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ACT 13 AND THE ENVIRONMENTAL RIGHTS AMENDMENT

*Lucas Liben and Marla D. Tortorice**

Act 13 was enacted on February 14, 2012, marking the first major overhaul of Pennsylvania's oil and gas legislation in over thirty years. The Act, which sought to provide uniformity across the state for oil and gas development, was immediately met with challenges in the courts. After years of litigation, many of its key provisions were declared unconstitutional through the line of Robinson Township cases. Of these challenges, the one with the potential to have the most far-reaching consequences came under the Environmental Rights Amendment (ERA). While this claim was initially dismissed in the Commonwealth Court, the plurality opinion in the Pennsylvania Supreme Court based its holding that certain provisions of Act 13 were unconstitutional on the ERA.

The Pennsylvania Supreme Court decision in Robinson II was quickly deemed a landmark decision because, until this time, the ERA had largely been ignored. The opinion's interpretation of the ERA could suggest a shift in the way future courts assess claims under the ERA and in environmental jurisprudence overall. This Article analyzes the case law succeeding Robinson II to determine if, five years later, the decision's critical textual interpretation of the ERA has had the momentous impact on Pennsylvania's environmental regulatory scheme that some predicted.

INTRODUCTION

The Environment Rights Amendment (ERA) has failed to gain much attention from both the legislature and the courts since its enactment in the Pennsylvania Constitution.¹ When Act 13, the new statutory framework for regulation of oil and gas operations

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¹ See *infra* Part I.A.

in Pennsylvania, was initially challenged, the Pennsylvania Commonwealth Court quickly dismissed the petitioners' claim that state preemption of oil and gas regulations violated the ERA.²

The claim was raised again on appeal to the Supreme Court of Pennsylvania.³ The plurality opinion dedicated sixty-five pages of its analysis to resolve the proper interpretation and application of the Amendment in light of the Act.⁴ The Court held that, "several core provisions of Act 13 violate[d] the Commonwealth's duties as trustee of Pennsylvania's public natural resources under the Environmental Rights Amendment"⁵ Such attention to the contours of the ERA was unprecedented.⁶

This Article addresses the question of whether the Pennsylvania Supreme Court's plurality opinion in *Robinson II* was the beginning of a shift in environmental jurisprudence that many scholars predicted it would be.⁷ This Article concludes that there has not been a massive upheaval of environmental law post *Robinson II*. Moreover, this Article shows that, due to the decision in *Robinson II* being a plurality, there was a trend in the lower courts to apply the same test that had been in effect under the ERA prior to *Robinson I*. This is not to say, however, that *Robinson II*'s impact is not developing. The Pennsylvania Supreme Court issued a majority opinion in *Pennsylvania Environmental Defense Foundation v. Commonwealth* on June 17, 2017. Still, the anticipated impact of *Robinson II* has yet to occur.

² *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 489 (Pa. Commw. Ct. 2012) [hereinafter *Robinson I*] (Commonwealth Court reasoning that "[Act 13] preempts a municipalities' obligation to plan for environmental concerns for oil and gas operations ... because [municipalities] were relieved of their responsibilities to strike a balance between oil and gas development and environmental concerns under the MPC [the Pennsylvania Municipalities Planning Code], Petitioners have not made out a cause of action under Article 1, § 27.").

³ *Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 915-16 (Pa. 2013) [hereinafter *Robinson II*].

⁴ *Id.* at 933-1016.

⁵ *Id.* at 913.

⁶ *See Id.* at 901.

⁷ *See, e.g.,* Richard Rinaldi, *Dormant for Decades, the Environmental Rights Amendment of Pennsylvania's Constitutional Recently Received a Spark of Life from Robinson Township v. Commonwealth*, 24 WIDENER L.J. 435, 458 (2015) ("[I]n 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."); John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENVTL. L. 463, 518 (2015) ("Whatever comes next, it is not likely to be a return to the time before Robinson Township.").

Part I explains how the ERA was interpreted before *Robinson II*. Part II discusses the plurality opinion in *Robinson II* and how it marked a departure from previous interpretations. Lastly, Part III surveys case law addressing challenges involving the ERA post-*Robinson II*.

I. BACKGROUND OF THE ENVIRONMENTAL RIGHTS AMENDMENT:
PRE-*ROBINSON II*

A. The Enactment and Subsequent Disappearance of the Environmental Rights Amendment

In response to the environmental impact of the coal industry, the ERA was introduced.⁸ Upon passing unanimously in both the House and Senate, and accumulating widespread voter approval by a margin of four-to-one, the ERA was ratified in 1971—incorporated as Article I, § 27 of the Pennsylvania Constitution.⁹ The Amendment reads:

Natural Resources and the Public Estate—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.¹⁰

There are various clauses found within the ERA. The first sentence grants individual 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."¹¹

⁸ See Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123 (1991) ("The public approved the amendment by a vote of 1,021,342 to 259,979 ...").

⁹ 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, 280 (2015).

¹⁰ PA. CONST. art. I, § 27 (1971).

¹¹ PA. CONST. art. I, § 27 (1971); see also *Robinson II*, 83 A.3d at 953 (discussing the substantive standards contained in the language of the constitutional provision).

The second and third sentences create a separate, public trust clause: "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."¹²

For most of its existence, the ERA has been governed by two key Pennsylvania cases: *Commonwealth v. National Gettysburg Battlefield Tower* and *Payne v. Kassab*.¹³ These decisions largely restricted the effectiveness of the ERA. As one commentator noted: "[T]he Amendment seems to have more symbolic than substantive value, inscribed on plaques and quoted in speeches, but rarely used in decision making."¹⁴

Commonwealth v. National Gettysburg Battlefield Tower was the first major case decided under the ERA. The Commonwealth sought to enjoin construction of a 307-foot observation tower on private land that was adjacent to the Gettysburg National Military Park.¹⁵ Based on the ERA's first clause, the Commonwealth alleged that the tower would interfere with the "natural, scenic, historic and esthetic values" of the environment because the "modern architecture would degrade the site's aesthetics and deprive visitors of the historic experience of the battlefield."¹⁶ The Pennsylvania Supreme Court affirmed the lower court's holding that the Commonwealth failed to carry its burden of proof on the issue of whether the tower would injure the Gettysburg environment.¹⁷

More importantly, however, was the discussion regarding whether the ERA was self-executing or required implementing legislation. The Commonwealth took the position that the Amendment was self-executing, stating "that the people have been given a right to the preservation of the natural, scenic, historic and esthetic values of the environment, and that no further legislation

¹² PA. CONST. art. I, § 27 (1971); see also *Robinson II*, 83 A.3d at 977-78 (discussing the substantive standards contained in the language of the constitutional provision).

¹³ See *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973) [hereinafter *Gettysburg*]; See *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976) [hereinafter *Payne*].

¹⁴ 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, 696 (1999).

¹⁵ *Gettysburg*, 311 A.2d at 589-90.

¹⁶ Rinaldi, *supra* note 7, at 441 (citing *Gettysburg*, 311 A.2d at 590).

¹⁷ *Gettysburg*, 311 A.2d at 595.

is necessary to vest these rights in the people.”¹⁸ Justice O’Brien, writing for the plurality,¹⁹ disagreed:

A Constitution is primarily a declaration of principles of the fundamental law. Its provisions are usually only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing²⁰ The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced.²¹

Thus, the plurality opinion in *Gettysburg* concluded that:

[T]he provisions of § 27 of Article 1 of the Constitution merely state the general principle of law that the Commonwealth is trustee of Pennsylvania’s public natural resources with power to protect the ‘natural, scenic, historic, and esthetic values’ of its environment. If the Amendment was self-executing, action taken under it would pose serious problems of constitutionality, under both the equal protection clause and the due process clause of the Fourteenth Amendment.²²

In *United Artists Theater Circuit, Inc. v. City of Philadelphia*, the Pennsylvania Supreme Court interpreted the

¹⁸ *Id.* at 591 (internal quotation marks omitted).

¹⁹ *Id.* at 588-89 (Justice O’Brien delivered the opinion of the court, joined by Justice Pomeroy. Justice Hix concurred in the result. Justice Roberts delivered a concurring opinion, joined by Justice Manderino. Chief Justice Jones delivered a dissenting opinion, joined by Justice Eagan).

²⁰ *Id.* at 591 (quoting 6 R.C.L. § 52, p. 57 (1915)).

²¹ *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 165 (8th ed. 1927)).

²² *Id.* at 594-95.

Gettysburg plurality opinion as holding that the ERA was not self-executing,²³ despite the fact that, as the *Robinson II* Court later pointed out, "only two of the seven Justices in *Gettysburg* subscribed to that view; two Justices concluded the opposite; and three Justice did not address the issue."²⁴

Payne v. Kassab, decided three years after *Gettysburg*, further limited the Amendment's efficacy.²⁵ 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 adjoining the Susquehanna River.²⁶ The ERA was being used by residents to check the Commonwealth's police power (as was evident in the individual rights clause) instead of an enforcement tool the Commonwealth used against residents, as was the case in *Gettysburg*.²⁷ The residents argued that the Commonwealth, through the approval of the River Street project, violated its duties as trustee under Article I, § 27 of the Pennsylvania Constitution.²⁸

Payne also differs from *Gettysburg* in that it provides both a majority opinion and a framework under which to analyze claims that rely on the ERA.²⁹ Concluding that Article I, § 27 required a "realistic and not merely legalistic" test, the Pennsylvania Commonwealth Court provided a three-part balancing test for whether the Amendment had been observed.³⁰ This test was neither expressly adopted nor applied in the Pennsylvania Supreme Court decision; rather, it was mentioned in a footnote:

- (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?

²³ *United Artists Theater Circuit, Inc. v. City of Phila.*, 635 A.2d 612, 620 (Pa. 1993).

²⁴ *Robinson II*, 83 A.3d at 964; see also Susan Kessler, *Interpreting the Post-Robinson Township Environmental Protection Amendment*, 77 U. PITT. L. REV. 579, 585 (2016).

²⁵ *Payne*, 361 A.2d at 266.

²⁶ *Id.* at 264-65.

²⁷ See *id.*

²⁸ *Id.* at 272.

²⁹ Kessler, *supra* note 26, at 586.

³⁰ *Payne*, 361 A.2d at 273 n.23.

(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?³¹

Nonetheless, the Supreme Court of Pennsylvania held that the street expansion did not violate the ERA.³² The three-part balancing test subsequently became the all-purpose test for applying the ERA—both for claims which were based on the Commonwealth’s failure to do its duty as trustee as well as claims based on the people’s rights to the “natural, scenic, historic, and esthetic values” of the environment.³³

Commentators have opined that the *Payne* balancing test “virtually wrote [the ERA] out of existence” by “ensur[ing] that laws tested against it would be sustained.”³⁴ According to these commentators, *Payne*’s non-textual test focused not on conserving and maintaining natural resources, but on managing their degradation.³⁵ More specifically, the third prong—the harms-benefit analysis—required a showing that the harm to the protected resources clearly outweighs the benefits of the challenged action.³⁶ This departure from the text, as *Robinson II* later points out, allegedly failed to effectuate the purpose of the Amendment which was to create an enforceable constitutional right of environmental protection in the people.³⁷ Thus, *Robinson II* can be viewed as a direct response to these stated failures of the *Payne* test and an attempt to restore that right.³⁸

B. The Enactment of Act 13 and its First Challenge

In 2012, the Pennsylvania General Assembly endeavored to provide uniformity across the state for oil and gas development by

³¹ *Id.* (quoting *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263 (1976)).

³² *Id.* at 273.

³³ Kessler, *supra* note 26, at 587.

³⁴ Erin Daly & James R. May, *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, 21 WIDENER L. REV. 151, 154 (2015).

³⁵ Dernbach, *supra* note 16, at 713.

³⁶ *Robinson II*, 83 A.2d at 967; *see also infra* Part II.C.

³⁷ *Id.*

³⁸ *Id.*

passing Act 13 and amending the Pennsylvania Oil and Gas Act.³⁹ Act 13 required statewide uniformity in zoning ordinances relating to oil and gas development.⁴⁰ It also prohibited any local regulation of oil and gas operations, including environmental legislation.⁴¹ In effect, municipalities could no longer use their zoning powers to regulate oil and gas development within their townships.⁴²

Act 13 was immediately challenged.⁴³ In *Robinson Township v. Commonwealth* (*Robinson I*), several Pennsylvania municipalities, two local elected officials, a non-profit environmental group, and a physician (collectively, the “Citizens”), challenged various provisions of the Act.⁴⁴ The Commonwealth Court held that § 3304 “violated substantive due process” because it allowed incompatible uses in zoning districts and did not protect the interests of neighboring property owners from harm, altered the character of the neighborhood, and made irrational classifications.”⁴⁵ The Commonwealth Court quickly rejected the remaining challenges to other aspects of Act 13, including the claim that Act 13 violated the ERA.⁴⁶ Both the Citizens and the Commonwealth appealed to the Supreme Court of Pennsylvania.⁴⁷

³⁹ Act No. 13 of Feb. 14, 2012, 2012 Pa. Laws 87 (codified as amended at 58 PA. STAT. ANN. §§ 2301-3504 (2012)).

⁴⁰ *Id.* §§ 3301-3309.

⁴¹ *Id.* § 3303.

⁴² *See id.*

⁴³ *Robinson I*, 52 A.3d. at 468.

⁴⁴ *Id.*

⁴⁵ *Id.* at 485, 490-93 (The Commonwealth Court also holding that § 3215(b)(4), the provision of Act 13 that empowered the Department of Environmental Protection (“DEP”) to grant variances from stream and wetland buffer zone requirements, violated the non-delegation doctrine embodied in Article 2, Section 1 of the Pennsylvania Constitution. Specifically, in the statute the DEP was delegated the authority to make legislative policy judgments reserved to the General Assembly, but because the DEP was given “no guidance” to inform its discretion and decision-making, this delegation was unconstitutional).

⁴⁶ *Id.* at 488-89.

⁴⁷ *Id.* at n. 3.

II. REVITALIZATION OF THE ENVIRONMENTAL RIGHTS AMENDMENT: ACT 13 AND *ROBINSON II*

A. The Robinson II Decision

In *Robinson II*, a four-Justice majority struck down §§ 3303,⁴⁸ 3304,⁴⁹ and 3215(b)(4) as unconstitutional,⁵⁰ affirming in part and reversing in part the Commonwealth Court's decision.⁵¹ The majority did not agree on a single rationale concerning the grounds for the decision, meaning the holding regarding the ERA was only a plurality.⁵² Nevertheless, the novel interpretation of the ERA in *Robinson II* warrants attention.

At the outset, the plurality opinion made clear that its primary concern was the text of the Pennsylvania Constitution.⁵³ Referring to previous decisions interpreting the ERA, Justice Castille reasoned that “in circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary.”⁵⁴

In beginning its interpretation of the ERA, the Court discussed that it created two sets of rights.⁵⁵ First, the initial clause created an individual environmental right: “The people have a right to clear air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”⁵⁶ The Court expressly placed the people's right to clean air and pure water “on par with, and enforceable to the same extent as, any

⁴⁸ *Robinson II*, 83 A.3d at 941 (Section 3303 requiring municipalities to uniformly amend their existing zoning ordinances).

⁴⁹ *Id.* (Section 3304 declared that statewide rules on oil and gas would preempt all local zoning rules).

⁵⁰ *Id.* (Section 3215(b)(4) empowered the DEP to grant variances from stream and wetland buffer zone requirements).

⁵¹ *Id.* at 1000-01.

⁵² *Id.* at 913 (Justice Todd and Justice McCaffery joining Chief Justice Castille, concluding the law violated the ERA); *Id.* at 1000-14 (Justice Bear concurring, but preferring to resolve the case on substantive due process grounds); *Id.* at 1014-16 (Justices Saylor and Eakin dissenting); *Id.* at 1000 (Former Justice Orie Melvin taking no part in the decision).

⁵³ *Id.* at 913.

⁵⁴ *Id.* at 946.

⁵⁵ *Id.* at 913.

⁵⁶ PA. CONST. art. I, § 27 (1971).

other right reserved to the people in Article I.”⁵⁷ The issue of Act 13’s application to the first clause was not properly developed in arguments before the court.⁵⁸

The ERA also created a second set of rights found in the second and third sentences of the Amendment, known as the public trust clause.⁵⁹ This clause reads: “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.”⁶⁰ This is the clause upon which *Robinson II* was decided.⁶¹

The Court further broke down the public trust clause and wrote that the Commonwealth’s trustee duty consists of two sub-duties.⁶² The first is a duty “[t]o refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action.”⁶³ This means that the Commonwealth has “a duty to refrain from encouraging or permitting the ... diminution ... of public natural resources.”⁶⁴

The second is a duty to “act affirmatively to protect the environment, via legislative action.”⁶⁵ The court cited two examples, the Clean Streams Act and the Air Pollution Control Act, and explained that those “administrative details [were] appropriately addressed by legislation because ... the generalized terms comprising the ERA [did] not articulate them.”⁶⁶ Importantly, the court noted that “the call for complimentary legislation ... [did] not override the otherwise plain conferral of rights upon the people.”⁶⁷

In applying the ERA to Act 13, the Court found violations of both of the General Assembly’s duties as trustee under the Amendment.⁶⁸ First, § 3303 was held to violate the ERA’s public

⁵⁷ *Id.* at 953-54.

⁵⁸ *Id.* at 974 n.56.

⁵⁹ *Id.* at 913.

⁶⁰ PA. CONST. art. I, § 27 (1971).

⁶¹ *Id.*

⁶² *Robinson II*, 83 A.3d at 957.

⁶³ *Id.*

⁶⁴ *Id.* at 957.

⁶⁵ *Id.* at 958.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 981

trust doctrine because preempting zoning measures that necessarily address local environmental concerns “command[ed] municipalities to ignore their obligations under [the ERA] and further direct[ed] municipalities to take affirmative actions to undo existing protections of the environment in the localities.”⁶⁹ This was held to be an improper exercise of police power that violated the public trust doctrine.⁷⁰

Similarly, the Court held that § 3304 violated the ERA because it demanded municipalities to allow oil and gas operations as a matter of right in every zoning district.⁷¹ Section 3304’s sweeping mandate would have a disparate effect on some localities that would bear much greater “environmental and habitability burdens than others,” which violates the express constitutional command that the environment be maintained “for the benefit of all the people.”⁷² Act 13 would, by necessity, harm some areas more than others, a disparity found to be incompatible with the trustee’s duty to protect the rights of all the beneficiaries of the trust.⁷³

Finally, the Court held that § 3215(b)(4) violated the public trust doctrine because it lacked any identifiable or enforceable environmental standards by which the DEP could effectively “conserve and maintain” the corpus of the trust, specifically the waters of the Commonwealth.⁷⁴

B. Robinson II’s Response to Gettysburg and Self-execution

Robinson II also addressed self-execution, concluding that, unlike *Gettysburg*, the ERA was self-executing.⁷⁵ In a footnote, the *Robinson II* plurality first criticized *United Artists’ Theater Circuit, Inc. v. City of Philadelphia* for stating that *Gettysburg* held “that § 27 was not self-executing and that legislative action

⁶⁹ *Id.* at 978. Section 3303 stated that “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.” 58 Pa.C.S. § 3303.

⁷⁰ *Id.*

⁷¹ *Id.* at 980-81.

⁷² *Id.* at 980.

⁷³ *Id.*

⁷⁴ *Id.* at 983-84. Section 3215(b)(4) created a provision by which the department could waive the distance restrictions of well sites “upon submission of a plan identifying additional measures, facilities or practices to be employed ... to protect the waters of this commonwealth.” 58 Pa.C.S. § 3215(b)(4).

⁷⁵ *Id.* at 964 n.52.

was necessary to accomplish [its] goals.”⁷⁶ Because no majority of the court agreed on the issue in *Gettysburg*, this was found to be an incorrect statement of law.⁷⁷ The plurality wrote that the Commonwealth Court’s decision in *Gettysburg*, the last majority opinion holding that the Amendment was self-executing, must be the prevailing view.⁷⁸

C. Robinson II’s Response to Payne

The *Robinson II* Court also addressed *Payne*. The Court first noted that “the *Payne* test appear[ed] to have become, for the Commonwealth Court, the benchmark for § 27 decisions *in lieu of the constitutional text*.”⁷⁹ Lower courts were foregoing the plain language of the amendment in favor of the General Assembly’s acts and policy choices.⁸⁰ While the *Payne* test had its advantages (e.g., providing guidance on substantive standards in this area of law), the test was found to be problematic for three main reasons.⁸¹

First, the test “describes the Commonwealth’s obligations—both as trustee and under the first clause of § 27—in much narrower terms than the constitutional provision.”⁸² Second, “the test assumes that the availability of judicial relief premised upon § 27 is contingent upon and constrained by legislative action.”⁸³ The test assumes that the ERA is not self-executing.⁸⁴ Third, “*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 independent of legislative control.”⁸⁵ For all of these reasons, the plurality rejected the *Payne* test for all claims except those based on a failure to comply with statutory standards enacted to advance environmental interests.⁸⁶

⁷⁶ *Id.* at 964 n.52 (quoting *United Artists’ Theater Circuit, Inc. v. City of Phila.*, 635 A.2d 612, 620 (Pa. 1993)).

⁷⁷ *Id.*

⁷⁸ *See id.*

⁷⁹ *Id.* at 966 (emphasis added).

⁸⁰ *See id.*

⁸¹ *Id.* at 966-67.

⁸² *Id.* at 967.

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

To replace the *Payne* test, the plurality held that the General Assembly must “exercise its police powers to foster sustainable development in a manner that respects the reserved rights of the people to a clean, healthy, and esthetically-pleasing environment.”⁸⁷ The court recognized that “the constitution constrains this court not to be swayed by counter policy arguments where the constitutional command is clear ... in our view, the framers and ratifiers of the Environmental Rights Amendment intended the constitutional provision as a bulwark against enactments, like Act 13, which permit development with such an immediate, disruptive effect upon how Pennsylvanians live their lives.”⁸⁸

D. The Predictions

Commentators were quick to call the plurality opinion in *Robinson II* a landmark decision.⁸⁹ “While not amassing a majority of the court, the plurality opinion will likely have major implications on lower courts and decision makers. For the first time since its enactment, Article I, § 27 was employed to strike down a statute as unconstitutional.”⁹⁰ The court’s interpretation of the ERA “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.”⁹¹ Some further anticipated that *Robinson II*’s “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.”⁹²

It must be noted that the plurality opinion, as such, on § 27 was not binding on other Pennsylvania courts.

⁸⁷ *Id.* at 981.

⁸⁸ *Id.*

⁸⁹ Dernbach, *supra* note 7, at 465.

⁹⁰ Rinaldi, *supra* note 7, at 454-55.

⁹¹ *Id.* at 438.

⁹² *Id.* at 437.

III. POST-*ROBINSON II*—SUBSEQUENT INTERPRETATION OF THE ERA

For most of the five years after *Robinson II*, lower courts continued to apply the *Payne* test. What had been lacking in *Robinson II* — a majority opinion — did not come until June of 2017 in *Pennsylvania Environmental Defense Foundation v. Commonwealth*.

A. Payne Survives — At Least Until 2017

Despite *Robinson II*'s detailed critique of the three-part balancing test established in *Payne*, lower courts continued to employ the analysis until June of 2017.⁹³

Decided on July 22, 2015 by the Commonwealth Court of Pennsylvania, *Feudale v. Aqua Pennsylvania, Inc.* is the first in a line of cases discussing the ERA.⁹⁴ Richard Feudale, a citizen of Pennsylvania, filed a *pro se* complaint against Aqua Pennsylvania and the Department of Conservation and Natural Resources (DCNR) challenging both the location of a waterline and prospective logging and earthmoving activities on state forest lands.⁹⁵ “The essence of Feudale’s claims against DCNR [was] that DCNR [was] not doing enough to conserve and protect Pennsylvania’s natural resources”⁹⁶ The court concluded that Feudale failed to state a claim under the ERA.⁹⁷

The *Feudale* court cited *Robinson II*, but then employed the *Payne* three-part test to determine if the proposed action violated the ERA.⁹⁸ Importantly, the *Feudale* court wrote in a footnote: “This Court also note[s] that although the plurality in *Robinson Township* took issue with this test, *Payne I* 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.”⁹⁹

⁹³ It will remain to be seen if the majority Pennsylvania Supreme Court holding in *PEDF I*, 161 A.3d 911 changes that. A detailed discussion of *PEDF* follows in Part III.C.

⁹⁴ *Feudale v. Aqua Pennsylvania, Inc.*, 122 A.3d 462 (Pa. Commw. Ct. 2015).

⁹⁵ *Id.* at 464.

⁹⁶ *Id.* at 467.

⁹⁷ *Id.*

⁹⁸ *Id.* at 468.

⁹⁹ *Id.* at 468 n.8 (citing *Pa. Env'tl. Def. Found. v. Commonwealth*, 108 A.3d 140, 159 (Pa. Commw. Ct. 2015) [hereinafter *PEDF II*]). Note, the citation is to the

Interestingly, despite citing the *Payne* test, the court did not apply it prong-by-prong. Rather, the court, citing *Robinson II*, first stated that the ERA only requires the DCNR to first take into consideration the environmental impact of proposed non-recreational activities on the land.¹⁰⁰ Then, the court applied the third prong of *Payne* by stating that “Feudale has not alleged any facts suggesting that the environmental harm which will result from the [timbering] so clearly outweighs the benefits to be derived therefrom that to proceed further would be an abuse of discretion.”¹⁰¹ The court ultimately placed all emphasis on the third prong of the *Payne* test, concluding that Feudale’s claim failed because “merely alleging that DCNR’s proposed action will do harm to the [land] is insufficient to establish a claim under the Environmental Rights Amendment.”¹⁰²

Brockway Borough Municipal Authority v. Department of Environmental Protection and United Refining Company v. Department of Environmental Protection were both appeals from orders issued by the Environmental Hearing Board upholding issuances of well permits.¹⁰³ *Brockway* was decided on January 6, 2016 by the Pennsylvania Commonwealth Court.¹⁰⁴ The Environmental Hearing Board had dismissed Brockway Borough’s challenge to an issuance of a second gas drilling permit.¹⁰⁵ Brockway Borough argued that the Board erred in allowing the Department of Environmental Protection to issue the permit because the drilling would injure natural resources within their municipality in violation of Article I, § 27 of the Pennsylvania Constitution.¹⁰⁶ In evaluating this claim, the Commonwealth Court stated that it must weigh the following considerations outlined in *Payne*:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection

Commonwealth Court decision in *PEDF*, and it is the Pennsylvania Supreme Court decision in *PEDF* that ultimately rejects *Payne*. See Part II.C.

¹⁰⁰ *Id.* at 468.

¹⁰¹ *Id.* (internal quotation removed).

¹⁰² *Id.* (citing *PEDF II*, 108 A.3d at 158-59).

¹⁰³ 131 A.3d 578, 580 (Pa. Commw. Ct. 2016); 163 A.3d 1125, 1129 (Pa. Commw. Ct. 2017).

¹⁰⁴ *Brockway*, 131 A.3d at 578.

¹⁰⁵ *Id.* at 585.

¹⁰⁶ *Id.* at 582-83.

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?¹⁰⁷

Brockway Borough claimed that the permit violated the Oil and Gas Act and Clean Streams Law because it would "result in diminution of the water supply and discharges of industrial waste into the waters of the Commonwealth."¹⁰⁸ The court found that no violation of the Oil and Gas Act or the Clean Streams Law occurred; therefore, petitioners failed to meet their burden under the first prong of *Payne*.¹⁰⁹ The second prong of *Payne* also was not met because the Department included "nine special conditions in the ... permit to mitigate any potential harm"¹¹⁰ Lastly, Brockway Borough failed to claim that any environmental harm which stemmed from the well would "so clearly outweigh the benefits to be derived from the drilling that issuance of the ... permit constitutes an abuse of discretion."¹¹¹ The court in *Brockway* made no mention of the *Robinson II* decision in its analysis.

On June 12, 2017, *United Refining Company* was decided by the Pennsylvania Commonwealth Court.¹¹² The discussion on the ERA is brief because the court found that the petitioner failed to raise its constitutional claim before the Board and therefore the claim had been waived. Nonetheless, the court went on to state in a footnote that if it were to consider the argument, it would do so by applying the three-part test found in *Payne*, and it would conclude that all of the prongs "weigh in favor of

¹⁰⁷ *Id.* at 588-89 (citing *Payne*, 312 A.2d at 94).

¹⁰⁸ *Id.* at 589.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *United Ref. Co. v. Dep't of Env'tl. Prot.*, 163 A.3d 1125, 1129 (Pa. Commw. Ct. 2017).

constitutionality.”¹¹³ *United Refining* also made no mention of *Robinson II* in its brief footnote on this subject.

In *Funk v. Wolf*, petitioners brought a declaratory action in the Pennsylvania Commonwealth Court against the Pennsylvania Public Utility Commission (PUC), alleging that by not developing and implementing a comprehensive plan to regulate carbon dioxide and other greenhouse gases in light of the present and projected effects of global climate change, the PUC has not fulfilled its constitutional obligations under the ERA.¹¹⁴ The case was decided on July 26, 2016.¹¹⁵

Interpreting the language of the ERA, the court noted that “[w]hile expansive in its language, the ERA was not intended to be read in absolutist terms so as to prohibit development that enhances the economic opportunities and welfare of the people currently living in Pennsylvania.”¹¹⁶ Rather, the court continued, “the ERA places policymakers in the constant and difficult position of weighing conflicting environmental and social concerns and in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.”¹¹⁷ “To this end, we recently described the ERA as a thumb on the scale, giving greater weight to the environmental concerns in the decision-making process when environmental concerns of development are juxtaposed with economic benefits of development.”¹¹⁸

The *Funk* Court then applied the three-part balancing test outlined in *Payne*.¹¹⁹ The opinion mentions in a footnote that while *Robinson II* criticized the *Payne* test, its critique is not binding precedent.¹²⁰ In any event, the *Payne* test is “somewhat less satisfying when, as here, a person alleges that the government failed to affirmatively engage in an action required by its

¹¹³ *Id.* at 1137 n.12.

¹¹⁴ *Funk v. Wolf*, 144 A.3d 228, 232-33 (Pa. Commw. Ct. 2016).

¹¹⁵ *Id.* at 228.

¹¹⁶ *Id.* at 233 (citing *Payne*, 361 A.2d at 273); see also *Robinson II*, 83 A.3d at 958 (“the duties to conserve and maintain [public natural resources] are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry”).

¹¹⁷ *Id.* at 233 (quoting *Payne*, 312 A.2d at 94) (internal quotation removed).

¹¹⁸ *Id.* at 234 (internal quotation removed).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 234 n.2.

trusteeship duties under the ERA's second provision."¹²¹ Citing to a different part of *Payne*, the court wrote that "merely to assert that one has a common right to a protected value under the trusteeship of the State, and that value is about to be invaded, creates no automatic right to relief. The [ERA] speaks in no such absolute terms."¹²²

Petitioners were asking the court to require the PUC to develop and implement a plan to conserve and maintain the public natural resources through regulation of carbon dioxide and other greenhouse gases.¹²³ While admitting that the ERA imposed mandatory duties "in the general sense," the court wrote that the question before it was "whether the ERA provide[d] Petitioners with a clear right to the performance of specific acts" ¹²⁴ Discussing mandatory duties imposed upon the executive branch, the court held that according to precedent, the ERA "may impose an obligation upon the Commonwealth to consider the propriety of preserving land as open space, [but] it cannot legally operate to expand the powers of a statutory agency [The ERA] could operate only to limit such powers as had been expressly delegated by proper enabling legislation."¹²⁵ Because the ERA does not authorize the PUC to "disturb the legislative scheme,"¹²⁶ and because petitioners could point to no legislative enactments or regulatory provisions that require the PUC to do any of the actions sought in the writ, the mandamus and declaratory relief were denied.¹²⁷

Without explicitly stating so, the *Funk* Court also implied that the ERA was not self-executing, as it held that the ERA "could operate only to limit such powers as had been expressly delegated by proper enabling legislation."¹²⁸ The court made no reference to previous precedent on the issue.

¹²¹ *Id.* at 234-35.

¹²² *Id.* at 235 (quoting *Payne*, 361 A.2d at 272-73).

¹²³ *Id.* at 239.

¹²⁴ *Id.* at 248.

¹²⁵ *Id.* at 249 (quoting *Cnty. Coll. of Delaware Cty. v. Fox*, 342 A.2d 468, 482 (Pa. Commw. Ct. (1975)).

¹²⁶ *Id.* at 250.

¹²⁷ *Id.* at 250-51.

¹²⁸ *Id.* at 249.

B. Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911 (Pa. 2017)

Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF) is the most recent Pennsylvania Supreme Court case interpreting the ERA. After a decision from the Commonwealth Court in 2015, the Pennsylvania Supreme Court published an opinion on June 20, 2017.¹²⁹ *PEDF* is a critical decision for two reasons. First, it was the first majority opinion that rejected the *Payne* test for determining violations of the ERA: “[W]e reject the [*Payne*] test developed by the Commonwealth Court as the appropriate standard for deciding Article I, § 27 challenges.”¹³⁰ Second, it was the first majority opinion to hold that the public trust provisions of the ERA were self-executing: “[W]e re-affirm our prior pronouncements that the public trust provisions of § 27 are self-executing.”¹³¹

In *PEDF*, the Pennsylvania Environmental Defense Foundation sought a declaratory judgment, challenging the constitutionality of statutory enactments relating to funds generated from the leasing of state forest and park lands for oil and gas exploration and extraction. “Because state parks and forests, including the oil and gas therein, are part of the corpus of Pennsylvania’s environmental public trust,” the Pennsylvania Supreme Court held that “the Commonwealth, as trustee, must manage them according to the plain language of § 27, which imposes fiduciary duties consistent with Pennsylvania trust law.”¹³²

The court quoted Professor John Dernbach to summarize the lengthy facts in this case:

Three legislative amendments to the state fiscal code between 2008 and 2014 redirected a total of \$335 million that would have been used for

¹²⁹ *PEDF I*, 161 A.3d at 916; see also Matt Fair, *Pa. Court Limits Review Over State’s Use of Gas Lease Funds*, LAW360 (Jan. 12, 2018), <https://www.law360.com/energy/articles/1001574/pa-court-limits-review-over-state-s-use-of-gas-lease-funds>.

¹³⁰ *Id.* at 930.

¹³¹ *Id.* at 936-37 (The court did not hold that the first clause of Section 27—enforcement of the people’s rights against owners of private property—was self-executing because prior case law has not resolved the issue and the Commonwealth in this case did not take a position on the issue).

¹³² *Id.* at 916.

conservation purposes under the [Lease Fund Act] to the general fund, where it is appropriated for a variety of state government purposes. In addition, the Legislature prevented the Department of Conservation and Natural Resources (DCNR) from spending any [Lease Fund Act] royalties without prior legislative authorization. Finally, the Legislature began using [Lease Fund] revenue to support the overall budget of DCNR, rather than obtaining that budget money from the general fund and using [Lease Fund] money for conservation purposes related to oil and gas extraction.¹³³

The Commonwealth Court held that there was no violation of the ERA.¹³⁴ The Pennsylvania Supreme Court heard oral argument to examine the proper standards for judicial review of government actions and legislation challenged under the ERA in light of *Robinson II* and whether the General Assembly's transfers from the Lease Fund were, in fact, unconstitutional under the ERA.¹³⁵

Perhaps most importantly, the Pennsylvania Supreme Court settled two questions that remained open-ended as a result of the *Robinson II* plurality. First, *PEDF* rejected the *Payne* test as the appropriate standard for deciding Article I, § 27 challenges, declaring that the test is “unrelated to the text of § 27 and the trust principles animating it [and] strips the constitutional provision of its meaning.”¹³⁶ The court stated that it agreed with *Robinson II*'s analysis of the *Payne* test's drawbacks.¹³⁷ Instead, the court held, “when reviewing challenges to the constitutionality of

¹³³ *Id.* at 925 (quoting John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENVTL. L. 463, 488 (2015)) (internal quotation removed).

¹³⁴ *Id.* at 928.

¹³⁵ *Id.* at 929.

¹³⁶ *Id.* at 930.

¹³⁷ *Id.*; *Robinson II*, 83 A.3d at 967 (plurality opinion) (“First, the *Payne* 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. Second, the test assumes that the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action. And, finally, the Commonwealth Court's *Payne* decision 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 independent of legislative control... the non-textual Article I, Section 27 test established in *Payne* and its progeny is inappropriate to determine matters outside the narrowest category of cases”).

Commonwealth actions under § 27, the proper standard of judicial review lies in the text of Article I, § 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”¹³⁸ The court then examined the contours of the ERA in order to “identify the rights of the people and the obligations of the Commonwealth guaranteed thereunder.”¹³⁹ This discussion largely mirrored and affirmed the discussion found in the *Robinson II* plurality, which was cited numerous times throughout.¹⁴⁰

The Pennsylvania Supreme Court thus reversed the holding of the Commonwealth Court, finding that the phrase “for the benefit of all the people” in the ERA is unambiguous and clearly indicates that the assets of the trust are to be used for conservation and maintenance purposes. The legislative amendments to the state fiscal code that redirected money to the General Assembly for the general fund were held to be unconstitutional and a violation of the ERA.¹⁴¹

The second important question that *PEDF* resolved was that of self-execution. The court confirmed that prior case law had not resolved the issue of whether § 27 required implementing legislation to be effective, “at least in regard to an attempt to enforce the people’s rights against owners of private property.”¹⁴² Thus, as to the first clause of the ERA, the question of self-execution had not been resolved. The court, however, also recognized that the Pennsylvania Supreme Court decision in *Payne* concluded that the trust provisions in § 27 did not “require legislative action in order to be enforced against the Commonwealth in regard to public property.”¹⁴³ Therefore, the public trust provisions of § 27 *were* self-executing.¹⁴⁴

In his concurring and dissenting opinion, Justice Baer summarized the impact of the majority opinion in *PEDF*:

Through today’s decision, this Court takes several monumental steps in the development of the Environmental Rights Amendment, Article I, § 27 of

¹³⁸ *PEDF I*, 161 A.3d at 930.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 930-33.

¹⁴¹ *Id.* at 934-35.

¹⁴² *Id.* at 936 (citing *Robinson II*, 83 A.3d at 964-65).

¹⁴³ *Id.* at 937 (citing *Payne*, 361 A.3d at 272).

¹⁴⁴ *Id.*

the Pennsylvania Constitution. I agree with many of the Majority's holdings, including Part IV.A.'s dismantling of the Commonwealth Court's *Payne* test, which stood for nearly fifty years, the confirmation that the public trust provisions of the amendment are self-executing in Part IV.C., and the recognition in footnote 23 that all branches of the Commonwealth are trustees of Pennsylvania's natural resources. These holdings solidify the jurisprudential sea-change begun by Chief Justice Castille's plurality in *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 950–51 (2013) (plurality), which rejuvenated § 27 and dispelled the oft-held view that the provision was merely an aspirational statement.¹⁴⁵

C. Post-PEDF

One of the first lower court cases decided after *PEDF* was *Friends of Lackawanna v. Pennsylvania*,¹⁴⁶ published November 8, 2017. In *Friends of Lackawanna*, the Environmental Hearing Board heard a challenge to the renewal of a ten-year permit for a municipal solid waste landfill operated by Keystone Sanitary Landfill, Inc. (Keystone).¹⁴⁷ This renewal was approved by the DEP and challenged by Friends of Lackawanna (FOL), a neighborhood environmental group.¹⁴⁸ FOL alleged DEP had failed “to fulfill its responsibilities under Article I, § 27 of the Pennsylvania Constitution.”¹⁴⁹

The Environmental Hearing Board stated that “Article 1, § 27 applies to the Department’s decision to renew a municipal waste landfill permit” and “[t]he Department may not take such an action in derogation of its constitutional responsibilities.”¹⁵⁰ The Board then cited its recent description of the Department’s duties and responsibilities under the Pennsylvania Constitution in *Center for*

¹⁴⁵ *Id.* at 940.

¹⁴⁶ *Friends of Lackawanna v. Pennsylvania*, EHB Dkt. No. 2015-063-L, 2017 Pa. Environ. LEXIS 73 (Pa. Envtl. Hearing Bd. Nov. 8, 2017).

¹⁴⁷ *Id.* at *17.

¹⁴⁸ *Id.* at *1-2.

¹⁴⁹ *Id.* at *34.

¹⁵⁰ *Id.* at *20.

Coalfield Justice v. DEP, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017) (CCJ), where it applied the Pennsylvania Supreme Court's holding in *PEDF*.¹⁵¹ The Board wrote:

We held in CCJ that the proper approach in evaluating the Department's decision under the first part of Article I, § 27 is, first, for the Board to ensure that the Department considered the environmental effects of its actions. The Department cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable. We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable In CCJ, we expressly rejected the notion, advocated here by Keystone, that the Article I, § 27 Constitutional standard [is] coextensive with compliance with the statutes and the regulations governing clean water. The Supreme Court in *PEDF* clearly rejected such an approach when it rejected the *Payne* [*v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1978)] test.¹⁵²

While vague, the standard is “not unlike the judgment that must be brought to bear regarding other constitutional provisions.”¹⁵³

In *Friends of Lackawanna*, the Board held that “Article I, § 27 requires effective oversight by the Department over a solid waste disposal facility accepting up to 7,500 tons of waste per day in such close proximity to densely populated areas” because “[t]he

¹⁵¹ *Id.* at *34 (internal quotation removed).

¹⁵² *Id.* at *38-39.

¹⁵³ *Id.* at *39.

lack of effective oversight will almost certainly lead to an impingement of the neighbors' constitutionally assured rights."¹⁵⁴ The Board, however, was willing to renew the permit on the condition that DEP exercised the requisite oversight.¹⁵⁵ The Board concluded that "[s]hutting down this facility at this juncture [was] simply too extreme a resolution in the context of a permit renewal."¹⁵⁶

In November of 2017, the Pennsylvania Commonwealth Court decided *UGI Utilities, Inc. v. City of Reading*.¹⁵⁷ UGI Utilities, Inc. (UGI) challenged a city ordinance that imposed restrictions on the location of gas meters in historic districts,¹⁵⁸ arguing that the Public Utility Code preempted the ordinance.¹⁵⁹ In response, the city argued that "preemption [did] not apply because the location of meters in historic districts implicates its protection of historic resources under Article 1, § 27 of the Pennsylvania Constitution."¹⁶⁰

The court stated the issue was "not the importance or legitimacy of the City's purpose"; rather, it was "whether it [had] been preempted by the state," noting that "Article 1, § 27 [did] not immunize local regulation from preemption."¹⁶¹ The court found a single exception to preemption "where the state statute or regulation on which preemption is based so completely removes environmental protections that it violates the state's duties under that constitutional provision," citing to the plurality decision in *Robinson II*.¹⁶² The court further explained:

The reason that preemption fails in such a case is that the preempting state law itself is unconstitutional. That situation is not present here. The City does not claim that [the PUC Regulation] violates Article 1, § 27 or is unconstitutional in any respect. Nor is there any basis on which a court

¹⁵⁴ *Id.* at *61-62.

¹⁵⁵ *See id.* at *1.

¹⁵⁶ *Id.* at *61.

¹⁵⁷ *UGI Utilities, Inc. v. City of Reading*, No. 499 M.D. 2015, 2017 WL 5580066, at *1 (Pa. Commw. Ct. Nov. 21, 2017).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *5.

¹⁶¹ *Id.*

¹⁶² *Id.*

could conclude that the PUC's safety regulation of gas meters violates Article 1, § 27 of the Pennsylvania Constitution, as it in fact takes into account the interest in protection of historic resources by providing for consideration of indoor meter placement in historic districts.¹⁶³

Thus, the claims made in *Friends of Lackawanna* and *UGI Utilities* were both struck down under Article I, § 27.¹⁶⁴

D. Evaluation

PEDF's long-term effect on the lower courts' approach to ERA claims will remain to be seen. The most notable change post-*PEDF* has been the inability of the lower courts to fall back on the three-part *Payne* test. It was clear that *Robinson II* alone was not enough to make the lower courts forgo this easy-to-apply standard; what is less clear is the new standard that should replace *Payne* after *PEDF*. Neither *Robinson II* nor *PEDF* provided as clear of a test for courts to apply to an alleged ERA violation. Some scholars argue that the ERA violation analysis should no longer involve a balancing test of any kind.¹⁶⁵ In application, however, that may not prove to be realistic.

Based on the few pre-*PEDF* cases cited in this Article, courts often passed over the harder-to-apply *Robinson II* analysis.

¹⁶³ *Id.*

¹⁶⁴ See *In re Condemnation by Sunoco Pipeline*, No. 1780 C.D. 2016 (Pa. Commw. Ct. October 24, 2017). On May 18, 2016, Sunoco filed a declaration to condemn various easements to construct a portion of a pipeline project named Mariner East 2. Shortly thereafter, the Condemnee filed preliminary objections, which were overruled. Condemnee then filed a motion for reconsideration, where it added additional arguments. The first of these arguments was "that the PUC's existing procedures unconstitutionally exclude landowners potentially impacted by Mariner East 2; Sunoco or the PUC were required to notify landowners that the PUC process would be used to remove private property rights; direct mail contact would have afforded reasonable minimal landowner notice; and, the Township did not have notice." The Commonwealth Court considered these issues to be waived because the condemnee failed to raise them for the first time in its motion for reconsideration. The second argument concerned the trustee function for natural resources. "Condemnee further asserts that no entity is serving as trustee of the Commonwealth's natural resources for Mariner East 2." However, once again, because Condemnee did not include this issue in its Preliminary Objections, the court concluded it was waived.

¹⁶⁵ See Dernbach, *supra* note 7, at 504 ("[I]n the absence of concretely defined and constitutionally protect property, or other, rights weighed against environmental rights, there should be no balancing of constitutionally protected environmental rights.").

This was possible because it was a plurality decision. But with the majority ruling in *PEDF*, which endorses the *Robinson II* analysis on the contours of the ERA, this may be beginning to change.

Despite this change in analysis, it remains the case that claims under Article I, § 27 are by no means a sure success, as demonstrated in *Friends of Lackawanna* and *UGI Utilities*. Both with and without the *Payne* test, petitioners alleging a violation under the ERA often fail in the lower courts. Perhaps one explanation is that the petitioners' claims were simply weak in that they only asserted generalized environmental harms rather than specific facts. Thus, regardless of the fact that *Payne* has been replaced, if a petitioner cannot allege a specific claim, the complaint will be dismissed.

To illustrate, in *Brockway*, the petitioner argued against issuing a drilling permit because the municipality's "natural resources [would] be injured in violation of Article I, § 27 of the Pennsylvania Constitution" ¹⁶⁶ In *Funk*, the petitioner requested the court to mandate the PUC to implement a plan to reduce carbon monoxide and greenhouse gases. In *United Refining Company*, the court stated that the "[p]etitioner's overarching theme in this appeal is that the Department's approval of the permit ... is at odds with the *purposes* of ... the Oil and Gas Act ... which Petitioner characterizes as assuring safe oil and gas development." ¹⁶⁷ The court further explained: "[P]etitioner asserts that the permit violates the purposes of the Oil and Gas Act by threatening the health and safety of the environment ..., [but] does not assert that the issuance of the permit actually violates a substantive provision of the Oil and Gas Act." ¹⁶⁸ Moreover, in *Feudale*, the claim failed because "merely alleging that DCNR's proposed action will do harm to the [land] is insufficient to establish a claim under the [ERA]." ¹⁶⁹ What does this mean? In a footnote the court explained that, although *Feudale* did invoke a specific act (i.e., the History Code) in his complaint, "he allege[d] *no facts specific* to any cause of action under the History Code and

¹⁶⁶ *Brockway Borough Mun. Auth. v. Dep't of Env'tl. Prot.*, 131 A.3d 578, 580 (Pa. Commw. Ct. 2016).

¹⁶⁷ *United Ref. Co. v. Dep't of Env'tl. Prot.*, 163 A.3d 1125, 1129 (Pa. Commw. Ct. 2017).

¹⁶⁸ *Id.*

¹⁶⁹ *Feudale v. Aqua Pennsylvania, Inc.*, 122 A.3d 462 (Pa. Commw. Ct. 2015). (citing *PEDF II*, 108 A.3d at 158-59).

fail[ed] to allege *any facts* which would establish his right to relief under the History Code.”¹⁷⁰

As for the post-*PEDF* cases, both *Friends of Lackawanna* and *UGI Utilities* recognized the emphasis placed on environmental rights by the Pennsylvania Constitution, citing much of the language from *PEDF* and *Robinson II*. But the Board in *Friends of Lackawanna* still determined that the petitioners did not prove by a preponderance of the evidence that the DEP “fail[ed] to fulfill [its] responsibilities under Article I, § 27.”¹⁷¹ And in *UGI Utilities*, it was enough for the court that petitioners failed to claim the PUC Regulation violated Article 1, § 27 in the first place.¹⁷²

Thus, perhaps simply alleging a generalized claim of environmental harm is not sufficient; rather, petitioners must prove something more specific in order to be entitled to relief. If the past cases are any indication, a petitioner must allege more than a just a general grievance of environmental harm.

CONCLUSION

At this juncture, the most that can be said about the plurality opinion in *Robinson II* is that it may have triggered a new way of thinking about the ERA. That opinion alone, however, did not have the momentous impact that some predicted, as lower courts found the unbinding plurality opinion easy to ignore in favor of a more rigid, familiar test. Occasionally, plurality decisions will provide the basis for future majority opinions, which is exactly what happened in *PEDF*. Because the Pennsylvania Supreme Court decision in *PEDF* was decided just months ago, only time will tell how lower courts respond to the now-majority opinion. Furthermore, case law demonstrating the lower courts’ response will be slow to develop as such decisions will be few and far between. Cases that determine the constitutionality of a legislative or administrative action are a last resort for courts, as “[i]t is well-settled that when a case raises both constitutional and non-constitutional issues, a court should not reach the

¹⁷⁰ *Id.* at 468 n.9 (emphasis added).

¹⁷¹ *Friends of Lackawanna v. Pennsylvania*, EHB Dkt. No. 2015-063-L, 2017 Pa. Environ. LEXIS 73, at *34 (Pa. Env’tl. Hearing Bd. Nov. 8, 2017).

¹⁷² *UGI Utilities, Inc. v. City of Reading*, No. 499 M.D. 2015, 2017 WL 5580066, at *5 (Pa. Commw. Ct. Nov. 21, 2017).

constitutional issue if the case can properly be decided on non-constitutional grounds.”¹⁷³ Thus, it may be years before a clear pattern emerges, if at all.

What is clear at this point, however, is that there are *numerous* issues which *PEDF* did not decide. *PEDF* left open many questions for Pennsylvania courts, including whether the first clause of the ERA is self-executing, what remedies are available to private plaintiffs (assuming they have a right to sue other private actors), whether the ERA empowers any agency to take an action not authorized by statute, whether tribunals (or other agencies) can second guess standards for air and water quality if established by environmental statutes and regulations, when a law “unreasonably impairs” the right to clear air, pure water, and the preservation of certain environmental values, whether a permit that authorizes a person to use his property constitutes “state action,” whether local governments are included in the term “trustee,” and the scope of terms such as “clean air,” “pure water,” “natural, scenic, historic and esthetic values,” “environment,” and “public natural resources.”

Perhaps unsurprisingly, the revitalization of Article I, § 27 has raised more questions than it answered. Five years later, it is difficult to conclude what the meaning and scope of environmental rights for Pennsylvanians are, or what precisely is the Commonwealth’s duty as a public trustee. But the case law so far shows us that while the Pennsylvania Supreme Court may have discussed a commitment to environmental concerns, courts in general have been hesitant to grant unfounded claims.

¹⁷³ Ballou v. State Ethics Comm’n, 436 A.2d 186, 187 (Pa. 1981); see also Dernbach, *supra* note 7, at 485.