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Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?

Introduction.....	339
I. Professor Langbein’s Portrayal of Strict Compliance.....	343
A. Substantial Compliance with the Wills Act.....	343
1. The Article’s Introduction.....	344
2. The Body of the Article	346
3. Conclusion	349
B. Excusing Harmless Errors	349
C. Professor Langbein’s Proposals—Epilogue	351
1. Academic Response	351
2. Normative Law Response	352
3. Positive Law Response	353
II. Strict Compliance—Is It Really that Harsh and Relentless?.....	354
A. <i>Groffman</i> Revisited.....	354
1. The Facts	354
2. The Court’s Analysis	355
B. <i>In re Demaris’ Estate</i>	356
1. The Facts	356
2. The Court’s Analysis	357
C. The <i>Ranney</i> Case	360

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1. The Court's Opinion	360
2. The Inconsistent Case Law	361
D. Professor Langbein's Articles Revisited.....	363
E. Other Evidence of a Possible Third Approach?.....	366
1. The Requirement that the Testator Publish the Will.....	367
2. The Order of Signing Requirement.....	368
3. The Requirement that the Testator Sign the Will at the End	369
4. If the Testator Fails to Sign at the End of the Will as Required.....	370
5. The Requirement that a Holographic Will Be Entirely Handwritten.....	371
6. The Requirement that a Holographic Will Be Dated	372
7. Post-Death Attestation	374
F. The Case for Flexible Strict Compliance.....	376
III. Flexible Strict Compliance vs. Substantial Compliance	376
A. Professor Langbein's Substantial Compliance Proposal	377
1. The Analytical Steps	377
2. Does the Document Express Testamentary Intent? ..	378
3. Does the Document's Form Approximate Wills Act Formality?	378
4. The Functional Approach to the Purposes of the Wills Act	379
5. To What Extent Are Economic Considerations Relevant?.....	382
B. Flexible Strict Compliance	386
1. A More Pragmatic Approach to the Purposes Served by the Wills Act	386
2. Balancing the Competing Public Policy Considerations.....	390
Conclusion	395

What degree of compliance with the Wills Act formalities should the courts require when analyzing whether a will has been properly executed? The conventional wisdom is that historically courts have insisted on absolute strict compliance, favoring formalities over testamentary intent. In 1975, Professor John Langbein argued that substantial compliance with the Wills Act formalities should suffice. A

little over a decade later, he modified his proposal, arguing for a harmless error approach.

Professor Langbein's proposals have been well received. Many academics have endorsed them. The Uniform Probate Code and the Restatement (Third) of Property have adopted his harmless error approach. Yet relatively few states have adopted either proposal. If Professor Langbein's substantial compliance/harmless error proposals are so much better than strict compliance, what explains the failure of most jurisdictions to adopt either of them?

This Article argues that (1) many of the states intuitively realize that the issue is not as simple as Professor Langbein depicts it—that strict compliance is neither as monolithic nor as strict as he portrays it; (2) most jurisdictions, in fact, do not apply the strict compliance approach he describes but rather a variation of it—flexible strict compliance; and (3) the real issue is not whether substantial compliance/harmless error is better than traditional strict compliance, but whether substantial compliance/harmless error is better than flexible strict compliance—and the answer to that question is far from obvious. Flexible strict compliance adopts a more pragmatic approach to the public policy considerations underlying the Wills Act formalities, eschewing the functional approach and instead favoring an approach that balances testator's intent with costs of administration and the potential for fraud, resulting in an approach that is more efficient than either substantial compliance or harmless error.

INTRODUCTION

He who phrases the issue usually wins the debate.

Whether a document qualifies as a valid will is a function of two variables: (1) the Wills Act formalities (i.e., the statutory requirements for a valid will), and (2) how strictly the courts require a party to comply with the Wills Act formalities.¹ Historically courts

¹ Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying to Fit a Square Peg into a Round Hole*, 43 CREIGHTON L. REV. 815, 825–26 (2010); see Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC J. 83, 83–85 (2008) (discussing the UPC Wills Act formalities and harmless error combination); see also Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1150–57 (1993); Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP.

were rather strict in analyzing whether a party had complied with the Wills Act formalities.² The Wills Act formalities are, after all, *statutory* requirements.³ If the legislature deems it appropriate to include a requirement in the statutory scheme, under the separation of powers inherent in the American legal system,⁴ is it appropriate for a court to question whether a statutory requirement is really required? If a court were to probate a document that was *not* executed in compliance with the jurisdiction's Wills Act formalities, would the court *de facto* be rewriting the statute?⁵ That logic, in part, underlies the traditional strict compliance approach. If the document was not executed in strict compliance with the state's Wills Act formalities, that was the end of the analysis: the document was not a valid will. Whether a will was validly executed was a question of statutory compliance, not testamentary intent.⁶

The traditional strict compliance approach to the Wills Act formalities first came under attack during the 1940s.⁷ Critics argued it

PROB. & TR. J. 523, 525 (2008) (discussing the relationship between a jurisdiction's Wills Act formalities and the degree of compliance the courts require).

² Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 598, 601–04 (2014); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 170, 177–79 (1991).

³ Hardin, *supra* note 1, at 1150–54; Sean P. Milligan, *The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court*, 36 ST. MARY'S L.J. 787, 792–94 (2005).

⁴ It should be noted, however, that the issue of separation of powers is much more complex at the state level than it is at the federal level. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908), Justice Oliver Wendell Holmes pointed out that the Federal Constitution imposes no "separation-of-powers restrictions on the states." See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 330 (2003). Nevertheless, the overwhelming majority of states have constitutionalized the separation of powers doctrine by expressly including it in their constitutions. *Id.* at 337–38.

⁵ See, e.g., Leigh A. Shipp, *Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States*, 79 TUL. L. REV. 723, 726 (2005) ("Perhaps institutional conflict left courts unclear as to the source, if any, of their authority to disregard the express mandates of the state will statutes. Courts, as a rule, dislike the idea of 'judicially rewrit[ing] the statute,' even in cases where the defect seems innocuous.").

⁶ Admittedly, a will must have testamentary intent, so testamentary intent is part of the analysis, but under traditional strict compliance the primary focus was on the formalities associated with the Wills Act and not on whether the decedent intended the document to be his or her will. See *Stevens v. Casdorff*, 508 S.E.2d 610, 613 (W. Va. 1998); Glover, *supra* note 2, at 604; Miller, *supra* note 2, at 177–79; Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236, 241 (1996); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1009 (1992).

⁷ See Ashbel G. Gulliver & Catherine E. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); Philip Mechem, *Why Not a Modern Wills Act? A Comment on the*

avored formalism at the expense of decedent's intent.⁸ Professor John H. Langbein's landmark article, *Substantial Compliance with the Wills Act*,⁹ forced the issue by offering an alternative to strict compliance. In making the case for substantial compliance, he portrays strict compliance as an extreme approach that always insists on absolute, "literal" compliance with a jurisdiction's Wills Act formalities.¹⁰ Having painted strict compliance as something of a ruthless villain, he then offers substantial compliance as a kinder and gentler—and better—approach.¹¹ Under his substantial compliance approach, even if a will is not strictly compliant with the applicable Wills Act formalities, it can still be probated, thereby saving decedent's intent, so long as (1) the document expresses the decedent's testamentary intent, and (2) the document's form sufficiently approximates the Wills Act formality to enable the court to conclude that the purposes underlying the Wills Act have been served.¹²

Professor Langbein, however, was not done. Just over a decade later he advocated an even more liberal approach to analyzing whether a defectively executed will should nevertheless be probated: the harmless error approach.¹³ His revised proposal arose out of his study of probate law in Australia. The state of South Australia had adopted a dispensing power approach that authorizes a court to dispense with a defective Wills Act formality so long as the court "is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."¹⁴ Professor Langbein praised the dispensing power approach as more consistent with the intent-based, purposive approach he envisioned when he first

Wills Provisions of the Model Probate Code, 33 IOWA L. REV. 501 (1948); see also David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 555–56 (2017) (recounting Gulliver and Tilson's discussion of the pros and cons of the Wills Act formalities and functions).

⁸ See Gulliver & Tilson, *supra* note 7, at 2–3, 17; Horton, *supra* note 7, at 546; Mechem, *supra* note 7, at 503–07.

⁹ John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

¹⁰ *Id.* at 489.

¹¹ *Id.* at 513–30.

¹² *Id.* at 489, 513.

¹³ John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

¹⁴ *Id.* at 9 (quoting section 12(2) of the new, local Wills Act, Wills Act Amendment Act (No. 2) of 1975, § 9 amending Wills Act of 1936, § 12(2), 8 S. Austl. Stat. 665).

proposed substantial compliance.¹⁵ Professor Langbein modified the doctrine slightly, renamed it the “harmless error” doctrine, and adopted it as his preferred approach.¹⁶ Under harmless error, so long as there is clear and convincing evidence that the document expresses the decedent’s testamentary intent, the court should probate the will despite any deficiencies in its execution.¹⁷

By most all accounts, Professor Langbein’s intent-based approach has carried the day. His articles constitute the foundation for the prevailing academic view of the Wills Act formalities,¹⁸ and his harmless error proposal has been adopted as part of the Uniform Probate Code (UPC) and the Restatement (Third) of Property.¹⁹ The rush to embrace the harmless error doctrine, however, has been much slower at the state level. Only ten states have adopted the UPC provision,²⁰ and several of them have modified it to narrow its scope.²¹ More importantly, the overwhelming majority of states have failed to adopt the harmless error doctrine.

If Professor Langbein’s substantial compliance/harmless error proposals are so much better than strict compliance, what explains the failure of most jurisdictions to adopt either of them? Might it be (1) that many of the states intuitively realize that the issue is not as simple as Professor Langbein depicts it—that strict compliance is neither as monolithic nor as strict as he portrays it; (2) that most jurisdictions, in fact, do not apply the strict compliance approach that he describes but rather a variation of it—*flexible strict compliance*;²² and (3) that the real issue is not whether substantial compliance/harmless error is better than traditional strict compliance, but whether substantial compliance/harmless error is better than flexible strict compliance—and the answer to *that* question is far from obvious.

¹⁵ See *id.* at 1–2, 33–34, 51–54.

¹⁶ *Id.* at 33–37, 53–54.

¹⁷ *Id.* at 3–37.

¹⁸ See Lindgren, *supra* note 6, at 1014 (declaring that “John Langbein has won”); see also *infra* notes 64–65 and accompanying text.

¹⁹ See *infra* notes 66–68 and accompanying text.

²⁰ See *infra* note 70.

²¹ See *infra* note 71 and accompanying text.

²² While there are a number of different terms that could be used to describe this approach, “flexible strict approach” arguably fits best because it acknowledges (1) that the jurisdiction’s default approach is strict compliance, while at the same time acknowledging (2) that the courts take a “flexible approach” to applying strict compliance in that they are open to applying a form of substantial compliance to execution scenarios where they think best. See *infra* notes 223–55 and accompanying text.

Whether substantial compliance or harmless error is better than flexible strict compliance is particularly questionable from an economic perspective. Professor Langbein's substantial compliance and harmless error approaches focus on "individual justice."²³ Once a testator puts his or her testamentary wishes in writing, the paramount public policy consideration is to give effect to that intent.²⁴ Professor Langbein's approaches focus solely on the outcome in a given case and fail to consider potential negative externalities: (1) whether the resulting precedent may encourage third parties to engage in future misconduct in the hope that they may be able to convince the court the latter case is indistinguishable from the prior case, and/or (2) whether the precedent established by the case before the court may result in increased future costs of administration because future testators may be more complacent in how they express their intent.²⁵ On the other hand, flexible strict compliance adopts a more pragmatic approach. Flexible strict compliance balances the competing public policy considerations of giving effect to testator's intent *while at the same time* minimizing costs of administration and the potential for fraud and/or other misconduct.²⁶ In doing so, flexible strict compliance focuses more on the marginal benefits of applying substantial compliance to a particular Wills Act formality in a given scenario and thus is more efficient than either substantial compliance or harmless error.²⁷

I

PROFESSOR LANGBEIN'S PORTRAYAL OF STRICT COMPLIANCE

A. *Substantial Compliance with the Wills Act*

Professor Langbein's first article, *Substantial Compliance with the Wills Act*, is generally credited with first asking the question of whether requiring strict compliance with a jurisdiction's Wills Act is the best approach.²⁸ As the title indicates, the focus of the article is on

²³ See *infra* notes 212–19 and accompanying text.

²⁴ See *infra* notes 192–202, 216–19 and accompanying text.

²⁵ See *infra* notes 203–29, 240–44 and accompanying text.

²⁶ See *infra* notes 223–38, 249–55 and accompanying text.

²⁷ See *infra* notes 203–55 and accompanying text.

²⁸ See Roger Andersen, *Will Executions: A Modern Guide*, 18 AM. J. TRIAL ADVOC. 57, 75 (1994); Glover, *supra* note 2, at 605; Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*,

offering substantial compliance as a viable alternative. It is somewhat understandable then that the article's description and discussion of strict compliance may not be as detailed and thorough as its description and discussion of his substantial compliance proposal. Nevertheless, in retrospect his examination of the strict compliance approach is surprisingly conclusory. The article paints a rather villainous picture of strict compliance, using a broad brush and damning colors, but with little support. It is almost as if the article assumes that the reader already agrees with its position that strict compliance is a rigid, monolithic approach that always and needlessly insists on one-hundred percent compliance with the Wills Act formalities or the will is invalid.

1. The Article's Introduction

The first two paragraphs of Professor Langbein's *Substantial Compliance* article are an excellent example of the school of persuasive writing that postulates that the opening paragraphs of an article should overview what is to come.²⁹ The first paragraph introduces the strict compliance approach, and the second paragraph introduces and contrasts Professor Langbein's substantial compliance proposal:

The law of wills is notorious for its harsh and relentless formalism. The Wills Act prescribes a particular set of formalities for executing one's testament. The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential. Probate courts do not speak of harmless error in the execution of wills. To be sure, there is considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities. But once a formal defect is found, Anglo-American courts have been unanimous in concluding that the attempted will fails.

This Article contends that the insistent formalism of the law of wills is mistaken and needless. The thesis, stimulated in part by relatively recent developments that have lessened the authority of the Wills Act, is that the familiar concept of substantial compliance should now be applied to the Wills Act. The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent's testamentary intent, and does its form sufficiently approximate

42 REAL PROP. PROB. & TR. J. 577, 579 (2007). *But see* Gulliver & Tilson, *supra* note 7, and Mechem, *supra* note 7 (for an analysis that arguably raised the issue before Langbein).

²⁹ See LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK 581–84 (3d ed. 2002); EUGENE VOLOKH, ACADEMIC LEGAL WRITING 39–42 (3d ed. 2007).

Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?³⁰

The opening paragraphs also set the tone for Professor Langbein's treatment of strict compliance. The opening sentence describes the strict compliance approach as "notorious," "harsh" and "relentless"—all critical terms loaded with negative connotations. While there are no supporting cites for the accusations, it is only the first sentence of the article. The purpose of the opening paragraph is to introduce the reader to the article's topic and themes. Broad, conclusory statements are to be expected. The assumption is that the body of the paper will elaborate on and prove the point.³¹ Having set forth the nature and tone of his attack on strict compliance in the opening sentence, the third sentence elaborates on it by noting: "The *most minute defect* in formal compliance is held to *void the will*, no matter how abundant the evidence that the defect was inconsequential."³² The paragraph closes with the damning accusation: "[O]nce a formal defect is found, Anglo-American courts have been *unanimous* in concluding that the attempted will fails."³³

The introductory paragraph quickly and effectively villainizes "literal" strict compliance as a monolithic approach to the Wills Act formalities, where even the slightest mistake in the will execution ceremony dooms the document. Decedent's intent is sacrificed in the name of formalism. While at first it is unclear whether Professor Langbein shares this view—or whether he is simply educating the reader on the commonly held view of strict compliance—the second paragraph removes any doubt: "This Article contends that the *insistent* formalism of the law of wills is mistaken and needless. The thesis . . . is that the familiar concept of substantial compliance should now be applied to the Wills Act."³⁴

Having framed the issue and set the tone in the article's introduction—which is better, the "harsh and relentless" strict compliance approach or our "familiar friend" substantial

³⁰ See Langbein, *supra* note 9, at 489.

³¹ An alternative explanation is that the point is so well known, and well accepted, that it does not need support or proof. That appears to be a weak explanation in this context. Because the crux of the article is that the new proposal is better than the prevailing approach, one would expect some support for the characterization of the prevailing strict compliance approach.

³² Langbein, *supra* note 9, at 489 (emphasis added).

³³ *Id.* (emphasis added).

³⁴ *Id.* (emphasis added).

compliance?—one would expect the body of the article to put the issue under the microscope and compare and contrast the two approaches—to examine each in greater detail and prove the failings of the strict compliance approach and the benefits of the substantial compliance approach. But does it?

2. *The Body of the Article*

The first two subsections of the article focus on the Wills Act formalities, their history and their functions—not on the degree of compliance that should be required.³⁵ The third subsection, “Formality and Formalism,” returns to the article’s focus: Should the courts require strict or substantial compliance with the Wills Act formalities?³⁶ The opening sentence of this third section reintroduces literal strict compliance, once again painting it as harsh and relentless: “What is peculiar about the law of wills is not the prominence of the formalities, but the judicial *insistence* that *any defect* in complying with them *automatically* and *inevitably* voids the will.”³⁷ Once again, however, the accusation lacks supporting citation, and he offers no immediate elaboration. It is, however, only the opening sentence of the opening paragraph of a new subsection. The opening paragraph typically overviews material to come. The assumption is the subsection will circle back around later to prove the point. The rest of the opening paragraph reintroduces substantial compliance, noting that in other areas of the law where formal statutory requirements are not satisfied, to prevent injustice, the courts have taken a more “purposive approach to formal defects” by applying substantial compliance.³⁸

Having reintroduced the contrasting approaches, the table has been set for a detailed examination of the pros and cons of each. The next paragraph, however, fails to offer any proof of “the judicial *insistence* that *any defect* in complying with them *automatically* and *inevitably*

³⁵ The first section of the article is “The Logic of Formalism.” The first subsection within that section is titled “The Wills Act Formalities.” It traces the history and basic provisions of the typical Wills Act. Langbein, *supra* note 9, at 490–91. The second subsection, “The Purposes of the Wills Act Formalities,” discusses the different theoretical explanations for why one’s testamentary intent must meet the requirements of the Wills Act, including a discussion of the classic functions underlying the Wills Act formalities. Langbein, *supra* note 9, at 491–98.

³⁶ See Langbein, *supra* note 9, at 498.

³⁷ *Id.* (emphasis added).

³⁸ *Id.* at 498–99 (emphasis added).

voids the will.”³⁹ Instead, the rest of the subsection (1) examines the traditional factors that have been offered to justify *why* strict compliance is necessary in the law of wills⁴⁰ and (2) analyzes whether these factors truly justify the harsher treatment strict compliance imposes on the law of wills—all without actually examining the harsher treatment.⁴¹ Throughout the analysis of the factors, the subsection repeatedly makes negative references to strict compliance that reinforce the image that it is harsh and relentless,⁴² without any detailed examination of the approach.

There is minimal examination or discussion of the harsh and relentless nature of strict compliance in the rest of the article.⁴³ There is, however, one noteworthy exception. In section III of the article, Professor Langbein argues that substantial compliance would neither increase nor decrease the amount of litigation with respect to the

³⁹ *Id.* at 498 (emphasis added).

⁴⁰ *Id.* at 499.

⁴¹ *Id.* at 499–503.

⁴² This is not to imply that the analysis under the law of wills is not harsher than it is under the statute of frauds, it is just that the article still has not examined in detail and proved the characterization of strict compliance that it alleges: that strict compliance is “harsh and relentless.” To be sure, however, the phrasing of the repeated references to the strict compliance approach leave the reader with the impression that there can be no other characterization of strict compliance. On pages 499 and 500, Professor Langbein uses the following phrases to describe the approach: “[j]udicial *insistence* on *literal* compliance,” “*rigid* enforcement,” “*rigidly* enforced,” and “construe *strictly against the will*.” *Id.* at 499–500 (emphasis added). On page 500, he uses the following phrases: “systematic *bias towards invalidity*,” “judicial *insistence* on *literal* compliance,” and “the courts have *denied themselves all flexibility*.” *Id.* at 500 (emphasis added). On page 501, he uses the following phrases: “the *rule of literal compliance*,” “the *rule of literal compliance inflicts* constant and mostly uncontrollable inequity,” “the *rule of literal compliance* with the formalities,” and “[t]he *rule of literal compliance with Wills Act formalities*.” *Id.* at 501 (emphasis added). On page 502, he uses the following phrases in discussing the approach: “[the resulting exclusion of evidence of the decedent’s testamentary intent is described as] ‘an intolerable injustice’” (citation omitted), “the *rule of literal compliance*,” “the *literal enforcement* of the formalities,” “[t]he *injustice of nonpurposive insistence* on the formalities,” and “the *injustice of their rule of literal compliance*.” *Id.* at 502 (emphasis added). On page 503, he describes the approach as “a wholly mechanical rule.” *Id.* at 503.

⁴³ The rest of the article looks at the issue of substantial compliance versus strict compliance from more of a macro perspective. Professor Langbein points out that the other time of death transfer mechanisms and the 1969 Uniform Probate Code revisions to the Wills Act take more of a functional approach to what constitutes a valid testamentary transfer. See Langbein, *supra* note 9, at 503–12. This functional approach *de facto* de-emphasizes the importance of the Wills Act formalities. Accordingly, adopting substantial compliance as the appropriate judicial approach to whatever Wills Act formalities remain would be consistent with the more functional approach applied to the rest of testamentary transfer law. See Langbein, *supra* note 9, at 513–31.

validity of a will.⁴⁴ Rather, substantial compliance would substitute one type of litigation (whether there is clear and convincing evidence that the decedent intended the document to be his or her will) for the existing litigation (whether the decedent had strictly complied with the Wills Act formalities).⁴⁵ In making the argument, the article returns to the harsh and relentless characterization of strict compliance. In particular, Professor Langbein notes: “The rule of literal compliance can produce results *so harsh* that sympathetic courts incline to squirm.”⁴⁶

The article then elaborates on that point by asserting that a number of the soft, fact-sensitive formalities have proven so problematic for the courts under strict compliance that the courts “have produced a vast, contradictory, unpredictable and sometimes dishonest case law in which the courts purport to find literal compliance in cases which in fact instance defective compliance.”⁴⁷ That comment is interesting because it appears to contradict the article’s overall characterization that strict compliance is “harsh and relentless” and that “*any defect* in complying with . . . [the Wills Act formalities] *automatically* and *inevitably* voids the will.”⁴⁸ Apparently failure to comply with the Wills Act formalities under strict compliance does *not* automatically and inevitably doom the decedent’s intent; some courts find a way to validate the will—“to find literal compliance”—despite “in fact . . . defective compliance.”⁴⁹ Instead of examining that case law, however, the article summarily dismisses the cases as “contradictory, unpredictable and sometimes dishonest”⁵⁰

Might the apparent “contradictory, unpredictable and . . . dishonest case law” be evidence that the strict compliance approach is not as monolithic as Professor Langbein’s *Substantial Compliance* article characterizes it? Might it be possible to synthesize some of the contradictory case law and extract from it a different approach, a flexible strict compliance approach that lies somewhere between the harsh and relentless strict compliance described in Professor Langbein’s *Substantial Compliance* article and his substantial compliance proposal? Professor Langbein adamantly rejects such a

⁴⁴ See Langbein, *supra* note 9, at 524–26.

⁴⁵ *Id.*

⁴⁶ *Id.* at 525 (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.* at 498 (emphasis added).

⁴⁹ *Id.* at 525.

⁵⁰ *Id.*

possibility: “In cases of defective compliance the important choice is between litigation resolved purposefully and honestly under the substantial compliance doctrine, or *irrationally* and sometimes *dishonestly* under the rule of literal compliance.”⁵¹

3. Conclusion

Professor Langbein’s *Substantial Compliance* article argues that the law of wills had only two options: maintain the status quo (continuing to apply the harsh and relentless strict compliance approach) or adopt his substantial compliance proposal. The article, however, never proves that assertion. Apparently the legal community was so interested in Professor Langbein’s substantial compliance proposal that it failed to critically examine his characterization of the state of law.

B. Excusing Harmless Errors

In his follow-up article, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*,⁵² Professor Langbein reexamines his substantial compliance proposal in light of South Australia’s experience with the dispensing power approach.⁵³ The opening section of the article sets the analytical framework. The section’s heading says it all: “The Problem and the Cures.”⁵⁴ Strict compliance is the problem. While the focus of the article is on the possible cures (substantial compliance versus harmless error), a quick look at the problem sets up the analysis.⁵⁵

Interestingly, compared to his criticism of strict compliance in the *Substantial Compliance* article, Professor Langbein’s treatment of strict compliance in the *Harmless Errors* article is markedly different. The rhetoric he uses is not nearly as negatively charged: “The puzzle about the Wills Act formalities is not why we have them, but why we enforce them so *stringently*.”⁵⁶ That is as critical as the phrasing gets. Gone is the visceral phrasing with its accompanying negative

⁵¹ *Id.* at 526 (emphasis added).

⁵² See Langbein, *supra* note 13.

⁵³ *Id.* at 33–36.

⁵⁴ *Id.* at 2.

⁵⁵ Professor Langbein devotes only two paragraphs to the problem. See *supra* note 13, at 3–4.

⁵⁶ Langbein, *supra* note 13, at 3 (emphasis added).

connotations.⁵⁷ Gone are the broadly-worded, conclusory, and repetitive attacks that permeated the *Substantial Compliance* discussion of strict compliance.⁵⁸ Instead, the *Harmless Errors* article points out the failings of strict compliance by offering but a single example of what can happen under that approach: the *In re Groffman*⁵⁹ case.

Professor Langbein introduces *Groffman* by stating that it involves a “common execution blunder”⁶⁰—implicitly asserting both that the case is (1) representative of execution blunders that occur, and (2) representative of the analysis and outcome that occurs under strict compliance. In two short paragraphs, the article presents the facts of the case, the court’s analysis, and Professor Langbein’s critique:

Each of the two witnesses, who were attending a social gathering at the testator’s home, took his turn signing the will in the dining room while the other witness was in the living room. The will was held invalid for violation of the requirement that the testator sign or acknowledge it in the presence of two witnesses present at the same time, although the judge forthrightly declared: “I am perfectly satisfied that that document was intended by the deceased to be executed as his will and that its contents represent his testamentary intentions.” The Wills Act is meant to implement the decedent’s intent; the paradox in a case like *Groffman* is that the Wills Act defeats that intent. What makes *Groffman* interesting is not the facts, which are commonplace, but the judge’s candor in admitting that his decision frustrated the decedent’s intent.

Must it be so? Is the rule of strict compliance the inevitable price for the benefits of Wills Act formality? If legal policymakers were put to the choice between a regime of no Wills Act formalities, on the one hand, versus the Wills Act as traditionally applied on the other hand, there would be a large consensus in favor of the status quo. The greatest blessing of the Wills Act formalities is the safe harbor that they create. Without prescribed formalities, the testator would be left to grope for his own means of persuading the probate court that his intentions were final and volitional. The testator who complies with Wills Act formalities assures his estate of routine probate in all but exceptional circumstances. In order to escape the rule of strict compliance with the Wills Act, therefore, the case must be made that the benefits of Wills Act formality would be retained even if the law were changed to excuse execution blunders.⁶¹

⁵⁷ See *supra* notes 30–34, 42 and accompanying text. Not once does the *Harmless Error* article use the term “harsh,” “relentless,” “literal,” or “notorious.”

⁵⁸ See *supra* note 42 and accompanying text.

⁵⁹ [1969] 1 W.L.R. 733, [1969] 2 All E.R. 108 (Q.B.).

⁶⁰ Langbein, *supra* note 13, at 3 (emphasis added).

⁶¹ Langbein, *supra* note 13, at 3–4 (emphasis added).

By using *Groffman* as a foil to set up his discussion of the substantial compliance and harmless error doctrines, Professor Langbein deftly makes his point: “The Wills Act is meant to implement the decedent’s intent; the paradox in a case like *Groffman* is that the Wills Act defeats that intent.”⁶² Obviously, however, it is not the Wills Act, per se, that defeats the decedent’s intent, it is the traditional strict compliance approach to the Wills Act.

There is very little additional discussion of strict compliance in the *Excusing Harmless Errors* article, and when there is, it is in passing and without the charged language used in the *Substantial Compliance* article. While the tone of the strict compliance discussion is softer, Professor Langbein implicitly makes his point that it is harsh and relentless:

[U]nder the rule of strict compliance, so long as some formalities remain, the *least* error in complying with any of them *still invalidates* the will [A] legal system should be able to preserve relatively high levels of formality, in order to enhance the safe harbor that is created for the careful testator who complies fully, without having to invalidate *every will* in which the testator does not reach the harbor.⁶³

As in the *Substantial Compliance* article, however, the characterization of strict compliance in the *Harmless Error* article as absolute and unforgiving is based on minimal evidence and support.

C. Professor Langbein’s Proposals—Epilogue

1. Academic Response

Professor Langbein’s *Substantial Compliance* and *Harmless Errors* articles ignited a flurry of scholarly activity. Academically, one would be hard-pressed to name a probate topic that has generated more legal scholarship in the past fifty years than Professor Langbein’s two articles.⁶⁴ The articles, and their substantial compliance and harmless

⁶² *Id.* at 4.

⁶³ *Id.* at 5–6 (emphasis added).

⁶⁴ A list of articles that either focus on or discuss one or both of Professor Langbein’s articles includes: Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3 (2016); Meridith H. Bogart, *State Doctrines of Substantial Compliance: A Call for ERISA Preemption and Uniform Federal Common Law Doctrine*, 25 CARDOZO L. REV. 447 (2003); Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893 (1996); Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93 (2006); Hanna M. Chouest, *Dot All ‘I’s and Cross all ‘T’s: Estate of Tamulis*

error proposals, have been critiqued, commented on, and elaborated on in dozens of law review articles, and as this Article evidences, that analysis continues. Most of the scholarship agrees with Professor Langbein that substantial compliance and harmless error are better approaches than the traditional strict compliance approach.⁶⁵ His intent-based approach to the Wills Act formalities has become the conventional wisdom within the academic community of the Wills Act formalities.

2. Normative Law Response

Professor Langbein's harmless error proposal has also enjoyed great success at the normative level. In 1990, The Uniform Law Commission adopted the harmless error approach as part of the

v. Commissioner and the Narrowing of the Substantial Compliance Doctrine to the Technical Compliance Doctrine, 62 TAX LAW. 259 (2008); Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. REV. 1049 (2006); Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 27 (2010); David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539 (2017); Katherine R. Guzman, *Where Strict Meets Substantial: Oklahoma Standards for the Execution of a Will*, 66 OKLA. L. REV. 543 (2014); Dan W. Holbrook, *Questionable Will Executions: Should 'Substantial Compliance' Suffice?*, 48 TENN. B.J. 28 (2012); Warren Gorham Lamont & Ronald R. Volkmer, *Substantial Compliance and Will Execution*, 18 EST. PLAN. 376 (1991); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994); Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577 (2007); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599 (1991); Sean P. Milligan, *The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Code*, 36 ST. MARY'S L.J. 787 (2005); John V. Orth, *Wills Act Formalities: How Much Compliance is Enough?*, 43 REAL PROP. TRUST & EST. L.J. 73 (2008); Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453 (2002); Leigh A. Shipp, *Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States*, 79 TUL. L. REV. 723 (2005); Eddy R. Smith, *Strictly Speaking, When is a Will not a Will?*, 51 TENN. B.J. 30 (2015); Ronald R. Volkmer, *Will Execution and Substantial Compliance*, 41 EST. PLAN. 40 (2014).

⁶⁵ A number of the articles make the case for why a particular jurisdiction should adopt one of the two approaches. See, e.g., Katherine R. Guzman, *Where Strict Meets Substantial: Oklahoma Standards for the Execution of a Will*, 66 OKLA. L. REV. 543 (2014); Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145 (1993); Sean P. Milligan, *The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Code*, 36 ST. MARY'S L.J. 787 (2005).

Uniform Probate Code (UPC).⁶⁶ Section 2-503 of the UPC provides that a document that is not executed in compliance with a state's Wills Act formalities can nevertheless be probated as the decedent's will so long as "the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will . . ." ⁶⁷ The Restatement (Third) of Property has also adopted Professor Langbein's harmless error approach: "A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will."⁶⁸

3. Positive Law Response

The rush to embrace substantial compliance and harmless error has been significantly slower at the positive law level. Judicially, to date, the only appellate court to expressly adopt Professor Langbein's substantial compliance approach is the New Jersey Supreme Court in *In re Will of Ranney*.⁶⁹ Statutorily, only ten states have adopted the UPC's harmless error provision (one being New Jersey),⁷⁰ and several of these states have revised the doctrine so that it can be applied only under more limited, statutorily defined conditions.⁷¹ Interestingly, the vast majority of the states have failed to adopt either

⁶⁶ UNIF. PROBATE CODE § 2-503 (2010) (amended 2010), 8 U.L.A. 215 (2013 & Supp. 2014).

⁶⁷ *Id.*

⁶⁸ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 1999).

⁶⁹ 589 A.2d 1339 (N.J. 1991). A Pennsylvania Court of Common Pleas, a trial court, adopted Professor Langbein's substantial compliance approach in *Estate of Kajut*, 22 Pa. D. & C.3d 123, 136 (C.P. 1981).

⁷⁰ See CAL. PROB. CODE § 6110(c)(2) (2010); COLO. REV. STAT. § 15-11-503 (2013); HAW. REV. STAT. § 560:2-503 (2006); MICH. COMP. LAWS ANN. § 700.2503 (2002); MONT. CODE ANN. § 72-2-523 (2007); N.J. REV. STAT. ANN. § 3B:3-3 (2012); OR. REV. STAT. § 112.238 (2015); S.D. CODIFIED LAWS § 29A-2-503 (2004); UTAH CODE ANN. § 75-2-503 (2013); VA. CODE ANN. § 64.2-404 (2013).

⁷¹ See CAL. PROB. CODE § 6110(c)(2) (2010) (limiting the harmless error doctrine to execution defects related to the witnessing requirements and not permitting it to be applied to defects related to the signature requirement); COLO. REV. STAT. § 15-11-503(2) (2013) (limiting Colorado's harmless error doctrine to documents "signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse"); VA. CODE ANN. § 64.2-404(B) (2013) (providing that Virginia's harmless error doctrine "may not be used to excuse compliance with any requirement for a testator's signature," except in very limited, statutorily defined circumstances).

Professor Langbein's substantial compliance or harmless error proposals, apparently preferring to stick with strict compliance.

If the benefits of Professor Langbein's substantial compliance/harmless errors proposals are so obvious, and if the traditional approach to strict compliance is so harsh and relentless, what explains the failure of most jurisdictions to adopt either of these approaches? Might it be that things are not as they seem?

II

STRICT COMPLIANCE—IS IT REALLY THAT HARSH AND RELENTLESS?

Professor Langbein's *Substantial Compliance* article repeatedly characterizes traditional strict compliance approach as harsh and relentless.⁷² While the criticism of traditional strict compliance in his *Harmless Error* article is less visceral, he still makes the point that traditional strict compliance sacrifices decedent's intent in favor of formalism.⁷³ He concludes his analysis of *Groffman* by asking the simple rhetorical question: "*Must it be so?*"⁷⁴ While the phrasing and analysis implies that under strict compliance the answer must always be yes, an examination of the case law shows that the answer might not be that simple.

A. *Groffman Revisited*

While the *Groffman* case can be used to demonstrate the failings of traditional strict compliance,⁷⁵ when juxtaposed with other case law addressing the same issue, it can also be used to demonstrate that strict compliance might be more complicated than Professor Langbein portrays it.

1. *The Facts*

Mr. Groffman's attorney prepared his will,⁷⁶ but instead of executing it at his attorney's office, he opted to execute it at a friend's house during an evening of socializing. The court described the execution ceremony as follows:

⁷² See *supra* notes 30–46 and accompanying text.

⁷³ See *supra* notes 60–63 and accompanying text.

⁷⁴ Langbein, *supra* note 13, at 4 (emphasis added).

⁷⁵ See *supra* notes 59–62 and accompanying text.

⁷⁶ *In re Groffman*, [1969] 1 W.L.R. 733 [1969] 2 All E.R. 108 (Q.B.).

During the course of the evening, when the coffee table, the only available table, was laden with coffee cups and cakes, the deceased said words to this effect, which he addressed to Mr. David Block and Mr. Julius Leigh: "I should like you now to witness my will." I think he may well have gestured towards his coat. The will in question as engrossed was of the usual double foolscap folded in two and then in four, so as to be a convenient size for putting in an inside pocket of a coat. That is where it was on this occasion. However, it was not taken out by the deceased in the lounge. At the most, he gestured towards the pocket where it was. There seems to me to be an overwhelming inference that his signature was on the document at that time. There being no convenient space for the execution in the lounge, Mr. Block led the deceased into the adjacent dining room. That was just across a small hall. There the deceased took the document from his pocket, unfolded it, and asked Mr. Block to sign, giving his occupation and address. The signature, as I have already said, was on the document at the time and was visible to Mr. Block at the time; indeed, he noted this. Mr. Leigh, who seems to have been somewhat cumbrous in his movements, was left behind. He was not there when Mr. Block signed his name. Mr. Block then returned to the lounge, leaving the deceased in the dining room. He said to Mr. Leigh words to this effect: "It is your turn now, don't keep him waiting, it's cold in there." Mr. Leigh then went into the dining room and, according to his statement, and as is indeed borne out by the form of the document that we now have, signed his name beneath that of Mr. David Block. In the meantime, Mr. Block had remained in the lounge.⁷⁷

The applicable Wills Act provided that the testator's "signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time" ⁷⁸ The issues were whether Mr. Groffman acknowledged the will in the presence of both witnesses and what constituted presence for purposes of the Wills Act?

2. *The Court's Analysis*

The court acknowledged this was not the first time a court had been called upon to construe the presence requirement:

The matter has been considered by a number of eminent judges, starting with Dr. Lushington, and followed by the members of the Court of Appeal in *Blake v. Blake* (1882) 7 P.D. 102 and *Daintree v. Butcher and Fasulo* (1888) 13 P.D. 102 It seems to me that the authorities establish that the signature of the testator must be on the document at the time of acknowledgment (as I think it was), and

⁷⁷ *Id.* at 737.

⁷⁸ *Id.*

*that the witnesses saw or had an opportunity of seeing the signature at that time, in other words, at the time of acknowledgment.*⁷⁹

This approach to the presence requirement is commonly known as the line of sight test.⁸⁰ Applying the line of sight test, the court concluded that Mr. Leigh was still in the lounge when the decedent acknowledged his signature to Mr. Block in the dining room, and Mr. Block was back in the lounge when the decedent acknowledged his signature to Mr. Leigh in the dining room. The witnesses did not see nor did they have the opportunity to see signature at the same time.⁸¹ Accordingly, the will was not validly executed.

Striking down the will in the *Groffman* case does seem like a harsh result, and thus it appears to be a good case to use to question the wisdom of strict compliance—if the case is truly representative of the strict compliance approach: But is it? Contrast *Groffman* with the American case of *In re Demaris' Estate*.⁸²

B. In re Demaris' Estate

1. The Facts

George Demaris went to Dr. Gillis' office suffering from extreme abdominal pain.⁸³ He was taken into the treatment room where he was placed on a cot.⁸⁴ Having been informed that he needed immediate surgery, and fearing the worst, Demaris asked Dr. Gillis to draft a will for him.⁸⁵ Dr. Gillis left the treatment room, and went across the waiting room to the consultation room where he typed up Demaris' testamentary wishes.⁸⁶ Dr. Gillis then returned to the treatment room where his wife, a registered nurse, was caring for

⁷⁹ *Id.* at 738 (emphasis added).

⁸⁰ See Andersen, *supra* note 28, at 64–67.

⁸¹ *In re Groffman*, 1 W.L.R. at 739.

⁸² 110 P.2d 571 (Or. 1941).

⁸³ *Id.* at 573–74. Dr. Gillis' office consisted of a suite of three offices: a waiting room in the middle (the waiting room was approximately eleven feet across and nine feet from front to back), a consultation room to the left of the waiting room (the consultation room was approximately nine feet by nine feet), and a treatment room to the right of waiting room (the treatment room was also approximately nine feet by nine feet). *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 474–75.

⁸⁶ *Id.* at 575.

Demaris.⁸⁷ Demaris signed the document in the presence of the two witnesses: Dr. Gillis and his wife.⁸⁸

Dr. Gillis and his wife then took the will back across the waiting room to a desk in the consultation room where they signed the will.⁸⁹ The Oregon Supreme Court quoted the circuit court's findings concerning that part of the execution ceremony:

[T]he doctor signed his name as a witness and requested Mrs. Gillis to sign her name as a witness, which she did; that from the point where Mrs. Gillis stood in front of the desk Mrs. Gillis was able to look through the door and see the patient, and that she was watching him because of his condition; that Dr. Gillis subscribed his name as a witness while sitting in a chair on the left side of the desk and could not see or be seen by the testator while actually witnessing the document; that while witnessing the document Dr. Gillis was directly in front of his wife across the table who could see the testator as well as the doctor; that George Demaris could have seen the witness Mrs. Gillis sign when she signed if he had looked; that *he could not have seen Dr. Gillis sign*; that the testator knew that Dr. Gillis had signed the Will as a witness, and some days later determined that Mrs. Gillis had signed the Will as a witness⁹⁰

The facts of the case, the terms of the Oregon Wills Act, and the admissions of the parties reduced the case to a rather simple issue: whether “the attestors [had] signed ‘in the presence of the testator.’”⁹¹ As in *Groffman*, the Court was called upon to construe what constitutes “presence” for purposes of the Wills Act formalities.

2. *The Court's Analysis*

Given the line of sight test applied in *Groffman*,⁹² and the rather absolutist and extreme terms which the *Substantial Compliance* and

⁸⁷ *Id.*

⁸⁸ *Id.* at 575. Demaris became violently sick while writing his signature and Mrs. Gillis had to leave the room to get some towels, but the Court concluded that Demaris had properly signed the will in the presence of two witnesses present at the same time. *Id.* at 575–76.

⁸⁹ *Id.* at 575.

⁹⁰ *Id.* (emphasis added).

⁹¹ *Id.* at 580. The presence requirement at issue in *Demaris* is the requirement that the witnesses must be in the testator's presence when they sign the will, as opposed to the presence requirement in *Groffman* (that the testator must be in the witnesses' presence when the testator signs the will). Presence, however, arguably is presence. Both presence requirements arguably should be the same for purposes of the Wills Act formalities.

⁹² See *supra* notes 79–81 and accompanying text.

Harmless Error articles use to describe the traditional strict compliance approach to the Wills Act formalities,⁹³ one would expect the *Demaris* case to be another example of formalism over intent. The Oregon Wills Act required that the witnesses sign the will “in the presence of the testator.”⁹⁴ Under the line of sight test, the presence formality requires that the party must be capable of seeing the act being performed, at the time it is performed, if he or she were to look.⁹⁵ In *Demaris*, the trial court found that the testator could *not* have seen one of the witnesses, Dr. Gillis, sign the will.⁹⁶ Accordingly, the witnesses did *not* sign in the presence of the testator.

Yet the Oregon Supreme Court held the document *was* validly executed and ordered the will probated.⁹⁷ In contrast to the monolithic approach to strict compliance portrayed by Professor Langbein, the Oregon Supreme Court began its analysis by noting that the judicial approach to the presence requirement *varies greatly*: “The meaning of the phrase ‘in the presence of the testator’ has been the subject of *much controversy and of diversity of opinion. Decisions directly opposite to one another can be readily found.*”⁹⁸ On the one hand, there is the line of sight approach—the approach applied by the court in *Groffman* and which the Oregon Supreme Court calls the “strict interpretation” approach.⁹⁹ On the other hand, there is what the Court expressly calls a more “liberal” approach¹⁰⁰ known as the “conscious presence” approach.¹⁰¹

The Court’s discussion of the conscious presence approach is particularly interesting because it parallels the arguments Professor Langbein invokes in support of his substantial compliance/harmless error approach:

Other courts adopt a liberal point of view. They speak of the circumstances of the individual case and of the purpose of the statute . . .

[As] stated in *Healey v. Bartlett*, 73 N.H. 110, 59 A. 617, 618, 6 Ann.Cas. 413: . . . “It is not necessary that he should actually see the witnesses, for them to be in his presence. They are in his

⁹³ See, e.g., *supra* notes 30–34, 42 and accompanying text.

⁹⁴ 110 P.2d at 580.

⁹⁵ See *supra* notes 79–81 and accompanying text.

⁹⁶ 110 P.2d at 579.

⁹⁷ *Id.* at 588.

⁹⁸ *Id.* at 580 (emphasis added).

⁹⁹ *Id.* at 580–81.

¹⁰⁰ *Id.* at 581.

¹⁰¹ See Andersen, *supra* note 28, at 64–67.

presence whenever they are so near him that he is conscious of where they are and of what they are doing, through any of his senses, and are where he can readily see them if he is so disposed”

We quote from [Sturdivant] further: “While it is the duty of the court to observe carefully the spirit and intent of the statute, they will not adopt a strained and technical construction to defeat a will where the capacity and intention is plain, and where, by fair and reasonable intendment, the statute may be held to have been complied with, and such is the case here”

The court [in the Sturdivant case], in sustaining the attestation, . . . said: “I agree that it is not competent for the court to adopt another and different mode of attestation than that directed by the statute” but pointed out that literal compliance with the statute was not necessary. Substantial compliance, so it said, sufficed. It believed that recognition and acknowledgment of their signatures by the attestors constituted a part of the *res gestae* of the will’s execution. It declared that all that was done constituted one transaction. The decision further said: “Upon the whole, I think there has been a reasonable and substantial, if not a literal, compliance with the requisites of the statute shown in this case, sufficient for all practical purposes. To reject the will in such a case would be, as I think, to sacrifice substance to form, and the ends of justice to the means by which they are to be accomplished.”¹⁰²

After reviewing leading opinions on both sides of the issue, the Court reaffirms its support for the more liberal, substantial compliance based conscious presence approach, applies it to the facts of the case, finds that Demaris “was conscious of the attestation when it took place” and upholds the circuit court’s order sustaining the will.¹⁰³

In light of the conscious presence approach to the presence requirement, and based on the Court’s express reference to substantial compliance as opposed to literal compliance, might it be that strict compliance is *not* as harsh and relentless as one might think from Professor Langbein’s articles?¹⁰⁴

¹⁰² 110 P.2d at 581–82 (emphasis added).

¹⁰³ *Id.* at 548–87. The conscious presence test adopted and applied by the Court in *Demaris* is a far cry from the line of sight test applied by the court in *Groffman*. In fact, a good faith argument can be made that the *Groffman* case would come out differently under the conscious presence test and the will would have been upheld.

¹⁰⁴ Or, might it be that the *Demaris* case is simply an example of the case law that Professor Langbein dismissed when he noted that a number of the soft, fact-sensitive formalities have proved problematic for the courts under strict compliance—so problematic that the courts “have produced a vast, contradictory, unpredictable and sometimes dishonest case law in which the courts purport to find literal compliance in cases which in fact instance defective compliance”? See Langbein, *supra* note 9, at 525;

C. *The Ranney Case*

Additional support for the view that strict compliance is *not* as harsh and relentless as Professor Langbein's articles imply can be found in the case of *In re Will of Ranney*.¹⁰⁵ That statement may seem odd to those who are familiar with the *Ranney* case, as it is a landmark case commonly cited as the first case to adopt Professor Langbein's substantial compliance proposal.¹⁰⁶ Yet a careful reading of the opinion shows that it can also be used to question Professor Langbein's characterization of the underlying issue.

1. *The Court's Opinion*

Russell Ranney, the testator, signed page four of his will in the presence of two witnesses, but the witnesses signed page five of the document—the self-proving affidavit—and no other page of the document.¹⁰⁷ The issue was whether the witnesses had signed the will as required by the Wills Act.¹⁰⁸ In its initial analysis of the issue, the New Jersey Supreme Court expressly phrased the issue as “whether Russell's will *literally complies* with the requirements of [the New Jersey Wills Act].”¹⁰⁹ Applying the traditional strict compliance approach the Court concluded that the self-proving affidavit technically is not a part of the will and thus the will was not properly executed.¹¹⁰ The Court, however, went on to adopt Professor Langbein's substantial compliance approach and ordered the will probated under it.¹¹¹

During the course of its literal strict compliance analysis, the Court acknowledged that several other courts had upheld a will executed under similar circumstances:

The rationale of those cases is that a self-proving affidavit and an attestation clause are sufficiently similar to justify the conclusion that signatures on a self-proving affidavit, like signatures on the

see also Langbein, *supra* note 13, at 27–28. For further discussion of this possible explanation, *see infra* notes 120–31 and accompanying text.

¹⁰⁵ 589 A.2d 1339 (N.J. 1991).

¹⁰⁶ *See* Lindgren, *supra* note 6, at 1015; Lester, *supra* note 28, at 601.

¹⁰⁷ *See supra* notes 77–85 and accompanying text.

¹⁰⁸ *See supra* note 86 and accompanying text.

¹⁰⁹ 589 A.2d at 1342 (emphasis added). The court's use of the phrase “literally complies” is particularly interesting because it harkens back to and adopts the phrasing used by Professor Langbein in his *Substantial Compliance* article approach to describe the traditional approach. *See supra* note 42 and accompanying text.

¹¹⁰ 589 A.2d at 1342–43.

¹¹¹ *Id.* at 1343–46.

attestation clause, satisfy the requirement that the signatures be on the will. See *In re Estate of Charry*, 359 So. 2d 544, 545 (Fla. Dist. Ct. App. 1978) (witnesses' signatures on self-proving affidavit on same page as testator's signature satisfied attestation requirements); *In re Estate of Petty*, 227 Kan. 697, 702-03, 608 P.2d 987, 992-93 (1980) (self-proving affidavit on same page as testator's signature substantially complies with attestation requirements); *In re Cutsinger*, 445 P.2d 778, 782 (Okla. 1968) (self-proving affidavit executed on same page as testator's signature is an attestation clause in substantial compliance with statutory requirement); see also *In re Will of Leitstein*, 46 Misc. 2d 656, 657, 260 N.Y.S.2d 406, 407-08 (Sur. 1965) (probating will when witnesses signed affidavit purporting to be attestation clause).¹¹²

At the time of each of the respective opinions, each of the respective jurisdictions was a strict compliance jurisdiction, yet the courts found a way to uphold the will.

In *Ranney*, the New Jersey Supreme Court took the position that where the witnesses sign the self-proving affidavit paragraph rather than the will, under strict compliance, the will must be declared invalid. But if one were to ask, "*Must it be so?*" apparently the answer is no; four other strict compliance jurisdictions found a way to probate the will.

2. *The Inconsistent Case Law*

The question of law involved in *Ranney*, and the four inconsistent cases, is whether the witnesses had signed the will as required by the Wills Act.¹¹³ The execution blunder in each case is that the witnesses signed the self-proving affidavit clause, believing they were signing the will, but they did not otherwise sign the will.¹¹⁴ In comparing and contrasting the courts' analysis, it is apparent that, like the courts' analysis of the presence requirement, the courts' analysis of the requirement that the witnesses sign the will varies greatly in this scenario.

On the one hand, there is the literal strict compliance approach the New Jersey Supreme Court initially applied in *Ranney*: "We are

¹¹² *Id.* at 1342.

¹¹³ *In re Estate of Charry*, 359 So. 2d 544, 544 (Fla. Dist. Ct. App. 1978); *In re Estate of Petty*, 608 P.2d 987, 992-93 (Kan. 1980); *In re Will of Ranney*, 589 A.2d at 1339; *In re Will of Leitstein*, 46 Misc. 2d 656, 656-67 (Sur. Ct. 1965); *In re Estate of Cutsinger*, 445 P.2d 778, 781 (Okla. 1968).

¹¹⁴ *In re Estate of Charry*, 359 So. 2d at 544-45; *In re Estate of Petty*, 608 P.2d at 992-93; *In re Will of Ranney*, 589 A.2d at 1340; *In re Will of Leitstein*, 46 Misc. 2d at 656-67; *In re Estate of Cutsinger*, 445 P.2d at 781.

unable to conclude that a will containing the signatures of witnesses only on such an affidavit *literally complies* with the attestation requirements of *N.J.S.A. 3B:3-2*.”¹¹⁵ The Court’s initial analysis is consistent with and supports Professor Langbein’s characterization of strict compliance.

On the other hand, the analysis adopted by the four courts that upheld the will under these circumstances reflects a more liberal, a more purposive, and a more intent-based approach. In at least two of the cases the will contestants brought to the court’s attention Texas case law that applied literal strict compliance and held the will had not been properly executed.¹¹⁶ Nevertheless, the courts expressly rejected the strict compliance approach. Instead, the courts adopted and applied a more liberal, more intent-based approach that some of the courts expressly acknowledged constituted a substantial compliance approach. The Oklahoma Supreme Court wrote: “[W]e hold that the attestation of the will involved here was in *substantial compliance* with the provisions of [the Oklahoma Wills Act] False.”¹¹⁷ The Kansas Supreme Court stated, “It has been the policy of this court to uphold wills *if the form of the will substantially complies with the requirements of the statute*.”¹¹⁸ A third court, the Florida Court of Appeals, did not use the phrase substantial compliance, but its phrasing *de facto* acknowledges a more liberal approach: “The Texas view places form above substance and we decline to follow it.”¹¹⁹

Based on Professor Langbein’s characterization of the state of the law of wills in his *Substantial Compliance* and *Harmless Errors* articles, New York, Oklahoma, Florida, and Kansas would all be considered strict compliance jurisdictions. Yet the judicial opinions in *In re Estate of Charry*, *In re Estate of Petty*, *In the Matter of the Estate of Cutsinger*, and *In re Will of Leitstein*, are anything but literal strict compliance. Might it be that the issue of what degree of compliance the courts should require with the Wills Act is not as simple as Professor Langbein’s articles depict? Might it be that strict

¹¹⁵ *In re Will of Ranney*, 589 A.2d at 1342 (emphasis added). The Court goes on to repeat its conclusion and again uses the same phrase: “Consequently, the signatures of the witnesses on the subject self-proving affidavit do not literally comply with the statutory requirements.” *Id.* at 1343.

¹¹⁶ *In re Estate of Charry*, 359 So. 2d at 544–45; *In re Estate of Cutsinger*, 445 P.2d at 782.

¹¹⁷ *In re Estate of Cutsinger*, 445 P.2d at 782 (emphasis added).

¹¹⁸ *In re Estate of Petty*, 608 P.2d at 992–93 (emphasis added).

¹¹⁹ *In re Estate of Charry*, 359 So. 2d at 545.

compliance is not as strict, nor as harsh and relentless, as Professor Langbein's articles portray it?

D. Professor Langbein's Articles Revisited

At first blush it might seem odd that Professor Langbein did not acknowledge and analyze this inconsistent case law—case law that is clearly inconsistent with his overall characterization of how strictly the courts interpret and apply the Wills Act formalities. Upon further review, however, it becomes apparent that he did, in fact, acknowledge the inconsistent case law. He just did it so quickly, and so dismissively, that one could almost be excused for overlooking it.

In his *Substantial Compliance* article, Professor Langbein notes that a number of the soft, fact-sensitive formalities have proved problematic for the courts under strict compliance, so problematic that the courts “have produced a vast, contradictory, unpredictable and sometimes dishonest case law in which the courts purport to find literal compliance in cases which in fact instance defective compliance.”¹²⁰ The exact case law to which Professor Langbein is referring is unclear, but when the inconsistent case law above is juxtaposed with his overall description of how the courts interpret and apply the Wills Act formalities, one could only assume that his criticism applies to this inconsistent case law. Professor Langbein confirms this assumption, at least with respect to the conscious presence doctrine, in his *Harmless Error* article:

I have a particular reason for wanting an American readership to pause over these cases [a number of Australian cases he has just analyzed under the harmless error doctrine], even though the genre falls outside our familiar set of recurrent Wills Act execution blunders. I think these cases illustrate one of the great advantages of a harmless [sic] error rule: its tendency to displace *sleight-of-hand* and to promote candor. When I first wrote in 1975 about the likely consequences of a harmless error rule, I pointed out that the traditional strict compliance rule tended to drive sympathetic courts into strained interpretations of what constituted compliance with the relevant formality. In a presence case like *Groffman*, for example, where each witness was in the next room while the other attested, most courts invalidate the will. But not all. Some courts have squirmed and used the *fiction* of “conscious presence” to conclude that since the two witnesses were close enough for each other and for the testator to be conscious of their presence, their conduct satisfied the strict compliance standard. The trouble with *such tricks*

¹²⁰ See Langbein, *supra* note 9, at 525.

is that it is so hard to predict whether the equities in a particular case will prove sufficiently appealing to inspire the court to indulge in the pretense.¹²¹

It seems probable that Professor Langbein would likewise dismiss the opinions in *In re Estate of Charry*, *In re Estate of Petty*, *In the Matter of the Estate of Cutsinger*, and *In re Will of Leitstein* as more squirming by the courts to avoid the inequitable results imposed by literal strict compliance.

Professor Langbein's treatment of the inconsistent case law is interesting for several reasons. First and foremost, his description of the inconsistent case law is questionable. In the *Substantial Compliance* article, he summarily dismisses the case law with the following damning comment: "the courts purport to find literal compliance in cases which in fact instance defective compliance."¹²² In the *Harmless Errors* article he describes the conscious presence doctrine as a "fiction" that the courts use to find that the conduct in question "satisfied the strict compliance standard."¹²³

That is an overly simplistic, if not out-right flawed, description of the inconsistent case law. In *Demaris* the Oregon Supreme Court performed a thorough and detailed analysis of the issue. In doing so, the Court expressly acknowledged (1) the split in the case law;¹²⁴ (2) that the line of sight approach constituted the literal/strict compliance approach;¹²⁵ and (3) that it was rejecting literal compliance in favor of substantial compliance—a more liberal, more purposive, more intent-based approach.¹²⁶ The Oregon Supreme Court does *not* purport to *require* literal compliance, nor does the Court purport to *find* literal compliance. The Court openly adopts a more liberal approach to the Wills Act formality: the court-created substantial compliance approach commonly known as the conscious presence doctrine.¹²⁷ The Court applies that approach and finds that the

¹²¹ Langbein, *supra* note 13, at 27–28 (emphasis added) (footnotes omitted).

¹²² Langbein, *supra* note 9, at 525 (emphasis added).

¹²³ Langbein, *supra* note 13, at 28 (emphasis added).

¹²⁴ *In re Demaris' Estate*, 110 P.2d 571 (Or. 1941).

¹²⁵ *Id.* at 580–81.

¹²⁶ *Id.* at 581–87.

¹²⁷ *Id.* at 66 (referencing *Sturdivant v. Birchett*, 51 Va. 67 (1853)). The literal, strict compliance approach was brought to the court's attention. *See supra* note 116 and accompanying text. The courts rejected the literal strict compliance approach. *See supra* notes 116–19 and accompanying text. Professor Langbein's derogatory description and summary dismissal of the "contradictory, unpredictable and sometimes dishonest case law" is also interesting because the opinions adopt many of the same philosophical

execution ceremony sufficiently satisfied the Wills Act. The same can be said of the four opinions that upheld the will where the witnesses signed the self-proving affidavit rather than the attestation clause. The courts did *not* purport to find literal compliance; they expressly rejected the strict compliance approach as exalting form over substance.¹²⁸ Instead the courts expressly acknowledged (1) they were adopting more of a substantial compliance approach, and (2) that the witnesses had substantially complied with the Wills Act formality by signing the self-proving affidavit.¹²⁹

Professor Langbein's flawed description of the inconsistent case law is also important because it calls into question his overall description of the state of the law with respect to how strictly the courts insist on compliance with the Wills Act formalities. Professor Langbein's analysis of the issue assumes there were only two possible approaches: (1) traditional, literal/strict compliance, or (2) *his* substantial compliance approach. By summarily dismissing the inconsistent case law as "contradictory, unpredictable and sometimes dishonest case law"¹³⁰ Professor Langbein fails to consider whether the inconsistent case law might be evidence of yet a third approach, an approach that lies somewhere between traditional strict compliance and *his* proposed substantial compliance approach.¹³¹

arguments that Professor Langbein invokes in favor of his substantial compliance approach.

¹²⁸ See *supra* notes 116–19 and accompanying text.

¹²⁹ See *supra* notes 116–19 and accompanying text.

¹³⁰ Langbein, *supra* note 9, at 525.

¹³¹ As a curative doctrine, substantial compliance is not limited to the Wills Act. Substantial compliance can be—and has been—applied to a plethora of rules, including the Statute of Frauds (*e.g.*, 2 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 366–82, 420–43 (1950)); state contractor licensing requirements (*e.g.*, Lawrence Jennings Imel, *Substantial Compliance with the Contractors' State License Law: An Equitable Doctrine Producing Inequitable Results*, 34 LOY. L.A. L. REV. 1539, 1545–1555 (2001)); tax law valuation elections (*e.g.*, Victoria A. Levin, *The Substantial Compliance Doctrine in Tax Law: Equity vs. Efficiency*, 40 UCLA L. REV. 1587 (1993)); government contracts (*e.g.*, William H. Venema, *Substantial Compliance in Fixed-Price Supply Contracts: A Call for Commercial Reasonableness*, 17 PUB. CONT. L.J. 187, 191–208 (1987)); the rules of civil procedure (*e.g.*, 71 C.J.S. *Pleading* § 95 (2017)); mechanic's liens (*e.g.*, *Grant v. Davis (In re CJW Ltd.)*, 172 B.R. 675, 684 (Bankr. M.D. Fla. 1994)); absentee voting requirements (*e.g.*, William T. McCauley, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U. MIAMI L. REV. 625, 636 (2000)); insurance contract change of beneficiary compliance (*e.g.*, *Teachers Ins. & Annuity Ass'n of Am. v. Bernardo*, 683 F. Supp. 2d 344, 352 (E.D. Pa. 2010)); ERISA change of beneficiary compliance (*e.g.*, Meridith H. Bogart, *State Doctrines of Substantial Compliance: A Call for ERISA Preemption and Uniform Federal Common Law Doctrine*, 25 CARDOZO L. REV. 447,

E. Other Evidence of a Possible Third Approach?

Asking whether the conscious presence doctrine and the case law upholding a will where the witnesses sign the self-proving affidavit rather than the will constitute a possible third approach to the issue of Wills Act compliance, admittedly, is a bit of a stretch. One doctrine and a handful of cases hardly constitute an approach, but it is enough to ask whether there might be other evidence—other case law—that is consistent with this third approach. Is there other case law where the courts (1) reject literal strict compliance (either expressly or implicitly), and (2) adopt a substantial compliance approach (either expressly or implicitly) to the Wills Act formality in question? When viewed from that analytical perspective, the perspective of asking whether the case law might be evidence of a formality based, court-created substantial compliance approach, the amount of case law supporting such an approach is surprising.

469–73 (2003); and the SEC’s Regulation D (*e.g.*, Mark A. Sargent, *The New Regulation D: Deregulation, Federalism and the Dynamics of Regulatory Reform*, 68 WASH. U. L.Q. 225 (1990)).

Arguing that substantial compliance should apply begs the question: What constitutes substantial compliance? Not surprisingly, opinions differ. Substantial compliance runs the gamut. As awkward as it sounds at first blush, some scholars and courts take a narrower/more limited/stricter view of substantial compliance, while others take a broader/more liberal/looser view of substantial compliance. Some scholars and courts take a more purposive approach to what constitutes substantive compliance, while others also factor in how close factually the party comes to literal compliance. Some scholars and courts take a single consideration approach, while others take multiple variables into consideration in analyzing what constitutes substantial compliance. The Michigan Supreme Court recently acknowledged the complexity inherent in articulating a substantial compliance standard:

The scope of a statutory “substantial compliance” provision requires an analysis, on a case-by-case basis, of the following logically relevant factors among others: the overall purpose of the statute; the potential for prejudice or unfairness when the apparent clarity of a statutory provision is replaced by the uncertainty of a “substantial compliance” clause; the interests of future litigants and the public; the extent to which a court can reasonably determine what constitutes “substantial compliance” within a particular context; and, of course, the specific language of the “substantial compliance” and other provisions of the statute.

Northern Concrete Pipe, Inc. v. Sinacola Companies-Midwest, Inc., 603 N.W.2d 257, 260–61 (Mich. 1999). What the test should be for substantial compliance is far from clear or universally agreed upon. There are plenty of examples of other areas of law where the courts and scholars agree that substantial compliance should apply, but disagree over what the test should be. That, arguably, is the current state of affairs with respect to the Wills Act. The courts have developed one approach, flexible strict compliance, while Professor Langbein proposed a different approach.

1. *The Requirement that the Testator Publish the Will*

Historically, although neither the English Statute of Frauds nor the English Wills Act required a testator to publish his or her will to the witnesses as part of the execution ceremony,¹³² many American jurisdictions did.¹³³ Not surprisingly, a variety of execution scenarios arose where it was questionable whether the testator had published the document to the witnesses. Consistent with Professor Langbein's portrayal of the state of the law, some courts adopted an approach that required "literal compliance" with the requirement:

Literal compliance with regard to publication means that 'in the presence of 2 witnesses present at the same time' there must be some conscious indication by the testator, unmistakable in its import, that the act he is about to perform is, or the act he has performed was, the signing of his last will and testament. The declaration may take the form of an expression by the testator himself to the required effect; or it may be a statement by the scrivener or some one else acting for the testator in his presence and positively acquiesced in by the testator, that the testator's last will is about to be signed or has been signed by him.¹³⁴

On the other hand, a number of courts rejected the strict compliance approach and instead adopted a substantial compliance approach. As the Montana Supreme Court stated:

Our conclusion in this matter is borne out by the following authorities: . . . Mr. Schouler in his work on Wills, § 326, says this: "A declaration before the witnesses in express terms that the instrument is one's last will best satisfies the statute; but less than this is considered acceptable, provided that in some way the testator makes this fact known by acts or conduct, or, better still, by words. And, bearing in mind that the main object of such legislation is to repel fraud and establish a bona fide testament, *we may assume that a substantial rather than a literal compliance with the statute formalities is sufficient.*" See, also, 30 Am. & Eng. Ency. of Law (2d Ed.) p. 589.¹³⁵

The Montana Supreme Court's opinion is important for several reasons. First, it constitutes further evidence of a possible third

¹³² RICHARD T. BOWSER & JAMES B. MCLAUGHLIN, JR., 1 WIGGINS WILLS & ADMINISTRATION OF ESTATES IN NORTH CAROLINA, § 8:8 THE TESTATOR'S REQUEST OF WITNESSES TO SIGN (4th ed. 2016); John B. Rees, Jr., *American Wills Statutes: I*, 46 VA. L. REV. 613, 620–21 (1960).

¹³³ BOWSER & MCLAUGHLIN, *supra* note 132; HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 1077 (3d ed. 1975).

¹³⁴ *In re Hale's Will*, 121 A.2d 511, 518 (N.J. 1956).

¹³⁵ *In re Miller's Estate*, 97 P. 935, 941–42 (Mont. 1908) (emphasis added).

approach to the issue of how strictly a testator must comply with the Wills Act formalities. Yet again the courts adopted their own substantial compliance approach to the formality. Second, the opinion is important because the Court does not purport to find literal compliance. Nor is the Court squirming to find that the conduct in question satisfies the strict compliance standard. The Montana Supreme Court expressly rejects literal compliance as the applicable test and instead adopts and applies substantial compliance to the publication formality. Finally, this is not an isolated example of a court losing its judicial fortitude with respect to the publication requirement when faced with compelling equities. In fact, a “large majority” of the jurisdictions that required publication accepted substantial compliance.¹³⁶

2. *The Order of Signing Requirement*

The phrasing of a typical Wills Act for a formal will sets forth three core requirements: there must be (1) a writing, (2) that is signed or acknowledged by the testator in the presence of two or more witnesses, and (3) the writing must be signed by the witnesses.¹³⁷ The phrasing implies that the testator should sign the will before the witnesses, and typically a testator does sign the will before the witnesses, but *must* the testator sign first? What if the witnesses sign before the testator? Does that *per se* invalidate the execution ceremony? In *Marshall v. Mason*,¹³⁸ the Massachusetts Supreme Court ruled that “good sense and the plain meaning of the words of the statute” dictate that the testator must sign the will first.¹³⁹ The Court’s reasoning and holding are classic examples of the literal strict compliance approach to the Wills Act formalities.

On the other hand, in *Waldrep v. Goodwin*,¹⁴⁰ the Georgia Supreme Court expressly overruled its prior plain meaning/strict compliance precedents and adopted a more liberal approach. The Court reasoned that “when all parties sit at the same table and affix

¹³⁶ BOWSER & MCLAUGHLIN, *supra* note 132; W.R. Habeeb, *Sufficiency of Publication of Will* § 5[a] *Substantial or Literal Compliance—Generally*, 60 A.L.R.2d 124 (1958).

¹³⁷ *See, e.g.*, Wills Act of 1837, 1 Vict., c. 26 (Eng.). The Act had great influence over many American jurisdictions. UNIF. PROBATE CODE § 2-502 (1969) (reducing the formalities associated with the Wills Act and loosening up some of the remaining formalities, but still maintaining the basic structure and core formalities).

¹³⁸ 57 N.E. 340, 340 (Mass. 1900).

¹³⁹ *Id.*

¹⁴⁰ 195 S.E.2d 432, 434–35 (Ga. 1973).

their signatures in the presence of each other” as part of “the same continuous transaction” the witnesses can satisfy the Wills Act requirement that they “attest and subscribe in the presence of the testator” even if the witnesses sign the will before the testator.¹⁴¹ A number of other courts have similarly held that the order of signing is unimportant so long as “the whole transaction is substantially contemporaneous”¹⁴² The approach that the order of signing is irrelevant so long as all of the parties sign the will before anyone leaves the room and everyone signs as part of one continuous execution ceremony, is nothing more than yet another example of a court-created form of substantial compliance with respect to the Wills Act formalities.¹⁴³

3. *The Requirement that the Testator Sign the Will at the End*

Historically, many Wills Acts required the testator to “subscribe” or sign at the end of the will.¹⁴⁴ Some courts, applying a literal strict compliance approach, expressly required the testator to sign at the logical end of the will—e.g., on the signature line for the testator if the will had one.¹⁴⁵ Under the literal strict compliance approach, if the testator happened to write his or her name in the attestation clause below the signature line, under the strict compliance approach the will would be invalid because the testator had not signed at the end of the will.¹⁴⁶

On the other hand, a number of courts adopted a more purposive, intent-based substantial compliance approach to the requirement. Under this approach, so long as the testator wrote his or her name

¹⁴¹ *Id.* at 435.

¹⁴² *Hopson v. Ewing*, 353 S.W.2d 203, 206 (Ky. 1961); *see also* *Estate of Lee*, 37 Cal. Rptr. 572 (Cal. Ct. App. 1964); *Conway v. Conway*, 153 N.E.2d 11 (Ill. 1958); *Wilkinson v. White*, 334 P.2d 564 (Utah 1959).

¹⁴³ One can make a strong case that the one continuous transaction or one whole transaction test is nothing more than a substantial compliance alternative to an otherwise strict compliance analysis.

¹⁴⁴ The English Statute of Frauds did not proscribe a location, but many American states nonetheless did. HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY* § 1076 (3d ed. 1975) (“The statutes of a number of states, however, require the testator to ‘subscribe’ the will, or contain some other express requirement that the signature appear at the end of the will”).

¹⁴⁵ *See* *Sears v. Sears*, 82 N.E. 1067 (Ohio 1907).

¹⁴⁶ *Id.*; *see also* *In re Estate of Bond*, 153 P.2d 912 (Kan. 1944); *Weiss Estate*, 279 A.2d 189 (Pa. 1971); *Churchill’s Estate*, 103 A. 533 (Pa. 1918); *Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1958).

below all of the dispositive provisions in the will, the testator signed at the end of the will—even if the testator wrote his or her name in the attestation clause.¹⁴⁷ As the Oklahoma Supreme Court said: “‘To reach a different conclusion would in our opinion, be unnecessarily *raising form above substance* to destroy a document that was undoubtedly the will of the testatrix.’”¹⁴⁸ Moreover, the Court expressly acknowledged that the testator’s act of writing his name in the attestation clause rather than on the signature block line “constituted a substantial and sufficient compliance with the statute”¹⁴⁹ This approach shows yet more evidence of a strict versus substantial compliance split with respect to the degree of compliance the courts historically have required.

4. If the Testator Fails to Sign at the End of the Will as Required

In those jurisdictions where the Wills Act required the testator to sign at the end of the will, where the testator signed the will before the end, an issue arises as to whether the whole document should be void or just the provisions after the testator’s signature. The courts split yet again between those that adopted more of a literal strict compliance approach that voided the entire will,¹⁵⁰ and those that

¹⁴⁷ *Coplin v. Anderson*, 281 P.2d 186–88 (Okla. 1955) (acknowledging that the testator’s writing his name in the attestation “constituted a substantial and sufficient compliance with the statute”); *see also* *Estate of Tonneson*, 185 P.2d 78 (Cal. Dist. Ct. App. 1947); *Gardner v. Balboni*, 588 A.2d 634, 638 (Conn. 1991) (citing *McCue v. Turner*, 68 S.W.2d 415 (Ky. 1934)); *Lucas v. Brown*, 219 S.W. 796 (Ky. 1920); *In re Drake’s Will*, 192 A. 428 (N.J. Orphans Ct. 1937); *Younger v. Duffie*, 94 N.Y. 535 (1884); *In re Eyett’s Will*, 209 N.Y.S. 251 (Sur. Ct. 1925); *In re Noon’s Will*, 65 N.Y.S. 568 (Sur. Ct. 1900) (discussing a signature within attestation clause); *Coplin v. Anderson*, 281 P.2d 186 (Okla. 1955); *In re Miller Will*, 200 A.2d 284 (Pa. 1964); *Gale v. Freeman*, 141 N.W. 226 (Wis. 1913) (discussing the testator’s signature appearing after attestation clause). *See generally* Thomas J. Goger, Annotation, *Wills: When is Will Signed at “End” or “Foot” as Required by State*, 44 A.L.R.3d 735 § 15[b] (1972).

¹⁴⁸ *Coplin*, 281 P.2d at 189 (quoting *Estate of Chase*, 124 P.2d 895, 900 (Cal. Dist. Ct. App. 1942)).

¹⁴⁹ *Id.* at 187.

¹⁵⁰ *See* *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N.Y. 409 (1876); *In re Winter’s Will*, 98 N.Y.S.2d 312 (App. Div. 1950) (discussing how administrative clause appointing executors is below testator’s signature, whole will is invalid under Wills Act requirement that testator sign the end of the will); *In re Estate of Tyner*, 245 N.Y.S. 206 (Sur. Ct. 1930) (acknowledging that the court was applying strict compliance “to the end that no opening wedge may be driven into the protecting barrier against fraud and imposition which it interposes”); *Appeal of Wineland*, 12 A. 301 (Pa. 1888) (acknowledging English authority for more of a substantial compliance approach to the issue: “I am aware that our act of 1833 closely resembles the statute of 1 Vict. c. 26, and that some English authorities seem to sanction the doctrine contended for by the appellees. It is said, in *Williams, Ex’rs* 69, in commenting upon the above statute of Vict., and its

adopted a more liberal, intent-based “substantial compliance” approach that voided only as much of the document as was below the signature (thereby *de facto* putting the signature at the end of the will):

Where the signature is placed at the close of the substantial provisions of the document, and the writing as signed is sufficient to effectuate the intention of the party signing it, *the statute is substantially complied with*, although there may be words following the signature which are unessential to the validity of the instrument.¹⁵¹

That quote from the Kentucky Supreme Court is important because it evidences yet another court-created substantial compliance approach to a Wills Act formality. It is also important because the Court is not purporting to find literal compliance, nor is the Court squirming to find that the conduct in question satisfies the strict compliance standard. The Court expressly acknowledges that it is adopting and applying a substantial compliance approach as the better approach.

5. *The Requirement that a Holographic Will Be Entirely Handwritten*

The court-created substantial compliance doctrines are not limited to attested wills. Many courts have adopted the same liberal, intent-based substantial compliance approach to some of the Wills Act formalities for a holographic will.¹⁵² Historically, the holographic Wills Act required the document to be entirely in the testator’s

supplement of 15 Vict. c. 24, that ‘in order to get rid of the objection that the will was not signed at the foot or end thereof, the court, in some cases, has thought itself justified in regarding a portion running below the signature as forming no part of the will, and granting probate exclusive of that portion.’”).

¹⁵¹ Ward v. Putnam, 85 S.W. 179, 182 (Ky. 1905) (emphasis added); *see also* In re Gibson’s Will, 128 A.D. 769, 771–72 (N.Y. 1908) (acknowledging the requirement that the will be signed at the end must be strictly construed, where testator added handwritten interlineation to will that was legally immaterial but part of which ran physically below where testator subsequently signed the will, the court upheld the will invoking the “spirit” of the statute and rejecting a “technical” construction and application of the statute); Baker v. Baker, 37 N.E. 125 (Ohio 1894) (discussing how the court took more of an intent-based approach).

¹⁵² Only about half of the states permit holographic wills. Kevin R. Natale, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 161 (1988). Inasmuch as the paradigm holographic will scenario inherently assumes a layperson creates the will, some courts have reasoned that it makes more sense to apply a substantial compliance approach to execution issues than strict compliance. *See* Estate of Black, 641 P.2d 754, 755–56 (Cal. 1982).

handwriting.¹⁵³ Literal strict compliance should have meant that if there was any material on the will that was not in the testator's handwriting, the will was invalid.

Yet from the earliest cases virtually all courts reasoned that when the legislature provided that a holographic will must be "entirely" or "wholly" in the testator's handwriting, the legislature did *not* use the term in its "absolute, utter and rigidly uncompromising sense."¹⁵⁴ Instead, the courts fashioned a more common sense substantial compliance approach.¹⁵⁵ Using either an intent-based approach (so long as the testator did not intend to incorporate the non-handwritten material on the paper, the non-handwritten material could be ignored and the will would still be valid)¹⁵⁶ or the more liberal surplusage approach (so long as the non-handwritten material was not essential to the validity or meaning of the will, the non-handwritten material could be ignored and the will would still be valid),¹⁵⁷ the courts reasoned that, inasmuch as holographic wills were intended to be drafted and executed by the layperson, it made more sense to apply a substantial compliance approach than a literal compliance approach. In time, the Uniform Probate Code codified the surplusage approach by changing the requirement from the entire will must be in the testator's handwriting to only the material provisions must be in the testator's handwriting.¹⁵⁸

6. *The Requirement that a Holographic Will Be Dated*

The courts faced a similar issue with the traditional requirement that a holographic will be dated. Because the early holographic Wills Act typically required that the holographic will be (1) dated, and (2) entirely in the testator's handwriting, the courts could not use either the intent approach or the surplusage approach where the will's date

¹⁵³ Natale, *supra* note 152, at 159; Miller, *supra* note 2, at 212.

¹⁵⁴ *In re Estate of Billings*, 1 P. 701 (Cal. 1884); *Bell v. Timmins*, 58 S.E.2d 55, 59 (Va. 1950); *see also* Miller, *supra* note 2, at 213 (discussing how strict construction of the handwriting requirement could invalidate a holograph containing typed or preprinted matter, even if the non-handwritten material was unrelated to the substance of the will).

¹⁵⁵ *Timmins*, 58 S.E.2d at 59–60 (emphasis added) ("It is not my disposition to relax at all the requirements of the statute, but merely to do what we do freely in the matter of construction and other fields of law give the statute a sound and fair construction and rigidly insist upon *substantial compliance* with its requirements.").

¹⁵⁶ Richard Lewis Brown, *The Holographic Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 101–04 (2006); Natale, *supra* note 152, at 171–73.

¹⁵⁷ Natale, *supra* note 152, at 173–76; Brown, *supra* note 158, at 104–10.

¹⁵⁸ UNIF. PROBATE CODE § 2-502(a)(3) (amended 1990), 8 U.L.A (1998).

was incomplete or not completely in the testator's handwriting.¹⁵⁹ The issue was presented front and center in *In re Hail's Estate*.¹⁶⁰ The decedent, John D. Hail, handwrote out what purported to be a holographic will, but all he wrote for the date was "November, 1919."¹⁶¹ The Court's analysis includes a discussion of the state of the law with respect to the issue, and not surprisingly that analysis acknowledges a split in the law:

The sole question to be passed on in this case is: Does the omission of the day of the month in the date to said will invalidate it, and justify the court in denying it probate as the last will and testament of John D. Hail, deceased? . . . The reading of these authorities cited by respective counsels, as well as independent research on our part, shows that there are two well-defined rules of construction. *One may be defined as that line which holds to a strict compliance with the statute, and the other that holds that a substantial compliance with the statute is all that is required.*¹⁶²

The Oklahoma Supreme Court adopted the substantial compliance approach.¹⁶³

The Court's opinion is important not only because it provides further evidence of a court-created substantial compliance approach, it also calls into question Professor Langbein's characterization of the inconsistent case law. The Court is not "purport[ing] to find literal compliance,"¹⁶⁴ nor is the Court squirming to find that the conduct in question satisfies the strict compliance standard. The Oklahoma Supreme Court expressly rejects strict compliance as the applicable test and instead adopts and applies substantial compliance to the holographic Wills Act formality that the will be dated. Nor is the Court's holding an isolated ruling by a court losing its judicial fortitude in the face of compelling equities. The split in the case law shows that the intent-based, purposive, substantial compliance approach to the formality in question was a widely recognized and widely accepted approach.

¹⁵⁹ Miller, *supra* note 2, at 212; Natale, *supra* note 152, at 159.

¹⁶⁰ 235 P. 916 (Okla. 1923).

¹⁶¹ *Id.* at 917.

¹⁶² *Id.* (emphasis added).

¹⁶³ *Id.* at 921.

¹⁶⁴ See *supra* note 124 and accompanying text.

7. *Post-Death Attestation*

Historically, most American Wills Acts were based on either the English Statute of Frauds of 1677, or the Wills Act of 1837.¹⁶⁵ Both statutes expressly require the witnesses to sign the will in the testator's presence.¹⁶⁶ The requirement that the witnesses sign in the testator's presence implicitly, if not expressly, imposed a temporal requirement that the witnesses had to sign the will immediately after the testator signed the will and while the testator was alive.¹⁶⁷ Where a testator was not conscious of the fact that the witnesses were signing because he or she is unconscious, asleep, or dead, the will was invalid because the witnesses had not signed in the testator's presence.¹⁶⁸

In 1969 the Uniform Law Commission revised the Uniform Probate Code to facilitate the valid execution of a will.¹⁶⁹ Several traditional Wills Act formalities were eliminated,¹⁷⁰ including the requirement that the witnesses had to attest in the presence of the testator (or each other).¹⁷¹ That revision created a latent ambiguity:

¹⁶⁵ Herbert E. Tucker et al., *Holographic and Nonconforming Wills: Dispensing with Formalities—Part I*, 31 COLO. LAW. 57, 57 (2002); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994); Anne-Marie Rhodes, *Notarized Wills*, 27 QUINNIPIAC PROB. L.J. 419, 419–20 (2014).

¹⁶⁶ Wills Act of 1837, 7 Wm. 4 & 1 Vict. ch. 26, 217 (1837); The Statute of Frauds of 1677, 29 Car. II., ch. 3 § 5 (1676); see also James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547–48 (1990).

¹⁶⁷ The two traditional tests for the testator's presence are the line of sight test and the conscious presence test. Both inherently include the notion that the testator is physically present, though to slightly different degrees, but nonetheless that the testator is within the immediate vicinity of the witnesses when they sign and is consciously aware of what the witnesses are doing. W.W. Allen, *What Constitutes the Presence of the Testator in the Witnessing of his Will*, 75 A.L.R.2d 318 (1961) (“Undoubtedly, to be effective the signing by the witnesses must occur in the testator's conscious presence.”). Where a testator who is not conscious of the fact that the witnesses are signing because he or she is unconscious, asleep or dead, the will was not executed in the testator's presence.

¹⁶⁸ *Maturiz Estate*, 20 Pa. D. & C.2d 692, 694 (C.P. 1959) (“[T]he subscription is not made in the testator's presence, if at the time of subscribing, from sleep or other cause, he is unconscious of the act of subscribing”) (citation omitted).

¹⁶⁹ *In re Estate of Peters*, 526 A.2d 1005, 1010 (N.J. 1987) (acknowledging that several traditional Wills Act formalities were eliminated).

¹⁷⁰ UNIF. PROBATE CODE § 2-502(a)(3) cmt. (amended 1990) 8 U.L.A. 144 (1998) (“The formalities for execution of a witnessed will have been reduced to a minimum.”); Stephanie J. Willbanks, *Parting Is Such Sweet Sorrow, But Does It Have to Be So Complicated? Transmission of Property at Death in Vermont*, 29 VT. L. REV. 895, 934 (2005).

¹⁷¹ UNIF. PROBATE CODE § 2-502 (amended 1990), 8 U.L.A. 144 (1998); see also *In re Estate of McGurrin*, 743 P.2d 994, 998 (Idaho 1987).

By using the verb “witnessed,” and by directing this verb toward certain antecedent acts of the testator, the drafters of section 2-502 plainly contemplated

inasmuch as the new UPC Wills Act was silent as to when an attesting witness must sign the will, if the witnesses did not sign when the testator signed or acknowledged, how much later could the witnesses sign? In particular, could the witness sign after the testator died? Some courts, favoring a bright-line test, adopted a strict compliance approach that the witnesses must sign the will before the testator dies.¹⁷²

Other courts adopted a more purposive approach to the issue. In *In re Estate of Peters*, the New Jersey Supreme Court acknowledged that New Jersey was a strict compliance jurisdiction,¹⁷³ but the Court also quoted at length Professor Langbein's arguments in favor of substantial compliance. The Court expressly adopted a purposive approach to the issue¹⁷⁴ and construed the statute as requiring that the witnesses must attest the will within a reasonable period of time after the will's execution,¹⁷⁵ even if that occurred after the testator's death.¹⁷⁶ Permitting post-death attestation, so long as it is within a reasonable time of the testator's death, is nothing more than substantial compliance as opposed to the bright-line, strict compliance approach that the witnesses must sign before the testator dies.¹⁷⁷

that at least one of these enumerated acts would occur where it could, in fact, be "witnessed." After such an act had been "witnessed," it became immaterial whether the witnesses added their signatures to the will in the testator's presence or elsewhere. Accordingly, the clause in earlier drafts, requiring the will to "be signed by [the] witnesses in the presence of the testator," was dropped.

Id.

¹⁷² See *Estate of Saueressig*, 136 P.3d 201 (Cal. 2006); *In re Estate of Flicker*, 339 N.W.2d 914 (Neb. 1983); *Rogers v. Rogers*, 691 P.2d 114, 115 (Or. Ct. App. 1984).

¹⁷³ 526 A.2d at 1008, 1014.

¹⁷⁴ *Id.* at 1011 ("Resolution of the issue of when the witnesses must sign the will in relation to their observations of the execution of the will by the testator follows from the *purpose of the requirement* that the will be signed. Because, as noted, the signatory function *serves an evidentiary purpose*, the signatures of the witnesses would lose probative worth and tend to fail of this purpose if the witnesses were permitted to sign at a time remote from their required observations as witnesses By implication, the statute requires that the signatures of witnesses be affixed to a will *within a reasonable period of time* from the execution of the will.") (emphasis added).

¹⁷⁵ *Id.* at 1010–11.

¹⁷⁶ *Id.* at 1013 (holding that a delay of fifteen months between when the testator signed the will and when the witnesses signed the will was too long).

¹⁷⁷ The UPC subsequently codified the position permitting post-death attestation so long as it is within a reasonable time period. See UNIF. PROBATE CODE § 2-502(a)(3) (amended 1990), 8 U.L.A. 144 (1988).

F. The Case for Flexible Strict Compliance

When taken together, the number of doctrines that expressly or *de facto* adopt and apply a substantial compliance approach to the Wills Act formalities is striking.¹⁷⁸ No doubt literal strict compliance can be harsh and relentless, but the number and variety of court-created substantial compliance doctrines that find a way to validate a will that literal strict compliance would invalidate is impressive, particularly when juxtaposed with Professor Langbein's characterization of the state of the law.

Proving that the courts have created a number of doctrines that are either expressly or *de facto* substantial compliance approaches over the years is, however, only the first step. The question is whether they can be synthesized into a coherent and defensible approach to the issue of compliance with the Wills Act formalities. Unless the doctrines can be synthesized, they remain just a number of isolated, ad hoc, disparate doctrines adopted to promote testator's intent in a particular setting.

III

FLEXIBLE STRICT COMPLIANCE VS. SUBSTANTIAL COMPLIANCE

It is unclear how much of the court-created substantial compliance case law Professor Langbein had in mind when he summarily dismissed the case law in his *Substantial Compliance* and *Harmless Error* articles. It is unclear whether the quantity of case law that either expressly or *de facto* adopts a substantial compliance approach would give him cause to reconsider. Between the *Substantial Compliance* and the *Harmless Error* articles, he depicts the case law as dishonest, stating that the courts use "sleight-of-hand" and trickery to find strict compliance where there is none: "a vast, contradictory, unpredictable and sometimes dishonest case law in which the courts purport to find literal compliance in cases which in fact instance defective compliance."¹⁷⁹

¹⁷⁸ See 2 PAGE ON THE LAW OF WILLS § 19.4, at 14–15 n.20 (3d ed. 2003) (acknowledging and citing to a number of courts that had adopted and applied a substantial compliance approach). This acknowledgment is not the result of Professor Langbein's substantial compliance proposal. Earlier editions of the treatise which pre-date Professor Langbein's *Substantial Compliance* article clearly and expressly acknowledge that a number of courts had adopted and applied substantial compliance; see also 1 PAGE ON THE LAW OF WILLS § 233, at 407 n.14 (2d ed. 1926).

¹⁷⁹ See Langbein, *supra* note 9, at 525; see also Langbein, *supra* note 13, at 27–28.

If that truly is the reason Professor Langbein summarily dismissed the inconsistent case law, one would hope that he would reconsider his position.¹⁸⁰ The body of case law that either expressly or *de facto* adopts a substantial compliance approach and that does *not* purport to find literal compliance is substantial.¹⁸¹ That being said, one can still question the honesty of the case law. Is it dishonest for a court to apply one approach to certain Wills Act formalities in certain scenarios and a different approach to the same or other Wills Act formalities in other scenarios? Would it be more honest to either apply substantial compliance across the board to all Wills Act formality issues, as Professor Langbein proposes, or not apply it at all, as literal strict compliance advocates? Is the only difference between Professor Langbein's substantial compliance and flexible strict compliance that, under the latter, the courts pick and choose when to apply substantial compliance, while Professor Langbein applies substantial compliance universally to all Wills Act compliance issues?

Or might it be that there is something more complicated going on?

A. Professor Langbein's Substantial Compliance Proposal

1. The Analytical Steps

Professor Langbein's substantial compliance proposal adopts a rather holistic approach to the analysis, focusing more on the Wills Act and its purposes than the formalities:

The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent's testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?¹⁸²

There are three core Wills Act formalities for a formal will: the writing, the signature, and the attestation.¹⁸³ These three core

¹⁸⁰ Much, if not most, of the case law does *not* purport to find literal compliance. Instead the courts reject the strict compliance approach in favor of a substantial compliance approach. The courts then typically found that the execution ceremony in question substantially complied with the Wills Act formality in question and that was good enough. *See supra* notes 97–103, 110–19, 132–77 and accompanying text.

¹⁸¹ *See supra* notes 97–103, 110–19, 132–77 and accompanying text.

¹⁸² Langbein, *supra* note 9, at 489.

¹⁸³ Joseph M. Mentrek, *Estate Planning in a Digital World*, 19 OHIO PROB. L.J. 195 (2009) (“The requirement that a will be in writing, signed in the presence of witnesses, has existed for hundreds of years.”); EST. PLAN. LAW & TAX ¶ 1.07 (“Typical requirements

formalities have spawned a plethora of additional formalities. The Wills Act involved in the *Groffman* case is a classic example of the multitude of formalities that may exist in a Wills Act:

[N]o will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.¹⁸⁴

The phrasing of Professor Langbein's substantial compliance proposal de-emphasizes the individual formalities as distinct requirements and shifts the focus to testator's intent and the "purposes of the Wills Act."¹⁸⁵

2. Does the Document Express Testamentary Intent?

Assuming a noncomplying document, the first step under Professor Langbein's substantial compliance doctrine is to analyze whether the will proponent can prove, by a preponderance of the evidence, that the "document express[es] the decedent's testamentary intent."¹⁸⁶ That analytical step is noncontroversial. It is well accepted that all wills, formal or holographic, must express testamentary intent.¹⁸⁷

3. Does the Document's Form Approximate Wills Act Formality?

Assuming, *arguendo*, it can be proved that the defectively executed instrument expresses the decedent's testamentary intent, then

include that the will be in writing, signed by the testator, and witnessed by persons who sign the will as witnesses in the testator's presence.").

¹⁸⁴ See *In re Groffman*, [1969] 1 W.L.R. 733, [1969] 2 All E.R. 108 (Q.B.).

¹⁸⁵ *Supra* note 182 and accompanying text.

¹⁸⁶ Langbein, *supra* note 9, at 489.

¹⁸⁷ Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 569, 571 (2016). Historically testamentary intent, as a practical matter, asked whether the decedent intended the document to be his or her will. *Id.* at 572–74. If the decedent intended the document to be his or her last will and testament, it follows logically that the document expresses the decedent's testamentary wishes. *Id.* The nuanced issue with respect to testamentary intent is whether the decedent must have intended for that piece of paper to be probated as his or her will or whether it is sufficient that the document expresses the decedent's testamentary wishes even if he or she did not intend for that piece of paper to be probated as his or her will. The former view of testamentary intent constitutes the more traditional, strict compliance approach to testamentary intent, while the latter articulation constitutes the modern trend, more intent-based approach. For a more detailed and more interesting analysis of the issue, see generally *id.*

Professor Langbein proposes that the analysis shift to whether the noncomplying document's "*form* sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act[.]"¹⁸⁸ When put under the analytical microscope, that analytical step is more of a change in the law than it appears. Under Professor Langbein's substantial compliance proposal, the disparate Wills Act formalities are bundled together: "[D]oes [the document's] form sufficiently approximate Wills Act *formality* to enable the court to conclude that it serves the purposes of the Wills Act?"¹⁸⁹ The focus is not on the parties and how close they came to meeting the requirements of the formality in question. Nor is the focus on the formality *per se*. Instead the focus shifts to the document's *form* and whether that *form* sufficiently approximate Wills Act *formality* to enable the court to conclude that the document's *form* serves the purposes underlying the Wills Act. First, it is unclear exactly what Professor Langbein means by the document's *form*. Second, it is unclear exactly what Professor Langbein means by the phrase Wills Act *formality*—singular. The logical assumption is that he is not referring to the individual formalities *per se* but rather to the traditional formalistic approach with which the courts have historically approached the issue.¹⁹⁰ Assuming, *arguendo*, that is the intended meaning, it is far from clear when a noncomplying document's *form* would sufficiently approximate that formality to enable the court to conclude that it serves the purposes of the Wills Act.¹⁹¹ The practical effect of the analytical complexity is to shift the focus more to the final step of the analysis: whether the document's form serves the purposes of the Wills Act. That obviously gives rise to the simple question: What are the purposes of the Wills Act?

4. The Functional Approach to the Purposes of the Wills Act

Professor Langbein starts his analysis of the policies served by the Wills Act by stating that "[t]he first principle of the law of wills is freedom of testation."¹⁹² Shortly thereafter he asserts that a "tension

¹⁸⁸ Langbein, *supra* note 9, at 489 (emphasis added).

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ See Langbein, *supra* note 9, at 497; Langbein, *supra* note 13, at 1, 4–7.

¹⁹¹ Lindgren, *supra* note 6, at 1014 (acknowledging the difficulty the Queensland, Australia, courts had implementing Professor Langbein's substantial compliance approach); see also Langbein, *supra* note 13, at 1.

¹⁹² Langbein, *supra* note 9, at 491.

is apparent between this principle of ‘free testation and the stiff, formal’ requirements of the Wills Act.’”¹⁹³ The implicit assertion is that, to the extent the formalities conflict with the “first principle of . . . freedom of testation[,]” the formalities should yield to testamentary freedom if they cannot be justified—not just as an academic matter, but as applied to any given will offered for probate.¹⁹⁴ If a formality stands in the way of promoting testamentary intent, and the formality cannot be justified under the circumstances of the case, the formality should yield: the court should dispense with the formality and probate the will. Professor Langbein’s substantial compliance and harmless error approaches reflect this philosophical approach.

Professor Langbein’s discussion of the underlying policies then shifts to the *functions* served by the Wills Act. Professor Langbein cites to, adopts, and elaborates on the functional approach first set forth in the classic article by Gulliver and Tilson.¹⁹⁵ Gulliver and Tilson first articulated three functions served by the Wills Act: the ritual function, the evidentiary function, and the protective function.¹⁹⁶ Professor Langbein added a fourth: the channeling function.¹⁹⁷ While the functions are important and constitute a well-recognized approach to the benefits of the Wills Act formalities, Professor Langbein’s discussion naturally gives rise to some questions as to the relationship of the different abstract terms and concepts being analyzed. What exactly is the relationship between testamentary intent and the functions served by the Wills Act formalities? Is testator’s intent *a* first principle of the law of wills or *the* first principle? Are the functions in and of themselves policy considerations, or are the functions designed to serve the public policy considerations?¹⁹⁸

¹⁹³ *Id.* at 491–92; cf. Horton, *supra* note 7, at 575 (“[S]cholars sometimes argue that formalism safeguards intent indirectly. Because testators and their attorneys have the axe of strict compliance hanging over their heads, they must be meticulous.”).

¹⁹⁴ Langbein, *supra* note 9, at 491.

¹⁹⁵ *Id.* at 492–98 (citing and discussing Gulliver & Tilson, *supra* note 7).

¹⁹⁶ Gulliver & Tilson, *supra* note 7, at 513; Anne-Marie Rhodes, *supra* note 167, at 419–20.

¹⁹⁷ Langbein, *supra* note 9, at 489, 493–94.

¹⁹⁸ One cannot help but wonder to what extent the functional approach fits Judge Posner’s comment about the discourse between academics and the bench: “But little of this largely scholarly literature gives the judiciary the kind of help it most needs Partly it is because rewards (status, prestige, not necessarily money) in academic law go to doctrinalists and theoreticians who write for each other on a plane of discourse

The impression that testamentary intent is the be all and end all of the Wills Act, and any other policies served by the functions are at best second tier considerations, is supported by Professor Langbein's reliance on the classic article by Gulliver and Tilson. Gulliver and Tilson are even more emphatic in their expression of that hierarchy:

One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power. This is commonplace enough, but it needs constant emphasis, for it may be obscured or neglected in inordinate preoccupation with detail or dialectic. A court absorbed in purely doctrinal arguments may lose sight of the important and desirable objective of sanctioning what the transferor wanted to do, even though it is convinced that he wanted to do it. If this objective is primary, the requirements of execution, which concern only the form of the transfer—what the transferor or others must do to make it legally effective—seem justifiable only as implements for its accomplishment, and should be so interpreted by the courts in these cases. They surely should not be revered as ends in themselves, enthroning formality over frustrated intent.¹⁹⁹

It comes as no surprise that Professor Langbein ultimately adopts harmless error as his preferred approach over substantial compliance.²⁰⁰ Harmless error essentially codifies Gulliver and Tilson's fundamental proposition that testator's intent is the paramount consideration underlying the Wills Act.²⁰¹ Theoretically, all other considerations, including questions concerning compliance with the formalities set forth in the Wills Act, should yield when there is clear and convincing evidence of testator's intent.²⁰²

inaccessible or unhelpful to judges" RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 295 (2016).

¹⁹⁹ Gulliver & Tilson, *supra* note 7, at 2–3 (footnotes omitted).

²⁰⁰ Langbein, *supra* note 13, at 20.

²⁰¹ See Gulliver & Tilson, *supra* note 7, at 2–3.

²⁰² The Uniform Probate Code and the Restatement (Third), however, do not take the intent-based approach to its logical extreme. Even when there is clear and convincing evidence of the testator's intent, both of them still require a writing. See UNIF. PROBATE CODE § 2-503 (2010) (amended 2010), 8 U.L.A. 215 (2013 & Supp. 2014); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 1999).

5. *To What Extent Are Economic Considerations Relevant?*

There is no doubt that a decedent's testamentary intent is an important public policy consideration, but it is not the only relevant public policy consideration. Gulliver and Tilson implicitly admit as much:

Why do these requirements exist and what functions may they usefully perform? If all transfers were required to be made before the court determining their validity, it is probable that no formalities except oral declarations in the presence of the court would be necessary. The court could observe the transferor, hear his statements, and clear up ambiguities by appropriate questions. But such a procedure does not correspond with existing mores *and would be entirely impracticable in our present society for various rather obvious reasons.*²⁰³

Maybe I spent too much time at the University of Chicago, but it seems rather obvious that one of those reasons would be that the transaction costs associated with such a procedure would be prohibitively expensive. Accordingly, it seems rather obvious that one of the important public policy considerations served by the Wills Act is to help control the costs of administration associated with ascertaining and giving effect to testator's intent.²⁰⁴ Yet there is no express mention of costs of administration, efficiency, or any other economic consideration in Gulliver and Tilson's discussion of the functions served by the Wills Act formalities.

While Professor Langbein's discussion of the functions served by the Wills Act formalities mentions economic considerations, he does not treat economic considerations as a public policy consideration in its own right. When discussing the channeling function, the function added by Professor Langbein,²⁰⁵ he acknowledges "the relationship between the formalities and efficient judicial administration."²⁰⁶ Historically the formalities had the effect of channeling testators to lawyers who used standardized documents, with standardized terminology, and who supervised the execution of the instrument.²⁰⁷

²⁰³ Gulliver & Tilson, *supra* note 7, at 3 (emphasis added).

²⁰⁴ See Horton, *supra* note 7, at 574 ("[C]oncern about the burden on the judicial system has also surfaced during the debate over the harmless error rule. Scholars have voiced anxiety that replacing strict compliance with harmless error may increase litigation rates by providing new ammunition to disappointed heirs.").

²⁰⁵ See Langbein, *supra* note 9, at 493–94.

²⁰⁶ *Id.* at 494.

²⁰⁷ *Id.* at 493–94; see also Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 367–68 (1966).

The resulting document should have fewer, if any, issues with respect to validity and construction, thereby saving both testator's estate and the probate system time and money.²⁰⁸ Rarely would there be questions as to whether the document was intended to be the person's will or as to the construction of the will. The document would sail through probate at minimum cost to the estate and the judicial system.

While the channeling function has a "relationship" with judicial efficiency, Professor Langbein's discussion of the channeling function implies he believes the economic effect is more of a consequential benefit than a public policy consideration in its own right. He notes that the standardization of wills is "a matter of unusual importance" for the courts, and it "benefits" the testator. Nowhere, however, does he acknowledge economic efficiency as a public policy consideration in its own right to be juxtaposed with testamentary freedom.²⁰⁹ Professor Langbein's primary point is that the channeling function serves a linguistic purpose.²¹⁰ In the context of the Wills Act, the channeling function promotes testamentary intent by providing standard phrasing and terminology for testators to use to ensure that the probate court understands and gives effect to testator's true intent. Professor Langbein cites Professor Friedman's work which also focuses on the linguistic benefits of the channeling function, while acknowledging the bureaucratic benefits.²¹¹ While Professor Langbein was one of the first to acknowledge the economic benefits of the Wills Act, his discussion indicates that the economic benefits are not an important public policy consideration in their own right but rather are more a tangential or secondary benefit at best.

²⁰⁸ Langbein, *supra* note 9, at 494; *see also* Glover, *supra* note 2, at 606.

²⁰⁹ Langbein, *supra* note 9, at 494; *see also* Adam J. Hirsh, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1066 n.31 (1996) ("Fuller called this the 'channeling function' of legal formalities; as he pointed out, the procedural efficiency of formalities is *useful* for courts as well as for individual actors who seek low-cost means of ensuring the legal effectiveness of their transactions.") (emphasis added).

²¹⁰ Although Professor Langbein is credited with being the first to articulate the channeling function as it applies to the Wills Act formalities, Professor Langbein acknowledges that he is building upon Professor Fuller's work, which recognized the channeling function of the statute of fraud formalities as applied to the law of contracts. Professor Fuller argued that the primary benefit of the channeling function is that it serves a linguistic function. Langbein, *supra* note 9, at 493 (citing and discussing Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941)).

²¹¹ Langbein, *supra* note 9, at 493 (citing and discussing Friedman, *supra* note 209, at 368).

Arguably the best evidence that Professor Langbein considers any economic component to the Wills Act formalities as, at best, secondary considerations, is his discussion of the possible consequences of his proposed substantial compliance doctrine. In commenting on the possible effects, Professor Langbein returns to the implicit economic benefits of the formalities:

If the substantial compliance doctrine can do individual justice only at the price of disorder and uncertainty in the patterns of transfer and testation, the gain may not be worth the cost. It must be shown that the substantial compliance doctrine would not confuse the channels, nor clog them with significantly increased litigation.²¹²

While implicitly acknowledging that there is an economic cost-benefit component to the analysis, the phrasing suggests economic considerations are relevant only at the extreme: only if the cost of substantial compliance is “*disorder and uncertainty* in the patterns of transfer and testation.”²¹³ Such phrasing hardly constitutes an economic analysis of the proposal. An economic analysis focuses on *marginal* costs and benefits.²¹⁴ Whether one should enter into a

²¹² Langbein, *supra* note 9, at 523.

²¹³ *Id.*

²¹⁴ Terry L. Anderson, *Markets and the Environment: Friends or Foes*, 55 CASE W. RES. L. REV. 81, 81 (2004) (“This type of analysis illustrates the way economists often approach problems, namely using marginal analysis to maximize some value subject to opportunity cost constraints. From this analysis follows one of the main tenets of economics: if the marginal benefits are greater than the marginal cost, do it. We economists think this marginal analysis is a pretty powerful way of thinking about the world.”); Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 100–04 (2015).

If one were to ask a layperson what is the optimal level of crime, most people would answer “zero.” If one were to ask an economist whether a zero rate of crime was the optimal rate of crime, he or she would immediately answer “no.” For an economist, the optimal level of crime is whatever crime rate exists at the point where an additional expenditure of \$1.00 on crime prevention does not produce at least one dollar’s worth of additional benefit. Society should be willing to invest in efforts aimed at reducing the crime rate so long as every dollar spent produces at least a dollar’s worth of benefits. Once, however, a dollar spent does not produce at least a dollar’s worth of benefits, society should accept that level of crime. See Mark A. Cohen, *The Economics of Crime and Punishment: Implications for Sentencing of Economic Crimes and New Technology Offenses*, 9 GEO. MASON L. REV. 503, 504 (2000) (citing and discussing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 171 (1968)).

Professor Langbein’s substantial compliance and harmless error doctrines take more of a non-economist’s approach to the question of what is the optimal level of testamentary intent that should be given effect. Under his harmless error proposal, anytime there is clear and convincing evidence that the document expresses the decedent’s testamentary intent, the document should be probated. Such an approach ignores the economic costs that may be associated with producing this acknowledged benefit. It implicitly argues that the

proposed transaction, or adopt a proposed law, depends on whether the marginal benefits of the proposed transaction or law exceed the marginal costs of the proposed transaction or law.²¹⁵ The proposed transaction/law is efficient if the marginal benefits exceed the marginal costs.

In contrast, Professor Langbein's phrasing evidences at best a superficial economic analysis, one that supports the view that Professor Langbein and the functional approach do not consider economic considerations to be a public policy consideration in their own right.²¹⁶ Economic considerations are relevant only at the extreme, not at the margin. In arguing that his substantial compliance proposal should be adopted, Professor Langbein implicitly argues that the benefits associated with the "individual justice" served by giving effect to a decedent's testamentary intent should prevail unless the costs associated with substantial compliance rose to the level of "disorder and uncertainty in the patterns of transfer and testation."²¹⁷ Not only is that wording of the analysis inconsistent with traditional economic analysis,²¹⁸ such vague and nontraditional phrasing makes it difficult to measure and assess such costs. Accordingly, the likelihood one will conclude that the clear and easy-to-assess benefits of his proposal outweigh the vague and uncertain costs, is increased because the economic costs are not fully appreciated.²¹⁹

decedent's testamentary intent should be given effect to promote "individual justice" notwithstanding the potential costs—social costs in particular—associated with doing so. An economist would have strong reservations about such an approach. An economist would prefer an approach that does a better job of trying to insure that testamentary intent is given effect so long as it is efficient: so long as doing so produces more benefit than it costs—at both the individual and the social level.

²¹⁵ See Anderson, *supra* note 214.

²¹⁶ Interestingly, Professor Langbein uses the phrases "free testation" and "the principle of free testation" as a public policy consideration at odds with Wills Act formalities and formalism. Langbein, *supra* note 9, at 491–92, 494, 500. If Professor Langbein means for such phrases to have an economic component, with apologies to Milton Friedman, there's is no such thing as "free testation." MILTON FRIEDMAN, *THERE'S NO SUCH THING AS A FREE LUNCH* (Open Court Publishing Co. 1975).

²¹⁷ Langbein, *supra* note 9, at 523.

²¹⁸ See *supra* notes 214–15 and accompanying text.

²¹⁹ Professor Langbein goes on to admit that substantial compliance will result in increased litigation where proponents offer to prove that a noncomplying instrument should nevertheless be probated under the substantial compliance analysis, but asserts that substantial compliance will have "no effect whatever upon the primary conduct. The incentive for due execution would remain." Langbein, *supra* note 9, at 524. Other scholars, however, have questioned that assertion: "The harmless error power might tend to encourage carelessness and breed litigation, or open up avenues for fraud." Adam J.

Interestingly, when discussing the purposes of the Wills Act, Professor Langbein's *Harmless Error* article reverts to the more traditional functional approach. Moreover, when discussing the functions served by the Wills Act, the text mentions only the evidentiary, cautionary, and protection functions.²²⁰ The channeling function is relegated to a footnote.²²¹ Unlike the *Substantial Compliance* article, which at least hinted at the possible relevance of economic considerations, the *Harmless Error* article is devoid of any economic analysis or phrasing. Instead, the approach is closer to the traditional approach articulated by Gulliver and Tilson: that the formalities serve no purpose other than to insure intent, and where there is clear and convincing evidence of testator's intent, the court should be authorized and prepared to waive any formalities that would otherwise stand in the way of giving effect to that intent.²²²

B. Flexible Strict Compliance

1. A More Pragmatic Approach to the Purposes Served by the Wills Act

In contrast to Professor Langbein's functional approach to the public policy considerations underlying the Wills Act formalities, the court-created flexible strict compliance approach is more pragmatic. While the court-created flexible strict compliance approach overlaps to some degree with the Gulliver and Tilson/Langbein functional approach, the courts' articulation and assessment of the public policy considerations differs greatly with that of Gulliver and Tilson/Langbein.

No doubt the courts would agree that in an ideal world, where an individual has expressed his or her intent with respect to who should get his or her property following his or her death, such intent should be ascertained and given effect regardless of the costs. Only then

Hirsch, *Formalizing Gratuitous Transfers and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 829 (2014) (discussing harmless error, but the logic applies equally to Professor Langbein's original substantial compliance proposal); *see also* In re Will of Ranney, 589 A.2d 1339, 1345 (N.J. 1991) ("Our adoption of the doctrine of substantial compliance should not be construed as an invitation either to carelessness or chicanery.") The Court's statement that substantial compliance is not an "invitation" to carelessness is an implicit acknowledgment that it is a likely risk, the question is just how much of a risk.

²²⁰ Langbein, *supra* note 13, at 87.

²²¹ *Id.* at 3 n.6.

²²² *See* Gulliver & Tilson, *supra* note 7 and accompanying text.

would the legal system fulfill its general philosophy of “giving effect to an intentional exercise of”²²³ the decedent’s “power to determine his successors in ownership.”²²⁴ The courts realize, however, that we do not live in such an ideal world; we live in a world of limited resources. In a world of limited resources tough decisions have to be made with respect to how those limited resources should be distributed among different needs. This is particularly true with respect to public resources.²²⁵ With the myriad of competing claims on public resources, it is poor public policy to spend excessive public funds on ascertaining testator’s intent when imposing reasonable formalities on testators, reasonably interpreted and reasonably applied, can save society money and permit society to allocate its scarce resources to more pressing needs. Limiting the costs of administration associated with ascertaining and giving effect to a decedent’s testamentary intent is a reasonable and important public policy consideration, just as important as ascertaining and giving effect to a decedent’s testamentary intent.²²⁶

In contrast to the functional approach adopted by both Langbein and Gulliver and Tilson, the courts and many scholars historically have taken a more pragmatic approach to the purposes underlying the

²²³ Gulliver & Tilson, *supra* note 7, at 2.

²²⁴ *Id.* Gulliver and Tilson’s ideal testamentary world is similar, in some respects, to Professor Coase’s ideal economic world. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Professor Coase’s ideal world envisions no transaction costs when transferring property rights. R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* 14–15 (1988). Gulliver and Tilson’s ideal testamentary world is one where there are no transaction costs associated with giving effect to a decedent’s testamentary intent. While both worlds are conceivable and desirable as a theoretical matter, neither is possible as a practical matter.

²²⁵ Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 119–20 (1998); John H. Turner, *The U.S. EPA 40 C.F.R. Part 258 Financial Test/Corporate Guarantee—New Environmentally Protective, Cost-Effective Mechanisms for the Demonstration of Financial Responsibility*, 9 FORDHAM ENVTL. L.J. 567, 615 (1998). The U.S. Supreme Court has acknowledged as much when it stated in *Dandridge v. Williams*, 397 U.S. 471, 487 (1970): “the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.”

²²⁶ *See, e.g.*, Horton, *supra* note 7, at 574 (“The idea that the Wills Act formalities prevent negative externalities is not entirely novel. One can catch glimmers of it in three places. First, some commentators have observed that the evidentiary and channeling propensities of the ‘writing’ and ‘signature’ elements limit the burden on courts Second, concern about the burden on the judicial system has also surfaced during the debate over the harmless error rule Third, judges and academics sometimes claim that strict compliance furthers the interests of decedents *as a class*.”).

Wills Act formalities. In contrast to the evidentiary, cautionary, and protective functions,²²⁷ the courts and many scholars tend to talk more in terms of testator's intent,²²⁸ costs of administration,²²⁹ and the potential for fraud and/or other third party misconduct.²³⁰ Time of

²²⁷ Gulliver & Tilson, *supra* note 7, at 2–3.

²²⁸ See, e.g., *Feinberg v. Feinberg* (In re Estate of Feinberg), 919 N.E.2d 888, 895–96 (Ill. 2009); *Matter of Am. Comm. for the Weizmann Inst. of Sci. v. Dunn*, 883 N.E.2d 996, 1002 (N.Y. 2008) (where the Court of Appeals of New York acknowledged “the well-settled precept that ‘[t]he . . . freedom of testation is a jealously guarded right’”); *In re Estate of Malloy*, 949 P.2d 804, 806–07 (Wash. 1998); see also Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1133–38 (2013) (referring to testamentary freedom as the “organizing principle” of American succession law).

²²⁹ See *Estate of Heigho*, 186 Cal. App. 2d 360, 367–68 (Cal. Ct. App. 1960) (“It is the public policy of this state that there be an efficient administration and prompt settlement of estates not only for the sake of creditors but also for the benefit of heirs and beneficiaries.”); *Rex v. Tovrea* (In re Estate of Wiltfong), 148 P.3d 465, 467 (Colo. App. 2006) (emphasis added) (“The underlying purposes of the Colorado Probate Code (Code) are to simplify and clarify the law concerning the affairs of decedents; to discover and make effective the intent of decedents in distributing their property; and to *promote a speedy and efficient system* for settling estates of decedents and distributing their property to their successors.”); *Quinn v. Quinn*, 772 P.2d 979, 980 (Utah Ct. App. 1989) (acknowledging that one of the underlying purposes and policies of the Utah Uniform Probate Code is to promote “a speedy and efficient system for administering the estate of the decedent and making distribution to his successors.”); Shipp, *supra* note 5, at 753 (emphasis added) (“The routine application of the exacting standards of the Wills Act formalities to all wills submitted for probate provides a simple and *efficient* practice for treating wills. Indeed, this practice has existed for centuries”); *Horton*, *supra* note 7 and accompanying text; *Mann*, *supra* note 167, at 1048 (emphasis added) (“The formal requirements for wills enable probate to function as an administrative process rather than a judicial one in the crucial initial determination of whether or not a writing is a will. They impose a standard form on testamentary writings that, for the vast majority of documents that comply with it, relieves probate of the time-consuming and administratively inefficient burden of conducting an individual inquiry into the substantive issue of whether the decedent intended the document to be a will. Because ‘substantively rational processes are disorderly,’ the massive volume of probate business and the inferior status of probate courts make such *routinization essential*.”); *Miller*, *supra* note 2, at 288 (acknowledging the tension between Gulliver and Tilson’s functional approach with its focus on testator’s intent and “the efficient functioning of the implementing courts”).

²³⁰ See, e.g., *McKee v. McKee’s Ex’r*, 160 S.W. 261, 264 (Ky. 1913) (“It is a solemn thing to dispose of one’s property by will, especially on a deathbed, and the legislative purpose as clearly evidenced by this statute was to require it to be done in such way as to eliminate, as far as human laws can, all possibility of fraud, deception, or imposition.”); *In re Noyes’ Estate*, 105 P. 1013, 1016 (Mont. 1909) (“The purpose of the formalities prescribed is to prevent simulated and fraudulent writings from being probated and used as genuine. While the application of the strict rule of construction may sometimes defeat the intention of the testator as manifested by an imperfectly executed and authenticated writing, yet in the long run such statutes tend to promote justice, by lessening, so far as possible, the opportunity for fraud, which history and experience have demonstrated to be feasible and measurably safe in the absence of them The courts may not, therefore, out of regard for the supposed intention of the testator, however clearly it may be

death transfers, particularly those executed by elderly testators, intuitively present an increased risk of fraud, duress, and/or undue influence.²³¹ Moreover, because the transferor is dead when the gift is given effect, the transferor is not able to express to the court the transferor's true intent with respect to who is to take what.²³² Whatever safeguards one tries to build into the transfer process, the risk of misconduct by third parties with respect to a time of death transfer is greater than the risk of third party misconduct with respect to an inter vivos transfer. And while there are legal doctrines that specifically address these concerns—e.g., fraud, undue influence,

manifested by the attendant circumstances, adopt a rule which would open the way for the same frauds which the statute was designed to prevent. The restrictions made by it are reasonable and easily understood, and, as experience has shown, it is far safer for society that a rule be adopted that requires a strict compliance with them, and, as a consequence, that occasionally an honest attempt to execute a will be defeated, than that the protections thus thrown about the testator should be disregarded because of an undue respect for his intentions, and way be left open the for the multitude of frauds and perjuries which would result.”); Meyer Estate, 42 Pa. D. & C.2d 295, 302 (C.P. 1967) (“Section 2 of the Wills Act of 1947 . . . must be strictly applied. The reason for this strict application of the act is to prevent the possibility of fraud”); In re Estate of Haugk, 280 N.W.2d 684, 690 (Wis. 1979) (emphasis added) (“Again, it is the clear intent of the will execution statute and the construing case law to prevent the fraudulent manipulation of a testator’s estate. . . . To hold otherwise would *open the door* to enumerable cases of fraud.”); Horton, *supra* note 7 and accompanying text.

²³¹ *McKee*, 160 S.W. at 264 (“Many persons wait until their last days—even hours—to make wills; they are frequently then weak and debilitated. At such times, they are usually surrounded by persons who are interested in the disposition of their property. Under such conditions opportunity for fraud or deception is frequently presented, and the incentive for its perpetration is great. Manifestly the Legislature had these things in mind when it laid down these strict rules for the execution of wills, and clearly it would be unwise for the courts to relax them.”); James H. Pietsch & Margaret Hall, “*Elder Law*” and *Conflicts of Interest in the United States and Canada*, 117 PENN ST. L. REV. 1191, 1196–97 (2013) (“[I]t is indisputable that some people—including some lawyers—take advantage of individuals who may not retain the ability to protect themselves due to diminished mental or physical capacity and who may be more vulnerable due to their reliance on others for their care.”). See generally, Katherine Mann, J.D., in consultation with Gary W. Steinke, M.D., *Alzheimer’s and Multi-Infarct Dementia—Incapacity to Execute Will*, 17 AM. JUR. PROOF OF FACTS 3D 219, § 1 (2016).

²³² *Sudwischer v. Estate of Hoffpauir*, 705 So. 2d 724 (La. 1997) (discussing the potential for fraudulent claims of paternity, and noting, “the state’s interest in the orderly disposition of property at death because of the danger of fraud and the inability of the opponents to present evidence which might be available to the alleged parent if he were alive”); Teague D. Devitt, *P.O.D.s May Thwart Testators’ Intent: It’s What Mom Wanted*, 86 WIS. L. REV. 24, 26 (2013) (“[G]iven that disputes over what a testator actually intended nearly always take place after the testator’s death, *Sensenbrenner’s* focus on the testator’s intentions, and the reasons underlying those intentions, can become blurry in practice. How, after all, is one to accurately assess a testator’s true intent and underlying rationale when one can no longer ask the testator herself?”).

duress—if any of these doctrines have to be asserted and proved, that only further increases costs of administration. Hence the traditional common law view that one of the public policy considerations underlying the Wills Act formalities was to prevent the *potential* for fraud and other misconduct.²³³

2. *Balancing the Competing Public Policy Considerations*

The challenge in creating and applying a Wills Act is how to balance the competing public policy considerations of testator's intent, costs of administration, and potential for misconduct. If decedent's intent and testamentary freedom were the sole public policy concerns, a court would hold a hearing either prior to or immediately following a person's death to determine the person's testamentary wishes,²³⁴ whether the person died testate or intestate.²³⁵ The court would consider extrinsic evidence to determine the person's intent at time of death regardless of the presence or terms of a will.²³⁶ So long as there is clear and convincing evidence of the decedent's intent, in theory, it should be given effect. Such a procedure, however, “does not correspond with existing mores *and would be entirely impracticable in our present society for various rather obvious reasons.*”²³⁷ The costs of administration would be prohibitive, and the potential for fraud would be unacceptably high.²³⁸ Creating a

²³³ See Gulliver & Tilson, *supra* note 7.

²³⁴ See Horton, *supra* note 7 and accompanying text.

²³⁵ The harmless error doctrine provides that one should give effect to a noncomplying document so long as there is clear and convincing evidence that the document expresses the decedent's testamentary intent. The modern trend intent-based approach also grants the courts the power to reform a will to express the decedent's true intent any time there is clear and convincing evidence of a mistake and clear and convincing evidence of its effect on testator's intent. Accordingly, one could argue that in the absence of transaction costs a court should be willing to give effect to a decedent's intent whenever there is clear and convincing evidence of such intent, *whether the decedent dies testate or intestate*. The intestate scheme is nothing more than the default will the state provides for a decedent in the absence of the decedent opting out of intestate scheme. To the extent the intent-based movement is open to reforming a lawyer drafted will to promote testator's intent, likewise the intent-based movement should—in theory—be open to reforming the intestate scheme to promote the decedent's intent. Such an approach, while theoretically intriguing, is clearly unworkable.

²³⁶ See UNIF. PROBATE CODE § 2-805 (2010) (amended 2010), 8 U.L.A. 215 (2013 & Supp. 2014); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 1999).

²³⁷ See Gulliver & Tilson, *supra* note 203 and accompanying text.

²³⁸ The wisdom of an approach that over-focuses on intent is called into question when one examines California's history with the law of transmutation. California is a community property state. CAL. CIV. PRAC. FAMILY LAW LITIGATION § 5:1 (2016).

Property acquired before marriage remains separate property following marriage, and property which is acquired by gift, is a spouse's separate property. CAL. FAM. CODE § 770 (2017). Property acquired during marriage as a result of the labor of either spouse is community property. *Id.* § 760. Separate property is owned solely by the spouse who acquired the property. Community property is owned by the community, which means that it is owned equally by the spouses. *Id.* § 751. Each spouse has an undivided equal interest in the property. Transmutation is the law that governs a spouse's changing the characterization of his or her property relative to the other spouse. A transmutation occurs (1) when one spouse transfers his or her separate property to (a) community property, or (b) the other spouse's separate property, or (2) when a spouse transfers his or her community property to the other spouse, making the property in question the other spouse's separate property. *Id.* § 850.

Inasmuch as transmutation is a transfer of property between spouses, Gulliver and Tilson's admonishment about intent versus the formalities arguably applies just as well to the law of transmutation as it does the law of wills:

One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power If this objective is primary, the requirements of execution, which concern only the form of the transfer—what the transferor or others must do to make it legally effective—seem justifiable only as implements for its accomplishment, and should be so interpreted by the courts in these cases. They surely should not be revered as ends in themselves, enthrone formalism over frustrated intent.

Gulliver & Tilson, *supra* note 7, at 2–3.

Historically the California courts adopted and applied that approach to the issue of transmutation between spouses. The approach was known as the rule—and era—of *easy transmutation*. In re Marriage of Benson, 116 P.3d 1152, 1158 (Cal. 2005). The courts focused on each spouse's intent, and intent trumped the formalities. In re Marriage of Jafeman, 29 Cal. App. 3d 244, 255 (1972). Transmutations of real property could occur orally so long as the court was convinced the spouse intended to transfer the property interest even if there was no writing. In re Marriage of Milse, 227 Cal. Rptr. 70, 71 (Cal. Ct. App. 1986) (citing Tomaier v. Tomaier, 146 P.2d 905 (Cal. 1944)). The courts held hearings to ascertain and give effect to each spouse's claimed intent. *Id.*

With time, however, the courts came to realize that intent was *not* the sole or paramount public policy. In the absence of a writing requirement, the issue of a spouse's intent becomes extremely fact-sensitive. The rule of easy transmutation "generated extensive litigation" In re Marriage of Benson, 116 P.3d 1152, 1158 (Cal. 2005). The rule of easy transmutation generated an increased number of fraudulent claims. Estate of MacDonald, 794 P.2d 911, 921–22 (Cal. 1990). While intent is important, so too are costs of administration and the potential for fraud or misconduct.

In response to the increased costs of administration and risk of fraudulent claims, and on the recommendation of the California Law Revision Commission, the California legislature enacted Civil Code Section 5110.730, which provides in pertinent part as follows: "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." CAL. CIV. CODE § 5110.730(a) (repealed and re-adopted as CAL. FAM. CODE § 852).

The California courts have been very strict in their interpretation of California's hard transmutation statute. The courts have rejected claims that it is *de facto* nothing more than a statute of frauds and therefore should be subject to the usual exceptions and exemptions

presumed intent for each decedent (i.e., the *intestate* scheme), and then putting the burden on each individual to opt out of the presumed intent by properly expressing his or her intent, is a reasonable and more efficient approach.²³⁹

The challenge then becomes what should be required before a society will recognize an individual's intent to opt out of the default scheme. Professor Langbein's substantial compliance/harmless error approach focuses on "individual justice"²⁴⁰ and implicitly adopts the view that once the testator puts his or her testamentary wishes in writing, the paramount public policy consideration is to give effect to that intent.²⁴¹ Professor Langbein's approach focuses solely on the outcome in a given case and fails to consider (1) whether the resulting precedent may encourage third parties to engage in future misconduct in the hope that they may be able to convince the court the latter case is indistinguishable from the prior case,²⁴² and/or (2) whether the precedent established by the case before the court may result in increased future costs of administration because future testators may be more complacent in how they express their intent.²⁴³ In economic

to the statute of frauds (including substantial compliance). *See generally* Kim M. Seavey, *Formalizing Interspousal Transfers of Real and Personal Property in California*, 30 SAN DIEGO L. REV. 425 (1993). The California Supreme Court has construed the statutory requirement of "an express declaration" as requiring "language which expressly states that the characterization or ownership of the property is being changed." *Estate of MacDonald*, 794 P.2d at 918. Where there is a writing but the express language is ambiguous, the courts have refused to admit extrinsic evidence to help resolve the ambiguity on the grounds that any other approach would "encourag[e] perjury and the proliferation of litigation." *Id.* Intent, while important, is not the sole public policy consideration. Intent must be balanced against costs of administration and potential for fraud and other misconduct.

²³⁹ *See* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 866–67 (2012). *See generally* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031 (2004).

²⁴⁰ Langbein, *supra* note 9, at 523.

²⁴¹ *Id.* at 518, 523 (arguing that such cases should be permitted to be tried because of the "rare cases" where the persuasive evidence exists even where the decedent failed to sign the will, although Professor Langbein acknowledges that the likelihood that the document will meet the requirements of his substantial compliance proposal is very low—so most cases involving such a scenario would be fruitless).

²⁴² *See supra* note 230; Kelly, *supra* note 239, at 881.

²⁴³ *See* Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 173–74 (2013) ("The adoption of the substantial compliance doctrine or the harmless error rule, however, could reduce the estate planning attorney's role as a therapeutic agent for her client and diminish the ritualistic nature of the will-execution ceremony. Much like the effect of eliminating the attestation requirement, a rule of relaxed testamentary formalism could encourage testators to execute wills informally and without

terminology, Professor Langbein's approach fails to take into account the negative externalities a precedent may create.²⁴⁴

That, in essence, is what distinguishes the court-created flexible strict compliance from Professor Langbein's holistic substantial compliance/harmless error approach. Judge Posner was the first to assert that common law judges are intuitive economists concerned with efficiency.²⁴⁵ The court-created flexible strict compliance approach rejects the holistic approach in favor of a more formality-based or scenario-based approach.²⁴⁶ The courts ask whether the *conduct* in question sufficiently meets *the purposes of the formality*, not whether the *document* in question "sufficiently approximate[s] Wills Act formality to enable the court to conclude that it serves the purposes of the *Wills Act*."²⁴⁷ In doing so, the court-created flexible strict compliance approach balances the competing public policy considerations of giving effect to testator's intent *while at the same*

the assistance of a lawyer. Because a formal defect would no longer automatically invalidate an attempted expression of testamentary intent, the harsh consequences of forgoing legal assistance would be reduced and consequently the testator's incentive to consult an estate planning attorney would be diminished. The relaxation of testamentary formalism could also encourage the testator to abandon strict adherence to the formalities of will execution because simpler and cheaper methods of executing a will would be legally valid."); *see also* Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 468 (2002) ("If it is generally understood that judges have the power to dispense with formality requirements . . . testators might come to believe that the statutory procedures are no longer necessary. Accordingly, they might gradually abandon traditional testamentary procedures in favor of other, perhaps cheaper, means of expressing testamentary intent."); Kelly, *supra* note 241, at 878–79. *But see* Langbein, *supra* note 9, at 524 (arguing that relaxed testamentary formalism "would have no effect whatever upon primary conduct").

²⁴⁴ *See* Langbein, *supra* note 9, at 524 (claiming that substantial compliance "would have no effect whatever upon primary conduct"); Langbein, *supra* note 9, at 525 (claiming that substantial compliance "would actually decrease litigation about the formalities"); *Bieber v. Bieber* (In re Estate of Krueger), 529 N.W.2d 151, 154 (N.D. 1995) (emphasis added) (articulating a fear that "a precedent would be set which could open the door to forged and fraudulent documents being admitted as a decedent's will"); *see also* Horton, *supra* note 7, at 577 ("[T]he need to prevent spillover costs—not the desire to carry out a decedent's intent—furnishes the most forceful reasons to take the Wills Act at its letter.").

²⁴⁵ RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 4 (1981); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 21 (3d ed. 1986); Nuno Garoupa & Carlos Gomez Liguere, *The Evolution of the Common Law and Efficiency*, 40 GA. J. INT'L & COMP. L. 307, 309 (2012).

²⁴⁶ *See supra* notes 97–103, 110–19, 132–77 and accompanying text.

²⁴⁷ *See supra* note 182 and accompanying text (emphasis added).

time minimizing costs of administration and the potential for fraud and/or other misconduct.²⁴⁸

Each burden or Wills Act formality society imposes on a testator conflicts with the public policy of honoring the testator's testamentary intent.²⁴⁹ The history of the law of wills is one of society placing a relatively high bar on the individual to opt out of intestacy and applying that bar stringently.²⁵⁰ The history of the law of wills is also that of the courts, in the best tradition of the common law, identifying scenarios where the requirements for expressing one's testamentary intent could be applied more flexibly without significantly increasing administrative costs and/or the potential for fraud.²⁵¹ In those scenarios, the courts have articulated a specific doctrine—i.e., the conscious presence doctrine—that either expressly or *de facto* took more of a substantial compliance approach to the formality.²⁵²

By identifying scenarios where the bar to executing a valid will could be lowered (and/or applied more flexibly), the courts were adopting something of a situational approach to the Wills Act formalities²⁵³ that promotes testamentary intent, without significantly increasing costs of administration or the potential for fraud/misconduct. The courts were identifying particular scenarios where the marginal benefits associated with the substantial compliance approach exceeded the marginal costs, thereby justifying adoption of the court-created substantial compliance doctrine.²⁵⁴ Over

²⁴⁸ Buried in a footnote, deep in his *Substantial Compliance* article, Professor Langbein admits as much but dismisses such an approach because it fails to adopt a purposive approach. Langbein, *supra* note 9, at 526 n.127. A flexible strict compliance advocate would counter that the courts *are* adopting a purposive approach, they just view the relevant public policy considerations differently from Professor Langbein's functional approach.

²⁴⁹ Glover, *supra* note 2, at 607; Glover, *supra* note 243, at 158; Gulliver & Tilson, *supra* note 7, at 2–3.

²⁵⁰ See Brown, *supra* note 156, at 96–98; Langbein, *supra* note 9, at 490–92; Miller, *supra* note 2, at 200–05.

²⁵¹ Hence the term “flexible strict compliance.” See *supra* notes 97–103, 110–19, 132–77 and accompanying text.

²⁵² See *supra* notes 97–103, 110–19, 132–77 and accompanying text.

²⁵³ See generally Hirsch, *supra* note 219.

²⁵⁴ Interestingly, while Professor Langbein fails to take marginal costs and marginal benefits into consideration, some legislatures have implicitly done so in adopting a modified/limited version of his harmless error proposal. A number of states, in adopting the harmless error doctrine statutorily, have expressly provided that the doctrine does not apply to the writing or signature requirement, only to the witnessing requirement and the formalities associated with it. See UNIF. PROBATE CODE § 2-503 (2010) (amended 2010), 8 U.L.A. 215 (2013 & Supp. 2014). In so limiting the harmless error doctrine the legislatures have implicitly concluded that marginal benefits to be derived from the limited

time the legislatures often agreed with the courts' assessment of how best to balance the competing public policy consideration. Many of the early court-created substantial compliance doctrines have been codified in subsequent Wills Acts.²⁵⁵

The court-created flexible strict compliance approach permits the courts to identify scenarios where the Wills Act can be improved, authorizes the courts to take the first shot at drafting the *de facto* revision to the Wills Act, and empowers the courts to define the scope of the amendment. This formality-by-formality-based approach lets the courts create sub-doctrines that improve the balance between promoting testamentary intent while at the same time minimizing costs of administration and potential for third party misconduct. Might—just might—this flexible strict compliance approach, this symbiotic legislative/judicial approach to Wills Act evolution, be more efficient and better than a statutorily mandated, across the board, holistic approach to substantial compliance/harmless error? Might that be why more jurisdictions have not adopted the harmless error doctrine?

CONCLUSION

He who phrases the issue usually wins the debate.

Professor Langbein's articles, particularly his *Substantial Compliance* article, imply that the only other option to his proposals is literal strict compliance.²⁵⁶ That is one way to view the state of the law of Wills Act compliance. Another, however, is to acknowledge and factor in the growing body of court-created substantial compliance doctrines.²⁵⁷ Recognizing the substantial and expanding body of case law that either expressly or *de facto* adopts a substantial compliance approach to the Wills Act formalities results in more of a spectrum-based view of the state of the law of Wills Act compliance. At one end of the spectrum is literal strict compliance, at the other end are Professor Langbein's substantial compliance/harmless error

number of additional wills that might be probated under a broad harmless error doctrine that applied to the signature requirement are not worth the increased marginal costs of administration and the increased potential for fraud or other third party misconduct that would likely accompany such a broad approach to the harmless error doctrine.

²⁵⁵ See *supra* notes 97–103, 110–19, 132–77 and accompanying text; see also Langbein, *supra* note 9, at 510.

²⁵⁶ Langbein, *supra* note 9, at 489, 526; Langbein, *supra* note 13, at 1–6.

²⁵⁷ See *supra* notes 97–103, 110–19, 132–77 and accompanying text.

proposals, and in between are those jurisdictions that apply strict compliance as their default approach, but which have adopted one or more court-created substantial compliance doctrines. Viewed from the spectrum-based approach, while there may be a handful of states at either end of the spectrum, the overwhelming majority of the states are somewhere in between. Most states have adopted one or more court-created substantial compliance doctrines. The more court-created substantial compliance doctrines a jurisdiction has adopted, the closer it is to Professor Langbein's end of the spectrum—and the less it fits Professor Langbein's description of the law of Wills Act compliance as being harsh and relentless.

Professor Langbein phrased the issue as which is better: traditional strict compliance or his substantial compliance/harmless error proposals. If presented with only these two options, a strong case can be made that Professor Langbein's substantial compliance/harmless error proposals are better. The problem with that analysis, however, is that most states do not apply traditional strict compliance. Most jurisdictions have adopted some form of flexible strict compliance (depending on the number of court-created substantial compliance doctrines the jurisdiction has adopted). The issue then becomes whether the marginal benefits of Professor Langbein's substantial compliance/harmless error proposals are worth the increased costs of administration and potential for fraud/misconduct inherent in those approaches. As compared to flexible strict compliance, how many more wills will be probated (admittedly more), but at what additional cost of administration and at what increased potential for fraud/other third party misconduct? Are the marginal benefits of the holistic approach to substantial compliance/harmless error greater than the marginal benefits associated with the formality based flexible strict compliance approach? The answer to *that* question is far from obvious.

Now that the third option, flexible strict compliance, has been articulated, may the debate over which approach is best begin anew.