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I DRINK YOUR MILKSHAKE: WHY HYDRAULIC FRACTURING SHOULD BE PROTECTED UNDER THE RULE OF CAPTURE IN PENNSYLVANIA

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I DRINK YOUR MILKSHAKE: WHY HYDRAULIC FRACTURING SHOULD BE PROTECTED UNDER THE RULE OF CAPTURE IN PENNSYLVANIA

Christopher Weis*

SUMMARY OF ARGUMENT

The rule of capture, a longstanding principle of property and oil and gas law, should apply to the type of natural gas extraction known as hydraulic fracturing. The Pennsylvania Supreme Court would more faithfully adhere to the rule of capture by more closely following the Texas Supreme Court's view in *Coastal Oil & Gas Corp. v. Garza Energy Trust*[1] instead of the Pennsylvania Superior Court's view in *Briggs v. Southwestern Energy Production Co.*[2] Past caselaw, the well-established historical nature of the rule of capture, and, less importantly, the public policy rationales behind the rule, all lend support to the argument that the Pennsylvania Supreme Court should overturn the Superior Court's decision in *Briggs*. Consequently, Southwestern Energy should not, under the rule of capture, be liable for trespass damages because of the hydraulic fracturing that occurred in *Briggs*. The issues of subsurface trespass raised in *Briggs* could, however, be governed by regulations. Potential regulations could state that wells must be set back a certain distance from property lines. Putting the potential regulations in the hands of the state legislature and state agencies would help to ensure that the laws would be dictated by those with greater expertise. The legislature and agencies would have more expertise and knowledge of the issues in

* Candidate for J.D., 2020, University of Pittsburgh School of Law. B.A. with Honors in History and English Writing, University of Pittsburgh, 2015. I would, first and foremost, like to thank my parents for their invaluable support and encouragement. In addition, I would like to thank Kevin C. Abbott for his advice and help with the topic of this Note, and for teaching a very interesting course on Oil and Gas Law. Furthermore, thanks to Aaron Christenson and Derek Luke for their advice while writing and for most of the *There Will Be Blood*-related suggestions. Finally, thanks to whoever invented baseball.

[1] Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1 (Tex. 2008).

[2] Briggs v. Sw. Energy Prod. Co., 184 A.3d 153 (Pa. Super. Ct. 2018).

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the oil and gas industry as well as the environmental impacts of a regulation than the court system would. For these and other reasons that this Note will explore, the Pennsylvania Supreme Court should reverse the Superior Court because, in doing so, it would more faithfully follow the law as it stands in Pennsylvania and, secondarily, it would also produce a more desirous public policy result.

I. INTRODUCTION AND BASIC CONCEPTS

"As is true with many topics, it is helpful to start with . . . the basics."[3] First of all, the rule of capture "permits an owner to extract oil and gas even when extraction depletes a single oil or gas reservoir lying beneath adjoining lands."[4] Simplified further: If Person A and Person B own adjacent tracts of land, it is well-established that Person A may, drilling a traditional vertical oil and gas well, extract all the oil or gas from underneath Person B's land, as long as he or she does not physically trespass onto Person B's land.[5] Here, Person B typically has one recourse that has been in place for over a century across the country: to "go and do likewise," meaning that the owner of the adjoining lands can drill a well on his or her property by leasing out his or her land to an oil and gas company.[6] If, however, after this explanation, you still are unclear about what exactly the rule of capture entails, I encourage you to go watch a famous scene from the 2007 movie *There Will Be Blood*, featuring the Oscar-winning performance of Daniel Day-Lewis.[7]

Multiple other terms should be defined before delving further into the merits of the two cases and which way the Pennsylvania Supreme Court should rule on this difficult issue. For example, it is important to understand what shale gas is. The

[3] Joseph F. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385, 1385 (1992).

[4] Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 256 (3d Cir. 2011).

[5] *See generally* Barnard v. Monongahela Nat. Gas Co., 65 A. 801 (Pa. 1907).

[6] Christopher S. Kulander, *Common Law Aspects of Shale Oil and Gas Development*, 49 IDAHO L. REV. 367, 386 (2013).

[7] THERE WILL BE BLOOD (Paramount Vantage 2007). Based on Upton Sinclair's novel *Oil!*, this movie is about Daniel Plainview, a man who builds a vast empire in the oil business. Anthony Arthur, *Blood and 'Oil!,'* N.Y. TIMES (Feb. 24, 2008), https://www.nytimes.com/2008/02/24/books/review/Essay-t.html. Nominated for eight Academy Awards, the film won two. *There Will Be Blood Awards*, IMDB, https://www.imdb.com/title/tt0469494/awards (last visited Oct. 3, 2019). The famous scene that I am referencing comes at the end of the movie, when Plainview describes the rule of capture to his rival—played by Paul Dano—using some rather descriptive metaphors, including the title of this Note. Bob Mondelo, *Actor Paul Dano, 'There Will Be Blood,'* NPR (Jan. 8, 2008), https://www.npr.org/templates/story/story.php?storyId=17926946.

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Pennsylvania case *Butler v. Charles Powers Estate* defines shale gas as "natural gas that has been trapped by the shale rock formation from reaching the sandy, higher levels in the ground. The trapping of the natural gas by shale rock forces gas drillers to employ [hydraulic fracturing] to obtain the gas."[8] The *Butler* court continues by stating that "natural gas found in the Marcellus Shale is not 'unconventional and different' from natural gas found in any other geological formation or geographic region."[9] Only the processes for drilling are different.[10]

In order to determine whether hydraulic fracturing is a trespass, it is also essential to determine what hydraulic fracturing is. Hydraulic fracturing, or "fracking,"[11] as it is frequently called,

> is done by pumping fluid down a well at high pressure so that it is forced out into the formation. The pressure creates cracks in the rock that propagate along the azimuth of natural fault lines in an elongated elliptical pattern in opposite directions from the well. Behind the fluid comes a slurry containing small granules called proppants—sand, ceramic beads, or bauxite are used—that lodge themselves in the cracks, propping them open against the enormous subsurface pressure that would force them shut as soon as the fluid was gone. The fluid is then drained, leaving the cracks open for gas or oil to flow to the wellbore. Fracing in effect increases the well's exposure to the formation, allowing greater production. First used commercially in 1949, fracing is now essential to economic production of oil and gas and commonly used throughout Texas, the United States, and the world.[12]

To grasp the process of horizontal drilling, it is necessary to understand the basic science behind the process. Horizontal drilling is described as:

> the process of drilling and completing, for production, a well that begins as a vertical or inclined linear bore which extends from the surface to a subsurface location just above the target oil or gas reservoir called the 'kick-off point,' then bears off on an arc to intersect the reservoir at the 'entry point,' and, thereafter,

[8] Butler v. Charles Powers Estate, 65 A.3d 885, 894 (Pa. 2013).

[9] *Id.*

[10] *Id.*

[11] The term "fracing" is also used to refer to the process.

[12] Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 6–7 (Tex. 2008).

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> continues at a near-horizontal attitude tangent to the arc, to substantially or entirely remain within the reservoir until the desired bottom hole location is reached.[13]

In addition, a landowner "cannot slant [a] well from your surface to intrude into your neighbors' subsurface."[14] That would be considered a trespass and would, therefore, lead to a cause of action.[15] Also, the Pennsylvania Superior Court in *Briggs* defined a trespass as:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) fails to remove from the land a thing which he is under a duty to remove.[16]

Additionally, the court noted that "[t]he actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing . . . beneath the surface of the land . . . ."[17]

Now that we have some basic definitions and concepts in this area articulated, it is essential to examine, among other things, the two predominant cases and laws in the states that fuel the debate about whether hydraulic fracturing can be considered a subsurface trespass: the aforementioned *Coastal Oil* and *Briggs* cases.[18]

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[13] Michael J. Wozniak & Jamie L. Jost, *Horizontal Drilling: Why It's Much Better to "Lay Down" Than "Stand Up" and What Is an "18˚ Azimuth" Anyway?*, 57 ROCKY MOUNTAIN MIN. L. INST. 2, 3 (2011).

[14] John Burritt MacArthur, *How the Texas Supreme Court Lost Its Position as a Leading Oil and Gas Royalty Court: A Tale of 18 Cases*, 49 TEX. TECH L. REV. 263, 296 (2017).

[15] *See id.*

[16] Briggs v. Sw. Energy Prod. Co., 184 A.3d 153, 157 (Pa. Super. Ct. 2018).

[17] *Id.*

[18] *See* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 1 (Tex. 2008); *Briggs*, 184 A.3d at 153. There is also the *Stone* case out of West Virginia that concerns the issue of subsurface trespass by hydraulic fracturing. Stone v. Chesapeake Appalachia, LLC, No. 5:12-CV-102, 2013 WL 2097397 (N.D. W. Va. Apr. 10, 2013). That case will be discussed further before the exploration of *Briggs* because, in

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II. TEXAS

In *Coastal Oil*, the Coastal Oil & Gas Company owned a lease located immediately adjacent to a tract of land owned by Garza Energy Trust.[19] Coastal Oil's drilling operation allegedly made it possible for gas to flow from underneath the Garza's lease to the adjacent lease owned by Coastal Oil.[20] Garza sued for trespass.[21] Garza argued that between one-quarter and one-third of the gas produced came from under its property rather than from the adjacent property.[22] The jury found that trespass had occurred and that lost royalties to Garza amounted to over one million dollars.[23] The verdict was appealed and the appeals court affirmed the jury verdict.[24] The case was subsequently appealed to the Texas Supreme Court.[25] There, the court succinctly stated: "The primary issue in this appeal is whether subsurface hydraulic fracturing of a natural gas well that extends into another's property is a trespass for which the value of gas drained as a result may be recovered as damages."[26]

The Texas Supreme Court reversed the lower court's decision on the trespass claim because it argued that the rule of capture prohibited the plaintiffs from bringing a trespass claim.[27] The court noted that "[t]he rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation."[28] Therefore, because the rule of capture is so central to the field of oil and gas law, the court seemed to see very little reason to alter it just because a horizontal well is drilled differently than a vertical well.[29] Broadly, the court

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many ways, the *Stone* opinion paved the way for the *Briggs* opinion. *See infra* notes 72–79 and accompanying text.

[19] *Coastal Oil*, 268 S.W.3d at 5.

[20] *Id.* at 6.

[21] *Id.* at 7.

[22] *Id.* at 8.

[23] *Id.*

[24] *Id.* at 8–9.

[25] *Id.* at 4.

[26] *Id.* at 11.

[27] *Id.* at 15–16.

[28] *Id.* at 13.

[29] *Id.* at 16–17.

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articulated four reasons for its ruling[30]: 1) that full recourse was already provided to a landowner because he or she can go and do likewise by drilling a well; 2) that providing recourse would have usurped the regulatory authority of the Railroad Commission, the appropriate regulatory body in Texas; 3) that litigation was very ill-equipped to handle this sort of problem; and 4) that no one in the energy industry wanted or needed the change.[31] The scope of the *Coastal Oil* decision is succinctly summarized in a recent treatise on oil and gas law in Texas: "The rule of capture barred recovery for any damages caused by drainage induced by fracturing. Because no damages could be shown, no actionable trespass occurred in this case."[32]

In explaining the rationale for its decision, the majority addressed the question about the gas being artificially induced.[33] The court argued that any concept of artificiality was not accurate and should, thus, not render the rule of capture invalid in that instance.[34] Instead, the fracking in *Coastal Oil* and *Briggs* constitutes "the very basis for the rule, not a reason to suspend its application."[35] The court further argued that hydraulic fracturing and its methods have long been utilized, so that any argument that it is "unnatural" was inapt.[36] The decision of the court was viewed as unsurprising.[37] As John Burritt MacArthur writes, "it is hard to be surprised by the outcome when the precedent facing the Court included its 1962 holding in *Railroad Commission of Texas v. Manziel* that subsurface invasion of water from a waterflood program approved by the Texas Railroad Commission is not a trespass."[38]

Despite the unsurprising result in *Coastal Oil*, there are undeniable flaws with the majority's opinion. Many individuals, including a scholar who specializes in oil and gas and energy law, have harsh and justifiable critiques of the opinion.[39] For

[30] *Id.* at 14.

[31] *Id.* at 14–17.

[32] ERNEST E. SMITH & JACQUELINE LANG WEAVER, 2 TEXAS LAW OF OIL & GAS § 8.3 (2019).

[33] *Coastal Oil*, 268 S.W.3d at 13.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See* MacArthur, *supra* note 14, at 297.

[38] *Id.*

[39] *See* Bruce M. Kramer, *Horizontal Drilling and Trespass: A Challenge to the Norms of Property and Tort Law*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 291, 306 (2014).

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example, Bruce M. Kramer, a former long-time professor at the Texas Tech School of Law, states that the court relied primarily upon the aforementioned public policy rationales that were not well-thought-out or well-articulated.[40] He argues that "the Texas Supreme Court decided to ignore 1000 years of the common law of trespass based on four public policy reasons and weak attempts to distinguish both the earlier Texas cases dealing with hydraulic fracturing and the Texas cases dealing with slant or directional holes."[41] Clearly, Kramer highlights an important critique of the *Coastal Oil* opinion—namely, that there is not enough attention paid to the common law surrounding the rule of capture. In contrast, this Note argues that, in Pennsylvania, the long-established common law would preclude a finding that Southwestern is liable for trespass, although this issue will be addressed much more extensively in Part IV.

This Note agrees that the opinion strays too far from the law, particularly its focus on what the energy industry "want[s] or need[s]."[42] Put simply, this should not be the focus of the Texas Supreme Court or any court. While reliance interests and public policy impacts are perfectly reasonable for consideration by courts, the plain language of this opinion suggests that the court could be veering dangerously into outwardly preferring or promoting one policy over the other. While public policy can be a factor in judicial decision-making, overt policy preferences and determinations should not have an influence in judicial decision-making.

Although there are undeniable faults with the *Coastal Oil* opinion, there are several positive results of the opinion. The largest advantage is the pragmatism that underlies the decision. It is far more pragmatic to exercise restraint by sticking with what is a known quantity and not open up the floodgates of potential litigation. Two experts in the field, Christopher S. Kulander and R. Jordan Shaw, agree with this point in an article they wrote, arguing that:

> [O]ne of the justifications for the rule of capture is to avoid this expensive and often erroneous errand being left to the courts as a first resort. Allowing an adjacent property owner to wait for another to drill a well and then sue for damages

[40] *Id.*

[41] *Id.*

[42] Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 16 (Tex. 2008).

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> to exact a profit without taking any risk is exactly what the [*Coastal Oil*] majority was attempting to avoid.[43]

Kulander and Shaw are correct on this front. This type of speculative litigation is not something that a court should voluntarily open itself up to with a decision.

Beyond the majority opinion, the concurrence written in *Coastal Oil* by then-Justice Don Willett is also worth examining.[44] In his concurring opinion, seemingly anticipating one of the arguments that would later be raised in *Briggs*, Justice Willett wrote that ruling against the energy company would render them virtually "unable to adapt to essential new technologies."[45] Although this statement tends toward the hyperbolic, a valid point underlies the contention. The point is that if the law has allowed the reasonable use of technological innovation to extract oil and gas, the law should continue to allow that even in hydraulic fracturing situations.[46] The focus should not be, as it seemingly was in this part of Justice Willett's concurrence, on how the decision would impact the energy industry going forward, but rather on what the law has stated about the issue in Texas or in the state where the issue has been raised.

Similar to the majority opinion, Justice Willett also argued that adopting the rationale of the dissent would lead to more speculative litigation.[47] As he stated, "[t]he dissent's view would invite a nightmarish flood of litigation over unknowable facts."[48] The underlying thrust of this part of his opinion is that too much litigation

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[43] Christopher S. Kulander & R. Jordan Shaw, *Comparing Subsurface Trespass Jurisprudence: Geophysical Surveying and Hydraulic Fracturing*, 46 N.M. L. REV. 67, 106 (2016). Dr. Kulander is a Professor of Law at South Texas College of Law Houston and specializes in Energy Law and Oil and Gas Law. *Id.* at 67 n.2. Interestingly, he is a scientist by background, holding a Ph.D. in Geophysics from Texas A&M University, where he specialized in Petroleum Seismology. *Id.* Consequently, he would truly be an expert in this field. For anyone interested, this article gives an excellent summary of this area of law in Texas and examines the historical background and the science behind fracking.

[44] Justice Willett is now Judge Willett, as he was confirmed to serve on the United States Court of Appeals for the Fifth Circuit. *See* Nicole Cobler, *Tweet-Loving Justice Don Willett Confirmed for Federal Appeals Court*, DALL. MORNING NEWS (Dec. 13, 2017), https://www.dallasnews.com/news/politics/2017/12/13/democrats-urge-rejection-willett-texan-nears-confirmation-appeals-court.

[45] *Coastal Oil*, 268 S.W.3d at 35 (Willett, J., concurring).

[46] *See id.*

[47] *Id.* at 30.

[48] *Id.*

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could spring up over facts that are, unfortunately, very difficult to ascertain.[49] Although the concurrence has undeniable "weaknesses,"[50] the sentiment concerning the struggle to ascertain facts is shared by Kulander and Shaw.[51] They state that the court system is generally "poorly equipped to handle valuation of oil and gas drainage [that involves] having to make difficult, lengthy, expensive—and very likely erroneous—decisions about who was getting drained and by how much."[52] Consequently, Kulander and Shaw believe that, practically speaking, the majority and concurrence are correct in citing this as a reason not to hold Coastal Oil liable.[53] A full-throated defense of the energy industry in Texas, Justice Willett's concurrence seconded the points of the majority opinion and highlighted several important points in a more blunt and strident manner.

The dissent in *Coastal Oil* largely served as the basis for the future majority opinion in *Briggs*, so it is worth examining closely. Justice Phil Johnson—the lead author—began by introducing a definition of the rule of capture, which is important for his points that follow. He wrote that "[t]he rule of capture precludes liability for capturing oil or gas drained from a neighboring property whenever such flow occurs solely through the operation of natural agencies in a normal manner, as distinguished from artificial means applied to stimulate such a flow."[54] The dissent focused heavily on the fact that the gas in *Coastal Oil* was artificially stimulated and extraction did not occur through "natural agencies in a normal manner."[55] Justice Johnson further argued: "The gas at issue here, however, did not migrate to Coastal's well because of naturally occurring pressure changes in the reservoir. If it had, then I probably would agree that the rule of capture insulates Coastal from liability."[56] Consequently, a significant factor for the dissent in this case was that the gas was stimulated artificially and did not migrate naturally.[57] If the well in question were a traditional

[49] *Id.*

[50] MacArthur, *supra* note 14, at 302.

[51] Kulander & Shaw, *supra* note 43, at 103.

[52] *Id.*

[53] *See generally* Kulander & Shaw, *supra* note 43.

[54] *Coastal Oil*, 268 S.W.3d at 42 (Johnson, J., dissenting).

[55] *Id.*

[56] *Id.*

[57] *See id.*

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vertical well, then the result would likely have been different.[58] Justice Johnson focuses on what Judge John Musmanno in Pennsylvania discusses extensively in the *Briggs* opinion, that the gas did not migrate naturally and was, instead, manually drawn across the property line.[59]

Coastal Oil's majority opinion, however, countered the dissent's rule of capture distinction and stated that the dissent took a staple of property law—the rule of capture—and rendered it inapplicable.[60] While the dissent contended that the artificial nature of extraction meant that the rule of capture is inapt in this situation, the majority disagreed. The majority stated that a distinction between artificial and non-artificial means of extraction "is either meaningless or circular because all extraction of oil and gas is by artificial means."[61] Furthermore, the dissent argued that the statement "as distinguished from artificial means applied to stimulate such a flow" proved its point that hydraulic fracturing was different from typical vertical drilling and so the majority's argument did not hold weight.[62] Yet, the majority contended that the dissent misapplied the case from the Texas Court of Appeals that first articulated the phrase "as distinguished from artificial means applied to stimulate such a flow."[63] The majority stated that the *Manziel* court "held that injecting water into a reservoir in a secondary recovery operation to increase production was not a trespass. The outcomes of these cases were different, not because water injection is less artificial than vacuum pumps, but because Railroad Commission rules allowed water injection and forbade vacuum pumps."[64] Therefore, the majority contended that its interpretation was correct because of the distinction

[58] *Id.*

[59] *See* Briggs v. Sw. Energy Prod. Co., 184 A.3d 153, 160–61 (Pa. Super. Ct. 2018).

[60] *Coastal Oil*, 268 S.W.3d at 13–14, 30. According to the majority, the rule of capture is a rule of "expedience" and should not be touched in this instance. *Id.* at 13. Furthermore, the majority wrote that it was a "cornerstone" of the oil and gas industry and that it was important to both property rights and to state regulation. *Id.* at 14. Justice Willett went a step further than the majority and termed the rule of capture an "indispensable innovation in an indispensable industry." *Id.* at 30 (Willett, J., concurring).

[61] *Id.* at 13 n.39.

[62] *Id.* at 42 (Johnson, J., dissenting).

[63] *Id.* at 13 n.39.

[64] *Id.*

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in Railroad Commission rules and because it was meaningless to attempt to define what is "artificial."[65]

As with any problem, however, it is appropriate to examine who is in the best position to remedy it. The majority and concurrence did address the appropriate way to handle problems like the problems in *Coastal Oil*.[66] Broadly speaking, the answer was regulatory bodies.[67] The majority seemed to believe that judges would be usurping the authority of the appropriate regulating body, the Texas Railroad Commission.[68] Judges, the majority noted, are not the best equipped individuals to handle the regulation of property.[69] Concurring, Justice Willett agreed, stating that the dissent "would take a meat-ax approach to a task that demands scalpel-like precision, all to address a problem that, even assuming it exists, surely has better solutions."[70] Justice Willett also raised a good point that there are likely better solutions to potential issues than judicially-created solutions. The Texas Railroad Commission and the state legislature would have far greater knowledge of the situation on the ground than the judiciary and, therefore, the solution should come from there.

In conclusion, the Texas Supreme Court proffered multiple practical and pragmatic reasons for why the rule of capture precluded trespass liability on the part of Coastal Oil. These concerns were written even more stridently in concurrence by Justice Willett and were rebutted by the dissent. The next opinion on the issue came in 2013 from West Virginia.

III. WEST VIRGINIA

Before this Note examines the current situation in Pennsylvania, an opinion out of the United States District Court for the Northern District of West Virginia warrants a brief examination.[71] Although the opinion ended up being vacated because of the

[65] *See id.*

[66] *See id.* at 15; *see also id.* at 30 (Willett, J., concurring).

[67] *See id.*

[68] *Id.* at 14–15.

[69] *Id.* at 15–16.

[70] *Id.* at 30 (Willett, J., concurring).

[71] *See* Stone v. Chesapeake Appalachia, LLC, No. 5:12-CV-102, 2013 WL 2097397 (N.D. W. Va. Apr. 10, 2013).

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parties' Joint Motion to Vacate,[72] the case was heavily cited by the *Briggs* court and, in some ways, paved the way for the *Briggs* opinion. In this case, the district court examined whether the rule of capture applied to hydraulic fracturing.[73]

Looking at the facts of the case, the Stones entered into an oil and gas lease with Chesapeake in 2001.[74] The court proceeded to describe the drilling operations: "Chesapeake drilled a horizontal well on the neighboring Hupp property, near the property line with the plaintiffs. The vertical wellbore on the Hupp property is approximately 200 feet from the Stone property, with the horizontal aspect of the bore within tens of feet of the property line."[75] In articulating its reasons for declaring that Chesapeake trespassed, the court critiqued a critical component of *Coastal Oil*. Judge John Bailey stated: "Perhaps the most significant and compelling criticism of the [*Coastal Oil*] majority opinion is the dissent's criticism of the majority's first rationale—that the law already provides full recourse—through drilling his own well . . . ."[76] The *Briggs* court makes a similar argument, which I will address and critique more fully in Part IV. Judge Bailey also argued that the "*Coastal* opinion gives oil and gas operators a blank check to steal from the small landowner."[77] In many ways, this argument was resurrected by the *Briggs* court. In West Virginia, however, the *Stone* opinion is not binding law due to the settlement between the parties.[78] The influence of the opinion, however, was certainly felt in Pennsylvania.

IV. PENNSYLVANIA

Surrounding trespass by hydraulic fracturing and other issues with oil and gas law, the following position has been taken: "I can't understand what the law is in Pennsylvania, and I don't think very many Pennsylvania lawyers have got it, either."[79] Regardless, here is a look at the history of the rule of capture in

[72] *See* Stone v. Chesapeake Appalachia, LLC, No. 5:12-CV-102, 2013 WL 7863861 (N.D. W. Va. July 30, 2013).

[73] *See Stone*, 2013 WL 2097937, at *1.

[74] *Id.*

[75] *Id.*

[76] *Id.*, at *6.

[77] *Id.*

[78] *See* Stone v. Chesapeake Appalachia, LLC, No. 5:12-CV-102, 2013 WL 7863861 (N.D. W. Va. July 30, 2013).

[79] Ellen M. Gilmer, *In Evolving World of Oil and Gas Law, 'This Ain't Texas*,' E&E NEWS (July 30, 2018), https://www.eenews.net/stories/1060091449. This quote is attributed to Southern Methodist

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Pennsylvania, the longstanding rule that the Pennsylvania Superior Court turned on its proverbial head in the spring of 2018.

The Pennsylvania Supreme Court first articulated the rule of capture in the 1889 case of *Westmoreland & Cambria Natural Gas Co. v. Dewitt*.[80] That decision stood for the proposition that landowners cannot recover damages for oil and gas taken from underneath their property by their neighbors.[81] The neighbor can also not claim a trespass in this instance.[82] In *Westmoreland*, the Pennsylvania Supreme Court compared the ability of oil and gas to travel to the ability of wild animals to travel.[83] The court stated that "when [oil and gas] escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas."[84]

Westmoreland has, however, been criticized by some scholars and courts because of the court's reliance on the comparison between oil and gas and wildlife.[85] For example, the United States District Court for the District of Nebraska in *K.N. Energy v. Marathon Oil* discussed the analogy to wildlife stating that "[t]his fanciful analogy which originated in an early Pennsylvania decision at a time when there was

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University Professor of Law John Lowe, who specializes in energy law and oil and gas law. *Id.* In some ways, Professor Lowe is absolutely right. Pennsylvania does have many different opinions that relate to the oil and gas industry and cut different ways for and against the industry. I have mentioned the *Butler* case, which was decided "for" the industry. *See generally* Butler v. Charles Powers Estate, 65 A.3d 885 (Pa. 2013). Furthermore, that case highlighted the *Dunham* Rule, which is a different rule than exists in any other state or commonwealth in the country. *Id.* Another case, *Kilmer v. Elexco*, 990 A.2d 1147 (Pa. 2010) put the state firmly in the netback method of "netting out" post-production costs, which is more favorable to the industry and is the more frequent method for handling post-production costs. Yet, one of the largest wrenches tossed into the proverbial gears of the Pennsylvania Supreme Court's jurisprudence on oil and gas law was the *Robinson Township* case in 2013. *See* Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013). The very lengthy opinion struck down as unconstitutional part of Act 13 that restricted local control on zoning. *Id.* Thoughts on the opinion are mixed. Some view the opinion as nebulous and ill-defined while others believe it is one of the better-written opinions in the history of the Pennsylvania Supreme Court. Clearly, however, the results for the industry and environmental groups have been somewhat mixed at the highest court in Pennsylvania. In relation to Professor Lowe's quotation, I cannot promise that I completely understood everything about it, either. But I gave it a shot.

[80] Westmoreland & Cambria Nat. Gas Co. v. Dewitt, 18 A. 724, 725 (Pa. 1889).

[81] *Id.*

[82] *See id.*

[83] *See id.*

[84] *Id.*

[85] *See* K.N. Energy, Inc. v. Marathon Oil Co., No. CV82-L-564, 1983 WL 1430 (D. Neb. Oct. 26, 1983).

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little information available on the physical facts relating to oil and gas is now generally recognized to be false."[86] *Westmoreland*, however, is still good law in Pennsylvania and, thus, should not be lightly dismissed or ignored.

Beyond *Westmoreland*, other subsequent cases further developed the rule of capture in Pennsylvania. In another early Pennsylvania Supreme Court case that could be helpful for Southwestern's argument, *Jones v. Forest Oil Co.*, the court did acknowledge that oil and gas operators could use gas pumps to make their wells as large as possible, even if doing so would affect production from nearby wells.[87] The question confronting the court in *Jones* was "to what extent an owner of oil wells may use mechanical devices for bringing the oil to the surface."[88] The court wrote that "[i]t is not denied that a gas pump will to some extent affect the production of oil wells located in the immediate neighborhood of the well to which the pump is attached."[89] In addition, the court queried: "is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible?"[90] Consequently, the court authorized "any and all appliances known to the trade" to enhance production.[91] Applying this law to *Briggs* arguably leads to the result that the energy company is within its rights to extract the fracking fluid because it is only using appliances known to the trade to enhance the production of its wells.

Furthermore, in *Barnard v. Monongahela Natural Gas Co.*, the court expanded upon the rule of capture, examining whether a landowner may drill a well on his or her property if it happened to be very near the property line of his or her neighbor.[92] The court said that "every landowner or his lessee may locate his wells wherever he pleases, regardless of the interests of others . . . he may crowd the adjoining farms so as to enable him to draw the oil and gas from them."[93] The rule of capture in Pennsylvania permits an owner to extract oil and gas even when, in doing so, some

[86] *Id.* at *3.

[87] Jones v. Forest Oil Co., 44 A. 1074, 1075 (Pa. 1900).

[88] *Id.* at 1074.

[89] *Id.* at 1075.

[90] *Id.*

[91] *Id.*

[92] *See* Barnard v. Monongahela Nat. Gas Co., 65 A. 801 (Pa. 1907).

[93] *Id.*

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of the gas extracted comes not from underneath the owner's land, but, instead, from under an adjacent property.[94] This case, therefore, stands for the proposition that an oil and gas owner can drill a well close to the property—and thus extract more gas—if that is the optimal location. Furthermore, the *Barnard* court argued that one remedy existed for someone who complained that their gas was being taken: to "go and do likewise," or, in other words, lease out your land to someone who can drill a well for you.[95] Interestingly, the court noted that while the rule of capture may not be the "best rule," the state legislature "has [not] given us any better."[96] Potential regulations by the legislature at the state level will be discussed more extensively in Part VI.

The case where these issues rose to the forefront is the aforementioned *Briggs* case. Some of the pertinent facts of *Briggs* are as follows. The Briggses are landowners in Harford Township, Susquehanna County, Pennsylvania who own property right next to property that Southwestern Energy was leasing.[97] Southwestern Energy engaged in hydraulic fracturing on their leased property.[98] The Briggses claim that Southwestern trespassed on their land by extracting natural gas from underneath the property.[99] The trial court, following the precedent set by *Westmoreland*, *Jones*, and *Barnard* regarding the rule of capture, granted Southwestern's motion for summary judgment, and the Briggses appealed the decision to the Pennsylvania Superior Court.[100]

A two-judge panel on the Pennsylvania Superior Court held that because of the differences between "conventional" and "unconventional" drilling, including hydraulic fracturing, "the 'rule of capture' does not preclude liability for trespass due to hydraulic fracturing."[101] While *Westmoreland* first articulated the law surrounding

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[94] *See id.*

[95] *Id.* at 802.

[96] *Id.*

[97] Briggs v. Sw. Energy Prod. Co., 184 A.3d 153, 154 (Pa. Super. Ct. 2018).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Matthew F. Burger & Brendan P. Lucas, *Pennsylvania Superior Court Holds "Rule of Capture" Does Not Preclude Liability for Trespass Due to Hydraulic Fracturing*, BUCHANAN INGERSOLL & ROONEY (Apr. 9, 2018), https://www.bipc.com/pennsylvania-superior-court-holds-%E2%80%9Crule-of-capture%E2%80%9D-does-not-preclude-liability-for-trespass-due-to-hydraulic-fracturing.

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the rule of capture, one main contention raised by the *Briggs* court is that prior decisions regarding the rule of capture in Pennsylvania have only concerned "traditional" vertical drilling as opposed to the horizontal drilling that is prevalent in hydraulic fracturing.[102]

In further explaining its decision, the Pennsylvania Superior Court also relied upon the Eighth Circuit case of *J.M. Young v. Ethyl Corp.* to further its point that the rule of capture only applies to the drilling done from traditional vertical wells and not to "the forced migration of minerals of different physical properties."[103] This was one of the most significant arguments put forward by the *Briggs* court and formed the basis for its final conclusion that hydraulic fracturing differs significantly enough from more traditional methods of oil and gas extraction to rule hydraulic fracturing a trespass.[104] Natural gas, the *Briggs* court argued, would remain trapped forever in shale formations if it were not for forced extraction and, consequently, that makes hydraulic fracturing and shale gas extraction distinct from traditional vertical wells drilled for extracting oil and gas.[105] As the court notes in *Briggs*: "Shale gas does not merely 'escape' to adjoining land absent the application of an external force."[106]

Some in the energy and oil and gas law fields concur with the Pennsylvania Superior Court's notion that the "artificial" external force in shale extraction causes a difference between it and regular oil or gas extraction. For example, attorneys at the law firm of Houston Harbaugh make a very similar argument to the one raised by Justice Johnson's dissent in *Coastal Oil*, arguing that the rule of capture "has historically only been applied to vertical wells that access a common reservoir. Here, there was no common reservoir as the rock formation itself (i.e., Marcellus Shale) had to be fractured in order to unlock the gas and create flow into the well bore."[107] Therefore, according to this law firm, the energy company's argument that there is

[102] *Briggs*, 184 A.3d at 161.

[103] J.M. Young v. Ethyl Corp., 521 F.2d 771, 774 (8th Cir. 1975).

[104] *Id.*

[105] *Briggs*, 184 A.3d at 157.

[106] *Id.*

[107] Robert J. Burnett, *Pennsylvania Court Rejects Rule of Capture in Subsurface Trespass Suit*, HOUSTON-HARBAUGH (Apr. 16, 2018), https://www.hh-law.com/rule-of-capture-does-not-apply-in-fracking-pennsylvania-superior-court/.

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no practical difference between a horizontal well and a vertical well is inapt and cannot be supported.[108]

Clearly, the *Briggs* court concentrates heavily on the contention that hydraulic fracturing is a manmade and artificial process and, thus, it is different from the more traditional vertical drilling.[109] This line of reasoning, however, does not follow from the *Jones* case. Using a gas pump can hardly be considered something that is natural.[110] In that case, the court even states that one pumping oil or gas

> has a right to by all the skill and invention of which a man is capable; and it seems to me that as long as the plaintiff uses only lawful means as against his neighbor, however artificial those means may be, his right to appropriate the common source is not diminished because he uses the most artificial methods.[111]

Consequently, purely because artificial means were used to pump the gas does not mean that a company should be legally prohibited from doing so. The text of this quotation shows that, despite the perceived artificiality of the means of extracting the oil in *Jones*, the court deemed it acceptable as long as it was "lawful."[112] Applied logically to *Briggs*, even if the court were to view the means of extraction as "artificial" as opposed to natural, the law of Pennsylvania still protects against claims of trespass for artificial extraction. The rationale in *Jones*, therefore, speaks very directly to why the decision of the Pennsylvania Superior Court should be reversed.

Other Pennsylvania cases discuss the acceptable use of technology to achieve a goal of extracting natural resources from below ground. For example, the 1871 case of *Roberts v. Dickey* discussed a patent for a torpedo used to break oil out of sandstone rocks.[113] The court stated that "torpedoes were exploded in oil wells, for the purpose of obtaining oil."[114] While this Note does not advocate the use of torpedoes to break up rocks in oil wells in modern times, *Roberts* shows that producers were able to use whatever technology was available to obtain oil.

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[108] *Id.*

[109] *Briggs*, 184 A.3d at 157.

[110] *See* Jones v. Forest Oil Co., 44 A. 1074, 1075 (Pa. 1900).

[111] *Id.*

[112] *Id.*

[113] *See* Roberts v. Dickey, 20 F. Cas. 880 (C.C.W.D. Pa. 1871) (No. 11,899).

[114] *Id.* at 887.

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Furthermore, the case notes that torpedoes were used to fracture the rocks in oil wells as far back as 1860.[115] Consequently, it seems long-established in Pennsylvania that it is acceptable to use artificial means to stimulate production. The oil in *Roberts* may not have started flowing without the torpedo but the court seemingly did not care about the use of technology to stimulate production.[116] The Pennsylvania Superior Court in *Briggs* misapplies the concept of the artificiality of the technology, treating it as something new to the Commonwealth.[117]

Attorneys from the Pittsburgh-based law firm Eckert, Seamans, Cherin & Mellott further emphasize the deficiencies of this line of argument.[118] They state:

> Unfortunately, the Briggs' arguments . . . reflect a fundamental misunderstanding of hydraulic fracturing in unconventional shale gas formations, which is the same technology that has been used for decades to stimulate conventional gas wells in Pennsylvania, albeit on a smaller scale in terms of liquid volumes.[119]

These attorneys highlight well how the Pennsylvania Superior Court's reasoning is inapt on this contention. The type of technology used for hydraulic fracturing has been used before, so it is not different from the technology that has been widely accepted. Consequently, this bit of reasoning on the part of the *Briggs* court seems to be on shaky ground.

One of the other most prominent arguments put forward by the court in *Briggs* was that not every property owner is financially able to drill a well on his or her property.[120] The court seemed concerned that this would preclude some owners from taking advantage of the traditional recourse offered by the rule of capture,[121] that of going and doing likewise.[122] Importantly, Judge Musmanno seemingly notes that

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[115] *Id.*

[116] *Id.*

[117] *See* Briggs v. Sw. Energy Prod. Co., 184 A.3d 153, 162 (Pa. Super. Ct. 2018).

[118] James A. Pellow, III, *Fracking and the Rule of Capture*, ECKERT SEAMANS CHERIN & MELLOTT (Apr. 19, 2018), https://www.eckertseamans.com/legal-updates/fracking-and-the-rule-of-capture.

[119] *Id.*

[120] *Briggs*, 184 A.3d at 158.

[121] *Id.*

[122] Barnard v. Monongahela Nat. Gas Co., 65 A. 801, 802 (Pa. 1907).

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drilling the horizontal well needed for shale would be prohibitively more expensive than drilling a well for regular oil or gas.[123] He wrote: "[W]e are not persuaded by the *Coastal Oil* Court's rationale that a landowner can adequately protect his interests by drilling his own well to prevent drainage to an adjoining property."[124] Clearly, this factor was one of Judge Musmanno's primary reasons leading to a ruling in favor of the Briggses.[125] According to him, the classic remedy of "go and do likewise" is inapt in the current instance because drilling a horizontal well is more costly than drilling a traditional vertical well.[126] Therefore, it would be unreasonable to expect a landowner to drill his or her own well.[127]

The opinion, however, seemingly does not address or acknowledge the fact that almost no individual landowner drills his or her own vertical or horizontal well.[128] Instead, for all types of drilling, landowners must typically lease out their interest in the oil and gas rights, usually to a gas company that carries out the drilling and extraction.[129] The Pennsylvania Superior Court could be under the misapprehension that the owners of the property must pay some of the production costs themselves, which is usually untrue.[130] Working interest owners are the ones who bear the costs of production.[131] While drilling a Marcellus Shale well can cost in the range of five to six million dollars,[132] none of that figure is usually borne by the landowner. It is,

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[123] *Briggs*, 184 A.3d at 163.

[124] *Id.*

[125] *See id.*

[126] *Id.*

[127] *See id.*

[128] *Id.* at 163.

[129] *See Natural Gas Exploration: A Landowner's Guide to Leasing in Pennsylvania*, PENN. STATE UNIV. EXTENSION (Sept. 19, 2017), https://extension.psu.edu/natural-gas-exploration-a-landowners-guide-to-leasing-in-pennsylvania; TRUST COMPANY OF OKLAHOMA, *Working Interest vs. Mineral Interest*, TULSA ESTATE PLANNING FORUM (Apr. 21, 2015), http://www.tulsaepf.org/assets/Councils/Tulsa-OK/library/TEFP%20Meeting%2015-04-21%20-%20Working%20Interest%20vs%20Mineral%20Interest.pdf.

[130] *See Natural Gas Exploration: A Landowner's Guide to Leasing in Pennsylvania*, PENN. STATE UNIV. EXTENSION (Sept. 19, 2017), https://extension.psu.edu/natural-gas-exploration-a-landowners-guide-to-leasing-in-pennsylvania.

[131] *Id.*

[132] *See* U.S. ENERGY INFO. ADMIN., TRENDS IN U.S. OIL AND NATURAL GAS UPSTREAM COSTS 1, 20 (Mar. 2016), http://www.eia.gov/analysis/studies/drilling/pdf/upstream.pdf, *cited in Briggs*, 184 A.3d at 163; Samuel C. Stephens, Comment, *Poison Under Pressure: The EPA's New Hydraulic Fracturing Study and the Case for Rational Regulation*, 43 CUMB. L. REV. 63, 74 (2013) (same).

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instead, borne by the company and, if present, the other working interest owners.[133] In most cases, those leasing out the oil and gas rights would not be working interest owners and would likely be royalty owners.[134] Thus, those owners would get a share of the profits and, depending on the state, would probably help bear some of the post-production costs, but would not bear any of the pre-production or production costs.[135]

In conclusion, the *Briggs* opinion has several flaws that should warrant reversal: First, it disregards longstanding precedent concerning the rule of capture in Pennsylvania. Second, and relatedly, it does not recognize the artificial means that have been used and allowed for a long time to stimulate production of natural gas and oil. Finally, it misunderstands that landowners almost always do not bear the expense of drilling a well. Therefore, this Note contends, the Justices on the Pennsylvania Supreme Court would more faithfully follow longstanding law in Pennsylvania by reversing the Superior Court's ruling.

V. FURTHER DISCUSSION AND PUBLIC POLICY IMPLICATIONS

After the Pennsylvania Superior Court released its opinion in April of 2018, Southwestern petitioned for an *en banc* rehearing of the case but was denied.[136] Subsequently, the decision was appealed to the Pennsylvania Supreme Court.[137] On November 24, 2018, the court granted allocatur (akin to certiorari at the United States Supreme Court).[138] The case was argued on September 12, 2019 before the

[133] *See Working Interest Oil and Gas: Explained!*, BWAB OIL & GAS, https://bwab.com/working-interest-oil-gas-explained/ (last visited Oct. 25, 2019).

[134] *Id.*

[135] *See Post-Production Costs*, MARCELLUS SHALE COAL., https://marcelluscoalition.org/wp-content/uploads/2016/10/FINAL-Post-Production-Toolkit_100616.pdf (last visited Oct. 26, 2019).

[136] *Court Rejects Producer's Appeal in "Rule of Capture" Decision*, KALLANISH ENERGY (June 12, 2018), http://www.kallanishenergy.com/2018/06/12/court-rejects-producers-appeal-in-rule-of-capture-decision/. Perhaps the Superior Court recognized that such a key question in this area of economic importance to Pennsylvania would likely be heard by the Supreme Court regardless of whether or not the case was heard en banc.

[137] Tara Rice Hopper & John R. Seeds, *Year-End Recap on* Briggs*—The Pennsylvania Supreme Court to Decide Ancient "Rule of Capture" in Era of Extraction by Frac: Whose Milkshake Is It*, DICKIE MCCAMEY (Dec. 10, 2018), https://www.dmclaw.com/events-media/year-end-recap-on-briggs/.

[138] *Id.*

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Pennsylvania Supreme Court.[139] As of the writing of this Note, the court has not released a decision.

The court rephrased the issue that it was considering to be as follows:

> Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass liability for allegedly draining oil or gas from under nearby property, where the well is drilled solely on and beneath the driller's own property and the hydraulic fracturing fluids are injected solely on or beneath the driller's own property?[140]

The rephrasing of the issue has already caused some debate over how the court is going to rule when it ultimately does. Attorney Ken Witzel surmises that the language that the Pennsylvania Supreme Court used "could be read as a signal that it intends to limit its consideration to situations in which no hydraulic fracturing fluids leave the borders of the driller's own property (which, standing alone, would not constitute a trespass at all)."[141] Witzel, however, writes that he hopes "that the court will read the issue more broadly and address situations in which hydraulic fracturing fluids enter an adjacent property. If the court does, regardless of the outcome, clarity on the subject will be welcome."[142]

With all the uncertainty surrounding the law and the complexity of this issue in Pennsylvania, why does this Note argue that the Pennsylvania Superior Court's decision should be reversed, and the decision of the *Coastal Oil* majority adopted? Most importantly, the aforementioned longstanding common law of Pennsylvania lends considerable support to the idea that the decision should be overturned. The rule of capture has been followed in Pennsylvania going back to 1889.[143] Subsequently, the Pennsylvania Supreme Court acknowledged in 1900 that using

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[139] Appeal Docket Sheet at 11, Briggs v. Sw. Energy Prod. Co., No. 63 MAP 2018 (Pa. argued Sept. 12, 2019).

[140] Zack Needles, *Justices to Decide Whether Rule of Capture Applies to Fracking*, LEGAL INTELLIGENCER (Nov. 21, 2018), https://www.law.com/thelegalintelligencer/2018/11/21/justices-to-decide-whether-rule-of-capture-applies-to-fracking/?slreturn=20190024205105.

[141] Kenneth J. Witzel, *Pennsylvania Supreme Court to Give Trespass by Hydraulic Fracturing a Closer Look*, FROST BROWN TODD (Nov. 28, 2018), https://frostbrowntodd.com/pennsylvania-supreme-court-to-give-trespass-by-hydraulic-fracturing-a-closer-look/.

[142] *Id.*

[143] *See* Westmoreland & Cambria Nat. Gas Co. v. Dewitt, 18 A. 724 (Pa. 1889).

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artificial means of extraction, such as a gas pump, to artificially enhance production of one's oil and natural gas was allowable under the rule of capture.[144] Additionally, the rule of capture includes the classic remedy furnished by courts for over a century: to "go and do likewise."[145] Pennsylvania should want to keep the well-settled rule of capture and its remedy in place to not disturb settled law. Furthermore, as mentioned above, proving any sort of trespass damages could be extremely difficult and, thus, for pragmatic purposes, the *Coastal Oil* decision is superior to the *Briggs* decision.

Beyond the legal principles suggesting reversal, there are other, more policy-oriented reasons to reverse *Briggs*. For example, one of the goals behind the longstanding rule of capture principle is to prevent waste of natural resources.[146] Kulander and Shaw, in discussing the rule of capture, articulate critiques of the vacated *Stone* opinion that also apply directly to the *Briggs* opinion.[147] One of the main benefits of the *Coastal Oil* opinion is that it "[prevents] the waste of leaving oil and gas in place due to fear of liability for fracing trespass."[148] This would indeed be a valid public policy concern that underlies the rule of capture. Leaving natural gas in place would not be ideal for those who rely on it for everyday use or for those whose jobs are in the industry. Furthermore, those who lease out their land to energy companies frequently rely on the royalty payments from the sale of their gas. Were the Pennsylvania Supreme Court to uphold *Briggs*, investment in the state by energy companies could potentially decrease and that would harm both those who work in the industry and also the landowners who rely on the royalty payments from the companies. Consequently, the economy of Pennsylvania would suffer.

Affirming the Pennsylvania Superior Court's decision would not be extremely sound from a legal or public policy standpoint and would open up the opportunity for litigation where damages are speculative at best. Proving exactly how much gas was taken from under Property B as opposed to Property A is speculative and would likely be an extremely difficult and costly endeavor. Furthermore, were the *Briggs* ruling to be upheld, courts might experience a flood of litigation and the law of Pennsylvania would become uncertain.

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[144] *See* Jones v. Forest Oil Co., 44 A. 1074 (Pa. 1900).

[145] Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture—An Oil and Gas Perspective*, 35 ENVTL. L. 899, 920 (2005).

[146] *See, e.g.*, Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 12 n.33 (Tex. 2008).

[147] *See* Kulander & Shaw, *supra* note 43, at 105–07.

[148] *Id.* at 105.

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Beyond the pragmatism and practicality of *Coastal Oil* as opposed to *Briggs*, other rationales exist for keeping the rule of capture in place and not amending or overthrowing the law. Kramer and another leading scholar in oil and gas law, Owen Anderson, delineate public policy reasons that those conducting hydraulic fracturing should be protected from trespass actions.[149] They argue that fracking should be encouraged as a means of stimulating domestic energy production and further reducing America's dependence on foreign energy sources.[150] They write: "On balance, because fracing can greatly increase production rates and ultimate recovery, making operations more profitable and providing more domestic oil and gas resources . . . fracing should be protected from trespass actions."[151] Producing more energy is certainly an important goal of the state and the country.[152] Consequently, that should, at the very least, be a small factor that courts consider in the determination of this issue. This is, however, different from overtly considering whether the energy industry wants or needs a court ruling because, in this instance, courts would merely be weighing the public policies behind the rule of capture as opposed to whether a specific industry "wants" something.[153]

In contrast to the *Coastal Oil* majority opinion, other courts such as the Pennsylvania Supreme Court in *Butler*, have successfully been able to highlight reliance interests and public policy concerns without such strident language virtually indicating a preferred policy choice.[154] Broadly, *Butler* concerned who owned the gas trapped in shale.[155] In *Butler*, the gas went to the oil and gas owner, not the shale owner because, under Pennsylvania law, there is a rebuttable presumption that a conveyance of "minerals" does not include oil and gas.[156] This is, however, contrary

[149] Kramer & Anderson, *supra* note 145, at 935–36.

[150] *Id.* at 935.

[151] *Id.*

[152] *See* U.S. DEP'T OF ENERGY, VALUATION OF ENERGY SECURITY FOR THE UNITED STATES: REPORT TO CONGRESS 46–54 (Jan. 2017), https://www.energy.gov/sites/prod/files/2017/01/f34/Valuation%20of%20Energy%20Security%20for%20the%20United%20States%20%28Full%20Report%29_1.pdf.

[153] *See* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 16–17 (Tex. 2008).

[154] *See* Butler v. Charles Powers Estate, 65 A.3d 885, 894 (Pa. 2013). The property rule in question is known as the *Dunham* Rule and states that it is a rebuttable presumption under Pennsylvania law that a conveyance of minerals does not include oil and gas rights. *Id.* at 897.

[155] *Id.* at 894.

[156] *Id.* at 897.

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to the way other states in the country handle this issue.[157] In *Butler*, the court ruled that it would be too difficult to unwind many transactions that had relied on the longstanding *Dunham* Rule.[158] Justice Baer wrote: "In our view, neither the Superior Court nor Appellees have provided any justification for overruling or limiting the *Dunham* Rule and its longstanding progeny that have formed the bedrock for innumerable private, real property transactions for nearly two centuries."[159] This opinion, which overruled a prior decision of the Pennsylvania Superior Court and was joined by the entire Supreme Court, focused on how many transactions would be unwound by affirming the Superior Court's decision and on the stability that the *Dunham* Rule provided.[160] It is unclear how many leases, contracts, or other like documents have been drafted that have relied on rule of capture principles, but it is likely that very many have. The *Butler* case is an example of appropriate examination of reliance interests that are based on pragmatic ideas. It would have behooved the Texas Supreme Court to follow this line of reasoning instead of focusing so heavily on the wants or needs of the energy industry, which was and is a largely irrelevant concern for a judicial opinion.

In addition, the *Butler* court also wrote a striking maxim that applies neatly to *Briggs*. The court states that "[a] rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice."[161] Although *Butler* concerned a different area of oil and gas law, the situation is certainly similar to *Briggs*. The *Dunham* Rule was traced definitively to the *Dunham* case in 1882 and possibly all the way back to 1836.[162] Similarly, the rule of capture in connection with oil and gas has been the law in Pennsylvania since 1889.[163] Other subsequent cases have reinforced it in Pennsylvania and have also demonstrated that one can use technological advancements such as pumps to draw

[157] *Id.* at 891.

[158] *Id.* at 897. Interestingly, procedurally, the *Briggs* case was even somewhat similar to *Butler*. In *Butler*, the trial court ruled that any natural gas found in the shale formation was not contained in the mineral rights and the Superior Court reversed that ruling. *Id.* at 188.

[159] *Id.* at 897.

[160] *See id.*

[161] *Id.* at 891–92, 897 (citing Highland v. Commonwealth, 161 A.2d 390, 399 n.5 (Pa. 1960)).

[162] *Id.* at 889.

[163] *See* Westmoreland & Cambria Nat. Gas Co. v. Dewitt, 18 A. 724 (Pa. 1889).

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more oil and gas to one's well.[164] In *Briggs*, the public policy or justice concerns do not seem to warrant ignoring a 130-year-old rule of property law and arguing that it does not apply in this instance. Now-Chief Justice Saylor argued in a brief concurrence in *Butler* that since "*Dunham* has effectively served to establish a governing rule of property law in Pennsylvania for over a century, too many settled expectations rest upon it for the courts to upset it."[165] Similarly, there are expectations surrounding the rule of capture and the court should take care to not upset those.

Hydraulic fracturing itself has been around for over a decade in Pennsylvania and had been a method of production for many years before that.[166] The court would be well-served to consider the language of an opinion from West Virginia, which stated that "plaintiff's contention that conditions, namely technological advances, have changed in the coal mining industry, thereby rendering the 1905 waiver invalid, fails because of the clear meaning of the waiver."[167] Similarly, technological advances have changed the oil and gas industry in Pennsylvania. Just because technology has changed in the Pennsylvania oil and gas industry does not mean that the oil and gas industry should be precluded from adopting that technology. Furthermore, although technology has also changed since the period of 1889–1907, the law and its spirit should still apply to the present day. Many leases, transactions, and other business-related assumptions have likely rested on having the certainty that the rule of capture is the law. Furthermore, Texas, one of the leading states in natural gas production, has also not ruled hydraulic fracturing a trespass in a similar situation and, thus, provides guidance for how to handle this novel legal issue.

Some, however, might have concerns that overturning such a ruling would lead to, in essence, an unlimited blank check for the energy industry, which concerned Judge Musmanno, Justice Johnson, and Judge Bailey in the various opinions that they authored.[168] This concern could be addressed by potential regulations, which will be explored further in Part VI.

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[164] *See* Jones v. Forest Oil Co., 44 A. 1074 (Pa. 1900); *see also* Barnard v. Monongahela Nat. Gas Co., 65 A. 801 (Pa. 1907).

[165] *Butler*, 65 A.3d at 900 (Saylor, J., concurring).

[166] Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 1, 7 (Tex. 2008) (noting that hydraulic fracturing was first used commercially in 1949); U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1383 (Pa. 1983).

[167] Smerdell v. Consolidation Coal Co., 806 F. Supp. 1278, 1285 (N.D. W. Va. 1992).

[168] *See Coastal Oil*, 268 S.W.3d at 45 (Johnson, J., dissenting); *see also* Stone v. Chesapeake Appalachia, LLC, No. 5:12-CV-102, 2013 WL 2097397, at *6 (N.D. W. Va. Apr. 10, 2013); *see also* Briggs v. Sw. Energy Prod. Co., 184 A.3d 153, 161 (Pa. Super. Ct. 2018).

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Consequently, for these reasons, and especially because of the longstanding Pennsylvania common law related to the rule of capture, this Note contends that the Pennsylvania Supreme Court would more faithfully follow the law by reversing the judgment of the Pennsylvania Superior Court.

VI. CONSIDERATIONS FOR THE FUTURE

Although this Note advocates reversal of the Pennsylvania Superior Court's decision, there should be consideration of regulations to protect landowners from the negative consequences of the rule of capture while also recognizing the vital importance of oil and natural gas to the Commonwealth and to the country. These notions can coexist. Although the rule of capture is firmly settled law in Pennsylvania, it is not, naturally, a perfect law. According to Judge Rosemary Barkett, formerly of the Eleventh Circuit, the rule of capture promotes—rather than prevents—waste by encouraging the drilling of multiple wells where one well could possibly be sufficient.[169] Furthermore, that court also argued that the rule of capture contributes to the degradation of the environment, and that it is an arguably inefficient way to encourage the production of oil and natural gas.[170] While there is the counterargument that the rule of capture prevents wasting natural gas, these are still valid concerns. Because of these and other problems associated with the rule of capture, multiple states have passed statutes that mitigate some of the larger problems associated with the rule.[171] Consequently, if Pennsylvania is to act on this issue, a regulation enacted by the legislature would be the more ideal solution, as opposed to an inexact remedy created by the judiciary.

After examining the potential solutions to this issue, it is my view that the first action that the industry could take to ensure that no trespass claims get brought would be to acquire the leases of the unleased properties, with cost being a secondary consideration and acquisition being the primary focus. Acquiring as many leases as possible and pooling them would be the simplest way to ensure that no trespass claims are brought. In addition, if acquiring the leases is not possible, it is possible to change the direction of the drilling to avoid certain properties.[172]

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[169] Alabama v. U.S. Dep't of Interior, 84 F.3d 410, 413 (11th Cir. 1996).

[170] *Id.*

[171] *Id.*

[172] *See* Jason Lewis, *Directional Drilling: Everything You Ever Wanted to Know*, DRILLERS.COM (Aug. 14, 2018), https://drillers.com/directional-drilling-everything-you-ever-wanted-to-know/.

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If these solutions prove impossible to accomplish, however, one other idea is to implement further regulations within the state legislature to address issues of subsurface trespass that stem from hydraulic fracturing. A possible regulatory idea is that for the production of shale, certain wells must be set back a certain distance from property lines. Instituting such a rule would help to ensure that a vast majority of the shale gas obtained was from the property where the well was being drilled, thus avoiding any lawsuits of this type or making it less likely that there would be any reason that a trespass or damage to another property would occur. It would eliminate issues like those that occurred in *Briggs*.[173] Additionally, such a regulation could serve the dual purpose of protecting landowners and giving the industry better guidance in knowing how far back wells should be, as opposed to what would come out of a likely more nebulous court decision.

Instituting a regulation, however, would not be a perfect fix. For example, it is very likely that if wells were located further back from a property line, a lot of oil and natural gas could be lost. Since the operators would be concerned about the legal consequences of overstepping property lines, a lot of gas would be wasted. Furthermore, production would become less efficient because the well would be placed where it must be, instead of the optimal location shown by survey to be closer to the property line than allowed. In addition, a regulation such as this would likely make production more expensive because it would lengthen the time in which it took to determine where the well could legally be placed.

Yet, while this Note argues that additional regulations could have certain benefits, such a decision, as articulated in *Coastal Oil*, should be put in the hands of the appropriate regulatory body, such as the Texas Railroad Commission.[174] The Texas Supreme Court addresses the appropriateness of regulation by the Texas Railroad Commission in *Coastal Oil*: "The rule of capture makes it possible for the Commission, through rules governing the spacing, density, and allowables of wells, to protect correlative rights of owners with interests in the same mineral deposits while securing 'the state's goals of preventing waste and conserving natural resources.'"[175] In Pennsylvania, the state legislature and the state agencies would be best positioned to regulate the oil and gas industry, as opposed to the court system. Similarly, Pennsylvania can effectively follow the rule of capture and let the legislature and regulatory bodies of the state determine—for example—appropriate well spacing and well setback distances to help alleviate issues surrounding the rule of capture. If appropriate action is taken by those bodies, then perhaps issues such as

[173] *See generally* Briggs v. Sw. Energy Prod. Co., 184 A.3d 153 (Pa. Super. Ct. 2018).

[174] Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 14–15 (Tex. 2008).

[175] *Id.* at 15 (citing Seagull Energy E&P, Inc. v. R.R. Comm'n, 226 S.W.3d 383, 389 (Tex. 2007)).

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those that occurred in *Briggs* can be avoided. If so, the state and federal courts would be spared costly litigation. Furthermore, landowners, as well as the lessors who rely on the royalty payments, could be protected.

In conclusion, although clearly a thorny problem in this Commonwealth, the Pennsylvania Supreme Court would be more faithful to longstanding law if it reversed the decision of the Superior Court. Furthermore, if there are regulations that should be adopted to alleviate the negative effects of the rule of capture, they should come from the legislature and not from the courts. The legislature and state agencies should study how regulations would impact the industry and what issues regulations would help solve. In short, the legislature and agencies can better gather factual information from all groups and parties concerned. The court system, simply put, is not the proper place for regulations to be instituted.

"I'm finished."[176]

[176] THERE WILL BE BLOOD, *supra* note 7.

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