Widener Law School Legal Studies Research Paper Series no. 14-10

Robinson Township v. Commonwealth of Pennsylvania:

Examination and Implications

John C. Dernbach
Widener University School of Law
James R. May
Widener University School of Law
Kenneth T. Kristl
Widener University School of Law

ROBINSON TOWNSHIP v. COMMONWEALTH OF PENNSYLVANIA: EXAMINATION AND IMPLICATIONS

John C. Dernbach, James R. May & Kenneth T. Kristl

ENVIRONMENTAL LAW CENTER
AT WIDENER UNIVERSITY

March 2014

ROBINSON TOWNSHIP v. COMMONWEALTH OF PENNSYLVANIA: EXAMINATION AND IMPLICATIONS

John C. Dernbach, James R. May, Kenneth T. Kristl

ENVIRONMENTAL LAW CENTER AT WIDENER UNIVERSITY*

In *Robinson Township v. Commonwealth of Pennsylvania*,[1] the Pennsylvania Supreme Court held unconstitutional major parts of Pennsylvania's "Act 13"—a 2012 oil and gas law designed to facilitate the development of natural gas from Marcellus Shale. In so doing, the Court breathed new life into Article I, Section 27 of Pennsylvania's constitution, which creates public rights in certain environmental amenities and requires the state to "conserve and maintain" public resources "for the benefit of all the people." The wide-ranging implications of this decision will be felt for years, perhaps decades.

This White Paper – produced by the Environmental Law Center at the Widener University School of Law – does three things. First, it provides a brief introduction to the three players in this drama – Article I, Section 27, the Pennsylvania's Environmental Rights Amendment; Act 13, and the lower court decision in *Robinson Township*. It then drills deep into the Supreme Court's remarkable determination that Act 13 is unconstitutional. Last, it places *Robinson Township* into context by considering its implications going forward, including at the local, state and global levels.

I. Brief Background to Pennsylvania's Environmental Rights Act, Act 13, and *Robinson Township*

A. The Environmental Rights Amendment

Article I, Section 27 of the Pennsylvania Constitution, known as the "Environmental Rights Amendment," provides:

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

Penn. Const. Art. I, Sec. 27.

John C. Dernbach, James R. May and Kenneth T. Kristl co-authored this report, and own the copyright thereto. John Dernbach is Distinguished Professor of Law at Widener University and co-director of Widener's Environmental Law Center, jcdernbach@widener.edu; Jim May is Professor of Law and co-director of Widener's Environmental Law Center, jrmay@widener.edu; Ken Kristl is Professor of Law and director of Widener's Environmental and Natural Resources Law Clinic, ktkristl@widener.edu.

The Environmental Rights Amendment was adopted in response to Pennsylvania's experience with extractive industries and activities. The Commonwealth has a long and sordid history of coal mining, oil and gas development, deforestation, industrialization, and attendant loss of species and habitat. In a strong display of support, the people of Pennsylvania adopted the Environmental Rights Amendment in a 1971 referendum by a four-to-one margin.

B. Act 13

Ancient shale strata exist deep below the surface of the Earth. These layers of shale embed natural gas in what are known as 'plays.' To reach the natural gas within a play, one has to break the shale that contains it apart. One method for doing so is known as "horizontal hydraulic fracturing," or HHF.

The Marcellus Shale Play is a giant geologic formation beneath the State of Pennsylvania. It is thought to contain up to 10 percent of available natural gas deposits in North America. The Marcellus Shale Play has been subject to enormous development pressures and concomitant concerns about adverse environmental effects.

Pennsylvania enacted one of the nation's first oil and gas laws, known as the Pennsylvania Oil and Gas Act. The act, however, was not designed to address HHF, not to mention development of the Marcellus Shale Play, thus resulting in a patchwork of regulatory responses by the state as well as local governments.

Accordingly, in 2012 the Pennsylvania Legislature revised the Oil and Gas Act with the twin goals of liberalizing the extraction of natural gas from the Marcellus Shale Play and creating a uniform regulatory structure to do so. This revision is commonly called "Act 13" because it was Act 13 of 2012. Act 13 establishes a system for collecting impact fees from hydrofracturing, and allocates much of the revenue from those fees to various municipalities and several state agencies to offset some of the adverse environmental effects of hydrofracturing. It also contains new or modified permitting requirements for oil and gas operations by the state Department of Environmental Protection (DEP). In addition, Act 13 prevents physicians from obtaining information about the risks of exposure to certain chemicals used in HHF unless they agree to sign a confidentiality agreement. It then subjects physicians who released information about potential chemical exposure to civil and criminal liability.

Three provisions of Act 13 are central to the Supreme Court's *Robinson Township* decision. First, section 3303 declares that state environmental laws "occupy the entire field" of oil and gas regulation, "to the exclusion of all local ordinances. Section 3303 also "preempts and supersedes the local regulation of oil and gas operations" regulated under the state's various environmental laws.

Second, section 3304 requires "all local ordinances regulating oil and gas operations" to "allow for the reasonable development of oil and gas resources." In so doing, it imposes uniform rules for hydrofracturing in the state, prohibits local governments from establishing more stringent rules, and establishes limited time periods for local review of drilling proposals.

Third, section 3215(b) prohibits drilling or disturbing area within specific distances of streams, springs, wetlands, other water bodies. But Section 3215(b)(4) requires DEP to waive these distance restrictions if the permit applicant submits "additional measures, facilities or practices" that it will employ to protect these waters. That provision states: "The waiver, if granted, shall include additional terms and conditions required by [DEP] to protect the waters of this Commonwealth."

C. *Robinson Township v. Commonwealth of Pennsylvania*: Lower Court Decision

Robinson Township and six other municipalities, two individuals, an environmental organization, and a physician filed an action against the state challenging Act 13 as inconsistent with the Environmental Rights Amendment, substantive due process, and other provisions of the Pennsylvania Constitution. In its July 2012 decision, the Commonwealth Court of the State of Pennsylvania dismissed most of the petitioners' claims but held Section 3215(b)(4) and Section 3304 to be unconstitutional.[2] President Judge Dan Pellegrini wrote for the four-judge majority; three judges dissented.

The Commonwealth Court first held section 3215(b)(4) invalid under the state constitutional requirement that "legislation must contain adequate standards that will guide and restrain the exercise of the delegated administrative functions." It held Section 3215(b)(4) violates that requirement because it "gives no guidance to DEP that guide and constrain its discretion to decide to waive the distance requirements from water body and wetland setbacks."

It then held Section 3304 invalid as a matter of "substantive due process," which derives from the property rights provisions of the Pennsylvania constitution. For zoning requirements and other laws to satisfy substantive due process, Pennsylvania courts have previously ruled, they "must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits." Section 3304 violates substantive due process, the Commonwealth Court ruled, because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications."

The court upheld Section 3303 under the Environmental Rights Amendment. Notwithstanding its bold pronouncements (or perhaps because of them), Article I, Section 27 was mostly marginalized by Pennsylvania courts from the outset. This marginalization took two forms. First, viewing Article I, Section 27 as a grant of authority to government, Pennsylvania courts developed the view that the amendment was not self-executing, that it applies only when the legislature specifically says so. Second, in *Payne v. Kassab*, the Commonwealth Court substituted a three-part balancing test for the text of the amendment.[3] That test has since been used by courts in the overwhelming majority of cases involving Article I, Section 27.[4]

Because of these prior court decisions, the Commonwealth Court made short work of the claim against Section 3303. Because Act 13 relieved municipalities "of their responsibilities to strike a balance between oil and gas development and environmental concerns," there was no cause of action under Article I, Section 27.

The Commonwealth Court also held that the environmental plaintiffs and the physician lacked constitutional standing.

Both sides appealed to the seven-member Pennsylvania Supreme Court.

II. *Robinson Township* and the Pennsylvania Supreme Court

In a remarkable decision, the Pennsylvania Supreme Court affirmed the Commonwealth Court's decision on the two provisions that the Commonwealth Court had held unconstitutional, and also held Section 3303 to be unconstitutional under the Environmental Rights Amendment.

In a 162-page plurality opinion, Chief Justice Ronald Castille and two other justices, Debra McCloskey Todd and Seamus McCaffery, grounded their decision in the Environmental Rights Amendment. A fourth justice, Max Baer, concurred in the decision but based his concurring opinion on substantive due process.

Justice Thomas Saylor and Justice J. Michael Eakin wrote separate dissenting opinions. Neither former Justice Orrie Melvin nor newly appointed Justice Correale Stevens participated in the decision.

The decision has three major thrusts. First, a majority (the plurality plus Justice Baer) reversed the lower court insofar as it upheld standing for all of the plaintiffs in the case. Second, the same majority rejected the argument that the case is precluded under the political question doctrine. Third, as already noted, it held three sections of Act 13 to be unconstitutional. We take these in turn below.

A. Majority: Standing

The basic requirement for standing is that the petitioner or plaintiff must show that he or she has "a substantial, direct, and immediate" interest in the outcome of the litigation.[5] The state argued that most of the petitioners did not have standing. A majority of the court disagreed, and upheld standing.

Two individuals—Brian Coppola and David Ball--asserted that Act 13 negatively affected them because they cannot enjoy their properties as expected or guarantee enjoyment of these properties to potential buyers. The court held they had standing as individuals. They are also local government officials. The Supreme Court did not decide whether they had a separate interest as local elected officials that would confer standing.

Robinson Township and six other local governments asserted standing because Act 13 imposes substantial, direct and immediate obligations on them that affect their governmental functions. The Supreme Court agreed, saying that protection of environmental and esthetic interests is an essential aspect of Pennsylvanians' quality of life and a key part of local government's role. In effect, the Court said, Act 13 places them in position of either violating constitutional duties or violating Act 13.

Maya van Rossum and the Delaware Riverkeeper Network submitted affidavits on record showing that individual members of the Delaware Riverkeeper Network were Pennsylvania residents as well as owners of property or business interests that were likely to suffer harm in the value of their existing homes and enjoyment of their properties because of Act 13. The Supreme Court held that the Delaware River keeper Network has standing because of injury alleged to its members. Because of her official position as executive director of this organization, the Court held, Maya Van Rossum also has standing to represent the organization.

The Court also upheld standing for Mehernosh Khan, a physician who treats patients in areas where drilling operations are taking place. Dr. Khan alleged that Act 13's restrictions on obtaining and sharing information with other physicians regarding chemicals used in drilling operations impede his ability to properly treat his patients. Act 13 allows a physician to get the identity of these chemicals from the industry, but then requires the physician to keep the identity of these chemicals confidential. Failure to do so subjects the physician to legal action for failure to protect trade secrets. Dr. Khan said this restriction forces him to choose between following Act 13 and adhering to his legal and ethical duties to report findings in medical records and make records available to patients and other doctors. Because of what the Supreme Court called his "unpalatable professional choices in the wake of Act 13," his interest is substantial and direct.[6]

In sum, the Supreme Court held that all of these petitioners or citizens have standing.

B. Majority: Political Question

The state also argued that the claims presented against Act 13 should not be heard because they present a political question. The courts, the state argued, should not be in a position of revisiting or second guessing legislative choices. The Supreme Court, citing precedent that goes back to the early history of the United States, said that it had the power to decide whether legislative choices, including Act 13, are constitutional. It does not matter, the Supreme Court said, that the legislative choices were made in a difficult political context; the question is whether they are constitutional, and the courts have the ability to decide that.

C. Constitutionality of Act 13

1. Plurality: Article I, Section 27

The state's position on Article I, Section 27, Chief Justice Castille wrote, is that the amendment "recognizes or confers no rights upon citizens and no right or inherent obligation upon municipalities; rather, the constitutional provision exists only to guide the General Assembly, which alone determines what is best for public natural resources, and the environment generally, in Pennsylvania."[7] The Commonwealth Court's decision on Section 3303 of Act 13, which said in effect that legislation trumps Article I, Section 27, is consistent with the state's position.

The three-justice plurality plurality took a much different view. A substantial part of its opinion sets out "foundational principles" about Article I, Section 27 to guide future courts and decision makers.[8]

The plurality emphasizes that the environmental amendment is located in Article I of the Pennsylvania Constitution, which is Pennsylvania's analogue to the U.S Bill of Rights. Article I is the same place where the right to free speech; the right to bear arms; and the right to acquire, possess, and protect property are located. Rights in Article I, the plurality noted, are understood as inherent rights that are reserved to the people; they operate as limits on government power. The plurality explained that the court had not previously had an opportunity to address how Article I, Section 27 restrains the exercise of governmental regulatory power, and therefore "has had no opportunity to address the original understanding of the constitutional provision."[9]

Constitutional interpretation, the plurality wrote, must begin with the plain language of Article I, Section 27 itself. The first sentence establishes two rights in the people, Castille wrote. The first is a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. The second is "a limitation on the state's power to act contrary to this right."[10] The state as well as local governments is bound by these rights, the plurality said. In addition, these rights are equal in status and enforceability to any other rights included in the state constitution, including property rights.

The second and third sentences, the plurality wrote, involve a public trust. Public natural resources are owned in common by the people, including future generations. Because the state is the trustee of these resources, it has a fiduciary duty to "conserve and maintain" them. "The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources."[11] The state has two separate obligations as trustee. The first is "a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources."[12] The second is a duty "to act affirmatively to protect the environment, via legislative action." These duties, the plurality said, foster "legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development."[13]

Pennsylvania's history, Castille wrote, includes massive deforestation, the loss of game, and industrialization and coal mining. "It is not a historical accident that the Pennsylvania Constitution now places citizens' environmental rights on par with their political rights," the plurality wrote.[14] Constitutional provisions, he pointed out, are to be interpreted based on "the mischief to be remedied and the object to be attained."[15]

In light of this analysis, the plurality concluded, the "non-textual" balancing test in *Payne v. Kassab* "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."[16]

The plurality then applied this framework to Sections 3303, 3304, and 3215(b)(4):

- Section 3303, which preempted local regulation of oil and gas operations, violates Article I, Section 27 "because the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties."[17] The Commonwealth is the trustee under the amendment, which means that local governments are among the trustees with constitutional responsibilities.

- Section 3304, which requires "all local ordinances" to "allow for the reasonable development of oil and gas resources" and imposes uniform rules for oil and gas regulation, violates Article I, Section 27 for two reasons. "First, a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential] is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life."[18] Second, under Act 13 "some properties and communities will carry much heavier environmental and habitability burdens than others." This result is inconsistent with the obligation that the trustee act for the benefit of "all the people."[19]

- Section 3215(b)(4), which requires DEP to waive setback distances to protect streams and other water bodies, violates Article I, Section 27 for three reasons. First, the legislation "does not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver."[20] Second, "[i]f an applicant appeals permit terms or conditions…Section 3215 remarkably places the burden on [DEP] to 'prov[e] that the conditions were necessary to protect against a probable harmful impact of [sic] the public resources.'"[21] Third, because Section 3215 prevents anyone other than the applicant from appealing a permit condition, it "marginalizes participation by residents, business owners, and their elected representatives with environmental and habitability concerns, whose interests Section 3215 ostensibly protects."[22].

2. Concurring Opinion: Substantive Due Process

In his concurring opinion, Justice Baer saw the primary argument of the petitioners to be based on substantive due process, and also viewed that approach as "better developed and a narrower avenue to resolve this appeal."[23] In "a state as large and diverse as Pennsylvania, meaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level."[24] The challenged provisions, he said, "force municipalities to enact zoning ordinances" that "violate the substantive due process rights of their citizenries."[25]

3. Dissenting Opinions

Justice Saylor, in his dissenting opinion, took issue with the Article I, Section 27 and the substantive due process aspects of this case. In his view, Act 13 provides a detailed system for regulating unconventional gas development. The legislature "occupies the primary fiduciary role" under Article I, Section 27, and local governments have no "vested entitlement" to "dictate the manner in which the General Assembly administers the Commonwealth's fiduciary obligation to the citizenry at large relative to the environment."[26] Justice Eakin's dissent expressed concern that the decision empowers municipalities at the expense of state decision-making authority.

III. Impacts and Implications of *Robinson Township*

The most obvious impact of the *Robinson Township* decision is to force lawyers and decision makers to look anew at the text of Article I, Section 27, and to recognize it as constitutional law. The decision also raises a wide variety of specific questions. Two of the most important are the impact of the opinion on municipal decision making and the likelihood that Article I, Section 27 will be used again to challenge the constitutionality of a statute. In other states and countries that also have some form of constitutional environmental rights provision, the decision will likely be read carefully by courts and other decision makers that are considering the meaning of their own law.

A. Revitalizing the Environmental Rights Amendment

Robinson Township has major consequences for Article I, Section 27. The revitalization of Article I, Section 27 may be of even greater import than its effect on Marcellus Shale development, even though it did command the votes of a majority. The plurality treated Article I, Section 27 as actual constitutional law. It also reinforces environmental constitutionalism insofar as it represents an authentic attempt to engage the text of the Environmental Rights Amendment. No Pennsylvania court has ever before articulated the "foundational principles" of Article I, Section 27 in this way, or at this level of detail. In addition, no Pennsylvania court has previously used Article I, Section 27 as a justification for holding a statute unconstitutional. In so doing, the court provided a framework for understanding and applying the amendment that will likely be considered for decades.

The plurality clarified the meaning of Article I, Section 27 by recognizing that it contains two distinct sets of rules. The first is a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. The second involves a public trust in public natural resources, which the state is to conserve and maintain for the benefit of present and future generations. The plurality also articulated for the first time what limits each of these rules imposes on the state—limitations that were described above.

The plurality's approach also refocused the role of balancing in environmental constitutionalism. Specifically, the plurality rejected the "non-textual" balancing test in *Payne v. Kassab* as "inappropriate" to determine matters outside a narrow category of cases. Its criticism of the *Payne* test suggests that, even in those cases, courts will use the constitutional text as a point of reference.

Last, the plurality in *Robinson Township* made a point of explaining that environmental rights provisions serve both present and future generations. It observed: "By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction."[27] While some contest the comparison of shale gas with coal, there is a larger point here. The plurality opinion in particular advances the purpose of constitutional-enshrinement of environmental rights and public trust duties in the first place – to promote environmental protection and advance individual rights to a quality environment for both present and future generations.

While an outlier, the Pennsylvania Supreme Court is not alone in engaging constitutional environmental rights. The Supreme Court of Alaska recently read that state's "public interest" constitutional standard for resource development to require that courts take a hard look at whether state agencies adequately considered the cumulative environmental impacts of oil and gas leases.[28] And the Supreme Court of Montana has subjected state decisions that implicate the environmental rights provision in its constitution to strict scrutiny,[29] although it has since been reluctant about enforcing that provision.[30]

On the other hand, most developments at the state level in the United States have not been terribly encouraging. As Professor Barton Thompson has observed: "[s]tate courts have helped ease most of the constitutional provisions into relative obscurity by holding that the provisions are not self-executing, by denying standing to private citizens and groups trying to enforce the provisions, or by establishing relatively easy standards for meeting the constitutional requirements."[31]

B. Immediate Consequences in Pennsylvania

This case has a wide range of implications. We discuss here only two of the most immediate implications—how it will affect decision-making by municipalities, and the likelihood that the text of Article I, Section 27 will again be used to challenge the constitutionality of a statute.

1. Decision-making by Municipalities

A likely focus of both immediate and longer-term analyses of the *Robinson Township* decision is the effect it will have on Pennsylvania municipalities. On one level, the decision represents a victory for municipalities because it identifies limits on the General Assembly's ability to interfere with local regulation. In recognizing that the municipal plaintiffs had standing, the majority stated:

> This Court has held that a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders, which interest confers upon the political subdivision standing in a legal action to enforce environmental standards. Susquehanna County v. Commonwealth, 458 A.2d 929, 931 (Pa. 1983) (county has standing to appeal executive agency order related to operation of sanitary landfill by corporate permit holder); Franklin Twp., 452 A.2d at 720 (municipality and county have standing to appeal agency's decision to issue permit to operate solid waste facility). Political subdivisions, the Court has recognized, are legal persons, which have the right and indeed the duty to seek judicial relief, and, more importantly, they are "place[s] populated by people." Id. The protection of environmental and esthetic interests is an essential aspect of Pennsylvanians' quality of life and a key part of local government's role. Local government, therefore, has a substantial and direct interest in the outcome of litigation premised upon changes, or serious and imminent risk of changes, which would alter the physical nature of the political subdivision and of various components of the environment.[32]

Because this municipal interest in protecting environmental, esthetic, and quality of life issues is "a quintessential local issue that must be tailored to local conditions,"[33] the plurality found that Act 13's "one size fits all" approach impermissibly displaced local development guidelines and "effectively disposed of the regulatory structures upon which citizens and communities made significant financial and quality of life decisions, and has sanctioned a direct and harmful degradation of the environmental quality of life in these communities and zoning districts."[34] While the General Assembly "has the authority to alter or remove any powers granted or imposed by statute on municipalities . . . constitutional commands regarding municipalities' obligations and duties to citizens cannot be abrogated by statute" and "the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties."[35] Thus, whether under the guise of the plurality's view of Article I, Section 27 or Justice Baer's view of substantive due process, municipalities enjoy some constitutional protection against General Assembly overreach.

What is more likely to draw immediate attention, however, is language suggesting that municipalities have responsibilities that they may not have recognized or fully appreciated before the decision. In discussing standing, for example, the majority states that "[t]he aggrievement alleged by the political subdivisions is not limited to vindication of individual citizens' rights but extends to allegations that the challenged statute interferes with the subdivisions' constitutional duties respecting the environment and, therefore, its interests and functions as a governing entity."[36] This notion that political subdivisions have "constitutional duties respecting the environment" gets further amplified by the plurality's multiple assertions that Article I, Section 27 imposes a constitutional obligation on local governments.[37] Indeed, the plurality's declares the limits of the General Assembly's ability to grant or withdraw municipal powers in terms of "constitutional commands regarding municipalities' obligations and duties to citizens."[38] Thus, the plurality decision in *Robinson Township* affirmatively states that municipalities share in the constitutional obligations imposed by Article I, Section 27, and therefore the affirmative obligations imposed on the Commonwealth at the state level are imposed at the local level as well.

Recognition of such constitutional obligations at the local level means that Article I, Section 27 challenges to local actions (such as zoning or other ordinances) or non-actions (such as the failure to have zoning or other ordinances) are theoretically possible. Such challenges would at the very least impose defense burdens on municipalities. *Robinson Township* provides some guidance on how such challenges can and should be resolved.

First, the plurality articulated two basic categories of claims under Article I, Section 27:

> A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens' rights or the government has failed in its trustee obligations, or upon both theories . . . .[39]

The first of these categories ("rights claims") suggests a governmental action resulting in an infringement of a citizen's right under Section 27—"the 'right' to clean air and pure water and to the preservation of natural, scenic, historic and esthetic values of the environment,"[40]—contained

in the first clause of Section 27. The implication from the plurality's analysis is that the notion of an "infringement" of these rights arises from government *action* and not from inaction:

> This clause affirms a limitation on the state's power to act contrary to this right . . . the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment . . . .[41]

Thus, as to the first category of claims, a failure to act likely falls outside this category.

The second category of claims ("trust claims") could arise from either an action or a failure to act because of its trust law roots.[42] (public trust concept in third clause of Section 27 establishes duties "which are both negative (*i.e.,* prohibitory) and affirmative (*i.e.,* implicating enactment of legislation and regulations)"). However, trust claims must be rooted in the public trust principles imposed by the second and third clauses of Section 27. The plurality made it clear that "[o]n its terms, the second clause of Section 27 applies to a narrower category of "public" natural resources than the first clause of the provision," [43]although this distinction still encompasses a wide array of things:

> The drafters, however, left unqualified the phrase public natural resources, suggesting that the term fairly implicates relatively broad aspects of the environment, and is amenable to change over time to conform, for example, with the development of related legal and societal concerns. *Accord* 1970 Pa. Legislative Journal–House at 2274. At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.[44]

Nevertheless, the notion of a public interest implication arguably limits claims that are about private property unless a connection to "public natural resources" can be shown.

The express duty in Section 27 is to "conserve and maintain" the public resources that form the corpus of the trust. As noted earlier, for the plurality, this creates three obligations:

> (1) "a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.,* because of the state's failure to restrain the actions of private parties,"[45];
>
> (2) a duty to "act affirmatively to protect the environment, via legislative action,"[46]; and
>
> (3) a duty "to deal impartially with all beneficiaries" by "balanc[ing] the interests of present and future beneficiaries."[47]

The precise contours of these three obligations are not explained, and therefore left to future judicial interpretation. Nevertheless, the plurality seems to recognize at least two countervailing principles that may mitigate the impact of these obligations on municipalities.

First, the plurality makes clear that "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, with the evident goal of promoting sustainable development."[48] Thus, legitimate development designed to improve the general welfare that amounts to sustainable development would not violate the plurality's view of the trust obligations imposed on municipalities under Article I, § 27.

Second, both the plurality and Justice Baer recognize and place importance on what the plurality termed "regulatory structures upon which citizens and communities made significant financial and quality of life decisions."[49] For Justice Baer, these regulatory structures "vindicate" a substantive due process right in the neighboring land owner.[50] ("May the General Assembly, through a law applicable statewide, remove *en toto* from local municipalities the apparatus it provided to vindicate the individual substantive due process rights of Pennsylvanian landowners?"). Zoning (or, presumably, other local regulation springing from the police power) which bears "a substantial relationship to the health, safety, morals, or general welfare of the community" is constitutionally permissible.[51] Thus, local regulatory structures may enjoy some protection from claims under Article I, § 27. How the police power and public trust obligations interrelate will likely be the context in which challenges to municipal actions and non-actions play out in the near term after *Robinson Township*.

2. Challenge to Constitutionality of Statutes

The *Robinson Township* decision was based on a facial constitutional challenge to Act 13, and the grounds for the decision were divided between Article I, Section 27 and substantive due process. An immediate next step for the development of Article I, Section 27 jurisprudence could be a majority decision invalidating a statute (or regulation or ordinance) based on the text of the environmental amendment.

The plurality opinion, of course, provides much of the basis for this conclusion. But so do inherent limitations in the three-part *Payne v. Kassab* test.[52] A constitutional challenge to a statute—whether a facial challenge like the one in this case or a challenge to a statute as applied—obviously requires the use of a constitutional rule. The *Payne* test, however, does not provide such a rule. The first prong of the test" is: "Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?" This prong is about compliance with statutes and regulations, and provides no means for determining the constitutionality of the statute(s) being implemented. The second prong is: "Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?" This prong is about reducing environmental harm, but once again does not provide a standard for determining the constitutionality of a statute.

The third prong is: "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?" This prong presupposes that the standard of review is an "arbitrary and capricious" test, not a constitutional test. As administrative lawyers well know, the "arbitrary and capricious" test is applied to decisions that are within the statutory or regulatory authority of the administrative agency or local government that made the decision, but are considered to be an abuse of discretion. A claim that a statute is unconstitutional, by contrast, is directed against the authority of the legislature, and is not based on an "arbitrary and capricious" test. It thus seems likely that a future court will use the text of Article I, Section 27 to determine the constitutionality of a statute, ordinance, or administrative regulation.

C. Influencing Constitutional Environmental Rights Elsewhere

Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide.[53]

Environmental constitutionalism is evolving globally and subnationally. The constitutions of about three-quarters of nations worldwide address environmental matters in some fashion, some by committing to environmental stewardship, others by recognizing a basic right to a quality environment, and still others by ensuring a right to information, participation, and justice in environmental matters. Indeed, most people on earth now live under constitutions that protect environmental rights in some way. And environmental constitutionalism continues to emerge and evolve in courts all around the globe, although many constitutionally-embedded environmental rights provisions have yet to be energetically engaged. Courts and lawyers in other states and countries are likely to look the *Robinson Township* decision for guidance and ideas.

1. Subnational Environmental Constitutionalism

Pennsylvania's Environmental Rights Amendment is unique but not alone. While all efforts to amend the U.S. Constitution to recognize environmental rights have failed,[54] states in the United States have a long tradition of constitutionalizing environmental protection. Indeed, constitutional recognition of natural resources and the environment at the subnational level in the United States harkens back almost two centuries, beginning in 1842 with Rhode Island's protection of "all the rights of fishery, and the privileges of the shore."[55] Among the more notable provisions is the "Wildlands Forever" provision of the New York State Constitution, which provides that: "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."[56]

There are at least 207 natural resource or environment-related provisions in 46 state constitutions. These provisions reach 19 different categories of natural resources or the environment, including water, timber and minerals.[57] They also take 11 different forms, including general policy statements, legislative directives, and individual rights to a quality

environment.[58] States recognizing environmental protection as an overarching state policy include Louisiana,[59] Michigan,[60] Ohio,[61] South Carolina,[62] and Virginia.[63] Several more address parochial environmental concerns, such as access to water, preservation, re-development, sustainability, pollution abatement, climate change, energy reform, or environmental rights.[64] Dozens more contain provisions fairly characterized as recognizing that the state holds state resources in "public trust."

Currently, beside Pennsylvania, five other states instantiate a substantive right to a quality environment,[65] including Hawaii,[66] Illinois,[67] Massachusetts,[68] and Montana.[69] These provisions are independent of state laws that allow citizens to enforce pollution control statutes.[70]

No state provision is the same as Pennsylvania's Environmental Rights Amendment. While most provide a "right" to the "environment," the adjectival objective – "clean" or "healthful" or "quality" – differs from state to state. For example, Hawaii's and Montana's constitutions aim to afford a "clean and healthful environment,"[71] Illinois' "a right to a healthful environment,"[72] Massachusetts' a "right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment."[73]

2. Global Environmental Constitutionalism

Nearly one-half of countries worldwide have constitutions that include substantive environmental rights like those advanced in *Robinson Township*. Substantive environmental rights are those that recognize a right to some degree of environmental quality, such as a right to an 'adequate,' 'clean,' 'healthy,' 'productive,' 'harmonious,' or 'sustainable' environment. Moreover, environmental rights have been recognized as a component of non-environmental substantive rights, such as the right to life.[74]

Since the turn of the millennium, about two dozen countries have adopted new or amended substantive environmental rights provisions in their constitutions, including Armenia, Bolivia, Ecuador, Dominican Republic, France, Guinea, Hungary, Jamaica, Kenya, Maldives, Madagascar, Montenegro, Myanmar, Nepal, Rwanda, Serbia, South Sudan, Sudan and Turkmenistan. At this writing, environmental constitutionalism is under consideration in several other countries, including Egypt, Fiji, Iceland, New Zealand, Sri Lanka and Tunisia, and is bound to find new national homes into the future.

More and more courts around the globe are engaging environmental constitutionalism that is manifested in much the same way as the Environmental Rights Amendment. Consequently, courts from around the globe are likely to turn to *Robinson Township* for guidance.

Conclusion

Robinson Township is a potentially important corrective to judicial under-engagement of environmental constitutionalism. Within Pennsylvania, the case forces lawyers and decision makers to closely examine the text of Article I, Section 27 and treat it as constitutional law. It is particularly noteworthy that the decision was issued in the context of a significant social, economic, and environmental controversy—Marcellus Shale development. The plurality opinion

is also a powerful vindication of constitutional environmentalism and may represent a significant step forward for American constitutional environmental rights in particular. The case may have far-reaching implications in other states and countries. The Pennsylvania Supreme Court attended to almost every significant issue that courts around the world are reckoning with, including standing, self-execution, interpretation of constitutional provisions, the public trust doctrine, and enforcement of constitutional environmental provisions. And it has done so in a way that takes seriously the environmental interests of the general public and of future generations. It is likely that other courts within and outside Pennsylvania will take notice, even though these views did not command a majority of the Pennsylvania court.

---

[1] Robinson Township v. Commonwealth of Pennsylvania, ___ A.3d ___, 2013 WL 6687290 (Pa. 2013).
[2] Robinson Township v. Commonwealth of Pennsylvania, 52 A.3d 463 (Pa. Cmwlth. 2012), available at: http://blogs.law.widener.edu/envirolawcenter/files/2013/12/RobinsonTp-v.-Commonwealth-CommCt2012.pdf.
[3] The Commonwealth Court stated:

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

312 A. 2d. 86, 94 (Pa. Commw. Ct. 1973), aff'd 361 A.2d 263 (Pa. 1976).
[4] For a more detailed explanation of these two points, *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 DICKINSON L. REV. 693 (1999) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105154) and John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II - Environmental Rights and Public Trust*, 104 DICKINSON L. REV. 97 (1999) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105158). *See also* John C. Dernbach, *Natural Resources and the Public Estate, in* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 683 (Geo. T. Bisel Co., Ken Gormley et al. eds. (2004)).
[5] 2013 WL 6687290 at *6.
[6] *Id.* at *12.
[7] *Id.* at *26.
[8] *Id.* at *38.
[9] *Id.* at *44.
[10] *Id.* at *31.
[11] *Id.* at *34.
[12] *Id.* at *35.
[13] *Id.* at *40.
[14] *Id.* at *41.
[15] *Id.* at *29.
[16] *Id.* at *47.
[17] *Id.* at *56.
[18] *Id.* at *59.
[19] *Id.* at *60.
[20] *Id.* at *62.
[21] *Id.* at *63.
[22] *Id.*

[23] *Id*. at *78.
[24] *Id*. at *79.
[25] *Id*. at *85.
[26] *Id*. at *89.
[27] *Id*. at *56.
[28] Sullivan v. Resisting Environmental Destruction On Indigenious Lands, 311 P.3d 625 (Alaska 2013).
[29] Montana Environmental Information Center v. Department of Environmental Quality, 988 P.2d 1236 (Mont. 1999).
[30] *See, e.g.*, Northern Plains Resource Council v. Montana Board of Land Commissioners, 288 P.3d 169 (Mont. 2012).
[31] Barton H. Thompson, Jr., *Constitutionalizing the Environment, the History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003).
[32] 2013 WL 6687290 at *7.
[33] *Id*. at *58.
[34] *Id*.
[35] *Id*. at *55.
[36] *Id*. at *8.
[37] See *id.* at 34 ("Moreover, as the citizens argue, the constitutional obligation binds all government, state or local, concurrently. Franklin Twp., 452 A.2d at 722 & n.8 (citing Section 27, Court stated that protection and enhancement of citizens' quality of life "is a constitutional charge which must be respected by all levels of government in the Commonwealth")"); id. at *37 ("The plain intent of the [third clause of Article I, § 27] is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people in order to accomplish the purposes of the trust. This includes local government"); id. at *56 ("With respect to the public trust, Article I, Section 27 of the Pennsylvania Constitution names not the General Assembly but "the Commonwealth" as trustee. We have explained that, as a result, all existing branches and levels of government derive constitutional duties and obligations with respect to the people"); id. ("Act 13 thus commands municipalities to ignore their obligations under Article I, Section 27").
[38] *Id*. at *55.
[39] *Id*. at *32.
[40] Id at *33.
[41] *Id*.
[42] *See id*. at *36.
[43] *Id*. at 36.
[44] *Id*.
[45] *Id*. at *38.
[46] *Id*. at *39.
[47] *Id*. at *40.
[48] *Id*. at *39.
[49] *Id*. at *58.
[50] *See id.* at *79.
[51] *Id*. at *81.
[52] *See* note 3, *supra*, and accompanying text.
[53] *See generally* James R. May and Erin Daly, *Global Constitutional Environmental Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury and Erika J. Techera, eds., Routledge, 2012); James R. May and Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 ORE. REV. INTL. L. 365 (2010); James R. May and Erin Daly, *New Directors in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, IUCN ACADEMY OF ENVIRONMENTAL LAW E-JOURNAL 1 (2011); James R. May and Erin Daly, *Constitutional Environmental Rights Worldwide, in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW (James R. May, ed., ABA Publishing/Environmental Law Institute, 2011); James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113 (2006).
[54] *See generally*, Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?, 34* ENVTL. L. REP. 11013 (2004).

[55] R.I. Const. of 1842, art. I, § 17. For a thorough history of the evolution of Rhode Island's Constitution, *see Kevin* Leitao, Rhode Island's Forgotten Bill of Rights, 1 ROGER WILLIAMS U.L. REV. 58 n.68 (1996):.
[56] N.Y. Const. art. XIV, § 1. *See, e.g.*, Assn. for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 242 (1930) (timber harvesting inconsistent with "Forever Wild" portion of New York State Constitution).
[57] 'Environmental and Natural Resources Provisions in State Constitutions.' 22 J. LAND RES. & ENVTL. L. 74 (2002). The categories are: (1) public land acquisition, preservation or management, (2) public ownership of land and other resources, (3) sovereignty, (4) the balance of use and development, (5) school trust doctrine, (6) public trust doctrine, (7) takings or eminent domain, (8) access to water, (9) allocation of water, (10) water development and reclamation, (11) water resource protection, (12) mining and mineral rights, (13) fish and wildlife, (14) fishing rights, (15) hunting and fishing restrictions, (16) rights of way, (17) timber and forest management, (18) nuclear power, and (19) agriculture. Id. at 74-75.
[58] Id. at 75. The other manifestations include provisions respecting (1) legislative protection, (2) agency authority, (3) general financing, (4) taxing authority, (5) bonding authority, (6) funds and trust accounts, (7) educational programs, and (8) private liability. Id.
[59] La. Const. art. IX, § 1 ("The natural resources of the state including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.")
[60] Mich. Const. art. IV, § 51 ("The legislature shall pass suitable laws for the protection and promotion of the public health.")
[61] Ohio Const., art VIII, §2 ("environmental and related conservation, preservation, and revitalization purposes … are proper public purposes of the state and local governmental entities and are necessary and appropriate means to improve the quality of life and the general and economic well-being of the people of this state …")
[62] S. Car. Const. art. XII § 1 ("The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern.")
[63] Va. Const. art. XI, § 1 ("To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, its public lands, … Further it shall be the Commonwealth's policy to protect the atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.")
[64] Of course, whether to categorize a constitutional provision as addressing the environmental or resources involves some measure of subjectivity.
[65] *See* Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 181 (1993) (noting amendments to state constitutions include "those granting citizens the right to a healthful environment; public policy statements concerning preservation of natural resources; financial provisions for environmental programs; and clauses that restrict the environmental prerogatives of state legislatures.") *See also*, Edith Brown Weiss, et al. INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 416 (Aspen Law & Business 1998) (identifying Illinois, Hawaii, California, Florida, Massachusetts, Montana, Pennsylvania, Rhode Island, and Virginia as embedding environmental rights).
[66] Haw. Const. art. XI, § 9.
[67] Ill. Const. art. XI, § 2.
[68] Mass. Const. art. XLIX.
[69] Mont. Const. art. II, § 3.
[70] *See, e.g.*, Dernbach, *supra* note 4.
[71] Haw. Const. art. XI, § 9 ("Each person has the right to a clean and healthful environment."); Mont. Const. art. II § 3 (guaranteeing "right to clean and healthful environment.").
[72] Ill. Const. art. XI, § 2 ("Each person has the right to a healthful environment.")
[73] Mass. Const. art. XLIX ("The people shall have the right to clean air and water.")
[74] *See, e.g.*, Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TULANE ENVTL. L. J. 65 (2002).