

## NOTES

### INTERPRETING THE POST-*ROBINSON TOWNSHIP* ENVIRONMENTAL PROTECTION AMENDMENT

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# NOTES

## INTERPRETING THE POST-*ROBINSON TOWNSHIP* ENVIRONMENTAL PROTECTION AMENDMENT

Susan Kessler\*

### INTRODUCTION

On December 19, 2013, the Pennsylvania Supreme Court (“Supreme Court”) decided *Robinson Township v. Commonwealth*,<sup>1</sup> a decision that had everything: a plurality holding;<sup>2</sup> fourteen pages of standing, ripeness, and political question discussion;<sup>3</sup> an industry so controversial that even its spelling is subject to debate;<sup>4</sup> and, perhaps most importantly, a hitherto largely ignored state constitutional provision.<sup>5</sup> In the wake of *Robinson Township*, the political, legal, economic, and environmental debates surrounding hydraulic fracturing rage on in Pennsylvania and

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<sup>1</sup> 83 A.3d 901 (Pa. 2013) (plurality opinion).

<sup>2</sup> *Id.* Chief Justice Castille delivered the judgment of the court and the opinion of the court with respect to Parts I, II, IV, V, and VI(A), (B), (D)–(G), in which Justices Baer, Todd, and McCaffery joined, and delivered an opinion with respect to Parts III and VI(C), in which Justices Todd and McCaffery joined; Justice Baer delivered a concurring opinion; Justice Saylor delivered a dissenting opinion. *Id.* at 913.

<sup>3</sup> *Id.* at 916–30.

<sup>4</sup> Compare *Robinson Twp.*, 83 A.3d at 914 (using “fracking” abbreviation), with *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 6 (Tex. 2008) (using “fracing” abbreviation). See also *Robinson Twp.*, 83 A.3d at 963 n.51 (adding a bracketed “k” to a report of the Delaware River Basin Commission). For purposes of phonetic impartiality, this Note will use the unabbreviated term “hydraulic fracturing.”

<sup>5</sup> PA. CONST. art I, § 27.

beyond.<sup>6</sup> However, this Note seeks to look beyond hydraulic fracturing to more basic questions of what the case may mean moving forward. It argues that the proper reading of the case is to enforce Article I, Section 27 of the Pennsylvania Constitution according to its text, but to give significant deference to the democratic branches in its application.

## I. THE ENVIRONMENTAL PROTECTION AMENDMENT

Article I, Section 27 of the Pennsylvania Constitution (“Environmental Protection Amendment” or “Amendment”) was adopted in 1970 as part of a wider trend of environmentalism in not only the Commonwealth, but the United States as a whole,<sup>7</sup> and 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.<sup>8</sup>

The Amendment passed unanimously in both the House and Senate, which likely explains its sparse legislative history,<sup>9</sup> and also received overwhelming

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<sup>6</sup> See, e.g., Joshua P. Fershee, *Facts, Fiction, and Perception in Hydraulic Fracturing: Illuminating Act 13 and Robinson Township v. Commonwealth of Pennsylvania*, 116 W. VA. L. REV. 819 (2014); Kristen Allen, Comment, *The Big Fracking Deal: Marcellus Shale—Pennsylvania’s Untapped Resource*, 23 VILL. ENVTL. L.J. 51 (2012).

<sup>7</sup> See John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 695 (1999) (“The public enthusiasm for environmental protection that swept the country in the early 1970s was premised on the view that ecological degradation is an unacceptable price for social and economic progress.”).

<sup>8</sup> PA. CONST. art I, § 27.

<sup>9</sup> *Robinson Twp.*, 83 A.3d at 950 n.38 (“The [Amendment] eventually received unanimous support in both houses and, perhaps as a direct result, its legislative record consists simply of a statement in support offered by its primary sponsor, Representative Franklin L. Kury. The statement includes a pre-adoption ‘Analysis of HB 958, the Proposed Pennsylvania Environmental Declaration of Rights’ by Robert Broughton, Associate Professor of Law at Duquesne University Law School.”).

support from Pennsylvania's electorate.<sup>10</sup>

Textually, the Amendment “accomplishes two primary goals.”<sup>11</sup> First, “the provision identifies protected rights, to prevent the state from acting in certain ways,” and second, “the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights.”<sup>12</sup> In other words, the first sentence identifies rights that the people have, and the second and third together lay out the Commonwealth's broad duties in protecting those rights.<sup>13</sup> The Commonwealth, as it is used in the Amendment, refers to the legislative, executive, and judicial branches,<sup>14</sup> and to local government.<sup>15</sup>

Therefore, according to the *Robinson Township* plurality, “[a] legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens' rights or the government has failed in its trustee obligation, or upon both theories.”<sup>16</sup> In fact, there appear to be at least two procedural backgrounds wherein the Commonwealth, as trustee, as opposed to the citizens, as beneficiaries, may raise the Amendment. First, the Commonwealth has attempted to use the Amendment as an enforcement tool to prevent private citizens from using their land in an otherwise lawful manner that violates the Amendment.<sup>17</sup> Second, the Commonwealth has successfully used the Amendment as a defense where legislation intended to protect the environment was contested on other grounds.<sup>18</sup>

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<sup>10</sup> Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123 (1990) (“The public approved the [A]mendment by a vote of 1,021,342 to 259,979.”).

<sup>11</sup> *Robinson Twp.*, 83 A.3d at 950.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 951, 955–56.

<sup>14</sup> *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 593 (Pa. 1973).

<sup>15</sup> *Robinson Twp.*, 83 A.3d at 956–57.

<sup>16</sup> *Id.* at 950.

<sup>17</sup> *Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 589–90 (“[T]he Commonwealth brought an action . . . to enjoin construction of [a] proposed 307-foot tower . . .”). As discussed *infra*, it is unlikely that a suit of this kind based only on the Amendment, as opposed to a suit based on legislation enacted under the Amendment, would be successful because of what the court identified as potential equal protection and due process implications.

<sup>18</sup> *United Artists' Theater Circuit, Inc. v. City of Phila.*, 635 A.2d 612 (Pa. 1993) (upholding a historic preservation statute under the Amendment in the face of a regulatory takings claim).

In practice, for decades following its enactment, many commentators believed that the Amendment had little more than symbolic impact.<sup>19</sup> The first two major cases decided under the Amendment, *Commonwealth v. National Gettysburg Battlefield Tower*<sup>20</sup> and *Payne v. Kassab*,<sup>21</sup> seemed to limit the Amendment's efficacy, both as an enforcement tool that the Commonwealth could use against the people and as a check that the people could use against the Commonwealth's use of its police power.

## II. COMMONWEALTH V. NATIONAL GETTYSBURG BATTLEFIELD TOWER AND THE PROBLEM OF SELF-EXECUTION

*National Gettysburg Battlefield Tower* was the first major case decided under the Environmental Protection Amendment, and, predictably, the result was a plurality opinion that left significant questions about what the Amendment actually meant.<sup>22</sup> The Commonwealth sought to enjoin the construction of a large watchtower near the battlefields on "esthetic" grounds,<sup>23</sup> and the court granted allocatur in order to determine whether the Amendment was "self-executing"—that is, whether it required implementing legislation before it could be enforced.<sup>24</sup> In a 5–2 decision, the court held that the Commonwealth failed to meet its burden to enjoin the

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<sup>19</sup> Dernbach, *supra* note 7, at 695–96 ("More than a quarter century later, the promise of Article I, Section 27 has been realized more by the enactment and implementation of legislation and regulations . . . than by the Amendment itself. . . . As its early supporters feared, the Amendment seems to have more symbolic than substantive value, inscribed on plaques and quoted in speeches, but rarely used in decision making.").

<sup>20</sup> 311 A.2d 588 (Pa. 1973).

<sup>21</sup> 361 A.2d 263 (Pa. 1976).

<sup>22</sup> *Gettysburg*, 311 A.2d at 588. Justice O'Brien delivered the opinion, joined by Justice Pomeroy. *Id.* Justice Nix concurred in the result. *Id.* Justice Roberts delivered a concurring opinion, joined by Justice Manderino. *Id.* Chief Justice Jones delivered a dissenting opinion, joined by Justice Eagan. *Id.*

<sup>23</sup> *Id.* at 590 ("[T]he Commonwealth brought an action because . . . '[t]he tower as proposed . . . would disrupt the skyline, dominate the setting from many angles, and still further erode the natural beauty and setting which once was marked by the awful conflict of a brothers' war.'" (internal citation omitted)). This argument seems to be an unintuitive first test of the Environmental Protection Amendment. Indeed, the court explains that the Commonwealth was essentially forced to rely on the Amendment to make out its claim because Adams County had no zoning ordinances at all, and no Pennsylvania statute authorized the Governor or Attorney General to bring such an action. *See id.* at 590–92.

<sup>24</sup> *Id.* at 591 (holding that the provision was self-executing).

construction.<sup>25</sup> The issue of whether the Amendment was self-executing was less clear.<sup>26</sup>

Ostensibly writing for the court, Justice O'Brien found that rather than providing self-executing rights on its own strength, the Environmental Protection Amendment required implementing legislation because

[a] Constitution is primarily a declaration of principles of fundamental law. Its provisions are usually only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing.<sup>27</sup>

Justice O'Brien continued: "The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced."<sup>28</sup> To hold that the Amendment was self-executing would, according to Justice O'Brien, mean that "a property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property," which would raise "serious questions under both the equal protection clause and the due process clause of the United States Constitution."<sup>29</sup> Therefore, before the executive branch could enforce the Amendment, the General Assembly would have to provide orders clarifying this "declaration of principles of fundamental law."<sup>30</sup>

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<sup>25</sup> See *id.* at 595, 599.

<sup>26</sup> See *id.*

<sup>27</sup> *Id.* at 591 (quoting *O'Neil v. White*, 22 A.2d 25, 26–27 (Pa. 1941)).

<sup>28</sup> *Id.* (quoting 1 THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 165 (8th ed. 1927)).

<sup>29</sup> *Id.* at 593. It is interesting to note that the Commonwealth argued that the Amendment is self-executing by comparing it with other similar state amendments, which were "obviously not self-executing." *Id.* This argument appears to have backfired, as the court "[f]ound] it more significant that all of these other states . . . recognized that legislative implementation was necessary before such new power could be exercised." *Id.* at 594.

<sup>30</sup> *Id.* at 591, 593–94 ("In our opinion, to insure that these clauses are not violated, the [l]egislature should set standards and procedures for proposed executive action.").

However, Justice Roberts apparently disagreed and “believe[d] that the Commonwealth, even prior to the recent adoption of Article I, Section 27, possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27.”<sup>31</sup> Nonetheless, he found that the Chancellor’s finding that the Commonwealth “failed to show by clear and convincing proof that the natural, historic, scenic, and aesthetic [sic] values of the Gettysburg area will be irreparably harmed by the erection of the proposed tower at the proposed site” should not be disturbed in this case.<sup>32</sup> He further shared Justice O’Brien’s concerns as to granting relief absent clearer standards.<sup>33</sup>

Finally, Chief Justice Jones issued a strongly worded dissent.<sup>34</sup> The Chief Justice quickly found, in only three paragraphs, that the Amendment is indeed self-executing.<sup>35</sup> To him, the inquiry “focused upon the ultimate issue of fact: does the proposed tower violate the rights of the people of the Commonwealth as secured by this amendment?”<sup>36</sup> The Chief Justice found that the Chancellor’s findings as to that question were reviewable as an ultimate fact<sup>37</sup> and proceeded to find that “the proposed structure [would] do violence to the ‘natural, scenic, historic, and aesthetic [sic] values’ of Gettysburg.”<sup>38</sup> In finding otherwise, the court had “disemboweled a constitutional provision which seems, by unequivocal language, to establish

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<sup>31</sup> *Id.* at 595 (Roberts, J., concurring).

<sup>32</sup> *Id.* at 596.

<sup>33</sup> *See id.* (“Moreover, I entertain serious reservations as to the propriety of granting the requested relief in this case in the absence of appropriate and articulated substantive and procedural standards.” (citing *Just v. Marinette Cnty.*, 201 N.W.2d 761 (Wisc. 1972))).

<sup>34</sup> *Id.* (Jones, C.J., dissenting). Indeed, the Chief Justice so opposed the opinion of the court that he ended his dissent with a rare set of judicial exclamation marks: “I dissent!!” *Id.* at 599.

<sup>35</sup> *Id.* at 596–97 (“Its provisions are clear and uncomplicated. . . . If the [A]mendment was intended only to espouse a policy undisposed to enforcement without supplementing legislation, it would surely have taken a different form. But the [A]mendment is not addressed to the General Assembly. It does not require the legislative creation of remedial measures. Instead, the [A]mendment creates a public trust. . . . That the language of the [A]mendment is subject to judicial interpretation does not mean that the enactment must remain an *ineffectual constitutional platitude* until such time as the legislature acts.” (internal citations omitted)).

<sup>36</sup> *Id.* at 597.

<sup>37</sup> *Id.* (“This [c]ourt has held on numerous occasions that, although a [C]hancellor’s findings of fact have the force and effect of a jury’s verdict, the [C]hancellor’s conclusions of ultimate fact are reviewable.” (citations omitted)).

<sup>38</sup> *Id.* at 599 (quoting the Amendment).

environmental control by public trust and, in so doing consequently sanctions the desecration of a unique national monument.”<sup>39</sup>

In *United Artists Theater Circuit, Inc. v. City of Philadelphia*,<sup>40</sup> the court interpreted the *Gettysburg* opinion as holding by a plurality that the Environmental Protection Amendment was not self-executing.<sup>41</sup> As the *Robinson Township* court pointed out, this statement was made despite the fact that “only two of the seven Justices in *Gettysburg* subscribed to that view; two Justices concluded the opposite; and three Justices did not address the issue.”<sup>42</sup> Therefore, “[t]he prevailing view, insofar as the *Gettysburg* case was concerned, was the Commonwealth Court’s holding that the provision was self-executing.”<sup>43</sup> The *Robinson Township* plurality would later affirm the view that the Amendment is self-executing.<sup>44</sup>

### III. THE PAYNE TEST

In *Payne v. Kassab*, a group of citizens sought to enjoin a street-widening project by the Pennsylvania Department of Transportation under the Environmental Protection Amendment based on the project’s projected impact on the Wilkes-Barre River Common.<sup>45</sup> Factually, the most critical difference between *Payne* and *Gettysburg* is that here, instead of the government seeking to enjoin otherwise lawful use of private property, citizens sought to enjoin the government’s development of public property.<sup>46</sup> In this case, the Pennsylvania Supreme Court did what it had not

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<sup>39</sup> *Id.*

<sup>40</sup> 635 A.2d 612 (Pa. 1993).

<sup>41</sup> *Id.* at 620.

<sup>42</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 964 n.52 (Pa. 2013) (plurality opinion).

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 974 (“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.”).

<sup>45</sup> *Payne v. Kassab*, 361 A.2d 263, 264 (Pa. 1976) (“Appellants protest the River Street project because of the allegedly negative impact it will have on the historical, scenic, recreational, and environmental values of an area of Wilkes-Barre known as the River Common.”). Notably in this case, unlike *Gettysburg*, the Amendment was only one of the bases of the appellants’ claims, the bulk of which relied on other alleged statutory limitations. *See id.* at 267–72.

<sup>46</sup> *Id.* at 272.



in *Gettysburg*—it provided, in a majority opinion,<sup>47</sup> what appeared to be a framework under which to analyze claims that rely on the Amendment.<sup>48</sup>

The court started by declining to revisit the issue of whether the Amendment is self-executing because “[t]hat question may be of paramount importance when the Commonwealth as trustee is seeking to curtail or prevent the otherwise entirely legal use of private property,” but in this case, “the shoe [was] on the other foot.”<sup>49</sup>

There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the amendment does so by its own *ipse dixit*.<sup>50</sup>

On that basis, the court went on to hold that an act setting forth the Department’s duties in such projects (“Act 120”) provided “elaborate safeguards” which, “if truly complied with by the governmental departments and agencies involved, vouchsafe that a breach of the trust established by [Article] 1, [Section] 27 will not occur.”<sup>51</sup>

Apparently more impactful than the actual holding, though, was a footnote in which the court quoted with apparent approval, but did not expressly adopt, the Commonwealth Court’s three-part test for whether the Amendment has been observed:<sup>52</sup>

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<sup>47</sup> *Id.* at 264–73. Justice Pomery delivered the opinion of the court, joined by Justices O’Brien, Nix, and Manderino; Justice Eagen concurred in the result; Justice Roberts delivered a dissenting opinion; Chief Justice Jones did not participate in the consideration or decision of the case. *Id.* at 264.

<sup>48</sup> *Id.* at 272–74. As discussed *infra*, the *Robinson Township* court largely rejected this framework, or at least the lower courts’ subsequent interpretation of it. *Robinson Twp.*, 83 A.3d at 952 n.40.

<sup>49</sup> *Payne*, 361 A.2d at 272.

<sup>50</sup> *Id.* This is relevant in light of *Robinson Township*, because there, as in *Payne*, the appellants were citizens arguing that the Commonwealth had breached its duty as trustee. *Robinson Twp.*, 83 A.3d at 901.

<sup>51</sup> *Payne*, 361 A.2d at 273.

<sup>52</sup> *Id.* at 273 n.23 (“We note that the Commonwealth Court, in fashioning a threepart [sic] test to determine whether Article I, [Section] 27 has or has not been observed, requires nothing more in this case than does normal appellate review of [Pennsylvania Department of Transportation’s] actions under Act 120.”).

(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?<sup>53</sup>

While the court did not expressly adopt the Commonwealth's test, lower courts did appear to adopt the view that "Section 27 rights are merely co-extensive with statutory protections,"<sup>54</sup> so that "the *Payne* test [became] the all-purpose test for applying Article I, Section 27."<sup>55</sup> This applied not only to claims, like that in *Payne*, which were based on the Commonwealth's failure to act as trustee, but also to claims that were based on the first clause of the Amendment: the people's rights to enumerated environmental protections.<sup>56</sup>

#### IV. ROBINSON TOWNSHIP

Act 13 amended the Pennsylvania Oil and Gas Act in order to account for the hydraulic fracturing development in the Marcellus Shale gas reservoir in Pennsylvania.<sup>57</sup> Among other things, Act 13 prohibited any local regulation of oil and gas operations, including via environmental legislation, and required statewide uniformity among local zoning ordinances with respect to the development of oil and gas resources; in effect, the Act stripped local municipalities of their zoning powers

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<sup>53</sup> *Id.* (quoting *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (1976)). This test appears to have been proposed by a brief from the Defendant, the Pennsylvania Department of Transportation. See *Dernbach*, *supra* note 7, at 710 ("Conveniently, the test required nothing more of the agency than its existing statutes.").

<sup>54</sup> *Robinson Twp.*, 83 A.3d at 952 n.40 (citing *Larwin Multihousing Pa. Corp. v. Commonwealth*, 343 A.2d 83, 89 n.9 (Pa. Commw. Ct. 1975)); see also *Dernbach*, *supra* note 7, at 712 ("Indeed, the Amendment's text tends to be less important to lawyers and judges than the text of the *Payne* test.").

<sup>55</sup> *Dernbach*, *supra* note 7, at 712 (citing *Kury*, *supra* note 10, at 132–41).

<sup>56</sup> *Robinson Twp.*, 83 A.3d at 966 ("Notably, although the test was developed in the context of a challenge pursuant to the second and third clauses of Section 27 (implicating trustee duties), the Commonwealth Court has applied it irrespective of the type of environmental rights claim raised.").

<sup>57</sup> Act No. 13 of Feb. 14, 2012, 2012 Pa. Laws 87 (codified as amended at 58 PA. STAT. ANN. §§ 2301–3504 (2012)).

as they related to oil and gas.<sup>58</sup> In the interim between the Act being signed into law and its taking effect, several municipalities, two local elected officials, a non-profit environmental group, and a physician (collectively the “Citizens”) challenged various aspects of Act 13, seeking a declaration that it is unconstitutional, a permanent injunction prohibiting its application, and legal fees and costs of litigation.<sup>59</sup>

The Citizens’ primary argument, in front of both the Commonwealth Court and the Supreme Court, was that Act 13 violated their right to due process under both Article I, Section 1 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution because, “while the General Assembly may dissolve the municipalities’ power to zone, the General Assembly may not remove the protections created by existing zoning districts only to replace them with a zoning scheme that is inconsistent with constitutional mandates generally imposed on any legislative zoning effort.”<sup>60</sup> The challenge also included—likely not optimistically given the common law backdrop of the last several decades—a challenge based on the Environmental Protection Amendment on the theory that “municipalities are agents of the Commonwealth, which share the Commonwealth’s duties ‘as trustees’” under the Amendment.<sup>61</sup> The Commonwealth responded by characterizing the challenge as a simple “dispute over public policy voiced by a disappointed minority.”<sup>62</sup> The Commonwealth Court granted an injunction to critical portions of the Act on due process and separation of powers grounds.<sup>63</sup> Ultimately, the only clear result of this case was that the Supreme Court affirmed the Commonwealth Court’s injunction, making Act 13 effectively toothless.<sup>64</sup>

Chief Justice Castille delivered the judgment of the court and an opinion as to the applicability of the Environmental Protection Amendment that was joined by

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<sup>58</sup> *Robinson Twp.*, 83 A.3d at 915. While Act 13 did many things, for the sake of brevity, this Note will focus on its impact on local zoning regulations, as that is the portion that each opinion analyzed in the most detail.

<sup>59</sup> *Id.* at 914–16.

<sup>60</sup> *Id.* at 936, 942.

<sup>61</sup> *Id.* at 940. The plurality opinion did find that the trustee duty “includes local government.” *Id.* at 956–57.

<sup>62</sup> *Id.* at 976.

<sup>63</sup> *Id.* at 942.

<sup>64</sup> *Id.* at 913, 936, 942.

Justices Todd and McCaffery.<sup>65</sup> In his opinion, the Chief Justice rejects the *Payne* test as it had been used, finding that it “appear[ed] to have become, for the Commonwealth Court, the benchmark for Section 27 decisions in lieu of the constitutional text.”<sup>66</sup>

Justice Baer joined in the judgment, but he delivered a concurring opinion based not on the Environmental Protection Amendment, but on substantive due process grounds.<sup>67</sup> Finally, Justices Saylor and Eakin delivered dissenting opinions under which they would deny the challengers relief, where they “would decline to substitute the [c]ourt’s own wisdom about the merits of Act 13 for that of the General Assembly, in contravention of the limited role of judges upon their review of a duly-promulgated and presumptively valid legislative enactment.”<sup>68</sup> For the moment, litigants, agencies, and even the lower courts are at a loss as to what analytical framework applies to claims brought under the Environmental Protection Amendment.<sup>69</sup>

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<sup>65</sup> *Id.* Chief Justice Castille’s opinion expressly offered no view of the substantive due process arguments that made up much of the litigation. *Id.* at 913 n.2.

<sup>66</sup> *Id.* at 966.

<sup>67</sup> *Id.* at 1001 (Baer, J., concurring) (“I view the substantive due process contentions made by [the c]hallengers to be better developed and a narrower avenue to resolve this appeal.”).

<sup>68</sup> *Id.* at 1014 (Saylor, J., dissenting).

<sup>69</sup> As of the writing of this Note, one of the many things that makes the law from this case unclear is the extraordinary upheaval of the Pennsylvania Supreme Court. Chief Justice Castille reached the mandatory age of retirement on the court and stepped down in January of 2015. See P.J. D’Annunzio, *After 21 Years on Pennsylvania Supreme Court Bench, Ronald D. Castille Retires*, PITTSBURGH POST-GAZETTE (Jan. 6, 2015, 12:00 AM), <http://www.post-gazette.com/business/legal/2015/01/06/After-21-years-on-Pennsylvania-Supreme-Court-bench-Ronald-D-Castille-retires/stories/201501060054>. In October of 2014, Justice McCaffery also stepped down from the Supreme Court unexpectedly. See Karen Langley, *Justice McCaffery Steps Down from Pennsylvania Supreme Court*, PITTSBURGH POST-GAZETTE (Oct. 27, 2014, 11:50 PM), <http://www.post-gazette.com/news/state/2014/10/27/Sources-Justice-McCaffery-to-step-down-from-Pennsylvania-Supreme-Court/stories/201410270154>. Former Justice Orié Melvin stepped down from the court on March 25, 2013, in the wake of a criminal conviction and so did not participate in the consideration or decision of the matter. See Brad Bumsted & Adam Brandolph, *Suspended State Justice Joan Orié Melvin to Resign*, TRIBLIVE (Mar. 25, 2013, 11:36 AM), <http://triblive.com/news/adminpage/3724714-74/court-melvin-state>. The three justices were replaced by now-Justices Christine Donohue, Kevin Dougherty, and David Wecht in November of 2015. See Chris Potter, *Democrats Take Control of State Supreme Court, Win All 3 Open Seats*, PITTSBURGH POST-GAZETTE (Nov. 4, 2015, 1:02 AM), <http://www.post-gazette.com/news/politics-local/2015/11/03/Polls-open-at-7-a-m-in-Pennsylvania-voting-pittsburgh-election-day/stories/201511030149>. Finally, in March of 2015, Justice Eakin, who dissented in *Robinson Township*, stepped down from the court, leaving the court down one Justice yet again. See Angela Coulombis, *Amid Furor of Porngate, Eakin Resigns from High Court*,

*A. Chief Justice Castille's Plurality Opinion*

In his plurality opinion, Chief Justice Castille made “a thorough, well-considered, and able” attempt to revitalize the Environmental Protection Amendment.<sup>70</sup> If there was a central theme to the opinion, it was that the courts cannot simply rubber-stamp the acts of the General Assembly when a constitutional right is implicated,<sup>71</sup> regardless of how inevitable the action may be<sup>72</sup> or of the deference that the judiciary owes the legislative branch.<sup>73</sup> Further, the opinion stated that the court cannot abdicate its duty to enforce the Constitution on the basis of precedent.<sup>74</sup>

After an exhaustive recitation of the facts and procedural history, as well as an analysis of several procedural issues,<sup>75</sup> the plurality began its opinion by laying down the groundwork for disregarding the previous limitations on the Amendment's enforcement. First, the opinion conceded that “the parties [did] not develop their Environmental Rights Amendment arguments to the same extent as, for example, the due process . . . and separation of powers arguments,” then noting that “[t]his is explained no doubt, by the fact that the citizens were successful in asserting these claims below, and perhaps by the limited decisional law developed in relation to the Environmental Rights Amendment.”<sup>76</sup> The opinion continued, ominously, that there

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PHILLY.COM (Mar. 15, 2016), [http://www.philly.com/philly/news/politics/20160316\\_Amid\\_furor\\_of\\_Pomgate\\_Eakin\\_resigns\\_from\\_high\\_court.html](http://www.philly.com/philly/news/politics/20160316_Amid_furor_of_Pomgate_Eakin_resigns_from_high_court.html).

<sup>70</sup> *Robinson Twp.*, 83 A.3d at 1000 (Baer, J., concurring) (complimenting the Chief Justice's opinion).

<sup>71</sup> *Id.* at 951 (“Indeed, ‘for this Court to accept the notion that legislative pronouncements of benign intent can control a constitutional inquiry . . . would be tantamount to ceding our constitutional duty, and our independence, to the legislative branch.’” (citations omitted)).

<sup>72</sup> *Id.* at 1015 (Eakin, J., dissenting) (“And like it or not, the bottom line is this—the gas in question *will* be extracted. . . . It is going to be transported to refineries. The question for our legislature is not ‘if’ this will happen, but ‘how.’”).

<sup>73</sup> *Id.* at 1010 (Saylor, J., dissenting) (calling for deference to the legislature in its policy-making capacity).

<sup>74</sup> *Id.* at 946–47 (plurality opinion).

<sup>75</sup> *Id.* at 913–42.

<sup>76</sup> *Id.* at 942. The opinion also noted that the plurality was

cognizant of the fact that Act 13 required local government to implement challenged provisions within narrow timeframes, with substantial financial consequences for non-compliance; this necessarily prompted the citizens to commence litigation quickly and to assent to expedited judicial review both below and here.

is “no prudential impediment to articulating principles of law that offer guidance to the bench and bar upon the broader legal issue, while providing context to the decision in this case.”<sup>77</sup> Finally, it stated that state judges have a duty to uphold the text of state constitutional amendments, even to the point of “engagement and adjustment of precedent” where “prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language.”<sup>78</sup>

However, what this opinion may be most notable for in the long run is its discussion of the spotted environmental history that inspired the Environmental Protection Amendment in the first place: the plurality used the lumber, gaming, and mining industries to illustrate, in often-impassioned language, that “[i]t is not historical accident that the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights.”<sup>79</sup>

### 1. The Two-Part, Then Two-More-Parts Analysis

The plurality recognized that the Amendment creates two sets of rights. First, there are individual rights created by the first sentence: “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.”<sup>80</sup> The plurality ultimately found that, while Act 13 may have violated these personal rights, the issue was not properly developed in

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*Id.* at 943.

<sup>77</sup> *Id.* at 943.

<sup>78</sup> *Id.* at 946. Somewhat ironically, in this analysis, Chief Justice Castille quotes extensively from a scholarly article written by the dissenting Justice Saylor, noting that “there is some degree of consensus . . . that the overarching task is to determine the intent of voters who ratified the constitution.” *Id.* at 944 (quoting Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283, 290–91 (2003)).

<sup>79</sup> *Id.* at 960; *see id.* at 976 (“Pennsylvania’s very real and mixed past is visible today to anyone travelling across Pennsylvania’s spectacular, rolling, varied terrain. The forests may not be primordial, but they have returned and are beautiful nonetheless; the mountains and valleys remain; the riverways remain, too, not as pure as when William Penn first laid eyes upon his colonial charter, but cleaner and better than they were in a relatively recent past, when the citizenry was less attuned to the environmental effects of the exploitation of subsurface natural resources. But, the landscape bears visible scars, too, as reminders of the past efforts of man to exploit Pennsylvania’s natural assets. Pennsylvania’s past is the necessary prologue here: the reserved rights, and the concomitant duties and constraints, embraced by the Environmental Rights Amendment, are a product of our unique history.”).

<sup>80</sup> PA. CONST. art I, § 27; *Robinson Twp.*, 83 A.3d at 953.

this case.<sup>81</sup> Instead, it rested its decision on the second set of rights created—the trustee duties of the second and third sentences: “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”<sup>82</sup>

Substantively, Chief Justice Castille adopted a view that the Commonwealth’s trustee duty consists of two sub-duties.<sup>83</sup> The first sub-duty is a negative one: “[T]o refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action.”<sup>84</sup> The Commonwealth has a duty to refrain from encouraging or permitting the diminution of public natural resources, “whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties.”<sup>85</sup>

The second sub-duty in the amendment is based on a positive obligation “to act affirmatively to protect the environment, via legislative action.”<sup>86</sup> The plurality enunciated a standard that “the trust’s express directions . . . do not require a freeze of the existing public natural resources stock . . . the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.”<sup>87</sup> The opinion further acknowledged that the General Assembly “has not shied away” from its affirmative duty, enacting many protective laws.<sup>88</sup> This second duty, conferred by the Amendment, then, requires legislative action to fulfill,

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<sup>81</sup> *Robinson Twp.*, 83 A.3d at 974 n.56.

<sup>82</sup> PA. CONST. art I, § 27; *Robinson Twp.*, 83 A.3d at 978.

<sup>83</sup> *Robinson Twp.*, 83 A.3d at 957.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* The plurality did not elaborate further on what standards may be applied either in determining whether there is a violation, either by the Commonwealth itself, or by a private party.

<sup>86</sup> *Id.* at 958.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (“As these statutes (and related regulations) illustrate, legislative enactments serve to define regulatory powers and duties, to describe prohibited conduct of private individuals and entities, to provide procedural safeguards, and to enunciate technical standards of environmental protection.”).

but “[t]he call for complementary legislation, however, does not override the otherwise plain conferral of rights upon the people.”<sup>89</sup>

## 2. The Problem of Self-Execution, Revisited

One important question this case leaves unanswered arises from the fact that it is another plurality opinion holding that the Amendment is self-executing.<sup>90</sup> In fact, in a footnote, the plurality discussed *Gettysburg* and the problem of self-execution in some depth.<sup>91</sup> The plurality acknowledged that the *Gettysburg* court did not come to a majority holding on the issue of self-execution, but it criticized a later court for saying that *Gettysburg* held “that Section 27 was not self-executing and that legislative action was necessary to accomplish [its] goals.”<sup>92</sup> The court clarified that, in fact, because no majority of the court agreed on the issue in *Gettysburg*, the Commonwealth’s Court’s opinion on that issue stood, and so the Amendment was self-executing.<sup>93</sup> Of course, because *Robinson Township* is itself a plurality decision, and one that did not even squarely address the issue, it is not clear whether the Commonwealth Court’s *Gettysburg* opinion or the *United Artists* court’s opinion on the self-execution issue is binding.

## 3. *Robinson Township* and the *Payne* Test<sup>94</sup>

Most importantly, the plurality emphatically rejected what it called the lower

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 964 n.52.

<sup>91</sup> *Id.* The plurality points out that the parties do not contest the issue of self-execution as such, but that “the Commonwealth’s arguments concerning justiciability implicate the point.” *Id.*

<sup>92</sup> *Id.* (quoting *United Artists’ Theater Circuit, Inc. v. City of Phila.*, 635 A.2d 612, 620 (Pa. 1993)).

<sup>93</sup> *Id.* at 964 n.52.

<sup>94</sup> It is noteworthy that the plurality considered, in passing, the alternate theory that Act 13 was, in fact, an environmental protection statute passed in order to regulate what Justice Eakin felt was the inevitable exploitation of the Marcellus Shale gas formation. *Id.* at 974 n.56. The plurality rejected this argument on the grounds that, unlike general environmental legislation, “Act 13’s primary stated purpose is . . . to provide a maximally favorable environment for industry operators to exploit Pennsylvania’s oil and natural gas resources.” *Id.* at 975. Therefore, rather than deriving from the Amendment, “[t]he authority to regulate the oil and gas industry in this context derives . . . from the General Assembly’s plenary power to enact laws for the purposes of promoting the general welfare.” *Id.* However, it is not entirely clear how the different analysis would have affected the result. Presumably, were the General Assembly acting under its authority to protect the environment, the plurality would have given greater deference, but it is not at all clear that even under a more deferential standard the court would have upheld a statute that they found would unreasonably harm the corpus of the trust.



courts' misreading of *Payne*.<sup>95</sup> According to the plurality, the test's advantages—that it is easy to apply and will generally have substantive standards—do not hold up against its “obvious and critical” shortcomings.<sup>96</sup> Specifically, the *Payne* test fails to protect the citizens' rights because it describes the Commonwealth's obligations more narrowly than the Amendment and assumes that the Amendment is not self-executing, which is to say that judicial and executive authority are conditioned on prior legislative action.<sup>97</sup> On that basis, the plurality rejected the test for all claims other than those based on a failure to comply with statutory standards advancing environmental interests.<sup>98</sup> Instead of the *Payne* test, the General Assembly “must exercise its police powers to foster sustainable development in a manner that respects the reserved rights of the people to a clean, healthy, and esthetically-pleasing environment.”<sup>99</sup>

In the challenge at hand, the court appeared to find violations of the General Assembly's negative and positive trustee duties under the Amendment. The most audacious thing Act 13 did was to strip local municipalities of their zoning power, commanding uniform policies, through which the General Assembly “command[ed] municipalities to ignore their obligations under [the Amendment] and further direct[ed] municipalities to take affirmative actions to undo existing protections of the environment in their localities.”<sup>100</sup> The plurality was unimpressed by Act 13's declaration of intent—“to provide for the general welfare and prosperity by ‘permit[ting] optimal development of oil and gas resources of this Commonwealth’ and for the protection of ‘natural resources, environmental rights[,] and values secured by the Constitution of Pennsylvania.’”<sup>101</sup> This declaration, according to the plurality, is not even “particularly probative.”<sup>102</sup> The plurality was also unimpressed

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<sup>95</sup> *Id.* at 967.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 981.

<sup>100</sup> *Id.* at 978.

<sup>101</sup> *Id.* at 978–79 (quoting PA. STAT. ANN. § 3202 (2012)).

<sup>102</sup> *Id.* at 979.

by the “modest” safeguards within Act 13, relating to well locations near sensitive water resources.<sup>103</sup>

Ultimately, the plurality found the zoning overhaul impermissible for two reasons. First, the varied terrains and purposes throughout the Commonwealth mean that protection of environmental values in the context of zoning is “a quintessential local issue that must be tailored to local conditions.”<sup>104</sup> On that note, any scheme that requires industrial uses as a matter of right in every kind of zoning district is, by definition, impermissible under the Amendment. Second, the Act is impermissible because it would necessarily involve disparate impacts.<sup>105</sup> Because of its widespread application to all kinds of zoning districts, the Act would by necessity harm some areas more than others, which, says the plurality, is fundamentally incompatible with the trustee’s duty to protect the rights of all the beneficiaries of the trust.<sup>106</sup>

### *B. The Concurring and Dissenting Opinions*

Justice Baer began his concurrence by effusively complimenting the plurality’s opinion, but declining to join it on the grounds that “the primary argument of the challengers to Act 13 [is] that the General Assembly has unconstitutionally, as a matter of substantive due process, usurped local municipalities’ duty to impose and enforce community planning, and the concomitant reliance by property owners, citizens, and the like on that community planning.”<sup>107</sup> While Justice Baer conceded that, absent a grant by the General Assembly, municipalities would have no zoning authority to begin with,<sup>108</sup> once this power is granted, and “zoning ordinances are enacted and relied upon by the residents of a community, the state may not alter or invalidate those ordinances, given their constitutional underpinning . . . even if the state seeks their invalidation with the compelling justification of improving its economic development.”<sup>109</sup>

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<sup>103</sup> *Id.* at 973.

<sup>104</sup> *Id.* at 979.

<sup>105</sup> *Id.* at 980.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1001 (Baer, J., concurring).

<sup>108</sup> *Id.* at 1002.

<sup>109</sup> *Id.* at 1006. In other words, “what the Commonwealth giveth to municipalities, the Commonwealth can taketh away, but with an important limitation: only when constitutionally permissible.” *Id.* at 1002 (quoting *Knauer v. Commonwealth*, 332 A.2d 589, 590 (Pa. Commw. Ct. 1975)).

Like Justice Baer, Justices Saylor and Eakin, in dissent, both criticized the plurality for deciding the case on different grounds from that which the parties argued and which the Commonwealth Court considered and found the takings claim to be the better grounds to decide the case.<sup>110</sup> The dissenters also criticized the plurality for not granting the General Assembly the deference it is due and for substituting its value for that of the legislature.<sup>111</sup>

Regardless of the narrow grounds he claimed were at issue, Justice Saylor, joined by Justice Eakin, nonetheless responded to the plurality's opinion on the Environmental Protection Amendment.<sup>112</sup> Rather than arguing that the General Assembly has *carte blanche* in regards to the environment, Justice Saylor appeared to actually suggest that, were he to consider the issue of the Amendment, he would find that the General Assembly had not unreasonably failed in its trustee duty.<sup>113</sup> It would appear that the dissent does not, in fact, believe that the deference to the legislature in this arena must be absolute, but that the legislature met its burden with the safeguards contained within Act 13.

## CONCLUSION

As of this writing of this Note, in the only case that directly addressed the issue, the Commonwealth Court rejected the plurality's *Robinson Township* framework

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<sup>110</sup> *Id.* at 1009 (Saylor, J., dissenting). Justice Eakin noted that, “[w]hile we often *affirm* decisions using different reasoning than the court below, we should be chary of *reversing* on theories not raised or argued.” *Id.* at 1014 (Eakin, J., dissenting).

<sup>111</sup> *Id.* at 1009–10 (Saylor, J., dissenting) (“There are very good reasons why judicial review of social policymaking by the political branch is highly deferential and closely constrained. This [c]ourt regularly acknowledges that the Legislature possesses superior resources for information-gathering, debate, and deliberation in the policymaking arena.”). It is a theme of both dissenting opinions that Justices Saylor and Eakin seem to generally view the issue as entirely one of differing policy preferences—not of constitutional compulsion. *Id.* at 1010, 1015–16 (Saylor, J., dissenting and Eakin, J., dissenting).

<sup>112</sup> *Id.* at 1011 (Saylor, J., dissenting).

<sup>113</sup> *Id.* (“[W]hile hypothesizing an unreasonably deleterious impact of Act 13 on the environment, . . . [Chief Justice Castille’s plurality] opinion gives scant attention to its extensive scheme for well permitting, including the imposition of well location restrictions; the enactment’s requirements for protection of fresh groundwater and water supplies; Act 13’s dictate to restore land areas disturbed in siting, drilling, completing, and producing a well; the investiture of responsibility in the Department of Environmental Protection to enforce Act 13’s requirements, *inter alia*, through permit revocation, assessment of civil fines and penalties, and injunctive relief; and the preservation of existing requirements under environmental laws, including the Clean Streams Law, as well as statutory and common-law remedies to abate nuisances and pollution.” (internal citations omitted)).

and continued to apply the *Payne* test absent a binding Supreme Court decision.<sup>114</sup> Strangely, though, the Commonwealth Court did, in a footnote, point out that none of the *Robinson Township* opinions appeared to contradict the plurality's construction of the Amendment.<sup>115</sup> Given such self-contradictory interpretation of the Amendment, it is clear that a definite rule is necessary in this critical area.

The plurality opinion leaves much wanting in the way of specificity and predictability. Under its regime, the General Assembly cannot know whether its actions involving the otherwise permissible use of public resources meet some ephemeral concept of "reasonableness." Executive agencies, it follows, not only cannot be certain that their regulations will meet this standard, but also cannot even be sure if the legislation from which they derive their regulatory power is constitutionally kosher. Regulations, and particularly environmental regulations, thrive on checklists, and *Robinson Township* throws these bright-line tests for environmental responsibility into question. Where once, under the *Payne* test, an agency only needed to worry about whether its actions were in line with the relevant legislation, following this case, an independent constitutional analysis is also necessary.

If the agency in question is one such as the Department of Environmental Protection or the Pennsylvania Fish and Boat Commission, of which we would expect to have specialized knowledge of the Environmental Protection Amendment, this cost seems relatively *de minimus*. It is, after all, their purpose.<sup>116</sup> However, as *Payne* itself illustrates, this burden is not to be limited to these agencies. In *Payne*, the Department of Transportation was implicated,<sup>117</sup> and it is a near certainty that any agency that engages in construction, uses materials that are arguably environmentally deleterious, or performs any action that implicates water or air quality could be subject to a challenge. Further, a broad reading of the distressingly

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<sup>114</sup> Pa. Env'tl. Def. Found. v. Commonwealth, 108 A.3d 140, 159 (Pa. Commw. Ct. 2015) ("In the absence of a majority opinion from the [Pennsylvania] Supreme Court or a decision from this [c]ourt overruling *Payne I*, that opinion is still binding precedent on this [c]ourt.").

<sup>115</sup> *Id.* at 156 n.37.

<sup>116</sup> See *Mission*, PA. DEP'T ENVTL. PROTECTION, <http://www.dep.pa.gov/Business/Land/Mining/BureauofMineSafety/Organization/Pages/OrgChart.aspx#.VrPoXil6Lao> (last visited Mar. 9, 2016) ("The Department of Environmental Protection's mission is to protect Pennsylvania's air, land[,] and water from pollution and to provide for the health and safety of its citizens through a cleaner environment. We will work as partners with individuals, organizations, governments and businesses to prevent pollution and restore our natural resources.").

<sup>117</sup> *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

broad category of potential “esthetic” challenges would come close to implicating all agency actions.<sup>118</sup>

A greater problem is the potential challenges to local government decisions. If the General Assembly’s blanket zoning was problematic in *Robinson Township*, it must follow that local zoning bodies have some amount of constitutional duty when enacting such rules. The plurality does give some hope to these bodies where it notes that the zoning restrictions Act 13 replaced “presumably were rationally related to the scheme’s benefits.”<sup>119</sup> Nonetheless, any local zoning official who reads the opinion would likely feel a twinge of horror at the idea of a new avenue for citizens to challenge decisions that are esthetically displeasing.

Probably most distressingly, though, are the implications for private citizens with real, investment-backed expectations, who have certainly never read the opinion and who likely live in blissful ignorance of the Environmental Protection Amendment and the finer points of zoning constitutionality. Under the plurality, these citizens are now subject to a General Assembly and executive branch with a trustee duty to restrain the citizens’ actions to prevent environmental degradation.<sup>120</sup>

There are also, as Justice Saylor rightly pointed out, compelling reasons that decisions regarding the use of natural resources are better suited to the General Assembly.<sup>121</sup> The General Assembly is simply better equipped to gather and consider information necessary to determine technically divisive questions.

Despite all of these problems, though, the simple touchstone of the plurality opinion cannot be ignored: no matter how unwise or inconvenient its provisions may

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<sup>118</sup> It should be pointed out, though, that since the *Robinson Township* court did not overrule *Gettysburg*, there remains good precedent for limiting such a challenge. *Commonwealth v. Nat’l Gettysburg Battlefield Tower*, 311 A.2d 588 (Pa. 1973).

<sup>119</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 980 (Pa. 2013) (plurality opinion).

<sup>120</sup> *Id.* at 957 (noting the trustee may violate its duty indirectly by failing to restrain the actions of private parties). *But see* *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462, 466–67 (Pa. Commw. Ct. 2015) (“To the extent *Feudale* contends he was not required to appeal to the [Environmental Hearing Board] because his claims against Aqua originate in the Environmental Rights Amendment or the [Pennsylvania] History Code[, 37 PA. CONS. STAT. §§ 101–906 (2016)], these claims are without foundation, as Aqua is not a Commonwealth entity and thus not a trustee under the Environmental Rights Amendment or owner of a historic resource and thus subject the [Pennsylvania] History Code. The plain language of the Environmental Rights Amendment charges the Commonwealth, as trustee, with the duty to conserve and maintain Pennsylvania’s public natural resources, and we are unaware of any case law applying this duty to non-Commonwealth entities.”).

<sup>121</sup> *Robinson Twp.*, 83 A.3d at 1009–10 (Saylor, J., dissenting).

seem, the Constitution trumps all else in our system, and it cannot properly be ignored or circumvented by any branch of government, regardless of its democratic credentials.<sup>122</sup> Therefore, the plurality was correct to hold that the General Assembly, broad as its powers may be, simply cannot ignore the plain text of the Constitution. Furthermore, the plurality was right to hold that precedent must be overturned where it is contrary to that text because unconstitutional actions do not become constitutional simply because a previous court let them slide. Further, just because it may be difficult to establish a principled jurisprudence for handling a widespread problem does not give any court license to give up the challenge.<sup>123</sup>

What the Environmental Protection Amendment calls for can be achieved through the plurality's framework, while keeping in mind Justice Saylor's legitimate critiques as to legislative deference. The citizens of Pennsylvania overwhelmingly supported a constitutional amendment protecting the environment, and the plurality was right to recognize that fact.<sup>124</sup> However, the court does not have the same information-gathering capacities that the legislature has. Therefore, where the Commonwealth is able to show that there is a legitimate dispute as to whether its actions with respect to the trust's corpus are environmentally sound, the court should defer to the democratic branches' judgments. This is the only workable interpretation of the Amendment that recognizes both the citizens' interest in preserving the environment and the need for an operational government.

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<sup>122</sup> *Id.* at 947 (plurality opinion) ("Legislative power is subject to restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth."); *see also* *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>123</sup> *See McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) ("The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role.").

<sup>124</sup> It is also worth noting that the Amendment's sponsor, Representative Kury, apparently felt that the plurality opinion "really got it right." John C. Dernbach, *The Pennsylvania Supreme Court's Robinson Township Decision: A Step Back for Marcellus Shale, A Step Forward for Environmental Rights and the Public Trust*, WIDENER ENVTL. L. CENTER (Dec. 21, 2013, 9:39 AM), <http://blogs.law.widener.edu/envirolawcenter/2013/12/21/the-pennsylvania-supreme-courts-robinson-township-decision-a-step-back-for-marcellus-shale-a-step-forward-for-article-i-section-27/>.