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ENVIRONMENTAL RIGHTS UNDER THE PENNSYLVANIA CONSTITUTION

DORMANT FOR DECADES, THE ENVIRONMENTAL
RIGHTS AMENDMENT OF PENNSYLVANIA'S
CONSTITUTION RECENTLY RECEIVED A SPARK OF
LIFE FROM *ROBINSON TOWNSHIP V. COMMONWEALTH*

Richard Rinaldi*

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*We seared and scarred our once green and pleasant land with mining operations. We polluted our rivers and our streams with acid mine drainage, with industrial waste, with sewage. We poisoned our 'delicate, pleasant and wholesome' air with the smoke of steel mills and coke ovens and with the fumes of millions of automobiles We uglified our land and we called it progress.*¹

I. INTRODUCTION

In the dark wake of Pennsylvania's coal revolution, voters took to the polls in 1971 expressing a unified vow not to repeat the environmental mistakes of their industrious-minded forefathers. What resulted was the Environmental Rights Amendment to Pennsylvania's Constitution. It guaranteed the people's "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" and affirmed that "public natural resources are the common property of all the people, including generations yet to come."² The Amendment was the most powerful affirmation of citizens' rights to environmental protection in the United States—perhaps even a bit too powerful for its time.

Over the years, Pennsylvania courts gave little constitutional effect to the Amendment's plain meaning, treating it instead as a broad policy statement whose true activation as a constitutional right might require further action from the General Assembly.³ However, after lying in suspended animation for forty-three years, Pennsylvania's Environmental Rights Amendment recently received a spark of life from a plurality of the Supreme Court of Pennsylvania. In a landmark decision, *Robinson Township v.*

¹ *Robinson Twp., Wash. Cnty. v. Commonwealth*, 83 A.3d 901, 961 (Pa. 2013) (quoting 1970 PA. LEGISLATIVE JOURNAL—HOUSE 2270 (April 14, 1970)).

² PA. CONST. art. I, § 27 (adopted 1971).

³ See John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment*, 103 DICK. L. REV. 693, 696 (1999) ("As its early supporters feared, the Amendment seems to have more symbolic than substantive value, inscribed on plaques and quoted in speeches, but rarely used in decision making.").

*Commonwealth*⁴ employed the Environmental Rights Amendment—for the first time since its inception—to strike down a Pennsylvania statute as unconstitutional. The unprecedented judicial affirmation of the people's constitutional right to clean air and pure water can have far-reaching effects on the gas drilling industry and others that may cause "actual or likely degradation" of Pennsylvania's natural environment.

In 2012, the General Assembly passed Act 13 in order to expedite oil and gas extraction throughout Pennsylvania.⁵ Amending much of Pennsylvania's Oil and Gas Act, Act 13 provided a universal, streamlined process for permitting drilling operations, largely by eliminating municipal authority to regulate the industry.⁶ In response, several local citizens challenged three main provisions of Act 13, arguing *inter alia*, that it violated Pennsylvania's Environmental Rights Amendment.⁷ The Commonwealth Court of Pennsylvania, however, made quick work of the environmental rights claim, giving it little treatment before dismissing it in lockstep with previous decisions.⁸ On appeal, a plurality of the Supreme Court of Pennsylvania disagreed and struck down all three provisions of Act 13 under the Environmental Rights Amendment.⁹ More importantly, the decision placed the people's environmental rights on par with other constitutionally guaranteed rights.¹⁰

Part II.A of this survey first details the three challenged provisions of Act 13. Part II.B then outlines Pennsylvania's Environmental Rights Amendment, including the historical context

⁴ *Robinson Twp., Wash. Cnty.*, 83 A.3d 901.

⁵ Act of Feb. 14, 2012, P.L. 87, No. 13 (Pa.) (codified at 58 PA. CONS. STAT. § 2301 *et seq.*)

⁶ See 58 PA. CONS. STAT. §§ 3302-04 (2012) (preempting local ordinances that regulate the gas industry and mandating that they be amended to allow every activity associated with gas extraction "as a permitted use in all zoning districts").

⁷ *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 468, 470 (Pa. Commw. Ct. 2012), *aff'd in part, rev'd in part sub nom.* *Robinson Twp., Wash. Cnty. v. Com.*, 83 A.3d 901 (Pa. 2013).

⁸ *Id.* at 489.

⁹ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 985 (plurality opinion).

¹⁰ *Id.* at 953-54.

of its passage and the past jurisprudence that diminished the Amendment's purpose. Part III then highlights the facts of *Robinson Township*, including its procedural history, the parties' arguments, and its final treatment by the Supreme Court of Pennsylvania. Part IV evaluates the impact of that landmark decision and suggests a potentially vast sea-change in the way future courts assess claims under the Environmental Rights Amendment, namely that the plurality's textual interpretation of the Amendment may revitalize its promise as a true constitutional right to environmental protection. In conclusion, Part V argues that the plurality's interpretation and prescribed application of the Amendment is in accordance with the intent of the legislators and ratifying voters who were responsible for its enactment.

II. BACKGROUND

A. The Challenged Provisions of Act 13

Section 3303 was the heart of Act 13. With one fell swoop, it removed local governmental authority to regulate the oil and gas industry. It provided:

Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.¹¹

Section 3304 then displaced prior land use planning across the state by mandating that "all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources."¹² More specifically, section 3304 prohibited local governments from imposing more stringent standards on the oil

¹¹ 58 PA. CONS. STAT. § 3303 (2012).

¹² § 3304(a).

and gas industry than those imposed on "other industrial uses."¹³ Municipalities were thus required to amend their zoning ordinances to allow activities associated with gas and oil operations (including seismic and other blasting activities) as "permitted use[s] in all zoning districts."¹⁴ Section 3304 also prohibited municipalities from delineating well setback requirements or hours of operation for gas producers.¹⁵ While section 3215 prescribed uniform setback requirements from sensitive water sources, it also mandated the Department of Environmental Protection (DEP) to grant waivers from such requirements upon receiving revised drilling plans that DEP deemed "necessary to protect [such] waters."¹⁶

Governor Tom Corbett signed Act 13 into law in February 2012, and by March, citizens and local municipalities filed a complaint seeking an injunction of the law and a declaration that it violated several provisions of the Pennsylvania Constitution, including the Environmental Rights Amendment of Article I, Section 27.¹⁷

B. Pennsylvania's Environmental Rights Amendment

With the scars inflicted by "King Coal" still visible upon Pennsylvania's landscape, the early 1970s saw a rise in public concern about environmental harms that, like today, often came in the name of economic progress.¹⁸ Against that unsightly backdrop, Pennsylvania's Environmental Rights Amendment was introduced

¹³ § 3304(b)(2).

¹⁴ § 3304(b)(5).

¹⁵ § 3304(b)(10)-(11).

¹⁶ § 3215(b)(4).

¹⁷ *Supra* note 7 and accompanying text.

¹⁸ For an insightful discussion about the "environmental tide" that swept the nation, circa 1970, in reaction to the industrial exploitation of natural resources, see generally, PENNSYLVANIA HOUSE OF REPRESENTATIVES BIPARTISAN COMMITTEE, ORAL HISTORY PROJECT, INTERVIEW WITH: THE HONORABLE FRANKLIN L. KURY (D) 14-19 (May 17, 2006) (statement of Franklin L. Kury, the retired Pennsylvania House Representative who introduced the Environmental Rights Amendment). Reflecting on his six years in the state House, Mr. Kury noted that "we passed more environmental legislation than in all of Pennsylvania history prior to that time." *Id.* at 17.

in 1969.¹⁹ It garnered unanimous support in both Pennsylvania Houses.²⁰ Subsequently placed on the ballot for ratification, it also garnered widespread voter approval by a margin of four-to-one, greatly outpacing every candidate seeking statewide election that day.²¹ Article I, Section 27 thus became part of Pennsylvania's Constitution.²² Its three clauses state:

[1] 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. [2] Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. [3] As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.²³

However, despite it clearly reserving an environmental right in the people, its ultimate application as true constitutional law left much to be desired.²⁴

The first Article I, Section 27 case was *Commonwealth v. National Gettysburg Battlefield Tower*.²⁵ Here, the Commonwealth

¹⁹ Robinson Twp., Wash. Cnty. v. Com., 83 A.3d 901, 963 (Pa. 2013) (noting that, in light of the environmental harms left by the coal industry, "Pennsylvania deliberately chose a course different from virtually all of its sister states").

²⁰ Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123 (1990) (the lawmaker who authored the Amendment recalling the events leading to its swift passage). For further insight into the popularity of the Amendment among lawmakers and the historical context of its passage, see generally John C. Dernbach & Edmond J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181 (2015).

²¹ Dernbach & Sonnenberg, *supra* note 20, tbl. at 280 (official results of the vote count show that Pennsylvania voters ratified the Amendment by a vote of 1,021,342 to 259,979 (reprinting PA. DEP'T OF STATE, RESOLUTIONS TO BE VOTED ON AT THE PRIMARY ELECTION 2 (May 18, 1971))).

²² PA. CONST. art I, § 27 (adopted May 18, 1971).

²³ *Id.*

²⁴ See Dernbach, *supra* note 3.

sought to enjoin a private corporation from constructing a 307-foot tower on private land adjacent to the Gettysburg National Military Park.²⁶ Based on the Amendment's first clause, the Commonwealth argued that the tower would interfere with the people's "natural, scenic, historic and esthetic values" of the environment because modern architecture would degrade the site's aesthetics and deprive visitors the historic experience of the battlefield.²⁷ The trial court stated where clear and convincing evidence showed the challenged action would cause irreparable harm to a protected resource, such action would infringe on the Amendment's guaranteed rights.²⁸ In other words, the Amendment reserved an enforceable right in the people, even in the absence of supporting legislation.²⁹ Nevertheless, the court held that the Commonwealth failed to show how the tower would cause such irreparable harm.³⁰ The Commonwealth Court of Pennsylvania affirmed.³¹ While *Gettysburg* interpreted the Environmental Rights Amendment as true constitutional law, subsequent litigation undercut that textual interpretation and drastically dulled the Amendment's teeth as a practical remedy.³²

For example, the next Article I, Section 27 case was *Payne v. Kassab*.³³ In *Payne*, local residents sought to enjoin the City of Wilkes-Barre from widening a city street and eliminating a half-acre of the River Common, a public park abutting the Susquehanna

²⁵ Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 13 Adams Cnty. L.J. 75 (C.P. Adams County 1971), *aff'd*, 302 A.2d 886 (Pa. Commw. Ct. 1973).

²⁶ *Id.* at 76.

²⁷ *Id.* at 83-85.

²⁸ *Id.* at 83.

²⁹ *Id.* at 80.

³⁰ *Id.* at 84.

³¹ Com. v. Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d 886, 895 (Pa. Commw. Ct. 1973).

³² See Dernbach *supra* note 3 at 696 ("The [*Payne*] test is so weak that litigants using it to challenge environmentally damaging projects are almost always unsuccessful.").

³³ *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 323 A.2d 407 (1974), *aff'd*, 361 A.2d 263 (Pa. 1976).

River.³⁴ The Commonwealth Court of Pennsylvania concluded that Article I, Section 27 required a "realistic and not merely [a] legalistic"³⁵ test and thus provided:

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?³⁶

Not surprisingly, the court held that the street expansion did not violate the Environmental Rights Amendment.³⁷ It reasoned that the project passed all three prongs of the test because applicable statutes were complied with during planning, uprooted trees would be replanted and grounds re-landscaped, and the wider street would significantly benefit the community.³⁸ The Supreme Court of Pennsylvania affirmed, but did not expressly adopt or apply the three-part test.³⁹ Subsequently, *Payne* was not viewed as overruling *Gettysburg*'s more textual analysis because *Payne* was focused on the public trust provision, while *Gettysburg* was focused on the Amendment's first clause.⁴⁰ Nevertheless, *Payne*'s "realistic" approach became the benchmark for *all* claims under Article I, Section 27, a move which greatly diminished it as

³⁴ *Id.* at 88.

³⁵ *Id.* at 94.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 94-96.

³⁹ *Payne v. Kassab*, 361 A.2d 263, 272-73 (Pa. 1976).

⁴⁰ For an in-depth discussion of the legal implications resulting from the interplay between *Gettysburg Tower* and *Payne* see generally Dernbach *supra* note 3 at 704-14.

practically enforceable constitutional law.⁴¹ Consequently, *Robinson Township v. Commonwealth* was a direct response to the failures of the *Payne* test.

III. *ROBINSON TOWNSHIP V. COMMONWEALTH*

A. *Procedural History*

Soon after Act 13 became law in February 2012, citizens, municipalities and local environmental groups (collectively "Citizens") challenged the constitutionality of the Act in the Commonwealth Court of Pennsylvania.⁴² They sought an injunction of Act 13 and a declaration that it violated several provisions of Pennsylvania's Constitution.⁴³

The Commonwealth Court first held that section 3304 violated substantive due process under Pennsylvania's Constitution.⁴⁴ Section 3304 mandated local governments to amend zoning ordinances, thereby allowing all drilling-associated operations in every zoning district.⁴⁵ The court reasoned that such a mandate violated substantive due process because such operations were "incompatible" with the purpose of comprehensive zoning—to protect *all* landowners from harmful, neighboring land uses and preserve "the [essential] character of neighborhoods."⁴⁶ As the

⁴¹ See *Robinson Twp., Wash. Cnty. v. Com.*, 83 A.3d 901, 950 (Pa. 2013) (plurality opinion) (noting that *Payne* had become the primary test for all Article I, Section 27 claims, and that "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.").

⁴² *Robinson Twp. v. Com.*, 52 A.3d 463, 468 (Pa. Commw. Ct. 2012) (en banc), *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013).

⁴³ *Id.* In actuality, the Citizens filed a twelve-count Complaint alleging that Act 13 violated several provisions of both the U.S. and Pennsylvania Constitutions. *Id.* at 469-70. This survey, however, only focuses on three constitutional challenges under the Pennsylvania Constitution: (1) substantive due process under Article I, Section 1, (2) separation of powers under Article XI, Section 1, and most importantly, (3) the Environmental Rights Amendment under Article I, Section 27.

⁴⁴ *Id.* at 485.

⁴⁵ 58 PA. CONS. STAT. § 3304(a)(5) (2012).

⁴⁶ *Robinson Twp.*, 52 A.3d at 485.

court simply put it, requiring "drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts" was not rationally related to comprehensive planning and thus violated substantive due process.⁴⁷

Based on separation of powers, the Commonwealth Court also struck down section 3215(b)(4), which required that DEP grant waivers from watershed setback requirements.⁴⁸ Citing Pennsylvania's Constitution, which solely vests legislative power in the General Assembly, the court reasoned that section 3215(b)(4) is tantamount to "giv[ing] DEP the power to make legislative policy judgments otherwise reserved for the General Assembly" because it provided no guidance as to when waivers were appropriate.⁴⁹ Rejecting the Commonwealth's argument, the court stated that general goals listed elsewhere in Act 13, such as the "protection of health, safety, environment and property of Pennsylvania citizens," did not constitute adequate guidelines.⁵⁰

Lastly, the court dismissed the Citizens' claims under the Environmental Rights Amendment.⁵¹ Focusing only on the public trust provision, it reasoned that municipalities were relieved from their responsibilities as trustees by section 3303's preempting all local authority to regulate the oil and gas industry.⁵² Both the Citizens and the Commonwealth appealed to the Supreme Court of Pennsylvania.⁵³

*B. The Parties' Arguments to the Supreme
Court of Pennsylvania*

Regarding section 3303's preemption clause and section 3304's allowance of gas operations in every zoning district, the Commonwealth's substantive due process argument was based on

⁴⁷ *Id.* at 484.

⁴⁸ *Id.* at 493.

⁴⁹ *Id.*

⁵⁰ *Id.* at 492 (quoting 58 PA. CONS. STAT. § 3202(1)).

⁵¹ *Id.* at 489.

⁵² *Robinson Twp.*, 52 A.3d at 489.

⁵³ *Robinson Twp., Wash. Cnty. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013).

the undisputed notion that the General Assembly may regulate the oil and gas industry.⁵⁴ Considering that the power to enact local ordinances was granted to municipalities by the General Assembly, the Commonwealth argued that state legislators also have the power to preempt local zoning ordinances, and thus, Act 13 was simply a legitimate exercise of the Commonwealth's police power to foster economic development by promoting the efficient recovery of oil and gas.⁵⁵ According to the Commonwealth, because Act 13 was a valid exercise of police power, any amendment to zoning ordinances required by section 3304 was *a fortiori* constitutional.⁵⁶

The Commonwealth next argued that the Environmental Rights Amendment did not confer any independent obligation or power on local governments as trustees of public natural resources, beyond those granted by the General Assembly; and since the General Assembly already balanced environmental and social concerns in enacting Act 13, which preempted local zoning, municipalities had no power to second-guess the legislature by enacting more protective zoning measures.⁵⁷

In response, the Citizens argued that municipalities are agents of the Commonwealth and fiduciaries under the Environmental Rights Amendment, which required them to evaluate the short-term as well as the cumulative impacts on the public's natural

⁵⁴ Reply Brief for Appellants Commonwealth of Pennsylvania, Office of the Attorney General at 5, *Robinson Twp., Wash. Cnty. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (No. 64 MAP 2012) [hereinafter, Attorney General's Reply Brief].

⁵⁵ *Id.* at 3-7.

⁵⁶ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 934 (citing Brief of Appellants (Pennsylvania Public Utility Commission & Department of Environmental Protection) at 22-23, *Robinson Twp., Wash. Cnty.*, 83 A.3d 901 (Pa. 2013) (No. 63 MAP 2012) [hereinafter, Brief of Appellants (Agencies)]).

⁵⁷ See Brief of Appellees Pennsylvania Public Utility Commission at 13-15, *Robinson Twp., Wash. Cnty.*, 83 A.3d 901 (Pa. 2013) (No. 72 MAP 2012) [hereinafter, Utility Commission's Appellate Brief] (arguing that the Environmental Rights Amendment "does not give [municipalities] power beyond what the General Assembly bestowed" and because the legislature already balanced environmental concerns "[m]unicipalities [lacked] the power to challenge the legislature's judgments").

resources to assure preservation of such resources.⁵⁸ They further argued that because section 3303 preempted municipalities from imposing any meaningful regulations on the oil and gas industry, it prevented them from observing that fiduciary role to preserve natural resources in trust.⁵⁹ And given that oil and gas operations "will cause degradation and diminution of trust resources," Act 13 violated the Amendment's trust provision by impeding municipalities from carrying out their constitutional duty to protect those resources.⁶⁰

Regarding substantive due process, the Citizens did not dispute the General Assembly's power to preempt local zoning ordinances or to repeal the authority to zone altogether, but instead, argued that merely having the power does not guarantee that exercising it is *per se* constitutional.⁶¹ They stated that Act 13, like any zoning measure, is subject to constitutional limitations, and "[t]he police power to zone cannot be exercised in an unreasonable or arbitrary manner" but must separate incompatible uses based on the unique characteristics of each community.⁶² Therefore, allowing heavy industrial uses associated with oil and gas production in every zoning district as a matter of right was unreasonable and arbitrary because it would alter the character of residential neighborhood and decrease property values.⁶³

Finally, the Citizens argued that section 3215(b)(4) lacked any meaningful standards to guide DEP in issuing waivers from setback requirements, and thus, it violated the separation of powers doctrine by granting an executive agency power "on par with those possessed by the General Assembly."⁶⁴ The Commonwealth responded that 3215(b)(4) contains sufficient legislative guidance because it only requires a waiver when safeguards "necessary to

⁵⁸ *Robinson Twp., Washington Cnty.*, 83 A.3d at 941.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 936.

⁶² Brief of Appellees (Citizens) at 10, *Robinson Twp., Wash. Cnty.*, 83 A.3d 901, (Pa. 2013) (No. 64 MAP 2012) [hereinafter, Citizens' Appellate Brief].

⁶³ *Id.* at 20-21.

⁶⁴ *Id.* at 48.

protect the waters of this Commonwealth" are utilized and thus does not violate separation of powers.⁶⁵ However, despite these better-developed arguments, most of the opinion focused solely on Pennsylvania's Environmental Rights Amendment.⁶⁶

C. *The Landmark Plurality Decision*

The plurality, coupled with the concurrence, rendered the judgment of the court, which struck down sections 3303, 3304, and 3215(b)(4) as unconstitutional, affirming in part and reversing in part the Commonwealth Court's decision.⁶⁷ Delivered by Chief Justice Castille and joined by Justices Todd and McCaffery, the plurality struck down the three provisions as unconstitutional under the Environmental Rights Amendment.⁶⁸ Thus it never decided the issues of substantive due process or separation of powers.

Preliminarily, the plurality laid out principals of constitutional construction. It reiterated that constitutional interpretation requires strict adherence to the "actual language of the Constitution," and where the plain language is unambiguous, the judiciary is bound to give effect to its clear intent.⁶⁹ Thus, the plurality explained, "the overarching task is to determine the intent of voters who ratified the [Amendment]" by considering the historic context of ratification, the Amendment's contextual structure and its underlying values.⁷⁰

With those principals in mind, the plurality noted that Article I of Pennsylvania's Constitution is the Declaration of Rights, which

⁶⁵ Attorney General's Reply Brief, *supra* note 54 at 8-9.

⁶⁶ Despite the numerous issues raised in the case, the plurality's discussion of the Environmental Rights Amendment spans 55 pages of the 116-page opinion. *Robinson Twp., Wash. Cnty.*, 83 A.3d at 930-85.

⁶⁷ *Id.* at 1000-01. Additionally, a majority of the court also struck down other sections of Act 13 that the plurality and concurrence agreed were inseparable from the three unconstitutional provisions. *Id.* at 1000, 1008. And, a majority of the court also held that all plaintiffs had standing to bring the suit, including a local doctor, an environmental group, citizens, and township administrators. *Id.* at 999 (majority opinion).

⁶⁸ *Id.* at 1000.

⁶⁹ *Id.* at 943.

⁷⁰ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 944.

acts as a limitation on governmental police power.⁷¹ It explained that Article I rights inherently belong to the people, while the government's powers are granted by the Constitution.⁷² As such, Article I, Section 27 enumerates the people's inherent environmental rights:

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.⁷³

Given the Amendment's position, the plurality expressly placed the people's right to clean air and pure water "on par with, and enforceable to the same extent as, any other right reserved to the people in Article I."⁷⁴ Relying on sister states' interpretations of similar provisions, the plurality provided that governmental actions resulting in the "actual or likely degradation" of the air or water violate the individual rights delineated by the Amendment's first clause.⁷⁵ And while the state's police power encompasses the promotion of economic development, the Amendment acts as further check on such power by requiring that such development be "sustainable."⁷⁶

Turning to the public trust provision, the plurality similarly stated that the third clause clearly required the Commonwealth-trustee to "conserve and maintain the public natural resources for the benefit of the people, including generations yet to come."⁷⁷ Thus, if economic development is pursued by lawmakers, such

⁷¹ *Id.* at 948-49.

⁷² *Id.* at 948.

⁷³ PA. CONST. art. I, § 27 (adopted May 18, 1971).

⁷⁴ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 953-54.

⁷⁵ *Id.* at 944 (citing *Montana Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1249 (Mont. 1999)).

⁷⁶ *Id.* at 981.

⁷⁷ *Id.* at 974.

must be pursued to benefit the entire citizenry in a sustainable way that preserves the corpus of the trust—namely clean air, water, wild flora, fauna, and the like.⁷⁸ In further adherence to the text and precedent, the plurality concluded that all levels of state government were included in the term "Commonwealth" because the Amendment did not specifically name any one entity as trustee.⁷⁹

Taking the three clauses together, the plurality concluded that the plain language allowed citizens to level two separate and independently enforceable constitutional charges against the government: (1) that some affirmative state action has caused actual or likely degradation of some protected resource belonging to the people, or (2) that some governmental entity has failed its trustee obligations by not conserving or maintaining the public natural resources for both current and future generations.⁸⁰ Here the plurality explicitly rejected the *Payne* test, stating the non-textual standard historically used by the Commonwealth Court was inappropriate to assess allegations brought solely under Article I, Section 27.⁸¹ Relying on the Amendment's legislative history and historical context of its passage, the plurality concluded that the former non-textual approach failed to place environmental rights on equal footing with the people's political rights, as intended by both the drafters who included it in the Declaration of Rights under Article I and the voters who ratified it.⁸²

⁷⁸ *Id.* at 954-55.

⁷⁹ *Id.* at 956-57.

⁸⁰ See *Robinson Twp., Wash. Cnty.*, 83 A.3d at 950 (explaining that the Amendment both prohibits the state from overacting and also requires it to affirmatively participate in the protection of resources) (citing PA. CONST. art. I, § 27 (1971)).

⁸¹ *Id.* at 967.

⁸² After noting the historical context of the Amendment's passage, its plain language, and the diminishing effect that *Payne*'s departure from the text had on the Amendment, the plurality explicitly rejected that non-textual approach for Article I, Section 27 claims. *Id.* at 959-67. In doing so, the plurality specifically took issue with the second prong of the *Payne* test that "tended to define the broad constitutional rights in terms of compliance with various statutes" and found that it "minimize[d] the constitutional import of the Environmental Rights Amendment." *Id.* at 964.

The plurality next reiterated the proper deferential posture of the judiciary, stating that legislative enactments enjoy a strong presumption of constitutionality whereby a challenger carries a heavy burden to show it "clearly, palpably and plainly violates the Constitution."⁸³ However, it further provided that in determining whether the General Assembly has exercised its police power unconstitutionally, a court must look at more than its stated intent, but should also assess whether the *effect* of the enactment violates the asserted rights.⁸⁴ To ignore the latter, stated the plurality, "would be tantamount to ceding [the court's] constitutional duty, and [its] independence, to the legislative branch."⁸⁵ Finally, while recognizing that courts often defer to agency decisions about whether environmentally protective measures are sufficient, the plurality nevertheless asserted its constitutional obligation to embark on a more independent analysis by "weigh[ing the] parties' competing evidence and arguments."⁸⁶

Applying the above concepts, the plurality held that section 3303 violated the public trust doctrine of the Environmental Rights Amendment.⁸⁷ In the plurality's view, preempting zoning measures that necessarily addressed local environmental concerns in accordance with municipalities' fiduciary duties as trustees violated the public trust doctrine.⁸⁸ In short, it held that because "Act 13 thus commands municipalities to ignore their obligations under Article I, Section 27 and further directs municipalities to take affirmative actions to undo existing protections of the environment," it is an improper exercise of police power that violates the Amendment's public trust doctrine.⁸⁹

Likewise the plurality held that mandating municipalities to allow oil and gas operations as a matter of right in every zoning

⁸³ *Id.* at 943 (quoting *W. Mifflin Area Sch. Dist. v. Zahorchak*, 4 A.3d 1042, 1048 (Pa. 2010)).

⁸⁴ *Id.* at 951.

⁸⁵ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 951 (quoting *Stlip v. Com.*, 905 A.2d 918 (Pa. 2006)).

⁸⁶ *Id.* at 953.

⁸⁷ *Id.* at 978.

⁸⁸ *Id.* at 977.

⁸⁹ *Id.* at 978.

district, under section 3304, also violated the Environmental Rights Amendment.⁹⁰ It reasoned that the sweeping state-wide mandate of section 3304 could not "conserve or maintain" local natural resources because it allowed oil and gas operations (including blasting), even in sensitive areas whose environment would be substantially degraded by such operations.⁹¹ Act 13's mere recital that it attempts to protect "natural resources, environmental rights and values secured by the Constitution of Pennsylvania" was of little importance in determining whether it employed means inconsistent with the Environmental Rights Amendment.⁹² While recognizing that "sustainable development may require some degradation of the corpus of the trust," the plurality also found that section 3304's sweeping mandate would have a disparate effect on some localities because some would bare much greater "environmental and habitability burdens than others," which violates the express constitutional command that the corpus be maintained "for the benefit of all the people."⁹³

Finally, the plurality held section 3215(b)(4)'s procedure for granting mandatory waivers of setback requirements violated the public trust doctrine because it lacked any identifiable or enforceable environmental standards by which DEP could effectively "conserve and maintain" the corpus of the trust, specifically the waters of the Commonwealth.⁹⁴ It rejected the Commonwealth's argument that section 3215(b)(4) protected natural resources because it allowed DEP to implement well location standards it deemed "necessary" to protect such waters.⁹⁵ Instead, the plurality concluded the term "necessary" was "malleable and unpredictable,"⁹⁶ especially considering that other provisions of Act 13 were geared not to protecting the environment, but rather to "ensure optimal development of the

⁹⁰ *Id.* at 981.

⁹¹ *See Robinson Twp., Wash. Cnty.*, 83 A.3d at 978-79.

⁹² *Id.* at 979 (quoting 58 PA. CONS. STAT. § 3202(4)).

⁹³ *Id.* at 980.

⁹⁴ *Id.* at 983-84.

⁹⁵ *Id.* at 983.

⁹⁶ *Id.*

industry."⁹⁷ Pointing to section 3215(e), which placed the burden on DEP to justify any denial of a waiver from setback requirements, the plurality concluded that the "statutory scheme overall dilutes the Department's authority to regulate and enforce adequate environmental standards, and fosters departures from the goal of sustainable development."⁹⁸

The plurality considered it important that the Amendment was passed and ratified in reaction to the environmental harms left by an unrestrained coal industry, and concluded that Act 13's deregulatory effect upon on the gas industry would unquestionably lead to similar, long-lasting environmental harms.⁹⁹ In short, Act 13 was held to directly contravene the Amendment's explicitly stated purpose—to protect previously exploited natural resources such as clean air and pure water by holding them in a public trust.¹⁰⁰

D. The Concurrence

Justice Baer agreed that all three provisions were unconstitutional, but based his findings on substantive due process rather than the Environmental Rights Amendment.¹⁰¹ He reasoned that the parties' substantive due process arguments were better-developed and sought to resolve the issue as narrowly as possible.¹⁰² In doing so, however, the concurrence's reasoning mirrored that of the plurality.¹⁰³ That is, Justice Baer found Act 13's mandating oil and gas operations in every zoning district was irrational because "it sets static commandments to the municipalities of the Commonwealth in a vacuum, without due consideration for any effect upon those municipalities" which

⁹⁷ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 983 (citing 58 PA. CONS. STAT. § 3215(e)).

⁹⁸ *Id.* at 984.

⁹⁹ *Id.* at 976-77.

¹⁰⁰ *See id.* at 976, 981 ("In our view, the framers and ratifiers of the Environmental Rights Amendment intended the constitutional provision as a bulwark against enactments, like Act 13 . . .").

¹⁰¹ *Id.* at 1001 (Baer, J., concurring).

¹⁰² *Id.*

¹⁰³ *See infra* notes 104-05 and accompanying text.

essentially mandated that the "pigs" of industrial uses associated with oil and gas recovery be brought "into the parlor" of environmentally sensitive areas.¹⁰⁴ That impact, according to Justice Baer, was "the epitome of arbitrary and discriminatory" which is violative of substantive due process.¹⁰⁵

E. The Dissent

Justices Saylor and Eakin wholly disagreed with the judgment of the court, expressing concerns over the proper role of the judiciary in relation to that of the legislature.¹⁰⁶ The dissent would have granted greater deference to the legislature, rather than embark on what it saw as judicial policymaking that encroached on the political process.¹⁰⁷ Thus, it would have focused solely on Act 13's *stated* purpose to "[p]ermit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens," and would have concluded that because its purpose was a legitimate exercise of police power, Act 13 was constitutionally permissible.¹⁰⁸

The dissent also did not believe Article I, Section 27 imposed a fiduciary duty on any governmental entity except the General Assembly, and accordingly concluded that Act 13's preemptory effect did not violate the environmental public trust.¹⁰⁹ It reasoned that, because municipal authority to zone was derived from the General Assembly, such can be removed at the Assembly's discretion.¹¹⁰ According to the dissent, Act 13 was simply a proper exercise of the Assembly's police power to make policy choices for the entire Commonwealth.¹¹¹

¹⁰⁴ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 1008 (Baer, J., concurring).

¹⁰⁵ *Id.* at 1007.

¹⁰⁶ *Id.* at 1009-10 (Saylor, J., dissenting).

¹⁰⁷ *Id.* at 1010.

¹⁰⁸ *Id.* at 1013 (citing 58 PA. CONS. STAT. §3202 (1)).

¹⁰⁹ *Id.* at 1014.

¹¹⁰ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 1015 (Eakin, J., dissenting).

¹¹¹ *Id.* at 1013 (Saylor, J., dissenting).

IV. EVALUATION

Payne's non-textual test greatly diminished Article I, Section 27's explicit purpose because it would not "conserve and maintain" natural resources, but rather "manage[d] their degradation."¹¹² That test abruptly departed from the Amendment's plain meaning because it superimposed extraneous concepts onto unambiguous language.¹¹³ Additionally, it did so in a fashion that tipped the scales against finding a violation of the Amendment from the start: to fail *Payne's* third prong, the harms-benefit analysis required showing that the "harm" to protected resources "clearly outweigh[ed]" the benefits of the challenged action.¹¹⁴ This skewed textual departure failed to effectuate the Amendment's core purpose—to reserve an enforceable constitutional right of environmental protection in the people.¹¹⁵ The *Robinson Township* plurality is easily viewed as an attempt to restore that right in accordance with the Amendment's original purpose.¹¹⁶

While not amassing a majority of the court, the plurality opinion will likely have major implications on lower courts and decision makers.¹¹⁷ For the first time since its enactment, Article I,

¹¹² Dernbach, *supra* note 3 at 713.

¹¹³ See *id.* at 696 (contending that the *Payne* test "utterly ignores the constitutional text").

¹¹⁴ See *supra* note 36 and accompanying text (highly burdening plaintiffs to show that "to proceed further [with the challenged action] would be an abuse of discretion").

¹¹⁵ See *Robinson Twp., Wash. Cnty.*, 83 A.3d at 967 (plurality opinion) ("*Payne* . . . and its progeny have 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 constitutional duties . . .").

¹¹⁶ See *id.* at 946, 967 (describing how "prior decisional law obscured the manifest intent of [the Environmental Rights Amendment] as expressed in its plain language" and rejecting that precedent to enumerate a more plain text approach).

¹¹⁷ The opinion should also influence the policy considerations of lower courts tasked with interpreting novel questions of common law, especially those concerning Pennsylvania's gas drilling industry. See Richard Rinaldi, *Fracturing the Keystone: Why Fracking in Pennsylvania Should Be Considered an Abnormally Dangerous Activity*, 24 WIDENER L.J. 385, 429 (2015) ([The plurality opinion] should carry considerable weight in deciding public policy for

Section 27 was employed to strike down a statute as unconstitutional.¹¹⁸ Significantly, the plurality recognized that jurisprudence in the lower courts "has weakened the clear import of the plain language of the constitutional provision in unexpected ways."¹¹⁹ In light of those unexpected results, the plurality embraced the opportunity to "offer guidance to the bench and bar" concerning the proper application of the Environmental Rights Amendment.¹²⁰ Finally confronting the issue of whether the environmental rights guaranteed by Article I, Section 27 were on par with other constitutional rights reserved by the people, three Supreme Court Justices responded with a resounding YES. That affirmation may be the initial spark of life that reanimates the long-considered dormant promises of Pennsylvania's Environmental Rights Amendment.

Going forward, the Amendment should be read as grafting another limitation on governmental power, in addition to that of substantive due process; that is, not only must governmental action be substantially related to a legitimate exercise of police power, but in Pennsylvania, it must also "conserve and maintain" natural resources like pure air and clean water by preventing the "actual or likely degradation" of such resources.¹²¹ Unlike that of *Payne*, this framework would presumably prohibit an action that would substantially degrade those resources, even if such degradation was outweighed by the benefits of the action. That is, the Environmental Rights Amendment sets out a threshold test, beyond which is constitutionally unacceptable activity; there is no balancing involved whatsoever.¹²² In other words, development

any common law regime, especially when deciding whether an activity that threatens valued water supplies should be considered abnormally dangerous.").

¹¹⁸ See *Robinson Twp., Wash. Cnty.*, 83 A.3d at 963-64 (noting that the question of how the Environmental Rights Amendment limits the government's police power has not been answered prior to *Robinson Township*).

¹¹⁹ *Id.* at 950.

¹²⁰ *Id.* at 942.

¹²¹ See *id.* at 953.

¹²² See *id.* at 981 ("[T]he Constitution constrains this Court not to be swayed by counter policy arguments where the constitutional command is clear . . . [Rather] [i]n our view, the framers and ratifiers of the Environmental Rights Amendment intended the constitutional provision as a *bulwark* against

can progress to its heart's content, so long as it is environmentally "sustainable," not such a radical idea at all in 2013.¹²³

V. CONCLUSION

The plurality's textual approach in *Robinson Township* placed environmental rights on equal footing with the people's other important constitutional rights. Significantly, the concurrence lauded the plurality as a "thorough, well-considered and able opinion."¹²⁴ Justice Baer, it might be said, merely took the path of least resistance to meet the plurality at its destination. Finding substantive due process the more direct route, he admittedly "differ[ed] from [his] esteemed colleague only in degree."¹²⁵ It will be interesting to see how Justice Baer treats a similar factual case, in which future parties argue within the textual framework provided by the plurality.

That framework, granting full constitutional weight to the people's environmental rights, had been long overdue according to many legal scholars.¹²⁶ Recently, Frank Kury, the former state

enactments, like Act 13, which permit development with such an immediate, disruptive effect upon how Pennsylvanians live their lives.") (emphasis added). *But cf.* *Payne v. Kassab*, 312 A.2d 86, 96 (Pa. Commw. Ct. 1973) (asking, in the last prong of the *Payne* test "[d]oes 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") (emphasis added).

¹²³ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 953 (citing John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment*, 103 DICK. L. REV. 693, 718-20 (1999)). Protecting natural resources and development are by no means mutually exclusive; but much to the contrary, broad and lasting economic development actually *requires* clean air and water. *See* Dernbach, *supra* note 3, at 718.

¹²⁴ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 1000 (Baer, J., concurring).

¹²⁵ *Id.* at 1001.

¹²⁶ *See, e.g.*, Dernbach, *supra* note 3 ("As its early supporters feared, the Amendment seems to have a more symbolic than substantive value . . ."). Most notably, Frank Kury, the author and sponsoring legislator of the Amendment had "hope[ed] that the declaration of environmental rights would be used by the courts on a case-by-case basis to develop a body of environmental rights law

legislator who drafted and introduced Article I, Section 27 stated "In terms of what we intended . . . the plurality really got it right."¹²⁷

The dissent in *Robinson Township* disagreed, contending that the plurality's failure to give greater deference to a General Assembly that was duly elected through the political process was tantamount to judicial policy making.¹²⁸ But cannot one view the plurality's approach exactly the opposite, as holding the legislative and democratic process that resulted in Pennsylvania's Environmental Rights Amendment in very high regard? Recall that the plurality took a conservative approach to constitutional construction—prescribing strict adherence to the Amendment's text and affording great weight to the original intent of its drafters. Relying on the legislative history that continually referenced the environmental damage caused by unrestrained industry, the plurality stated that "[t]he drafters of the Environmental Rights Amendment recognized and acknowledged [these] shocks to our environment and quality of life."¹²⁹ It thus naturally concluded the drafters' intent was to prevent the further degradation of

comparable to [the Bill of Rights] . . . [b]y giving individual citizens the legal right to a decent environment" Kury, *supra* note 20 at 124.

¹²⁷ John C. Dernbach, *The Pennsylvania Supreme Court's Robinson Township Decision: A Step Back for Marcellus Shale, a Step Forward for Environmental Rights and the Public Trust*, WIDENER ENVTL. LAW CENTER BLOG (Dec. 21, 2013), <http://blogs.law.widener.edu/envirolawcenter/2013/12/21/the-pennsylvania-supreme-courts-robinson-township-decision-a-step-back-for-marcellus-shale-a-step-forward-for-article-i-section-27/> (Frank Kury quote) (internal quotation marks omitted).

¹²⁸ See *Robinson Twp., Wash. Cnty.*, 83 A.3d at 1009-10 (Saylor, J., dissenting).

¹²⁹ *Id.* at 961 (plurality opinion). As another example of how lawmakers recognized unrestrained industry as the main cause of environmental harm, during the Amendment's third consideration in the Pennsylvania House, one representative candidly declared, "Considering Pennsylvania's shameful history of a state government too often controlled by the plunderers of our natural resources, this amendment is long overdue. If only it had been enacted a century ago—how different the face of Pennsylvania would look today!" Dernbach & Sonnenberg, *supra* note 20, at 198 (quoting PA. LEGISLATIVE JOURNAL—HOUSE 722 (June 2, 1969) (statement of Representative Frank Kury)).

Pennsylvania's environment, especially from unrestrained industry.¹³⁰ To carry forth that intent the plurality diverged from lower courts by prescribing strict adherence to the Amendment's text.¹³¹ In doing so, it firmly re-affixed the Amendment on its original textual foundation where subsequent jurisprudence can give life to its principal purpose—hardly an exercise in judicial activism.

Echoing the dissent, the Commonwealth argued that if the Citizens disagreed with Act 13's policy of promoting expedited gas and oil extraction, they should seek to change the law through the political process.¹³² But naturally, one must ask, did not the citizens already achieve their political remedy to such governmental intrusions when they overwhelmingly voted to ratify the Environmental Rights Amendment back in 1971? Unlike Act 13, the Environmental Rights Amendment is enumerated in Pennsylvania's Constitution under the people's "Declaration of Rights," and it garnered overwhelming voter approval through referendum. Therefore, in light of the Amendment's swift passage, prominent placement, and clear purpose, it certainly does seem a plurality of Pennsylvania Supreme Court justices got it right—finally.

¹³⁰ *Robinson Twp., Wash. Cnty.*, 83 A.3d at 963 (finding it no mere coincidence "[t]hat Pennsylvania deliberately chose a course different from virtually all of its sister states" in the wake of the environmental damage left by virtually unrestrained industries that swept across Pennsylvania for generations).

¹³¹ See *supra* note 81 and accompanying text.

¹³² Attorney General's Reply Brief, *supra* note 54, at 7 ("If the Municipalities wish to change Act 13, they should seek to amend or repeal the law through the political process and not by petitioning the courts.").