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Recognition of Environmental Rights for Pennsylvania Citizens: *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*

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RECOGNITION OF ENVIRONMENTAL RIGHTS FOR PENNSYLVANIA CITIZENS: *PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION V. COMMONWEALTH OF PENNSYLVANIA*

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INTRODUCTION

In 2013, in *Robinson Township v. Commonwealth*,[1] the Pennsylvania Supreme Court held unconstitutional major parts of Pennsylvania's Act 13—a 2012 oil and gas law designed to facilitate the development of natural gas from Marcellus Shale.[2] A plurality of the court based its decision on the text of article I, section 27 of the Pennsylvania Constitution,[3] the state's "Environmental Rights Amendment," a then-near-dormant provision that had never been used, even by a plurality, to justify holding a statute unconstitutional.

In an earlier Article in these pages we placed *Robinson Township* into context by considering its implications going forward, including at the local, state, and global levels in general, and in the context of environmental constitutionalism in particular.[4] While the section 27 rationale did not command a majority of the Supreme Court of Pennsylvania, the case nonetheless received widespread attention because of its implications.[5]

1. 83 A.3d 901, 999–1000 (Pa. 2013), *on remand*, 96 A.3d 1104 (Pa. Commw. Ct. 2014), *aff'd in part, rev'd in part*, 637 Pa. 239 (Pa. 2016).

2. Oil and Gas Act, 58 PA. STAT. AND CONS. STAT. ANN. §§ 2301–3504 (West 2014).

3. PA. CONST. art. I, § 27; *Robinson Township*, 83 A.3d at 943.

4. John C. Dernbach, James R. May & Kenneth T. Kristl, Robinson Township v. Commonwealth of Pennsylvania*: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1169–70 (2015).

5. *See, e.g.*, Erin Daly & James R. May, Robinson Township v. Pennsylvania*: A Model for Environmental Constitutionalism*, 21 Widener L. Rev. 151 (2015) [hereinafter Daly & May, *A Model for Environmental Constitutionalism*]; John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Envtl. L. 463 (2015) [hereinafter, Dernbach, *Constitutional Trust*]; Joshua P. Fershee, *Facts, Fiction, and Perception in Hydraulic Fracturing: Illuminating Act 13 and* Robinson Township v. Commonwealth of Pennsylvania, 116 W. Va. L. Rev. 819 (2014); Kenneth T. Kristl, *The Devil is in the Details:*

Not surprisingly, Pennsylvania judges, lawyers, and government agencies were of the view that, while the *Robinson Township* decision is interesting and important, it was not the law of the state on section 27. Instead, they continued to apply a three-part balancing test that the Commonwealth Court of Pennsylvania invented in 1973 as a substitute for the text of the amendment.[6]

That all changed on June 20, 2017. In *Pennsylvania Environmental Defense Foundation v. Commonwealth* ("*PEDF*"), the Supreme Court of Pennsylvania decided by a clear majority that the state has a constitutional obligation, under the text of article I, section 27, to manage state parks and forests, including the oil and gas they contain, as a trustee.[7] The court also held that the "constitutional language controls how the Commonwealth may dispose of any proceeds generated from the sale of its public natural resources."[8] In a separate opinion, Justice Baer described the decision as "monumental."[9]

The decision in *PEDF* is indeed monumental. The court set aside the three-part balancing test that had been used for more than four decades, and it did so by a majority decision.[10] It held that the text of article I, section 27 provides the rules to be applied in any case.[11] It also reaffirmed that the constitutional public trust is self-executing; it does not need further legislation in order to be applied.[12] The court's attentiveness to the text of article I, section 27 is underscored by its careful analysis of the legislative history, showing, among other things, how the Environmental Rights Amendment had been amended several times during the legislative process before it was approved

Articulating Practical Principles for Implementing the Duties in Pennsylvania's Environmental Rights Amendment, 28 Geo. Envtl. L. Rev 589 (2016) [hereinafter Kristl, *The Devil is in the Details*]; Elizabeth Fuller Valentine, *Arguments in Support of a Constitutional Right to Atmospheric Integrity*, 32 Pace Envtl. L. Rev. 56 (2015).

6. The test was originally articulated in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). Post-*Robinson Township* cases continuing to apply the *Payne* test include: Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot., 131 A.3d 578, 588–89 (Pa. Commw. Ct. 2016); Feudale v. Aqua Pennsylvania, Inc., 122 A.3d 462, 468, 468 n.8 (Pa. Commw. Ct. 2015); Pennsylvania Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 158 (Pa. Commw. Ct. 2015), *rev'd in part*, *vacated in part*, 161 A.3d 911 (Pa. 2017). *See generally* James R. May & William Romanowicz, *Environmental Rights in State Constitutions, in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305 (2011) (addressing arc of jurisprudence respecting Pennsylvania's Environmental Rights Amendment).

7. 161 A.3d 911, 916 (Pa. 2017).

8. *Id.*

9. *Id.* at 940 (Baer, J., concurring and dissenting).

10. *Id.* at 926–27 (majority opinion).

11. *Id.* at 930.

12. *Id.* at 937.

by Pennsylvania voters in 1971 by a four-to-one vote.[13] It also held that the rules governing management of public trust resources apply to the expenditure of royalties and perhaps other funds received from oil and gas leases on those resources.[14]

Nearly two decades ago, one of the authors of this article published a two-part article on section 27. While the subtitles of each part were different, the main title was *Taking the Pennsylvania Constitution Seriously When It Protects the Environment*.[15] The point of the title was to highlight the second-class status that environmental rights were given at the time, particularly because of the use of the three-part balancing test as a substitute for the text of article I, section 27. There is now no question that environmental rights are equal in status—and in the seriousness with which the Pennsylvania Supreme Court takes them—to any other rights recognized in the state constitution. That is the central achievement of the *PEDF* decision.

More broadly, the case signaled the court's willingness to enforce the public trust doctrine. This case was decided on the same day as another public trust case, *In Re Borough of Downingtown*, in which the court used common law public trust principles to invalidate the transfer of significant parts of a public park to a real estate developer.[16]

But as the *PEDF* decision did all of these things, it also challenges judges, lawyers, state agencies, local governments, and others to develop a workable and meaningful way of applying the text of the Environmental Rights Amendment in a variety of contexts.

This Article describes the background of this landmark case, including the cases in which the Pennsylvania courts put the Environmental Rights Amendment into a state of near dormancy for more than four decades. After briefly reviewing *Robinson Township*, this Article reviews each of the Pennsylvania Supreme Court's opinions in *PEDF*. It then addresses a variety of issues about the interpretation and application of section 27, many of which surfaced after *Robinson Township*, but which have much greater salience after *PEDF*. Finally, the Article addresses the implications of this remarkable decision for

13. *Id.* at 916–19.

14. *Id.* at 934–36.

15. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27,* 103 DICK. L. REV. 693 (1999) [hereinafter Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I*]; John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust,* 104 DICK. L. REV. 97 (1999) [hereinafter Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II*].

16. 161 A.3d 844, 849 (Pa. 2017).

constitutional environmental amendments in other states and around the globe.

I. SECTION 27: ORIGIN, JUDICIAL ABANDONMENT, AND STEPS TOWARD JUDICIAL RESTORATION

A. The Environmental Rights Amendment

In May 1971, near the outset of the modern environmental movement, Pennsylvania citizens voted four-to-one to add environmental rights to article I of the state constitution, the state's Declaration of Rights. Article I, section 27 provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[17]

Amendments to the state constitution must be approved by each house of the General Assembly in two successive legislative sessions, and then approved by a majority of voters in a public referendum.[18] The General Assembly unanimously approved section 27 in the 1969–1970 and 1971–1972 legislative sessions before submitting it to the voters. The legislative history of section 27[19] makes several broad points about the Environmental Rights Amendment quite clear. First, its placement in article I, which sets forth public rights, as opposed to some other part of the constitution involving governmental powers or duties, was intentional. Representative Franklin Kury, the amendment's drafter as well as its chief legislative sponsor and advocate, introduced the bill that became section 27 by arguing that protection of the environment "has

17. PA. CONST. art. I, § 27.

18. PA. CONST. art. XI, § 1.

19. Two versions of the legislative history are available. The first is John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Showing Source Documents in* WIDENER LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES no. 1418 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660. The second, which shows only material that is relevant to section 27, and not the extraneous material that is often included in the pages of some of the source documents where both section 27 as well as other issues are shown, is John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181, 184 (2015).

now become as vital to the good life—indeed, to life itself—as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and of privacy."[20] In addition, the amendment was adopted against a historical context of repeated exploitation of and damage to Pennsylvania's environment and natural resources over several centuries.[21] Section 27 was specifically intended to provide permanent constitutional guidance for all three branches of government as well as the private sector.[22]

The legislative history also makes clear that section 27 has two parts, or clauses, and that these clauses have different meanings. This understanding originates in the text itself. The first and second clauses of the Amendment, moreover, are analytically distinct.[23] The first clause is also the first sentence; it protects air, water, and certain values in the environment, but says nothing about public natural resources. The second clause is based on the second and third sentences; this clause protects "public natural resources." The second and third sentences are best understood together because they are linked; the second sentence refers to "public natural resources" and the third sentence refers back to the prior sentence when it says "these resources." Representative Kury explained:

> The first sentence of this constitutional amendment grants to the people a clearly enforceable constitutional right to: (1) clean air and pure waters, and (2) preservation of the natural scenic, historic and esthetic values of the environment.
>
> In addition, the second and third sentences of the amendment spell out the common property right of all the people, including generations yet to come, in Pennsylvania's public natural resources. As trustee of these resources, the Commonwealth,

20. LEGISLATIVE JOURNAL—HOUSE, at 485–86 (Pa. 1969) (statement of Rep. Franklin Kury), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania*, *supra* note 19, at 188.

21. LEGISLATIVE JOURNAL—HOUSE, at 721–22 (Pa. 1969) (statement of Rep. Franklin Kury), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania*, *supra* note 19, at 198.

22. LEGISLATIVE JOURNAL—HOUSE, at 722 (Pa. 1969) (statement of Rep. Franklin Kury), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania*, *supra* note 19, at 198 ("[T]he amendment provides a firm, clear policy statement for the guidance of all those branches of government and private parties alike.").

23. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I*, *supra* note 15, at 700–04.

> through all agencies and branches of its government, is required to conserve and maintain them for the benefit of all the people.[24]

This distinction is affirmed and explained in detail in an article on then-proposed section 27 by Professor Robert Broughton of Duquesne University Law School[25] that Representative Kury had reprinted in the House Legislative Journal.[26] Broughton summarized the significance of these two parts: "The proposed Amendment, for purposes of analyzing its effects, can be viewed almost as two separate bills—albeit there is considerable interaction between them, and the legal doctrines invoked by each should tend mutually to support and reinforce the other because of their inclusion in a single amendment."[27] Broughton devoted most of the article to an explanation of the differences between the two parts.[28]

Finally, the General Assembly believed that the text of section 27 matters—a point which would seem self-evident were it not for subsequent cases (discussed below) that took a different view. In fact, the legislature amended the bill that became section 27 three times before finally approving it. First, as originally introduced, the bill required the state, as trustee, to "preserve and maintain" resources "in their natural state for the benefit of all the people."[29] Almost immediately after it was introduced, the phrase "in their natural state" was removed.[30] Second, the bill originally subjected "Pennsylvania's natural resources, including the air, waters, fish, wildlife, and the public lands and property of the Commonwealth," to the public trust.[31] That language was changed and

24. COMMONWEALTH OF PA. LEGISLATIVE JOURNAL—HOUSE, Gen. Assemb. 154-126, Sess. of 1970, at 2271 (1970) (statement of Rep. Franklin Kury), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania*, *Showing Source Documents*, *supra* note 19, at 30.

25. Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. B. ASS'N Q. 421 (1970).

26. LEGISLATIVE JOURNAL—HOUSE, at 2272 (Pa. 1970), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania, supra* note 19, at 216–50.

27. Broughton, *supra* note 25, at 422; LEGISLATIVE JOURNAL—HOUSE, at 2272–73 (Pa. 1970), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania, supra* note 19, at 221.

28. Broughton, *supra* note 25, at 422–27; LEGISLATIVE JOURNAL—HOUSE, at 227–381 (Pa. 1970), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania*, *supra* note 19, at 221–49.

29. H.B. 958, 1969 Gen. Assemb. (Pa. 1969), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania*, *supra* note 19, at 188.

30. H.B. 958, 1969 Gen. Assemb. (Pa. 1969) (as reported by Committee on Conservation, House of representatives, as amended, April 29, 1969), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania*, *supra* note 19, at 194.

31. *Id.*

simplified so that "public natural resources" are subject to the public trust.[32] Third, the "preserve and maintain" language in the original bill was changed to "conserve and maintain."[33] As the Pennsylvania Supreme Court explained in *PEDF*:

> [I]f the language of a constitutional provision is unclear, we may be informed by 'the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; *and the contemporaneous legislative history*.[34]

Each of these three changes, then, should inform the meaning of section 27.

B. Judicial Abandonment

Two cases decided shortly after section 27's adoption consigned the amendment to desuetude for more than four decades. The first created a muddle about whether the amendment is self-executing—whether, in other words, it requires implementing legislation in order to be effective. It also helped persuade future courts and decision makers to think about section 27 as a grant of power to government rather than a limitation on the exercise of governmental power. The second substituted a three-part balancing test for the text of the amendment—if a court decides that the amendment is self-executing.

The first significant case under the Amendment was *Commonwealth v. National Gettysburg Battlefield Tower, Inc.* ("*Gettysburg Tower*").[35] The case involved a challenge by the Attorney General to the construction of an observation tower on private land outside of Gettysburg Battlefield National Park.[36] No local or state governmental approval was required to construct the tower.[37] The state did not claim that it was attempting

32. H.B. 958, 1969 Gen. Assemb. (Pa. 1970) (as amended by Senate, March 10, 1970), *as reprinted in A Legislative History of Article 1, Section 27 of the Commonwealth of Pennsylvania*, *supra* note 19, at 212.

33. *Id.*

34. Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 929–30 (Pa. 2017) (emphasis added) (quoting Robinson Township v. Commonwealth, 83 A.3d 901, 945 (Pa. 2013)); *accord* Zauflik v. Pennsbury Sch. Dist., 104 A.3d 1096, 1126 (Pa. 2014) (quoting *Robinson Township.*, 83 A.3d at 945, with approval on this point).

35. Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc. (*Nat'l Gettysburg Battlefield Tower III*), 311 A.2d 588 (Pa. 1973).

36. *Id.* at 589–90.

37. *Id.* at 590.

to conserve and maintain public natural resources.[38] Rather, the state focused on the Amendment's first clause, arguing that the tower's visibility throughout the Gettysburg Battlefield would interfere with the public right to preservation of the natural, scenic, historic, and esthetic values of that environment.[39] The public's right to the preservation of those values, the Attorney General claimed, imposed a substantive limitation on such private development.[40]

The Attorney General's claim under the Amendment's first clause, against a private project on private land when no state or local governmental approval is required, would not ordinarily be brought or decided under article I. While the public trust clause imposes an affirmative responsibility on the government to "conserve and maintain" public natural resources, there is no comparable duty in the Amendment's first clause. Thus, it is better to understand the first clause as a limit on governmental authority.[41] But, the courts proceeded in a different way.

The Adams County Court of Common Pleas decided section 27 is self-executing because, among other reasons, provisions in the state's bill of rights had previously been held to be self-executing.[42] The common pleas court also denied the requested injunction, ruling that the state "failed to show by clear and convincing proof that the natural, historic, scenic, and aesthetic values of the Gettysburg area will be irreparably harmed by the erection of the proposed tower at the proposed site."[43]

The government lost on appeal before both the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court.[44] Still, the commonwealth court held that section 27 is self-executing.[45] While the Pennsylvania Supreme Court affirmed the commonwealth court's decision, there was no majority opinion on whether section 27 is self-executing.[46] This decision established the commonwealth court's opinion as binding precedent on the question of whether the Amendment

38. *Id.*

39. *Id.*

40. Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc. (*Nat'l Gettysburg Battlefield Tower I*), 13 ADAMS COUNTY LEGAL J. 75, 83–86 (1971).

41. PA. CONST. art. I, § 25 (stating that article I rights are "excepted out of the general powers of government").

42. *Nat'l Gettysburg Battlefield Tower I*, 13 ADAMS COUNTY LEGAL J. at 79–80 (citing Erdman v. Mitchell, 56 A. 327 (Pa. 1903)).

43. *Id.* at 86–87.

44. Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc. (*Nat'l Gettysburg Battlefield Tower II*), 302 A.2d 886, 895 (Pa. Commw. Ct. 1973); *Nat'l Gettysburg Battlefield Tower III*, 311 A.2d at 595.

45. *Nat'l Gettysburg Battlefield Tower II*, 302 A.2d at 892.

46. *Nat'l Gettysburg Battlefield Tower III*, 311 A.2d at 595.

is self-executing.[47] For reasons that appear to be outside the realm of precedent, that point was lost on subsequent courts, which held that section 27 is not self-executing; that is, that it does not apply unless the state legislature says so.[48]

The second case is *Payne v. Kassab*,[49] which involved a challenge to a state agency decision, not a private decision. The case was based in part on a claim that a street widening project in Wilkes-Barre violated the commonwealth's public trust obligation under section 27 by converting half an acre of a public park (about 3 percent of the park's area) to widen a street.[50] In deciding the case, the commonwealth court stated that judicial review of such decisions "must be realistic and not merely legalistic."[51] It then formulated a three-part balancing test that came to function as a substitute for the actual text of section 27:

> The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[52]

The court in *Payne* applied and found this three-part test to be satisfied. By prefacing the test with a statement that judicial review must be "realistic" rather than "legalistic," the commonwealth court all but stated that it was substituting its own rule for that stated in the constitution.[53] The Pennsylvania Supreme Court affirmed, but not on the basis of the three-part balancing test.[54]

This *Payne* test, not the text of section 27, came to be the "all-purpose test for applying article I, section 27 when there is a claim that the

47. *Id.*
48. *See, e.g.*, Robinson Township v. Commonwealth, 52 A.3d 463, 489 (Pa. Commw. Ct. 2012) (en banc), *aff'd in part*, *rev'd in part*, 83 A.3d 901 (Pa. 2013).
49. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).
50. *Id.* at 88.
51. *Id.* at 94.
52. *Id.*
53. *Id.*
54. *See generally* Payne v. Kassab, 361 A.2d 263 (Pa. 1976).

Amendment itself has been violated."[55] This test also greatly diminished the effectiveness of section 27, according to a comprehensive review of reported cases under *Payne v. Kassab* that was published in 2015.[56] Of twenty-four reported court cases involving a Section 27 challenge, only one held that the government decision failed the *Payne* test.[57] Another fifty-five reported cases were decided by the Environmental Hearing Board ("EHB"), which hears appeals of Department of Environmental Protection ("DEP") decisions.[58] Only eight of these had outcomes that could be considered favorable to a challenging party.[59]

C. Partial Restoration: Robinson Township v. Commonwealth

The Pennsylvania Supreme Court's landmark 2013 decision in *Robinson Township v. Commonwealth* partially restored section 27's status as constitutional law. In *Robinson Township*, as mentioned, a plurality of the Pennsylvania Supreme Court held unconstitutional several provisions of Act 13, a piece of state legislation designed to promote shale gas development in the state, by applying traditional rules of constitutional interpretation instead of the three-part *Payne* test.[60] We view *Robinson Township* as a "partial" restoration of section 27 because only two other justices (out of seven on the court) signed on to Chief Justice Castille's plurality opinion. Plurality opinions do not create binding precedent.[61] A fourth justice based his holding on substantive due process. Still, it was the first time that section 27 had ever been used (even by a plurality) to hold a statute unconstitutional.[62] It also brought attention to a fundamental point that had been more or less lost in decades of litigation—that section 27 is in Pennsylvania's Declaration of Rights and thus functions as a limitation on governmental power that is "on par" with other constitutionally-incorporated fundamental rights.[63] The environmental rights in section 27, the plurality said, are "on par

55. Pa. Envtl. Def. Found. v. Commonwealth, No. 228 M.D. 2012, 2013 WL 3942086, at *8 (Pa. Commw. Ct. Jan. 22, 2013) (quoting John C. Dernbach, *Natural Resources and the Public Estate*, *in* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES § 29.3(a) (Ken Gormley et al. eds., 2004)).

56. John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 344 (2015).

57. *Id.* at 344.

58. *Id.* at 348.

59. *Id.*

60. *Id.* at 350–51. On shale gas development, see John C. Dernbach & James R. May, SHALE GAS AND THE FUTURE OF ENERGY: LAW AND POLICY FOR SUSTAINABILITY (2016).

61. Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1070 n.14 (Pa. 2006); Commonwealth v. Sepulveda, 855 A.2d 783, 790 n.12 (Pa. 2004).

62. Dernbach, May & Kristl, *supra* note 4, at 1182.

63. Robinson Township v. Commonwealth, 83 A.3d 901, 948–49, 953 (Pa. 2013).

with, and enforceable to the same extent as, any other right reserved to the people in Article I."[64] Although we have described this case in detail elsewhere,[65] a brief summary helps to contextualize the *PEDF* decision.

Prior to Act 13, local governments had been preempted from regulating *how* shale gas activities should be conducted; most environmental regulation of these activities was reserved to the state. Municipalities could, however, use their zoning authority to regulate *where* such activities occur. Act 13 changed that. It declared that state environmental laws "occupy the entire field" of oil and gas regulation, "to the exclusion of all local ordinances."[66] In addition, it required "all local ordinances regulating oil and gas operations" to "allow for the reasonable development of oil and gas resources," and imposed uniform rules for oil and gas regulation.[67] The legislation also prohibited drilling or disturbing areas within specific distances of streams, springs, wetlands, and other water bodies,[68] but required DEP to waive these distance restrictions if the permit applicant submits "additional measures, facilities or practices" that it will employ to protect these waters.[69]

Recognizing that it was breaking new ground, the plurality stated:

> The actions brought under Section 27 since its ratification . . . have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision. Moreover, it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways. As a jurisprudential matter (and . . . as a matter of substantive law), these precedents do not preclude recognition and enforcement of the plain and original understanding of the Environmental Rights Amendment.[70]

The plurality emphasized that the Amendment is located in article I of the Pennsylvania Constitution, Pennsylvania's analogue to the U.S. Bill of Rights.[71] Rights in article I, the plurality noted, are understood as

64. *Id.* at 953–54.
65. *See generally* Dernbach, May & Kristl, *supra* note 4.
66. 58 PA. STAT. AND CONS. STAT. ANN. § 3303 (West 2014), *declared unconstitutional by* Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013), *on remand*, 96 A.3d 1104 (Pa. Commw. Ct. 2014).
67. *See id.* § 3304(a), *declared unconstitutional by Robinson Township*, 83 A.3d 901.
68. *See id.* § 3215(b), *declared unconstitutional by Robinson Township*, 83 A.3d 901.
69. *See id.* § 3215(b)(4), *declared unconstitutional by Robinson Township*, 83 A.3d 901.
70. *Robinson Township*, 83 A.3d at 950.
71. *See id.* at 962.

inherent rights that are reserved to the people; they operate as limits on government power.[72]

The first clause establishes two rights in the people, Castille wrote.[73] The first is a right to clean air, pure water, and "to the preservation of natural, scenic, historic and esthetic values of the environment."[74] The second is "a limitation on the state's power to act contrary to this right."[75] The second and third sentences of section 27, the plurality wrote, involve a public trust.[76] The state has two separate obligations as trustee.

> [First,] the Commonwealth has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties.[77]

The second is a duty "to act affirmatively to protect the environment, via legislative action."[78]

The plurality then applied that framework to the legislation at issue. With respect to pre-emption of local regulation, the plurality explained that the commonwealth is the trustee under the Amendment, which means that local governments are among the trustees with constitutional responsibilities.[79] The preemption of all local government regulation of shale gas development, the plurality explained, violates section 27 because "the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties."[80] These provisions are unconstitutional, the plurality reasoned, for two reasons. "First, a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential] is incapable of conserving or maintaining the constitutionally-protected aspects of the

72. *Id.* at 948.
73. *Id.* at 951.
74. *Id.*
75. *Id.*
76. *Id.* at 954–56.
77. *Id.* at 957.
78. *Id.* at 958.
79. *Id.* at 957.
80. *Id.* at 976–77.

public environment and of a certain quality of life."[81] Second, under Act 13 "some properties and communities will carry much heavier environmental and habitability burdens than others."[82] This result, the plurality stated, is inconsistent with the obligation that the trustee act for the benefit of "all the people."[83]

The plurality also decided that the buffer zone provisions for water bodies in section 3215 of Act 13 violates section 27 for three reasons.[84] First, the legislation "does not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver."[85] Second, "[i]f an applicant appeals permit terms or conditions . . . Section 3215 remarkably places the burden on [DEP] to 'prov[e] that the conditions were necessary to protect against a probable harmful impact of [sic] the public resources.'"[86] Third, because section 3215 prevents anyone other than the applicant from appealing a permit condition, it "marginalizes participation by residents, business owners, and their elected representatives with environmental and habitability concerns, whose interests Section 3215 ostensibly protects."[87]

Justice Baer's concurring opinion anchored the decision in substantive due process, which he said is "better developed and a narrower avenue to resolve this appeal."[88] While the challenged statutory provisions described above were held unconstitutional, there was no majority opinion on the basis for that holding. As a result, *Robinson Township* provided a dramatically different framework for thinking about the Environmental Rights Amendment. But it left open the question of how much the law had actually changed.

81. *Id.* at 979.
82. *Id.* at 980.
83. *Id.*
84. *Id.* at 982–84.
85. *Id.* at 983.
86. *Id.* at 984 (alteration in original) (citation omitted).
87. *Id.*
88. *Id.* at 1001 (Baer, J., concurring).

D. PEDF v. Commonwealth of Pennsylvania: Lower Court Decision

PEDF v. Commonwealth of Pennsylvania emerged as well from the shale gas revolution. Since at least 1947, the Department of Conservation and Natural Resources ("DCNR") and its predecessor agencies have leased state forests for oil and gas drilling. The Oil and Gas Lease Fund Act set out DCNR's responsibilities for administering that program, and assigned all rents and royalties received from leasing to DCNR, to be used for "conservation, recreation, dams, or flood control."[89] The wells under this program, mostly small in size and impact, generated several million dollars per year that DCNR used to offset the environmental impacts of the program and for other conservation purposes.

The Marcellus Shale revolution led to dramatic changes in this program. To begin with, it led to significant increases in both the number of acres leased and the revenues received by the state. Revenues from oil and gas leasing in 2009 alone brought in $167 million.[90]

Because of the recession that began in 2007, moreover, the state government experienced serious revenue shortfalls. In consequence, the legislature began to use oil and gas leasing on state forest and park lands to balance the budget by supplying money to the General Fund. Section 1602–E of the Fiscal Code shifted all royalties from the Oil and Gas Lease Fund to the General Fund.[91] Section 1603–E of the Fiscal Code appropriated up to $50 million in royalty money to DCNR (subject to the availability of funds) and required DCNR to prioritize expenditure of those funds for state forests and parks.[92] These are two of the most prominent amendments to the Fiscal Code that redirected money that would have been used for conservation purposes under the Oil and Gas Lease Fund Act to the General Fund, where it was appropriated for a variety of state government purposes.

The state received $926 million in oil and gas lease revenues between Fiscal Years 2008–2009 and 2014–2015. DCNR received about half of that. The rest was spent as part of the General Fund.[93]

89. Oil and Gas Lease Fund, 71 PA. STAT. AND CONS. STAT. ANN. §§ 1331–1333 (West 2012), *repealed by* 2017, Oct. 30, P.L. 725, No. 44, § 20(2)(i).

90. Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 921 (Pa. 2017).

91. 72 PA. STAT. AND CONS. STAT. ANN. § 1602–E (Supp. 2017), *declared unconstitutional by Pa. Envtl. Def. Found.*, 161 A.3d 911, as violative of PA CONST. art. 1, § 27.

92. *Id.* § 1603–E. (Supp. 2017), *declared unconstitutional by Pa. Envtl. Def. Found.*, 161 A.3d 911, as violative of PA CONST. art. 1, § 27.

93. *Pa. Envtl. Def. Found.*, 161 A.3d at 925.

In 2012, Pennsylvania Environmental Defense Foundation ("PEDF") sued the state in commonwealth court, seeking declaratory relief that a variety of legislative and administrative decisions to lease state land for oil and gas development, and divert funds from oil and gas leasing to the General Fund, are unlawful. Although brought prior to *Robinson Township*, PEDF's arguments evolved after that decision. This case ultimately was argued and decided under the public trust provisions of the Environmental Rights Amendment.

In 2015, the commonwealth court decided that DCNR's oil and gas leasing decisions are subject to article I, section 27, but nonetheless denied most of the declaratory relief that PEDF requested.[94] The court began its analysis by explaining that the plurality opinion in *Robinson Township* is not binding precedent.[95] This case was the first time the commonwealth court confronted the implications of *Robinson Township*. In a footnote, the commonwealth court noted its limited precedential effect:

> Part III of the . . . lead opinion in *Robinson Township*, authored by Chief Justice Castille, garnered the support of only two joining justices . . . . [And] therefore, represents a plurality view of the Supreme Court. The legal reasoning and conclusions contained therein are thus not binding precedent on this Court. . . . For our purposes, we find the plurality's construction of Article I, Section 27 persuasive only to the extent it is consistent with binding precedent from this Court and the Supreme Court on the same subject.[96]

Noting that the *Robinson Township* plurality had criticized the three-part *Payne* balancing test, the commonwealth court in *PEDF* stated that "[i]n the absence of a majority opinion from the Supreme Court or a decision from this Court overturning *Payne I*, that opinion is still binding precedent on this Court."[97] The commonwealth court nonetheless applied the public trust provisions of the Environmental Rights Amendment to PEDF's three primary arguments.

To begin with, PEDF argued that the legislature violated section 27 by preventing DCNR from spending any Oil and Gas Lease Fund Act

94. Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 172 (Pa. Commw. Ct. 2015), *rev'd in part, vacated in part*, 161 A.3d 911 (Pa. 2017).

95. *Id.* at 156 n.37 (citing Kelley v. State Emps.' Ret. Bd., 932 A.2d 61, 67–68 (Pa. 2007)).

96. *Id.*

97. *Id.* at 159.

royalties without prior legislative authorization.[98] By taking away DCNR's authority to spend royalty receipts from gas leasing, PEDF argued, the legislature had compromised DCNR's ability to conserve and maintain public natural resources by, among other things, expending these funds to mitigate the environmental effects of leasing.[99] The court was not persuaded that the legislation is "clearly, palpably, and plainly unconstitutional."[100]

PEDF also argued that Section 1603–E of the Fiscal Code limits leasing funds to DCNR $50 million "*without any fiduciary analysis* of the financial needs of DCNR to meet its statutory and constitutional responsibilities," including its responsibilities under section 27.[101] The court restated this argument, explaining that "[i]n essence" PEDF argued that the legislature was failing to adequately fund DCNR.[102] The court then rejected this argument as restated: "PEDF has presented no evidence that the current funding appropriated to DCNR from all sources is inadequate—*i.e.*, that the funding is so deficient that DCNR cannot conserve and maintain our State natural resources."[103]

Finally, PEDF sought a judicial declaration that, because oil and gas taken through leasing on state forest lands is "a nonrenewable public natural resource," money received from leasing can only be used for public trust purposes under section 27.[104] The court rejected that argument.[105] While section 27 requires the state to conserve and maintain public natural resources, the court explained, it "does not also expressly command that all revenues derived from the sale or leasing of the Commonwealth's natural resources must be funneled to those purposes and those purposes only."[106] Other provisions of the constitution, by contrast, require that moneys be expended for a particular purpose.[107]

98. *Id.* at 159–60 (referring to Act of Apr. 9, 1929, P.L. 343, No. 176, *as amended* 72 PA. STAT. AND CONS. STAT. ANN. § 1602–E (West 2013)).

99. *Id.*

100. *Id.* at 161.

101. *Id.* (emphasis added) (quoting Brief for Petitioner at 93–94, *Pa. Envtl. Def. Found.*, 108 A.3d 140).

102. *Id.*

103. *Id.* at 166.

104. Second Amended Petition for Review in the Nature of an Action for Declaratory Relief at 58–59, *Pa. Envtl. Def. Found.*, 108 A.3d 140 (No. 228 M.D. 1012).

105. *Pa. Envtl. Def. Found. v. Commonwealth*, 108 A.3d at 168.

106. *Id.*

107. *Id.* at 168 n.46.

II. PEDF AND THE PENNSYLVANIA SUPREME COURT

The supreme court reversed and remanded the commonwealth court's decision. Justice Christine Donohue wrote the majority opinion for the court, and was joined by Justices Todd, Dougherty, and Wecht. Justice Baer wrote an opinion that concurred with the majority opinion on the meaning of article I, section 27 but dissented from the majority's application of article I, section 27 to the proceeds of the oil and gas leasing program. Justice Saylor issued a dissenting statement based on Justice Baer's opinion but nonetheless recognized "that the Environmental Rights Amendment is an embodiment of the public trust doctrine." The seventh justice, Justice Eakin, did not participate in the decision.

A. Majority

The Supreme Court of Pennsylvania took jurisdiction on two issues:

> 1. The proper standards for judicial review of government actions and legislation challenged under the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, in light of *Robinson Township v. Commonwealth*;
>
> 2. Constitutionality under Article I, [Section] 27 of Section 1602–E and 1603–E of the Fiscal Code and the General Assembly's transfers/appropriations from the Lease Fund.[108]

On the proper standard of judicial review, the court began by addressing the three-part balancing test that the commonwealth court first used in *Payne v. Kassab* in 1973. Stating that the test "is unrelated to the text of Section 27 and the trust principles animating it," and that it "strips the constitutional provision of its meaning," the court rejected the test as the proper standard to apply.[109] Instead, the court said, "the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment."[110]

The court noted that the amendment is located in article I, which is the constitutional declaration of rights. The court explained that the amendment grants two sets of rights to the people.[111] Citing the *Robinson*

108. Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 929 (Pa. 2017) (alteration in original) (citation omitted).

109. *Id.* at 930.

110. *Id.*

111. *Id.* at 930–31.

Township plurality, the court said: "[t]his clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional."[112]

The second and third sentences, the court said, echoing *Robinson Township*, create a constitutional public trust.[113] Under these provisions, the court noted, the Commonwealth is the trustee.[114] The corpus, or body, of the trust, is public natural resources, which the court said includes state parks and forests, as well as the oil and gas they contain.[115] The people, including present and future generations, are "the named beneficiaries" of this trust.[116] The court also explained that "all agencies and entities of the Commonwealth government, both statewide and local," have a constitutional trust responsibility.[117]

The use of trust language in the public trust sentences, the court said, indicates the value of drawing on pre-existing private trust law to determine their meaning.[118] Thus, in exercising its public trust duties, the Commonwealth is bound by the private trust duties of prudence (exercising "such care and skill as a man of ordinary prudence would exercise in dealing with his own property"), loyalty (managing the trust corpus "so as to accomplish the trust's purposes for the benefit of the trust's beneficiaries"), and impartiality (managing "the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust").[119]

The court added that, while the trustee has some discretion with respect to the corpus, or subject, of the trust, it "may use the assets of the trust 'only for purposes authorized by the trust or necessary for the preservation of the trust.'"[120] Under private trust law in effect at the time of the enactment of article I, section 27, the court said, "proceeds from the sale of trust assets are part of the corpus of the trust."[121] The court addressed and rejected the Commonwealth's argument that proceeds from oil and gas leasing are not subject to the trust, saying it would "substantially diminish" the Commonwealth's public trust

112. *Id.* at 931.
113. *Id.* at 931–32.
114. *Id.* at 932.
115. *Id.* at 916.
116. *Id.* at 931–32.
117. *Id.* at 931 n.23.
118. *Id.* at 932.
119. *Id.* at 932–33 (citations omitted).
120. *Id.* at 933 (Robinson Township v. Commonwealth, 83 A.3d 901, 978 (Pa. 2013)).
121. *Id.*

responsibilities.[122] A recurring point in the majority opinion, in fact, is that the Commonwealth must use public natural resources as a trustee, and not as a proprietor.[123]

PEDF argued that all proceeds from oil and gas leasing are subject to the public trust. The court said it could not decide that question because it had not been sufficiently argued and briefed by the parties.[124] Because proceeds from the sale of the trust corpus are subject to public trust restrictions, the court held, royalties based on gross production from oil and gas wells are subject to the public trust.[125] But under trust law, conventional rental income for a property can be paid directly to the beneficiaries without any restrictions. The court said it did not know how to categorize other income to the state from leasing, particularly annual rental fees.[126]

This discussion was a part of the court's analysis of the first issue—the proper standard of review under section 27. The court concluded its analysis of the first issue by addressing a question raised by an amicus brief from the Republican Caucus. The Caucus argued that the Environmental Rights Amendment is not self-executing. The court, citing its own prior decisions, rejected that argument, and reaffirmed that the public trust is self-executing against the government.[127]

The court then addressed the second issue, the constitutionality of sections 1602–E and 1603–E of the Fiscal Code and the General Assembly's transfers/appropriations from the Lease Fund. Sections 1602–E and 1603–E, the court said, specifically relate to royalties. The court held both provisions to be unconstitutional on their face, based on the prior analysis. The court said: "Without any question, these legislative enactments permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee's fiduciary obligations."[128] The court then said: "To the extent the remainder of the Fiscal Code amendments transfer proceeds from the sale of trust assets to the General Fund, they are likewise constitutionally infirm."[129] The court suggested that an accounting—a kind of financial audit—may be needed to ensure that funds moved to the General Fund "are ultimately

122. *Id.* at 935.
123. *Id.* at 935, 939.
124. *Id.* at 935.
125. *Id.*
126. *Id.* at 935–36.
127. *Id.* at 936–37.
128. *Id.* at 938 (citing Robinson Township v. Commonwealth, 83 A.3d 901, 950 (Pa. 2013)).
129. *Id.* at 938 (emphasis omitted).

used in accordance with the trustee's obligation to conserve and maintain our natural resources."[130]

The supreme court remanded the case to the commonwealth court for a determination on whether proceeds other than royalties from oil and gas leasing are subject to the section 27 public trust.[131] That determination will almost certainly include a determination of what specific purposes lease moneys can be expended consistent with the obligation to conserve and maintain public natural resources. The remand will involve the constitutionality of expenditures involving roughly half of the $926 million received from oil and gas leasing between 2008 and 2015.[132] The commonwealth court on remand will likely also need to address the extent to which subsequent and future proceeds from leasing are subject to section 27, and for what specific purposes they can be spent.

B. Concurring and Dissenting Opinion

Justice Baer filed a concurring and dissenting opinion. He described the court's decision as "monumental," and noted that he was in "full agreement" 1) with the "dismantling" of the *Payne* test, 2) that the public trust provisions of article I, section 27 are self-executing, and 3) with the recognition that "all branches of the Commonwealth are trustees of Pennsylvania's natural resources."[133] These holdings solidify what he called "the jurisprudential sea-change begun by Chief Justice Castille's plurality in *Robinson Township*."[134] He also agreed that, in managing public natural resources, the Commonwealth trustees must adhere to the private trustee's duties of loyalty, impartiality, and prudence.[135]

He nonetheless dissented from "the primary holding of the case declaring various fiscal enactments unconstitutional or potentially unconstitutional based upon the Majority's conclusion that the proceeds from the sale of natural resources are part of the 'trust corpus' protected by Section 27."[136] Among other things, he argued that there is no language in article I, section 27 relating to how money obtained from public trust resources is to be expended, that the common law public trust doctrine imposes no such limits, and that the legislative history indicates

130. *Id.* at 939.
131. *Id.* at 936, 939.
132. *Id.* at 925.
133. *Id.* at 940 (Baer, J., concurring and dissenting).
134. *Id.*
135. *Id.* at 945–46.
136. *Id.* at 940.

that the Commonwealth can continue to dispose of public natural resources.[137]

C. Dissenting Opinion

Justice Saylor filed a dissenting opinion that reads in full: "I join the central analysis of the dissenting opinion authored by Justice Baer, based on the recognition that the Environmental Rights Amendment is an embodiment of the public trust doctrine."[138]

III. OVERALL IMPLICATIONS OF PEDF DECISION

The *PEDF* decision presents a host of implications for Pennsylvania and the broader law related to natural resources and constitutional environmentalism. It clarifies and resolves some issues left open by *Robinson Township*, opens a new chapter in the nature and application of public trust principles, and furthers the global trend towards constitutional protection of important environmental rights.

A. The Principles of Robinson Township Are Now Controlling Precedent

After issuance Chief Justice Castille's plurality decision in *Robinson Township,* recognition of its importance as a fundamental clarification and renewal of section 27 was swift and ongoing. Chief Justice Castille's opinion was described as a "landmark decision."[139] Others said, "Pennsylvanians will almost certainly be able to count on reinvigorated judicial protection of their environmental rights for generations to come."[140] As a result, *Robinson Township* has been the subject of an ever-expanding body of articles and commentaries.[141] Still, despite its legal insights, Chief Justice Castille's opinion in *Robinson Township* commanded only a plurality of three votes—a point that was not lost on the commonwealth court.

The *PEDF* decision, by contrast was by four justices (out of six who participated on a seven-member court), with a fifth concurring on the

137. *See id.* at 940–49.

138. *Id.* at 949 (Saylor, J., dissenting).

139. *See* ION Geophysical Corp. v. Hempfield Township, Civ. No. 14–410, 2014 WL 1405397, at *7 (W.D. Pa. Apr. 10, 2014).

140. *See* Dernbach & Prokopchak, *supra* note 56, at 359.

141. *See, e.g.*, Dernbach, *Constitutional Trust*, *supra* note 5; Dernbach, May & Kristl, *supra* note 4; Dernbach & Prokopchak, *supra* note 56; Daly & May, *A Model for Environmental Constitutionalism*, *supra* note 5; Fershee, *supra* note 5; Kristl, *The Devil is in the Details, supra* note 5; Valentine, *supra* note 5, at 78–90.

principles employed to decide the case. The majority opinion embraces and adopts *Robinson Township*'s core principles and makes many of them binding legal precedent. This adoption of *Robinson Township* is quite comprehensive. It starts near the very beginning of the majority opinion with the wholesale quotation of nearly three pages of the *Robinson Township* plurality opinion.[142] The *PEDF* majority described this passage as the plurality's "careful[] review[] [of] the reasons why the Environmental Rights Amendment was necessary, the history of its enactment and ratification, and the mischief to be remedied and the object to be obtained."[143]

In its discussion of "the contours of Section 27,"[144] the majority opinion referred back to *Robinson Township*: "[t]his is not the first time we have been called upon to address the rights and obligations set forth in the Environmental Rights Amendment. We did so in *Robinson Township,* and we rely here upon the statement of basic principles thoughtfully developed in that plurality opinion."[145] The majority then articulated several principles recognized in *Robinson Township*, including:

- The General Assembly's "broad and flexible" police powers in Article III of the Pennsylvania Constitution are "expressly limited by fundamental rights reserved to the people in Article I of our Constitution"[146] that are "inherent and indefeasible;"[147]
- Section 27 sets forth at least two "inherent and indefeasible" article I rights;[148]
- The first section 27 right, found in the first sentence, is "a prohibitory clause declaring the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment" such that "[t]his clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional;"[149]

142. *See Pa. Envtl. Def. Found.*, 161 A.3d at 916–19 (citing Robinson Township v. Commonwealth, 83 A.3d 901, 950 (Pa. 2013)).
143. *Id.* at 916.
144. *Id.* at 930.
145. *Id.*
146. *Id.* at 930–31 (citing *Robinson Township*, 83 A.3d at 946).
147. *Id.* at 931 (citing *Robinson Township*, 83 A.3d at 948 (quoting PA. CONST. art. I, § 1)).
148. *Id.*
149. *Id.* (citing *Robinson Township*, 83 A.3d at 951).

- The second section 27 right, found in the second and third sentences, is "the common ownership by the people, including future generations, of Pennsylvania's public natural resources,"[150] and the third sentence's establishment of "a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries;"[151]
- As trustee of the environmental trust,

> [T]he Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality;[152]

- The fiduciary duties of the section 27 trustee "are not vested exclusively in any single branch of Pennsylvania's government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality;"[153]
- "Pennsylvania's environmental trust thus imposes two basic duties on the Commonwealth as the trustee. First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. Second, the Commonwealth must act affirmatively via legislative action to protect the environment."[154]

150. *Id.* (citing *Robinson Township*, 83 A.3d at 954).
151. *Id.* at 931–32 (citing *Robinson Township*, 83 A.3d at 955–56).
152. *Id.* at 932 (citation omitted) (quoting *Robinson Township*, 83 A.3d at 956–57).
153. *Id.* at 931 n.23 (citing *Robinson Township*, 83 A.3d at 956–57).
154. *Id.* at 933 (citing *Robinson Township*, 83 A.3d at 957–58).

As Justice Baer observed in the concurrence paragraph of his opinion, the majority's holdings "solidify the jurisprudential sea-change begun by Chief Justice Castille's plurality in *Robinson Township* which rejuvenated Section 27 and dispelled the oft-held view that the provision was merely an aspirational statement. With this, I am in full agreement."[155]

Thus, with five justices voting in support of these statements, many of these core principles from *Robinson Township* provide a solid framework for deciding future section 27 cases. Because the court used many of these principles—particularly on public trust—to decide the *PEDF* case, these principles are now binding precedent. In addition, this full-throated approval and adoption of the main principles set forth in the *Robinson Township* plurality opinion likely also gives highly persuasive effect to other statements in the plurality opinion when analyzing section 27 claims.

Some of what is said in *Robinson Township* and *PEDF* is arguably dicta; it was not necessary to decide these cases. The first clause of section 27 was not at issue in *PEDF*, for example, and appears to have played only a minor role in *Robinson Township*. That means a future court might depart in some way from one or more of the broader pronouncements made about section 27 that are not the basis for the holdings in those cases. At least three factors, however, mitigate against the likelihood of that happening to any significant degree. First, these statements were made in two separate cases. In *PEDF*, in fact, five of the court's six participating justices endorsed these broad principles.[156] Second, many of these principles derive directly from the text of the Amendment itself: the fact that section 27 is in article I, which provides the people with rights against the government; the fact that there are two clauses, each of which have an independent meaning; the fact that the public trust clause explicitly places an affirmative duty on the Commonwealth; the fact that these rights and duties explicitly involve the Commonwealth in general and not a specific branch of government or a specific governmental entity; and the fact that public trust language in section 27 makes it appropriate to consider private trust law as a source of meaning for the amendment.[157] Third, these broad statements of principles make sense as necessary guidance to the bar, lower courts, and the public as a way of reducing uncertainty about the meaning and

155. *Id.* at 940 (Baer, J., concurring and dissenting) (citation omitted).

156. It is possible to read Justice Saylor's dissenting opinion—in which he recognized "that the Environmental Rights Amendment is an embodiment of the public trust doctrine"—as an endorsement of these principles. 161 A.3d at 949 (Saylor, J., dissenting).

157. *See* PA. CONST. art. I; *id.* § 27.

scope of text that had previously not been taken seriously. Because the principles were articulated for that purpose, it is less likely that a future court will deviate from them in any significant way.

It is also possible to overstate the extent to which these principles are non-authoritative dicta. While the first clause of section 27 was not at issue in *PEDF*, it is difficult to disagree with the court's statement that the clause imposes a limit on government authority. That is, after all, the whole point of article I rights. Similarly, the *PEDF* court states "all agencies and entities of the Commonwealth government, both statewide and local," have public trust responsibilities under section 27.[158] Because local governments were not parties to the *PEDF* decision, it is easy to read that statement as dicta insofar as local governments are concerned. Yet the *Robinson Township* plurality decision was based on an understanding that Act 13 violated section 27 because it prevented local governments from carrying out their constitutional public trust responsibilities.[159] A plurality opinion on this issue coupled with a majority dicta statement supporting it do not have the same precedential weight as a majority holding, but it cannot be said that the applicability of section 27 to local governments is merely an abstract judicial pronouncement.

B. Section 27 Analysis Will Henceforth Be Payne-Free

As noted above, in its 1973 *Payne v. Kassab* decision the Commonwealth Court of Pennsylvania adopted a three-part test for analyzing claims under section 27.[160] The *Robinson Township* plurality found the *Payne* test problematic for a number of reasons.[161] According to the plurality, the *Payne* test ignored the text of the amendment in favor of General Assembly actions and policy choices.[162] The test "describes the Commonwealth's obligations—both as trustee and under the first clause of Section 27—in much narrower terms than the constitutional provision."[163] It had "the effect of minimizing the constitutional duties of executive agencies and the judicial branch, and circumscribing the abilities of these entities to carry out their

158. *Pa. Envtl. Def. Found.*, 161 A.3d at 931 n.23.

159. *Robinson Township*, 83 A.3d at 977.

160. 312 A.2d 86 (Pa. Commw. Ct. 1973).

161. For a more detailed analysis of the *Robinson Township* plurality's critique, see Kenneth T. Kristl, *It Only Hurts When I Use It: The Payne Test and Pennsylvania's Environmental Rights Amendment*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10594, 10598–601 (2016) [hereinafter Kristl, *It Only Hurts When I Use It*].

162. *Robinson Township.*, 83 A.3d at 966.

163. *Id.* at 967.

constitutional duties independent of legislative control."[164] As a result, the plurality concluded that the *Payne* test is "inappropriate to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests."[165] Thus, while not throwing out the test completely, the plurality concluded that the *Payne* test is "inappropriate" for the vast majority of section 27 claims.

As noted above, the commonwealth court's *PEDF* decision—while mentioning the *Robinson Township* plurality's critique—nevertheless chose to continue following its *Payne* test because there was no "majority opinion from the Supreme Court or a decision from this Court overturning *Payne I*."[166] Subsequent commonwealth court opinions continued to view and apply the *Payne* test as binding precedent to the apparent exclusion of the concerns raised by the *Robinson Township* plurality.[167]

The Supreme Court of Pennsylvania's *PEDF* majority opinion shuts the door completely on future use of the *Payne* test—what Justice Baer calls the "dismantling" of the test.[168] Eschewing even the "narrowest category" of cases described in *Robinson Township*, the majority was clear and unequivocal:

> The *Payne* . . . test, which is unrelated to the text of Section 27 and the trust principles animating it, strips the constitutional provision of its meaning. Accordingly, we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges.[169]

164. *Id.*

165. *Id.*

166. Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 159 (Pa. Commw. Ct. 2015), *rev'd in part, vacated in part*, 161 A.3d 911 (Pa. 2017).

167. *See* Brockway Borough Municipal Auth. v. Dep't of Envtl. Prot., 131 A.3d 578, 588–89 (Pa. Commw. Ct. 2016) (simply applying the *Payne* test); Feudale v. Aqua Pa., Inc., 122 A.3d 462, 468, 468 n.8 (Pa. Commw. Ct. 2015) (applying only the *Payne* test and noting that "it remains binding precedent on this Court until overruled by either a majority opinion of the Supreme Court or an en banc panel of this Court").

168. Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 940 (Pa. 2017) (Baer, J., concurring and dissenting).

169. *Id.* at 930 (majority opinion) (citations omitted). This conclusion may be less surprising given that the parties and various amici before the court all rejected the *Payne* test as the appropriate standard for examining section 27 challenges. *Id.*

The net result of this rejection is that courts will need to develop a different way of conducting the section 27 analysis.[170]

C. The Text of Section 27 Plus Private Trust Law Provide the Controlling Law for the Second Clause

With the *Payne* test rejected, the majority posited a different test:

> [W]hen reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment. We must therefore carefully examine the contours of the Environmental Rights Amendment to identify the rights of the people and the obligations of the Commonwealth guaranteed thereunder.[171]

One implication of this new test will be determining how it will work in practical terms.[172] *Robinson Township* and the *PEDF* majority opinion provide some clues. The *Robinson Township* plurality used the text of section 27 to identify key obligations of the Commonwealth trustee: (1) a prohibition against unreasonably impairing the rights in the first sentence;[173] and (2) a duty to conserve and maintain—created by the public trust in the second and third sentences—that requires the Commonwealth "to prevent and remedy the degradation, diminution, or depletion of our public natural resources."[174] With the second of these textual mandates, the *Robinson Township* plurality interpreted the obligation through the lens of private trust law fiduciary duties of "prudence, loyalty, and impartiality" as shaped by the nature and corpus of the trust.[175] The *PEDF* majority, by embracing the *Robinson Township* plurality analysis, echoes this approach. In both cases, the analysis led to the conclusion that the statutes at issue were unconstitutional because they were fundamentally inconsistent with or otherwise ignored section 27's text and fiduciary obligations.[176]

170. For one suggestion of how that might occur based the on the principles of *Robinson Township*, see Kristl, *It Only Hurts When I Use It*, *supra* note 161.

171. *Pa. Envtl. Def. Found.*, 161 A.3d at 930.

172. One approach, articulating practical principles for administrative and judicial decision-making based on the *Robinson Township* plurality's analysis, can be found in Kristl, *The Devil is in the Details*, *supra* note 5.

173. Robinson Township v. Commonwealth, 83 A.3d 901, 951–52 (Pa. 2013).

174. *Id.* at 956–57.

175. *Id.*

176. *Id.* at 979, 981–82; *Pa. Envtl. Def. Found.*, 161 A.3d at 939.

Interestingly, the *PEDF* majority's new text, consistent with Pennsylvania trust law, was described in the context of determining the "proper standard of judicial review."[177] The court did not use "standard of review" in an appellate review sense. The typical "standard of review" in any appellate case looks at whether there are questions of law or fact, with questions of law subject to *de novo* review.[178] Nor did the court refer to the differing standards of review that are often used to adjudicate constitutional claims. The typical levels of review used in the analysis of constitutional claims are strict scrutiny, intermediate scrutiny, and rational-basis review.[179] However, neither *Robinson Township* nor *PEDF* stated the test in terms of a level of scrutiny. The most likely reason is the focus of those cases on the public trust clause of section 27, which comes with a specific substantive trustee responsibility ("conserve and maintain") as well as the trust obligations of prudence, loyalty, and impartiality.[180] The public trust clause does not lend itself easily or coherently to an additional test based on strict or other scrutiny.

The first clause, which was not at issue in *PEDF* and appears not to have played a significant role in *Robinson Township*, could arguably be interpreted in terms of strict scrutiny.[181] Under that approach, for example, the government cannot interfere with the people's rights to clean air, pure water, or the preservation of certain values in the environment unless 1) it does so to further a compelling government interest and 2) the legislation in question was drawn narrowly to further that interest.[182] That approach has features that a future court might find attractive, particularly because it is consistent with other constitutional jurisprudence.[183]

From a workability perspective, however, one challenge would be applying such a test when both clauses of section 27 are applicable. To begin with, the first clause of section 27 will usually be applicable in cases involving the second or public trust clause of section 27. The "public natural resources" protected by the second clause will always, or nearly always, be a subset of "clean air, pure water, the natural, scenic, historic,

177. *Pa. Envtl. Def. Found.*, 161 A.3d at 930.

178. *See, e.g.*, Pa. State Educ. Ass'n v. Commonwealth, 148 A.3d 142, 149 n.5 (Pa. 2016); *Robinson Township*, 83 A.3d at 943.

179. *See, e.g.*, Zauflik v. Pennsbury Sch. Dist., 104 A.3d 1096, 1118 (Pa. 2014) (discussing different levels of scrutiny). *See also* Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (applying strict scrutiny in analyzing environmental rights amendment to Montana constitution).

180. *Robinson Township*, 83 A.3d at 957; *Pa. Envtl. Def. Found.*, 161 A.3d at 932.

181. *See* PA. CONST. art. I, § 27.

182. *Cf.* DePaul v. Commonwealth, 969 A.2d 536, 548 (Pa. 2009) (applying strict scrutiny for article I, section 7 freedom of expression analysis).

183. *See, e.g.*, *id.* at 549–50.

and esthetic values of the environment." That means that both tests ordinarily will be applied in any case involving public natural resources. That was not done in *PEDF* because the petitioner raised only the public trust issue, but future cases under section 27 are likely to involve claims that both clauses have been violated. When that happens, it would be helpful to the parties and reviewing bodies such as courts for the two tests to be compatible. This, of course, is a question to be decided in a future case.

The unreasonable interference/unreasonable degradation standards applied to the first and second clauses, respectively, raises a different standard of review issue: the meaning of "reasonable." In a case decided less than two months after the *PEDF* decision, *Center for Coalfield Justice v. Commonwealth, Department of Environmental Protection*,[184] the EHB indicated the determination of reasonableness should depend on both the economic value of the activity being challenged and the environmental harm it causes. In this case, the EHB heard the appeal of two longwall mining permit revisions issued by DEP. Longwall mining is a type of underground mining that involves the use of continuous mining machines that remove an entire coal seam, causing almost immediate subsidence after the machines have done their work.[185] The Center's challenge was based in part on a claim that overlying streams were unconstitutionally damaged by the resulting subsidence.[186] In deciding that the degradation was not unreasonable, the EHB said:

> In order to be unreasonable, we conclude that the destruction and degradation of the streams would need be more significant than the limited and temporary impacts that result from Consol's longwall mining under Permit Revision No. 180 issued by the Department. Longwall mining has social utility and is a type of development leading to an increase in the general welfare, convenience, and prosperity of the people. If it lacked that characteristic, it would be more likely to be judged unreasonable. The impacts to the streams are generally limited in time and scope in a large part because of the requirements for mitigation and restoration that the Department placed in Permit Revision No. 180.[187]

184. EHB, No. 2014-072-B (Aug. 15, 2017) (consolidated with No. 2014-083-B & No. 2015-051-B).

185. *See id.* at 4–5.

186. *See id.* at 1–3, 9.

187. *Id.* at 62.

The EHB made two kinds of arguments about reasonableness. One is based on the "limited and temporary" impacts to the streams.[188] The other is about the economic and social value of longwall mining.[189] The EHB acknowledged that it was on uncertain ground, not quite two months after the *PEDF* decision, because both the *Robinson Township* and *PEDF* courts involved the constitutionality of legislation and did not provide guidance on challenges to DEP permitting decisions.[190] But the EHB decision raises a problem that will need to be addressed properly to ensure the integrity of section 27 going forward.

The problem is simply put: if reasonableness includes the economic value of the activity being challenged, then in any section 27 case a court or other reviewing body (like the EHB) will have to balance the economic value of the activity against its environmental harm—and harm to public rights. That, of course, is essentially the third prong of the now-repudiated *Payne* test. The history of the *Payne* test, summarized above, suggests that reviewing bodies are unlikely to decide that the environmental harm of an activity outweighs its economic benefit. Beyond that, a focus on balancing economic and environmental value is at odds with the purpose of section 27—which is to create and protect rights in a clean environment.[191] The magnitude of the interference with those rights is best measured in terms of the significance of the environmental harm being imposed by the challenged activity, not on the outcome of this kind of balancing test, much less a judicially repudiated balancing test. If, in this case, DEP acted so as to make the harms to these streams negligible or *de minimis*, then section 27 was not violated regardless of the economic and social utility of longwall mining. The overall magnitude of the adverse environmental impact, by itself, is a much better standard by which to judge the constitutionality of DEP actions. It is one thing to engage in balancing at the remedy phase of litigation, when a court or other reviewing body is trying to decide what relief a party is entitled to. It is quite another to decide that a person's constitutional rights have not been violated because of the economic and social value of the activity that the person is challenging.

In addition to the question of what "reasonable" means, another basic question remains to be resolved—the relationship between the Commonwealth's constitutional duty to conserve and maintain public natural resources and its trust responsibilities of prudence, loyalty, and impartiality. On one level, the answer is easy: both are required. In

188. *Id.*
189. *Id.* at 60.
190. *Id.* at 56–58.
191. PA. CONST. art. I, § 27.

Center for Coalfield Justice, for instance, the EHB held that DEP had met its trustee responsibilities to conserve and maintain two streams by denying Consol permission to mine under them.[192] It also held that DEP had exercised its trustee responsibilities of prudence, loyalty, and impartiality by exercising not only ordinary care, but great care, and a high level of skill, in reviewing the permit application.[193] In that sense, the two responsibilities reinforce each other. If the Commonwealth acts with prudence, loyalty, and impartiality, it is highly likely that it will conserve and maintain the public natural resources in question. Conversely, if it conserves and maintains public natural resources, few will question whether the Commonwealth acted with prudence, loyalty, and impartiality. But it is conceivable—particularly in cases where the actual impact on the resource is uncertain or where the public natural resource is already deteriorating (e.g., climate change)—that acting with prudence, loyalty, and impartiality will be viewed as a substitute for conserving and maintaining public natural resources.

D. Section 27 is Self-Executing Against the Government

The *PEDF* majority decision resolves a question about the nature of section 27: Is it self-executing? Or does it need further legislation for it to be effective? The question of whether section 27 was self-executing had been unresolved since 1973. In that year, the Pennsylvania Supreme Court decided *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,[194] a case in which Commonwealth parties sought to enjoin the construction of an observation tower on property adjoining the Gettysburg battlefield. The issue of whether section 27 was self-executing was considered by two of the five justices (who would have found that it was self-executing) but not by the other three.[195] As the *Robinson Township* plurality described it, "[o]n the issue of whether Section 27 of Article I was self-executing, no majority holding or reasoning emerged."[196] The *Robinson Township* plurality did not decide the issue because "[t]he parties here do not dispute the self-executing nature of Section 27."[197] However, in the Pennsylvania Supreme Court's *PEDF* case, the Republican caucus as amicus argued that section 27 was

192. *Ctr. for Coalfield Justice v. Commonwealth, Dep't of Environmental Protection*, EHB, No. 2014-072-B, at 63–64.
193. *Id.* at 64–65.
194. 311 A.2d 588 (Pa. 1973).
195. *Id.* at 590.
196. 83 A.3d 901, 964 n.52 (Pa. 2013).
197. *Id.*

not self-executing.[198] The *PEDF* majority therefore took the opportunity to decide the issue.

The *PEDF* majority cited to the supreme court's affirmance in the *Payne* case in which the court nevertheless concluded that the trust provisions in the second and third sentences of section 27 do not require legislative action in order to be enforced against the Commonwealth in regard to public property.[199] In *Payne*, the supreme court stated:

> There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the [A]mendment does so by its own *Ipse dixit*.[200]

After citing to Chief Justice Castille's recognition in *Robinson Township*, that the Commonwealth's trustee obligations "create a right in the people to seek to enforce the obligations,"[201] the *PEDF* majority "re-affirm[ed] our prior pronouncements that the public trust provisions of Section 27 are self-executing."[202]

This therefore puts the issue regarding the self-executing nature of the public trust clause of section 27 to rest. The public trust obligations of section 27 are enforceable regardless of whether there is legislation. This conclusion makes perfect sense under article I. We do not expect that legislation is needed to protect our constitutional right to free speech; that right is, after all, protected by the constitution. It is the same with public trust rights under section 27.

As previously noted, this line of analysis supports the view that the first clause of section 27 is also self-executing against the government, even though that issue was not before the court in *PEDF*. This raises a question about the continuing vitality of *Gettysburg Tower*, which involved a claim that a private party violated the first clause of section 27.[203] That question, of course, will need to be decided by a future court.

198. Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 936 (Pa. 2017).
199. *Id.* at 937 (quoting Payne v. Kassab, 361 A.2d 263, 272 (Pa. 1976)).
200. *Payne*, 361 A.2d at 272.
201. *Pa. Envtl. Def. Found.*, 161 A.3d at 937 (quoting *Robinson Township*, 83 A.3d at 974).
202. *Id.*
203. *See supra* notes 194–98 and accompanying text.

E. The Emergence of Public Trust Issues

The public trust doctrine has historical, common law, and constitutional dimensions. It derives from the ancient notion that the sovereign holds certain natural resources and objects of nature in trust for the benefit of current and future generations. The principle of public ownership underlying the public trust doctrine can be traced from Roman Law through the Magna Carta to present-day constitutionalism and jurisprudence. The Romans codified the right of public ownership of important natural resources: "The things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore."[204] English common law continued the public trust tradition: "[T]here are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common. . . . Such (among others) are the elements of light, air, and water."[205]

The public trust doctrine has evolved largely under the common law. The doctrine is "rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles."[206] The leading case establishing the doctrine in the United States—the "lodestar" of the modern public trust doctrine—is the United States Supreme Court's 1892 decision in *Illinois Central Railroad Company v. Illinois*.[207] In that case, the Court held that states hold submerged lands under navigable waters in public trust and are not allowed to convey those lands to private parties.[208]

PEDF appears to be a gateway through which a new exploration of public trust principles in Pennsylvania may emerge. This is evident in two different ways. First, the primary basis for Justice Baer's dissent rests on a disagreement over the nature and extent of private versus public trust principles.[209] Second, *PEDF* was decided on the same day as another Pennsylvania Supreme Court case, *In re Borough of Downingtown*.[210]

204. J. INST. 2.2.1 (Peter Birks & Grant McLeod trans., 1987).
205. 2 WILLIAM BLACKSTONE, COMMENTARIES *14.
206. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980).
207. 146 U.S. 387 (1892).
208. *Id.* at 462–64.
209. Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 943 (Pa. 2017) (Baer, J., concurring and dissenting).
210. 161 A.3d 844 (Pa. 2017).

1. Public and Private Trust Issues in *PEDF*

Before the adoption of section 27 in 1971, there already existed in Pennsylvania a body of common law public trust law.[211] In addition, there already existed in other states a body of public trust law as well as significant academic commentary on public trust law.[212] The writings of Professor Joseph L. Sax,[213] in particular, are widely and properly viewed as reinvigorating the public trust doctrine in the United States.[214]

In the *Robinson Township* and *PEDF* cases, however, the Supreme Court of Pennsylvania provided abundant implicit and explicit evidence that the evolution of section 27 would follow its own course and not automatically track the contours of the common law of public trust. The *Robinson Township* plurality articulated the basic parameters of section 27 law with little if any explanation of how it related to common law public trust law. The *PEDF* majority, by contrast, explained in no uncertain terms that Pennsylvania was following its own course on public trust, and not simply tracking common law public trust rules. For the majority, in fact, there is no "universally applicable black letter law" for the public trust.[215] "At most," the court explained, "the public trust doctrine provides a framework for states to draft their own public trust provisions, which (like many trust instruments) will ultimately be interpreted by the state courts."[216]

The *PEDF* majority's recognition that the third sentence "of Section 27 establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries"[217] was the springboard for a discussion of the application of trust law in the section 27 context. Justice Baer's concurring and dissenting opinion in *PEDF*, by contrast, criticized the

211. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II*, *supra* note 15, at 118–31.

212. *See generally* MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (2d ed. 2015).

213. Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*].

214. *See, e.g.*, *Pa. Envtl. Def. Found.*, 161 A.3d at 943 (Pa. 2017) (Baer, J., concurring and dissenting).

215. *Id.* at 933 n.26 (majority opinion).

216. *Id.*

217. *Id.* at 931–32 (citing Robinson Township v. Commonwealth, 83 A.3d 901, 955–56 (Pa. 2013)).

majority for not following the common law of public trust,[218] thus highlighting the fact that Pennsylvania is taking its own course.

The majority articulated several principles that it believed followed from section 27's creation of a public trust, and all of these appear to have been derived from Pennsylvania trust law. These included:

- "The terms 'trust' and 'trustee' carry their legal implications under Pennsylvania law at the time the amendment was adopted."[219] In this regard, the majority found significant the analysis provided by Professor Robert Broughton in the legislative history of the Act that "the Commonwealth's role was plainly intended to be that of a 'trustee,' as opposed to 'proprietor'";[220]
- "As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct";[221]
- "As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality";[222]
- "The trustee may use the assets of the trust 'only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.'"[223]

From these principles, the majority concluded that:

> [[B]ecause section 27] expressly creates a trust, and pursuant to Pennsylvania law in effect at the time of enactment, proceeds from the sale of trust assets are part of the corpus of the trust. The unavoidable result is that proceeds from the sale of oil and gas from Section 27's public trust remain in the corpus of the trust.[224]

And, because section 27 requires that the Commonwealth conserve and maintain the public natural resources for the benefit of all the people, royalty funds as trust assets are "to be used for conservation and

218. *Id.* at 944 (Baer, J., concurring and dissenting) ("[I]t is notable that the classic public trust doctrine does not contemplate what the majority holds.").
219. *Id.* at 932 (majority opinion).
220. *Id.*
221. *Id.* (quoting *Robinson Township*, 83 A.3d at 956–57).
222. *Id.* (quoting *Robinson Township*, 83 A.3d at 956–57).
223. *Id.* at 933 (quoting *Robinson Township*., 83 A.3d at 978).
224. *Id.* (citation omitted).

maintenance purposes," and cannot simply be put into the Commonwealth's General Fund.[225]

Justice Baer's dissent rests on a criticism of this application of private trust principles to section 27 issues. He "reject[s] the imposition of inflexible private trust requirements and instead would interpret the language of Section 27 with an awareness of the public trust doctrine as it applied to natural resources at the time" of section 27's enactment.[226] For Justice Baer, private trust law is an inappropriate reference point because the language of section 27 does not support it:

> Notably, Section 27 does not speak in terms of the people as "beneficiaries," nor does it define the resources in terms of the "corpus of the trust." Instead, it broadly provides that the resources are the "common property" of the people. Common ownership, however, does not grant individuals rights commensurate with private ownership.[227]

Instead, Justice Baer looked to the legislative history of section 27, focusing on Professor Broughton's analysis, to find that section 27 must be viewed through the public trust doctrine.[228] Finding that "the public trust doctrine does not forbid the state from developing, leasing, or even disposing of portions of trust property,"[229] Justice Baer concluded that "the classic public trust doctrine does not contemplate what the majority holds."[230] Explaining that section 27 contains no "financial constraint," Justice Baer stated that "[t]he Commonwealth's obligation is to conserve and maintain the public's natural resources regardless of the Commonwealth's current financial status" so that, once conservation and maintenance are achieved, the Commonwealth may use excess funds generated from the natural resources "in its sound discretion for the public's health, safety, and welfare, whether that be for education, infrastructure, or other necessary programs."[231] Thus, Justice Baer

225. *Id.* at 935. While the majority was clear about royalties, it left open the question of whether other revenue streams such as rental payments for leasehold interests in the land and up-front bonus bid payments should also be considered part of the corpus of the trust. It therefore remanded to the commonwealth court "in the first instance and in strict accordance and fidelity to Pennsylvania trust principles" to determine whether those funds should also be considered part of the corpus. *Id.* at 936.

226. *Id.* at 941 (Baer, J., concurring and dissenting).

227. *Id.* at 942.

228. *Id.* at 943.

229. *Id.* (citing Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, *supra* note 213, at 485–89).

230. *Id.* at 944.

231. *Id.* at 944–45.

departed from the majority's conclusion that all funds are corpus of the trust and must be used for conservation and maintenance of the natural resources because, he believed, the majority is "mistakenly viewing this public trust as a private trust."[232]

Justice Baer's public versus private trust distinction is complicated by his own recognition that "many of the basic principles underlying the public trust doctrine overlap with traditional duties of private trustees, including the requirement that a trustee act in the public's interest which requires loyalty, impartiality, and prudence."[233] He was therefore forced to agree with the *PEDF* majority and the *Robinson Township* plurality:

> [T]o the extent they hold that the Commonwealth, as trustee under Section 27's public trust, should (1) exercise the duty of loyalty by administering the trust solely for the benefit of all the people, including future generations, (2) abide by the duty of impartiality by balancing the interests of all the beneficiaries, including balancing the interests of current versus future generations, and (3) act with prudence by managing the resources with ordinary skill and caution.[234]

Nevertheless, because he did not find in section 27 a requirement that additional monies must be "cabined off from other pressing needs of the people of this Commonwealth,"[235] he dissented from the majority's holding in that regard.

While the dissent's view of the public versus private trust issue clearly lost, and the private trust principles used by the majority are

232. *Id.* at 945.

233. *Id.* (citing Robinson Township v. Commonwealth, 83 A.3d 901, 957 (2013)).

234. *Id.* at 945–46.

235. *Id.* at 946. As part of his argument, Justice Baer said:

> My conclusion is buttressed by the specific alterations of the language of Section 27 during the drafting process to allow for the Commonwealth's continued disposition of natural resources, including through logging and hunting, without any suggestion in the text of the Amendment that the funds had to be reinvested in the trust or used solely for trust purposes.

Id. at 947. Hunting and logging are different from oil and gas extraction, however, because the former involve renewable resources (deer, trees) and the latter involves nonrenewable resources (oil and gas). Although the majority opinion does not reflect this distinction, this distinction may nonetheless have influenced the majority's thinking. The trustee's obligation, the majority explained, is to "prevent and remedy the degradation, diminution, or depletion of our public natural resources." *Id.* at 932 (majority opinion) (quoting *Robinson Township*, 83 A.3d at 956–57). When logging and hunting are managed in a sustainable manner, and trees and game animals are allowed to replenish naturally, there is not likely to be "degradation, diminution, or depletion" of those resources. By contrast, the extraction of nonrenewable resources like oil and gas necessarily results in their "degradation, diminution, or depletion." *See id.*

binding precedent for future section 27 cases, Justice Baer nevertheless raises a question that may play some role in future section 27 litigation. There may be circumstances where the public versus private dichotomy might impact the consideration of section 27 issues—not in the articulation of the duties so much as in the application of those duties to a particular problem. There is a difference between the interests of the beneficiaries of a private trust (generally limited in number and duration) and those of public trust beneficiaries that stretch out indefinitely to include "generations yet to come."[236] *PEDF* may well be the start of a long process of spelling out how to apply those now-controlling private principles in the public trust context.

2. Public Trust Issues Arising from *In re Borough of Downingtown*

PEDF was not the only public trust case the Pennsylvania Supreme Court decided on June 20, 2017. The other was *In re Borough of Downingtown*.[237] At first glance, the two cases are unrelated. Although section 27 was cited as a basis for the public trust doctrine by one of the parties in *Borough of Downingtown*, the court specifically found that "we need not express an opinion on this question" because "we decide this case solely on statutory grounds."[238] Nevertheless, public trust principles suffused the opinion.

Borough of Downingtown involved a challenge to the Borough's decision to sell to private housing developers four parcels of property comprising a significant portion of a public park known as Kardon Park and to grant easements to the developers over parts of the park.[239] Two of the parcels to create Kardon Park in the first place were obtained via eminent domain and two were purchased with funds obtained under Pennsylvania's Project 70 Act.[240] This legislation makes Commonwealth resources available to help finance the purchase of lands for recreational, conservation, or historical purposes.[241] The Borough operated and maintained Kardon Park until it decided it wanted to sell parts for commercial and housing development and to grant easements in furtherance of this purpose.[242] The decisions were challenged as violating the Donated or Dedicated Property Act ("DDPA"),[243] the Project 70 Act,

236. PA. CONST. art. I, § 27.
237. *In re* Borough of Downingtown, 161 A.3d 844 (Pa. 2017).
238. *Id.* at 869 n.40.
239. *Id.* at 848–49.
240. 72 PA. STAT. AND CONS. STAT. ANN. §§ 3946.1–.22 (West 2013).
241. *Id.* §§ 3946.2(9), 3946.16(a)(4) (West 2013).
242. *In re Borough of Downingtown*, 161 A.3d at 852.
243. 53 PA. STAT. AND CONS. STAT. ANN. §§ 3381–3386 (West 2011).

and the Eminent Domain Code.[244] On appeal from orders of the court of common pleas, the commonwealth court approved the land sales and easements.[245] The Pennsylvania Supreme Court reversed in part and vacated in part the commonwealth court's ruling.[246]

In considering the application of the DDPA, the *Borough of Downingtown* court drew upon its 2010 decision, *In re Erie Golf Course*,[247] to invoke the public trust doctrine.[248] The court found that:

> [W]henever property was dedicated to public use by a municipality, this action created a trust for the property with the public as the beneficiary. It correspondingly required the municipality to act in the capacity of a trustee by holding the property in favor of the community, and restricted the municipality from diverting it from public use, or conveying it to a private party.[249]

In addition, the *Borough of Downingtown* court cited *In re Acchione*[250] for the proposition that "once land is dedicated to a public use by a municipality, the municipality becomes 'trustee, subject to all the duties and responsibilities imposed on any other trustee.'"[251] Because the DDPA incorporates these public trust principles,[252] and does not conflict with the Project 70 Act,[253] the supreme court reversed the commonwealth court's finding that the DDPA did not apply to the parcel sale, and remanded the case to commonwealth court for further consideration in light of that decision.[254]

As to the easements, the Pennsylvania Supreme Court found that the grant of the easements—which would allow the private developers, inter alia, to discharge stormwater into ponds remaining on park property and

244. 26 PA. STAT. AND CONS. STAT. ANN. §§ 101–1106 (West 2009).

245. *In re* Borough of Downingtown, 116 A.3d 727, 743 (Pa. Commw. Ct. 2015) (per curiam), *rev'd in part, vacated in part*, 161 A.3d 844 (Pa. 2017).

246. *In re* Borough of Downingtown, 161 A.3d 844, 866 (Pa. 2017). The supreme court vacated and remanded the ruling on two of the parcels because both the parties and the commonwealth court had proceeded on the basis of the Eminent Domain Code, which the supreme court found did not apply. *Id.*

247. 992 A.2d 75 (Pa. 2010).

248. *In re Borough of Downingtown*, 161 A.3d at 872–73 (citing *In re Erie Golf Course*, 992 A.2d at 86).

249. *Id.* at 872.

250. 227 A.2d 816 (Pa. 1967).

251. *In re Borough of Downingtown*, 161 A.3d at 872 (quoting *In re Acchione*, 227 A.2d at 820).

252. *Id.*

253. *Id.* at 874.

254. *Id.*

to construct and maintain utilities—without judicial approval—violated the public trust principles ensconced in the DDPA. Section 3383 of the DDPA requires that: "All such lands and buildings held by a political subdivision, as trustee, shall be used for the purpose or purposes for which they were originally dedicated or donated, except insofar as modified by court order pursuant to this act."[255] The court described it in this way:

> Section 3383's restriction of a municipality's power to unilaterally change the purpose for which property has been dedicated to the public trust is a codification of a bedrock tenet of the common law public trust doctrine, which is that "[a] municipality cannot revoke or destroy, after dedication and acceptance, the right of the public to the exclusive use of the property for the purpose designated." Consistent with this principle, the common law public trust doctrine strictly prohibits a governmental body from conveying public lands to an entity or person for private use. The DDPA retains this common law prohibition, but modifies it to afford a municipality the right to seek judicial approval for a fundamental change in the purpose for which public trust property has been used and dedicated.[256]

Because the easement would allow use of the trust property for a private purpose, "the Borough has ceded to a private party some of the Borough's exclusive rights as trustee of that land to manage it for the public's benefit, thereby subordinating those public rights to the private rights of the easement holders."[257] That would violate the public trust in section 3383 unless the Borough first obtains judicial approval.[258]

Together, *PEDF* and *Borough of Downingtown* underscore several important themes about the public trust doctrine in Pennsylvania. First, when assets or obligations implicate the public trust, the supreme court will require compliance with the relevant public trust principles. Second, while the constitution (in the case of section 27) or a statute (in the case of the DDPA) may create public trust responsibilities, underlying these sources is the common law public trust doctrine. This allows the wisdom of the common law, and its use beyond the boundaries of Pennsylvania, to inform the interpretation and application of public trust principles. Third, the fiduciary responsibilities of the public trustee apply with full

255. 53 PA. STAT. AND CONS. STAT. ANN. § 3383 (West 2011).

256. *In re Borough of Downingtown*, 161 A.3d at 876–77 (alteration in original) (citations omitted).

257. *Id.* at 877.

258. *Id.*

force regardless of the magnitude of the event implicating those responsibilities; an easement that allows underground utilities that might not even interfere with use of a public park can still violate "bedrock tenets" of public trust doctrine and require judicial intervention. Collectively, these two cases suggest that future claims of public trustee mis-, mal-, or non-feasance should trigger serious judicial scrutiny.

IV. *PEDF* AND ENVIRONMENTAL CONSTITUTIONALISM

As is evident from this discussion, *PEDF* is indeed a "monumental" decision. It provides a majority opinion that resoundingly upholds the enforceability of constitutional provisions affording environmental rights and recognizing trustee obligations. This outcome breathes life into what had been a dormant constitutional test, and will no doubt be tested before courts in Pennsylvania, and influence policymaking at all levels throughout the Commonwealth.

But *PEDF*'s import does not stop at the border. Its influences on environmental outcomes and constitutional interpretation resonate elsewhere. As we explained in our article on *Robinson Township*,[259] section 27 has constitutional cousins all over the country and the planet. To be sure, section 27 reflects the broad and steady accretion of global environmental constitutionalism, which explores the constitutional incorporation of environmental rights, duties, procedures, policies, and other provisions to promote environmental protection.[260] Indeed, about one hundred nations have recognized a constitutional right to a healthy environment expressly or implicitly.[261] Moreover, a growing number of countries constitutionally instantiate the public trust doctrine, that is, by imparting a fiduciary duty for government to act as trustee over state resources for present and future generations, or for government to manage resources sustainably. Indeed, the constitutions of nearly 170 countries, representing three fourths of the world's citizens, have

259. Dernbach, May & Kristl, *supra* note 4, at 1189–92.

260. *See generally* ERIN DALY & JAMES R. MAY, IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES (2018) [hereinafter MAY & DALY, IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM]; JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 358–68 (2015) [hereinafter MAY & DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM]; Louis J. Kotze, *The Conceptual Contours of Environmental Constitutionalism*, 21 WIDENER L. REV. 187, 188, 198 (2015); James R. May, *Symposium on Global Environmental Constitutionalism: An Introduction and Overview*, 21 WIDENER L. REV. 139, 140 (2015); Erin Daly & James R. May, *Comparative Environmental Constitutionalism*, 6 JINDAL GLOBAL L. REV. 9, 10–11, 30 (2015).

261. *See* ENVIRORIGHTS MAP, http://envirorightsmap.org (last visited Dec. 7, 2018).

constitutionalized the environment in some way, shape or form, in what has come to be known as "global environmental constitutionalism."[262]

As *PEDF* demonstrates, such environmental constitutionalism can provide new causes of action or stretch existing environmental rights into new forms. It can also serve to promote human and environmental rights,[263] procedural guarantees,[264] remedies,[265] and judicial engagement.[266] Environmental constitutionalism also has normative spillover effects and has been correlated with lower greenhouse gas emissions.[267]

Yet environmental constitutionalism is still young in constitutional timeframes. Thus, jurisprudence is nascent and implementation inconsistent.[268] A few formative cases in this or any field can shape shared conversations in the legal academy and elsewhere for generations to come. We posit that *PEDF* is one such important case.

Accordingly, we turn next to *PEDF*'s more salient implications on environmental constitutionalism, which in our view, are on: (1) enforceability of environmental rights, (2) implementation of constitutionalized public trust principles, and (3) the constitutionalism of climate change.

A. Enforceability of Environmental Rights

As discussed above, section 27 exists in the Declaration of Rights portion of the constitution of the Commonwealth of Pennsylvania. The plurality in *Robinson Township* and then the majority in *PEDF* determined that the rights in section 27 are "on par" with other rights in the Declaration of Rights, including the rights to property and freedom of speech. As such, they are self-executing against the government and require no further act of the legislature to be enforceable in court.

262. *See generally* ENVIRONMENTAL CONSTITUTIONALISM (James R. May & Erin Daly eds., 2016).

263. *See* James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, 1 IUCN ACAD. ENVTL. L. E-J. 13, 14 (2011).

264. *See generally* James R. May & Erin Daly, *Constitutional Directions in Procedural Environmental Rights*, 28 J. ENVTL. L. & LITIG. 27 (2013).

265. *See generally* James R. May & Erin Daly, *Constitutional Environmental Rights and Liabilities*, 3 ENV. LIAB. 75 (2012).

266. James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OR. REV. INT'L L. 365, 390–405 (2009).

267. *See* DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 226, 273 (2012).

268. *See generally* IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 260.

The most effective substantive environmental rights are those that are self-executing: "It is important for fundamental rights to be self-executing because enforcement of such rights should not depend on the legislative machinery. Moreover, it is particularly important for environmental rights to be self-executing because legislatures are not likely to provide sufficient implementing legislation."[269]

Indeed, the whole point of entrenching a right is to ensure that the value remains protected even if (and especially when) a political majority does not support it. Self-execution can be exhibited either structurally or syntactically. Substantive environmental rights provisions that appear structurally in a constitution alongside first generation constitutional rights are those most likely to be self-executing.[270] Some nations place substantive environmental rights among other first generation civil and political rights by designating them as an express "right," or as a "major," "human," "fundamental," "basic," or "guaranteed" right.

The constitutions of the majority of nations that have adopted substantive environmental rights seem to classify them as first order, self-executing rights.[271] Countries in Central and Eastern Europe have led the way in this regard, including Albania,[272] Azerbaijan,[273] Belarus,[274]

269. Joshua J. Bruckerhoff, Note, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615, 627–28 (2008).

270. *See* TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 93–128 (2005) (examining challenges of judicial enforcement of fundamental environmental rights); *see also* Bruckerhoff, *supra* note 269, at 627–28.

271. Please note the translations in this Article are unofficial and may differ from source to source. *See* sources cited *infra* notes 272–313, 315–17, 321.

272. KUSHTETUTA E REPUBLIKËS SË SHQIPËRISË [CONSTITUTION] Nov. 28, 1998, pt. 2 ("The Fundamental Human Rights and Freedoms"), ch. IV ("Economic, Social and Cultural Rights and Freedoms"), art. 56 ("Everyone has the right to be informed about the status of the environment and its protection.") (Alb.).

273. AZƏRBAYCAN RESPUBLIKASININ KONSTITUSIYAI [AZER. KONST.] [CONSTITUTION] Nov. 12, 1995, pt. 2 ("Major rights, freedoms and responsibilities"), ch. III ("Principal Human Rights and Civil Liberties"), art. 39 ("Right to Live in a Healthy Environment") (Azer.).

274. KANSTYTUCYJA RÈSPUBLIKI BELARUS [KANST. BELR.] [CONSTITUTION] Mar. 15, 1994, § 2 ("The Individual, Society and the State"), art. 46 ("Everyone shall be entitled to a conducive environment and to compensation for loss or damage caused by the violation of this right.") (Belr.).

Bulgaria,[275] Chechnya,[276] Croatia,[277] Estonia,[278] Georgia,[279] Hungary,[280] Moldova,[281] Montenegro,[282] Romania,[283] Russia,[284] Serbia,[285] Slovakia,[286]

275. KONSTITUTSIYA NA REPUBLIKA BALGARIYA [KONST. BULG.] [CONSTITUTION] July 12, 1991, ch. II ("Fundamental Rights and Duties of Citizens"), art. 55 ("Everyone shall have the right to a healthy and favorable environment . . . .") (Bulg.).

276. KONSTITUCIIA CHECHENSKOJ RESPUBLIKI [KONST. CHECH. ICH.] [CONSTITUTION] Mar. 12, 1992, § 1, ch. 2, art. 34, para. 1–2 ("The citizens of Chechen Republic have the right to favorable environment. The damage caused to citizen, his health or property by wrongful actions in the area of nature utilization is liable to compensation.") (Chechnya).

277. USTAV REPUBLIKE HRVATSKE [CONSTITUTION] Dec. 22, 1990, ch. III ("Protection of Human Rights and Fundamental Freedoms"), pt. 3 ("Economic, Social and Cultural Rights") art. 69 ("Everyone shall have the right to a healthy life.") (Croat.).

278. EESTI VABARIIGI PÕHISEADUS [EVP] [CONSTITUTION] June 28, 1992, ch. II, § 53 ("Everyone has a duty to preserve the human and natural environment . . . .") (Est.).

279. SAKARTVELOS K'ONSTITUTSIA [CONSTITUTION] Aug. 24, 1995, ch. 2, art. 37, para. 3 ("Everyone shall have the right to live in a healthy environment . . . .") (Geor.).

280. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, ch. I, § 18 ("The Republic of Hungary shall recognize and implement everyone's right to a healthy environment."); ch. XII, § 70/D, para. 1 ("Everyone living in the territory of the Republic of Hungary shall have the right to the highest possible level of physical and mental health."); ch. XII, § 70/D, para. 2 ("The Republic of Hungary shall implement this right . . . through the protection of the . . . natural environment.").

281. CONSTITUTIA REPUBLICII DEMOCRAT DIN MOLDOVA [CONSTITUTION] Aug. 27, 1994, title II ("Fundamental Rights, Freedoms and Duties"), ch. II ("Fundamental Rights and Freedoms"), art. 37, para. 1 ("Every individual has the right to live in an ecologically safe and healthy environment, to consume healthy food and to use harmless household appliances.").

282. USTAV CRNE GORE [CONSTITUTION] Oct. 19, 2007, pt. 2, art. 23 ("Everyone shall have the right to a sound environment. Everyone shall have the right to receive a timely and full information about the status of the environment, to influence the decision-making regarding the issues of importance for the environment, and to legal protection of these rights. Everyone, the state in particular, shall be bound to preserve and improve the environment.") (Montenegro).

283. CONSTITUTIA ROMÂNIEI [CONSTITUTION] Nov. 21, 1991, tit. II, ch. II, art. 35, para. 1 ("The State shall acknowledge the right of every person to a healthy, well preserved and balanced environment.") (Rom.).

284. KONSTITUTSIIA ROSSIIKOI FEDERATSII [KONST. RF] [CONSTITUTION] ch. 2 ("Rights and Freedoms of Man and Citizen"), art. 42, § 1 ("Everyone shall have the right to a favorable environment . . . .") (Russ.).

285. USTAV REPUBLIKE SRBIJE [CONSTITUTION] Nov. 8, 2006, § 2, art. 74 ("Everyone shall have the right to healthy environment and the right to timely and full information about the state of environment. Everyone, especially the Republic of Serbia and autonomous provinces, shall be accountable for the protection of environment. Everyone shall be obliged to preserve and improve the environment.") (Serb.).

286. ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION] Sept. 3, 1992, ch. 2, pt. 6, art. 44, para. 1 ("Everyone has the right to a favorable environment.") (Slovk.).

Slovenia,[287] and Ukraine.[288] Most countries with constitutional substantive environmental rights in Africa also place them among first generation rights, including Angola,[289] Benin,[290] Burkina Faso,[291] Chad,[292] Congo,[293] Ethiopia,[294] Mali,[295] Niger,[296] South Africa,[297]

287. USTAVA REPUBLIKE SLOVENIJE [CONSTITUTION] Dec. 23, 1991, pt. III, art. 72 ("Everyone has the right . . . to a healthy living environment.") (Slovn.).

288. KONSTITUTSIYA UKRAINI [CONSTITUTION] June 28, 1996, ch. II ("Human and Citizen's Rights, Freedoms and Duties"), art. 50 ("Everyone has the right to an environment that is safe for life and health . . . .") (Ukr.).

289. CONSTITUIÇÃO DA REPÚBLICA DE ANGOLA [CONSTITUTION] Jan. 21, 2010, tit. II, ch. II, § I, art. 39, para. 1 ("Everyone has the right to live in a healthy and unpolluted environment . . . .").

290. LA CONSTITUTION DE LA RÉPUBLIQUE DU BÉNIN [CONSTITUTION] Dec. 11, 1990, tit. II ("Rights and Duties of the Individual"), art. 27 ("Every person has the right to a healthy, satisfying and lasting environment . . . .") (Benin).

291. LA CONSTITUTION DU BURKINA FASO June 11, 1991, tit. I, ch. IV, arts. 29–30 ("[Recognizes] [t]he right to a healthy environment . . . [by making] the protection, the defense and the promotion of the environment . . . a duty for all [and the] right to initiate an action . . . .").

292. CONSTITUTION DE LA RÉPUBLIQUE DU TCHAD Apr. 8, 1996, tit. II, ch. I, art. 47 ("Every person has the right to a healthy environment.") (Chad).

293. CONSTITUTION DE LA RÉPUBLIQUE DU CONGO Dec. 22, 2001, tit. II, art. 35 ("Every citizen has the right to a healthy satisfying and durable environment and the duty to defend it. The State watches over the protection and conservation of the environment.") (Congo). *See also* CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO Feb. 18, 2006 title II, ch. 3, art. 53 ("All persons have the right to a healthy environment and [one] propitious for their integral development.") (Dem. Rep. Congo).

294. FEDERAL NEGARIT GAZETA OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA [CONSTITUTION] Aug. 21, 1995, ch. 3 ("Fundamental Rights and Freedoms"), pt. 2 ("Democratic Rights"), art. 44, para. 1 ("All persons have the right to a clean and healthy environment.").

295. LA CONSTITUTION DE LA RÉPUBLIQUE DU MALI Jan. 12, 1992, tit. I ("The Rights and Duties of the Human Dignity'), art. 15 ("Every person has a right to a healthy environment.").

296. CONSTITUTION DE LA RÉPUBLIQUE DU NIGER July 18, 1999, tit. II ("Rights and Duties of the Individual"), art. 27 ("Each person shall have the right to a healthy environment.").

297. S. AFR. CONST., 1996, ch. 2 ("Bill of Rights"), art. 24 ("Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations . . . .").

Sudan,[298] Togo,[299] the island nations of Cape Verde,[300] and Seychelles.[301] Countries in Central and South America to do so include Argentina,[302] Brazil,[303] Ecuador,[304] El Salvador,[305] Guatemala,[306] Honduras,[307] and Venezuela.[308] Other countries that appear to recognize substantive environmental rights as rights of the first order include Belgium[309] and

298. The Democratic Republic of Sudan's Interim National Constitution, which was adopted in July 2005, provides that "[t]he people of the Sudan shall have the right to a clean and diverse environment . . . ." INTERIM NAT'L CONST. OF THE REPUBLIC OF THE SUDAN 2005, pt. 1, ch. II, art. 11, para. 1. The Democratic Republic of Sudan's Interim National Constitution also provides that "every citizen shall . . . preserve the natural environment . . . ." *Id.* at pt. 1, ch. III, art. 23, para. 2(h).

299. LA CONSTITUTION DE LA IVE REPUBLIQUE TOGOLAISE Sept. 27, 1992, tit. II, sub tit. I, art. 41 ("Every person has the right to a healthy environment.") (Togo).

300. CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE [CONSTITUTION] Sept. 25, 1992, pt. II, tit. III, art. 70 ("Everyone shall have the right to a healthy, ecologically balanced environment . . . .") (Cape Verde).

301. LA CONSTITUTION DE LA RÉPUBLIQUE DES SEYCHELLES June. 21, 1993, ch. III, pt. I ("Seychelles Charter of Fundamental Human Rights and Freedoms"), art. 38 ('[R]ecognises the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment . . . .").

302. Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] 1st pt. ("New Rights and Guarantees"), ch. 2 ("All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations . . . .") (Arg.)

303. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.), tit. II ("Fundamental Rights and Guarantees"), ch. I, art. 5, para. LXXIII ("[A]ny citizen has standing to bring a popular action to annul an act injurious to the public patrimony or to the patrimony of an entity in which the State participates . . . to the environment . . . ."). For a discussion of the extensive reach of Brazil's constitutional environmental provisions, see John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299, 312–14 (2000).

304. LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] Sept. 28, 2008, tit. II, ch. 2, § 2, art. 14 ("The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumac kawsay), is recognized.").

305. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR [CONSTITUTION] Dec. 20, 1983, tit. II, ch. II, § 1, art. 34 ("Every child has the right to live in familial and environmental conditions that permit his integral development, for which he shall have the protection of the State.").

306. LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [CONSTITUTION] May 31, 1985, tit. II, ch. II, § 7, art. 93 ("The enjoyment of health is a fundamental right of the human being, without any discrimination.").

307. CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE HONDURAS [CONSTITUTION] Jan. 20, 1982, tit. III, ch. VII, art. 145 ("[R]ight to the protection of one's health . . . .").

308. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 15, 1999, tit. III, ch. IX, art. 127 ("Everyone has the right, individually and collectively, to enjoy a safe, healthful and ecologically balanced life and environment.").

309. 1994 CONST. tit. II ("Belgians and their rights"), art. 23 ("Everyone has the right to lead a life in keeping with human dignity . . . includ[ing] . . . the right to the protection of a healthy environment.") (Belg.).

France.[310] Countries in Asia to have done so include Kyrgyzstan[311] and Mongolia.[312] Such structural placement makes it more likely that such provisions are self-executing and enforceable. Other provisions are written in such a way as to leave little doubt that they are self-executing, enforceable, and subject to redress without the need for intervening state action.[313]

310. 1958 CONST. tit. XVII ("Charter for the Environment"), art. 1 ("Each person has the right to live in a balanced environment which shows due respect for health.") (Fr.).

311. CONST. OF THE KYRGYZ REPUBLIC June 27, 2010, § II, ch. II ("Human Rights and Freedoms"), art. 48, para. 1 ("Everyone shall have the right to environment favorable for life and health."); para. 3 ("Everyone should care for the environment, flora and fauna.") (Kyrg.).

312. MONGOL ULSYN ÜNDSEN KHUULI [CONSTITUTION] Jan. 13, 1992, ch. 2 ("Human Rights and Freedoms"), art. 16, para. 2 ("The citizens of Mongolia shall be guaranteed to enjoy . . . [the] [r]ight to healthy and safe environment, and to be protected against environmental pollution and ecological imbalance.") (Mong.).

313. Notably, constitutions from the former Soviet Bloc make it clear that affected parties can recover compensation for violations of environmental rights, including Belarus, KANSTYTUCYJA RÈSPUBLIKI BELARUS [KANST. BELR.] [CONSTITUTION] Mar. 15, 1994, § 2 ("The Individual, Society and the State"), art. 46 ("Everyone shall be entitled to a conducive environment and to compensation for loss or damage caused by the violation of this right.") (Belr.); Chechnya, KONSTITUCIIA CHECHENSKOJ RESPUBLIKI [KONST. CHECH. ICH.] [CONSTITUTION] Mar. 12, 1992, § 1, ch. 2, art. 34, para. 1–2 ("The citizens of Chechen Republic have the right to favorable environment. The damage caused to citizen, his health or property by wrongful actions in the area of nature utilization is liable to compensation.") (Chechnya); the Kyrgyz Republic, CONST. OF THE KYRGYZ REPUBLIC June 27, 2010, § II, ch. II ("Human Rights and Freedoms"), art. 48, para. 1 ("Everyone shall have the right to environment favorable for life and health."); para. 2 ("Everyone shall have the right to compensation of damage to health or property resulting from actions in the area of nature management.") (Kyrg.); the Russian Federation, KONSTITUTSIIA ROSSIIKOI FEDERATSII [KONST. RF] [CONSTITUTION] ch. 2 ("Rights and Freedoms of Man and Citizen"), art. 42, § 1 ("Everyone shall have the right to a favorable environment . . . and to compensation for the damage caused to his or her health or property by ecological violations") (Russ.); and Ukraine, KONSTITUTSIYA UKRAINI [CONSTITUTION] June 28, 1996, ch. II ("Human and Citizen's Rights, Freedoms and Duties"), art. 50 ("Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right") (Ukr.).

The variety of constitutional provisions in the Constitution of Pennsylvania and elsewhere—aiming to protect different aspects of the environment with a range of scaffolding and enforcement mechanisms—attests to the growth of environmental constitutionalism throughout the world in the last four decades. But the value of constitutional guarantees is measured not only by their textual manifestations, but perhaps even more importantly by the extent to which the rights are capable of being enforced by the nation's courts. *PEDF* supports the case that provisions that appear in the "Bill of Rights" or its equivalent stand "on par" with other provisions and are self-executing. The *PEDF* decision may, in turn, encourage courts in other jurisdictions with comparable constitutional provisions to find those provisions to be self-executing.

B. Enforceability of Constitutionally-Embedded Public Trust Principles

The outcomes in *PEDF* and *Robinson Township* are based primarily on judicial conclusions that the government was failing to uphold its responsibilities under section 27 as "trustee" of public resources under the Constitution of the Commonwealth of Pennsylvania. This outcome has the potential to advance enforcement of constitutionally-embedded public trust principles around the globe.[314]

As already explained, the second and third sentences of article I, section 27 provide a constitutional form of the public trust doctrine. The idea that public trust principles are enforceable is of profound import to other systems that have constitutionalized the public trust obligations.[315] Constitutionalizing the doctrine ups the stakes. While not as common as environmental rights provisions, the constitutions of about one-half dozen countries reference holding or protecting resources for the "public trust" or some variation of that terminology. These tend to impose a trust responsibility upon policy makers, rulers, or citizens to hold resources in trust for current or future generations. Some specify trust

314. *See generally* James R. May, *Sustainability Constitutionalism,* 86 UMKC L. REV. 855 (2018).

315. *See generally* MAY & DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 260, at 255–72.

responsibilities as a general governing norm.[316] Reflecting traditional views of sovereignty, some constitutions invest public trust in a supreme leader.[317] Some constitutional provisions hold citizens accountable to hold resources in trust for future generations.[318] Several courts, including India's Supreme Court, have even gone so far as to infer public trust responsibilities from other constitutional text.[319]

The *PEDF* decision may encourage courts in other jurisdictions with public trust provisions in their constitutions to enforce those provisions against the government. As explained previously, the *PEDF* majority consciously departed from common law public trust principles in doing so, choosing instead to follow the text of article I, section 27. One can expect to see similar decisions in other jurisdictions, forging their own understanding of the meaning of a constitutional public trust.

316. For example, the Ugandan Constitution provides that "the Government or a local government as determined by Parliament by law, shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens." CONST. OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art XXIX, ch. 15, art. 237, § 2(b). The Constitution of Papua New Guinea calls for "wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations." CONST. OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA Sept. 16, 1975, art. 4, § 1. Many of the constitutional provisions that protect water, including those that assert sovereign jurisdictional control, also embody the public trust doctrine.

317. The Constitution of Swaziland, for example, provides that "all land (including any existing concessions) in Swaziland, save privately held title-deed land, shall continue to vest in *iNgwenyama* in trust for the Swazi Nation," and "[a]ll minerals and mineral oils in, under or upon any land in Swaziland shall, after the commencement of the Constitution, continue to vest in *iNgwenyama* in trust for the Swazi Nation." CONST. OF THE KINGDOM OF SWAZILAND ACT, 2005, ch. XII, art. 211, § 1; art. 213. (*iNgwenyama* is the title of the male ruler or king of Swaziland.) Ghana's constitution provides that:

> All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana . . . It also provides that [e]very mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.

CONST. OF THE REPUBLIC OF GHANA, Apr. 28, 1992, ch. 21, art. 257, §§ 1 & 6.

318. For example, the Bhutanese constitution provides that "Every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment . . . ." CONST. OF THE PEOPLE OF BHUTAN, July 18, 2008, art. 5.

319. *See, e.g.*, M.C. Mehta v. Kamal Nath., (1997) 1 S.C.C. 388 (1996) (India).

C. Support for Climate Constitutionalism

Lastly, by finding section 27's environmental rights to be self-executing and public trust principles to be legally cognizable, *PEDF* has the potential effect of encouraging constitutional rights-based claims to have government fulfill a fiduciary duty to address climate change. One such case under section 27 has already been litigated,[320] and one can easily imagine others after *PEDF*. This is particularly true because, while section 27 does not expressly address climate change, its broad references to "public natural resources," as well as "clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment" almost certainly encompass a stable climate not adversely affected by human-caused climate change.[321] This is important because, as indicated below, litigants are increasingly willing to seek judicial assistance in addressing climate change and will likely find *PEDF* a source of support in doing so.

Some national constitutions expressly embrace climate change.[322] The High Court in South Africa has found protection against climate change in environmental rights provisions of the South African Constitution that do not expressly mention climate change but are broad

320. Funk v. Wolf, 144 A.3d 228 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017) (refusing to issue writ of mandamus for rulemaking to reduce greenhouse gas emissions).

321. Robert B. McKinstry, Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, MICH. J. ENVTL. & ADMIN. L. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3141354.

322. The Dominican Republic appears to be the first country to have made a constitutional commitment to address climate change by requiring policies to promote the use of renewable energy and to adapt to climate change. CONSTITUCIÓN DE LA REPUBLICA DOMINICANA [CONSTITUTION] June 13, 2015, tit. I, ch. IV, art. 17 & tit. VII, art. 184. Ecuador amended its constitution in 2008 to adopt comprehensive climate mitigation measures, limit greenhouse gas emissions and deforestation, and promote the use of renewable energy. CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, tit. VII, ch. 2, § 7, art. 414. And Tunisia—which stands to lose up to one-third of its land to climate change—entered the canon of climate constitutionalism in 2014, guaranteeing the "right to participate in the protection of the climate." CONSTITUTION TUNISIENNE DE 2014 [CONSTITUTION] Jan. 26, 2014, tit. 2, art. 45 (Tunis.).

enough to cover it.[323] Some courts have found protection against climate change in, for example, constitutional rights to life and dignity. These includes courts in Pakistan[324] and Nigeria.[325] A Dutch court found protection against climate change in constitutional rights to health and

323. Some courts have turned to constitutionally-entrenched environmental rights provisions to resolve climate justice-based claims. For example, in *Earthlife Africa Johannesburg v. Minister of Environmental Affairs*, an environmental nongovernmental organization appealed the issuance of a permit to build a large coal-fired power station without having considered the climate change impacts. *Earthlife Africa Johannesburg v. Minister of Environmental Affairs* 2017 (2) All SA 519 (GP) at paras. 2, 4 (S. Afr.). The court considered the regulations and the environmental management act in light of South Africa's constitutional environmental rights provision and under international law. *Id*. at para. 12. The court held that even in the absence of an express obligation to consider climate change, the ministry is nonetheless required to consider all the relevant issues, which includes climate change, and to do so before, and not after, the permit is issued. *Id*. at paras. 78, 88, 91.

324. For example, *Ashgar Leghari v. Federation of Pakistan* was brought under the Lahore High Court's continuing mandamus jurisdiction, assessing the work of the Climate Change Commission (CCC) it had established pursuant to a ruling in 2015. Ashgar Leghari v. Fed'n of Pakistan, (2015) W.P. No. 25501/2015 (Lahore) (2018). In a 2015 decision, the court required the government to implement climate change mitigation and adaptation plans to fulfill a constitutional right to life and dignity. Ashgar Leghari v. Fed'n of Pakistan, (2015) W.P. No. 25501/2015 (Lahore). In the 2018 decision, the court reviewed at some length the threats of climate change in Pakistan, considering its effects on water resources as well as forestry and agriculture, among other things, but found that the Commission had been the driving force in sensitizing the Governments and other stakeholders regarding the gravity and importance of climate change and had accomplished 66 percent of the goals assigned to it. The court then dissolved the CCC and established a Standing Committee to act, on an ongoing basis, as a link between the court and the Executive and to render assistance to the government to further implementation. Ashgar Leghari v. Fed'n of Pakistan, (2015) W.P. No. 25501/2015 (Lahore) (2018).

325. The court in *Gbemre v. Shell Petroleum Development Company Nigeria* sounded a claim by farmers to address natural gas flaring and climate change as part of their constitutional right to dignity. Gbemre v. Shell Petrol. Dev. Co. Nigeria Ltd. [2005] AHRLR 151. The court held that the petroleum developers' flaring of "waste" natural gas in the Niger Delta without the preparation of an environmental impact statement abridged the community plaintiffs' constitutionally guaranteed right to dignity. In observing that flaring activities contributes to climate change, the court upheld "the inherent jurisdiction to grant leave to the applicants to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999." It also held "that these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment." *Id*.

welfare.[326] A federal district court in the United States has held that the constitutional right to due process embraces a right to have the government address climate change.[327]

With its recognition of self-executing environmental rights and public trust, *PEDF* can also play an important part in animating climate constitutionalism. A handful of countries address climate change expressly in their constitutions and a growing number of courts have found a right to climate justice in other provisions of their constitutions. In Pennsylvania, *PEDF* has provided support for an argument that the state has a duty under section 27 to address climate change.[328] Hence, *PEDF* stands as a source of legal reasoning in the development of climate constitutionalism.

326. The leading case is *Urgenda Foundation v. Kingdom of the Netherlands*, where a trial court ordered the federal government to reduce greenhouse gas emissions and to mitigate the effects of climate change as a means of fulfilling constitutionally recognized rights to health and welfare. Rechtbank Haag 24 juni 2015, C/09/456689 (Urgenda Foundation/Kingdom of the Netherlands) (Neth.) (appeal pending). *But see* HR 21 maart 2003, NJ 2003, 691 m.nt T. Koopmans (Netherlands Stichting Waterpakt/Netherlands) (LJN: AE8462) (Neth.) (Supreme Court of the Netherlands holding that the obligation imposed on the State by article 5 of the Nitrates Directive to establish antipollution programs to prevent harm to the climate is not enforceable).

327. In *Juliana v. United States*, a federal district court held that the plaintiffs had a legally cognizable cause of action to assert that the U.S. government's collective actions and inactions concerning greenhouse gas emissions deprived them of a right "to a stable climate" under the Due Process Clause of the 5th Amendment. Juliana v. United States, 217 F. Supp. 3d 1224, 1240, 1250 (D. Or. 2016). In a case of first impression, the court agreed that plaintiffs pled a plausible cause of action, concluding: "Exercising my 'reasoned judgment,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." In finding that Plaintiffs had alleged an infringement of a fundamental right sufficient to withstand a motion to dismiss, the court noted:

> [W]here a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.

Id. at 1250. The U.S. government found this decision so problematic that it took the extraordinary step of asking the Ninth Circuit Court of Appeals to intercept the case from the lower court and dismiss it without further proceedings. The Ninth Circuit denied the government's petition in March 2018. *In re* United States, 884 F.3d 830, 833 (9th Cir. 2018).

328. See McKinstry & Dernbach, *supra* note 320.

V. CONCLUSION

PEDF is a landmark decision, recognizing that Pennsylvania citizens have constitutional rights to "clean air and water," to "preservation of the natural, scenic, historic, and esthetic values of the environment," and to have public natural resources conserved and maintained for their benefit as well as the benefit of future generations. Its full legal implications will likely not be felt for a long time, as many of the issues it raises will require judicial resolution. And the decision will likely influence the unfolding of constitutional environmental jurisprudence in other jurisdictions.

Beyond its legal significance, the decision has political implications as well. Because of their enduring nature and their higher legal status, public rights of the kind embodied in section 27 tend to more easily become part of the broader public discourse and public values over the long term than provisions in statutes or regulations.[329] They thus foster the values they embody. As people become more aware of their right to a quality environment and to have public natural resources conserved and maintained for their benefit, the impact of this decision is likely to grow.

329. According to Daly and May:

> Constitutional environmental rights have qualities that are timeless and transformative. They protect and value the geography that people own, care about, associate with, and are willing to defend. These provisions value the landscape around which people build their sense of collective and sometimes individual identity. And they recognize the multiple ways in which natural resources contribute to social and ecological well-being: because of their intrinsic beauty, because they provide balance in ecosystems, because they nourish life and ensure biodiversity, because they provide enjoyment to people, and because they contribute to local and national economies.

Daly & May, *supra* note 5, at 152.