WHEN THE SHALE GALE HIT OHIO:
THE FAILURES OF THE DORMANT MINERAL ACT, ITS
HEROIC INTERPRETATIONS, AND GRAVE CHOICES
FACING THE SUPREME COURT
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I. ABSTRACT

As stories of signing bonuses and the promise of rich gas royalties spread through the local communities in Eastern Ohio, owning land was like owning a lottery ticket. For some, fortunes were made over night. For others, their land was not over the sweet spots of the shale plays. And for others still, what appeared to be their easy path to prosperity was blocked, much to their surprise and chagrin, by title ambiguities. It was at this point that Ohio’s dormant mineral rights became litigious, and the Ohio Dormant Mineral Act (ODMA) was scrutinized for the first time. In fact, to say that the ODMA was scrutinized may be an understatement, as local lawyers have commented: “The amount of litigation that has been generated involving Ohio’s DMA during the past three years [2011-2014] has rarely been seen with regard to a single statute.”

Ohio’s Seventh District Court of Appeals recently attempted to remedy the ODMA’s ambiguities. The appellate court, however, may not have the final word on the matter. The Ohio Supreme Court will review a number of issues in the coming year, and there are still others which may ultimately need to be reviewed. In light of this, this article will evaluate the appellate court’s judgments. This study is confined to research the following issues: (1) whether all three appellant panels correctly determined that the 1989 version provides for automatic vesting; (2) whether the court in Eisenbarth

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correctly determined that the look-back period under the 1989 version is for a fixed twenty-year period; and (3) what is the proper interpretation and application of the title transaction savings event. This Article will argue for automatic vesting, argue against a fixed look-back period, and finally, offer some guidance as to the application of the title transaction savings event.

II. INTRODUCTION

Commercial hydraulic fracturing started almost seventy years ago.2 However, if not for George Mitchell’s investment in the technology from 1998 to 2003 when few others believed in it, coupled with his dogged persistence in unlocking the treasure of the Barnett Shale,3 modern hydraulic fracturing may never have developed.4 Likewise, the first commercial horizontal wells were drilled in the early 1980s by Elf Aquitaine.5 But if not for Larry Nichols pushing Devon Energy6 and Harold Hamm pushing Continental7 to combine horizontal drilling with Mitchell’s hydraulic fracturing techniques, the power of horizontal drilling may not have been fully appreciated.8 Without the combination of these two technologies, the “American energy revolution” may never have occurred.9

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4 See id. at 34–39.
8 See id. (discussing the pressure of Hamm and Mitchell’s teams competing to reach better results in drilling).
But the star of the show is another wildcatter, former landman Aubrey McClendon. His company, Chesapeake, co-founded by Tom Ward, may not have pioneered the technologies of modern hydraulic fracturing, but its aggressive acquisition of shale plays across the United States set it apart from its competitors. McClendon, with the help of investment banker and close friend Ralph Eads, is largely accredited for the “Shale Gale,” which really picked up steam in 2007 and blew across America. Even by 2006, McClendon—“the chief apostle of [the] energy revolution”—was “declaring victory” in what he characterized as the “land run of 2000 to 2006.” This was a reference to the land runs which started in 1889 when unassigned lands where opened to settlers. But in 2006, McClendon was far from finished with his aggressive acquisition of shale plays.

It was not until 2007 that this land grab moved to Ohio. By 2008, Chesapeake and others “raced to lease land” in the Marcellus and Utica shale plays. The pace of leasing activity “grew heated.” Competing landmen armed with company checkbooks scoured the Ohio countryside hunting for leasing opportunities. By 2011, McClendon declared the Utica was “the

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12 GOLD, supra note 6, at 190.
14 Nelder, supra note 10, at 185; GOLD, supra note 6, at 165–66.
16 Blackwill & O’Sullivan, supra note 9, at 102.
17 GOLD, supra note 6, at 158.
18 Id. at 192.
21 GOLD, supra note 6, at 206.
22 ZUCKERMAN, supra note 3, at 277.
23 Id. at 276.
biggest thing to hit Ohio since the plow,” and it was “one of our biggest
discoveries in US history.”

As stories of signing bonuses and the promise of rich gas royalties
spread through the local communities in Eastern Ohio, owning land was like
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Mineral Act (the ODMA) was scrutinized for the first time. In fact, to say
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have commented: “The amount of litigation that has been generated
involving Ohio’s DMA during the past three years [2011-2014] has rarely
been seen with regard to a single statute.”

Such problems with ownership are not new to American law. In
America, unlike most countries, the surface owner owns subsurface
rights. In some cases, especially in resource rich areas, surface owners will

25 Robert L. Smith, Some Think a Gas Boom Can Reignite Ohio’s Manufacturing
/2011/11/some_think_a_gas_boom_can_reig.html.
26 GOLD, supra note 6, at 206.
27 Spencer Hunt, Eastern Ohio Swept by Drillers’ Land Rush, COLUMBUS DISPATCH, Nov.
20, 2010.
28 Steve Hargreaves, Gas Boom Mints Instant Millionaires, CNN Money, Nov. 2, 2010,
30 See John K. Keller & Gregory D. Russell, Ohio’s Dormant Mineral Act, OHIO ST. BAR
ASS’N. (June 29, 2010), available at https://www.ohiobar.org/NewsAndPublications/
News(OSBANews/ Pages/OSBANews-1808.aspx.
31 See OHIO REV. CODE ANN. § 5301.56 (West Supp. 2014).
32 Keller et al., supra note 1, at 21.
33 See, e.g., Ernest E. Smith, Methods for Facilitating the Development of Oil and Gas
34 Jacqueline Lang Weaver & David F. Asmus, Unitizing Oil and Gas Fields Around The
World: A Comparative Analysis of National Laws and Private Contracts, 28 HOUS. J. INT’L
35 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS: OIL AND GAS LAW
sell the mineral rights under their land to another, creating a split title.36 When such mineral interests prove valueless, the mineral rights are abandoned, forgotten, and often unmentioned in successive land transactions.37 In Ohio, many seemingly worthless mineral right interests were poorly recorded through title documents, and they were inherited without notice from one generation to the next.38 As explained above, these neglected mineral rights may never have resulted in any consequence except for their newfound value created by the advent and popularization of hydraulic fracturing.39

Under the common law, some property rights can be deemed abandoned if there is evidence of both non-use and an owner’s intention to abandon the property.40 However, corporeal interests, such as severed mineral interests, are rarely terminated in this manner.41 Typically, statutory authority bolsters this common law forfeiture.42 In cases where the abandonment impedes the marketability of property, the normal legislative response is the enactment of a marketable title act.43 A marketable title act operates to create legal certainty of transactions by erasing the ambiguity created by ancient claims to title and, thus, eliminating potential liability.45

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38 See generally Jeff A. Spencer & Mark J. Camp, Ohio Oil and Gas (2008) (information on the oil and gas booms and busts in Ohio).
39 Blackwill & O’Sullivan, supra note 9, at 102–04.
41 The exception is the California Supreme Court in Gerhard v. Stephens, 442 P.2d 693, 718 (Cal. 1968) (holding the lower court correctly found that the “plaintiffs abandoned their [oil and gas] interests”).
42 See, e.g., Ferris v. Coover, 10 Cal. 589, 631 (1858) (explaining that the “doctrine of abandonment only applies where there has been a mere naked possession without title”); Cox v. Colossal Cavern Co., 276 S.W. 540, 544 (Ky. 1925) (holding that the doctrine of abandonment “could only apply to easements or licenses”).
In some hydrocarbon-producing states, however, the governing marketable title act either excluded mineral rights from its application or inadequately dealt with the problems arising from dormant mineral interests.\footnote{For instance, after the Ohio Supreme Court’s ruling in Heifner v. Bradford, 446 N.E.2d 440 (Ohio 1983), it became obvious that the Ohio Marketable Title Act would not be an effective mechanism for clarifying or terminating title to ancient mineral claims. In part, this led to the 1989 version of the ODMA.} As a result, many states adopted a dormant minerals act.\footnote{These states include California, Illinois, Indiana, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, Washington, and Wisconsin. See An Ohio Dormant Mineral Act Testimony: Hearing on S.B. 223 and H.B. 521, 1988 Leg., 117th Sess. (Ohio 1988) [hereinafter ODMA Testimony] (testimony of William J. Taylor, Esq., Partner, Kincaid, Cultice & Geyer) (on file with author).} The National Conference of Commissioners on Uniform State Law supported this legal evolution by drafting a Uniform Dormant Mineral Interest Act in 1986 to guide state drafters.\footnote{LOWE ET AL., supra note 36. See generally UNIF. DORMANT MINERAL INTEREST ACT (1986), available at http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia_final_86.pdf. William Taylor, a drafter of the original version of Ohio’s Dormant Minerals Act, explains the need for a Dormant Minerals Act in states like Ohio. See ODMA Testimony, supra note 47.} In general, a dormant minerals act provides a mechanism, similar to a marketable title act, to erase the ambiguity created by ancient claims, but it does so more aggressively.\footnote{LOWE ET AL., supra note 36, at 167–69, 172–74.} In other words, ancient claims do not need to be so ancient to be quickly dismissed by the function of a dormant minerals act—if such claims pose a threat to the marketable title of natural resources.

In light of Ohio’s history of title ambiguities concerning mineral interests, it would seem fortunate that Ohio enacted a marketable title act,\footnote{OHIO REV. CODE ANN. §§ 5301.47–.56 (West Supp. 2014).} and within it, a dormant minerals act.\footnote{Id. § 5301.56.} The ODMA attempts to ensure that, in the face of title ambiguities, ownership and possession of mineral rights can be efficiently established.\footnote{See OHIO LEGISLATIVE SERVICE COMMISSION, BILL ANALYSIS H.B. 288 (2005) (providing a summary of the 2006 amendments to § 5301.56). See also MARTIN & KRAMER, supra note 35, § 215 (universal purpose of Dormant Mineral Acts).} In this way, the ODMA is designed to determine title certainty through a quick and efficient administrative
process; this helps lessee-developers avoid liability arising from exploration and production, and it facilitates oil and gas development.53

To be clear, the ODMA’s forfeiture provision is to establish clear title, not to grant surface owners the power to capture mineral interest from those who have legitimate claims to them.54 Clear title must be established in a manner that best protects private property.55 As the National Conference of Commissioners on Uniform State Law explained:

A [DMA] statute that combines a number of different protections for the mineral owner, but that still enables termination of dormant mineral rights, is likely to be the most successful. Such a combination may also help ensure the constitutionality of the act from state to state. For these reasons, the draft statute developed by the committee consists of a workable combination of the most widely accepted approaches found in jurisdictions with existing dormant mineral legislation, together with prior notice protection for the mineral owner.56

To achieve this end, the ODMA establishes an eight-step process that affords surface owners the opportunity to acquire title to previously severed mineral rights, while still providing the mineral interest owners the opportunity to preserve their property rights.57

53 See ODMA Testimony, supra note 47.
55 See Comment, Enhancing the Marketability of Land: The Suit to Quiet Title, 68 YALE L.J. 1245, 1249–50 (1959) (“[A] finding of unmarketability . . . operates to destroy a title’s value unless and until it can be cleared by some remedial device . . . . In sum, judicial adherence to the marketability standard is both an implicit admission that shortcomings in the law of land-transfer engender private injustice, and an explicit process which serves to accentuate and aggravate the law’s inadequacies.”).
57 See generally OHIO REV. CODE ANN. § 5301.56(B) (West Supp. 2014) (statutory requirements for surface owners to acquire mineral interests held by another).
Supporters view this as a sound remedy to “the ‘often-tangled history’ of mineral titles,”58 while critics argue that it is worse than a public taking.59 This latter group posits that the legislature cleared the path for taking property from one private individual by another private individual.60 Unlike in an eminent domain situation, where the state takes private property for “public use,”61 here, a private actor takes private property for their own profit.62 To its champions, the ODMA is necessary to “encourage the development of minerals,” fix “defects in title,” and “enhance the economy of areas of [Ohio] which may have no other source of revenue production.”63

Ohio’s Seventh District Court of Appeals recently attempted to remedy the ODMA’s ambiguities in *Walker v. Shondrick-Nau*,64 *Swartz v. Householder*,65 and *Eisenbarth v. Reusser*.66 The appellate court, however, may not have the final word on the matter.67 The Ohio Supreme Court will review a number of issues in the coming year,68 and there are still others that may ultimately need to be reviewed. In light of these awaiting pertinent issues, this Article evaluates the appellate court’s judgments.69

This study is confined to research the following issues: (1) whether all three appellate panels correctly determined that the 1989 version provides for automatic vesting; (2) whether the court in *Eisenbarth* correctly

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59 See Teichman, *supra* note 37, at 158.

60 See id. at 175–78.


63 See ODMA Testimony, *supra* note 47.

64 7th Dist. Noble No. 13 NO 402, 2014-Ohio-1499.

65 2014-Ohio-2359, 12 N.E.3d 1243 (7th Dist.).

66 2014-Ohio-3792, 18 N.E.3d 477 (7th Dist.).


68 See id.

69 See discussion *infra* Parts IV.B–D.
determined that the “look-back period” under the 1989 version is for a fixed twenty-year period; and (3) what is the proper interpretation and application of the title transaction savings event. This Article argues for automatic vesting and against a fixed look-back period, and it offers some guidance as to the application of the title transaction savings event. To do so, this Article examines the 1989 and 2006 versions of the ODMA, relevant case law, and academic literature on the issue. Accordingly, Part II of this Article lays out the operations of the ODMA; Part III highlights its weaknesses that triggered litigations, and also analyzes the most recent judicial determinations on these three issues on the eve of the Supreme Court of Ohio’s decisions; and Part IV offers some final thoughts upon the ODMA, and its judicial interpretations.

III. THE OPERATION OF THE ODMA

A. Interested Parties and ODMA

There are three basic parties that play a role in the classic ODMA/shale gas scenario: the lessee-gas company, the surface owner, and the potential owner of the mineral interest that was severed from the surface in question. For the lessee, the dispute is usually of less consequence. The landmen

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70 See discussion infra Parts IV.B–D.

71 See discussion infra Parts IV.B–D.

72 See generally discussion infra Part IV.

73 See discussion infra Part II.

74 See discussion infra Part III.

75 See discussion infra Part IV.

76 Although there is a strategy in Ohio, New York, and Pennsylvania in which “neighboring landowners . . . unit[e] to form [a] negotiating alliance[],” Jodi Liss, Negotiating the Marcellus: The Role of Information in Building Trust in Extractive Deals, 27:4 NEGOTIATION J. 419, 426 (2011), for the sake of simplicity, this is the classic ODMA/shale gas scenario that has been adopted. For more on the strategy, see id.


78 Zachary M. Simpson, Lecture at Capital University Law School: Representing Industry in Oil and Gas Leasing Transactions in Ohio (Oct. 9, 2013).
will seek out those with rival claims to the mineral rights and attempt to negotiate lease agreements with each. The gas companies are usually successful in doing this. The rivaling lessor-owners are enticed by a portion of the full signing bonus, win or lose. Then, an agreement is reached where the remainder of the signing bonus and the royalty payments are placed in an escrow account for whoever establishes clear title to the mineral interest. The gas company will proceed with their exploration. Of course complications can arise, but it is important to note that these title ambiguities and the ODMA litigations create less disruption to exploration and production than one might think.

In this classic scenario, the surface owner is unaware of the mineral reservation. The landman and the surface owner come to an agreement. The landman explains that the lessor will receive the signing bonus after the gas company establishes that the lessor has clear title to the oil and gas interests in question. But instead of a signing bonus check, the surface owner receives a written notice of a title ambiguity that must be clarified prior to entering into the lease agreement. Because establishing clear title to the mineral rights is a condition precedent to receiving the signing bonus, the surface owner will either attempt to use the ODMA to establish clear title or abandon the pursuit of the lease.

Some owners of an ancient claim to mineral rights know about their potential ownership of the reservation. For the rest, notice that they

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80 Simpson, supra note 78.
82 Simpson, supra note 78.
83 Id.
85 Lowe, supra note 77, at 287–88. See generally Childers & Judd, supra note 79.
86 See generally Childers & Judd, supra note 79.
87 See Lowe, supra note 77, at 288 (more information on such potential interferences with a landowner’s interest).
88 Childers & Judd, supra note 79.
90 Lowe, supra note 77, at 287
potentially own a vast fortune in oil and gas is a great surprise. In these cases, the severed mineral rights were owned, deemed valueless, and then silently past to the next of kin. Not surprisingly, the newly-informed potential mineral right owners are reluctant to give up their claim—and the accompanying signing bonuses and royalties—without a legal challenge.

B. The Administrative Process of the ODMA

If the 2006 ODMA applies and not the earlier 1989 version, the surface owner must abide by an eight-step process to legally take the mineral rights from an ancient claimholder. The first step is to ensure that the mineral interest is not coal. Coal has been king in Ohio for many years, and its lobby secured an exception for coal rights. Likewise, if the owner of the minerals is the U.S. Government, the State of Ohio, or any accompanying political subdivision, the ODMA will not apply. Thus, the second step is to ensure that the subsurface owner is not the government.

In the third step, the surface owner will have to find a gap of twenty years between “savings events” related to the mineral interest in question. If this dormant period between savings events exists, the surface owner will be able to establish a stronger legal claim to the mineral interest than the

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91 See UNIF. DORMANT MINERAL INTEREST ACT (1986), available at http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia_final_86.pdf (an explanation of DMAs, which anticipates this scenario).
92 See id. For the operation of Ohio law in this matter, see OHIO REV. CODE ANN. § 5105.11 (West Supp. 2014).
93 For a seminal text on rational choice theory see BECKER, supra note 81.
94 This assumption is not a forgone conclusion.
95 OHIO REV. CODE ANN. § 5301.56 (West Supp. 2014).
96 Russell & Fromme, supra note 77, at 302.
97 § 5301.56(B)(1).
99 Telephone interview with Bill Taylor, former member of the Natural Res. Comm. of the Ohio St. Bar Ass’n, in Columbus, Ohio (Feb. 26, 2015). For a history critical account of the power and influence of the coal lobby in Ohio and other Appalachian States, see generally CHAD MONTRIE, TO SAVE THE LAND AND PEOPLE: A HISTORY OF OPPOSITION TO SURFACE COAL MINING IN APPALACHIA (2003).
100 § 5301.56(B)(2).
101 See id.
102 See § 5301.56(B)(3).
holder of the mineral interest.\textsuperscript{103} Rephrased in the negative, without the twenty-year gap between savings events, the surface owner will have no legal claim to the mineral rights in question. The six savings events are listed as follows:

1. The oil and gas mineral interest has been the “subject of” a recorded “title transaction,”\textsuperscript{104} which refers to “any transaction affecting title to any interest in land”;\textsuperscript{105}
2. There has been actual production or withdrawal of oil and gas by the holder of the mineral interest;\textsuperscript{106}
3. The mineral interest reservoir has been used in underground gas storage;\textsuperscript{107}
4. A drilling or mining permit has been issued to the holder of the mineral interest;\textsuperscript{108}
5. A statutorily-compliant affidavit to preserve the mineral interest has been filed;\textsuperscript{109} or
6. The county auditor has created a separately listed tax parcel number for the mineral interest.\textsuperscript{110}

If a gap of dormancy is established, the surface owner proceeds to the fourth step.\textsuperscript{111} The surface owner must serve notice of intent to declare the mineral interest at issue abandoned, and subsequently, to claim ownership of the mineral interest.\textsuperscript{112} The notice must be sent by certified mail,\textsuperscript{113} with return receipt requested, to the last known address of each “holder” of the mineral interest.\textsuperscript{114} The holder is defined to include “any person who derives

\textsuperscript{103} \textit{See id.}
\textsuperscript{104} \textsection 5301.56(B)(3)(a).
\textsuperscript{105} \textsection 5301.47(F).
\textsuperscript{106} \textsection 5301.56(B)(3)(b).
\textsuperscript{107} \textsection 5301.56(B)(3)(c).
\textsuperscript{108} \textsection 5301.56(B)(3)(d).
\textsuperscript{109} \textsection 5301.56(B)(3)(e).
\textsuperscript{110} \textsection 5301.56(B)(3)(f).
\textsuperscript{111} \textsection 5301.56(B).
\textsuperscript{112} \textsection 5301.56(E)(1).
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
the person’s rights from, or has a common source with, the record holder” of the mineral rights. The fifth step is closely associated with the Fourth Step. If notice is not possible (for instance, the certified mail notice is returned undelivered), then the surface owner must publish notice at least once in a newspaper of general circulation in each county in which the land is located. Although this Article does not address this issue, the surface owner is likely required to meet a level of due diligence in attempting to track down the holder of the mineral interest.

Within sixty days of service or publication of the notice, the holder must file a claim to preserve the mineral interest with the county recorder’s office. This is the sixth step. If the holder has a legitimate claim and files the preservation order, the holder will maintain ownership and be shielded from the forfeiture process of the ODMA. However, if the holder of the mineral interest does not file the preservation order within sixty days, the seventh step then requires the surface owner to file a notice of failure to file the preservation order in the county recorder’s office. It must be filed within the thirty- to sixty-day window after the date the notice was served or published.

Finally, in the eighth step, the surface owner sends a “notice of failure” to the county recorder at least sixty days after the date notice was served or published. A surface owner who can manage to successfully navigate all eight steps will have legally taken the property under the ODMA.

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115 § 5301.56(A)(1).
116 § 5301.56(E)(1).
117 The level of due diligence necessary to identify the heirs of the severed mineral interest holder is unclear. The issue will surely be litigated. That said, some guidance is available from the case law dealing with Ohio Civil Rule 4.4, which sets forth the rules for serving parties by publication. See, e.g., Sizemore v. Smith, 453 N.E.2d 632, 635 (Ohio 1983).
118 § 5301.56(E)(2).
119 § 5301.56(C)(2).
120 § 5301.56(H)(2).
121 § 5301.56(E)(2).
122 See id.
123 § 5301.56(H)(2).
124 § 5301.56.
IV. Litigation Arising of The ODMA

A. Quick Note on Judicial Interpretation of Statutory Ambiguities in Ohio

In Ohio, the legislature has codified,125 and the Supreme Court has clarified,126 the basic maxims for interpreting statutes; legislative intent must be established “primarily from the language of the statute.”127 Moreover, a court must not “speculate” as to intent,128 but must assume that the legislature understood the plain meaning of “the use of words found in the statute.”129 Thus, a court must not read substance into a statute “which is not within the manifest intention of the Legislature as gathered from the act itself.”130 This means judges cannot add restrictions or qualifications if the language of the act itself does not support the judicial interpretation of the legislative intent.131 In other words, judges can interpret, but they cannot step beyond interpreting law to amend it; they cannot make statutory law.132 Only the legislature can do that.133 The main point is that judges must attempt to give “significance and effect” to “every word, phrase, sentence, and part of an act”134 without reaching beyond it to create new, and unintended, law.135

This is in accordance with a great deal of the academic literature on the topic of statutory interpretation.136 For instance, Justice Easterbrook explained that some judges and academics confuse the nature of statutory interpretation, leading to an overreach in the presumed scope of judicial authority.137 He wrote:

If history and language do not supply a certain meaning for a text, as the argument goes, then judges are entitled to

\[\text{References:}\]

125 Ohio Rev. Code Ann. §§ 1.41–.64 (West 2013).
128 Wachendorf, 78 N.E.2d at 374.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
135 Id.
137 Id.
supply meanings, and they should choose the meaning that best accords with wise and just government. . . . [This premise] confuses legal with literary interpretation. The ambulatory nature of statutes means that judges have less power, not more.\textsuperscript{138}

The power to interpret is not the power to make law; it is bound by a “duty of restraint.”\textsuperscript{139} The function of a judge when interpreting a statute is “as merely a translator of another’s command.”\textsuperscript{140} Even if the legislature makes a serious mess of drafting a piece of legislation, the courts cannot rewrite a statute under the guise of interpreting it.\textsuperscript{141} The judicial branch simply does not have this authority.\textsuperscript{142} As Justice Frankfurter explained:

\begin{quote}
[Courts] are under the constraints imposed by the judicial function in our democratic society. . . . [Their] function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. . . . Legislative words presumably have meaning and so we must try to find it.\textsuperscript{143}
\end{quote}

That said, there is a gray area.\textsuperscript{144} Occasionally, there are gaps and uncertainties that force judges to make choices.\textsuperscript{145} Statutory language must have meaning, and the courts have a duty to interpret ambiguous language.\textsuperscript{146} This may not be so easy. When the language of an act is of little guidance in selecting between plausible interpretations, an Ohio court can consider:

\textsuperscript{138} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Easterbrook, \textit{supra} note 136, at 98–99.
\textsuperscript{142} Id.
\textsuperscript{143} Frankfurter, \textit{supra} note 139, at 533–34.
\textsuperscript{144} See James M. Landis, \textit{A Note on Statutory Interpretation}, 43 \textit{Harv. L. Rev.} 886, 891–92 (1930).
\textsuperscript{146} See Wachendorf \textit{v.} Shaver, 78 N.E.2d 370, 374 (Ohio 1948).
the object sought to be attained; the circumstances under which the statute was enacted; the legislative history; the common law or former statutory provisions, including laws upon the same or similar subjects; the consequences of a particular construction; [and] the administrative construction of the statute.\textsuperscript{147}

Sometimes, such as with the ODMA, judges may face unfortunate outcomes not intended by the legislature, which are the result of the best plain meaning interpretation of statutory language.\textsuperscript{148} These consequences are unfortunate, and some may encourage greater judicial activism in these situations.\textsuperscript{149} But there are limits to what Ohio courts can do.\textsuperscript{150} Courts ought to respect the limits of their power, since protecting democratic control over law making, even when flawed, is more important than the inequities that result from poor drafting.\textsuperscript{151} If legislation is seriously flawed and leads to serious inequities, then it will likely be declared unconstitutional.\textsuperscript{152} Otherwise, faults with statutory construction, and the unfortunate outcomes that arise from them, are the legislature’s problem to fix—not the courts’.

\textbf{B. Vesting under of 1989 ODMA: Automatic or Not}

In 2006, the 1989 ODMA was repealed and replaced by a new version designed to better protect mineral estate owners from its expropriation function.\textsuperscript{154} In testimony before the House Energy and Public Utilities

\textsuperscript{147} OHIO REV. CODE ANN. § 1.49 (West 2013).
\textsuperscript{148} Wachendorf, 78 N.E.2d at 374.
\textsuperscript{149} For a discussion of the extremes of the debate over the possibility of constrained or objective legal interpretation, see Cass R. Sunstein, \textit{Interpreting Statutes in the Regulatory State}, 103 HARV. L. REV. 405, 409–11 (1989).
\textsuperscript{150} §§ 1.41–.64 (West 2013). See, e.g., Wingate v. Hordge, 396 N.E.2d 770, 771–72 (Ohio 1979).
\textsuperscript{151} Frankfurter, supra note 139, at 532–33.
\textsuperscript{152} OLIVER PETER FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 1–12 (1935).
\textsuperscript{153} Frankfurter, supra note 139, at 533.

A statute that combines a number of different protections for the mineral owner, but that still enables termination of dormant mineral
Committee, Rep. Mark Wagner disclosed that the 2006 amendments intended to correct deficiencies in the 1989 version; these deficiencies included clarifying both the processes for abandoning a mineral interest and for reuniting the mineral severance with the surface ownership. As a result, the 2006 version now provides the detailed eight-step process discussed above. The most significant additions are the notice requirements of the fourth step (notice by registered mail) and the fifth step (notice by local paper), along with the sixth step (the opportunity of the mineral interest owner to file a claim to preserve the mineral interest)—all which are to be completed prior to reuniting the mineral severance with the surface ownership.

These three steps provide significant additional safeguards against expropriation not explicitly granted by the language of the 1989 version. To explain, a plain reading of the 1989 version’s text appears to automatically grant the surface owner the severed mineral right if there is a twenty-year gap without a savings event. In other words, a surface owner need only find a twenty-year gap; this evidence—without more—establishes that the mineral rights were abandoned and automatically...
reunites the rights to the mineral estate with the surface owner without any further legislative or judicial action.165

The effect of automatic vesting, or what might be more appropriately referred to as a self-executing statute,166 is not altogether apparent upon first consideration.167 If, after the 1989 version came into effect, there was a twenty-year gap during the look-back period (1992–1972)168 without a savings event, then the title reverted to the surface owner.169 The effect of this is that the 1989 version is de facto still in effect because surface owners can turn to the 1989 version170 to see if they already owned the property before the 2006 ODMA eight-step process came into effect.171 Phrased differently, if the Ohio Supreme Court agrees with its appellate courts that the 1989 version granted automatic vesting,172 the 1989 version still offers a huge exception to the additional protections provided to severed mineral interest owners under the 2006 version.173

The counterargument is that the mineral rights did not vest automatically under the 1989 ODMA174 because some further judicial or administrative action—a quiet title action—was necessary to perfect the reversion of mineral interest back to the surface owner.175 A quiet title action seeks to establish title to real or personal property against any potential rival claimants.176 In particular, it quiets any claims to the title. Section 5303.01 of the Ohio Revised Code reads:

165 See id.
166 See Telephone Interview with Bill Taylor, supra note 99. See also Swartz v. Householder, 2014-Ohio-2359, 12 N.E.3d 1243, ¶ 27 (7th Dist.).
169 See Ohio Rev. Code Ann. § 5301.56(B)(1) and (B)(1)(c) (West 1995).
174 See Telephone Interview with Bill Taylor, supra note 99.
175 See id.
[An action to quiet title] may be brought . . . by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein.177

Bill Taylor is one of Ohio’s preeminent oil and gas lawyers, an advocate against the automatic vesting interpretation, and one of the most significant members of the Natural Resources Committee of the Ohio State Bar Association when it drafted the 1989 version.178 In an interview, he explained the draft version of the 1989 ODMA was submitted to the Board of Governors of the Ohio State Bar Association, and it passed through the Board of Governors without change.179 He confirmed that in the bill of the 1989 ODMA that went to the General Assembly, there was language that made it clearly not self-executing.180 He was surprised with the General Assembly’s cut of this language because it reduced clarity as regards the mechanism of vesting.181 There was no apparent reason for this cut.182 He speculated that perhaps the bill was too long or that the need for a quiet title action was self-apparent and thus redundant.183 Mr. Taylor emphasized that the bill was devised to be merely a statutory possessory interest in oil and gas—that is all. After Heifner, in his estimation, it appeared clear that a possessory right would still need to be asserted.184 For these reasons, Mr. Taylor concluded that the 1989 ODMA was clear enough on this issue.185 In fact, after the 1989 version was published, Mr. Taylor, as a matter of practice, filed quiet titles for his clients in such cases because he was confident that it was a clear and necessary step to capitalize upon the possessory interest created by the 1989 ODMA.186

177 Id.
179 See Telephone Interview with Bill Taylor, supra note 99.
180 See id.
181 See id.
182 See id.
183 See id.
184 See id. See also Heifner v. Bradford, 446 N.E.2d 440, 441 (Ohio 1983).
185 See Telephone Interview with Bill Taylor, supra note 99.
186 Id.
Mr. Taylor continued that when the 1989 version of the ODMA took effect, few challenged the need for a quiet title action.\textsuperscript{187} The problems only started when lawyers and clients started to file affidavits instead of quiet title actions because they were cheaper and less complicated.\textsuperscript{188} This trend caused some lawyers and clients to quietly question whether an affidavit would suffice or if a quiet title action was required.\textsuperscript{189} It was this issue that opened the door for the more radical question of whether an affidavit was needed at all. In other words, the question arose as to whether the 1989 version was self-executing.\textsuperscript{190} This confusion helped to trigger the 2006 amendments.\textsuperscript{191}

Thus, it appears clear that the original drafters intended for the 1989 ODMA to require a quiet title action to execute the conveyance of mineral rights to the surface owner.\textsuperscript{192} However, the General Assembly removed the language\textsuperscript{193} and embedded the intention of the original drafters, leaving merely the language “shall vest.”\textsuperscript{194} If one accepts Mr. Taylor’s interpretation that the language was redundant,\textsuperscript{195} then the legislative intent argument holds value of those opposed to the ODMA being self-executing.\textsuperscript{196} On the other hand, another interpretation of these events is that the General Assembly’s action to remove the explicit language was a deliberate attempt to make the ODMA self-executing.\textsuperscript{197} Unfortunately,
without additional information, the legislative intent argument can be spun in both directions, rendering it inconclusive.\footnote{198}{See Chris Baronzzi, \textit{The Dormant Mineral Act: Lots of Questions, Few Answers}, \textit{OIL \& GAS LAW REPORT} (Jan. 2, 2015), http://www.oilandgaslawreport.com/2015/01/02/the-dormant-mineral-act-lots-of-questions-and-still-no-answers/} If the 1989 version was not self-executing, its repeal immediately rendered the ability for the surface owner to acquire title under the less strenuous standards of the 1989 version impossible.\footnote{199}{Id.; Telephone interview with Bill Taylor, supra note 99.} In other words, if the Ohio Supreme Court determines that the 1989 version requires a quiet title action to execute the conveyance of mineral rights to the surface owner, the holding will effectively block any application of the repealed version.\footnote{200}{See id.} On the other hand, if the court determines the mineral rights vested automatically, the surface owner can still enjoy the less strenuous standards of the 1989 version, provided that the owner can establish ownership of the property interest prior to the repeal.\footnote{201}{See id.}

A plain reading of the 1989 version supports automatic vesting, stating that the mineral interest “shall be deemed abandoned and vested in the owner of the surface, if none of the following [savings events] applies.”\footnote{202}{\textit{Prima facie}, this language clearly reads that if there is not a savings event, the mineral interests vest with the surface owner.} \footnote{203}{See id.} Bolstering this position, the Supreme Court of Ohio stated, “If the meaning of a statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.”\footnote{204}{\textit{State ex rel. Burrows v. Indus. Comm.}, 676 N.E.2d 519, 521 (Ohio 1997) (quoting \textit{State ex rel. Savarese v. Buckeye Local Sch. Dist. Bd. of Educ.}, 660 N.E.2d 463, 465 (Ohio 1996)).} Thus, because the plain meaning of the statute provides that the rights “shall be deemed abandoned and vested”\footnote{205}{\textsection 5301.56(B)(1).} and is unequivocally silent to any further action, it appears the most accurate and plausible interpretation is that the 1989 version grants automatic vesting—regardless of the consequences.\footnote{206}{See id.}

The argument against automatic vesting asserts that the language “shall vest” implies the need for a quiet title action.\footnote{207}{Telephone interview with Bill Taylor, supra note 99.} It is also suggested that if
the legislature intended for the 1989 ODMA to vest automatically, the text would have expressly used some language to indicate automatic vesting, and this language is not present.\textsuperscript{208} The statute only provides that mineral rights “shall vest,” and are “deemed abandoned” \textsuperscript{209}, because Ohio courts have established that the word “deemed” in other statutory provisions does not have the power to complete or perfect a right itself,\textsuperscript{210} there was not automatic vesting under the 1989 ODMA. For instance, in \textit{Jacobs v. England},\textsuperscript{211} “the court held that the use of the term ‘deemed’ in [a] statute merely created a presumption that could be rebutted at trial.”\textsuperscript{212} It logically follows that the language “deemed abandoned” cannot create a right to automatic perfection, but merely provides an inchoate right—vesting of a right with the option for some affirmative action or judicial determination. In response, cases in different jurisdictions that go the other way are proffered.\textsuperscript{213} These cases determined that the language “deemed abandoned” in their state’s DMA creates a right to automatic vesting.\textsuperscript{214}

The champion case for bestowing a right to vest is \textit{Dahlgren v. Brown Farm Properties LLC}.\textsuperscript{215} In the trial court, Judge Richard Markus, an experienced judge of considerable influence in Ohio legal circles, held that the language of the 1989 version implied, at least,\textsuperscript{216} an additional requirement of a recorded abandonment claim to provide mineral interest holders the ability to challenge the claim’s validity.\textsuperscript{217} Judge Markus took


\textsuperscript{210} Plaintiffs’ Response Brief, Dahlgren v. Brown Farm Prop., supra note 208.


\textsuperscript{213} \textit{See}, \textit{e.g.}, Van Slooten v. Larsen, 299 N.W.2d 704, 707, 714 (Mich. 1980).

\textsuperscript{214} \textit{Id.} at 708, 716.


\textsuperscript{216} Judge Markus went on to suggest that it might also require a judicial determination to confirm that claimed abandonment. \textit{Id.} at *10.

\textsuperscript{217} \textit{Id.} at *8. Judge Markus provided six reasons for determining that the 1989 version of the DMA did not provide for automatic vesting. Three of the reasons can be consolidated as an interpretation of legislative intent. Another justification was based on the general rule that the law does not favor forfeitures. Finally, another reason considered the constitutionality of automatic vesting, which is discussed elsewhere in this Article. \textit{Id.} at *8–*9.
the position that even if the ODMA appears to unambiguously provide for automatic vesting, the interpretive process must extend further because the ODMA must be interpreted in a manner consistent with the legislative purpose of the Marketable Titles Act (MTA). Judge Markus focused on the language of the MTA, which expressly provides that the MTA, including the ODMA, “shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title.” He concluded that automatic vesting conflicts with this legislative purpose.

To justify his conclusion, Judge Markus outlined how automatic vesting would play out in practice. He explained that it would rob the title examiner of the ability to rely on the record chain of title because it would demand that the title examiner be able to make an assessment as to whether one of the savings events had occurred within any given twenty-year period. The record chain of title would no longer provide conclusive evidence as to the owner of the property in question, and this could not be interpreted as “simplifying and facilitating land title transactions.” Rather, in his opinion, it appeared to be doing the opposite: making any determination of a clear chain of title more complicated and less certain.

Judge Markus’s argument assumes that the surface owner would not record a saving event to ensure the owner’s newly acquired title. This may be debatable, but at bare minimum, no rational oil and gas company would commence a multi-million dollar hydraulic fracturing project without first ensuring that its lease is valid. The lessor may not have the incentive,

218 Id. at *8. ODMA is a part of the MTA. See OHIO REV. CODE ANN. §§ 5301.47–.56. (West Supp. 2014).
219 § 5301.55; Dahlgren, 2013 WL 9924091, at *3.
221 Id.
222 Id.
223 See id.
224 Id.
225 See id.
226 See id.
227 One detailed estimate of the costs associated with drilling a horizontal shale well in the Marcellus, excluding the cost of the lease and post-completion cost, at $1,878,125.00. See William E. Hefley & Shaun M. Seydor, Direct Economic Impact of the Value Chain of a Marcellus Shale Case Well, in ECONOMICS OF UNCONVENTIONAL SHALE GAS DEVELOPMENT: CASE STUDIES AND IMPACTS 33 (William E. Hefley & Yongsheng Wang eds. 2014); see generally Timothy Fitzgerald, Frackonomics: Some Economics of Hydraulic Fracturing, 63
but the lessee does.\textsuperscript{228} Accordingly, automatic vesting would not result in greater uncertainty of ownership nor reduce the ability to rely on the record chain of title because lessees would require certainty of title.\textsuperscript{229} So, whether an application is made to vest title or an application is made to clarify that title has vested, there is an extra step that may need judicial intervention. In terms of “simplifying and facilitating land title transactions,”\textsuperscript{230} it makes little difference. In terms of equity to the holder of the ancient claim to the subsurface estate, it may make a world of difference, but it does not speak to the purpose of the MTA.\textsuperscript{231}

Regardless, this point is presently moot because Ohio’s Seventh District Court of Appeals overturned Markus’s ruling and reaffirmed its decisions in \textit{Walker v. Shondrick-Nau},\textsuperscript{232} \textit{Swartz v. Householder},\textsuperscript{233} and \textit{Eisenbarth v. Reusser}.\textsuperscript{234} Each confirmed that the 1989 version grants automatic vesting.\textsuperscript{235} The \textit{Walker} Court states it clearly:

\begin{quote}
When the 2006 version . . . was enacted, Noon’s mineral interest had already been abandoned and the mineral interest had been vested with the surface owner for 14 years. Once the mineral interest vested in the surface owner, it was reunited with the surface estate. Noon did not have any mineral interest in the subject property after March 22, 1992, because on that date the interest automatically vested in the surface owner by operation of the statute. And once the mineral interest vested in the surface owner, it “completely and definitely” belonged to the surface owner.\textsuperscript{236}
\end{quote}

The consequences may be regarded as unfortunate and Judge Markus’s efforts may have been heroic, but there are limits to what courts can do to...
remedy problematic legislation with judicial interpretation.\textsuperscript{237} These Seventh District opinions are clearly mindful of these limitations,\textsuperscript{238} as well as the Supreme Court’s position regarding statutory construction.\textsuperscript{239}

As to the issue of the time in which automatic vesting applies—the when of it—Judge Donofrio writes with clarity in \textit{Walker}:

\begin{quote}
The 1989 version became effective on March 22, 1989. It further provided that a mineral interest would not be deemed abandoned under [the statute] . . . until three years from the effective date of this section. Thus, it provided a three-year grace period until March 22, 1992 . . . . [O]n March 22, 1992, Noon’s mineral interest was “deemed abandoned and vested” in the surface owner . . . .\textsuperscript{240}
\end{quote}

In \textit{Walker} and \textit{Swartz}, since there was no saving event within the twenty-year look-back period from March 22, 1992 to March 22, 1972, these courts were able to avoid opening a Pandora’s Box.\textsuperscript{241} This was not the case in \textit{Eisenbarth}, which presented a new interpretative challenge that threatened to dramatically increase the scope of the automatic vesting capacity of the 1989 version,\textsuperscript{242} as will be explained in the next section.\textsuperscript{243}

\textbf{C. The Look-Back Period Under The 1989 ODMA: Fixed or Rolling}

Under the 2006 version, the language as to the twenty-year look-back period is clear and unambiguous. Section 5301.56(B)(3) states that the look-back period is “[w]ithin the 20 year period immediately preceding the date on which the notice is served or published.”\textsuperscript{244} This language indicates that the trigger event for the look-back period is the time in which the mineral owner either: (1) receives actual notice or (2) is deemed to have constructive notice.\textsuperscript{245} Notice in this circumstance means notice of the surface owner’s

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{237} \textsc{Ohio Rev. Code Ann.} \textsect{\textsection}s 1.41–.62 (West 2013).
\item \textsuperscript{238} From more on the duties of a judge to exercise restraint in interpreting statutes, see Frankfurter, \textit{supra} note 139, at 533–34; Easterbrook, \textit{supra} note 136; Landis, \textit{supra} note 144, at 892.
\item \textsuperscript{239} Wingate v. Hordge, 396 N.E.2d 770, 771–72 (Ohio 1979).
\item \textsuperscript{240} \textit{Walker}, 2014-Ohio-1499, at ¶ 39.
\item \textsuperscript{241} \textit{Id.} at ¶¶ 26–27; \textit{Swartz}, 2014-Ohio-2359, at ¶ 8.
\item \textsuperscript{242} \textit{See} Eisenbarth v. Reusser, 2014-Ohio-3792, 18 N.E.3d 477, ¶¶ 41–54.
\item \textsuperscript{243} \textit{See infra} Part IV.C.
\item \textsuperscript{244} \textsc{Ohio Rev. Code Ann.} \textsect{\textsection} 5301.56(B)(3) (West Supp. 2014).
\item \textsuperscript{245} \textit{Id.}
\end{enumerate}
\end{footnotesize}
intent to use the ODMA to gain ownership of the mineral rights in question.\textsuperscript{246}

In comparison, the 1989 version imprecisely states that the look-back period is “within the preceding twenty years,” with no clear indication as to what event triggers the look-back period.\textsuperscript{247} This ambiguity has led to a number of interpretations.\textsuperscript{248} The most obvious interpretation, at first blush, appears to be that “the preceding twenty years” is the preceding twenty years from when the 1989 version came in to effect (after the grace period): March 22, 1992.\textsuperscript{249} Accordingly, if there had not been a savings event from March 22, 1972 through March 22, 1992, then the mineral interests “shall be deemed abandoned and vested in the owner of the surface.”\textsuperscript{250} This is the interpretation adopted in both \textit{Walker} and \textit{Swartz}.\textsuperscript{251}

What happens if there was a savings event on March 22, 1973? The “rolling” 20-year look-back period argument dictates that vesting occurs,\textsuperscript{252} while the fixed look-back period dictates the opposite.\textsuperscript{253} First, the rolling look-back period argument is considered “rolling” because the twenty-year look-back period rolls forward from March 22, 1992.\textsuperscript{254} Thus, it would cover from when the 1989 version took effect on March 22, 1992, until it

\textsuperscript{246} \textit{Id.}

\textsuperscript{247} \textsc{Ohio Rev. Code Ann.} § 5301.56(B)(1)(c) (West 2005) (repealed 2006).


\textsuperscript{250} \textsc{Ohio Rev. Code Ann.} § 5301.56(B)(1) (West 2005) (repealed 2006).


\textsuperscript{254} This date takes into account the tree-year grace period. \textsc{Ohio Rev. Code Ann.} § 5301.56(B)(2) (West 2005) (repealed 2006) (“A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply until three years from the effective date of this section.”).
was amended. The potential number of occasions in which automatic vesting occurred from 1992 to 2006, makes this “rolling” interpretation of the look-back period particularly dramatic—especially when coupled with automatic vesting.

The drafters of the ODMA wanted to ensure the constitutionality of their drafting. As a consequence, they did not make the legislation retroactive. In other words, they intended for the look-back period to roll forward, not backward. No one would seriously challenge this interpretation. Nothing in the language of the 1989 version challenges this, and the appellate courts in *Walker*, *Swartz*, and *Eisenbarth* support this position.

One rival to the proposition that the look-back period rolls forward is that it is a fixed 20-year look-back period from 1972 to 1992. This rival interpretation, however, appears nonsensical without some justification for it, and there is no evidence in the history of Ohio’s oil and gas industry or in

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256 See supra Part IV.B.

257 Telephone Interview with Bill Taylor, supra note 99.

258 The statute provides a two-year grace period for owners of mineral interests to record a notice of intent to preserve interests that would be immediately or within a short period affected by enactment of the statute. This procedure will assure that active or valuable mineral interests are protected, but will not place an undue burden on marketability. The combination of protections will help ensure the fairness, as well as the constitutionality, of the statute.

259 See discussion supra note 258.


the statute itself that suggests why the ODMA would apply exclusively to
the period from 1972 to 1992.\textsuperscript{262} This “fixed” look-back period
interpretation, without justification, is highly arbitrary.\textsuperscript{263} Why did Ohio
need a one-time correction of title ambiguities created by severed mineral
interests from the dates 1972 to 1992? The answer is clear: it did not.
Nothing in Ohio’s history indicates this particular need for title clarity
during this time period.\textsuperscript{264}

Regardless, not only did \textit{Riddle v. Layman},\textsuperscript{265} \textit{Wendt v. Dickerson},\textsuperscript{266}
and \textit{Wiseman v. Potts}\textsuperscript{267} adopt the fixed twenty-year period, but also the
appellate court in \textit{Eisenbarth} adopted the fixed period.\textsuperscript{268} Rightly or
wrongly, the majority in \textit{Eisenbarth} appeared willing to let the ends justify
the means. The majority clearly stated that they wanted to limit the
application of the automatic vesting provision, declaring: “As forfeitures are
abhorred by the law, we refuse to extend the look-back period from fixed to
rolling.”\textsuperscript{269} The law may abhor forfeitures,\textsuperscript{270} but why does every state,
which has a significant mineral extraction industry, have a forfeiture
provision as the centerpiece of their DMA?\textsuperscript{271} If the majority simply

\textsuperscript{262} In fact, Bill Taylor states that, in the original draft of Natural Resources Committee
of the Ohio State Bar Association, which was submitted to the Board of Governors of the
Ohio State Bar Association, and passed through the Board of Governors without change, it
made clear that it was a rolling look back period. \textit{See} Telephone interview with Bill Taylor,
\textit{supra} note 99. In fact, he adds even without the language in the draft that made it through
the legislative assembly, a fixed look back period makes little sense. \textit{Id.} His speculates that
the language was removed because it was probably assumed to be redundant. \textit{Id.}

\textsuperscript{263} \textit{Id.}

\textsuperscript{264} \textit{See generally} \textit{Spencer \\& Camp, supra} note 38 (a history of the upstream oil and gas
industry in Ohio).


\textsuperscript{267} Morgan C.P. No. 08 CV 0145 (June 19, 2010).

\textsuperscript{268} \textit{Eisenbarth v. Reusser}, 2014-Ohio-3792, 18 N.E.3d 477, at ¶ 48 (7th Dist.).

\textsuperscript{269} \textit{Id.}

\textsuperscript{270} \textit{Id.} at ¶ 49.

\textsuperscript{271} “Land in many states is burdened by clouds on title and impediments to development
arising from ancient grants of mineral, royalty or leaseholds interests . . . States faced with
the problem caused by such ancient interests have sought in a variety of ways to remove these
burdens.” \textit{Martin \\& Kramer, supra} note 35, § 215. In non-ownership jurisdictions, the
doctrine of abandonment may apply to unify severed mineral and surface estates. The
following states have adopted some type of Dormant Mineral Interest Act or its functional
equivalent to deal with the problem of ancient mineral, royalty or leasehold interests:
Alabama, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota,
contemplated the function of DMAs more vigorously, the court might have discovered a possible justification for such forfeitures and framed the issue a bit differently. But they did not do so.

Alternatively, the majority devised a scenario that satisfied their ends of not extending “the look-back period from fixed to rolling,” but failed to address why forfeitures in this context might be justified. They wrote:

In considering [the] question [of a fixed 20 year period], we ask: would a mineral rights owner be unreasonable in reading the statute on March 22 1989, the day of the enactment and saying: “I have a saving event in the past twenty years as I just bought these mineral rights in 1974; so I’m safe,” without realizing that they had to reassert their interest by 1994 (5 years after enactment and 2 years after the grace period)?

We credit such thoughts as reasonable, and we concluded that the statute is ambiguous as to whether the look-back period is anything but fixed. The use of the words “preceding twenty years,” without stating the preceding years of what, does not create a rolling look-back period. Rather, the imposition of successive look-back periods would have required language that the mineral interest is deemed abandoned and vested if no saving event occurred within twenty years after the last saving event.

Judge DeGenaro, in her concurring opinion, disagreed with the majority on this point, prudently writing that “the 1989 ODMA contemplated that the holder of severed mineral rights was required to renew that interest of record every 20 years. Thus, the [mineral holders] were required to make some kind of successive filing before the initial 20 year period expired.”

Nebraska, North Carolina, Tennessee and Virginia. Id. In other states, a marketable record title act may operate to serve the same function. See Lowe et al., supra note 36, at 174.


274 Id.

275 Id. at ¶¶ 42–54.

276 Id. at ¶¶ 65–68 (DeGenaro, J., concurring).
Judge DeGenaro is clearly correct. In support, Williams and Meyers, who offer the equivalent to a religious text for oil and gas law in the US, define a Dormant Mineral Act as a state statute “to extinguish severed mineral and/or royalty interests” if “no exportation, development, operations or act of recording” has occurred “for a substantial number of years.” In Ohio, the “substantial number of years” mounts to twenty, and the bare minimum “act of recording” is a claim to preserve mineral rights. So, the 1989 version only required mineral interest owners to file a claim that they still want their mineral interests every twenty years. The forfeiture is an incentive to ensure that mineral interest owners, at bare minimum, are not neglectful of their commercial interest in a property: use it or lose it. This was clearly explained by Justice Watson in *Chesapeake v. Buell*:

Under either version of the ODMA, a twenty-year clock begins to run the moment that the mineral rights are acquired by someone other than the land holder. If twenty years run in which the rights are dormant and there is no “savings event” under § 5301.56(B), the mineral rights vest in the manner prescribed by the statute. A § 5301.56(B) savings event restarts the twenty-year clock from the date of the event.

In other words, it is best to think of the application of the look-back period as a look-forward period for mineral interest owners—they are under an obligation to ensure that a savings event occurs once every twenty years. This brings clarity to understanding the ODMA: the obligation to

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277 LexisNexis describes this text as “the most authoritative and comprehensive treatise on the law relating to oil and gas.” See LexisNexis Product Search Results, LEXISNEXIS STORE, http://www.lexisnexis.com/en-us/home.page (search for “9780820521480”; then follow the “Williams & Meyers, Oil and Gas Law” hyperlink).


280 Id.

281 Id.


284 Id. at 7.

285 See id.
record a mineral interest once every twenty years is to prevent ancient claims to mineral rights, which are long forgotten, from hampering the marketability of the interest in property today.\textsuperscript{286} The owners do not even have to use the mineral interest commercially; they just have to acknowledge ownership every twenty years.\textsuperscript{287} It is important to stress that this is not an exotic interpretation of a DMA. They all, for the most part, function in this manner.\textsuperscript{288} Therefore, to assume that the 1989 ODMA would function contrary to this well-established norm for DMAs, without some clear and unambiguous language stating otherwise, is a misunderstanding of the widely accepted manner for extinguishing a mineral interest within a DMA.\textsuperscript{289}

Returning to the question posed and answered by the majority in \textit{Eisenbarth}, would a mineral rights owner be unreasonable in the reading of

\textsuperscript{286}\textsc{Martin} & \textsc{Kramer}, supra note 35, § 215. \textit{See also ODMA Testimony, supra note 47.}

\textsuperscript{287}\textsc{Ohio Rev. Code Ann.} § 5301.56(B) (West Supp. 2014).

\textsuperscript{288} Since the Uniform Dormant Mineral Interest Act was adopted by the National Conference of Commissioners of Uniform State Laws in 1986, there has been great conformity toward this “recording Approach.” The Uniform Act states:

\begin{quote}
A number of statutes have made nonuse of a mineral interest for a term of years, e.g., 20 years, the basis for termination of the mineral interest. Such a statute in effect makes nonuse for the prescribed period conclusive evidence of intent to abandon. The nonuse scheme has advantages and disadvantages. Its major attraction is that it enables extinguishment of dormant interests solely on the basis of nonuse; proof of intent to abandon is unnecessary. Its major drawbacks are that it requires resort to facts outside the record and it requires a judicial proceeding to determine the fact of nonuse. It also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited. The nonuse concept should be incorporated in any dormant mineral statute. Even a statute based exclusively on recording, such as the Uniform Simplification of Land Transfers Act (USLTA) discussed below, does not terminate the right of a person who has an active legitimate mineral interest but who through inadvertence fails to record.
\end{quote}


\textsuperscript{289} \textit{See id.}
the 1989 ODMA suggested by the majority? 290 The best answer is yes. Considering that the hypothetical mineral interest in question might be worth many millions of dollars, a reasonable person would hopefully consult a lawyer who would read the legislation and determine that it is reasonable to file a notice to preserve the owner’s mineral rights given the potential risk.291 In light of this, the question can be framed a little differently: would it be reasonable to refuse to file a notice to preserve one’s mineral rights, for a fee of $1,000-$2,500 every 20 years,292 if the notice ensured the protection of one’s property interest? If that property interest might be worth many millions of dollars in royalties over the life of the natural gas lease,293 it is hard to imagine how this refusal can be construed as reasonable.

In reality, mineral interest holders involved in these litigations rarely knew the ODMA existed, and in 1989, before the advent of modern hydraulic fracturing of shale plays, did not appreciate the value of their mineral rights.294 This is, admittedly, where the inequity of automatic vesting is rooted.295 If mineral interest owners knew of the ODMA and


292 This price range estimation for filing a claim to preserve a mineral interest in accordance with the ODMA was made by a local Oil and Gas Lawyer in Columbus Ohio. Interview with Anonymous, in Columbus, Ohio (Mar. 6, 2015).

293 In Ohio, the average signing bonus on oil and gas leases was approximately $5000.00 per acre in 2012, and the average royalty nationwide was 18.7% in 2013. See Sally P. Schreiber, Before You Sign: Natural Gas Lease Tax Issues, J. ACCOUNTANCY (Oct. 31, 2013), available at http://www.journalofaccountancy.com/issues/2013/nov/20138424.html. It is also estimated that 750 trillion cubic feet of technically recoverable nature gas is within shale formations in the lower 48 U.S. states with the largest of these shale plays being the Marcellus. Id.


295 These shale formations prior to the advent of Hydraulic Fracturing were deemed worthless by the upstream industry; ergo, the mineral interest in oil and gas were also worthless, so allowing the mineral interest to lay dormant was the natural result. It was of little difference to anyone whether the subsurface rights vested with the surface owner of not. There was no foreseeable justification for filing a claim to preserve one’s claim to mineral interest in such shale plays. The “shale gale” changed all that, as Yergin writes: “The shale gale had not only taken almost the entire natural [gas] industry by surprise; it also sent people back to the geological maps.” See id. at 334.
anticipated their mineral interests would one day have value, they would have possessed extraordinary foresight. Thus, should such mineral interest owners be punished for not spending $1,000-$2,500 to preserve their seemingly worthless claim? A compassionate case can certainly be made that they should not. Nevertheless, as suggested of Judge Markus’s efforts in Dahlgren, this Article appreciates the equity that the court in Eisenbarth is attempting to achieve, but it is occurring at the expense of the law. It is worth repeating again, the consequences of the correct interpretation may be unfortunate, but there are limits to what courts can do to remedy problematic legislation through judicial interpretation.

In conclusion, the appellate courts achieved greater clarity as to the application periods of the 1989 and the 2006 ODMA, and there appears to be little reason for the Ohio Supreme Court to revisit the issue of automatic vesting. That said, this Article respectfully submits that the holding in Eisenbarth is problematic: the Supreme Court of Ohio ought to review this holding and consider whether the look-back under the 1989 ODMA is for a fixed or rolling period.

D. The Title Transaction Savings Event

Central to the 2006 ODMA is the operation of the six savings events, which protect a holder of mineral interests from the forfeiture mechanism within the ODMA. In general terms, the six savings events amount to a record of one of the following: a title transaction; drilling; production; gas storage; an affidavit to preserve the mineral interest; or a separately listed tax parcel number. To be shielded from forfeiture,

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296 It was not until 1992 that, out of desperation to replace natural gas reserved, George Mitchell first attempted to use “massive fracks” to get gas from the source rock of the Barnett. ZUCKERMAN, supra note 3, at 38. It would be another eleven years before the natural gas industry truly believed that it could work. See YERGIN, supra note 15, at 330–31.

297 Wingate v. Hordge, 396 N.E.2d 770, 772 (Ohio 1979). See also supra Part IV.A.

298 Easterbrook, supra note 136; Frankfurter, supra note 139, at 534; Landis, supra note 144, at 891.


300 Id.

301 § 5301.56(B)(3)(a).

302 § 5301.56(B)(3)(b).

303 Id.

304 § 5301.56(B)(3)(c).

305 § 5301.56(B)(3)(e).

306 § 5301.56(B)(3)(f).
one of these has to have occurred once within the twenty-year look-back period.\textsuperscript{307} This section addresses the most problematic of the six: the title transaction saving event.\textsuperscript{308} This event is found in § 5301.56(B)(3)(a) and reads: “The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.”\textsuperscript{309}

When the bill for the 2006 ODMA was first introduced before the Ohio Senate, it specifically defined the scope of a “title transaction.”\textsuperscript{310} For a transaction to be a “title transaction,” the mineral interest in question had to be “conveyed, leased, transferred, or mortgaged by an instrument filed or recorded in the recorder’s office of the county in which the lands are located.”\textsuperscript{311} Unfortunately, from the standpoint of legal clarity, this language was removed.\textsuperscript{312} Without a definition of a title transaction within the ODMA, an interpreter has to look to the more ambiguous, but seemingly more inclusive, definition provided by the Ohio’s Marketable Titles Act (MTA).\textsuperscript{313} This definition reads:

“Title transaction” means any transaction affecting title to any interest in land, including title by will or descent, titled by tax deed, or by trustee’s, assignee’s, guardian’s, executor’s, administrator’s, or sheriff’s deed, or decree of any court, as well as any warranty deed, quit claim deed, or mortgage.\textsuperscript{314}

The language “any transaction affecting title to any interest in land” speaks to the apparent breadth of permissible transactions that might

\textsuperscript{307} § 5301.56(B)(3).
\textsuperscript{308} One might be surprised that this Article is not addressing the issue that the Ohio Supreme Court will review in Dodd v. Croskey. This narrow issue focuses upon whether or not the requirement of 5301.56 (B)(3) applies to a claim under 5301.56 (H)(1)(a). There is nothing that this Article has to add to Judge Vukovich’s excellent treatment of this issue, which supports the position that § 5301.56 (B)(3)’s requirements do not apply to a § 5301.56 (H)(1)(a) claim. See Dodd v. Croskey, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257.
\textsuperscript{309} § 5301.56(B)(3)(a).
\textsuperscript{311} Id.
\textsuperscript{312} See § 5301.56(B)(3)(A).
\textsuperscript{313} OHIO REV. CODE ANN. § 5301.47. Again, the ODMA is a subpart of the MTA. Id.
\textsuperscript{314} § 5301.57(F).
constitute a title transaction under this definition. Use of the word “including,” bolsters this analysis by creating a non-exclusive list.

When one looks to the language of the statute, including the MTA’s definition, for guidance as to what transactions qualify as savings events, three qualifications emerge from a plain reading. First, the mineral interest in question must be “the subject” of the title transaction. Second, from the definition of a title transaction, the transaction must “affect” title. And third, the transaction must be at least recordable, since it also needs to be filed or recorded in the office of the county recorder.

What does being “the subject of” a title transaction mean? One interpretation is restrictive: if some right to the mineral interest is not transferred, then it does not satisfy the requirement suggested by the language, and is not a saving event. Phrased differently, there needs to be some change in, or affect on, the mineral interest as a result of the transaction in order for it to be “the subject of” a title transaction. Accordingly, the mere mention that there is a reservation of the mineral rights in the sale of the surface would not constitute a savings event, since the mineral interest in question is not affected by the transaction.

A broader interpretation of the language is that “subject” ought to be defined as “a person or thing that is being discussed, studied, or dealt with.” There can be many subjects of a book, a movie, a lawsuit, or even a title transaction. Thus, the phrase “the subject of” could be read quite broadly inviting a more expansive definition. As a consequence, this requirement does not demand the mineral interest be transferred in order for it to qualify as a saving event. Therefore, the mention that there is a

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315 Id.
316 See, e.g., Eisenbarth v. Reusser, 2014-Ohio-3792, 18 N.E.3d 477, ¶ 101 (7th Dist.).
317 § 5301.57(F).
318 § 5301.47.
319 § 5301.47(F).
320 § 5301.48.
321 See Dodd v. Croskey, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶ 48 (“In order for the mineral interest to be the ‘subject of’ the title transaction the grantor must be conveying that interest or retaining that interest.”).
322 See id. (“Here, the primary purpose of the title transaction is the sale of the surface rights.”).
323 See id.
324 OXFORD DICTIONARY AND THESAURUS 1030 (2007).
reservation of mineral rights in a sale ought to be enough to constitute a saving event because it is irrelevant whether or not the interest in question is affected by the transaction.326

The latter interpretation is the weaker of the two. The rules of grammar, coupled with the Supreme Court of Ohio’s presumptions regarding statutory language, compel acceptance of the narrower interpretation. The word “the,” as a definite article, expresses specificity of reference to the noun it modifies, compared to “a,” as an indefinite article, which expresses non-specificity of reference.327 Thus, if the section read “a” subject of the title transaction, “a” would indicate that the subject was indefinite; in other words, it could be one of several, nonspecific subjects of the title transaction. However, the statute uses the word “the”:

The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.328

The use of the word “the” indicates that only if the specific subject of the title transaction was the mineral interest in question could the transaction qualify as a saving event.329 Consequently, the definite article dictates that there needs to be some change in, or affect on, the mineral interest as a result of the transaction in order for it to be “the subject of” a title transaction.330

What does “affecting title” mean? Affecting title can mean affecting the ownership in the freehold estate.331 If taken at face value, courts will not have to theorize too deeply about the nature of property ownership and what can affect it.332 Clear examples emerge. For instance, a mineral deed affects

\begin{itemize}
  \item \textbf{Id.}
  \item \textbf{See Collins English Dictionary} (10th ed. 2009).
  \item \textbf{See Dodd v. Croskey, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶¶ 47–49.}
  \item \textbf{Id.}
  \item In the context of the ODMA, it is obvious to anyone familiar with property that the freehold estate is going to be a fee simple (basically ownership), and not a life estate or a fee tail. \textbf{See John E. Cribbet et al., Property: Cases and Materials} 251–55 (9th ed., 2008).
  \item For instance, Morris Cohen provides a historical and critical realist critic of the history of property, which reveals the explicit nature of owning and the very political dimension encode within these legal notions. \textbf{See Morris Cohen, Property and Sovereignty,} 13 Cornell L. Q. 8 (1927). For the sake of this analysis, a more straightforward understanding is appropriate. For instance, the nature of property in question can be gleaned which is described by Ohio’s General Warranty Deed Form:
\end{itemize}
title because it reduces the size of the freehold estate in Blackacre.\textsuperscript{333} Alternatively, a quitclaim deed also affects title because the freehold estate changes from seller to buyer.\textsuperscript{334} Another example is a mortgage, which, in Ohio, affects the defeasibility of the freehold estate until the mortgage is satisfied.\textsuperscript{335} At the other end of the spectrum, does a contract, such as a license, affect title? Possibly, at least, it appears more certain that an oil and gas lease does.\textsuperscript{336}

Obviously, transactions that pass title to another qualify as affecting title, but beyond this, how ought one distinguish between transactions that affect title and those that do not? A workable option is to accept the proposition that it includes all transactions affecting the monetary value of title. This creates a clear test for identifying the remainder of transactions that would qualify—any transaction that creates an encumbrance on the mineral interest in question, including one that blocks the conveyance of that mineral right.\textsuperscript{337} An encumbrance is a liability on, interest in, or a right to

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A deed . . . has the force and effect of a deed in fee simple to the grantee, the grantee's heirs, assigns, and successors, to the grantee's and the grantee's heirs', assigns', and successors' own use, with covenants on the part of the grantor with the grantee, the grantee's heirs, assigns, and successors, that, at the time of the delivery of that deed the grantor was lawfully seized in fee simple of the granted premises, that the granted premises were free from all encumbrances, that the grantor had good right to sell and convey the same to the grantee and the grantee's heirs, assigns, and successors, and that the grantor does warrant and will defend the same to the grantee and the grantee's heirs, assigns, and successors, forever, against the lawful claims and demands of all persons.

\textbf{Ohio Rev. Code Ann.} § 5302.05 (West 2013).

\textsuperscript{333} A mineral deed is “[a] conveyance of an interest in the minerals in or under the land.” \textit{Black's Law Dictionary} (9th ed. 2009).

\textsuperscript{334} A quitclaim deed is “[a] deed that conveys a grantor’s complete interest or claim in certain real property but that neither warrants nor professes that the title is valid.” \textit{Id.}

\textsuperscript{335} In Ohio, a mortgage is a conveyance, which is made to secure repayment or performance. \textit{See} Hurd v. Robinson, 11 Ohio St. 232, 234, 180 WL 43 (1860).


\textsuperscript{337} An encumbrance is a claim, charge, or liability that attached to real estate. Simply put, it is a right or an interest held by someone other than the fee owner or the property that affects title to real estate. An encumbrance may lessen the value or obstruct the use of the
real property that reduces the value of property.338 If this is so, then a mortgage, an easement, a lien, a severance, a judgment, a restrictive covenant, a lease, or a license all could qualify as affecting title.339

Moreover, considering the purpose of the ODMA, it is reasonable to suggest that this may be the most appropriate approach to clarifying the “affecting title” ambiguity.340 To explain, the forfeiture mechanism in the ODMA creates an incentive for the mineral interest owners to engage their property in some sort of commercial activity, or at bare minimum, generate evidence that they have not abandoned it.341 If they neglect this obligation, then their mineral interests will be forfeited.342 This helps ensure marketability in two ways: first, interest owners are forced to be mindful of their ownership of the mineral, and second, if they are not, it can be forfeited to those that appreciate its potential value.343 In this way, it helps to save property, which has been forgotten by its owners, from being lost to the market forever.344 If an owner cannot be found, the operation of the

Encumbrances may be divided into two general classifications: 1. Liens (usually monetary charges) and 2. Encumbrances such as restrictions, easements, and encroachments that affect the conditions or use of the property.

338 See id.
340 As a general principle, minerals are not deemed to be capable of being abandoned by a non-user unless they are actually possessed. Ohio is in the majority of jurisdictions which hold that a severed interest in undeveloped minerals does not constitute possession. Michigan’s legislators recognized the importance of including minerals in those defects and errors which should be eliminated by operation of time and non-use. . . I believe that enactment of the Dormant Mineral Act will encourage the development of minerals in Ohio which have been previously ignored due to severance in title.” ODMA Testimony, supra note 47.
342 § 5301.56(H)(2).
344 Dormant mineral interests in general, and severed mineral interests in particular, may present difficulties if the owner of the
ODMA’s forfeiture mechanism will find one. Since each of the saving events amount to evidence that mineral interest owners have not abandoned and forgotten their property, any transaction in the property that evidences commercial use ought to qualify. Thus, interpreting “affecting title” to include transactions which create an encumbrance ought to be included as savings events.

In sum, the suggestion is that the language of § 5301.56(B), which reads “the mineral interest has been the subject of a title transaction,” ought to be interpreted to mean two things. First, that the mineral interest in question ought to be the central, essential, or fundamental subject of a transaction. Second, that the transaction in question is at least an encumbrance on that mineral interest. If these two requirements are satisfied, and if the transaction is recordable—the third requirement—then it ought to qualify as a saving event. This appears to be the most sensible interpretation of the language.

interest is missing or unknown. Under the common law, a fee simple interest in land cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals. Thus, it is possible that the only document appearing in the public record may be the document initially creating the mineral interest. Subsequent mineral owners, such as the heirs of the original mineral owner, may be unconcerned about an apparently valueless mineral interest and may not even be aware of it; hence their interests may not appear of record.

Id. See id. (“The greatest value of a dormant mineral interest to the mineral owner may be its effectual impairment of the surface estate, which may have hold-up value when a person seeks to assemble an unencumbered fee. Even if one owner of a dormant mineral interest is willing to relinquish the interest for a reasonable price, the surface owner may find it impossible to trace the ownership of other fractional shares in the old interest.”).

For instance, consider the mechanisms “major attraction.” The National Conference of Commissions on Uniform State Laws writes: “[The nonuse scheme’s] major attraction is that it enables extinguishment of dormant interests solely on the basis of nonuse; proof of intent to abandon is unnecessary.” Id. But also consider the savings events in the ODMA.

The National Conference of Commissions on Uniform State Law’s hope that state would adopt a recording scheme to hopefully satisfy due process requirements at the state level; “A combination nonuse/recording scheme thus satisfies federal due process requirements. Whether such a scheme would satisfy the due process requirements of the
In September 2013, the appellate court in *Dodd v. Croskey* was reviewing whether or not a mineral interest reservation, which was merely mentioned in a sale of the surface, would constitute a saving event.\(^{349}\) The court determined that no germane case law, nor statute, determined what the language “subject to a title transaction” meant.\(^ {350}\) Entering this uncharted territory, the court relied on the rule of statutory interpretation as laid out in *Smith v. Landfair*,\(^ {351}\) which states: “first, the plain and ordinary meaning of language must be selected; and second, in determining this meaning, the language must be read in “accordance to the rules of grammar and common usage.”\(^ {352}\) Upon application, the court concluded that a narrow interpretation of “subject” was appropriate, writing:

> The common definition of the word “subject” is topic of interest, primary theme or basis for action. While the deed does mention the oil and gas reservation, the deed does not transfer those rights. In order for the mineral interest to be the “subject of” the title transaction the grantor must be conveying that interest or retaining that interest.\(^ {353}\)

The court has set a prudent precedent here: for the mineral interest to be the “subject of” a title transaction, there needs to be some change in, or affect upon, the mineral interest as a result of the transaction.\(^ {354}\) A mere mention of the mineral interest will not suffice.\(^ {355}\) The *Dodd* ruling has been since followed by the district court in *Buell*,\(^ {356}\) which endorsed the court’s reasoning as “sound,” and also by the appellate court in *Eisenbarth*.\(^ {357}\)

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\(^{349}\) *Dodd v. Croskey* 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶¶ 43–47.

\(^{350}\) Id. at ¶ 48.

\(^{351}\) *Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016, at ¶ 18.

\(^{352}\) *Dodd*, 2013-Ohio-4257, at ¶ 48 (citing *Landfair* at ¶ 18).

\(^{353}\) Id. at ¶¶ 48–54.

\(^{354}\) Id.

\(^{355}\) Id.


Judge Vukovich, speaking for the majority in *Eisenbarth*, went further than merely endorsing *Dodd*; he extended the application of the saving event analysis beyond the first requirement: the “subject of” requirement. He first held that the mineral interest is the “subject of” the lease, and thus the lease passes the first requirement. This leads to the second requirement: does a lease “affect title”? Unfortunately, Judge Vukovich did not engage with the nature of title or what might affect title. Rather, he merely turned to the enumerated list of examples of transactions that do qualify in § 5301.56(B) and pointed to the mortgage. Since it is included in the list, the statute identifies that a mortgage affects title. Judge Vukovich extrapolated that since a mortgage “does not transfer away title,” other transactions do not necessarily have to “transfer away title” either. Thus, the lease might meet the requirement.

Judge Vukovich then made a significant strive toward a farsighted rule, when he cites *Karas v. Brogan* as authority. He wrote:

> The Supreme Court has stated that an oil lease is an encumbrance [which affects] title... As such a lease is considered an encumbrance on a title, we conclude that it falls into the definition of “any transaction affecting title to any interest in land.”

358 It is important to note that Judge Vukovich draws a distinction between the transaction in *Dodd*, which involves surface rights, and the transaction at hand, which involves subsurface rights. *Dodd*, 2013-Ohio-4257, at ¶ 1. It is respectfully submitted that this distinction is redundant: the rule in *Dodd* necessitates that the transaction involve subsurface rights, since the transaction must result in some change in, or affect upon, the mineral interest, and the minerals interest in question, shale oil and gas, will always be subsurface. *Id.* at ¶ 32. Thus, overlooking this distinction adds clarity to the *Eisenbarth* precedent. See *Eisenbarth v. Reussler*, 2014-Ohio-3792 18 N.E.3d 477, ¶¶ 24–29 (7th Dist.).

359 *Eisenbarth* at ¶¶ 24–29.

360 *Id.* at ¶¶ 24–35.

361 It is important to note that this Article interprets the language of § 5301.56(B) as having three requirements. That said, although Judge Vukovich does not draw distinctions between these three requirements, his reasoning tacitly does. See *id.* at ¶¶ 15–20.

362 *Id.* at ¶¶ 24–35.


366 *Eisenbarth* at ¶ 29–35.
With a slightly different turn of phrase, Judge Vukovich could have explicitly set a rule of application which is implicit in his reasoning, namely: the Supreme Court has stated that an encumbrance on a title affects title, and therefore any encumbrance on a title will constitute a saving event under § 5301.56(B). Admittedly, this is slightly bolder than what he suggested, but only slightly. Furthermore, this appears to be the most prudent interpretation of what “affects title” under § 5301.56(B).

The Ohio Supreme Court is to review whether or not the recording as well as the removal of an oil and gas lease at the county register will both constitute saving events. At least at first blush, both the recording and the removal of an encumbrance appear to affect title in the same manner. If adding an encumbrance upon title negatively affects title, as suggested by Karas, then removing it positively affects value in an equal, yet opposite, manner. Between the appellate judgements in Dodd and Eisenbarth, the Supreme Court need only expand the reasoning of these judgments and add some clarity as to application.

V. CONCLUSION

In sum, this Article argued for automatic vesting and against a fixed look-back period, and also offered guidance as to the application of the title transaction savings event. The real story here, which has only been partially told, is about the sloppy drafting of the Legislative Assembly in creating the 1989 ODMA, and the judiciary’s heroic attempts to fix it.

The research, admittedly, is far from sufficient for a comprehensive policy history, but it uncovered much that will be used for a follow up article after the Supreme Court of Ohio makes its final determinations. From the research collected thus far, which still needs to be more rigorously investigated, the draft bill of the 1989 ODMA was non-contentious. The Ohio Farm Bureau supported it, because farmers could reunite the interests

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367 Id.
368 See supra note 366.
369 See discussion supra notes 349–60.
371 See discussion supra notes 349–72.
373 See GALATY ET AL., supra note 337.
375 See supra Part III.B.
in their land.\textsuperscript{376} The Ohio Coal Association did not oppose it, because it secured an exemption from the Natural Resources Committee of the Ohio State Bar Association, which drafted the bill (and most likely the Legislative Assembly).\textsuperscript{377} Finally, the Ohio Oil and Gas Association endorsed the draft bill, because although some of its members might have lost mineral interests, it was overall very good for the upstream industry because it greatly increased business certainty.\textsuperscript{378} With this kind of support, especially between mineral extractors and farmers, it appears all that the Legislative Assembly had to do was rubber stamp the bill when it got it from the Ohio State Bar Association. But they did not.\textsuperscript{379} By the time it left the Legislative Assembly, it had been stripped of clarity, resulting in it becoming one of the most frequently litigated single statutes, over a three-year period, in the history of Ohio.\textsuperscript{380} In retrospect, it appears that the Legislative Assembly made quite a mess of things.

The plain and obvious interpretation of the 1989 version is that if there was a twenty-year gap during the look-back period without a saving event, then the title to the mineral rights automatically reverted to the surface owner.\textsuperscript{381} The effect is that, even today, surface owners can still turn to the 1989 version to see if they already own the property before turning to the more onerous eight-step process of the 2006 ODMA.\textsuperscript{382} So, if the Ohio Supreme Court upholds the lower courts, as it should, then the 1989 version will offer an exception to the additional protections granted to severed mineral interest owners under the 2006 version. The lower courts have attempted to limit this loophole by deeming the look-back period to be for a fixed period from 1992 to 1972, but this is highly problematic. The Ohio Supreme Court should avoid following this mistake, even though supporting the rolling look back period will greatly extend the reach of this flawed legislation, further compromising the interests of some mineral rights owners.

The 1989 version may lead to unfortunate results, but the judiciary is bound by a “duty of restraint” to be “merely a translator of another’s

\textsuperscript{376} Keller et al., \textit{supra} note 1, at 4.

\textsuperscript{377} See Telephone interview with Bill Taylor, \textit{supra} note 99.

\textsuperscript{378} See \textit{ODMA Testimony}, \textit{supra} note 47, at 3 (Mr. Taylor was member of the Legal Committee for the Ohio Oil and Gas Association, and provided testimony as proponent of the 1989 ODMA).

\textsuperscript{379} See Keller et al., \textit{supra} note 1, at 21.

\textsuperscript{380} Id.

\textsuperscript{381} Id. at 4–5.

\textsuperscript{382} See \textit{supra} note 57.
command. The Supreme Court of Ohio can only do so much to remedy what the Legislative Assembly has done.

This is really what is at stake in this case. Yes, it is unfair that the 1989 version was so poorly constructed that even after the 2006 amendment, it can still reach from the grave to transfer property. It is also unfair that a disruptive technology, hydraulic fracturing, turned worthless shale into massive reserves of natural gas wealth, creating vast fortunes overnight. Those who would never have neglected their mineral interests, if they had known, lost out. But if the statute is self-executing and if it has a rolling-look back period, the Supreme Court ought not deem otherwise in a heroic gesture—sacrificing the law for the sake of compassion.

It is reminiscent of the situation in which Judge Stanley Fuld found himself in the classic textbook case: Walkovszky v. Carlton. A taxicab company was using limited liability to avoid paying damages to its victim, who was run down and grievously wounded by one of its cabs. Judge Fuld refused to overstep the limits of his judicial authority in the name of compassion for the victim—and it was a case that demanded compassion if there ever was one. Judge Fuld could have pierced the corporate veil, so that the victim did not receive a dry judgement, but instead, he held:

> It may very well be sound policy to require that certain corporations must take out liability insurance which will afford adequate compensation to their potential tort victims. However, the responsibility for imposing conditions on the privilege of incorporation has been committed by the Constitution to the Legislature (N. Y. Const., art. X, § 1) and it may not be fairly implied, from any statute, that the Legislature intended, without the slightest discussion or debate, to require of taxi corporations that they carry automobile liability insurance over and above that mandated by the Vehicle and Traffic Law.

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383 Frankfurter, supra note 139, at 534.
385 Id. at 7.
386 Id.
387 Id. at 9.
Judge Fuld, who became the Chief Judge of the New York Court of Appeals the year after this decision, held the line. Again, Justice Frankfurter asserted, “The great judges have constantly admonished their brethren of the need for discipline in observing the limitations [of their authority].” This is always more difficult in tough cases, like that which Judge Fuld faced; Justice Frankfurter certainly would have approved of Judge Fuld’s decision.

Likewise, the Supreme Court of Ohio is facing a tough situation: the case may test the limits of judicial activism in Ohio—or again—it may not. There may be a way around the conclusions of this Article, containing the reach of the 1989 version of the ODMA, while still respecting the “power which our democracy has lodged in its elected legislature.” One way, which is beyond the scope of the Article, might be the constitutional argument. If one thing is for certain, the Supreme Court of Ohio has a formidable challenge before it, and it will be interesting to learn how this story plays out.

389 See Frankfurter, supra note 139, at 534.
390 Id.