THE POTENTIAL MEANINGS OF A CONSTITUTIONAL PUBLIC TRUST

BY

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The Pennsylvania Supreme Court's 2013 decision in Robinson Township v. Commonwealth (Robinson Township) *has lawyers looking at the state's constitutional Environmental Rights Amendment (Amendment)—including its public trust provision—as if it magically appeared in the state constitution on the date of the decision. The Amendment had been so thoroughly buried by judicial decisions that most lawyers had never given the text much thought. This Article describes the origin of the Amendment, the two primary cases decided shortly after it was adopted that effectively buried the Amendment, and the* Robinson Township *decision. It then surveys the wide range of issues that have arisen in the courts and other adjudicatory bodies in the immediate aftermath of* Robinson Township *and provides suggestions for how some of them should be resolved. Taken together, these cases provide a glimpse of what constitutionally protected environmental rights, including a constitutional public trust, could mean if the Pennsylvania courts continue to treat the Amendment as constitutional law.*

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I. INTRODUCTION

On December 19, 2013, the Pennsylvania Supreme Court held several provisions of the state's recently adopted Marcellus shale gas legislation, known as Act 13,[1] to be unconstitutional.[2] A plurality of the court based its decision on article I, section 27 (section 27) of the state's constitution,[3] the Environmental Rights Amendment (Amendment). Section 27 creates two public rights in the environment.[4] One is a right to clean air, pure water, and the preservation of certain environmental values.[5] The other is a right, as beneficiaries of a public trust in "public natural resources," to have those resources conserved and maintained for the benefit of present and future generations.[6] This case, *Robinson Township v. Commonwealth of Pennsylvania* (*Robinson Township*), represents the first time since the Amendment was adopted in 1971 that any Pennsylvania court—even a plurality—has used section 27 to hold legislation to be unconstitutional.[7]

1 58 PA. CONS. STAT. ANN. §§ 2301–3504 (West 2014).

2 Robinson Twp. v. Commonwealth (*Robinson Township*), 83 A.3d 901 (Pa. 2013).

3 PA. CONST. art. I, § 27.

4 *Id.*

5 *Id.*

6 *Id.*

7 John C. Dernbach et al., Robinson Township v. Commonwealth of Pennsylvania*: Examination and Implications* 9 (Widener Law Sch., Legal Studies Research Paper Series No. 14-10, 2014) [hereinafter Dernbach et al., *Examination and Implications*], *available at* http://ssrn.com/abstract=2412657.

Section 27 had been so thoroughly buried by earlier court decisions that Pennsylvania lawyers, even lawyers deeply experienced in environmental law, are now looking at the Amendment as if "for the first time."[8]

The *Robinson Township* case is already—and properly—being described as a landmark decision.[9] Not only did Chief Justice Ronald Castille's plurality opinion resurrect the virtually dormant Amendment; it did so using conventional tools of constitutional interpretation—its text and purpose.[10] The plurality also focused on something that judges and lawyers had overlooked for decades: the Amendment is in article I of the Pennsylvania constitution—the Declaration of Rights, which is Pennsylvania's version of the U.S. Constitution's bill of rights.[11] More broadly, the explanation of the constitutional basis of environmental rights is more detailed, comprehensive, and thorough than perhaps any other judicial decision to date. That means its persuasive value, both in and out of Pennsylvania, and even outside the United States, could be substantial. In an interview shortly before he left the court, Chief Justice Castille described *Robinson Township* as his legacy decision.[12]

At the same time, *Robinson Township* is a plurality decision, not a majority decision.[13] While a fourth justice provided the basis for the holding that parts of Act 13 are unconstitutional, that justice based his reasoning on substantive due process, not environmental rights.[14] Moreover, only one of the three original justices who signed the plurality opinion was still on the court at the beginning of 2015.[15] Chief Justice Castille left the court at the end of 2014 because he had reached Pennsylvania's mandatory retirement

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8 T. S. ELIOT, FOUR QUARTETS 39 (1943):

> We shall not cease from exploration
> And the end of all our exploring
> Will be to arrive where we started
> And know the place for the first time.

The modern environmental movement in Pennsylvania and elsewhere began to unfold more than four decades ago about the time that the Amendment was adopted. Yet its text has been more or less ignored for nearly all of that period. In an important sense, lawyers have now "arrived where we started," and are understanding the Amendment as if it were new.

9 Paul Stockman, Robinson Township v. Commonwealth*: What Does It Mean for Oil and Gas Development and Land Use Regulation?*, 34 WESTLAW J. ENVTL. 1, 1 (2014), *available at* http://www.mcguirewoods.com/news-resources/publications/WLJ-Commentary-Stockman.pdf.

10 *Robinson Township*, 83 A.3d 901, 944, 950 (Pa. 2013).

11 *Id.* at 913.

12 Matt Fair, *Retiring Pa. Chief Justice Pegs Legacy on Fracking Decision*, LAW360, Dec. 19, 2014, http://www.law360.com/articles/606453/retiring-pa-chief-justice-pegs-legacy-on-fracking-decision (last visited Apr. 17, 2015).

13 *See Robinson Township*, 83 A.3d at 913.

14 *Id.* at 1000–01.

15 P.J. D'Annunzio, *After 21 Years on Pennsylvania Supreme Court Bench, Ronald D. Castille Retires*, PITTSBURGH POST-GAZETTE, Jan. 6, 2015, http://www.post-gazette.com/business/legal/2015/01/06/After-21-years-on-Pennsylvania-Supreme-Court-bench-Ronald-D-Castille-retires/stories/201501060054 (last visited Apr. 17, 2015) (noting that in this interview, Castille described *Robinson Township* as one of the court's three most important decisions during his tenure).

age.[16] Another justice who joined that opinion retired early due to a scandal.[17] Plurality opinions can, of course, provide the basis for majority opinions in future cases. But then again, they might not.

Yet in a small but significant number of cases, the *Robinson Township* decision is already being used to challenge a variety of state or local decisions.[18] Pennsylvania is thus experiencing an important constitutional moment. The potential for a more robust use of environmental rights and public trust is so near at hand as to be within reach, tangible, and capable of being pictured and understood in specific cases. Yet cynics say that this potential is perhaps still impossibly far away, and that the Amendment is destined to be buried again.[19] It is more likely that this potential will be realized to some degree over time as different cases raising different issues are decided.

What is clear, however, is that the reinvigoration of section 27 raises a multitude of questions about the meaning and scope of environmental rights, including public trust. This Article surveys these issues, based on cases that have been brought, many of which have not been fully resolved. Its purpose is to provide a sense of what actual constitutional environmental rights could mean, based to some degree on real experience.

Part II of this Article describes the legal landscape in Pennsylvania prior to *Robinson Township*. It provides an overview of the history and adoption of the Amendment as well as key court decisions decided shortly afterward that effectively buried it for decades. Part III explains the *Robinson Township* decision, with particular attention to how the plurality applied section 27 to the legislation that was challenged.

Parts IV through VI explain three different ways in which the meaning and application of *Robinson Township* is being tested, particularly through litigation, as of early 2015. Part IV discusses litigation concerning the rights expressly stated in section 27, as well as the government's implied duty to consider impacts on those rights prior to making a decision. These issues are at the center of many current disputes. Part V discusses litigation in which public trust duties are being asserted, not based upon the text of section 27, but rather based upon private trust law. These include, for example, the trustee's fiduciary duties of loyalty, prudence, and impartiality toward the beneficiaries of the trust, as well as standing to demand trustee accounting.[20]

16 *Id.*

17 Chris Brennan, *Seamus McCaffery Retiring from PA Supreme Court*, PHILA. DAILY NEWS, Oct. 27, 2014, http://www.philly.com/philly/blogs/cityhall/Seamus-McCaffery-retiring-from-PA-Supreme-Court.html (last visited Apr. 17, 2015).

18 *See infra* Parts IV–VI.

19 *See, e.g.*, David Mandelbaum, *Pennsylvania Environmental Rights Amendment: Back to Payne v. Kassab?*, NAT'L L. REV., Jan. 8, 2015, http://www.natlawreview.com/article/pennsylvania-environmental-rights-amendment-back-to-payne-v-kassab (last visited Apr. 17, 2015) (noting that a recent state court opinion refused to adopt the *Robinson Township* plurality's test for determining constitutionality under the Amendment). *But see infra* notes 295–298 and accompanying text (explaining that the court in that case actually applied the plurality's constitutional test).

20 *See infra* notes 360–361 and accompanying text.

Part VI discusses various supporting roles that section 27 has successfully played in litigation over the past four decades—confirmation and extension of the police power, guidance in statutory interpretation, and constitutional authority for laws whose constitutionality has been challenged on other grounds. These roles were not directly addressed in *Robinson Township*, but are likely to continue to be even more important in its wake.

Taken together, these cases provide a sense of the broad range of potential applications of section 27. As between the two rights stated in section 27—broad environmental rights and rights as a public trust beneficiary—public trust is getting the most attention from both litigants and courts.[21] In these cases, most of the individuals and organizations challenging particular governmental actions are focused on the alleged adverse effects of the particular actions on the places where they live, work, and engage in outdoor recreation. The cases also suggest that while section 27 may occasionally play a major role in state policy, as it did in *Robinson Township*, it is also likely to play a role filling gaps in the state's environmental and land use statutes and regulations. One can also begin to glimpse another and broader role for section 27 as the results of specific cases get translated into new law and policy, particularly laws and policies fleshing out the government's duty to conserve and maintain public natural resources. The Amendment is likely to move from the periphery of state law and policy closer to the center. Finally, as lawyers and judges gain a better understanding of the history and the text of section 27, and how it applies, it will become increasingly implausible to return to the legal landscape that existed prior to *Robinson Township*.

Understanding this range of potential applications is important for several reasons. While there is considerable literature on the importance of constitutional environmental law at the state and national levels,[22] the number of cases decided under those provisions is relatively small.[23] It is thus difficult to get a sense of the broad range of meanings that an environmental constitutional provision could have. For lawyers, judges, and decision makers in Pennsylvania, this sense of the bigger picture can provide context for understanding the effect of any particular situation or decision.

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21 *See infra* Part II.B.

22 JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2014) (explaining why environmental protection provisions are being placed in national constitutions, the various forms these provisions take, and the extent to which they are being enforced judicially); EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013) (explaining importance of state constitutional rights for education, workers, and environmental protection).

23 John C. Dernbach et al., *Examination and Implications*, *supra* note 7 (describing *Robinson Township* as "a potentially important corrective to judicial under-engagement of environmental constitutionalism"); Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 896 (1996) (stating that "environmental policy provisions [in state constitutions] have played an increasingly marginal role in those states where they are found" because courts have "refused to use" them "as a general means of regulating the specific actions of governmental or private entities").

For those in jurisdictions outside of Pennsylvania that also have constitutional environmental provisions, this sense can assist in providing legal advice or making decisions under those provisions. For those considering new or different environmental provisions in other jurisdictions, an understanding of the range of potential meanings can guide the way in which these provisions are drafted and explained. Because most of the cases being brought subsequent to *Robinson Township* involve the public trust clause of the Amendment, moreover, these cases provide an empirical basis for understanding how robust a constitutional public trust can be.

In addition, Pennsylvania has had a sophisticated environmental regulatory program for several decades.[24] State officials have often been able to legitimately claim that particular Pennsylvania regulatory programs are among the most stringent or innovative in the country.[25] Pennsylvania thus provides a useful way of understanding how, and to what extent, constitutionally based environmental rights claims, including those based on public trust, can add value in a sophisticated and well-developed legal regime for environmental protection.

Finally, the *Robinson Township* plurality emphasized that the Amendment, properly understood and applied, should have the effect of promoting sustainable development.[26] Sustainable development is a normative conceptual framework for integrating social and economic development with environmental protection in a way that fully realizes both.[27] A major challenge in realizing the transition to sustainability is to more fully and effectively convert that framework into law.[28] Pennsylvania's experience applying *Robinson Township* will test the effectiveness of one legal tool—the Amendment—in fostering sustainable development.

II. LEGAL LANDSCAPE PRIOR TO *ROBINSON TOWNSHIP*

There has always been a large gap between the promise of section 27 and how the courts actually applied it.[29] There can be no serious doubt that

24 John C. Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How "Cooperative Federalism" Can Make State Regulatory Programs More Effective*, 19 U. MICH. J.L. REFORM 903, 910–11 (1986).

25 *See, e.g.*, John C. Dernbach, *The Other Ninety-Six Percent*, ENVTL. F., Jan.–Feb. 1993, at 10 (Widener Law, Legal Research Paper Series No. 13-20, 1993), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2212356 (explaining value and importance of Pennsylvania's then newly adopted regulations for residual waste—industrial waste that is not legally hazardous—which constitutes 96% of all industrial waste that was then generated); Dernbach, *supra* note 24, at 906 (1986) (explaining how the Federal Surface Mining Control and Reclamation Act created Pennsylvania's surface coal mining regulatory program, which many considered to be a national model).

26 *Robinson Township*, 83 A.3d at 958, 963, 978, 980, 981.

27 JOHN C. DERNBACH ET AL., ACTING AS IF TOMORROW MATTERS: ACCELERATING THE TRANSITION TO SUSTAINABILITY 3–7 (2012) (explaining sustainable development).

28 *Id.* at 241–65 (outlining legal changes required to effectuate transition to sustainability).

29 For a pre-*Robinson Township* analysis of this gap, and an explanation of how the gap could be addressed, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section*

section 27 was written and intended to create public environmental rights against the government, much in the manner of any other rights in the state's Declaration of Rights.[30] Yet state courts rather quickly turned section 27 entirely into a grant of power to government, rather than a limitation on governmental power.[31] With that understanding, they decided that section 27 is not self-executing; that is, it requires implementing legislation in order to be effective.[32] In addition, when the legislature does act, the courts held, a three-part balancing test is to be applied, rather than the text of the Amendment.[33]

A. Article I, Section 27 As Written

Section 27 was placed in the constitution at the height of the modern environmental era to offer basic protections to Pennsylvania citizens that can withstand changing political times.[34] It was placed in article I of the state constitution to provide basic rights to Pennsylvania citizens—rights that would be equal to the other rights contained in the state's Declaration of Rights.[35] None of this was hidden or subtle; it all occurred in full public view.[36]

Amendments to the Pennsylvania constitution must be approved by each house of the state General Assembly in two successive legislative sessions, and then approved by a majority of voters in a public referendum.[37] Both houses of the Pennsylvania General Assembly adopted the Amendment in the 1969–70 and 1971–72 legislative sessions.[38] Before doing so, however, they amended it twice because they understood that its text mattered and they wanted to get it right.[39] Then the Amendment was subject to a public referendum.[40] On May 18, 1971, the public approved it by a four–to–one vote.[41]

27, 103 DICK. L. REV. 693, 696–97 (1999) [hereinafter Dernbach, *Interpretive Framework*]; John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 101 (1999) [hereinafter Dernbach, *Environmental Rights and Public Trust*].

30 *See infra* note 49 and accompanying text.

31 *See infra* Part II.B.

32 *See infra* notes 79–80 and accompanying text.

33 *See infra* note 84 and accompanying text.

34 *See infra* note 41 and accompanying text.

35 John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania* 31 (Widener Law Sch., Legal Research Paper Series No. 14-18, 2014) [hereinafter Dernbach & Sonnenberg, *Legislative History*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660 (WIDENER L. J. forthcoming 2015).

36 *See id.* at 70–71.

37 PA. CONST. art. XI, § 1.

38 Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 1.

39 Two amendments were made as section 27 went through the legislative process. *See infra* notes 134, 345 and accompanying text.

40 Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 70–71.

41 *Id.*

As finally adopted, section 27 provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[42]

Why a constitutional amendment, instead of some kind of legislation? Franklin Kury, a young lawyer and legislator from Sunbury who was elected to the Pennsylvania House of Representatives in 1968 on an environmental protection platform, was the author and chief advocate for the Amendment. He later explained his decision as follows: "Any student of history . . . knows that political tides rise and fall. What one legislature passes another may repeal or amend. I was well aware that the environmental tide in Pennsylvania was near its crest. This is the time, I concluded, to lock into the constitution basic environmental protections."[43] Kury's placement of the proposed amendment in article I was also no accident. When he first presented the amendment, on April 21, 1969, he said:

> Mr. Speaker, I rise to introduce a natural resource conservation amendment to Pennsylvania's declaration of rights. I do so because I believe that the protection of the air we breathe, the water we drink, the esthetic qualities of our environment, has now become as vital to the good life—indeed, to life itself—as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and of privacy.[44]

Article I of the state constitution is Pennsylvania's Declaration of Rights, which specifically provides rights to property,[45] religious freedom,[46] freedom of speech,[47] and security from unreasonable searches and seizures.[48] In fact, in the very same referendum in which the voters of Pennsylvania approved section 27, they also approved another amendment, article I, section 28, which prohibits discrimination based on sex.[49] Section 27 could have been placed, in some form, in other articles of the state constitution involving the authority of the legislative or executive branches.[50] In fact,

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42 PA. CONST. art. I, § 27.

43 FRANKLIN L. KURY, CLEAN POLITICS, CLEAN STREAMS, A LEGISLATIVE AUTOBIOGRAPHY AND REFLECTIONS 69 (2011).

44 Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 6–7. The legislative history, in fact, is replete with references to the importance of section 27's placement in article I. *See, e.g.*, *id.* at 14–15, 66–68.

45 PA. CONST. art. I, § 1.

46 *Id.* art. I, § 3.

47 *Id.* art. I, § 7.

48 *Id.* art. I, § 8.

49 *Id.* art. I, § 28; Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 70–71.

50 The most obvious alternatives are articles II or III (The Legislature and Legislation), article IV (The Executive), article VIII (Taxation and Finance, where the other environmental

most states with environmental provisions in their state constitutions have them in places other than their bill of rights.[51] Pennsylvania chose a different path.[52]

Section 27 provides the public with two basic kinds of rights. 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."[53] The second is a right, as the beneficiary of a constitutional trust in "public natural resources," to have the Commonwealth "conserve and maintain" those resources for the benefit of present and future generations.[54] These are actual constitutional rights.[55] They cannot be denied, altered, or abridged by the state; and they are not mere considerations or statements of aspiration.[56] As section 25, which was in the state constitution before section 27 was adopted, states: "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."[57] That means that the two environmental rights stated in section 27 expressly operate as limits on governmental authority.

Constitutionalizing public rights, of course, means that these rights trump inconsistent statutes and regulations.[58] These rights have the highest priority or status that our legal system can provide them; they create a legal bulwark against incursion by the legislative or executive branches.[59] Constitutional rights thus "help determine the nature and outcome of future legislative and administrative battles."[60] Because a constitution is harder to amend than legislation or regulations, constitutionalizing public rights also makes them a more permanent part of the legal system.[61] In addition, because of their enduring nature and their higher legal status, public rights

provisions (sections 15 and 16) in the Constitution are located), or even article IX (Local Government). PA. CONST. arts. II, III, IV, VIII, IX.

51 *Robinson Township*, 83 A.3d 901, 962 (Pa. 2013); *see also* James R. May & William Romanowicz, *Environmental Rights Embedded in State Constitutions*, *in* PRINCIPALS OF CONSTITUTIONAL ENVIRONMENTAL LAW 305 (James R. May ed. 2013).

52 *See Robinson Township*, 83 A.3d at 962 n.50 (comparing Pennsylvania's amendment to that of New York).

53 PA. CONST. art. I, § 27.

54 *Id.*

55 *Id.*

56 *See Robinson Township*, 83 A.3d at 951–52 (discussing how the rights in section 27 are not meaningless and how section 27 imposes an obligation on the government to protect such rights).

57 PA. CONST. art. I, § 25 (emphasis added).

58 For additional explanation of the value of constitutionalizing environmental rights, see GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 22.

59 *See* AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 2 (4th ed. 2009) (discussing how a "state's legal rules must comport with both the state and federal constitutions").

60 Thompson, *supra* note 23, at 920; *see also* ZACKIN, *supra* note 22, at 173–86 (explaining that state constitutional environmental amendments were intended to provide a basis for litigation and also to influence legislation).

61 *Compare* PA. CONST. art. III, § 6 (establishing amendment process for Pennsylvania laws), *with* art. XI (establishing amendment process for Pennsylvania constitution).

of the kind embodied in a bill of rights tend to more easily become part of the broader public discourse and public values over the long term than provisions in statutes or regulations.[62] They thus foster the values they embody, in this case public rights to a quality environment and to have public natural resources conserved and maintained. In the public trust context, constitutionalizing rights resolves the question of whether longstanding public trust rights, like the right of passage on navigable waterways, can be more broadly applied.[63] The broad public trust language in article I, section 27 has the effect of "[l]iberating the [p]ublic [t]rust [d]octrine from [i]ts [h]istorical [s]hackles."[64]

The public trust language in section 27, moreover, has a long and venerable history and meaning in law.[65] Its foundational ideas are rooted in private trust law, in which a trustee holds specific assets (the trust corpus) owned by others (beneficiaries), subject to specified responsibilities for the care of the trust corpus.[66] In the public trust, the government as trustee is obliged to hold certain natural resources for public use and benefit.[67] Section 27 is consistent with this classic public trust framework; it specifically states that the state is the trustee for public natural resources, and imposes a duty on the state to conserve and maintain those resources. This is no small thing because these publicly held natural resources—on which people rely—are

62 The application of the longstanding due process and equal protection clauses of the U.S. Constitution to same-sex marriages is a recent example. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013); *see also* ZACKIN, *supra* note 22, at 186–89 (explaining another purpose of state constitutional environmental amendments as providing the basis for a public movement on behalf of the environment); Erin Daly & James R. May, *Robinson Township: A Model for Environmental Constitutionalism*, WIDENER L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442367. According to Daly and May:

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

Id. at 1–2.

63 Thompson, *supra* note 23, at 866.

64 Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 185 (1980) [hereinafter Sax, *Historical Shackles*].

65 The classic explanation of the public trust doctrine is Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter Sax, *Public Trust Doctrine*]. *See also* Robert Broughton, *Analysis of HB 958*, *The Proposed Pennsylvania Environmental Declaration of Rights*, LEGIS. J.–HOUSE, April 14, 1970, at 2273, *reprinted in* Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 32 (explaining that "one can do little better" than this article "[f]or a thorough exposition of the public trust doctrine").

66 Dernbach, *Environmental Rights and Public Trust*, *supra* note 29, at 118–27.

67 Sax, *Public Trust Doctrine*, *supra* note 65.

under constant threat of being turned over to private ownership,[68] diverted for another use,[69] or polluted or degraded.[70] During the legislative process that led to adoption of section 27, Franklin Kury explained the Amendment as necessary to address such threats.[71] Finally, this understanding—the original understanding—of section 27 deserves respect because it is the meaning that was assigned to it by the people who wrote and voted for it.[72] Much of the controversy about originalism at the federal level involves claims that courts expanded constitutional rights that were originally drawn more narrowly.[73] Yet as Justice Antonin Scalia has pointed out, courts can, if guided by their views of "the 'fundamental values' of the current society," use those views not only "to 'expand on' freedoms" but to "contract them as well."[74] The latter is exactly what happened to section 27.

B. Article I, Section 27 As Applied by Pennsylvania Courts Before Robinson Township

Nearly all of this original understanding was essentially lost for the last four decades, and most of the damage was done in two cases decided shortly after section 27 was enacted.[75] The cases understood section 27 as a grant of power to the government to engage in environmental regulation, not as a limit on government authority.[76] Most of the case law could be summarized in two propositions: 1) the Amendment applies only if the General Assembly says so; and 2) if the General Assembly says so, a three-part balancing test applies instead of the text of the Amendment.[77]

The first significant case under the Amendment was *Commonwealth v. National Gettysburg Battlefield Tower, Inc.* (*Gettysburg Tower*).[78] The case

68 Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) (invalidating legislative grant of bottomland of Lake Michigan to private party). Professor Sax described this case as "the lodestar in American public trust law." Sax, *Public Trust Doctrine*, *supra* note 65, at 489.

69 *E.g.*, Paepcke v. Public Bldg. Comm'n of Chicago, 263 N.E.2d 11 (Ill. 1970) (holding that conversion of part of public park to school and recreational facilities was authorized by statute).

70 Sierra Club v. Dep't of Interior, 376 F. Supp. 90 (N.D. Cal. 1974); Sierra Club v. Dep't of Interior, 398 F. Supp. 284 (N.D. Cal. 1975) (invoking public trust doctrine to protect redwoods from erosion and destruction).

71 *E.g.*, Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 66 (noting that the Amendment "would go a long way toward tempering any individual, company, or governmental body which may have an adverse impact on our natural or historic assets").

72 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (discussing how an originalism approach requires "immersing oneself in the political and intellectual atmosphere of the time").

73 *Id.* at 855.

74 *Id.*

75 *See* Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc. (*Gettysburg Tower*), 311 A.2d 588, 594 (Pa. 1973); Payne v. Kassab, 312 A.2d 86, 97 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

76 *Gettysburg Tower*, 311 A.2d at 594; *Payne*, 312 A.2d at 97.

77 Robinson Twp. v. Commonwealth, 52 A.3d 463, 488–89 (Pa. Commw. Ct. 2012); *Payne*, 312 A.2d at 94.

78 *Gettysburg Tower*, 311 A.2d at 596.

involved a challenge by the Attorney General to the construction of an observation tower on private land outside of Gettysburg Battlefield National Park.[79] No local or state governmental approval was required to construct the tower.[80] The state did not claim that it was attempting to conserve and maintain public natural resources.[81] Rather, the state focused on the Amendment's first clause, arguing that the tower's visibility throughout the Gettysburg Battlefield would interfere with the public right to preservation of the natural, scenic, historic, and esthetic values of that environment.[82] The public's right to the preservation of those values, the Attorney General claimed, imposed a substantive limitation on such private development.[83] The Attorney General's claim under the Amendment's first clause, against a private project on private land when no state or local governmental approval is required, would not ordinarily be brought or decided under article I. While the public trust clause imposes an affirmative responsibility on the government to "conserve and maintain" public natural resources, there is no comparable duty in the Amendment's first clause. Thus, it is better to understand the first clause as a limit on governmental authority.[84] A court might thus have justifiably dismissed this case for failure to state a claim upon which relief could be granted. That is not, of course, what happened.

The Adams County Court of Common Pleas decided that article I, section 27 is self-executing because, among other reasons, provisions in the state's bill of rights had previously been held to be self-executing.[85] The common pleas court also denied the requested injunction, ruling that the state "failed to show by clear and convincing evidence that the natural, scenic, historic, and esthetic values of the Gettysburg area will be irreparably harmed by the construction of the proposed tower on the proposed site."[86] The court reviewed evidence on each of four values in the Amendment's first clause, and found substantial existing development in Gettysburg, significant educational value of the tower for many visitors, a prior agreement between the National Park Service and the tower developer for access to the site, and negligible adverse impact on most park visitors.[87] The government lost on appeal to both the commonwealth court and the Pennsylvania Supreme Court.[88] Still, the commonwealth court held that

79 *Id.* at 589.

80 *Id.* at 590.

81 *Id.* at 591.

82 *Id.*

83 *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 ADAMS COUNTY L.J. 75, 83–86 (1971).

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

85 *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, *supra* note 83, at 79–80 (citing Erdman v. Mitchell, 207 Pa. 79 (1903)).

86 *Id.* at 86–87.

87 *Id.* at 83–86.

88 Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc. (*Nat'l Gettysburg Battlefield Tower, Inc.*), 302 A.2d 886, 894–95 (Pa. Commw. Ct. 1973); *Gettysburg Tower*, 311 A.2d 588, 595 (Pa. 1973).

section 27 is self-executing.[89] While the Pennsylvania Supreme Court affirmed the commonwealth court's decision, there was no majority opinion on whether section 27 is self-executing.[90] This decision established the commonwealth court's opinion as binding precedent on the question of whether the Amendment is self-executing.[91] For reasons that appear to be outside the realm of precedent, that point has been lost on subsequent courts, which have held that section 27 is not self-executing; that is, that it does not apply unless the state legislature, says so.[92] The most obvious explanation is that the case led lawyers and judges to view section 27 as entirely a grant of governmental authority, and not as a limitation on that authority.

The attorney general's claim and the courts' failure to distinguish between the two clauses of the Amendment also contributed to this result. While the case was brought under the Amendment's first clause, the commonwealth court conflated the two clauses to conclude that the government has an affirmative duty to enforce the rights stated in the first clause:

> [U]niquely among the Sections of Article I, Section 27 confers upon the Commonwealth a definite status and imposes upon it an affirmative duty. The State is made trustee of the rights of the people in the enumerated values of the environment and of natural resources, and it is directed to conserve and maintain those values and resources. Section 27 is, we conceive, more than a declaration of rights not to be denied by government; it establishes rights to be protected by government. Indeed, the nature of those rights suggests the different role of government.[93]

The Supreme Court understood the Amendment in the same way. The claim that the government could use the Amendment's first sentence against private property owners on their own land in the absence of any need for governmental approval, in fact, led two justices to say that the Amendment is not self-executing:

> After all, 'clean air,' 'pure water' and 'the natural, scenic, historic and esthetic values of the environment,' have not been defined. The first two, 'clean air' and 'pure water,' require technical definitions, since they depend, to some extent, on the technological state of the science of purification. The other values, 'the natural, scenic, historic and esthetic values' of the environment are values which have heretofore not been the concern of government. To hold that the Governor needs no legislative authority to exercise the as yet undefined powers of a trustee to protect such undefined values would mean that individuals could be singled out for interference by the awesome power of the

89 *Nat'l Gettysburg Battlefield Tower, Inc.*, 302 A.2d at 892.

90 *Gettysburg Tower*, 311 A.2d at 595.

91 *Id.*

92 *See, e.g.*, Robinson Twp. v. Commonwealth, 52 A.3d 463, 488–89 (Pa. Commw. Ct. 2012), *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013).

93 *Nat'l Gettysburg Battlefield Tower, Inc.*, 302 A.2d at 892.

> state with no advance warning that their conduct would lead to such consequences.[94]

The first and second clauses of the Amendment, however, are analytically distinct.[95] In addition to involving different governmental duties, they also protect different (but overlapping) things: the first clause protects air, water, and certain values in the environment; the second protects "public natural resources." It is thus improper to conflate them. The government's claim under the Amendment against a private property owner has nonetheless led lawyers and judges who read this case to see the Amendment as an authorization of governmental power.

The second case is *Payne v. Kassab* (*Payne*),[96] which involved a challenge to a state agency decision, not a private decision. The case was based in part on a claim that a street widening project in Wilkes-Barre violated the commonwealth's public trust obligation under section 27 by converting half an acre of a public park (about 3% of the park's area) to a street for a street widening project.[97] In deciding the case, the commonwealth court stated that judicial review of such decisions "must be realistic and not merely legalistic."[98] It then formulated a three-part balancing test that has come to function as a substitute for the actual text of section 27:

> The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[99]

The court applied this test to the project in question and found compliance with the three-part test. The Pennsylvania Supreme Court affirmed. By prefacing the test with a statement that judicial review must be "realistic" rather than "legalistic," the commonwealth court all but stated that it was substituting its own rule for that stated in the constitution.

Indeed, the *Payne* test has come to be the "all-purpose test for applying article I, section 27 when there is a claim that the Amendment itself has been violated."[100] That is, when the legislature has decided to implement section

94 *Gettysburg Tower*, 311 A.2d at 593 (opinion of the court by Justice O'Brien, joined by Justice Pomeroy).

95 Dernbach, *Interpretive Framework*, *supra* note 29, at 700–04.

96 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd* 361 A.2d 263 (Pa. 1976).

97 *Id.* at 88.

98 *Id.* at 94.

99 *Id.*

100 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)

27, the courts apply the *Payne* test, not the text of section 27.[101] This is so in spite of the fact that it bears virtually no relationship to the text of section 27.[102] It is a test about the application of governmental authority, not a test based on public rights that would limit that authority. It does not function like a public trust rule functions, and it does not function like other environmental rights function.[103] It is essentially an administrative law test for determining the efficacy of an administrative agency or local government decision.

If one believes that the first cases brought under a new constitutional amendment should educate the courts about the value and importance of the amendment, the challenges to the decisions in both of these two cases were based on weak facts. In *Gettysburg Tower*, the National Park Service, which has primary administrative responsibility for the management of the Gettysburg Battlefield National Park, had originally approved the location of the tower.[104] The evidence put before the trial court showed that the tower would bother some visitors, but that other people visiting the park would appreciate the opportunity to see the entire battlefield from a higher elevation.[105] Even the trial court denied the government's request for an injunction.[106] The *Payne* case involved the loss of only 3% (one half acre) of a public park to a street widening project, with no evident loss in the public values of the park.[107] As a consequence, both courts openly worried that section 27 as written was antidevelopment, threatening to derail otherwise worthy projects based on relatively inconsequential impacts.[108]

But bad facts or not, these two cases supplied most of the law on section 27 for decades. Through it all, Franklin Kury never gave up hope that the Amendment would have a bigger impact.[109] "There is always the potential," he wrote in 2011, "for a future court to apply the amendment in ways that we cannot now imagine."[110]

(quoted in Pa. Envtl. Def. Found. v. Commonwealth (*Pennsylvania Environmental Defense Foundation*), No. 228 M.D. 2012, 2013 WL 3942086, at *8 (Pa. Commw. Ct. Jan. 22, 2013)).

101 *See* Dernbach, *Interpretive Framework*, *supra* note 29, at 696 (noting that *Payne* test "utterly ignores the constitutional text" but is "widely used").

102 *Id.*

103 *See id.* at 714 (discussing the conundrum created for parties seeking to "vindicate environmental rights" by the way that the *Payne* test functions).

104 *Gettysburg Tower*, 311 A.2d 588, 589 (Pa. 1973) (noting that National Park Service later opposed the tower).

105 *Id.* at 590.

106 *Id.*

107 *Payne*, 312 A.2d 86, 88 (Pa. Commw. Ct. 1973).

108 *See* Dernbach, *Interpretive Framework*, *supra* note 29, at 714–16 (discussing how both cases led the courts to interpret section 27 as antidevelopment).

109 FRANKLIN L. KURY, CLEAN POLITICS, CLEAN STREAMS: A LEGISLATIVE AUTOBIOGRAPHY AND REFLECTIONS 72 (2011).

110 *Id.*

III. THE SUPREME COURT'S *ROBINSON TOWNSHIP* DECISION

Pennsylvania's oil and gas industry dates back to 1859, when Edwin Drake drilled the world's first successful oil well in Titusville.[111] The success of Drake and his successors was based on vertical drilling for a pool or concentration of oil or gas in specific rock strata.[112] The state has actively regulated conventional oil and gas drilling for decades.[113] Although it has been long known that the shale strata existing throughout Pennsylvania and other states contain gas, the gas did not exist in pools in that shale. Rather, it was distributed throughout the shale strata. Pennsylvania's most prominent shale strata are known as the Marcellus shale. It wasn't until late 2004, in western Pennsylvania, that the commercial feasibility of extracting natural gas from Marcellus shale was first demonstrated.[114] Extraction became commercially feasible through the use of a combination of techniques: drilling vertically to the shale layer but then horizontally through the shale to expose more of the shale to the well bore; injecting large amounts of water under pressure to shatter the shale and thus capture the gas contained in the rock; and drilling multiple wells from the same drilling pad.[115] In less than a decade, billions of dollars have been expended to produce this gas and transport it to market, and an enormous amount of gas has been produced.[116]

Because the state's 1969 Oil and Gas Act was not written for unconventional gas production, it was necessary to amend the legislation.[117] The General Assembly addressed this issue with Act 13 of 2012, which was intended to create a regulatory structure appropriate for unconventional gas development and also to encourage the industry by establishing a uniform regulatory system.[118] Shortly thereafter, 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 section 27, substantive due process, and other provisions of the Pennsylvania constitution.[119] In July 2013, the commonwealth court dismissed most of these claims but held unconstitutional two provisions of

111 For an environmental history of that time and place, see BRIAN BLACK, PETROLIA: THE LANDSCAPE OF AMERICA'S FIRST OIL BOOM 13–36 (2000).

112 *See, e.g.*, *id.* at 37–59 (discussing the development of the oil industry following Drake's initial strike).

113 *E.g.*, Oil and Gas Act, 58 PA. CONS. STAT. §§ 601.101–.607 (1969).

114 RUSSELL GOLD, THE BOOM: HOW FRACKING IGNITED THE AMERICAN ENERGY REVOLUTION AND CHANGED THE WORLD 227–28 (2014). For an account of the effect of unconventional gas development on people living in a rural area in northern Pennsylvania, see SEAMUS MCGRAW, THE END OF COUNTRY (2011).

115 Beth E. Kinne, *The Technology of Oil and Gas Shale Development*, *in* BEYOND THE FRACKING WARS: A GUIDE FOR LAWYERS, PUBLIC OFFICIALS, PLANNERS, AND CITIZENS 3, 8–10 (Erica Levine Powers & Beth E. Kinne eds. 2013).

116 GOLD, *supra* note 114, at 228.

117 Dernbach et al., *Examination and Implications*, *supra* note 7, at 3.

118 Act of Aug. 13, 2012, 2012 Pa. Laws 87 (codified at 58 PA. CONS. STAT. §§ 2301–3504 (2014)) (amendments to Oil and Gas Act).

119 Robinson Twp. v. Commonwealth, 52 A.3d 463, 463–64 (Pa. Commw. Ct. 2012).

Act 13.[120] In December 2013, Pennsylvania's Supreme Court held unconstitutional three separate provisions of Act 13.[121]

The Pennsylvania Supreme Court's decision in *Robinson Township* changed the legal landscape concerning section 27 in at least three distinct ways. First, it was the first time that section 27 had ever been used (even by a plurality) to hold a statute unconstitutional.[122] Second, it brought attention to a fundamental point that had been more or less lost in decades of litigation—that section 27 is in Pennsylvania's Declaration of Rights.[123] The environmental rights in section 27, the plurality said, are "on par with, and enforceable to the same extent as, any other right reserved to the people in Article I."[124] Third, this case was decided based on the text of section 27 and traditional rules of constitutional interpretation and not the three-part *Payne* test.[125] That may, in fact, be *Robinson Township's* central achievement.

Because plurality opinions do not create binding precedent,[126] the plurality's opinion on section 27 is not binding on other Pennsylvania courts. A future decision by a majority of the Pennsylvania Supreme Court would be needed for that.[127] Still, the plurality opinion is likely to have significant persuasive power, in no small part, because it contains a lengthy, detailed, and thoughtful exposition of the meaning of section 27. The plurality prefaced this exposition by stating:

> 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.[128]

The plurality continued: "The matter now before us offers appropriate circumstances to undertake the necessary explication of the Environmental Rights Amendment, including foundational matters."[129]

The plurality emphasized that the Amendment is located in article I of the Pennsylvania constitution, Pennsylvania's analogue to the U.S. Bill of

120 *Id.* at 464.

121 *Robinson Township*, 83 A.3d 901, 985 (Pa. 2013).

122 Dernbach et al., *Examination and Implications*, *supra* note 7, at 9.

123 *Robinson Township*, 83 A.3d at 948.

124 *Id.* at 953–54.

125 *Id.* at 950–51.

126 Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1070 n.14 (Pa. 2006); Commonwealth v. Sepulveda, 855 A.2d 783, 791 n.12 (Pa. 2004).

127 *See, e.g.*, Commonwealth v. Tilghman, 673 A.2d 898, 903 (Pa. 1996) ("If a majority of the Justices of this Court, after reviewing an appeal before us (taken either by way of direct appeal or grant of allowance of appeal), join in issuing an opinion, our opinion becomes binding precedent on the courts of this Commonwealth.").

128 *Robinson Township*, 83 A.3d at 950.

129 *Id.*

Rights.[130] 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.[131] The plurality explained that the court had not previously had an opportunity to address how section 27 restrains the exercise of governmental regulatory power, and therefore "has had no opportunity to address the original understanding of the constitutional provision."[132]

The plurality treated the Amendment as self-executing, citing the commonwealth court decision in *Gettysburg Tower*.[133] "The Commonwealth's obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations."[134] As the plurality explained, constitutional provisions are self-executing when they impose restrictions on the state as section 27 does.[135]

Constitutional interpretation, the plurality then said, must begin with the plain language of section 27 itself.[136] The first clause establishes two rights in the people, Castille wrote.[137] The first is a right to clean air, pure water, and "to the preservation of natural, scenic, historic and esthetic values of the environment."[138] The second is "a limitation on the state's power to act contrary to this right."[139] These rights bind the state as well as local governments, the plurality explained.[140] In addition, these rights are equal in status and enforceability to any other rights included in the state constitution, including property rights.[141] While the state does not have a duty to enact laws to protect the right in this first clause, it does have a duty to "refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action."[142]

The second and third clauses of section 27, the plurality wrote, involve a public trust.[143] Public natural resources are owned or held in common by the people, including future generations.[144] The state's constitutional public trust responsibility applies to all "public natural resources," whether they are

130 *See id.* at 962.

131 *Id.* at 948.

132 *Id.* at 964.

133 *Id.* at 964–65 & n.52.

134 *Id.* at 974.

135 *Id.* at 974–75 (citing *Payne*, 361 A.2d 263, 272 (Pa. 1976) and Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 353–54 (1993)).

136 *Id.* at 943 (citing Stilp v. Commonwealth, 905 A.2d 918, 939 (Pa. 2006)).

137 *Id.* at 951.

138 *Id.*

139 *Id.*

140 *See id.* at 951.

141 *Id.* at 953–54.

142 *Id.* at 952; *see also id.* at 953 ("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.").

143 *Id.* at 954–56.

144 *Id.* at 954.

owned by the state or held in common law trust. [145] "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."[146] Because the state is the trustee of these resources, it has a fiduciary duty to "conserve and maintain" them.[147] "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."[148] The state has two separate obligations as trustee.

> [First,] the Commonwealth has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state's failure to restrain the actions of private parties.[149]

The second is a duty "to act affirmatively to protect the environment, via legislative action."[150]

In light of this understanding, the plurality explained why it believed three separate provisions of Act 13 violate section 27.[151] Section 3303 declares that state environmental laws "occupy the entire field" of oil and gas regulation, "to the exclusion of all local ordinances."[152] Section 3303 also "preempts and supersedes the local regulation of oil and gas operations" regulated under the state's various environmental laws.[153] "To put it succinctly," the plurality stated, "our citizens buying homes and raising

145 *Id.* at 955. The plurality explained that, as the Amendment was originally drafted, there was a list of protected resources including "the air, waters, fish, wildlife, and the public lands and property of the Commonwealth." *Id.* (internal quotation marks omitted) (referring to Pennsylvania General Assembly's H.B. 958 (Pa. 1969), as cited in Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 4). Because of concern in the legislature that a list would be used to "limit, rather than expand" the range of protected resources, the list was removed. *Id.* at 955 (referring to Pennsylvania General Assembly's H.B. 958, (Pa. 1970), as cited in Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 21–22).

146 *Id.* at 955; *see also id.* at 975 ("The public natural resources implicated by the 'optimal' accommodation of industry here are resources essential to life, health, and liberty: surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest."). The legislative history reinforces that understanding. *See, e.g.*, Statement of Rep. Franklin Kury, *in* Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 30–31 ("This trusteeship applies to resources owned by the Commonwealth and also to those resources not owned by the Commonwealth, which involve a public interest.").

147 *Robinson Township*, 83 A.3d at 957 (internal quotation marks omitted).

148 *Id.* at 957.

149 *Id.*

150 *Id.* at 958.

151 *Id.* at 977–85.

152 58 PA. CONS. STAT. ANN. § 3303 (West 2014).

153 *Id.*

families in areas zoned residential had a reasonable expectation concerning the environment in which they were living, often for years or even decades. Act 13 fundamentally disrupted those expectations, and ordered local government to take measures to effect the new uses, irrespective of local concerns."[154] Section 3303, the plurality stated, violates section 27 because "the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties."[155] The commonwealth is the trustee under the Amendment, which means that local governments are among the trustees with constitutional responsibilities.[156]

Section 3304 requires "all local ordinances regulating oil and gas operations" to "allow for the reasonable development of oil and gas resources."[157] In so doing, it imposes uniform rules for shale gas development in the state, prohibits local governments from establishing more stringent rules, establishes limited time periods for local review of drilling proposals, and imposes uniform rules for oil and gas regulation.[158] Section 3304, the plurality concluded, violates section 27 for two reasons.[159] "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."[160] Second, under Act 13 "some properties and communities will carry much heavier environmental and habitability burdens than others."[161] This result, the plurality stated, is inconsistent with the obligation that the trustee act for the benefit of "all the people."[162]

Finally, section 3215(b) prohibits drilling or disturbing areas within specific distances of streams, springs, wetlands, and other water bodies.[163] But section 3215(b)(4) requires the Pennsylvania Department of Environmental Protection (DEP) to waive these distance restrictions if the permit applicant submits "additional measures, facilities or practices" that it will employ to protect these waters.[164] This provision, the plurality stated, violates section 27 for three reasons.[165] 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."[166] Second, "[i]f an applicant appeals permit terms or conditions . . . Section 3215 remarkably

154 *Robinson Township*, 83 A.3d at 977.
155 *Id.* at 977.
156 *Id.*
157 58 PA. CONS. STAT. ANN. § 3304 (West 2014).
158 *Id.*
159 *Robinson Township*, 83 A.3d at 978–81.
160 *Id.* at 979.
161 *Id.* at 980.
162 *Id.* (internal quotation marks omitted).
163 58 PA. CONS. STAT. ANN. § 3215 (West 2014).
164 *Id.* § 3215(b)(4).
165 *Robinson Township*, 83 A.3d at 982–84.
166 *Id.* at 983.

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.'"[167] 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."[168]

Although section 27 contains both general environmental rights and public trust provisions, the plurality's analysis is anchored primarily in public trust.[169] Its explanation of the unconstitutionality of these three statutory provisions repeatedly refers to "public resources," "trust," and the obligation that the trustee act for the "benefit of 'all the people.'"[170]

In all three of these provisions, the plurality reasoned, the legislature violated section 27 by taking away or limiting the power of the state or local government trustee to conserve and maintain public natural resources.[171] The legislature did so in several different ways. To begin with, in sections 3303 and 3304, the legislature simply deprived local governments of their constitutional authority to conserve and maintain public natural resources under section 27.[172] In addition, section 3304 contains a uniform rule that protects some members of the public but not others, violating its duty to conserve and maintain public natural resources for the benefit of all.[173] Finally, section 3215 included substantive and procedural rules that significantly impaired DEP's ability to protect public natural resources: by requiring DEP to waive buffer zone limitations for water resources without providing DEP any guidance on how to grant that waiver; by shifting the traditional burden of proof from the applicant to DEP; and by significantly restricting public participation in both DEP's decision and any subsequent appeal of that decision.[174]

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."[175] Requiring all municipalities to adopt the same buffer zones for specific shale gas facilities—regardless of local circumstances, without any ability by the municipality to make the distances in these buffer zones more protective, and "without any available mechanism for objection or remedy by the citizenry consistent with the individualized concerns of each municipality, zoning district, or resident—is the epitome of arbitrary and discriminatory impact."[176] The challenged provisions, he said, "force

167 *Id.* at 984 (alteration in original).
168 *Id.*
169 PA. CONST. art. I, § 27; *Robinson Township*, 83 A.3d at 977–85.
170 *Robinson Township*, 83 A.3d at 977–85.
171 *Id.* at 913.
172 *Id.* at 977, 980–81.
173 *Id.* at 980.
174 *Id.* at 984.
175 *Id.* at 1001 (Baer, J., concurring).
176 *Id.* at 1007.

municipalities to enact zoning ordinances" that "violate the substantive due process rights of their citizenries."[177]

Justice Baer's concurring opinion, while rooted in substantive due process, is nonetheless very similar to that of the plurality. Like the plurality, he recognized that local zoning protects human quality of life. Like the plurality, he was concerned that depriving municipalities of their ability to engage in traditional zoning and land use will deprive the public of both quality of life and their right to reasonably enjoy their property.[178] What is striking about both opinions, taken together, is how closely their core concern tracks what Professor Joseph Sax described as the central public trust issue—protection of expectations in the continued public availability of natural resources and values:

> [T]he public trust doctrine should be employed to help us reach the real issues—expectation and destabilization—whether the expectations are those of private property ownership, of a diffuse public benefit from ecosystem protection or of a community's water supply. Our task is to identify the trustee's obligation with an eye toward insulating those expectations that support social, economic and ecological systems from avoidable destabilization and disruption.[179]

There were two dissenting opinions. Justice Saylor stated that Act 13 provides a detailed system for regulating unconventional gas development, that the legislature "occupies the primary fiduciary role" under section 27, and that 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."[180] Justice Eakin's dissent expressed concern that the decision empowers municipalities at the expense of state decision-making authority.[181]

The plurality's exposition of section 27 specifically referred to a wide range of possible applications. Many of these applications are already being argued in cases that have been brought, or amended, since the *Robinson Township* decision.[182] These include cases that are filed with courts of

177 *Id.* at 1008.

178 *Id.* at 1005. In fact, Justice Baer quoted the plurality opinion's description of the adverse effect of section 3304 of Act 13 on the ability of local governments to protect constitutional rights. *Id.* at 1007. "These factors, cogently cited within the [plurality opinion], are precisely why Act 13 encroaches upon the substantive due process rights found in Article I, Section 1 of the Pennsylvania Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution." *Id.* at 1008.

179 Sax, *Historical Shackles*, *supra* note 64, at 192–93; *see also Robinson Township*, 83 A.3d at 978 ("The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment.").

180 *Robinson Township*, 83 A.3d at 1012 (Saylor, J., dissenting).

181 *Id.* at 1015 ("Municipalities certainly have the power to manage land use, but such power is given by the legislature, not the Constitution.").

182 *See, e.g.*, Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 171 (Pa. Commw. Ct. 2015) (applying the *Robinson Township* plurality's analysis of article 1, section 27 to a statute governing future leases of state land for oil and gas development, and stating that "the sale or

common pleas, the basic trial courts in Pennsylvania; the commonwealth court, which hears appeals from many common pleas court decisions but also has original jurisdiction for certain cases against the state and state agencies; and the Environmental Hearing Board, an administrative tribunal that hears appeals of decisions by DEP, Pennsylvania's environmental regulatory agency.[183] The most obvious potential applications are those most explicitly addressed by the plurality. They involve claims that section 27 imposes substantive duties as well as an implied duty to consider environmental impacts before making a decision.

IV. EXPLICIT CONSTITUTIONAL OBLIGATIONS AND AN IMPLIED DUTY TO CONSIDER IMPACTS

Determining the constitutionality of a legislative or administrative action is a last resort for courts. First, these acts are clothed with a presumption of constitutionality, and this presumption is overturned only by palpable or clear violations.[184] Second, "[i]t is well settled that when a case raises both constitutional and non-constitutional issues, a court should not reach the constitutional issue if the case can properly be decided on non-constitutional grounds."[185]

In the case of environmental and land use matters, moreover, the protections built into a plethora of environmental and land use laws mean that, in many if not most cases, public constitutional environmental rights are already being protected. Thus, cases in which the plaintiff or appellant challenges a DEP action on the grounds that it violates several regulations and statutes as well as section 27 are not likely to be decided on constitutional grounds. In fact, many of the post-*Robinson Township* appeals to the Pennsylvania Environmental Hearing Board appear to fall into this category.[186] Similarly, challenges to local government land use and zoning

lease of our Commonwealth's natural resources implicates not just policy, but constitutional rights and duties as well").

183 *See, e.g.*, Complaint ¶¶ 43–54, Chito v. Pulaski Twp., No. 2014-10577, C.A. (Lawrence Cnty. Ct. Com. Pl. Aug. 25, 2014) (arguing that defendants had violated section 27 by approving gas exploration activities in Pulaski Township, and that this violation was a constitutional tort, entitling plaintiffs to damages); Markwest Liberty Midstream & Res., L.L.C. v. Cecil Twp. Zoning Hearing Bd., 102 A.3d 549, 573 (Pa. Commw. Ct. 2014) (upholding a municipal zoning law that allegedly excluded natural gas compressor stations after the *Robinson Township* decision invalidated statutes purporting to preempt local regulation of oil and gas operation); Harvilchuck v. Commonwealth, No. 2013-013-M, 2014 WL 4957400, at *11 n.13 (Pa. Envtl. Hearing Bd. Sept. 14, 2014) (demonstrating an appellant raising an objection under section 27, following the *Robinson Township* decision).

184 Eagle Envtl. II, L.P. v. Commonwealth, 884 A.2d 867, 880 (Pa. 2005).

185 Ballou v. State Ethics Comm'n, 436 A.2d 186, 187 (Pa. 1981).

186 These appeals fall into two broad categories. One category is appeals brought by individuals, local government entities, and nongovernmental organizations. *See, e.g.*, Post-Hearing Memorandum of the Appellant at 19, Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot., No. 2013-080-L (Pa. Envtl. Hearing. Bd. May 24, 2013) (arguing that DEP issuance of gas well permit violated various statutes and regulations as well as public trust requirements of section 27 by failing to protect aquifer that serves as a public water supply); Notice of Appeal at

decisions are likely to be based on a variety of statutory, procedural, and evidentiary issues as well as section 27, and are thus not likely to be decided based solely on the Amendment.[187]

That said, three different types of constitutional claims are being made subsequent to *Robinson Township* that can be directly or implicitly derived from the Amendment's text. The first is that the government has failed to comply with its duty to conserve and maintain public natural resources.[188] The second is that the state has failed to protect environmental rights in the preservation of the natural, scenic, historic, and esthetic values of the environment as well as clean air and pure water.[189] Both of these derive directly from the text of the constitution, but the public trust claims are much more numerous at present than those based on environmental rights. A third claim is reasonably implied from the text: the government violated section 27 by acting without first considering the impact of its action on constitutionally protected resources and values.[190] While most of these claims have yet to be fully litigated, they do give a sense of the range of potential meanings and applications of section 27.

A. Explicit Constitutional Obligations

After *Robinson Township*, claims are being made against the government under both clauses of the Amendment—public trust and general environmental rights.

4, Burnside Twp. Bd. of Supervisors v. Dep't of Envtl. Prot., No. 2014-030-B (Pa. Envtl. Hearing. Bd. Feb. 28, 2014) (arguing that DEP approval of the registration request for land application of bio solids violated various statutes and regulations as well as section 27); Notice of Appeal at 3, Hudson v. Dep't of Envtl. Prot., No. 2014-037-L (Pa. Envtl. Hearing. Bd. Mar. 13, 2014) (arguing that DEP approval of nutrient management plan for proposed concentrated animal feeding operation violated several different statutes and regulations as well as section 27).

In the second category, an industry appellant claims that DEP violated section 27. Notice of Appeal at 9–10, Nat'l Fuel Gas Supply Corp. v. Dep't of Envtl. Prot., No. 2014-039-R (Pa. Envtl. Hearing. Bd. Mar. 19, 2014). Appellant claims that a DEP permit condition is inconsistent with various air pollution control regulations, is improper under Pennsylvania administrative law, and violates section 27 because DEP did not balance the impact of the required condition against the environmental benefits of natural gas. *Id.*

187 *See, e.g.*, Gorsline v. Bd. of Supervisors of Fairfield Twp., No. 000130-2014 (Lycoming County Ct. Com. Pl. Aug. 29, 2014). In that case, the court vacated a township decision to grant a conditional use approval to construct and operate an unconventional gas well pad because the applicant had presented no evidence demonstrating compliance with the criteria required by local ordinance for the approval, and the objecting citizens "presented substantial evidence that there is a high degree of probability that the use will adversely affect the health, welfare and safety of the neighborhood." *Id.* at 24. The court then cited *Robinson Township* as providing broad support for its decision. *Id.* at 24–25.

188 *See infra* Part IV.A.1.

189 *See infra* Part IV.A.2.

190 *See infra* Part IV.B.

1. Duty to Conserve and Maintain Public Natural Resources

A pair of cases brought in commonwealth court are testing the state's public trust duty to conserve and maintain public natural resources.[191] Both challenge, in somewhat different ways, the transformation of state park and forest lands by leasing for oil and gas development that has been wrought by the Marcellus shale boom in Pennsylvania.[192] Both claim that the legislature has transformed longstanding oil and gas leasing programs on state forest and park lands in ways that significantly weaken the state's ability to conserve and maintain public natural resources, and has done so to provide money to help fund the state's overall budget.[193]

Since at least 1955, the Pennsylvania Department of Conservation and Natural Resources (DCNR) and its predecessor agencies have leased state forests for oil and gas drilling.[194] The Oil and Gas Lease Fund Act[195] sets out DCNR's responsibilities for administering that program, and assigns all rents and royalties received from leasing to DCNR, to be used for "conservation, recreation, dams, or flood control."[196] The wells under this program, mostly small in size and impact, generated a modest amount of money that DCNR used to offset the environmental impacts of the program and for other conservation purposes.[197]

191 *Pennsylvania Environmental Defense Foundation*, No. 228 M.D. 2012, 2013 WL 3942086 (Pa. Commw. Ct. Dec. 10, 2012) (mem.); Petition for Review, Del. Riverkeeper Network v. Corbett, No. 573 M.D. 2014 (Pa. Commw. Ct., filed Oct. 30, 2014) [hereinafter Delaware Riverkeeper Petition]. Other cases based on public trust responsibilities under section 27 are also pending before the Environmental Hearing Board. *See, e.g.*, Notice of Appeal, Ctr. for Coalfield Justice v. Commonwealth, No. 2014-072-B (2014), *available at* http://ehb.courtapps.com/efile/documentViewer.php?documentID=21675 (appealing the issuance of an underground coal mining permit for 3,175 acres based, among other things, on DEP's alleged failure to perform its constitutional public trust duties based on permit's "impact to public streams within the permit area, including those within Ryerson Station State Park, and likely additional impacts to other surface waters of the Commonwealth outside of the permit area").

192 *Pennsylvania Environmental Defense Foundation*, 2013 WL 3942086, at *1; Delaware Riverkeeper Petition, *supra* note 191, at 2.

193 *Pennsylvania Environmental Defense Foundation*, 2013 WL 3942086, at *2; Delaware Riverkeeper Petition, *supra* note 191, at 4.

194 *Pennsylvania Environmental Defense Foundation*, 2013 WL 3942086, at *3.

195 71 PA. STAT. ANN. §§ 1331–1333 (West 1955).

196 *Id.* § 1331 (stating the purposes of the act); *id.* § 1333 (stating that the fund is to be used to carry out purposes of the act).

197 As the Commonwealth Court explained:

> Throughout these historic actions, DCNR and its predecessors leased state forest land with the specific knowledge and belief that the rents received from granting leases and the royalties received from the production of oil and gas pursuant to those leases would be deposited into the Oil and Gas Lease Fund and would be put back into the State forest and park system for the purposes set forth in the Oil and Gas Lease Fund Act. Those enumerated purposes include restoring and improving the park and forest lands and purchasing additional lands to mitigate the gas extraction impacts. DCNR and its predecessors used the monies obtained from these leasing activities to enhance State parks and forests to the nationally recognized systems they are today.

Pennsylvania Environmental Defense Foundation, 2013 WL 3942086, at *3.

The Marcellus shale revolution in Pennsylvania led to several dramatic changes in this program.[198] To begin with, it led to significant increases in both the number of acres leased and the revenues received by the commonwealth. Prior to 2008, annual state revenues under the Oil and Gas Lease Fund Act were about $4 million per year.[199] This was all done with conventional oil and gas drilling. Unconventional Marcellus shale production technology led to enormous increases in production. In 2008, for example, DCNR leased 74,000 acres and "received $163 million in prepaid rental payments."[200] In 2009 and 2010, the state received a total of $444.1 million from leasing state land for oil and gas.[201]

Because of the recession that began in 2007, however, the state government experienced serious revenue shortfalls.[202] In consequence, the state legislature began to use oil and gas leasing on state forest and park lands to balance the budget by supplying money to the general fund.[203] Three legislative amendments to the state fiscal code between 2008 and 2014 redirected a total of $335 million that would have been used for conservation purposes under the Oil and Gas Lease Fund Act to the general fund, where it is appropriated for a variety of state government purposes.[204] In addition, the legislature prevented DCNR from spending any Oil and Gas Lease Fund Act royalties without prior legislative authorization.[205] Finally, the legislature began using Oil and Gas Lease Fund revenue to support the overall budget of DCNR, rather than obtaining that budget money from the general fund and using Oil and Gas Lease Fund money for conservation purposes related to oil and gas extraction.[206]

198 COMMONWEALTH OF PA. HOUSE APPROPRIATIONS COMMITTEE (D), BUDGET BRIEFING: REPORT ON KEY ISSUES 1 (2013), *available at* http://www.pahouse.com/Files/Documents/Appropriations/series/764/Oil_Gas_Lease_Fund_BB_082313.pdf.

199 *Id.*

200 *Pennsylvania Environmental Defense Foundation*, 2013 WL 3942086, at *6.

201 Timothy Puko, *Corbett Hopes to Raise $75M Through Natural Gas Leases in State Forests, Parks*, PITTSBURGH TRIB.-REV., Feb. 4, 2014, http://triblive.com/state/marcellusshale/5535968-74/state-drilling-corbett#axzz3WMuzoaB3 (last visited Apr. 17, 2015).

202 *See* PHIL OLIFF ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 1 (2012).

203 *Pennsylvania Environmental Defense Foundation*, 2013 WL 3942086, at *6 n.12 (explaining that general fund represents money that is available for the overall state budget).

204 Act of Oct. 9, 2009, No. 2009-50, sec. 3, § 1604-E ("Notwithstanding section 1603-E or any other provision of law, in fiscal year 2009–2010 the amount of $60,000,000 shall be transferred from the [Oil and Gas Lease Fund] to the General Fund."); Act of July 6, 2010, No. 2010-46, sec. 2.4, §1605-E ("Notwithstanding section 1603-E or any other provision of law, in fiscal year 2010–2011, the amount of $180,000,000 shall be transferred from the [Oil and Gas Lease Fund] to the General Fund; Act of July 10, 2014, No. 2014-126, sec. 8.9, § 1605-E(b) ("Notwithstanding section 1603-E or any other provision of law, in fiscal year 2014–2015, the amount of $95,000,000 shall be transferred from the [Oil and Gas Lease Fund] to the General Fund.").

205 Act of Oct. 9, 2009, No. 2009-50, sec. 3, § 1602-E ("Notwithstanding any other provision of law and except as provided in section 1603-E, no money in the [Oil and Gas Lease Fund] from royalties may be expended unless appropriated by the General Assembly.").

206 *See, e.g.*, H.B. 1485, pt. XVI, 2011–12 Leg., Gen. Assemb., Reg. Sess. (Pa. 2011) (appropriating $15 million from Oil and Gas Lease Fund to pay various administrative and operational expenses for DCNR).

In 2010, Governor Ed Rendell issued an executive order imposing a moratorium on further leasing of DCNR lands for oil and gas development.[207] The moratorium, of course, did not prevent the state from receiving revenue under previously issued leases. The executive order states that more than 700,000 acres of the 2.4 million acres of state forest and park land are "currently subject to oil and gas development, including development in the Marcellus shale formation, either through leases executed with the commonwealth or through private ownership or leasing where the commonwealth does not own the subsurface oil and gas."[208] Another 800,000 acres of state forest land not currently subject to development contains significant environmental values, including high-value ecosystems, old growth forests, areas with sensitive environmental resources, remote areas, and areas with significant recreational value.[209] Additional development of state park and forest land for oil and gas development, the executive order states, will have significant adverse impacts that cannot be fully understood, will jeopardize DCNR's ability to conserve and maintain those resources, and will jeopardize the state's Forest Stewardship Council sustainable forestry certification.[210]

In a 2014 executive order, Governor Tom Corbett rescinded the 2010 executive order and directed instead that "no State Park and State Forest lands owned and/or managed by DCNR shall be leased for oil and gas development," which would result in additional surface disturbance on state forest or state park lands.[211] Essentially, it said that leasing can resume, but only at existing well pads, where the state can allow drilling to deeper layers of shale (Marcellus shale is the shallowest of several potential shale gas strata in Pennsylvania) or different forms of drilling. The executive order also requires DCNR, within the bounds of existing law, to use oil and gas royalty revenue to repair and improve state park and forest infrastructure and amenities, and to acquire oil and gas and other mineral rights.[212] The recitations contained in the executive order suggest that use of state forests and parks for oil and gas drilling is compatible with use of those same lands for recreation and sustainable forestry.[213]

The first case challenging this program is *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania* (*Pennsylvania Environmental Defense Foundation*),[214] an original action brought in 2012 in Commonwealth court. Although brought prior to *Robinson Township*, the Pennsylvania Environmental Defense Foundation's (PEDF's) arguments

207 Pa. Exec. Order No. 2010-05 (2010), *available at* http://www.pedf.org/uploads/1/9/0/7/19078501/executive_order_2010-05.pdf.

208 *Id.*

209 *Id.*

210 *Id.*

211 Pa. Exec. Order No. 2014-03, at 2–3 (May 23, 2014), *available at* http://www.pedf.org/uploads/1/9/0/7/19078501/corbett_executive_order_2014_03.pdf.

212 *Id.* at 3.

213 *Id.* at 2–3 (whereas clauses).

214 No. 228 M.D. 2012, 2013 WL 3942086 (Pa. Commw. Ct. Jan. 22, 2013).

have evolved since that decision.[215] In this case, the petitioner, an environmental organization, sought declaratory relief against a variety of legislative and administrative actions that have occurred with state leasing of state parks and forests for Marcellus shale gas development since 2008.[216]

In early 2015, in a ruling on cross-motions for summary judgment, the commonwealth court denied most of the declaratory relief that PEDF requested, but nonetheless decided that DCNR's oil and gas leasing decisions are subject to section 27, and that the governor has no authority to override that responsibility.[217]

The court began its analysis by explaining that the plurality opinion in *Robinson Township* is not binding precedent.[218] It nonetheless acknowledged the persuasive power of the plurality's analysis by stating, "in reviewing the accompanying minority opinions, it does not appear that any of the concurring and dissenting justices disputed the plurality's construction of the Environmental Rights Amendment, including the rights declared therein and attendant duties imposed thereby on the Commonwealth."[219] In reconciling these two views, the Court cited *Payne* and said "we find the plurality's construction of Article I, Section 27 persuasive only to the extent it is consistent with binding precedent from this Court and the Supreme Court on the same subject."[220] The court also explained "our decision in *Gettysburg Tower* that the Environmental Rights Amendment is self-executing remains binding precedent."[221] The court then addressed four primary arguments concerning section 27.

First, PEDF argued that the legislature violated section 27 by preventing DCNR from spending any Oil and Gas Lease Fund Act royalties without prior legislative authorization.[222] By taking away DCNR's authority to spend royalty receipts from gas leasing, PEDF argued, the legislature had compromised DCNR's ability to conserve and maintain public natural resources by, among other things, expending these funds to mitigate the environmental effects of leasing.[223] The court was not persuaded that the legislation is "clearly, palpably, and plainly unconstitutional."[224] This

215 Petitioner's Brief in Opposition to Respondents' Cross Motion for Summary Judgment, *Pennsylvania Environmental Defense Foundation*, No. 228 M.D. 2012, 2013 WL 3942086 (Pa. Commw. Ct. Sept. 8, 2014); Petitioner's Reply to Respondents' Response to Petitioner's Motions for Summary Judgment, *Pennsylvania Environmental Defense Foundation*, No. 228 M.D. 2012, 2013 WL 3942086 (Pa. Commw. Ct. Sept. 8, 2014) (citing *Robinson Township* throughout).

216 Second Amended Petition for Review in the Nature of an Action for Declaratory Relief, *Pennsylvania Environmental Defense Foundation*, No. 228 M.D.2012, 2015 WL 79773, at *24 (Pa. Commw. Ct. Dec. 5, 2013). The Supreme Court issued its decision in *Robinson Township* on Dec. 19, 2013.

217 Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 172 (Pa. Commw. Ct. 2015).

218 *Id.* at 156 n.37.

219 *Id.*

220 *Id.*

221 *Id.* at 158 n.38.

222 *Id.* at 159–60 (referring to Act of Apr. 9, 1929, No. 176, 72 P.L. 343, § 1602-E (1929)).

223 *Id.*

224 *Id.* at 161.

legislation does not change DCNR's authority to decide whether to lease, the court explained, and it applies only to royalties, not rents.[225]

Second, PEDF challenged legislation that appropriated up to $50 million in royalty money to DCNR (subject to the availability of funds) and required DCNR to prioritize expenditure of those funds for state forests and parks.[226] This legislation, PEDF argued, limits funds to $50 million "*without any fiduciary analysis* of the financial needs of DCNR to meet its statutory and constitutional responsibilities," including its responsibilities under section 27.[227] The court restated this argument in different terms, explaining that "[i]n essence" PEDF argued that the legislature was failing to adequately fund DCNR.[228] The court then rejected this argument as restated: "PEDF has presented no evidence that the current funding appropriated to DCNR from all sources is inadequate—i.e., that the funding is so deficient that DCNR cannot conserve and maintain our State natural resources."[229]

Third, PEDF sought a judicial declaration that money received from oil and gas leasing on state lands can only be used for public trust purposes under section 27:

> The oil and gas that is taken by private entities through a lease of State Forest land for oil and gas extraction is part of the public natural resources of that land. It is a nonrenewable public natural resource. The conversion of that nonrenewable resource to money requires that the money obtained therefrom must be retained for purposes set forth within Article I § 27.[230]

The court rejected that argument.[231] While section 27 requires the state to conserve and maintain public natural resources, the court explained it "does not also expressly command that all revenues derived from the sale or leasing of the Commonwealth's natural resources must be funneled to those purposes and those purposes only."[232] Other provisions of the constitution, by contrast, require that moneys be expended for a particular purpose.[233]

Finally, the court decided, "DCNR has the exclusive statutory authority to determine whether to sell or lease the Commonwealth's natural resources for oil and natural gas extraction."[234] The state had argued that "because the DCNR Secretary serves at the pleasure of the Governor and as a part of the executive branch, the Governor may override any and all decisions made by the DCNR Secretary."[235] Yet state officials are constitutionally obliged to

225 *Id.*

226 *Id.*

227 *Id.* (emphasis added) (quoting Petitioner PEDF's brief at 93–94).

228 *Id.*

229 *Id.* at 166.

230 Second Amended Petition for Review in the Nature of an Action for Declaratory Relief, *supra* note 216, at 58.

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

232 *Id.*

233 *Id.* at 168 n.46.

234 *Id.* at 173.

235 *Id.* at 171.

faithfully execute the state laws, the court said.[236] DCNR is given exclusive authority for leasing under the Conservation and Natural Resources Act,[237] and is also subject to section 27.[238]

> [T]he people of Pennsylvania are entitled to expect that those officials will "support, obey and defend" Article I, Section 27 of the Pennsylvania Constitution in the discharge of their powers and duties under the CNRA with fidelity, even when faced with overwhelming political pressure, perhaps from the Governor, to act against their better judgment.[239]

The Governor may attempt to influence those decisions, the court said, but the ultimate responsibility for making and defending them rests with DCNR.[240] In future leasing, therefore, "DCNR must also consider whether even entering into further leasing would be in the best interests of the Commonwealth *and* consistent with the rights, duties, and obligations embodied in the Environmental Rights Amendment."[241]

The extent to which this fourth ruling actually requires changes in how the DCNR conducts future lease sales is unclear. A suitably *flexible* DCNR secretary will not have difficulty finding a way to give the governor what he or she wants.[242] The future effect of this decision will also likely be influenced by an executive order issued by newly elected Pennsylvania governor Tom Wolf, who was sworn in as governor in 2015, only two weeks after this opinion was issued.[243] As part of his gubernatorial campaign, Wolf promised changes in the state's Marcellus shale regulatory program as well as the program for oil and gas leasing on state lands.[244] The 2015 executive order effectively reinstates the 2010 executive order's moratorium on further leasing of state park and forest lands owned or managed by DCNR, but is "subject to future advice and recommendations made by DCNR."[245] The 2015 executive order also rescinds the 2014 Corbett executive order.[246] In

236 *Id.*

237 71 PA. CONS. STAT. ANN. §§ 1340.101–1340.1103 (West 2014).

238 Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d at 56.

239 *Id.* at 171–72.

240 *Id.* at 172.

241 *Id.*

242 *Cf.* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2540 (2011) (noting that it is easy for the President to persuade federal agency heads to do what he wants).

243 Pa. Exec. Order No. 2015-03 (Jan. 29, 2015), *available at* http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_785_708_0_43/http%3B/pubcontent.state.pa.us/publishedcontent/publish/global/files/executive_orders/2010___2019/2015_03.pdf; Rebecca Jones, *Tom Wolf Sworn In as Pennsylvania's 47th Governor*, PENNLIVE.COM, Jan. 20, 2015, http://www.pennlive.com/politics/index.ssf/2015/01/tom_wolf_sworn_in_as_pennsylva.html (last visited Apr. 17, 2015).

244 Peter Jackson, *Wolf Bans New Gas Drilling Leases on Public Land as Promised*, ASSOCIATED PRESS, Jan. 29, 2015, http://finance.yahoo.com/news/wolf-bans-gas-drilling-leases-163505418.html (last visited Apr. 17, 2015).

245 Pa. Exec. Order No. 2015-03, *supra* note 243, ¶ 1.

246 *Id.* ¶ 4.

addition, PEDF has appealed this decision to the state supreme court.[247] The effect of the 2015 executive order on the PEDF appeal is uncertain.

The second case, *Delaware Riverkeeper Network v. Corbett* (*Delaware Riverkeeper Network*),[248] was filed in commonwealth court in 2014. This case is explicitly directed against the 2014 executive order, but it also challenges amendments to the fiscal code, the legislatively approved state budget, and executive decisions approving further leasing.[249] One of the six counts in the petition for review involves claims that the state legislature and Governor Corbett, through the 2014 executive order, violated the constitutional obligation to conserve and maintain public natural resources under section 27.[250] Petitioner alleges that the state has breached its obligation to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources.[251] The 2015 executive order, which rescinded the 2014 order that is being challenged, appears to make this part of the case moot.

In at least one other case, plaintiffs claim that the defendants' violation of their responsibilities under section 27 is a constitutional tort, entitling them to damages.[252] Constitutional torts in Pennsylvania are normally limited to a fairly limited class of cases, such as where the government retaliates against individuals or punishes them for exercising constitutional rights.[253] Plaintiffs are longtime homeowners in a residential zoning district who now find themselves near unconventional gas operations because their township has given conditional use approvals for those operations.[254] These operations, they argue, amount to heavy industrial activity in a residential area.[255] The alleged constitutional violation involves primarily, but not exclusively, public trust.[256] This activity, they say:

> degrades the corpus of the environmental trust that Pulaski Township and its municipal officers are bound as trustee for, alters existing expectations of communities and property owners who purchased property with a reasonable

247 Saul Ewing LLP, *Unanimous Pennsylvania Commonwealth Court Rules That the Supreme Court's Interpretation of the Environmental Rights Amendment in Landmark* Robinson Township *Decision Is Nonbinding*, http://www.saul.com/publications/alerts/unanimous-pennsylvania-commonwealth-court-rules-supreme-court%E2%80%99s-interpretation (last visited Apr. 17, 2015) (noting that PEDF indicated that it will appeal the January 7, 2015 decision).

248 Delaware Riverkeeper Petition, *supra* note 191. The lead petitioner is the only environmental organization that was also a petitioner in *Robinson Township*.

249 *See id.* ¶ 188.

250 *Id.*

251 *Id.* ¶¶ 187–197.

252 Complaint ¶¶ 43–61, Chito v. Pulaski Township, No. 2014-10577, C.A. (Lawrence County Ct. Com. Pl. Aug. 25, 2014).

253 Yount v. Pa. Dep't of Corrections, 966 A.2d 1115, 1125 (Pa. 2009).

254 Complaint ¶¶ 11, 13, 15–16 Chito v. Pulaski Township, No. 2014-10577, C.A. (Lawrence County Ct. Com. Pl. Aug. 25, 2014).

255 *Id.* at 17.

256 *Id.* at 49–50.

> expectation of the area being residential or agricultural (not heavy industrial), and substantially diminishes natural and esthetic values of the local area.[257]

As a result, the plaintiffs seek damages of more than $50,000.[258] The exact outcome of this case remains to be seen.

2. Duty to Refrain from Impinging upon Public Environmental Rights

To a lesser degree than for public trust, there are claims that the environmental rights in the Amendment's first clause have been violated.[259] The Petitioner in *Delaware Riverkeeper Network* argues that the state has violated its duty to refrain from impinging on public rights.[260] "The Commonwealth has impermissibly and unconstitutionally burdened the constitutionally-protected rights of those who live in communities with state parks and forests to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment."[261] Further leasing, petitioner argues, fosters an industrial activity in communities and areas that is broadly inconsistent with the environmental values that exist in those areas and communities.[262] "These parks and forests exist in communities, and particularly in rural communities whose lives and livelihoods are inextricably connected to them via fishing, hunting, tourism, art, birdwatching, hiking, and scenic enjoyment."[263] Petitioner argues that these are all values protected by the first clause of section 27.[264]

B. Duty to Consider Impacts on Public Rights Before Making a Decision

The substantive duty to protect certain rights implies a corollary responsibility that is intended to ensure that these rights are actually protected: the responsibility to consider impacts on those rights prior to a decision. This duty should apply to both public rights in section 27. As the *Robinson Township* plurality explains: "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."[265] This understanding is reinforced by the Amendment's

257 Complaint ¶ 51, Chito v. Pulaski Township, No. 2014-10577, C.A. (Lawrence County Ct. Com. Pl. Aug. 25, 2014).

258 *Id.* ¶ 54.

259 *See Robinson Township*, 83 A.3d 901, 974 (Pa. 2013) (discussing the citizens' claims that the Commonwealth violated its duties under the Amendment).

260 Delaware Riverkeeper Petition, *supra* note 191, ¶ 290.

261 *Id.* at 79.

262 *Id.* at 78.

263 *Id.*

264 *See id.* at 77 (asserting that further leasing "[w]ould [c]ause [u]nreasonable [i]nfringement on [i]ndividual [e]nvironmental [r]ights, in [v]iolation of [a]rticle I, [s]ection 27").

265 *Robinson Township*, 83 A.3d 901, 952 (Pa. 2013).

legislative history.[266] Concerning clause two, the same logic applies to the public trust provisions.[267] The plurality cites with approval the California Supreme Court's decision in *National Audubon Society v. Superior Court*,[268] in which the court held that the state's failure to consider the impact of granting water diversion permits on protected natural resources violated the public trust doctrine.[269]

The required environmental assessment for each clause should cover the environmental resources or features protected by that clause. The assessment under clause one should thus pertain to "constitutionally protected features."[270] Similarly, the assessment for clause two should pertain to public natural resources.[271]

This understanding of the duty to consider impacts has particular relevance to long-term and cumulative impacts. As the plurality explained:

> [E]nvironmental 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.[272]

This obligation has at least three important consequences for administrative decision makers. First, by requiring administrative agencies and local governments to consider these features and resources in advance, it forces them to understand what features and resources their decisions are likely to affect and gives them the opportunity to avoid making decisions that will adversely affect those features and resources. Second, it requires the development of a record that would permit a reviewing court to quickly assess whether the decision-making body even considered these impacts. Third, it puts the burden of developing a factual record on the government, which effectively assigns government the initial burden of proof.

In *Pennsylvania Environmental Defense Foundation*, petitioner sought declaratory relief that the state has a duty to consider environmental impacts and ways of mitigating those impacts before making a decision that

266 *See id.* at 952–54 nn.41–42 (quoting a question-and-answer statement intended to "aid voters in understanding the proposed constitutional amendment").

267 *See id.* at 955 (finding that the legislative history of the second clause supports the court's reading).

268 658 P.2d 709, 728 (1983).

269 *Robinson Township*, 83 A.3d at 958.

270 *Id.* at 952.

271 *See id.* at 958 (discussing differences between the protections offered by clauses 1 and 2).

272 *Id.* at 959. *See also* Sullivan v. Resisting Environmental Destruction On Indigenous Lands, 311 P.3d 625 (Alaska 2013) (holding that that Alaska's "public interest" constitutional standard for resource development requires courts to take a hard look at whether state agencies adequately considered the cumulative environmental impacts of oil and gas leases).

affects public natural resources.[273] As previously explained, the commonwealth court's 2015 decision conflated this obligation with the duty to conserve and maintain public natural resources, holding that PEDF had not proven that the $50 million funding limit for DCNR made it impossible for the agency to conserve and maintain public natural resources.[274] What PEDF actually argued was that the state should have conducted an investigation of this question before it made its decision.[275] On issues like this, involving the ability of a state agency to perform particular tasks at a specified level of funding, the agency itself is in a vastly better position to make this assessment than a nongovernmental organization or a court.[276] If the state had done so, there would have been an administrative record for a reviewing court to consider. If there had been no prior analysis, as PEDF argued, the court could have issued the declaratory relief that PEDF sought. If there had been such an analysis, the court could have then assessed its adequacy in light of claims made by PEDF.

The claim that DEP should have first considered the effect of its decision on constitutionally protected public rights has been raised in several cases pending before the Environmental Hearing Board. In one, the Delaware Riverkeeper Network and others challenge DEP's issuance of gas well and well pad permits on a variety of statutory and regulatory grounds, but also claims that DEP failed to consider the impact of its permit issuance on public trust resources.[277] Among other things, they argue, DEP failed to consider the long-term and cumulative impacts of its decision on surface water, ground water, and air quality.[278] If this or other cases get to the merits, the board will need to decide, among other things, the extent to which

273 Pa. Envtl. Defense Found. v. Commonwealth, No. 228 M.D. 2012, 2015 WL 79773, at *1; Second Amended Petition for Review, *supra* note 216, ¶¶ 92–98 (Declaration C). PEDF also argues that the Governor has a duty to consult with DCNR before making a decision that could adversely affect state forests and parks. *Id.* ¶¶ 87–91 (Declaration B).

274 *Pa. Envtl. Defense Found.*, 2015 WL 79773, at *22.

275 Second Amended Petition for Review, *supra* note 216, ¶¶ 87–91 (Declaration B).

276 *See id.* ¶ 27 (arguing that DCNR has developed the knowledge and expertise to implement the purpose and goals of CNRA).

277 Notice of Appeal at 2, Del. Riverkeeper Network v. Commonwealth, No. 2014-101-M (Pa. Envtl. Hearing Bd. July 30, 2014), *available at* http://ehb.courtapps.com/efile/documentViewer.php?documentID=22237.

278 *Id.* Such claims also have been made in at least three other cases. *See* Notice of Appeal at 4, Sludge Free UMBT v. Commonwealth, No. 2014-015-L (Pa. Envtl. Hearing Bd. Feb. 19, 2014), *available at* http://ehb.courtapps.com/efile/documentViewer.php?documentID=20487 (appealing the issuance of site suitability notices for land application of sewage sludge based, among other things, on DEP's alleged failure to consider long-term and cumulative impacts); Notice of Appeal at Exhibit B, Berks Cnty. v. Commonwealth, No. 2014-023-L (Pa. Envtl. Hearing Bd. Mar. 7, 2014), *available at* http://ehb.courtapps.com/efile/documentViewer.php?documentID=20658 (appealing a DEP extension of plan approval for air-cleaning device for air contamination source based, among other things, on DEP's alleged failure to consider impact of lead emissions from the facility); Notice of Appeal at 12–13, Del. Riverkeeper Network v. Commonwealth, No. 2014-142-B (Pa. Envtl. Hearing Bd. Sept. 15, 2014), *available at* http://ehb.courtapps.com/efile/documentViewer.php?documentID=23099 (appealing a DEP decision to allow drill cuttings from gas drilling to be beneficially used for soil stabilization based, among other things, on DEP's alleged failure to consider impacts of decision on surface and groundwater).

information already required in permit applications about such resources provides the required analysis. If there are significant gaps between what regulations in individual programs require and the analysis required to protect public environmental rights, the appellants may succeed in their claims.

A similar claim has also been made in at least one challenge to a local government land use decision. In *Kretchmann Farm L.L.C. v. Township of New Sewickley*,[279] an organic farm filed an action in the common pleas court challenging the township's conditional use approval of a natural gas compressor station adjacent to the farm in an agricultural zoning district.[280] Among other things, the farm argues that the township failed, prior to its decision, to gather or analyze constitutionally required information about the impact of the compressor station on the farm, the agricultural district, and the health of the community.[281]

C. End of the Payne Test?

For decades, the three-part *Payne* test functioned as a kind of "all-purpose" substitute for the text of section 27.[282] Because the text of the Amendment should instead be the applicable rule, the plurality in *Robinson Township* all but decided that the *Payne* test violates section 27.[283] "[W]hile 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."[284] The test cannot properly be applied to legislation. In addition, it should no longer be applied to administrative or executive actions.

1. Challenges to Legislative Acts

The *Payne* test has never been applied in a case challenging the constitutionality of a legislative act, because until *Robinson Township* there had never been such a challenge. The *Robinson Township* plurality did not apply this test to determine the constitutionality of Act 13; it used the text of

279 Kretchmann Farm L.L.C. v. Twp. Of New Sewickley, No. 11393-2014, at 10 (Pa. Ct. Com. Pl. Feb. 11, 2015) (memorandum opinion and order).

280 Appellants' Omnibus Reply Brief at 2–4, Kretschmann Farm, L.L.C. v. Twp. of New Sewickley, No. 11393-2014 (Pa. Ct. Com. Pl. Dec. 19, 2014).

281 *Id.* at 14–19. The common pleas court subsequently ruled against the organic farm, finding that the township board of supervisors "gave careful consideration to the environmental impact of the proposed facility, and in doing so, fulfilled its constitutional obligations to its residents." Kretchmann Farm L.L.C. v. Twp. of New Sewickley 10, No. 11393-2014 (Pa. Ct. Com. Pl., Feb. 11, 2015).

282 Dernbach, *Natural Resources and the Public Estate*, *supra* note 100.

283 *Robinson Township*, 83 A.3d 901, 967 (Pa. 2013) (concluding that the "non-textual Article I, Section 27 test established in *Payne* and its progeny is inappropriate to determine matters outside the narrowest category of cases").

284 *Id.* at 966–67.

section 27.[285] The *Payne* test does not function as an appropriate constitutional basis for a challenge to legislation under section 27.[286]

The first prong of the *Payne* test, which is based on "compliance with all applicable statutes and regulations,"[287] does not provide a rule that can be used to determine the constitutionality of statutes or regulations. In fact, it reads the constitution out of the test, leaving only statutes and regulations.[288]

Nor does the second prong provide a standard for determining the constitutionality of a statute.[289] This prong, instead, is about whether a state or local administrative entity has, based on an administrative record, demonstrated "a reasonable effort to reduce the environmental incursion to a minimum."[290] This prong is directed at administrative action, where an administrative record is created, and not legislative action, where a factual record is not ordinarily created.[291] It has nothing to do with the constitutionality of the underlying legislation.

The third prong is similarly inappropriate for determining the constitutionality of legislation. The third prong inquires: "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?"[292] This prong presupposes that the standard of review is an "arbitrary and capricious" test, not a constitutional test. It is basic administrative law that 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. When the agency or local government abuses its discretion under that authority by, for example, ignoring relevant evidence, it is said to be arbitrary and capricious.[293] A claim that a statute is unconstitutional, by contrast, is directed against the authority of the legislature, and requires proof of a clear and palpable violation to be successful; it is not based on an "arbitrary and capricious" test.[294]

Wholly apart from the utility or coherence of applying the *Payne* test to legislative actions, the test has nothing to do with the text of section 27 or its underlying principles. It is not based on any recognizable understanding of trust law, let alone public trust law, nor is it based on any recognizable

285 *Id.* at 967.

286 *Id.*

287 *Payne*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

288 *See Robinson Township*, 83 A.3d at 967 ("[The] *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.").

289 *Payne*, 312 A.2d at 94 ("Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?").

290 *Id.*

291 *Id.* at 94–95 (applying test to actions of Secretary of Transportation, not legislative action).

292 *Id.* at 94.

293 Station Square Gaming L.P. v. Pa. Gaming Control Bd., 927 A.2d 232, 244 (Pa. 2007).

294 Eagle Envtl. II, L.P. v. Commonwealth, 884 A.2d 867, 880 (Pa. 2005).

version of public environmental rights. Put bluntly, the *Payne* test empties section 27 of its constitutional meaning.

The commonwealth court's 2015 decision in *Pennsylvania Environmental Defense Foundation* indicates that the court understands the difficulties of applying *Payne* in a case challenging the constitutionality of a statute.[295] The court in that case applied the constitutional public trust text in each of the four issues it addressed.[296] While the court cited *Payne* and described the case,[297] it did not apply the *Payne* test. In an earlier procedural decision in the same case, by contrast, the court indicated that *Payne* would be the applicable test.[298]

2. Challenges to Administrative Actions

The *Payne* test is not much better in challenges to administrative or executive actions. The *Robinson Township* plurality set out a straightforward critique of the *Payne* test, and it deserves some amplification.[299]

"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."[300] The first prong of the test requires the state to comply with all applicable statutes and regulations relevant to its trust responsibilities.[301] Yet state government is subject to applicable laws in any event; the Amendment does not change its responsibilities in that regard.[302] Moreover, because statutes and regulations differ depending on the problem being addressed, and can change over time; this prong of the test has no inherent substantive content. "[T]he test assumes that the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action."[303] The prong is thus deeply antagonistic to a basic purpose of section 27—to provide a separate and enduring basis for environmental protection.[304]

In addition, the first prong of the *Payne* test is utterly silent on environmental rights.[305] While it does mention public natural resources, it ignores the obligation in section 27's text to conserve and maintain those resources for the benefit of present and future generations, substituting an

295 *See* Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 174 (Pa. Commw. Ct. 2015).

296 *Id.* at 159–70.

297 *Id.* at 158–59.

298 *Pennsylvania Environmental Defense Foundation*, No. 228 M.D. 2012, 2013 WL 3942086, at *3 (Pa. Commw. Ct. Jan. 22, 2013).

299 The next several paragraphs draw extensively from a longer critique of the *Payne* test contained in Dernbach, *Environmental Rights and Public Trust*, *supra* note 29, at 136–42.

300 *Robinson Township*, 83 A.3d 901, 967 (Pa. 2013).

301 *Payne*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

302 Dernbach, *Environmental Rights and Public Trust*, *supra* note 29, at 138.

303 *Robinson Township*, 83 A.3d at 967.

304 Dernbach, *Environmental Rights and Public Trust*, *supra* note 29, at 139.

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

altogether different test—compliance with applicable statutes and regulations.[306]

The second prong of the test, which requires the state to make a reasonable effort to reduce environmental incursion to a minimum, is hardly better as a statement of overall trust management responsibilities.[307] The Amendment itself states that the "Commonwealth shall conserve and maintain" the state's public natural resources "for the benefit of all the people," including "generations yet to come."[308] The second prong only requires the state to make a reasonable effort to reduce environmental incursion to a minimum; it does not even require that environmental incursions be minimized.[309] Even if it did, reducing continuing incursions on the trust corpus will not, by itself, "conserve and maintain" the trust corpus over time.[310] Although reducing incursions is a necessary part of the state's responsibilities, it is not sufficient. Nor is there anything in the *Payne* test about ensuring clean air, pure water, or the preservation of certain environmental values.[311]

The third prong, which requires a balancing of the harm and benefit of a decision or action, also contradicts the principle of constitutional construction requiring that the various provisions of the constitution be interpreted as "an integrated whole."[312] Rather than providing a means of reconciling constitutionally based goals, the *Payne* test simply allows one set of goals to trump another. Put differently, *Payne* balancing would say there is no violation of section 27 even if the evidence shows that the state has failed to conserve and maintain public natural resources, has failed to provide for clean air, pure water, and the preservation of certain environmental values, or both—so long as there is a strong countervailing economic development justification.[313] Yet neither property rights nor economic development can simply trump public rights in the environment.[314] By allowing economic and social development to outweigh protection of public natural resources, the third prong of the *Payne* test violates a basic

306 *Id.*

307 *See id.* at 94 ("Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?").

308 *See* PA. CONST. art. I, § 27 ("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.").

309 *See Payne*, 312 A.2d at 94.

310 *See* PA. CONST. art. I, § 27 (stating that "the Commonwealth shall conserve and maintain" the resources).

311 *See Payne*, 312 A.2d at 94 (requiring the state to "reduce the environmental incursion to a minimum" and ensure that the "environmental harm" does not "clearly outweigh the benefits to be derived").

312 *Compare id.* (creating the *Payne* test without express consideration of constitutional duties), *with* Cavanaugh v. Davis, 440 A.2d 1380, 1382 (Pa. 1982) ("[B]ecause the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible.").

313 *See Payne*, 312 A.2d at 94 (stating that the state's duty is only to ensure that "environmental harm[s]" do not "clearly outweigh the benefits").

314 *Robinson Township*, 83 A.3d 901, 954 (Pa. 2013).

principle of constitutional interpretation and undercuts the Amendment's basic purpose.

The case-by-case approach to environmental decision making in *Payne* also contradicts a fundamental purpose of section 27—to provide a set of constitutional rules that would guide all branches of government.[315] Representative Franklin Kury's explanation of the Amendment in the legislative history is particularly telling on that point: "We need a state government policy that is clearly stated and beyond question, one that will firmly guide the legislature, the executive, and the courts alike."[316] Unlike the *Payne* test, which is case- and statute-specific, the obligation to conserve and maintain public natural resources provides an overall constitutional rule for all of those resources. This is also true of the public right to clean air, pure water, and the preservation of certain environmental values.

Altogether, then, the "*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."[317] In effect, the plurality explains, the *Payne* test reads section 27 out of the constitution.[318] The plurality's critique of *Community College of Delaware County v. Fox*,[319] a 1975 commonwealth court case, is a particularly telling illustration of that very point: "The court seemingly relieved executive agencies of the obligation to apply statutes and exercise their statutory discretion in a manner consonant with the Constitution, indicating that mere compliance with the enabling statute and relevant regulations was sufficient to satisfy constitutional strictures."[320]

Finally, if future courts apply the *Payne* test to executive branch decisions, there would in effect be two tests for determining the applicability of section 27. One test, based on the text of the Amendment, would be applicable to legislative acts.[321] Another test, the *Payne* test, would be applicable to executive branch decisions.[322] In effect, the courts would be allowing the executive branch to use the General Assembly's delegated authority to do what the General Assembly itself cannot do under *Robinson Township*—oversee the degradation of public natural resources and

315 *See* Preamble to PA. CONST. art. I (stating that article I provides for the recognition and establishment of the "general, great and essential principles of liberty and free government" of Pennsylvania).

316 *Pa. Legislative Journal-House 486* (Apr. 21, 1969) (statement of Rep. Franklin Kury), *in* Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 7. *See also Pa. Legislative Journal-House* 722 (June 2, 1969) (similar statement), *in* Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 15.

317 *Robinson Township*, 83 A.3d at 967.

318 *See id.* (stating that the *Payne* test describes the state's obligations "in much narrower terms than the constitutional provision").

319 342 A.2d 468 (Pa. Commw. Ct. 1975).

320 *Robinson Township*, 83 A.3d at 967 n.53.

321 *See id.* at 967 (holding that the "*Payne* [test] and its progeny" are only applicable to "cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests").

322 *Payne*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973); *Robinson Township*, 83 A.3d at 967 n.53.

environmental values, as well as the public rights that go with them.[323] That also would make litigation more complicated and even incoherent in cases like *Pennsylvania Environmental Defense Foundation* and *Delaware Riverkeeper Network*, where the petitioners are claiming that a combination of legislative and executive acts violated section 27.[324]

But this leaves a conundrum because, while the plurality is sharply critical of the *Payne* test, it also leaves a role for that test:

> Because of these critical difficulties, we conclude that the non-textual Article I, Section 27 test established in *Payne* and its progeny is inappropriate to determine matters outside the narrowest category of cases, 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.[325]

One way through the conundrum is to treat this exception as it is written. As stated above, this class of cases is very narrow—where the section 27 challenge is based on an "alleged failure to comply" with a statute enacted to further the Amendment.[326] A great many Pennsylvania statutes state, as one of their purposes, implementation of section 27.[327] Moreover, this tracks the first prong of the *Payne* test, which requires compliance with all applicable statutes and regulations.[328]

Another approach is to affirm the *Payne* holding but not the *Payne* test. Plainly, the *Payne* court believed that it was addressing a de minimis violation of the Amendment.[329] Yet the textual rules articulated by the *Robinson Township* plurality require substantial violations, or clear and palpable violations, avoiding the problem with de minimis violations that the *Payne* court sought to avoid.[330] In a fundamental way, there is no conflict between *Robinson Township* and the result in *Payne*. The *Payne* court held that the loss of 3% of the area of a public park to a street widening project did not violate the public trust.[331] It did so because it plainly feared that holding trivial or de minimis changes unconstitutional would impede development.[332] The *Robinson Township* court held unconstitutional several provisions of Act 13 because they significantly transgressed against the

323 *See Robinson Township*, 83 A.3d at 969.

324 Pa. Envtl. Defense Found. v. Commonwealth, No. 228 M.D. 2012, 2015 WL 79773, at *11–12 (Pa. Commw. Ct. Jan. 7, 2015); Notice of Appeal ¶ 5, *Delaware Riverkeeper Network*, No. 2014-101-M (Pa. Envtl. Hearing Bd. July 30, 2014), *available at* http://ehb.courtapps.com/efile/documentViewer.php?documentID=22237.

325 *Robinson Township*, 83 A.3d at 967.

326 *Id.*

327 *E.g.*, Pennsylvania Appalachian Trail Act, 64 PA. CONS. STAT. ANN. § 802 (West 1978); Pennsylvania Safe Drinking Water Act, 35 PA. CONS. STAT. ANN. § 721.2 (West 1984).

328 *Payne*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

329 *Id.*

330 *Robinson Township*, 83 A.3d at 951, 959.

331 *Payne*, 312 A.2d at 96.

332 *See id.* at 94, 96 ("We hold that Section 27 was intended to allow the normal development of property in the Commonwealth . . . .").

constitutional rules.[333] Had the *Payne* court applied the section 27 textual rule—the rule employed by the *Robinson Township* plurality—it would likely have arrived at the same result.[334] That is, trivial or de minimis changes in the public trust corpus do not violate the state's duty to conserve and maintain public natural resources.[335]

D. The Role of Balancing

A recurring and inevitable question in any discussion about section 27 after *Robinson Township* is the role of balancing. To some degree, the question occurs because most environmental law involves some balancing of environmental considerations with economic or social considerations.[336] In addition, because the third prong of the *Payne* test involves balancing, it has habituated lawyers to thinking of section 27 in those terms.[337] There also continue to be worries that balancing is necessary to control or limit the perceived radical consequences of section 27.[338] Because balancing can mean many things, and because sloppy use of the term can utterly undermine environmental rights in the Amendment, it is important to unpack several different uses of the term.

On one hand, balancing can occur when there are real environmentally related harms and real economic benefits, and a court or other decision maker is asked to decide which matters more. In an environmental context, "balancing" all too often means that economic development trumps environmental harms.[339] Much of Pennsylvania's history with logging, wildlife, mining, and industrialization involves precisely that kind of balancing.[340] In fact, the purpose of enshrining environmental rights in the state constitution was to impose limits on what the legislature could do in the name of economic development.[341] The manner in which the *Robinson Township* plurality applied these tests makes clear that any "balancing" of environmental and economic interests does not excuse the state's failure to

333 *Robinson Township*, 83 A.3d at 978.

334 *Id.* at 959.

335 *See id.* (explaining that the Amendment offers protection against actions including immediate severe impact on public natural resources and incremental impact that are likely to have significant effects in the short or long term).

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

337 *See id.*; *Robinson Township*, 83 A.3d at 966 ("[T]he *Payne* test appears to have become, for the Commonwealth Court, the benchmark for Section 27 decisions.").

338 *See Robinson Township*, 83 A.3d at 959 (explaining that balancing the interests of present and future beneficiaries includes weighing "actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term").

339 *E.g.*, *Payne*, 312 A.2d at 94 (holding for "controlled development of resources rather than no development").

340 *See Robinson Township*, 83 A.3d at 959–61 (explaining that history leading to the enactment of the Amendment included logging, wildlife, mining and industrialization).

341 *Robinson Township*, 83 A.3d at 954.

protect constitutional interests.[342] After it explained that sections 3303 and 3304 are unconstitutional, the plurality answered the argument that the benefits of shale gas development should trump or at least be balanced against the environmental constitutional claims of the citizen petitioners:

> To be sure, the Commonwealth and its *amici* make compelling policy arguments that Pennsylvania's populace will benefit from the exploitation of the natural gas found in the Marcellus Shale Formation. If economic and energy benefits were the only considerations at issue, this particular argument would carry more weight. But, the Constitution constrains this Court not to be swayed by counter-policy arguments where the constitutional command is clear.[343]

Put differently, section 27 means that policy arguments based on economic development or anything else do not provide a trump card against constitutionally protected rights.

Balancing can also mean reconciling and giving full effect to both constitutionally protected environmental rights and constitutionally protected property rights when a conflict arises between them. As the plurality makes clear, property rights do not automatically trump environmental rights.[344] Two basic rules of constitutional interpretation frame the means for resolving such questions. First, both provisions of the constitution are of equal weight.[345] Second, constitutional provisions are to be interpreted and applied so as to give full weight to each.[346] In that context, courts engage in some form of *constitutional* balancing.[347] The plurality refers to this kind of balancing, in which both property rights and environmental rights are given full effect, as embodying sustainable development.[348] But in the absence of concretely defined and constitutionally protected property, or other, rights weighed against environmental rights, there should be no balancing of constitutionally protected environmental rights.

Section 27 is thus premised on the relatively harmonious coexistence of humans and the rest of the environment, and the need to prevent significant adverse effects on the environment. This is perhaps most evident with the public trust part of the Amendment, which makes clear that the state's obligation is to "conserve and maintain" public natural resources. As originally introduced in the General Assembly, section 27 would have

342 *See id.* at 951–52 ("[A]s with any constitutional challenge, the role of the judiciary . . . includes the obligation to vindicate Section 27 rights.").

343 *Robinson Township*, 83 A.3d at 981.

344 *Id.* at 969.

345 *Id.* at 953–54 ("The right delineated in the first clause of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I.").

346 *See, e.g.*, Cavanaugh v. Davis, 440 A.2d 1380, 1381–82 (Pa. 1982).

347 *Robinson Township*, 83 A.3d at 940.

348 *Id.* at 958, 978, 981.

required the state to "preserve and maintain" public natural resources.[349] At the request of Dr. Maurice Goddard, who was then Secretary of the Department of Forests and Waters, "conserve" was substituted for "preserve."[350] Dr. Goddard worried that "preserve" might prohibit his department from authorizing "trees to be cut on Commonwealth land" or prohibit the game commission from licensing hunters to "harvest game."[351] Conservation, of course, allows these and other human uses of public lands. Thus, it is possible for the state to change the uses of public natural resources, so long as those resources are conserved and maintained. That, of course, is precisely what section 27 states.[352]

The doctrine of standing also supports this conclusion. Under Pennsylvania law, 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."[353] In *Robinson Township*, the Pennsylvania Supreme Court—not just the plurality—held that several different classes of petitioners had standing because the challenged parts of Act 13 adversely affected their environmental rights.[354] For at least some of the petitioners, moreover, the court found that Act 13 also adversely affected their property rights.[355] To show "substantial, direct, and immediate" interests, plaintiffs will need to show more than trivial or symbolic adverse effects.[356]

Balancing at the violation determination stage can also mean that there is no remedy for plaintiffs who have suffered "substantial, direct, and immediate" effects.[357] This is particularly true for *Payne*-type balancing, which involves all of a project's harms and benefits.[358] The problem with this type of balancing at the violation determination stage is that significant adverse effects to the plaintiff can simply be balanced away if the perceived

349 H.R. 958, Printers No. 1105 (Pa. 1969), *reprinted in* Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 5.

350 Robert Broughton, *Analysis of HB 958, The Proposed Pennsylvania Environmental Declaration of Rights*, LEGIS. J.–HOUSE, April 14, 1970, at 2273, *reprinted in* Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 32–33.

351 *Id.*

352 H.R. 958, Printers No. 2860 (Pa. 1969), *reprinted in Legislative History*, *supra* note 35, at 21–22.

353 *Robinson Township*, 83 A.3d at 917 (quoting Fumo v. City of Phila., 972 A.2d 487, 496 (Pa. 2009)).

354 *Id.* at 920.

355 *Id.* at 922.

356 S. Whitehall Twp. Police Serv. v. S. Whitehall Twp., 555 A.2d 793, 795 (Pa. 1989) (defining what substantial, direct, and immediate interests are under Pennsylvania law).

357 Another problem with balancing is in the possibility of industry challenges to government actions on the basis of claims that DEP did not engage in proper balancing of the economic, environmental, or other value of the proposed activity. Such challenges, if accepted, would appear to seriously undermine the integrity of the Amendment. *See* Notice of Appeal at 9–10, Nat'l Fuel Gas Supply Corp. v. Commonwealth, No. 2014-039-R (Pa. Envtl. Hearing Bd. Apr. 17, 2014), *available at* http://ehb.courtapps.com/efile/documentViewer.php?documentID=21076.

358 *See Payne*, 312 A.2d 86, 94 (Pa. 1973) (specifying the three prong balancing test that the court should use for judicial review of social and environmental concerns).

benefits are great enough, leaving the plaintiff without any remedy at all. Because section 27 establishes constitutional rights, and because plaintiffs in these cases are claiming the protection of those rights, courts should be chary of balancing them away.

V. PRIVATE TRUST DUTIES THAT APPLY TO PUBLIC TRUST

Another set of governmental responsibilities may derive from application of private trust rules to the public trust provision of section 27.[359] In *Robinson Township*, the plurality acknowledged that "the Environmental Rights Amendment creates an express trust," and that "'[t]rust' and 'trustee' are terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted."[360] While the plurality added that the "ultimate power and authority to interpret" section 27 "rests with the Judiciary, and in particular with [the Pennsylvania Supreme] Court,"[361] the plurality's opinion is replete with references to the Pennsylvania Uniform Trust Act,[362] the Restatement (Second) of Trusts, and Pennsylvania trust cases.[363] Indeed, the plurality stated that the public trust provisions of section 27 are "presumptively subject to the [Pennsylvania] Uniform Trust Act."[364] The state has a fiduciary responsibility under the public trust provisions of section 27:

> As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. *See* PA. CONST. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.[365]

In trust law, the term "fiduciary duty" encompasses several different trustee duties, including but not limited to prudence, loyalty, and impartiality toward beneficiaries.[366] These duties, taken together, are intended to "to

359 The public trust responsibilities based on trust law that have been articulated so far in Pennsylvania are a subset of a larger set of trust responsibilities described in MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 165–205 (2014).

360 *Robinson Township*, 83 A.3d 901, 956, 959 n.45 (Pa. 2013).

361 *Id.* at 949 n.45 (internal quotation marks omitted) (quoting Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cnty. Bd. of Assessment Appeals, 44 A.3d 3, 7 (Pa. 2012)).

362 Uniform Trust Act, 20 PA. CONS. STAT. ANN. §§ 7701–7799.3 (West 2014).

363 *See generally Robinson Township*, 83 A.3d at 956–58, 983.

364 *Id.* at 959 n.45.

365 *Robinson Township*, 83 A.3d at 957.

366 JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS & ESTATES 580 (9th ed. 2013) ("Trustees are subject to overarching fiduciary duties of *loyalty* and *prudence* and a host of *subsidiary duties* such as keeping adequate records and disclosing information about the trust to the beneficiaries.").

induce the trustee to adhere to the terms of the trust."[367] They are therefore separate from the substantive terms of the trust itself. These duties are being raised in litigation subsequent to the Supreme Court's *Robinson Township* decision as needed to implement the constitutional public trust. Another private trust duty being asserted in this litigation is the duty to provide an accounting. Finally, because private trust law in Pennsylvania limits the trustee's ability to delegate trust duties, some litigants are arguing, and one common pleas court has decided, that the government's ability to delegate public trust authority under section 27 is similarly limited.[368]

A. Duty of Prudence

A basic fiduciary duty for the state as trustee is the duty of prudence.[369] The trustee is generally required "to exercise ordinary skill, prudence, and caution in managing [the] corpus of [the] trust."[370] According to Pennsylvania trust law, "[a] trustee shall administer the trust as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by exercising reasonable care, skill and caution."[371] As Mary Wood has explained: "The [public] trustee's duty to act prudently suggests agencies should adopt the 'precautionary approach,' which requires erring on the side of caution where uncertainty exists."[372]

The duty of prudence includes, but is not limited to, the responsibility to assess and consider potential impacts on the beneficiary's rights prior to making a decision.[373] This responsibility overlaps with, but is not the same as, the government's duty to consider impacts on both environmental rights prior to making a decision.[374] Because the duty of prudence is a trust duty, it does not extend to the right stated in the Amendment's first clause.[375]

Another count in the *Delaware Riverkeeper Network* commonwealth court case is that the state breached its duty of prudence.[376] The state did so, petitioner asserts, because it does not fully understand the present and future impacts of gas drilling on state lands, including air quality impacts and cumulative environmental impacts.[377] Nor, the petitioner says, does the state

367 *Id.*

368 *See infra* Part V.A–D.

369 *Robinson Township*, 83 A.3d at 957.

370 *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 174 (1959)).

371 20 PA. CONS. STAT. ANN. § 7774 (West 2014).

372 WOOD, *supra* note 359, at 201.

373 *See generally id.* (recognizing that even when scientific uncertainty has existed, courts have accepted "anticipatory actions to avoid environmental harm *before* it occurs" (internal quotation marks omitted)).

374 *See id.* at 203–04 ("A crucial difference exists, however, between . . . statutorily required reports and trust accountings: the latter must specifically enable the beneficiaries to check on the management of their trust property.").

375 *See id.* at 166–67 ("A trust frame centers on fiduciary obligation rather than political discretion. . . . It returns us to an ancient and animating vernacular, one that empowers citizens to protect their public *property* rights." (internal quotation marks omitted)).

376 Delaware Riverkeeper Petition, *supra* note 191, ¶¶ 247–289.

377 *Id.* ¶ 251.

understand the overall public health impact of drilling.[378] The petitioner claims that "[t]he available data lacks clarity on certain future effects, and the Commonwealth has not even done an analysis on the available data, thereby failing to inform itself of whether the costs it is incurring are reasonable."[379] Delaware Riverkeeper Network has also made this argument in appeals of DEP decisions to issue individual permits for gas wells.[380]

B. Duty of Loyalty

Another fiduciary duty identified by the plurality is loyalty.[381] Loyalty means that the trustee must "administer the trust solely in the interest of the beneficiary."[382] Among other things, the duty of loyalty means that the trustee may not "place himself [or herself] in a position that is inconsistent with the interests of the trust."[383] The duty of loyalty is ordinarily invoked when the trustee manages the trust corpus in a way that constitutes self-dealing or otherwise benefits the trustee personally at the expense of beneficiaries.[384]

One potential conflict with respect to the duty of loyalty is between the government as proprietor and the government as trustee:

> Under the proprietary theory, government deals at arms[']' length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations. Under the trust theory, it deals with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.[385]

Petitioners in both the *Pennsylvania Environmental Defense Foundation* and *Delaware Riverkeeper Network* cases claim, in effect, that the state is balancing the budget by engaging in massive leasing of state forest and park lands for Marcellus shale gas extraction at the expense of

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378 *Id.* ¶ 262.

379 *Id.* ¶ 287; *see also id.* ¶¶ 267–268, 277.

380 *See, e.g.*, First Amended Notice of Appeal ¶¶ 19–23, 28–30, Del. Riverkeeper Network v. Commonwealth, No. 2014-142-B (Pa. Envtl. Hearing Bd. Nov. 3, 2014).

381 *Robinson Township*, 83 A.3d 901, 957 (Pa. 2013).

382 *In re* Flagg Estate, 73 A.2d 411, 414 (Pa. 1950) (internal quotation marks omitted) (citing RESTATEMENT (SECOND) OF TRUSTS § 170 (1959)); *see also Robinson Township*, 83 A.3d at 957 (loyalty requires the trustee to administer the trust "solely in [the] beneficiary's interest and not his own") (citation omitted).

383 *See* Estate of McCredy, 470 A.2d 585, 597 (Pa. Super. 1983).

384 *Id.* at 596–600 (summarizing law of trustee loyalty in terms of prohibition against self-dealing, and holding that trustee's purchase of securities from his investment firm did not constitute prohibited self-dealing because trustee's "firm acted simply as a conduit to facilitate purchases of the units by its various clients").

385 Clyde O. Martz, *The Role of Government in Public Resources Management*, *in* 15 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 1, 2 (Matthew Bender pub., 1969), cited in Robert Broughton, *Analysis of HB 958, The Proposed Pennsylvania Environmental Declaration of Rights*, LEGIS. J.–HOUSE, April 14, 1970, at 2273, reprinted in Dernbach & Sonnenberg, *Legislative History*, *supra* note 35, at 32.

those resources.[386] Both recognize a conflict between the state as proprietor, seeking to maximize revenues, and the state as trustee under section 27.[387] That conflict is stated most directly in *Pennsylvania Environmental Defense Foundation*, where the petitioner argues that the governor and the legislature are undermining DCNR's ability to conserve and maintain public natural resources by requiring DCNR to lease lands to raise revenue to balance the budget; by not fully protecting the environment from the effects of such leasing; and by committing the great bulk of the revenue from leasing—revenue that would otherwise have been used to mitigate the effects of leasing—to balance the state budget.[388] The petition for review in *Delaware Riverkeeper Network* cites a state government source as saying, "further leasing does not have any positive ecological value, but merely economic value for budgetary reasons."[389]

Yet the petitioners in neither case expressly argue that the state is violating its duty of loyalty under section 27 by playing two different and somewhat conflicting roles at the same time. To convince a court that the state had violated its duty of loyalty, petitioners would likely need to show that the state had engaged or was engaging in some form of self-dealing. Leasing public lands for gas extraction to balance the budget is arguably self-dealing because the state benefits financially from its management of public trust resources, to the detriment of trust beneficiaries. The financial benefit arguably compromises the state's willingness and ability to conserve and maintain public natural resources. But those arguments would need to be made and proven.

C. Duty of Impartiality Toward Beneficiaries

The trustee's duty of impartiality arises when there are multiple beneficiaries or classes of beneficiaries. The duty of impartiality "does not require impartiality in the sense of equality."[390] Rather, "[d]ealing impartially with all beneficiaries means that the trustee must treat all equitably in light of the purposes of the trust."[391] In *Robinson Township*, the duty of impartiality was expressed in two ways: "first, the trustee has an obligation to deal impartially with all beneficiaries and, second, the trustee has an obligation to balance the interests of present and future beneficiaries."[392] The duty of impartiality means that it is not enough simply to conserve and maintain public natural resources, or to do so in a way that protects some

386 *See* Delaware Riverkeeper Petition, *supra* note 191, ¶ 5.

387 *See* PA. CONST. art. I, § 27.

388 *See supra* notes 194–241 and accompanying text.

389 Delaware Riverkeeper Petition, *supra* note 191, ¶ 296.

390 DUKEMINIER & SITKOFF, *supra* note 366, at 658. In order to satisfy this requirement, a "trustee must construe the trust instrument to determine the respective interests of the beneficiaries." *Id.*

391 *Robinson Township*, 83 A.3d at 959 (citing 20 Pa.C.S. § 7773).

392 *Id.*

beneficiaries but not others.[393] One of the constitutional infirmities of section 3304 of Act 13, according to the plurality, is that it protected some members of the public but not everyone, violating the duty to conserve and maintain public natural resources for the benefit of everyone.[394] As the plurality explained, "inequitable treatment of trust beneficiaries is irreconcilable with the trustee duty of impartiality."[395] In cases brought or decided since *Robinson Township*, the duty of impartiality has been expressed in each of these ways.

First, a common pleas court decided that a city was obliged to treat impartially various local and statewide public trust beneficiaries. In *Fegley v. Lehigh County Board of Elections*,[396] opponents of a proposed waste-to-energy facility asked the county election board to place on the ballot a proposed ordinance for the City of Allentown containing requirements more stringent than those applicable under the state's Air Pollution Control Act.[397] In effect, the city would be in the position of regulating the project according to more stringent rules than those employed by the state. According to counsel for the proposed facility, the ordinance "could have derailed the project."[398] The election board refused to place the proposed ordinance on the ballot, finding that the Air Pollution Control Act preempted it.[399] The plaintiffs, who had gathered more than 2,000 signatures for this proposed ordinance, then sought a writ of mandamus in the court of common pleas.[400] The court denied the writ.[401] In doing so, the court acknowledged that federal and state law allows local governments to adopt more stringent air pollution control regulations.[402] The City of Allentown, however, was not specifically authorized to do so under the state's Air Pollution Control Act.[403]

In a separate motion for summary judgment, plaintiffs added a new argument. Plaintiffs argued that, after *Robinson Township*, the election board failed to fulfill its duty as a trustee under section 27 by not putting the proposed ordinance on the ballot.[404] The proposed facility operator filed a cross-motion for summary judgment, describing the extensive permit application review process that DEP had already undertaken, and explaining that the proposed ordinance would, in effect, supplant that regulatory

393 *See id.*

394 *Id.* at 980.

395 *Id.* at 984 (citing *In re Hamill's Estate*, 410 A.2d 770, 773 (Pa. 1980)).

396 No. 2013-C-3436 (Pa. Ct. Com. Pl., Oct. 3, 2014), *available at* http://stoptheburn.org/wp-content/uploads/2014/10/2014-10-03-CCP-dismissal.pdf.

397 *Id.* at 5; 35 PA. CONS. STAT. ANN. §§ 4001–4015 (West 2014).

398 Robert B. McKinstry Jr. et al., *Ballard Spahr Lawyers Turn Back* Robinson Township *Challenge to Waste-to-Energy Facility*, BALLARD SPAHR LLP, Oct. 15, 2014, http://www.ballardspahr.com/alertspublications/legalalerts/2014-10-15-ballard-spahr-lawyers-turn-back-robinson-township-challenge-to-waste-to-energy-facility.aspx (last visited Apr. 17, 2015).

399 *See Fegley*, No. 2013-C-3436, at 8–9.

400 *Id.* at 3.

401 *Id.* at 9.

402 *Id.* at 6–7.

403 *Id.* at 7–9.

404 Fegley v. Lehigh County Bd. of Elections, No. 2013-C-3436, at 6 (Pa. Ct. Com. Pl. Oct. 3, 2014) (denying motion for summary judgment).

system with one of the city's own.[405] DEP's existing permit application review process, it argued, is essential to the state's duty as a trustee.[406] Moreover, the state trustee has a duty to deal impartially with both the Allentown beneficiaries of the public trust and the statewide beneficiaries of the public trust. Thus, the developer argued:

> If the City were to abdicate its fiduciary duties as trustee of the environmental trust to the voters of Allentown, who are themselves a small subset of beneficiaries (the people of the Commonwealth) of the environmental trust, the result would be: . . . an unconstitutional conflict of interest between the *de facto* trustee (the voters of Allentown) and other beneficiaries (such as Commonwealth residents outside of Allentown located near landfills where Allentown's municipal waste is otherwise disposed, or along truck routes used for transporting waste to those landfills), and . . . an unconstitutional failure of the City to deal impartially with and to consider the interests of all beneficiaries of the trust.[407]

The court agreed with that analysis and granted the developer's cross motion for summary judgment:

> *Robinson* does not support the relief the Plaintiffs requested and does not alter the provisions of the [Air Pollution Control Act] regarding local authority and preemption. *Robinson* makes it clear that the relief Plaintiffs seek would unconstitutionally deprive the Pennsylvania Department of Environmental Protection and the City of the ability to fulfill their duties as a trustee of the environmental resources of the Commonwealth, as required under Article I § 27 of the PA Constitution.[408]

Somewhat similarly, in the *Delaware Riverkeeper Network* commonwealth court case, the petitioner claimed that the state breached its duty to act impartially between members of the same generation.[409] Those who live or work near state forests or parks with Marcellus shale development, it argues, experience greater burdens than those who do not.[410]

The duty of impartiality has also been expressed in terms of the state's duty toward present and future generations. As the *Robinson Township* plurality explained, this duty of intergenerational impartiality is deeply rooted in the text of section 27, which states that the beneficiaries are "'all the people' of Pennsylvania, including generations yet to come."[411] Indeed,

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405 Intervener Delta Thermo Energy A, L.L.C.'s Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment ¶¶ 14, 20, 26, 31, Fegley v. Lehigh Cnty. Bd. of Elections, No. 2013-C-3436 (Pa. Ct. Com. Pl.), *available at* http://stoptheburn.org/wp-content/uploads/2014/08/2014-07-01-DTE-ResponsetoMotionforSummary.pdf.

406 *Id.* ¶ 31.

407 *Id.* ¶ 32.

408 Order Denying Motion for Summary Judgment, Fegley v. Lehigh Cnty. Bd. of Elections, No. 2013-C-3436, at 6 (Pa. Ct. Com. Pl. July 1, 2004).

409 Delaware Riverkeeper Petition, *supra* note 191, ¶¶ 205–215.

410 *Id.* ¶¶ 205–206.

411 *Robinson Township*, 83 A.3d, 901, 959 (Pa. 2013) (quoting PA. CONST. art. 1 § 27).

the "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."[412] The plurality continued: "The Environmental Rights Amendment offers protection equally against actions" with short-term and long-term effects.[413]

In the *Delaware Riverkeeper Network* commonwealth court case, the petitioner also claimed the state breached its duty to act impartially between present and future generations.[414] "Shale gas development has exploded at a pace that has far outstripped current scientific knowledge," petitioner claimed.[415] Among other things, it asserted, the state has not developed baseline data, does not understand short- and long-term cumulative impacts, and does not know what chemicals are being injected underground as part of the hydraulic fracturing process, all of which will adversely affect future generations.[416]

D. Duty to Provide an Accounting

As the *Robinson Township* plurality explained, it is basic trust law that the trustee has a "duty of gathering and making available to the beneficiaries complete and accurate information as to the nature and amount of the trust property."[417] The beneficiary's right of inspection of records is rooted in his or her beneficiary status, and does not depend on litigation or a court order.[418] In fact, Pennsylvania law requires a trustee to "keep adequate records of the administration of the trust."[419] In its commonwealth court case, Delaware Riverkeeper Network claimed that the state had violated section 27 by failing to keep adequate records of the trust resources subject to oil and gas leasing and by failing to disclose information to beneficiaries concerning environmental effects, even when requested to do so.[420]

E. Limited Delegation Authority for Trustee Duties

The *Robinson Township* plurality notes that the "Commonwealth is named trustee and, notably, duties and powers attendant to the trust are not

412 *Id.*

413 *Id.* "In undertaking its constitutional cross-generational analysis, the Commonwealth trustee should be aware of and attempt to compensate for the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office." *Id.* at 959 n.46.

414 Delaware Riverkeeper Petition, *supra* note 191, ¶¶ 198–237. (Count II—Breach of Duty of Impartiality to Present and Future Generations).

415 *Id.* ¶ 220.

416 *Id.* ¶¶ 220–237.

417 *Robinson Township*, 83 A.3d 901, 983 n.60 (Pa. 2013).

418 *In re* Estate of Rosenblum, 328 A.2d 158, 164–65 (Pa. 1974) (citing RESTATEMENT (SECOND) OF TRUSTS § 173).

419 20 PA. CONS. STAT. ANN. § 7780(a) (West 2014).

420 Delaware Riverkeeper Petition, *supra* note 191, ¶¶ 238–246 (Count III—Breach of the Duty to Provide an Accounting).

vested exclusively in any single branch of Pennsylvania's government."[421] While co-trusteeship among multiple state and local governmental entities is inevitable, even desirable, issues about the appropriateness of delegation of legal authority are beginning to arise. Pennsylvania law allows a trustee to "delegate duties and powers to another trustee if the delegating trustee reasonably believes that the other trustee has greater skills than the delegating trustee with respect to those duties and powers and the other trustee accepts the delegation."[422] To avoid responsibility for the actions of the other trustee, however, the delegating trustee must have "exercised reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the performance" of the other trustee.[423]

One set of delegation issues arises when DEP considers permit applications for gas wells, coal mines, waste management facilities, and other facilities that cannot legally operate unless they first receive a DEP permit. Typically, DEP does not independently consider conformity to local zoning and planning when it reviews a permit application for such a facility; it relies on local governments for those determinations.[424] The theory, implied in DEP's policy, is that both the legal authority and administrative expertise for local zoning and planning reside with the relevant local government, while the legal authority and administrative expertise for DEP's regulatory programs reside with DEP.[425] However, the Municipalities Planning Code,[426] Pennsylvania's zoning enabling act, provides: "When a county adopts a comprehensive plan . . . and any municipalities therein have adopted comprehensive plans and zoning ordinances . . . Commonwealth agencies *shall consider and may rely upon comprehensive plans and zoning ordinances* when reviewing applications for the funding or permitting of infrastructure or facilities."[427]

In an appeal to the Environmental Hearing Board of a DEP decision to approve six gas well permits, several environmental groups claimed that DEP's decisions violated section 27 because DEP improperly deferred to a decision by the local township to support the proposed gas wells.[428] Appellants claim the township's zoning ordinance prohibited the activity at

421 *Robinson Township*, 83 A.3d at 956; *see also id.* at 967 ("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.").

422 20 PA. CONS. STAT. ANN. § 7777(e) (West 2014).

423 *Id.*

424 Pa. Dep't of Environmental Protection, Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Authorizations for Facilities and Infrastructure (2009), http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-76213/ (last visited Apr. 17, 2015).

425 *Id.*

426 Pennsylvania Municipalities Planning Code, 53 PA. CONS. STAT. ANN. §§ 10101–11202 (West 2014).

427 53 PA. CONS. STAT. ANN. § 10619.2(a) (West 2014) (emphasis added).

428 First Amended Notice of Appeal, Delaware Riverkeeper Network et al. v. Commonwealth, Dep't of Envtl. Resources & R.E. Gas Dev. L.L.C., No. 2014-142-B, 4, 13 (Pa. Envtl. Hearing Bd. Nov. 3, 2014).

the time the permit application was filed.[429] Then, appellants allege, while the application was pending, the township changed its ordinance to allow gas operations.[430] Shortly thereafter, plaintiffs claim, DEP approved the permit application, and used the changed ordinance to help justify its decision.[431] The environmental groups, which are challenging the changed ordinance in a separate proceeding, claim that DEP violated its independent trusteeship duty under section 27 by deferring to the township's decision that the location of the proposed facility was suitable.[432]

This issue also arose in *Fegley v. Lehigh County Board of Elections*,[433] discussed above, in which citizens sought a referendum on a stringent air pollution control ordinance to help fight a proposed incinerator.[434] In addition to its other claims, the developer argued that the city has a duty to personally carry out its trusteeship responsibilities, and not to delegate them to the voters.[435] Allowing the referendum to go forward would be "an unconstitutional failure of the City to personally perform the responsibilities of the trusteeship or prudently delegate responsibility."[436] In granting summary judgment against the citizens, the court stated that the proposed referendum would deprive the city of its duties as a trustee under section 27,[437] an explanation that appears to support the developer's nondelegation argument.

VI. MODIFICATION OF GOVERNMENTAL AUTHORITY

As the previous two Parts have indicated, the potential implications of *Robinson Township* are considerable. At the same time, though, these cases are more about filling gaps and repairing inadequacies in the existing environmental regulatory system than they are about overturning that system and replacing it with something else. While public constitutional rights undergird the entire regulatory system, they are likely to be applied directly in only a relatively small percentage of cases.

Yet there is another set of applications of section 27 that, while more subtle, could prove to be an important consequence of the *Robinson*

429 Press Release, Clean Air Council & Del. Riverkeeper Network, Parents and Environmental Groups Challenge Middlesex Township Zoning Changes and Permits for Gas Wells Near Schools and Homes (Oct. 10, 2014), *available at* http://www.cleanair.org/sites/default/files/FOR%20IMMEDIATE%20RELEASE_10.10.14_Parents%20and%20groups%20challenge%20Middlesex%20Twp%20zoning%20changes%20that%20allow%20fracking%20near%20schools%20and%20homes.pdf.

430 First Amended Notice of Appeal at 6–7, Del. Riverkeeper Network v. Commonwealth, No. 2014-142-B (Pa. Envtl. Hearing Bd. Nov. 3, 2014).

431 *Id.* at 7.

432 *Id.* at 13–15.

433 Order Denying Motion for Summary Judgment, Fegley v. Lehigh Cnty. Bd. of Elections, No. 2013-C-3436, at 6 (Pa. Ct. Com. Pl., Oct. 3, 2014).

434 *See supra* text accompanying notes 396–408.

435 Intervener Delta Thermo Energy A, L.L.C.'s Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, *supra* note 405, ¶ 27.

436 *Id.* at 7.

437 Order Denying Motion for Summary Judgment, *supra* note 433, at 6.

Township decision. These applications are particularly notable because they were a recognized part of section 27 jurisprudence prior to *Robinson Township*.[438] Essentially, these applications involve the Amendment in more of a supporting role—confirmation and extension of the police power, guidance in statutory interpretation, and providing constitutional authority for laws whose constitutionality is challenged on other grounds.[439] The Pennsylvania courts in these earlier cases expressly recognized each of those roles for the Amendment as an undivided whole—without separately considering the environmental rights and public trust clauses.[440] These roles were not directly addressed in *Robinson Township*.[441]

Each of these supporting roles modify governmental authority in the direction of more complete conformity with section 27. After *Robinson Township*, with its more specific and detailed expression of the Amendment, these modifications of governmental authority may become more pronounced.[442] All of these involve changes at the margins of governmental authority; in the main they do not create a new landscape. Yet taken together they suggest that the largest impact of *Robinson Township* may be more than a gap-filling role; section 27 may actually affect the trajectory of state environmental law and policy in coming decades. A brief explanation of each of these modifications in governmental authority will suggest why.

First, the police power provides state and local governments with the authority to protect public health, safety, welfare, and morals.[443] Government actions outside the scope of the police power can be overturned in court.[444] Prior to *Robinson Township*, Pennsylvania courts had used section 27 in several prominent environmental and historic preservation cases to support the application of police power in cases where the application of that power had been questionable.[445] Section 27 is likely to continue being used in this way after *Robinson Township*, precisely because the Amendment is no

438 Dernbach, *Natural Resources and the Public Estate*, *supra* note 100, § 29.3(b)–(d); *see generally* Dernbach, *Environmental Rights and Public Trust*, *supra* note 29, at 150–61 (discussing applications of section 27 prior to *Robinson Township*).

439 Dernbach, *Environmental Rights and Public Trust*, *supra* note 29, at 150.

440 *Id.*

441 *See generally Robinson Township*, 83 A.3d 901 (Pa. 2013).

442 *Cf. id.* at 977–78 (Pa. 2013) (explaining the expanded constitutional obligations on the legislature under section 27).

443 *See, e.g.*, Vill. Of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926) (noting the police power provides that cities can implement zoning regulations as long as there is a rational relationship to "health, morals, safety, and general welfare of the community").

444 *See, e.g.*, *id.* at 395 ("[B]efore the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."); Boundary Drive Assoc. v. Shrewsbury Twp. Bd. Of Supervisors, 491 A.2d 86, 90 (Pa. 1985).

445 Dernbach, Natural Resources and the Public Estate, *supra* note 100, § 29.3(b); Dernbach, *Environmental Rights and Public Trust*, *supra* note 29, at 150–56.

longer read as an undivided whole, and the text of each individual clause is read more carefully.[446]

Even more importantly, *Robinson Township* recognizes that state and local government no longer simply have police power authority; they also have constitutional public trust duties in the exercise of that police power, and a duty not to interfere with the public's right to clean air, pure water, and the preservation of certain values in the environment.[447] At the local government level in particular, this new understanding of powers and duties is only just beginning to be felt—particularly through some of the cases described above. This is easily one of the most significant short- and long-term implications of *Robinson Township*. Indeed, several of the cases described above are based on claims that local government failed to exercise its new responsibilities under *Robinson Township*.[448]

Second, the use of section 27 to guide statutory interpretation may also grow after *Robinson Township*. Because section 27 imposes duties on the legislature, it follows that legislative actions that protect the public rights expressed in the Amendment are fulfilling the legislature's constitutional duties, whether or not the legislature identifies implementation of section 27 as one of its purposes.[449] Thus, if there is any doubt about the meaning of a particular statutory provision, that doubt should be resolved in a way that most protects the rights expressed in section 27. In several cases prior to *Robinson Township*, the courts did just that.[450]

This application of section 27 is also likely to continue, and become more important, after *Robinson Township*.[451]It will likely become more important because, again, section 27 is no longer understood as an undivided whole, but rather as a two-part constitutional amendment whose text actually matters,[452] which will make it much easier to integrate an analysis of section 27 into the meaning of any particular statute. The Payne test, as previously explained, does not even apply coherently to statutes.[453] For example: Does a particular statute require the state to conserve and maintain the public natural resources to which it applies? This interpretive issue is also likely to have consequences for future administrative rulemaking, in no small part because administrative regulations are supposed to assist in the implementation of statutes. Administrative

446 *See Robinson Township*, 83 A.3d at 943 (noting that the constitution is meant to be interpreted using plain text, avoiding reading it in a "strained or technical manner") (citations omitted) (internal quotation marks omitted).

447 *Id.* at 946–48.

448 *See, e.g.*, *supra* notes 252–258, 279–281 and accompanying text.

449 *See Robinson Township*, 83 A.3d at 951–52 (holding that the legislative branch has an affirmative trust duty).

450 Dernbach, *Environmental Rights and Public Trust*, *supra* note 29, at 156–68.

451 Dernbach, Natural Resources and the Public Estate, *supra* note 100, § 29.3(c); *Cf. id.* (listing statutory interpretation prior to Robinson Township).

452 *Robinson Township*, 83 A.3d at 957–58 (noting that Pennsylvania has two distinct public trust obligations).

453 See *supra* notes 284–298 and accompanying text (explaining why the *Payne* test does not coherently apply to statutes).

agencies that fail to conform their regulations to section 27 may find those regulations challenged in court.

Third, Pennsylvania courts have often decided constitutional challenges to governmental regulation by relying in part on section 27 as authority for the regulation.[454] The more precise and text-based analysis of section 27 in *Robinson Township* may strengthen the government's legal ability to defend regulations based on the text of the Amendment.

As important as these shifts are in individual cases, they become even more important when state agencies, local governments, and other governmental agencies begin to think about translating constitutional text and court decisions into law and policy—that is, when they begin to think past the facts and holdings of individual cases to consider how the Amendment should be applied in the future to entire categories of persons or activities. That conversation is beginning to happen, and it could, over time, profoundly influence Pennsylvania law and policy.

VII. CONCLUSION

By reinvigorating section 27 of the Pennsylvania constitution, the state supreme court's *Robinson Township* decision has changed the state's legal landscape in significant ways. Most importantly, after the four-decade near dormancy of section 27, the case is forcing Pennsylvania lawyers, judges, and other decision makers to understand what the text of the Amendment actually requires. Whatever else the case may mean, several things seem clear.

First, and most obviously, the Amendment has many meanings. Some of these were recognized prior to *Robinson Township*, as Part VI explains, and there are many more potential meanings after that decision.

Second, most of the individuals and organizations challenging particular governmental actions in these cases are claiming adverse effects on the places where they live, work, and engage in outdoor recreation. They are making not just environmental quality claims, but also quality of life and property value claims. This is consistent with the purpose of the Amendment and the public trust concepts that it effectuates.

Third, the public trust clause of section 27 is getting much more attention from litigants and courts than the general environmental rights clause. When both rights could be argued or analyzed, it appears that there is a distinct preference for the public trust. In fact, one intriguing question that emerges from the cases so far is the extent to which private trust law will eventually be incorporated into Pennsylvania public trust law.

Fourth, the cases brought to date indicate that section 27 can have many different kinds of effects. It can be used to hold statutes unconstitutional, to control the exercise of authority in state regulatory and management programs, to fill in gaps in state programs, to oblige state and

454 Dernbach, Natural Resources and the Public Estate, *supra* note 100, § 29.3(d); Dernbach, *Environmental Rights and Public* Trust, *supra* note 29, at 158–61.

local governments to protect public trust resources and prevent them from acting in ways that damage constitutionally protected values, and to guide the future development and implementation of a variety of state laws and programs. While a great many of these claims may not succeed, they do provide a sense of the many ways in which the Amendment could affect state law. For that reason, they suggest what a more fully realized environmental public trust could mean, particularly if it is grounded in the constitution.

Finally, the Amendment seems to be moving closer to the center of state law and policy. As the text and history of the Amendment are better understood, the *Payne* test looks much less plausible and even less respectable than it once did. Whatever comes next, it is not likely to be a return to the time before *Robinson Township*.