices that do in fact create a noticeable disparate impact would implicate both of these considerations.

The first step that courts should take under this new framework would be very familiar; as to statistical significance, courts should continue to employ the standard deviation analysis as a tool to determine if a disparity actually exists. As part of the first step, plaintiffs would be required to demonstrate that a disparity exists that is at least two standard deviations from the outcome that assumes equal opportunity. This disparity is large enough to give a sample probative value because, as described above, two standard deviations is equivalent to a showing that the demonstrated disparity would occur as a result of random chance only one in twenty times. Defendants would be able to continue to attack the statistical analysis and question the methods used or the sample size analyzed.

149. See Peresie, supra note 40, at 790 (describing tests as problematic when used individually).

150. See id. at 790–91.

151. See Rutherglen, supra note 147, at 1324 (noting that employment practices that create great adverse impact likely serve as pretexts for discrimination and deny equality of opportunity).

152. See Peresie, supra note 40, at 792–93 (arguing that courts should continue to utilize standard deviation as measure of disparity). Retaining the same analytical tool carries several advantages. See id. The standard deviation analysis is, compared to other statistical analyses, relatively easy to understand. See Kaye, supra note 11, at 1337 (noting that concept of statistical significance is “easily grasped”). Further, it is well-engrained in disparate impact case law nationwide; courts would have no difficulty keeping a standard in place that they have already used for more than forty years. See supra notes 41–61 and accompanying text.

153. See Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 362–63 (7th Cir. 2001) (describing problems with using lower or higher p-value to determine significance). Judge Posner, writing for the Seventh Circuit, observed:

A lower significance level may show that the correlation is spurious, but may also be a result of “noise” in the data or collinearity . . . and such evidence, when corroborated by other evidence, need not be deemed worthless. Conversely, a high significance level may be a misleading artifact of the study’s design; and there is always the risk that . . . in the circumstances, it was a chance result with no actual evidentiary significance.

Id. at 362.

154. For a discussion on the standard deviation analysis and levels of significance, see supra notes 41–43 and accompanying text.

155. See Peresie, supra note 40, at 778 (describing shift of burden of proof to employer). If a plaintiff can offer a statistically significant disparity, the defendant can then attempt to rebut the plaintiff’s statistical evidence or demonstrate that the questioned employment practice is job-related and consistent with business necessity. See id.
If plaintiffs are able to demonstrate that a statistically significant disparity exists as a result of an employment practice, they should then be required to show that this disparity is practically significant. As the court in Jones observed, practical significance is a difficult concept to define in any concrete manner. However, various methods exist for determining practical significance that plaintiffs and defendants alike could use to persuade a court, much in the same way the four-fifths rule has been used in courts in the past. Courts should nevertheless discredit the four-fifths rule as a viable measure of disparate impact altogether due to its well-established history of inconsistent results. Although a “know-it-when-you-see-it” approach should be avoided, the particular nature of statistical analysis may lend itself to a “case-by-case” analysis or an “intuitive judicial judgment.” Until Congress or the Supreme Court adopts a new standard for practical significance, or until the EEOC provides a more coherent and consistently-applicable measure, courts may have to develop the standard through the common law. Used in conjunction, the two tests will more accurately weed out those employment practices that are causing actual discrimination, and they will also prevent unjust findings of

156. See id. at 802 (advocating for adoption of two-part test for significance at prima facie stage in disparate impact claims).

157. For a discussion on the difficulty in defining practical significance precisely, see supra note 82 and accompanying text.

158. See Peresie, supra note 40, at 799–800 (proposing three methods for establishing practical significance). Courts might utilize a method similar to the four-fifths rule, but use the fail rate instead of the pass rate in comparing selection ratios. See id. at 799 (“One way to minimize this problem is to use the fail ratio instead of the pass ratio when the selection rates are very low.”). Or, plaintiffs could be required to show that the difference in selection rates, not the ratio between the rates, establishes practical significance. See id. (noting that courts “could require plaintiffs to show that the difference was equal to, or greater than, a specified number of percentage points in the selection rate to establish practical significance”). Alternatively, defendants could demonstrate lack of practical significance by showing that subtracting a specified number of people from the disfavored group and adding them to the favored group discredits the significance of a statistical analysis. See id. at 800 (“If the addition of a certain number of persons to the pass group of the minority eliminates any statistically significant disparity, then the disparity is not practically significant.”).

159. For a description of problems with the four-fifths rule, see supra notes 69–72 and accompanying text.

160. See Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370, 1379 (2d Cir. 1991) (citing Ottaviani v. State Univ. of N.Y. at New Paltz, 875 F.2d 365, 371 (2d Cir. 1989)) (noting that courts should take case-by-case approach that considers both statistical analyses and surrounding facts and circumstances in determining if disparate impact occurred); Fudge v. City of Providence Fire Dep’t, 766 F.2d 650, 657 (1st Cir. 1985) (applying “intuitive judicial judgment” as proper mechanism for analyzing substantiality of established statistical discrepancy).

161. See Peresie, supra note 40, at 802 (recognizing necessity for practical and statistical significance tests and noting that choosing proper standard is “policy-laden decision”). But see Rutherglen, supra note 147, at 1330 (advocating that courts should establish modest threshold that includes consideration of practical significance).
discrimination against employers whose tests or other employment practices have no practically-meaningful impact on different classes.

Though this two-tiered approach has several benefits, it does have some potential weaknesses as well. First, it very obviously increases the plaintiff’s burden in establishing a prima facie case; plaintiffs very rarely win disparate impact claims as it is, and this added burden would surely screen out previously-acceptable claims. Secondly, there is scholarship that indicates that the standard deviation analysis may not, in fact, be the most accurate statistical measure of impact. However, until some measure of significance is suggested by the Supreme Court or is codified by Congress, the approach proposed above would still allow suits that actually identify discriminatory practices and policies to proceed.

B. Double Play: New Standard as Applied to Jones

The First Circuit erred in Jones v. City of Boston by not requiring the plaintiffs to show that their statistically significant sample was also practically significant. But, what if the court had embraced practical significance as a measure of impact—would the outcome have changed at all?

162. For a discussion of weaknesses of the two-tiered approach, see infra notes 163–65 and accompanying text.

163. See Selmi, supra note 6, at 739–40 (reporting that plaintiffs win about 25.1% of disparate impact cases at trial in federal district courts); see also Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 5 HARV. L. & POL’Y REV. 103, 103–04 (2009) (describing how plaintiffs win low proportion of cases at trial). Plaintiffs in federal employment discrimination cases also generally have a difficult time resolving cases pretrial. See id. at 111 (noting lack of success for plaintiffs pretrial). They also win a low percentage of cases at trial and, when they do, are often overturned on appeal. See id. at 109–11 (providing statistics for plaintiffs’ success rates at trial).

164. See, e.g., Murphy & Jacobs, supra note 88, at 486–87 (advocating for several different methods of determining impact). One such method would be to evaluate the difference between groups in terms of pooled deviations. See id. at 487 (noting that pooled deviations would “express[ ] the difference between groups in terms of the number of standard deviations that separate [the groups’] average scores”). This method would produce a $d$ value, which would range on the low end from zero (no impact) to one (large impact). See id. Another potential method would be to evaluate the percentage of variance explained by differences between the groups being compared:

If, for example, differences between men and women explain less than 1% of the variance in selection decisions, that figure will have the same meaning and the same implications regardless of the sample size. . . . PV values of .01, .05, .15, .20, respectively, are widely used to describe small, medium, moderately large, and large effects in the social and behavioral sciences.

Id.

165. See Peresie, supra note 40, at 792 (arguing that two-prong test at prima facie stage would more accurately measure existence of impact).

166. For an analysis of the First Circuit’s holding in Jones, see supra notes 100–26 and accompanying text.

167. For an application of the two-part test to the facts of Jones, see infra notes 168–76 and accompanying text.
Applying the proposed two-part test to the facts of Jones reveals several holes in the court’s reasoning.\textsuperscript{168} Under this new framework, the first part of the plaintiffs’ prima facie case—offering statistical evidence at or above the two standard deviation threshold—would be satisfied.\textsuperscript{169}

The second step in the proposed analysis, that would require plaintiffs to demonstrate practical significance, is where the most obvious divergences from the court’s holding are evident.\textsuperscript{170} Had the court taken practical significance into consideration, it would have had to more thoroughly examine the aggregation issue raised by the defendants.\textsuperscript{171} Although that specific argument was deemed not to have been properly preserved upon appeal to the First Circuit, the Department could have also attacked the plaintiffs’ aggregated data on the basis that the impact rose to an actionable level in only three of the eight years included in the sample.\textsuperscript{172} It was only in the aggregate that the plaintiffs’ sample seemed to shock the court into finding evidence of disparate impact.\textsuperscript{173} In the same vein, had the court taken into account the sheer size of the sample

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  \item \textsuperscript{168} For a discussion of the flaws in the Jones court’s reasoning, see infra notes 169–76 and accompanying text.
  \item \textsuperscript{169} See Jones v. City of Boston, 752 F.3d 38, 44 (1st Cir. 2014) (displaying table of plaintiffs’ statistical analysis). In Jones, the plaintiffs’ proffered statistical sample proved, in the aggregate, that the actual result was 7.14 standard deviations away from the expected norm, well above the necessary showing. See id. at 44 n.8 (providing sample’s “standard deviation of 7.14 for all years combined is far greater than the average of the standard deviations in the individual years”).
  \item \textsuperscript{170} For an application of the second part of the test to the facts of Jones, see infra notes 171–76 and accompanying text.
  \item \textsuperscript{171} See Jones, 752 F.3d at 48 (detailing defendant’s argument regarding aggregation of eight years of data); see also supra note 113 and accompanying text.
  \item \textsuperscript{172} See Jones, 752 F.3d at 44–45 (presenting plaintiffs’ proffered statistical data). In 1999, 2002, and 2003, the standard deviations between the actual and expected outcomes were 3.43, 4.41, and 2.01, respectively, which would be large enough disparities to be actionable on their own. See id. at 44. However, in the other five years in the sample, the standard deviation analysis did not produce statistically significant results, although some disparity did exist in all those years. See id.
  \item \textsuperscript{173} See id. at 45 (providing court’s stance on plaintiffs’ statistical data). The First Circuit acknowledged its uncertainty in dealing with the aggregated data, but still accepted the analysis as appropriate:

To the extent the facts make it appropriate to consider the eight-year aggregate data as a single sample, we can be almost certain that the difference in outcomes associated with race over that period cannot be attributed to chance alone. Nor can randomness be viewed as other than a very unlikely explanation for results in at least three of the years viewed in isolation.

\textit{Id.}

Although the Code of Federal Regulations supports aggregation, it clarifies that it should only be utilized where the “numbers . . . are too small to be reliable . . . .” 29 C.F.R. § 1607.4(D) (1981) (“Where . . . evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time . . . may be considered in determining adverse impact.”).
provided, it may have seen the necessity for a practical significance analysis.\footnote{See Jones, 752 F.3d at 44 (displaying plaintiffs’ sample). The aggregated eight-year sample included over 15,000 individuals tested. See id. For a discussion on how large sample sizes affect findings of statistical significance, see supra notes 56–58 and accompanying text.} Finally, the court should have taken into consideration the small difference in \textit{actual} failed drugs tests between the races.\footnote{See Jones, 752 F.3d at 44 (providing statistics). In total, fifty-five black officers and recruits tested positive for cocaine, compared to thirty white officers and recruits. See id. at 41. The total numbers reveal that 0.3\% of white officers (30/10,835) and 1.3\% of their black co-workers (55/4,222) failed the drug test. See id. at 44 (comparing cocaine use between black and white officers). The court admitted that the difference between these percentages is “very small.” Id. at 42.} Had it examined the practical, real-world consequences of the disparity, the court would likely have discovered that these considerations rendered the plaintiffs’ statistics, at the very least, to be much less probative than they originally understood.\footnote{See id. at 45 (acknowledging that plaintiffs’ statistical sample “does not establish that the differences in outcomes were large”).}

VI. Rounding the Bases: Looking Forward After Jones

The First Circuit’s decision in \textit{Jones v. City of Boston} is a prime example of how a consideration of practical significance can effectively and more justly change disparate impact law.\footnote{See Gerald L. Maatman, Jr. & Jennifer A. Riley, \textit{First Circuit Creates Potential Circuit Split by Rejecting “Practical Significance” Requirement and Finding that Hair-Based Drug Test Has Disparate Impact}, SEYFARTH SHAW LLP (May 14, 2014), http://www.workplaceclassaction.com/2014/05/first-circuit-creates-potential-circuit-split-by-rejecting-practical-significance-requirement-and-finding-that-hair-based-drug-test-has-disparate-impact/ (“If the decision stands, it smooths the road for plaintiffs looking to establish disparate impact in the First Circuit.”); see also Amici Curiae Brief of Massachusetts Employment Lawyers Association et al at 4, Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014) (No. 12-2280), 2013 WL 2149405 (describing plaintiffs’ prima facie burden as mere threshold showing not intended to be difficult).} However, as the law currently stands, the \textit{Jones} decision may have some lasting implications in both the First Circuit and in other courts nationwide.\footnote{See supra notes 166–76 and accompanying text.} Some commentators have suggested that the First Circuit’s holding in \textit{Jones} will make it easier for plaintiffs in the First Circuit to demonstrate a prima facie case of disparate impact.\footnote{See Schorr, \textit{Alan Schorr’s Employment Case of the Week Ending 5/9/14: Jones v. City of Boston}, ALAN H. SCHORR & ASSOCs., P.C. (May 12, 2014, 2:07 PM), http://www.schorrlaw.com/blog/154-week-ending-5-9-jones.html (“[T]he use of statistics in disparate impact cases continues to make this one of the most interesting and challenging aspects of employment law.”).} The case may also be a point of reference for other courts going forward, as the use of statistics in disparate impact cases continues to challenge both courts and practitioners alike.\footnote{For a discussion on the impact of the \textit{Jones} decision, see infra notes 179–83 and accompanying text.} From a practitioner’s...
standpoint, *Jones* will make it more difficult to defend against a statistically significant sample, despite any other factors that may influence that outcome.\footnote{181}{See Lydell C. Bridgeford, *Q&A: Statistical Proof of Discrimination Isn’t Static*, BLOOMBERG BNA LAB. & EMP. BLOG (June 20, 2014), http://www.bna.com/qa-statistical-proof-b17179891425/ (noting that *Jones* eliminates employers’ argument for consideration of practical significance of small differences in selection rates); Maatman & Riley, *supra* note 179 (asserting that plaintiffs are likely to cite *Jones* as disposing of practical considerations and will pursue “practically meaningless” statistical disparities in court).} Further, this case may be persuasive in light of the Supreme Court potentially deciding a disparate impact case in the context of the Fair Housing Act in the near future.\footnote{182}{See Sam Hananel, *Supreme Court May Get ‘Disparate Impact’ Housing Case*, INS. J. (Sept. 8, 2014), http://www.insurancejournal.com/news/national/2014/09/08/339951.htm (reporting that several cases challenging Department of Housing and Urban Development’s regulations based on disparate impact claims may be heard by Supreme Court in near future).} Finally, employers may take the *Jones* ruling into consideration when implementing new employment tests or analyzing existing tests by remaining cognizant that they may now be liable for any statistically significant disparity, regardless of its real-world implications.\footnote{183}{See Maatman & Riley, *supra* note 179 (noting that practically insignificant disparities are likely to be pursued by plaintiffs in First Circuit).}