

# It Only Hurts When I Use It: The *Payne* Test and Pennsylvania's Environmental Rights Amendment

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## Summary

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Article I, §27 of the Pennsylvania Constitution creates public rights in natural resources, and tasks the Commonwealth government with conserving and maintaining them for the benefit of all. The section's expansive language was restricted by the 1973 *Payne* decision, which created a three-part test focusing on statutory compliance, efforts to reduce environmental effects, and a balancing of harms and benefits; under that test, most §27 claims have failed. In 2013, a plurality of the Pennsylvania Supreme Court in *Robinson Township v. Commonwealth of Pennsylvania* questioned *Payne*'s continued viability. This Article analyzes and develops the judicial and scholarly criticisms of the *Payne* test, and concludes that it cannot be salvaged. The author develops a new test based on the principles articulated by the *Robinson Township* plurality, arguing that it would allow Commonwealth agents and judges to ensure that §27 plays a vital role in protecting the environment.

In 1971, the citizens of Pennsylvania amended the Commonwealth's Constitution to create specific rights and responsibilities in public natural resources.<sup>1</sup> This amendment—sometimes referred to as the Environmental Rights Amendment—added §27 to the articulation of fundamental rights set forth in Article I of the Pennsylvania Constitution. Section 27 states:

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.<sup>2</sup>

Although grand in its scope and promise, §27 was soon significantly restricted by judicial interpretations that lost its original meaning, in a manner that “had the effect of demonstrably and significantly limiting” the public rights set forth in the section.<sup>3</sup> Just two years after §27's passage, the Commonwealth Court's decision in *Payne v. Kassab*<sup>4</sup> articulated a three-part test for disposing of claims made under §27 that focused on statutory compliance, efforts to reduce environmental effects, and a balancing of environmental harm against the benefits of the challenged action

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1. For the details of how the amendment came about, see John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27, of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181 (2015); Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123 (1990). Franklin Kury, the legislative author and champion of Article I, §27, spoke about the history during a lecture at the Widener University Commonwealth Law School. The talk can be seen at <https://widenerenvironment.wordpress.com/speakers-and-conferences/speakersseries/>.
2. PA. CONST. art. I, §27.
3. See John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 338 (2015). This article provides an analysis of Pennsylvania court and administrative agency decisions in support of its conclusion.
4. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 6 ELR 20796 (Pa. 1976).

or decision.<sup>5</sup> Despite criticism,<sup>6</sup> the *Payne* test became the “all-purpose test for applying Article I, Section 27 when there is a claim that the Amendment itself has been violated.”<sup>7</sup> The effect of the test’s application was the consistent, near-universal rejection of §27 claims. An analysis of the application of the *Payne* test published in 2015 reported that 23 of 24 reported lower court cases and 47 out of 55 reported administrative agency decisions found no §27 violations.<sup>8</sup>

In 2013, a three-justice plurality in the Pennsylvania Supreme Court’s landmark decision of *Robinson Township v. Commonwealth of Pennsylvania*<sup>9</sup> rejected the previous judicial interpretations<sup>10</sup> and provided a new interpretation of Article I, §27, based on the text and purpose of the section itself.<sup>11</sup> In particular, the *Robinson Township* plurality criticized the *Payne* test, finding that the test “poses difficulties both obvious and critical,”<sup>12</sup> and is “inappropriate to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests.”<sup>13</sup> Despite this criticism, the Commonwealth Court has continued to apply the *Payne* test post-*Robinson Township* on the grounds that the discussion in *Robinson Township* was not a majority decision,<sup>14</sup> and

therefore *Payne* continues to be viewed as binding precedent by the Commonwealth Court.<sup>15</sup>

In light of the new understanding of §27 arising out of the *Robinson Township* plurality’s analysis, the time has come to reexamine the continued vitality and appropriateness of the *Payne* test for consideration of §27 claims. Critical examination of the test shows fundamental problems overall and within each of its three parts. The test fails to recognize the two unique sets of §27 rights, is vague, and is in many ways inconsistent with the text of §27 itself and the *Robinson Township* plurality’s explication of §27’s meaning. A careful analysis of these critiques shows that the *Payne* test is not salvageable, and instead should be replaced by a new test that better meets the new understanding of what §27 means and requires.

This Article is in three parts. In Part I, it discusses *Payne v. Kassab* and the three-part test as well as its subsequent application and ascension to be the “all-purpose test” for §27 claims. In Part II, the Article analyzes and develops the criticisms of the *Payne* test. Starting with the scholarly and *Robinson Township* criticisms, it identifies the fundamental problems with the test. It concludes that the *Payne* test cannot be salvaged or reformulated. In Part III, the Article develops a new test based on the principles articulated by the *Robinson Township* plurality. The Article concludes by calling for the *Payne* test’s replacement so that Commonwealth agents and courts can ensure that §27 plays a vital role in helping to protect Pennsylvania’s environment and public natural resources.

## I. The Symptoms: Development and Evolution of the *Payne* Test

In order to analyze the continued appropriateness of the *Payne* test in a post-*Robinson Township* world, it is first necessary to understand the general contours of §27, the articulation of the test itself, and how it has evolved over the more than 40 years since its enunciation. Developing that understanding begins with §27 and then moves to the case itself and its progeny.

### A. General Principles and Contours of §27<sup>16</sup>

The text of Article I, §27, identifies two distinct yet related sets of fundamental rights and corresponding duties. The

5. *Payne*, 312 A.2d at 94.

6. See 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) (“The test is so weak that litigants using it to challenge environmentally damaging projects are almost always unsuccessful.”).

7. John C. Dernbach, *Natural Resources and the Public Estate*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES §29.3[a] (Ken Gormley et al. eds., 2004). See also *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 966, 43 ELR 20796 (Pa. 2013) (“The *Payne* test appears to have become, for the Commonwealth Court, the benchmark for Section 27 decisions in lieu of the constitutional text.”).

8. Dernbach & Prokopchak, *supra* note 3, at 344, 348.

9. 83 A.3d 901, 43 ELR 20796 (Pa. 2013). For a thorough explication of the case’s history and its holdings concerning the legislation at issue, see John C. Dernbach et al., *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS L. REV. 1169 (2015).

10. As to previous judicial interpretations, the *Robinson Township* plurality had this to say:

The actions brought under Section 27 since its ratification . . . have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision. Moreover, it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways. As a jurisprudential matter (and . . . as a matter of substantive law), these precedents do not preclude recognition and enforcement of the plain and original understanding of the Environmental Rights Amendment. 83 A.3d at 950.

11. See Dernbach & Prokopchak, *supra* note 3, at 352.

12. *Robinson Twp.*, 83 A.3d at 967.

13. *Id.*

14. See *Pennsylvania Envtl. Def. Found. v. Commonwealth*, 108 A.3d 140, 159, 45 ELR 20006 (Pa. Commw. Ct. 2015).

15. See, e.g., *Brockway Borough Mun. Auth. v. Department of Envtl. Prot.* 131 A.3d 578, 588, 46 ELR 20015 (Pa. Commw. Ct. 2016).

16. The purpose here is only to describe in general terms the §27 context in which the *Payne* test operates, and thus this section of the Article is brief. For a more detailed analysis of what §27 requires and the implications therefrom, see Kenneth T. Kristl, *The Devil Is in the Details: Articulating Practical Principles for Implementing the Duties in Pennsylvania’s Environmental Rights Amendment*, 28 GEO. ENVTL. L. REV. \_\_\_\_ (forthcoming 2016), available at <http://ssrn.com/abstract=2752494>.

first sentence expressly provides that “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment”<sup>17</sup>—what have been termed First Sentence Rights.<sup>18</sup> The second set of rights arise out of the public trust created by the second and third sentences of §27, and are termed Public Trust Rights.<sup>19</sup> Because §27 is in Article I, the Declaration of Rights section of the Pennsylvania Constitution, it is “excepted out of the general powers of government and shall forever remain inviolate”<sup>20</sup> so that it operates as a limit on governmental authority.<sup>21</sup>

The First Sentence Rights to “clean air,” “pure water,” and “the preservation of the natural, scenic, historic and esthetic values of the environment” create a corresponding duty on the part of the Commonwealth and its agents to “refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.”<sup>22</sup> The Public Trust Rights create the public trustee duties that include: (1) the express textual requirement to “conserve and maintain” the public natural resources for the benefit of all the people; (2) the implied duties “to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state’s failure to restrain the actions of private parties,”<sup>23</sup> as well as the duty to “act affirmatively to protect the environment via legislative action”<sup>24</sup>; and (3) the duties from trust law as a fiduciary to the trust beneficiaries.<sup>25</sup> Because the Commonwealth acts only through its agents, these duties apply to agencies and officials at all levels of government in the Commonwealth.<sup>26</sup>

While the *Payne* court did not have the benefit of the *Robinson Township* plurality’s explication of the duties implicit in the text and purpose of §27, it did at least have the benefit of the text of the amendment itself. That text expressly recognizes the First Sentence Rights and expressly imposes the “conserve and maintain” duty on the Commonwealth as public trustee of the public natural resources.

## B. Payne

*Payne* arose out of a street-widening project in Wilkes-Barre, Pennsylvania.<sup>27</sup> The project as proposed by the Pennsylvania Department of Transportation (PennDOT) would require the taking of approximately one-half acre from a 22-acre park known as the River Commons, including the removal of some large trees and a pedestrian sidewalk.<sup>28</sup> The plaintiffs were citizens and college students who argued that, because the River Commons was a historical area,<sup>29</sup> their right to preservation of historic values of the environment in the first sentence of Article I, §27, meant that the highway project should be enjoined.<sup>30</sup>

In considering the plaintiffs’ claim, the Commonwealth Court rejected the assertion that §27 must be read in absolute terms. Citing the court’s ruling in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*<sup>31</sup>—the first case to interpret §27—the *Payne* court found that

Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development.<sup>32</sup>

By recognizing §27 rights as nonabsolute, the *Payne* Court immediately identified a consequence of this conclusion—the need for some way to assess when development is controlled in the proper way:

We must recognize, as a corollary of such a conclusion, that decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns 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. Judicial review of the endless decisions that will result from

17. PA. CONST. art. I, §27.

18. See Kristl, *supra* note 16, at 4.

19. *Id.*

20. PA. CONST. art. I, §25 (“To guard against the transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”).

21. John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENVTL. L. 463, 471 (2015).

22. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951-52, 43 ELR 20796 (Pa. 2013).

23. *Id.* at 957.

24. *Id.* at 958.

25. *Id.* at 957. The *Robinson Twp.* plurality stated in a footnote that “the Environmental Rights Amendment creates an express trust that is presumptively subject to the Uniform Trust Act, see [20] Pa. C.S.A. §§7702, 7731 . . .” 83 A.3d at 959, n.45.

26. *Id.* at 952 (Declaration of Rights (Article I) provisions “circumscribe[ ] the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law” (emphasis added) (quoting *Hartford Accident & Indem. Co. v. Insurance Comm’r of Commonwealth*, 482 A.2d 542 (Pa. 1984)).

27. *Payne v. Kassab*, 312 A.2d 86, 88 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263, 6 ELR 20796 (Pa. 1976).

28. *Id.*

29. The River Commons had been identified on an original town plot in 1770 and used for public events and the erection of historical monuments over the intervening two centuries. *Id.* In 1807 and 1846, the Pennsylvania Legislature enacted laws dedicating parts of the River Commons to be a public common “to remain as such forever” under the control of the town council. *Id.* at 90. The *Payne* Court viewed it as a public natural resource within the purview of Article I, §27. *Id.* at 93.

30. *Id.* at 94.

31. 302 A.2d 886, 3 ELR 20347 (Pa. Commw. Ct. 1973). The *Payne* Court focused on the following language from the *Gettysburg Tower* case:

It is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment. If the standard of injury to historic values is to that expressed by the Commonwealth’s witnesses as an “intrusion” or “distraction,” it becomes difficult to imagine any activity in the vicinity of Gettysburg which would not unconstitutionally harm its historic values.

312 A.2d at 94 (quoting *Gettysburg Tower*, 302 A.2d at 895).

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

such a balancing of environmental and social concerns must be realistic and not merely legalistic.<sup>33</sup>

The “realistic” method for judicial review that the *Payne* Court articulated was a three-part test:

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 therefore that to proceed further would be an abuse of discretion?<sup>34</sup>

This is what is now universally called the *Payne* test.

Having articulated its test, the *Payne* court applied it to the case and found dismissal of the plaintiffs’ claims warranted. The court found the first step satisfied because there was complete compliance with the applicable statute, known as Act 120, which prohibits building transportation facilities on public parks or historical sites unless there is no feasible and prudent alternative, and requires consultation with agencies having environmental expertise in the planning and construction of the transportation facility.<sup>35</sup> The second part of the test was satisfied because the plans included replacement of trees, relandscaping, reuse of existing materials where possible, preservation and relocation of historic markers, and protection of the Commons during construction.<sup>36</sup> The third part of the test was satisfied because the public benefit of an improvement in traffic movement clearly outweighed the environmental harms of taking about 3% of the land of the Commons.<sup>37</sup>

The Pennsylvania Supreme Court affirmed the Commonwealth Court’s conclusion as to the result,<sup>38</sup> but did so for different reasons. Finding that, while there was “no impediment to asserting the constitutional claim,” the assertion of the claim creates “no automatic right to relief,”<sup>39</sup> the Pennsylvania Supreme Court viewed the issue in this way:

The Commonwealth as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people. . . . It is manifest that a balancing must take place, and by Act 120 . . . the Leg-

islature has made careful provision for just that. . . . Having determined that Act 120 was complied with, we have no hesitation in deciding that appellee Commonwealth of Pennsylvania has not failed in its duties as trustee under the constitutional article.<sup>40</sup>

In so ruling, the Supreme Court did not adopt the three-part test formulated by the Commonwealth Court. Instead, in a footnote, the court noted the test but stated that it “required nothing more in this case than does normal appellate review of PennDOT’s actions under Act 120.”<sup>41</sup> Thus, while it did not adopt the three-part *Payne* test, the Pennsylvania Supreme Court did not reject it either.

### C. Chronic and Crippling *Payne*

Articulated by the Commonwealth Court and not rejected by the Supreme Court, the *Payne* test soon became the “all-purpose test for applying Article I, Section 27 when there is a claim that the Amendment itself has been violated.”<sup>42</sup> Its effect on §27 claims was almost universally fatal; as noted previously, an analysis of the application of the *Payne* test published in 2015 found that, in 23 of 24 reported lower court cases and 47 out of 55 reported administrative agency decisions, claims of §27 violations were rejected.<sup>43</sup> While it is certainly possible that at least some of the claims were in fact without merit or were the result of claimants trying to take §27 too far, it is at least as likely (if not more likely) that this toxicity arises from the *Payne* test itself.<sup>44</sup>

Some of the cases applying *Payne* illustrate this effect. *Concerned Citizens for Orderly Progress v. Department of Environmental Resources*<sup>45</sup> involved a challenge to the Department of Environmental Resources’ (DER’s) issuance of a water quality permit that would allow for the construction of a sewage system and treatment plant.<sup>46</sup> The permit would allow for discharge into a local tributary of Allegheny Creek or, when the tributary was running low, into a local bog area via an overland flow feature.<sup>47</sup> The challengers argued that the permit violated the Pennsylvania Clean Streams Law<sup>48</sup> and Article I, §27.

The court, after rejecting the statutory claims at least in part because the claimed impacts were “framed in terms of possible future effects” while the permittee presented evidence of the economic impact of the treatment plant,<sup>49</sup>

33. 312 A.2d at 94.

34. *Id.*

35. *Id.*

36. *Id.* at 95. The court deemed these planned efforts to be “reasonable under the circumstances of this case.” *Id.*

37. *Id.* at 96. It appears that the court also viewed the fact that “this land taking will be an extension or widening of the existing roadway and not a new intrusion at a location critical to the enjoyment and use of the Common” as further evidence of the relatively minor environmental harm being caused by the project. *Id.*

38. *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976).

39. *Id.* at 273.

40. *Id.*

41. *Id.* at 273, n.22. See Dernbach & Prokopchak, *supra* note 3, at 343 (discussing *Payne* affirmation: “The Supreme Court did not understand the three-part test to be an all-purpose substitute for the text of the Amendment.”).

42. Dernbach, *supra* note 7. See Robinson Twp. v. Commonwealth, 83 A.3d 901, 966, 43 ELR 20276 (Pa. 2013) (“the *Payne* test appears to have become, for the Commonwealth Court, the benchmark for Section 27 decisions in lieu of the constitutional text”).

43. Dernbach & Prokopchak, *supra* note 3, at 344, 348.

44. See Dernbach, *supra* note 6, at 696 (“The test is so weak that litigants using it to challenge environmentally damaging projects are almost always unsuccessful.”).

45. 387 A.2d 989 (Pa. Commw. Ct. 1978).

46. *Id.* at 991.

47. *Id.*

48. Pa. Clean Streams Law, 35 PA. STAT. §§691.1 et seq.

49. *Concerned Citizens*, 387 A.2d at 993.

turned to the §27 claim by applying the *Payne* test. The court found no statutory violations (thereby satisfying step 1),<sup>50</sup> found that environmental harm would be minimized because the permittee would be sampling its treated discharge (thereby satisfying step 2),<sup>51</sup> and found based on its own analysis<sup>52</sup> that the “the environmental impact of the sewage plant and the resulting effluent will be negligible, while the social and economic benefits appear to be significant,” so as to satisfy step 3.<sup>53</sup>

*Pennsylvania Environmental Management Services v. Commonwealth, Department of Environmental Resources*<sup>54</sup> involved an appeal of a DER denial of an application for a permit to operate a municipal waste landfill. The DER based its denial on failure to comply with the 1980 Solid Waste Management Act<sup>55</sup> and Article I, §27, because of, inter alia, the application’s failure to address the risk of harm from, and to prevent, leachate spill or discharge into the adjoining White Clay Creek, a high water quality trout stream used for biological research.<sup>56</sup> In upholding the denial, the Environmental Hearing Board (EHB) considered the proposed landfill’s impact on a neighboring inn, nearby residences, and an interstate highway due to its visibility and on nearby fruit orchards and the major local mushroom industry.<sup>57</sup> The EHB found that, while there was an “urgent need” for landfills in the region covering the proposed site, there was *no benefit* from siting a landfill at the proposed location because that particular *site* was *not* critical to the needs of the region, and hence the environmental harms outweighed the (non-)benefit for step 3 purposes.

The applicant appealed, claiming this was an error of law in applying *Payne* test step 3, and the Commonwealth Court reversed on that ground alone.<sup>58</sup> In reversing, the court stated:

This site-specific interpretation of the benefits to be considered is untenable because (1) there *is a benefit* in that the region would receive an urgently needed landfill and (2) the alleged unsuitability of the site is a factor to be considered in determining the harm to the environment, not the benefit from the landfill. We hold that DER must *balance* the regionwide benefits which would result from operation of the urgently needed landfill against the environmental harm it threatens.<sup>59</sup>

50. *Id.* at 994.

51. *Id.* at 994-95.

52. The court noted that, “The [Environmental Hearing] Board, in its adjudication, and the DER, in its brief, admit that the required balancing of social and economic benefits against environmental harm was not conducted in the instant case” apparently because the Board mistakenly believed it was not required to do so. *Id.* at 993-94. In lieu of remanding, the court did its own step 3 analysis. This willingness of the Commonwealth Court to step in and do a missing *Payne* test application shows up in other cases as well. See also *Blue Mountain Preservation Ass’n v. Township of Eldred*, 867 A.2d 692, 703 (Pa. Commw. Ct. 2005).

53. *Id.* at 994.

54. 503 A.2d 477 (Pa. Commw. Ct. 1986).

55. Pa. Solid Waste Mgmt. Act, 35 PA. STAT. §§6018.101 et seq.

56. *Pennsylvania Envtl. Mgmt. Servs.*, 503 A.2d at 479.

57. *Id.*

58. *Id.* at 480.

59. *Id.*

A critique of this case described it as “an excellent example of how far removed the *Payne* test is from the constitutional text”<sup>60</sup> because

[a] constitutional amendment intended to provide citizens with environmental rights was, in this case, used to overturn a decision protecting those rights. The benefits of the landfill, which are outside the scope of the Amendment and have no stated constitutional stature under any other provision of the Pennsylvania Constitution, provided the justification for doing so.<sup>61</sup>

Thus, 40 years of jurisprudence established the *Payne* test as the “go-to” measure for §27 claims. The effect was that §27 claims almost always failed, and §27 claims did not prove to provide much in the way of environmental protection to those who felt their First Sentence or Public Trust Rights had been violated.

## II. Critical Diagnosis: Why the *Payne* Test Is Not a Good Way to Measure §27 Compliance

Given the ubiquity of the *Payne* test’s use in the Commonwealth Court and at the EHB, it is difficult at first glance to think that the test might have problems. After all, could the Commonwealth Court really be wrong 96% (23 out of 24 cases), and the EHB wrong 87% (47 out of 54 cases) of the time? Except for the lonely arguments of scholar John Dernbach,<sup>62</sup> and one prescient comment in a concurrence opinion,<sup>63</sup> no one seriously criticized the *Payne* test for nearly 40 years. All of that changed, however, with the plurality opinion in *Robinson Township*.

### A. The Robinson Township Plurality’s Criticism

*Robinson Township* involved a challenge by numerous diverse petitioners to Act 13, which significantly changed Pennsylvania’s Oil and Gas Act<sup>64</sup> in response to the Marcellus Shale gas boom. In their 12-count petition for review, the petitioners raised a number of claims based on alleged

60. Dernbach & Prokopchak, *supra* note 3, at 347.

61. *Id.*

62. See Dernbach, *supra* note 6.

63. In *Commonwealth, DER v. Commonwealth, Pub. Util. Comm’n (PUC)*, 335 A.2d 860 (Pa. Commw. Ct. 1975), the late Judge Harry A. Kramer expressed this concern about the *Payne* test:

The problem with a balancing test in this area of the law is that no one can translate environmental harm into a dollar and cents figure. In the absence of any prescribed standard to weigh or value environmental harm, it is really impossible to have a meaningful balancing test. I do not believe our balancing test is really anything more than a “shock the conscience of the court test.” In the absence of more precise standards or guidelines, we can really do no more than proceed on a case-by-case basis, and decide each case on the basis of whether or not the proposed development offends our personal ideas concerning environmental values. Instead of applying any set law or standards to these cases, we will merely be applying our own personal standards (or biases) concerning environmental values.

*Id.* at 867 (Kramer, J., concurring).

64. Pa. Oil and Gas Act, 58 PA. CONS. STAT. ANN. §§2301 et seq.

violations of the Pennsylvania and U.S. Constitutions, including §27 and due process grounds.<sup>65</sup> The Commonwealth filed preliminary objections, and after oral arguments to the Commonwealth Court en banc, in July 2012 the Commonwealth Court issued an opinion<sup>66</sup> upholding the preliminary objections as to eight of the 12 counts<sup>67</sup>—including the count raising the §27 claim—and overruled the objections on four of the counts on the grounds of violations of substantive due process.<sup>68</sup> The Commonwealth Court granted the petitioners' request for summary relief on those four counts, in effect declaring that certain sections of Act 13 were unconstitutional because they violated principles of substantive due process.

The Commonwealth Court's analysis of the §27 claim did not explicitly rely on the *Payne* test. Instead, it appears to have been driven by the parties' arguments. The petitioners contended that Act 13 violated §27 "because it takes away their ability to strike a balance between oil and gas development and 'the preservation of natural, scenic, historic and esthetic values of the environment by requiring a municipality to allow industrial uses in non-industrial areas with little ability to protect surrounding resources and community.'"<sup>69</sup> The Commonwealth contended that (1) §27 did not apply because §27 applied only to the Commonwealth, not to municipalities; and (2) even if it did apply, Act 13's provisions preempting local regulation of oil and gas operations relieved municipalities of their §27 obligations.<sup>70</sup> While the Commonwealth Court rejected the first of the Commonwealth's arguments because of precedent holding that local agencies are subject to §27 statutory obligations,<sup>71</sup> the court accepted the second argument because the municipalities' statutory obligations under the Municipal Planning Code governing zoning had been preempted by Act 13.

The court put it this way:

Act 13 . . . preempts a municipalities' obligation to plan for environmental concerns for oil and gas operations. . . . By doing so, municipalities were no longer obligated, indeed were precluded, from taking into consideration environ-

mental concerns in the administration of their zoning ordinances. Because they were relieved of their responsibilities to strike a balance between oil and gas development and environmental concerns under the MPC, Petitioners have not made out a cause of action under Article 1, §27.<sup>72</sup>

Thus, the Commonwealth Court held that §27's constitutional obligations could be controlled and indeed eliminated by statutory enactment. Although it did not cite to or use the *Payne* test, the Commonwealth Court's analysis is the equivalent of saying that statutory compliance (*Payne* test step 1)—even a statute that in effect prohibited attempts to comply with §27—was sufficient to defeat a claim that §27 had been violated.

The Pennsylvania Supreme Court affirmed in part and reversed in part the Commonwealth Court's decision.<sup>73</sup> On the key issues relating to the constitutionality of certain provisions of Act 13, four of the six justices hearing the case found that four provisions of the Act were unconstitutional, but differed in their reasoning. A plurality of three justices (Justices Ronald Castille, Debra Todd, and Seamus McCaffery) found the four provisions unconstitutional for the sole reason that those provisions violated §27,<sup>74</sup> while the fourth (Justice Max Baer) found the provisions unconstitutional on the sole grounds of substantive due process.<sup>75</sup>

In the course of its extensive discussion of §27, the *Robinson Township* plurality needed to confront directly the §27 case law that had developed over the previous 40 years, including *Payne*. It started its analysis by noting that:

[t]he question of how Article I, Section 27 obligations restrain the exercise of police power by the government (e.g., to regulate an industry), although a significant matter, has not presented itself for judicial resolution and this Court has had no opportunity to address the original understanding of the constitutional provision in this context until now.<sup>76</sup>

The plurality characterized prior challenges as falling into two categories,<sup>77</sup> and then provided this overview:

In light of the challenges, precedent has tended to define the broad constitutional rights in terms of compliance with various statutes and, as a result, to minimize the constitu-

65. The claims included violations of Article I, §1 (relating to inherent rights of mankind); Article I, §10 (relating in relevant part to eminent domain); Article I, §27; Article III, §3 (relating to single subject bills); and Article III, §32 (relating in relevant part to special laws). Moreover, the citizens argued that Act 13 was unconstitutionally vague, and violated the separation-of-powers doctrine and the Due Process Clause of the U.S. Constitution. See *Robinson Twp.*, 83 A.3d at 915-16.

66. *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 42 ELR 20158 (Pa. Commw. Ct. 2012).

67. *Id.* at 485-90, 494.

68. *Id.* at 485.

69. *Id.* at 488.

70. *Id.*

71. The Court pointed to a prior decision, *Community Coll. of Del. Cnty. v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975), which found that municipalities are subject to §27 because they "have the responsibility to apply the §27 mandate as they fulfill their respective roles in the planning and regulation of land use, and they, of course, are not only agents of the Commonwealth, too, but trustees of the public natural resources as well . . ." 342 A.2d at 482. The Commonwealth Court in *Robinson Township* interpreted this precedent as follows: "*College of Delaware* held that local agencies were subject to suit under Article I, §27 because of statutory obligations that they were required to consider or enforce." 52 A.3d at 489.

72. *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 489 (Pa. Commw. Ct. 2012).

73. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 999-1000, 43 ELR 20276 (Pa. 2013) (conclusion and mandate summarizing the ruling).

74. *Id.* at 1000 ("Sections 3215(b)(4), 3215(d), 3303, and 3304 violate the Environmental Rights Amendment. We do not reach the other constitutional issues raised by the parties with respect to these provisions.").

75. *Id.* at 1001 (Baer, J. concurring) ("Thus, and despite the pioneering opinion by the Chief Justice, I view the substantive due process contentions made by Challengers to be better developed and a narrower avenue to resolve this appeal.").

76. *Id.* at 964.

77. *Robinson Twp.*, 83 A.3d at 964 The plurality characterized those categories as follows: "(1) challenges to specific private or governmental development projects, which implicated alleged violations of constitutional environmental rights and (2) challenges to local or statewide environmental quality laws, which implicated alleged violations of constitutional property rights." The court later put the *Gettysburg Tower* and *Payne* cases into the first of these categories. *Id.* at 964-65.

tional import of the Environmental Rights Amendment. Moreover, existing precedent has failed to differentiate between challenges based on whether they implicated the people's rights under the first or second clauses of Section 27, or the Commonwealth's trustee duties under the second and third clauses, or both. Courts seemingly applied the same analytical scheme to both types of challenges, which introduced additional confusion for the bench and bar and, as a practical matter, has impeded efforts to develop a coherent environmental rights jurisprudence.<sup>78</sup>

The plurality admitted that the Pennsylvania Supreme Court's ruling in the *Gettysburg Tower* and *Payne* cases provided little substantive guidance regarding the standards applicable to deciding Article I, §27, challenges.<sup>79</sup> That may be why the plurality felt the need to articulate in such great detail what §27 meant and required.

On the *Payne* test itself, the plurality—after explaining the Commonwealth Court's articulation of the test and the Pennsylvania Supreme Court's affirmance<sup>80</sup>—began its analysis by stating:

In subsequent cases implicating Section 27 challenges, the Commonwealth Court has generally applied its *Payne* test to a wide array of factual circumstances. . . . Notably, although the test was developed in the context of a challenge pursuant to the second and third clauses of Section 27 (implicating trustee duties), the Commonwealth Court has applied it irrespective of the type of environmental rights claim raised.<sup>81</sup>

Thus, in its very description of the *Payne* test's progeny, the *Robinson Township* plurality lodged its first criticism: that the test does not differentiate between claims based on First Sentence Rights and those based on Public Trust Rights.

The plurality's analysis of the *Payne* test then focused on what it viewed as a more fundamental problem:

More importantly, the *Payne* test appears to have become, for the Commonwealth Court, the benchmark for Section 27 decisions in lieu of the constitutional text. In its subsequent applications, the Commonwealth Court has indicated that the viability of constitutional claims premised upon the Environmental Rights Amendment was limited by whether the General Assembly had acted and by the General Assembly's policy choices, rather than by the plain language of the amendment.<sup>82</sup>

In other words, by ignoring the constitutional test, the *Payne* test reduces §27 to a question of statutory compli-

ance.<sup>83</sup> This creates two problems. First, it narrows the meaning and application of §27. Second, it focuses on the wrong thing: statutory compliance instead of what the text of §27 actually implicates and requires. Building on this criticism, the plurality summarized its problem with the *Payne* test in this way:

While the *Payne* test may have answered a call for guidance on substantive standards in this area of law and may be relatively easy to apply, the test poses difficulties both obvious and critical. 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 branches of government have independent constitutional duties pursuant to the Environmental Rights Amendment, as these duties are interpreted by the judicial branch and this Court in particular.<sup>84</sup>

As a result, the plurality concluded that the *Payne* test is “inappropriate to determine matters outside the narrowest category of cases, i.e., those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests.”<sup>85</sup> Thus, while not throwing out the test completely, the plurality concluded that the *Payne* test is “inappropriate” for the vast majority of §27 claims.

Despite this criticism, the Commonwealth Court has not abandoned the *Payne* test. In the first case to consider a §27 claim after *Robinson Township*,<sup>86</sup> the Commonwealth Court acknowledged the plurality's criticism,<sup>87</sup> but nevertheless held that “[i]n the absence of a majority opinion from the Supreme Court or a decision from this Court overruling *Payne I*, that opinion is still binding precedent on this Court.”<sup>88</sup> Subsequent Commonwealth Court opinions continue to view and apply the *Payne* test as binding precedent to the apparent exclusion of the concerns raised

78. *Id.* at 964.

79. *Id.* at 965.

80. *Id.* at 966. In explaining the Pennsylvania Supreme Court's actions in *Payne*, the plurality noted that “our Court affirmed without elaborating further on the applicable substantive standards for obtaining Section 27 relief.” The plurality did make clear that, “The Court did not adopt that test but noted that the standard was equivalent to appellate review of the agency's River Street project decision under Act 120.” *Id.* at 965.

81. *Id.* at 966.

82. *Id.*

83. This conclusion is supported by the fact that several Commonwealth Court decisions applying the *Payne* test appear to rely primarily if not exclusively on a finding of statutory compliance under the first prong of the test. *See, e.g., Szarko v. DER*, 668 A.2d 1232 (Pa. Commw. Ct. 1995); *O'Connor v. Pennsylvania PUC*, 582 A.2d 427 (Pa. Commw. Ct. 1990); *Snelling v. Department of Transp.*, 366 A.2d 1298 (Pa. Commw. Ct. 1976); *Community Coll. of Del. Cnty. v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975). Indeed, in *Snelling*, the court went so far as to say that “Article I, Section 27 does not require consideration of factors beyond those which, by statute, must be considered in evaluating projects which are potentially harmful to the environment.” 366 A.2d at 1305.

84. *Robinson Twp.*, 83 A.3d at 966-67.

85. *Id.* at 967.

86. *Pennsylvania. Envtl. Def. Found. v. Commonwealth*, 108 A.3d 140, 159 (Pa. Commw. Ct. 2015).

87. *Id.* at 159.

88. *Id.*

by the *Robinson Township* plurality.<sup>89</sup> As a result, the *Payne* test is still alive and well. The question is: Should it be?

## B. Fundamental Problems With the *Payne* Test

While the *Robinson Township* plurality's criticism of the *Payne* test is harsh, it is also incomplete. Based on the new understanding of §27 set forth in the plurality's opinion, as well as careful consideration of the provisions and legal issues raised by the test, there are numerous fundamental problems with the *Payne* test. These problems are worth exploring in detail.

### I. One Size Does Not Fit All (*Robinson Township* Plurality Criticism #1)

The first problem with the test is the first criticism raised by the *Robinson Township* plurality: The test makes no distinction between claims based on First Sentence Rights and Public Trust Rights. Yet that distinction is in fact important because these rights and the corresponding obligations are distinct and need to be treated differently.

First Sentence Rights are distinct from Public Trust Rights in both their textual source (different sentences of §27) and in their coverage (Public Trust Rights are limited to "public natural resources" while First Sentence Rights can apply to private as well as public issues).<sup>90</sup> The government's obligation concerning First Sentence Rights is to "refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action,"<sup>91</sup> while the public trustee's obligations include the express textual requirement to "conserve and maintain" the public natural resources for the benefit of all the people, as well as implied duties "to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources,"<sup>92</sup> to "act affirmatively to protect the environment via legislative action,"<sup>93</sup> and to act as a fiduciary to the trust beneficiaries.<sup>94</sup> The *Payne* test's failure to recognize the differences in rights and obligations and to take these differences into account risks applying the wrong standard (or, worse, no appropriate standard at all) to a claim.

## 2. Problems With the Focus on Statutory Compliance in *Payne* Test Step 1

Step 1 of the *Payne* test looks to see if there is compliance with statutes and regulations; as the *Robinson Township* plurality noted, the *Payne* test collapses §27 into a question of statutory compliance. This step itself has fundamental problems.

### a. Focus on Statutory Compliance Can Be Inconsistent With the Self-Executing Nature of §27

As far back as the Commonwealth Court's decision in *Gettysburg Tower*<sup>95</sup> (and reaffirmed in that court's ruling in *Payne*<sup>96</sup>), courts have consistently held that §27 is "self-executing," meaning that it does not need implementing legislation to go into effect. As a result, §27 has meaning regardless of whether there is legislation that implicates or attempts to put into place §27-driven values or solutions. In other words, §27 can be implicated even when there is no relevant legislation or regulation.<sup>97</sup>

Step 1 of the *Payne* test, however, looks at whether there is compliance with statutes and regulations. If, as the Commonwealth Court said in *Snelling v. Department of Transportation*,<sup>98</sup> the *Payne* test means that "Article I, Section 27 does not require consideration of factors beyond those which, by statute, must be considered in evaluating projects which are potentially harmful to the environment,"<sup>99</sup> then of necessity there must be a statutory or regulatory enactment that the Commonwealth agent needs to follow in order to trigger §27 issues. To the extent that this focus on statutory compliance suggests that §27 does not have meaning absent legislation, it is fundamentally inconsistent with the self-executing nature of §27.

### b. Focus on Statutory Compliance Narrows the Meaning of §27 (*Robinson Township* Plurality Criticism #2)

As the *Robinson Township* plurality noted, the *Payne* test "describes the Commonwealth's obligations—both as trustee and under the first clause of §27—in much narrower terms than the constitutional provision," in large part because the focus on statutory compliance found in step 1 means that "the availability of judicial relief premised upon Section 27 is contingent upon and constrained

89. While the Commonwealth Court in *Pennsylvania Env'tl. Def. Found.*, in an apparent nod to *Robinson Township*, applied an analysis that looked both to the text of §27 as well as the *Payne* test, subsequent decisions have used only the *Payne* test. See *Brockway Borough Mun. Auth. v. Department of Env'tl. Prot.*, 131 A.3d 578, 588, 46 ELR 20015 (Pa. Commw. Ct., 2016) (simply applying *Payne* test); *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462, 468 and n.8 (Pa. Commw. Ct. 2105) (applying only *Payne* test and noting that "it remains binding precedent on this Court until overruled by either a majority opinion of the Supreme Court or an en banc panel of this Court").

90. See Kristl, *supra* note 16, at 30; Dernbach, *supra* note 6, at 700.

91. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951-52, 43 ELR 20276 (Pa. 2013).

92. *Id.* at 957.

93. *Id.* at 958.

94. *Id.* at 957. The *Robinson Township* plurality stated in a footnote that "the Environmental Rights Amendment creates an express trust that is presumptively subject to the Uniform Trust Act, see [20] Pa. C.S.A. §§7702, 7731. . . ." 83 A.3d at 959, n.45.

95. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892, 3 ELR 20347 (Pa. Comm. Ct. 1973).

96. *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 6 ELR 20796 (Pa. 1976).

97. As the *Robinson Township* plurality put it in its criticism of the legislative focus of the *Payne* test, "The branches of government have independent constitutional duties pursuant to the Environmental Rights Amendment, as these duties are interpreted by the judicial branch and this Court in particular." *Robinson Twp.*, 83 A.3d at 967.

98. 366 A.2d 1298 (Pa. Commw. Ct. 1976).

99. *Id.* at 1305.



by legislative action.”<sup>100</sup> This narrowing is evident from the fact that the insistence on measuring statutory compliance makes it difficult if not impossible to handle §27 claims when there is no statutory or regulatory provision with which the Commonwealth agent should comply.

For example, a claim that the Commonwealth agent is failing to carry out his or her fiduciary duties as public trustee of a public nature resource does not have an immediate statutory requirement (as there is no statute saying the agent must act as a fiduciary); instead, the claim is based on the fiduciary obligation inherent in §27’s creation of the public trust. Step 1 provides no way to test that constitutionally (but not statutorily) based source of legal duty. The only way to make step 1 work is to ignore these nonstatutory duties—and thereby narrow what §27 means.<sup>101</sup>

### c. Statutory Compliance Does Not Always Equal §27 Compliance

Perhaps the most fundamental problem with step 1 is that it relies upon a false equivalence: that statutory compliance always equals §27 compliance. Some Commonwealth Court decisions expressly reached that very conclusion.<sup>102</sup> That assumption is demonstrably wrong for a number of reasons.

First, precisely because §27 is in the Declaration of Rights in Article I of the Pennsylvania Constitution, it is a fundamental right reserved to the people that acts as an inherent limitation on the power of the General Assembly.<sup>103</sup> As a result, legislation that limits the reach or application of §27 (or any other Article I right) would be unconstitutional, so that compliance with the statute would be irrelevant. That is one of the lessons of *Robinson*

*Township*. Whether viewed in terms of §27 or substantive due process, the relevant provisions of Act 13 were unconstitutional, and complying with those provisions would not remove that fundamental problem.

This becomes even more obvious if one considers a hypothetical statute that prohibits all Commonwealth agents from engaging in any action that would amount to the conservation and maintenance of public natural resources (in other words, a statute in direct contradiction to the public trust mandates of §27). Under step 1 of the *Payne* test, compliance with that statute would support the conclusion that the requirements of §27 were met, even though the statute and the actions taken in compliance with the statute would be unconstitutional because they violate §27. Thus, statutory compliance does not always determine §27 compliance; instead, the statute itself as well as the actions taken in compliance with the statute must be measured against what §27 requires.

Second, the General Assembly’s good intentions in passing a statute are not always enough to avoid constitutional problems. Act 13, the legislation at issue in *Robinson Township*, expressly stated that its purpose was to “protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.”<sup>104</sup> Nevertheless, and despite the legal presumptions concerning constitutionality that attach to any legislation,<sup>105</sup> a majority of the *Robinson Township* court found the four provisions of Act 13 unconstitutional. Thus, statutory compliance alone is not enough; consideration of §27 principles must still take place.

Third, compliance with statutory requirements can fall short of §27 compliance. This is especially possible in the public trust aspects of §27, where the textual obligation is to “conserve and maintain” public natural resources for the benefit of all the people, including generations yet to come. According to the *Robinson Township* plurality, “[t]he plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.”<sup>106</sup> It is certainly conceivable that fulfilling a statutory obligation could result in “degradation, diminution, or depletion” of a public natural resource because it does not meet the goal of “sustainable development” of the resource underlying §27.<sup>107</sup> Likewise, because the public trust in §27 impli-

100. *Robinson Twp.*, 83 A.3d at 966-67.

101. The fact that a statute does exist does not make this narrowing effect go away; as explained below, a focus on statutory compliance that views such compliance as proof of §27 compliance likewise narrows a self-executing constitutional concept into a mere statutory concept.

102. See, e.g., *Snelling*, 366 A.2d at 1305 (“Article I, Section 27 does not require consideration of factors beyond those which, by statute, must be considered in evaluating projects which are potentially harmful to the environment.”); *Community Coll. of Del. Cnty. v. Fox*, 342 A.2d 468, 481-82 (Pa. Commw. Ct. 1975).

103. The *Robinson Township* plurality noted:

The General Assembly derives its power from the Pennsylvania Constitution in Article III, Sections 1 through 27. The Constitution grants the General Assembly broad and flexible police powers embodied in a plenary authority to enact laws for the purposes of promoting public health, safety, morals, and the general welfare . . . although plenary, the General Assembly’s police power is not absolute; this distinction matters. Legislative power is subject to restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of the Commonwealth . . . Specifically, ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution . . . [thus] The Declaration of Rights is that general part of the Pennsylvania Constitution which limits the power of state government; additionally, “particular sections of the Declaration of Rights represent specific limits on governmental power.”

*Robinson Twp.*, 83 A.3d at 946-48 (quoting *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 A.2d 1331, 1335 (Pa. 1986)) (emphasis supplied).

104. Pa. Oil and Gas Act, 58 PA. CONS. STAT. ANN. §3202.

105. As *Robinson Township* puts it,

courts begin with the presumption that the General Assembly did not intend to violate the Pennsylvania Constitution, “in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths.” *Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 938-39 (2006); see also 1 PA. CONS. STAT. §1922(3). Accordingly, a statute is presumed valid and will be declared unconstitutional only if the challenging party carries the heavy burden of proof that the enactment “clearly, palpably and plainly violates the Constitution.” See *Zahorchak*, 4 A.3d at 1048. The practical implication of this presumption is that “[a]ny doubts are to be resolved in favor of a finding of constitutionality.” *Stilp*, 905 A.2d at 939.

83 A.3d at 943.

106. 83 A.3d at 957.

107. See *Robinson Twp.*, 83 A.3d at 958. For a more detailed discussion of what degradation, diminution, and depletion can mean in the context of §27, see

cates duties from private and public trust law, an action in compliance with a statutory requirement could nevertheless violate a fiduciary duty. Step 1's focus on statutory compliance, however, would find §27 compliance without consideration of these public and private trust duties.

Thus, the *Payne* test's focus on statutory compliance in step 1 has some fundamental inconsistencies with what §27 means and requires.

### 3. Problems With the Focus on Harms in *Payne* Test Steps 2 and 3

Steps 2 and 3 of the *Payne* test focus on environmental harms resulting from the governmental action or decision. Step 2 asks whether a reasonable effort has been or will be made to reduce the environmental incursion to a minimum,<sup>108</sup> while step 3 asks "[d]oes the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefore that to proceed further would be an abuse of discretion?"<sup>109</sup>

As an initial matter, it is worth noting that the focus on environmental harm in steps 2 and 3 correctly presaged elements of what emerged 40 years later in the *Robinson Township* plurality. In connection with First Sentence Rights, the plurality expressly stated:

Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.<sup>110</sup>

In the public trust context, the plurality cited a California case<sup>111</sup> and provided this telling parenthetical of the case's holding:

public trust doctrine permits sovereign to utilize trust resources required for prosperity and habitability of state, even if uses harm trust corpus; but, *before state courts and agencies approve use of trust resources, they must consider*

*effect of use upon public trust interests and attempt, so far as feasible, to avoid or minimize any harm to those interests; in that dispute, absence of "objective study" of impact on natural resource was deemed to hamper proper decision.*<sup>112</sup>

Thus, a focus on the environmental harms certainly fits within the understanding of §27 set forth by the *Robinson Township* plurality. Nevertheless, the way the *Payne* test focuses on environmental harm poses some fundamental problems.

#### a. Problems With Source, Timing, and Thoroughness of Determining Environmental Harm

The *Robinson Township* plurality's articulation of how environmental harm should be considered for §27 compliance set forth above suggests two immediate differences with the *Payne* test. First, the plurality makes it clear that the government must determine the environmental impacts. Under *Payne*, however, it is not clear *who* determines the environmental harm: Is it the petitioner/claimant asserting a §27 violation or the government? In at least one post-*Robinson Township* case, the Commonwealth Court squarely placed the burden on the claimant.<sup>113</sup>

This sourcing question matters because, among other things, it ultimately determines who is responsible for the assessment of environmental impacts. Presumably, the government will often have far more resources and expertise than citizen claimants. If the claimants must identify and prove the environmental harms, then their §27 rights are being unfairly burdened. In this way, *Payne* steps 2 and 3 are not as strong on sourcing the determination of environmental harms as the *Robinson Township* plurality's understanding of §27's contours.

Second, while the plurality's analysis makes it clear that the determination of environmental harms must be made *before* the action is taken or decision is made,<sup>114</sup> *Payne* leaves the timing question open. What this means is that *Payne* would allow for an after-the-fact determination of environmental harms. That is inconsistent with the plurality's insistence that the assessment of environmental harms occur *before* the decision is made—a pre-action assessment<sup>115</sup>—so that environmentally harmful actions/decisions can actually be avoided. In this way, *Payne* steps 2 and 3 are not as strong on timing as the *Robinson Township* plurality's understanding of §27's contours.

Perhaps the biggest distinction, however, relates to the thoroughness of the environmental harm information that

Kristl, *supra* note 16, at 33-38.

108. *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 6 ELR 20796 (Pa. 1976).

109. *Id.*

110. 83 A.3d at 952 (emphasis supplied). In support of this conclusion, the plurality pointed to a Question and Answer document developed by the amendment's chief legislative sponsor intended to aid voters in understanding the amendment, which stated that

once [the amendment] is passed and the citizens have a legal right to a decent environment under the State Constitution, every governmental agency or private entity, which by its actions may have an adverse effect on the environment, must consider the people's rights before it acts. If the public's rights are not considered, the public could seek protection of its legal rights in the environment by an appropriate law suit . . .

83 A.3d at 952, n.41 (emphasis supplied). A full copy of the Question and Answer document developed by chief legislative sponsor Franklin Kury can be found in Dernbach & Sonnenberg, *supra* note 1, at 269-73.

111. *National Audubon Soc'y v. Superior Court*, 189 Cal. Rptr. 346, 658 P.2d 709 (Cal. 1989).

112. *Robinson Twp.*, 83 A.3d at 958 (emphasis supplied). See Dernbach, *Constitutional Public Trust*, *supra* note 21, at 494-95 (same logic of plurality concerning First Sentence Rights applies to the public trust provisions; noting the plurality's citation to the *National Audubon* case).

113. *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462, 468 (Pa. Commw. 2015).

114. *Robinson Twp.*, 83 A.3d at 952, 958. The Commonwealth Court noted this requirement in a post-*Robinson Township* decision. See *Feudale*, 122 A.3d at 467.

115. For a further discussion of the notion of a pre-action assessment, see Kristl, *supra* note 16, at 16-18.

must be gathered. *Payne* does not articulate what or how much environmental harm information must be gathered. The result is that a decision can be made on little environmental harm information—whatever the parties put into the record. By contrast, the *Robinson Township* plurality identified a significant amount of environmental information that must be considered in the §27 context. In the Public Trust Rights context, the plurality stated:

The second, cross-generational dimension of Section 27 reinforces the conservation imperative: future generations are among the beneficiaries entitled to equal access and distribution of the resources, thus, the trustee cannot be shortsighted. . . . Moreover, this aspect of Section 27 recognizes the practical reality that environmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations. The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.<sup>116</sup>

Further, the plurality recognized that negative environmental effects can arise in a “direct” way (by the effect arising as result of a direct state action) as well as in an “indirect” way (by allowing a private party—for example, through the issuance of a permit—to engage in actions that result in the negative environmental effect).<sup>117</sup> Thus, what the *Robinson Township* plurality envisions is a pre-action assessment of direct and indirect environmental effects that can be negative or positive; have impacts that are immediate, short- or long-term; and can be incremental, compounding over time, or develop over generations. In this way, *Payne* steps 2 and 3 are not as strong on thoroughness as the *Robinson Township* plurality’s understanding of §27’s contours.

## b. Problems With Assessment of Environmental Harms

Separate and apart from the process of determining the environmental harms that are to play a role in §27 compliance, how *Payne* test steps 2 and 3 assess the significance of those identified harms also highlights some fundamental problems with the test.

### (i) Vagueness of Assessment Standard

*Payne* test step 2 asks “Does the record demonstrate a reasonable effort to reduce the environmental incur-

sion to a minimum?”<sup>118</sup> The step therefore requires the reviewing court to determine whether reasonable steps have been taken to “minimize” the environmental harms. What the step does not make clear is how much reduction is necessary to equal “minimization.” It certainly leaves open the possibility that *some* environmental harm will take place, but gives no guidance as to how much is too much.

*Payne* test step 3 asks: “Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefore that to proceed further would be an abuse of discretion?”<sup>119</sup> While it envisions a balancing or weighing of harms and benefits, the step lacks guidance on how to judge this balancing. It fails to explain how to compare the apples of environmental harms with the oranges of nonenvironmental benefits. In *Payne*, for example, the benefits of improved traffic flow were compared to the loss of parkland. The result, as Judge Harry A. Kramer noted, is that “[i]n the absence of any prescribed standard to weigh or value environmental harm, it is really impossible to have a meaningful balancing test.”<sup>120</sup> Likewise, the step provides no guidance on what constitutes a “clear outweighing” of benefits. The net effect of this vagueness is to create a potential for nonlegal, personal bias (such as the desire to obtain nonenvironmental benefits) to belittle or devalue the environmental harms so that the project can go forward.<sup>121</sup>

By contrast, the *Robinson Township* plurality’s assessment standard focuses solely on the environmental effects. In connection with First Sentence Rights, the assessment should analyze whether, in light of the determined environmental effects, the proposed action will unduly infringe upon or violate the right(s) involved<sup>122</sup> and/or unreasonably cause actual or likely deterioration of those environmental features.<sup>123</sup> In connection with Public Trust Rights, the assessment should analyze whether, in light of the determined environmental effects, the proposed action will be “unreasonable” and/or in fact result in degradation, diminution, or depletion of public natural resource(s), including both the resource(s) directly involved as well as other resource(s) that might be impacted by the action.<sup>124</sup> In short, the *Robinson Township* plurality views §27 compliance as fundamentally grounded in consideration of degradation, diminution, or depletion of public natural resources or actual or likely deterioration of First Sentence Rights or features. Such measureable impacts create a more definite assessment standard than what steps 2 and 3 offer.

116. 83 A.3d at 959. For support, the plurality cites John Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 117-20 (1999).

117. 83 A.3d at 957.

118. *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263, 6 ELR 20796 (Pa. 1976).

119. *Id.*

120. *Commonwealth DER v. Commonwealth PUC*, 335 A.2d 860, 867 (Pa. Commw. Ct. 1975) (Kramer, J., concurring).

121. *Id.* (“Instead of applying any set law or standards to these cases, we will merely be applying our own personal standards (or biases) concerning environmental values.”).

122. *Robinson Twp.*, 83 A.3d at 952.

123. *Id.* at 953.

124. *Id.* at 957.

## (ii) Use of Wrong Assessment Standard

If, as the *Robinson Township* plurality opines, §27 compliance is assessed by looking at degradation, diminution, or depletion of public natural resources or actual or likely deterioration of First Sentence Rights or features, then the assessment standard in *Payne* test steps 2 and 3 is the wrong standard. If an action or decision leads to the degradation, diminution, depletion, or deterioration that §27 prohibits, then neither “minimization” nor a nonenvironmental “benefit” can salvage it. Thus, focus on minimization and benefits is the wrong focus for determining §27 compliance.

What is the correct standard? The *Robinson Township* plurality recognized the kernel of truth lurking beneath the surface of steps 2 and 3 when it recognized that §27 does not mandate a “stagnant” or “frozen” state of affairs, but rather recognizes that development can occur.<sup>125</sup> However, unlike the *Payne* test (especially step 3), the plurality recognized limits on development arising out of §27:

to achieve recognition of the environmental rights enumerated in the first clause of Section 27 as “inviolable” necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. As respects the environment, the state’s plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development.<sup>126</sup>

Likewise, while discussing Public Trust Rights, the plurality stated that “the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, *with the evident goal of promoting sustainable development*.”<sup>127</sup> Thus, the relevant assessment standard is whether the development being promoted by the action or decision at issue is *sustainable* development. While sustainability might have different meanings depending on the resource involved,<sup>128</sup>

an important aspect of the inquiry (especially in the public trust context) focuses on whether future generations/beneficiaries will be able to enjoy a planet and resources at least as good as that enjoyed by the current generation—what has been called the “principle of intergenerational equity.”<sup>129</sup> Thus, by focusing on “minimization” and balancing environmental harms and nonenvironmental benefits, *Payne* test steps 2 and 3 use a standard for assessing §27 claims that ignores the sustainability standard at the core of §27.

## C. Can the Payne Test Be Salvaged?

As this section lays out, the *Payne* test has significant problems in general and in each of its three steps. Given that the test was formulated 40 years before the *Robinson Township* plurality’s exposition of §27’s meaning and import, it is fair to ask whether the *Payne* test might be salvageable via incorporation of concepts from the plurality’s analysis. The short answer: No.

First, the recognition of the inherent problems in focus on statutory compliance in step 1 means that any restructuring of the test will need to eliminate that focus. But the only way to do that is to eliminate step 1.<sup>130</sup> Second, if minimization of environmental harm is both vague and fails to recognize the sustainability component of §27 compliance, it is unclear what step 2 adds. In fact, to the extent that “minimization” offers a way to find §27 compliance even if there is impermissible degradation, diminution, depletion, or deterioration taking place, step 2 has the potential to steer the assessment in the wrong direction. Likewise, if the comparison of environmental harms to nonenvironmental benefits is vague and fails to recognize the sustainability component, step 3 adds little except to invite policy mischief when the decisionmaker likes the nonenvironmental benefits.

It appears that, to incorporate the new ideas of the *Robinson Township* plurality, the *Payne* test would need to become unrecognizable. Thus, the better strategy is to develop a replacement that hews more closely to the understanding of §27 articulated in the plurality’s opinion.

125. See *id.* at 953 (§27 language “does not call for a stagnant landscape . . . the derailment of economic or social development . . . [or] a sacrifice of other fundamental values”); *id.* at 958:

the trust’s express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry. . . .

126. *Id.* at 954.

127. *Robinson Twp.*, 83 A.3d at 958 (emphasis supplied). The plurality cites to *National Audubon Soc’y v. Superior Court*, 189 Cal. Rptr. 346, 658 P.2d 709, 727-29 (Cal. 1989), describing the case as holding that public trust doctrine permits sovereign to utilize trust resources required for prosperity and habitability of state, even if uses harm trust corpus; but, before state courts and agencies approve use of trust resources, they must consider effect of use upon public trust interests and attempt, so far as feasible, to avoid or minimize any harm to those interests.

For a thoughtful discussion of what “sustainable development” means, see John C. Dernbach, *Creating the Law of Environmentally Sustainable Economic Development*, 28 PACE ENVTL. L. REV. 614 (2011).

128. For a discussion of what sustainability means in the specific context of §27, see Kristl, *supra* note 16, at 34-40.

129. See Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198, 200 (1990). The concept has been distinctly described in this way: “Each generation should maintain the quality of the planet so that it is passed on in no worse condition than the generation received it, and each generation is entitled to an environmental quality comparable to that enjoyed by previous generations.” LAWRENCE E. SUSSKIND, ENVIRONMENTAL DIPLOMACY, NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 54 (1994) (citing EDITH WEISS BROWN, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989)).

130. It is true that the *Robinson Township* plurality recognized that the *Payne* test could apply to “the narrowest category” of cases “in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests.” 83 A.3d at 967. It is unclear how broad or meaningful a category this really is. To the extent that the claim referred to here is one in which the §27 violation arises *because* the Commonwealth agent did not follow the statute, it would seem that the statutory violation provides the basis for decision, not §27. It appears that the category is instead limited to claims in which the statutory violation cannot be challenged (because, for example, the time for appeal has passed).

### III. A Prescription for Living *Payne-Free*: Determining §27 Compliance Without the *Payne* Test

It is possible to test for §27 compliance in a way that incorporates the new, richer understanding of §27 articulated by the *Robinson Township* plurality. Based on concepts articulated above and developed more fully elsewhere,<sup>131</sup> the plurality's analysis suggests that three basic components—one procedural and two substantive—should be part of any test of §27 compliance.

The procedural component revolves around the pre-action assessment. The plurality emphasized that Commonwealth agents need to consider environmental effects *before* acting, finding this requirement both for First Sentence Rights<sup>132</sup> and Public Trust Rights.<sup>133</sup> Thus, a test for §27 compliance should require that such an assessment have occurred. However, not just any assessment will do. Rather, the plurality made clear that the assessment needs to be thorough in that it must consider direct and indirect environmental effects that: can be negative or positive; have impacts that are immediate, short- or long-term; and can be incremental, compounding over time, or develop over generations.<sup>134</sup>

The two substantive components arise out of the differences between First Sentence and Public Trust Rights,<sup>135</sup> and thus require one substantive principle for each of these sets of §27 rights and obligations. As to First Sentence Rights, the *Robinson Township* plurality viewed those rights as protecting against government action that “causes actual or likely deterioration of these features.”<sup>136</sup> The “features” being referenced here are the environmental features to which the right attaches—“clean air,” “pure water,” and the “natural,” “scenic,” “historical,” or “esthetic” values of the environment. In this formulation, a violation of a First Sentence Right occurs when the government action actually leads or is likely to lead to a deterioration of one or more of these environmental features.

However, not every deterioration is a violation. In recognition that some economic development is proper under §27, the plurality focused on “unreasonable degradation of the environment,”<sup>137</sup> where unreasonableness is grounded in the purpose of §27: “The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, inter alia, our air and water quality.”<sup>138</sup> The plurality also

suggested that a different way to see this is through the lens of sustainable development,<sup>139</sup> so that determining whether the “actual or likely deterioration” is unreasonable is to ask whether the action produces a sustainable result.

For Public Trust Rights, the plurality viewed the duty to conserve and maintain to mean “a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources,”<sup>140</sup> whether through direct action by the state on the resource or indirectly by allowing a private party to so affect the resource.<sup>141</sup> There are different ways to consider “degradation, diminution, and depletion,”<sup>142</sup> which all come back to the “evident goal of promoting sustainable development.”<sup>143</sup>

Putting it all together, the text of §27 and the *Robinson Township* plurality's understanding of that test can be boiled down to the following test:

1. Prior to acting or deciding, did the Commonwealth conduct a thorough pre-action assessment that considered direct and indirect environmental effects, whether negative or positive; that may have impacts that are immediate, short- or long-term; and can be incremental, compounding over time, or develop over generations?
2. If a First Sentence Right is at issue, in light of the properly prepared pre-action assessment, to what extent will the action or decision cause an actual or likely deterioration of the relevant feature (air, water, “natural,” “scenic,” “historical,” or “esthetic” values of the environment) underlying the First Sentence Right so that the “actual or likely deterioration” is unreasonable as measured by the language and purpose of §27 itself, including principles of sustainability?
3. If Public Trust Rights and/or the operation of the public trust is at issue, in light of the properly prepared pre-action assessment, to what extent will the environmental effects of the action or decision result in or fail to remedy the degradation, diminution, or depletion of public natural resources, so that it fails to promote sustainable development or will result in future generations receiving the impacted public natural resource(s) in a worse condition than it is now?

Such a test comes closer to the new understanding of §27 set forth in the *Robinson Township* plurality opinion. It arms both Commonwealth agents trying to comply with

131. See Kristl, *supra* note 16, at 15-22.

132. *Robinson Twp.*, 83 A.3d at 952.

133. *Id.* at 958.

134. *Id.* at 957, 959.

135. See Kristl, *supra* note 16, at 30-31; Dernbach, *supra* note 6, at 700 (“The two parts [of §27] differ in scope, in the types of rights they create, and in the responsibilities they articulate for the state. Because these two parts contain separate legal rules, it is impossible to analyze the Amendment in a useful manner unless each part is discussed separately.”); *id.* at 701-04 (discussing the differences in detail).

136. *Robinson Twp.*, 83 A.3d at 953.

137. *Id.* at 954.

138. *Id.* at 953.

139. *Id.* at 954.

140. *Id.* at 957. The language of “prevent and remedy” means that the public trust obligation requires that the Commonwealth agent both avoids making things worse by directly or indirectly causing degradation, diminution, or depletion of the resource(s) (the notion of “prevent”) and to act in a way that improves (and therefore lessens) the degradation, diminution, or depletion that public nature resources have already suffered (the notion of “remedy”).

141. *Robinson Twp.*, 83 A.3d at 957-58.

142. See Kristl, *supra* note 16, at 36-39.

143. *Robinson Twp.*, 83 A.3d at 958.

§27 and courts reviewing the ultimate actions or decisions with a clearer set of principles for assessing §27 compliance.

#### **IV. Conclusion**

The *Payne* test for §27 compliance, which has reigned for over 40 years, is fundamentally inconsistent with the text of §27 and with the understanding of what §27 means and

requires as articulated by the plurality opinion in *Robinson Township*. The time has come to retire the *Payne* test and replace it with something that is closer to the post-*Robinson Township* understanding of §27. Eliminating the *Payne* test would better serve the effort to revitalize §27 and allow Commonwealth agents and judges to ensure that §27 plays a vital role in helping to protect Pennsylvania's environment and public natural resources.