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# IDENTITY-BASED CONFLICTS IN PUBLIC POLICY: HYDRAULIC FRACTURING IN PENNSYLVANIA

Alison Peck\*

## ABSTRACT

*Americans are experiencing a communication crisis in public policy—a crisis that has become especially acute since the November 2016 elections. Research shows that Americans increasingly treat their policy views as constitutive of their identities and separate themselves from other groups based on these identities. New solutions are needed in the lawmaking process to soften participants' hardening of their own identities and negative characterizations of other groups. This Article studies one controversy that has proven to be entrenched, if not yet intractable, in many jurisdictions: hydraulic fracturing. The Article examines advances made by scholars of conflict resolution and peace and conflict studies in the late 20th and early 21st centuries that focus on dialogue and softening of frames to move entrenched conflicts towards resolution. Based on this case study of the legislative and regulatory snarl over hydraulic fracturing in Pennsylvania, the Article proposes a new process, marshaled by a Special Committee for Public Policy Dialogue, that would implement the insights of peace and conflict studies researchers allowing the legal system to address and move past identity-based conflicts that threaten to bring lawmaking to a standstill.*

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## INTRODUCTION

Americans are experiencing a communication crisis. Even before the 2016 elections, Americans held increasingly polarized opinions about issues like immigration, international trade, national security, and health care. Since the election of President Donald Trump, a red/blue chasm seems to have split open the country. In a Gallup poll taken immediately after the 2016 election, a record-high 77% of Americans believe that, “Americans are greatly divided when it comes to the most important values.”<sup>1</sup> Americans do not see it getting better soon: More Americans think President Trump will increase division (49%) than those that think he will bring unity (45%).<sup>2</sup> This is a more pessimistic assessment than Americans gave either Barack Obama or George W. Bush upon taking office.<sup>3</sup>

More fundamentally, the way Americans identify “us” and “them” seems to have shifted along this axis. In 1960, when Americans were asked how they would feel if their child married outside their political party, only 4% of Republicans and 3% of Democrats responded that they would be “somewhat upset” or “very upset.”<sup>4</sup> In 2010, those numbers had shot up to 44% of Republicans and 33% of Democrats.<sup>5</sup> As described by the magazine *Vox*, research shows that, “partisanship is no longer just a political phenomenon. Party and ideology have become powerful forms of personal identity . . . .”<sup>6</sup> The researchers Shanto Iyengar and colleagues put the point more precisely: “Policy-based division is but one way of defining partisan polarization. . . . [T]o the extent that party identification represents a meaningful group affiliation, the more appropriate test of polarization is affective, not ideological, identity.”<sup>7</sup> In other words, policy differences now affect not just what we think, but who we think we are.

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<sup>1</sup> Jeffrey M. Jones, *Record-High 77% of Americans Perceive Nation as Divided*, GALLUP (2016), <http://www.gallup.com/poll/197828/record-high-americans-perceive-nation-divided.aspx>.

<sup>2</sup> *Id.*

<sup>3</sup> In 2004, 57% of Americans thought Bush would do more to unite than divide the country. Public opinion was bullish about Obama as a unifying force during the 2008 presidential primaries, with 66% of Americans saying he would pull the country together. Attitudes were less optimistic but still positive after Obama’s re-election in 2012, with 55% of Americans believing he would bring greater unity. *Id.*

<sup>4</sup> Shanto Iyengar et al., *Affect Not Ideology: A Social Identity Perspective on Polarization*, PUB. OPINION Q. 11–14 (2012), <http://pcl.stanford.edu/research/2012/iyengar-poq-affect-not-ideology.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> Ezra Klein & Alvin Chang, “Political Identity is Fair Game for Hatred”: How Republicans and Democrats Discriminate, *VOX* (Dec. 7, 2015), <http://www.vox.com/2015/12/7/9790764/partisan-discrimination>.

<sup>7</sup> Iyengar et al., *supra* note 4, at 2.

In this climate, can Americans still talk to one another? Convincing a group (“us”) to communicate meaningfully with those whom they identify as the out-group (“them”) is a difficult and daunting task. However, conflict resolution practitioners and peace and conflict studies scholars have, for decades, been developing and testing techniques for accomplishing communication and movement on important issues of division between groups. These techniques start with the recognition that some conflicts go beyond competition over limited resources. Even what appear to be resource-based conflicts on the surface may mask deeper contests over individual or group identity. When a conflict challenges a group’s very identity, it is more likely to become entrenched, and thus, more likely to require specialized techniques for finding common ground. While progress on identity-based conflicts remains fragile in the most hotly contested regions in the world, the most successful of these identity-based conflict resolution techniques may be studied and applied to controversies in which U.S. citizens are divided along not just ideological lines but affective identity lines.

This Article examines one highly controversial issue that may offer a proving ground for conflict resolution strategies to resolve identity-based conflict. Hydraulic fracturing has engendered controversy in all jurisdictions that have considered it, both in the United States and abroad. New York Governor Andrew Cuomo described the hydraulic fracturing debate as, “probably the most emotionally charged issue I have ever experienced.”<sup>8</sup> Policies toward hydraulic fracturing around the world have been varied. Jurisdictions like France and New York have declared moratoria in the face of public opposition<sup>9</sup> while others, like Pennsylvania and Poland, have proceeded with development in spite of it. In many of these jurisdictions, discourse has been divisive.<sup>10</sup> Participants often portray the other “side” of the controversy in stark and absolute negative terms. For example, non-violent public opposition to

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<sup>8</sup> Geoffrey Lean, *Fracking banned on health grounds from New York State*, TELEGRAPH (London) (4:10 PM GMT Dec. 2014), <http://www.telegraph.co.uk/news/earth/11309441/Fracking-banned-on-health-grounds-from-New-York-state.html>.

<sup>9</sup> See Thomas Kaplan, *Citing Health Risks, Cuomo Bans Fracking in New York State*, N.Y. TIMES, Dec. 17, 2014; N.Y. STATE DEP’T OF HEALTH, A PUBLIC HEALTH REVIEW OF HIGH VOLUME HYDRAULIC FRACTURING FOR SHALE GAS DEVELOPMENT (Dec. 17, 2014), [https://www.health.ny.gov/press/reports/docs/high\\_volume\\_hydraulic\\_fracturing.pdf](https://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf); Loi 2011-835 du 13 juillet 2011 [Law 2011-835 of July 13, 2011], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], p. 658.

<sup>10</sup> See Alison Peck, *Talking About Shale in Any Language*, in DELIVERING ENERGY LAW AND POLICY IN THE EU AND THE US 325 (Raphael J. Heffron & Gavin F.M. Little eds., 2016).

hydraulic fracturing has been labeled “eco-terrorism” by government contractors;<sup>11</sup> counsel for landowners in a lawsuit against hydraulic fracturing companies has generalized that, “[i]ndustry doesn’t care,” and has publicly stated that, “it’s fine with me if they take a big fat hit.”<sup>12</sup> The movie *Gasland* by writer/director/producer Josh Fox<sup>13</sup> has been described as Nazi propaganda by a member of former Pennsylvania Governor Tom Corbett’s administration<sup>14</sup> and nominated for an Academy Award for documentary filmmaking.<sup>15</sup> In Poland, farmers occupied a Chevron shale gas concession for 400 days in 2012 and 2013, temporarily stopping work and most likely contributing to making Chevron’s investment in Poland less attractive.<sup>16</sup> In Argentina, members of indigenous groups took over four oil rigs operated by the state-owned oil company, YPF, after learning that the company had entered into a \$1.24 billion deal with Chevron to develop the country’s shale deposit.<sup>17</sup>

Does the public discourse around hydraulic fracturing suggest that the debate involves something more than a simple resource dispute? Dispute resolution experts have used at least three frames to identify and approach conflicts: resource-based, interest-based, and identity-based. Resource- and interest-based approaches view

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<sup>11</sup> See Adam Federman, *We’re Being Watched: How Corporations and Law Enforcement Are Spying on Environmentalists*, 28 EARTH ISLAND J. 30 (2013) (describing bulletins prepared by Institute of Terrorism Research and Response for Pennsylvania Department of Homeland Security); see also Glenn M. Cannon, Pennsylvania Emergency Management Agency letter to Gas Drilling Awareness Coalition 1 (Dec. 18, 2014), <https://assets.documentcloud.org/documents/1507784/pema-letter-to-gdac.pdf> (disclaiming statements of ITRR that environmental groups were engaged in terrorist activity).

<sup>12</sup> See Michael Rubinkam, *Pa. Gas Driller Case Nets Families \$4.2M*, U.S. NEWS & WORLD REP. (Mar. 10, 2016), <http://www.usnews.com/news/business/articles/2016-03-10/pennsylvania-families-win-424m-verdict-against-gas-driller> (statement of Leslie Lewis, counsel for plaintiffs in *Ely v. Cabot Oil & Gas*, Civil No. 3:09-CV-2284 (M.D. Pa.)).

<sup>13</sup> GASLAND (New Video Group/HBO/International WOW Company 2010).

<sup>14</sup> Amy Worden, *Corbett official compares “Gasland” to Nazi propaganda*, PHILA. INQUIRER (Mar. 14, 2011), [http://www.philly.com/philly/blogs/harrisburg\\_politics/Corbett-official-compares-Gasland-to-Nazi-propaganda-.html](http://www.philly.com/philly/blogs/harrisburg_politics/Corbett-official-compares-Gasland-to-Nazi-propaganda-.html).

<sup>15</sup> Charles Riley, *‘Gasland’ Oscar nod draws industry ire*, CNN MONEY (Feb. 27, 2011), [http://money.cnn.com/2011/01/26/news/companies/gasland\\_movie/](http://money.cnn.com/2011/01/26/news/companies/gasland_movie/) (in addition to the Oscar nomination, *Gasland* was awarded the Sundance Film Festival award for best documentary).

<sup>16</sup> Karolina Domagalska, *Local Residents Challenge US Company’s Shale Gas Exploration Plans in Poland*, BBC INT’L REP. (June 26, 2013) (describing citizen protest); Stanley Reed, *Chevron Abandoning Shale Project in Poland*, N.Y. TIMES, Jan. 30, 2015 (describing Chevron decision to abandon exploration in Poland to pursue “other opportunities in Chevron’s global portfolio”).

<sup>17</sup> Fermin Koop, *Fracking controversy arrives in Argentina*, BUENOS AIRES HERALD (July 21, 2013), <http://www.buenosairesherald.com/article/136591/fracking-controversy-arrives-in-argentina>.

conflicts as primarily relating to conflicting groups' claims for scarce resources or, more fundamentally, to the underlying needs or interests each group seeks to serve by claiming the resource. These types of conflicts involve relatively obvious, observable, and tangible differences; therefore, "[t]he usefulness of cooperative outcomes or mutual accommodation in such disputes is often not too difficult to discern, and thus negotiation and problem solving are relatively easy to initiate and sustain."<sup>18</sup> Identity-based approaches, by contrast, focus on conflicts involving assaults on a person's or group's fundamental sense of self, rooted in complex and multidimensional psychological, historical, and cultural factors.<sup>19</sup> Interest-based conflicts often, though not always, contain identity-based conflicts, and international and organizational research suggests that conflicts should often be approached on the identity level.<sup>20</sup> Because identity-based conflicts threaten a group's basic sense of security, such conflicts often fail to respond to traditional negotiation techniques, since "an attempt to separate people's basic concerns from their substantive problems, as commonly prescribed for effective negotiation behavior, is impossible when the core issue is identity itself."<sup>21</sup> A critical task for any conflict negotiator is to evaluate the nature and depth of the conflict at the outset and to ascertain how it should be treated.<sup>22</sup>

This Article undertakes such an analysis with regard to the conflict surrounding hydraulic fracturing. As a case study, the Article focuses on Pennsylvania, which is often held up in other jurisdictions, nationally and globally, as the poster child for fracking impacts, both positive and negative. Part I of this Article explores the concepts of resource-based and identity-based conflict in the dispute resolution literature, identifying elements that characterize a dispute as identity-based. Part II delves into the rhetorical quality of the debate over hydraulic fracturing, looking at examples from both the formal administrative process and in statements made by stakeholders to the media or in public fora. Part III analyzes this rhetoric through the prism of dispute conflict resolution scholarship, identifying characteristics of both resource-based and identity-based conflict and considering the prevalence of each in the controversy. Based on this diagnostic analysis, Part IV turns to a review of how

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<sup>18</sup> JAY ROTHMAN, RESOLVING IDENTITY-BASED CONFLICT IN NATIONS, ORGANIZATIONS, AND COMMUNITIES 10 (1997).

<sup>19</sup> See HEIDI BURGESS & GUY M. BURGESS, ENCYCLOPEDIA OF CONFLICT RESOLUTION 145-46 (1997); ROTHMAN, *supra* note 18, at 11.

<sup>20</sup> See Jay Rothman & Marie L. Olson, *From Interests to Identities: Towards a New Emphasis in Interactive Conflict Resolution*, 38 J. PEACE RES. 289, 295 (2001).

<sup>21</sup> ROTHMAN, *supra* note 18, at 12.

<sup>22</sup> *Id.* at 11.

the Pennsylvania administrative process has worked for unconventional oil and gas development. This Part identifies ways in which that process may be ill-suited to address identity-based conflict and suggests avenues for re-design, both in Pennsylvania and elsewhere, to bring those conflicts to the surface and resolve them. Part V recommends a new institution, the Special Committee for Public Policy Dialogue, to address identity divides in entrenched conflicts and outlines procedures for establishing and conducting extra-legal processes that may assist legislators and regulators in making decisions that resolve the issue without further engendering identity conflict.

The overarching goal of this Article is to stimulate discussion of such mechanisms that might be developed on the state level and applied to other issues, both state and federal, over which Americans seem to be divided on identity grounds. In this era of red/blue division and acrimony, experimentation with new mechanisms to bridge identity conflicts appears critical to prevent the country from moving toward an intractable identity-based impasse over critical issues of regional and national importance.

## I. WHAT ARE IDENTITY-BASED CONFLICTS?

Although conflict resolution studies emphasize the distinction between different types of conflict in crafting effective intervention procedures, relatively little scholarship has been devoted to distinguishing different types of conflicts.<sup>23</sup> This may be because different levels of conflict occur within most disputes simultaneously.<sup>24</sup> Thus, disputes probably should not be characterized as expressing only one level of conflict. Rather, effective mediators and facilitators should be prepared to identify and respond appropriately to different levels of conflict as they arise within a dispute resolution process.<sup>25</sup>

### A. *From Power Politics to Identity-Based Conflict Management*

Since the late 1980s, conflict resolution scholarship has evolved from a focus on power politics or, alternatively, interest-based bargaining, toward recognition of

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<sup>23</sup> See Lois Edmond, *Interdisciplinary Group Conflict Diagnosis and Intervention: Exploration of Conflict Intensity and Effective Conflict Resolution Methods*, 4 INT'L J. INTERDISCIPLINARY SOCIAL SCI. 35, 35 (2010).

<sup>24</sup> See Terrell A. Northrup, *The Dynamic of Identity in Personal and Social Conflict*, in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION 55, 63 (Louis Kriesberg et al. eds, 1989).

<sup>25</sup> *Id.*

a need for interest-based conflict resolution.<sup>26</sup> Traditional negotiation viewed conflicts primarily as competition over scarce resources.<sup>27</sup> Resource-based conflicts are relatively obvious and observable, such as an employee bargaining for a higher salary from an employer or two nations competing for the same economic market.<sup>28</sup> Under this model, parties (conventionally, nation-states) arrived with predefined interests and jockeyed for position in negotiation to give up as little as possible.<sup>29</sup> Describing this type of negotiation, Henry Kissinger emphasized that the parties would tend to begin with extreme bargaining positions, since, “[t]he more outrageous the initial proposition, the better is the prospect that what one *really* wants will be considered a compromise.”<sup>30</sup> Framing the conflict in this way assumes that the parties’ interests are fixed and that the purpose of the conflict resolution process is merely to get the parties to agree to what each will give up. Interest-based conflict is a slight re-framing of resource-based conflict.<sup>31</sup> Instead of focusing on what the party seeks, an interest-based conflict frame focuses on *why* a party seeks what it seeks.<sup>32</sup>

With all of these classes of conflict, traditional bargaining and negotiation techniques may be effective.<sup>33</sup> The goal is clear: the parties have a sufficient relationship and skills to negotiate (with intervention in more complex cases), and

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<sup>26</sup> See Rothman & Olson, *supra* note 20, at 292–97.

<sup>27</sup> LEWIS A. COSER, CONTINUITIES IN THE STUDY OF SOCIAL CONFLICT 8 (1967); Rothman & Olson, *supra* note 20, at 292–93.

<sup>28</sup> ROTHMAN, *supra* note 18, at 10.

<sup>29</sup> Rothman & Olson, *supra* note 20, at 292–93.

<sup>30</sup> HENRY KISSINGER, THE NECESSITY OF CHOICE 205 (1961).

<sup>31</sup> Rothman & Olson, *supra* note 20, at 291.

<sup>32</sup> *Id.*; see also ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 44 (1981). Lois Edmond describes slightly different categories of conflict that focus more on the triggering circumstances rather than the substantive nature of the matter in dispute. At the simplest level are “event-based conflicts,” short-term conflicts without deep roots arising out of the parties’ or groups’ differing interpretations of a specific event or of the other group’s needs or tactics with respect to the event. See Edmond, *supra* note 23, at 36. Because the roots of the conflict are not deep, the parties do not become defensive and communication is straightforward and not fraught with emotion. *Id.* At the next level are “communicative-affective conflicts,” which arise from a longer shared history between the parties and a build-up of miscommunication or heated affect during the conflict period. *Id.* at 37. These conflicts involve issues of deep personal meaning or group impact, and communication between the groups may involve a commitment to keeping the conflict alive or “dirty fighting.” *Id.*

<sup>33</sup> See ROTHMAN, *supra* note 18, at 14–15.



common ground exists since both parties are motivated to find an acceptable solution.<sup>34</sup>

In the latter part of the twentieth century, scholars began to focus attention on identity-based conflicts, in which the interest at stake is an individual's or group's integrity, fundamental beliefs, or survival.<sup>35</sup> These conflicts may be expressed in terms of resource conflicts or negotiated based on underlying interests, but those resource or interest concerns mask deeper, less tangible conflicts with complex psychological, historical, and cultural roots.<sup>36</sup> In her seminal 1989 work, Terrell Northrup characterized identity as a central facet of conflict because having a sense of identity allows human beings to make predictions in an otherwise unpredictable world.<sup>37</sup> Northrup relies on psychologist George Kelly's idea of "core constructs," or superordinate structures derived from the process of observing a series of events in one's life, and abstracting key themes and distinguishing contrasts.<sup>38</sup> These core constructs then become a system through which "reality" is construed to give a fixed sense of identity and continuing existence in an unpredictable world.<sup>39</sup>

Relying on Erik Erikson's identification of the four pillars of human identity,<sup>40</sup> Lois Edmond described identity-based conflicts as conflicts that threaten one of those four pillars: belonging, competency, continuity, and transcendent values and meaning.<sup>41</sup> Belonging may be threatened when a relationship is in danger; competency is threatened when humiliating failure is a possibility; continuity is broken when the stability of the past is no longer reliable; and values are challenged when the values to which one is committed are no longer sufficient to deal with current reality.<sup>42</sup> Identity-based conflicts implicate those group memberships that are most fundamental to an individual's identity formation: family, belief system, and

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<sup>34</sup> *Id.*

<sup>35</sup> *See id.* at 11; *see also* Rothman & Olson, *supra* note 20, at 294.

<sup>36</sup> ROTHMAN, *supra* note 18, at 11; Rothman & Olson, *supra* note 20, at 294.

<sup>37</sup> *See* Northrup, *supra* note 24, at 63.

<sup>38</sup> *Id.* (citing GEORGE KELLY, A THEORY OF PERSONALITY: THE PSYCHOLOGY OF PERSONAL CONSTRUCTS 43 (1955)).

<sup>39</sup> *Id.* at 65.

<sup>40</sup> ERIK ERIKSON, IDENTITY AND THE LIFE CYCLE 6–12 (1980).

<sup>41</sup> Edmond, *supra* note 23, at 39.

<sup>42</sup> *Id.*

self-concept.<sup>43</sup> Northrup describes four stages of identity-based conflicts. First, one of these threats to identity occurs; second, perceptions are distorted, and the opposing group is demonized; third, conflict tactics and dynamics become rigid; and fourth, group members collude to maintain the conflict in order to maintain their identity.<sup>44</sup>

The difficulty—and the root of many conflicts—arises when the individual receives information that is in conflict with his or her core constructs. Necessary to keep the terror of unpredictability at bay, “core constructs cannot be changed significantly without disturbing the very roots of our being.”<sup>45</sup> When the behaviors, beliefs, or values of another person or group are inconsistent with an individual’s core constructs, the individual experiences an intense sense of threat.<sup>46</sup> Once an individual experiences this threat, the next stage of the arising conflict is distortion of the new, inconsistent information.<sup>47</sup> The individual may deny the existence of the new information, or they may force new meaning upon it to maintain his or her core constructs.<sup>48</sup> In the third stage of the conflict formation process, the individual develops increasingly rigid interpretations of the world, in which “self” and “not-self” become impermeable.<sup>49</sup> At this stage, bad motivations are attributed to the opposing party, and other forms of physical separation or invalidation may occur.<sup>50</sup>

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

<sup>44</sup> Northrup, *supra* note 24, at 68–76.

<sup>45</sup> *Id.* at 65. Susan Hunter describes these core constructs as “ontologies.” Susan Hunter, *The Roots of Environmental Conflict in the Tahoe Basin*, in *INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION* 25, 26, 31 (Louis Kriesberg et al. eds., 1989). As Northrup notes, “ontologies (or core constructs) are not negotiable.” Northrup, *supra* note 24, at 69.

<sup>46</sup> Northrup, *supra* note 24, at 65, 68–69.

<sup>47</sup> *Id.* at 69–70.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 70–74.

<sup>50</sup> *Id.* at 71. This process is observed in the work of numerous other conflict resolution and mediation scholars, who note that participants in an identity conflict tend to view the other side as purely bad and to view their own side as purely good. *See, e.g.*, Elizabeth Bader, *The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle*, 10 PEPP. DISP. RES. L.J. 183, 189 (2010). Rothman describes this process in several steps, including blaming, polarizing, attributing, and projecting. ROTHMAN, *supra* note 18, at 23–28 (“[I]f the other side is perceived as a dangerous adversary threatening or frustrating identity needs, the common starting place is to draw a line in the sand between Us and Them. Each side feels relatively blameless, and each sees the opponents as aggressive, perhaps even evil.”).

As views of the “other” or the situation become rigid, the conflict becomes important to the parties in its own right.<sup>51</sup> At this final stage, which Northrup calls “collusion,” the parties may paradoxically prefer to perpetuate the conflict rather than resolve it. Once an individual has responded to a perceived threat to identity with distortion of the other and rigidification of his or her position, to give up the rigid views and see the other side’s humanity becomes tantamount to giving up one’s own identity. No longer just about resources or even different belief systems, “the conflict itself becomes defined as self.”<sup>52</sup> The behavior of the other party will likely be perceived as validating this view, since people will usually respond to the aggression of distortion and rigidification by becoming more aggressive and distortive themselves. “If the ‘enemy’ was not truly devious and aggressive before the distortions began, they certainly begin to behave just like ‘enemies’ in response to the distortions.”<sup>53</sup> At this stage, conflicts are likely to appear intractable.<sup>54</sup>

In this light, conventional dispute resolution mechanisms like negotiation and bargaining are, at a minimum, futile in fully-blown identity-based conflicts. Worse, if a mediator approaches the parties by urging them to engage in compromising of interests, the conflict may even escalate.<sup>55</sup> To compromise with the “enemy” at this point is unthinkable, as, “the prospect of ending the conflict threatens to invalidate the self.”<sup>56</sup> As the individual now sees the conflict as part of her identity, the mediator will have to fashion a process of intervention that engages the parties at the identity level and creates a sufficiently safe space for both parties to discuss their experiences and representations of the conflict as an aspect of their identities without invalidating the other side’s identity.<sup>57</sup>

### *B. Identity-Based Conflict Management in the Environmental Arena*

The notion of identity-based conflict was pioneered primarily by scholars and practitioners in international relations and peace studies alongside similar research

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<sup>51</sup> Northrup, *supra* note 24.

<sup>52</sup> *Id.* at 75.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 76.

<sup>55</sup> Rothman & Olson, *supra* note 20, at 293.

<sup>56</sup> Northrup, *supra* note 24, at 76.

<sup>57</sup> ROTHMAN, *supra* note 18, at 15.

by industrial relations researchers.<sup>58</sup> Beginning in 1973, a new subset of the field of conflict resolution was first documented when the governor of Washington hired two mediators to engage with local stakeholders over a proposed flood control dam on the Snoqualmie River.<sup>59</sup> Throughout the 70s, 80s and 90s, more ad hoc efforts to engage in mediated management of environmental conflicts led to the emergence of a distinct field of practice and research, known as Environmental and Public Policy (EPP) conflict management.<sup>60</sup>

Since 2000, EPP conflict resolution scholars have explored issues of identity as they affect dynamics in environmental conflicts and conflict management.<sup>61</sup> EPP scholars treat identity as one of several “frames” that parties use to understand or communicate about disputes.<sup>62</sup> Frames have been described as “cognitive shortcuts” that people use to make sense of the world around them.<sup>63</sup> Frames may be understood principally as cognitive devices through which all human beings make sense of complex situations in ways that give meaning to events in terms of prior life

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<sup>58</sup> Rothman & Olson, *supra* note 20, at 294–95.

<sup>59</sup> See Michael L. Elliott & Sandra Kaufman, *Enhancing Environmental Quality and Sustainability Through Negotiation and Conflict Management: Research into Systems, Dynamics, and Practices*, 9 NEGOT. & CONFLICT MGMT. RES. 199, 203 (2016).

<sup>60</sup> *Id.* at 203–05. Supporting institutions include the U.S. Institute of Environmental Conflict Resolution at the Udall Institute, a federally-authorized and -funded center that provides conflict resolution, facilitated collaboration, and training and assessment services for environmental conflicts involving federal agencies. *U.S. Institute for Environmental Conflict Resolution*, UDALL FOUND., <https://www.udall.gov/OurPrograms/Institute/Institute.aspx> (last visited Jan. 15, 2018). See also L.E. Susskind & S. McKearnan, *The Evolution of Public Policy Dispute Resolution*, 16 J. ARCHITECTURAL & PLANNING RES. 96 (1999) (identifying other supporting organizations such as Environmental and Public Policy Sector of Society for Professionals in Dispute Resolution and Administrative Conference of United States support for federal agency use of negotiation-based processes in regulatory conflicts).

<sup>61</sup> See, e.g., Barbara Gray, *Framing of Environmental Disputes*, in MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS 11 (Roy J. Lewicki et al. eds., 2003); Deborah Shmueli et al., *Frame Changes and the Management of Intractable Conflicts*, 24 CONFLICT RES. Q. 207 (2006) [hereinafter Shmueli et al., *Frame Changes*]; Deborah Shmueli, *Framing in Geographical Analysis of Environmental Conflicts: Theory, Methodology and Three Case Studies*, 39 GEOFORUM 2048 (2008) [hereinafter Shmueli, *Framing in Geographical Analysis*]; Carolyn Wiethoff et al., *Portraits of Self and Others: State-Level Conflict Over Water Regulation in Ohio*, in MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS, *supra*, at 225.

<sup>62</sup> See Gray, *supra* note 61, at 21–32; Shmueli et al., *Frame Changes*, *supra* note 61, at 208–09; Shmueli, *Framing in Geographical Analysis*, *supra* note 61, at 2048–50.

<sup>63</sup> See Sandra Kaufman et al., *Frames, Framing and Reframing*, BEYOND INTRACTABILITY (June 2017), <http://www.beyondintractability.org/essay/framing>.

experience, understandings, or rules.<sup>64</sup> Alternatively, sociolinguists view frames as devices principally created or re-created by people in conversation to determine whether others share interpretations of events.<sup>65</sup> As strategic linguistic devices, frames may be used to rationalize self-interest, persuade others, gain advantage in negotiations, or motivate others to action.<sup>66</sup>

Researchers have identified frames that appear to be common in environmental conflicts, including identity frames and, relatedly, characterization frames.<sup>67</sup> Drawing from the work of Rothman, Northrup, and other conflict resolution scholars,<sup>68</sup> EPP conflict management scholars describe identity frames as “how individuals answer the question, Who am I?”<sup>69</sup> Identity is often framed by membership in a particular group (man/woman, Republican/Democrat, Israeli/Palestinian).<sup>70</sup> Environmental conflicts frequently give rise to identity framing, since an individual’s sense of his or her relationship to the rest of the non-human world is central to a stable sense of individual identity.<sup>71</sup>

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<sup>64</sup> Shmueli, *Framing in Geographical Analysis*, *supra* note 61, at 2049. Research focused on the cognitive view of framing includes, Daniel Kahneman & Abner Tverski, *The Framing of Decisions and the Psychology of Choice*, 211 *SCI.* 453 (1981); Daniel Kahneman & Abner Tverski, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); M.A. Neale & M.H. Bazerman, *The Effects of Framing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes*, 28 *ACAD. MGMT. J.* 34 (1985); E. Vaughan & M. Seifert, *Variability in the Framing of Risk Issues*, *J. SOC. ISSUES* 119 (1992).

<sup>65</sup> See Laura E. Drake & William A. Donohue, *Communicative Framing Theory in Conflict Resolution*, 23 *COMM. RES.* 297 (1996); Linda L. Putnam & Majja Holmer, *Framing, Reframing and Issue Development*, in *COMMUNICATION AND NEGOTIATION* 128 (Linda L. Putnam & Michael E. Roloff eds., 1992).

<sup>66</sup> See Gray, *supra* note 61, at 16–20; Shmueli, *Framing in Geographical Analysis*, *supra* note 61, at 2049.

<sup>67</sup> See Gray, *supra* note 61, at 20 (identifying identity, characterization, and conflict management frames as common to all eight environmental case studies included in analysis); see also Shmeuli, *Framing in Geographical Analysis*, *supra* note 61, at 2051 (identifying “identity and values” frames, characterization frames, process frames (similar to conflict management frames), as well as phrasing and substance frames in 13 environmental conflict case studies).

<sup>68</sup> See Elliott & Kaufman, *supra* note 59, at 201; Gray, *supra* note 61, at 21–22; Shmueli et al., *Frame Changes*, *supra* note 61, at 211; Shmueli, *Framing in Geographical Analysis*, *supra* note 61, at 2051.

<sup>69</sup> Gray, *supra* note 61, at 21.

<sup>70</sup> See *id.*; see also Elliott & Kaufman, *supra* note 59, at 210.

<sup>71</sup> Individuals form identities based on the location where they work or live, the beliefs of the community in which they live, and their interests or views on certain issues. See Jonathan Kusel et al., *The Role of the Public in Adaptive Ecosystem Management*, in 2 *SIERRA NEVADA ECOSYSTEM PROJECT: FINAL REPORT*

Related to identity frames are “characterization frames,” through which individuals answer the question “Who are they?”<sup>72</sup> Characterization frames are reductionist labels placed on another group to ascribe to them positive or negative characteristics.<sup>73</sup> Characterization and identity frames are often recognized as linked, since profound threats to identity often lead to negative characterization of the group perceived as threatening.<sup>74</sup> As such, characterization frames seem to be the EPP conflict management way of describing what Northrup refers to as “distortion,” a step in the descent from identity threat to intractability.<sup>75</sup>

Other common frames identified by EPP conflict management researchers include phrasing frames,<sup>76</sup> substance frames,<sup>77</sup> process frames (or, similarly, conflict management frames),<sup>78</sup> whole story frames,<sup>79</sup> social control frames,<sup>80</sup> power

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TO CONGRESS: ASSESSMENTS AND SCIENTIFIC BASIS FOR MANAGEMENT OPTIONS 611 (1996) (describing identity deriving from “communities of place” and “communities of interest”).

<sup>72</sup> Gray, *supra* note 61, at 23.

<sup>73</sup> Shmueli et al., *Frame Changes*, *supra* note 61, at 211.

<sup>74</sup> See Elliott & Kaufman, *supra* note 59, at 210.

<sup>75</sup> See Northrup, *supra* note 24, at 69–70.

<sup>76</sup> See Shmueli, *Framing in Geographical Analysis*, *supra* note 61, at 2051 (defining “phrasing frames” as ways that parties communicate about issues to indicate desired outcomes, such as indicating a sense of win-win, zero-sum, etc.).

<sup>77</sup> See *id.* (defining “substance frames” as ways of characterizing the matter in conflict, including aspirations, issues of contention, and potential outcomes).

<sup>78</sup> Compare *id.* (defining “process frames” as ways the parties characterize the process and fairness of the conflict resolution process), with Gray, *supra* note 61, at 24–27 (defining “conflict management frames” as ways the participants express how they would like the conflict resolution process to be conducted).

<sup>79</sup> See Gray, *supra* note 61, at 27 (defining “whole story frames” as the way participants sum up or state the essence of the conflict).

<sup>80</sup> See *id.* at 28 (defining “social control” frames as participants’ views about how they believe decisions regarding social issues should be made, including individualist, egalitarian, fatalist, or hierarchist attitudes); see also Karl Dake, *Myths of Nature: Culture and the Social Construction of Risk*, 48 J. SOC. ISSUES 21 (1992); Karl Dake, *Orienting Dispositions in the Perception of Risk: An Analysis of Contemporary Worldviews and Cultural Biases*, 22 J. CROSS-CULTURAL PSYCH. 61 (1991); Aaron Wildavsky & Karl Dake, *Theories of Risk Perception: Who Fears What and Why?*, 119 DAEDALUS 41 (1990).

frames,<sup>81</sup> risk and information frames,<sup>82</sup> and gain-versus-loss frames.<sup>83</sup> In essence, each of these frames represents a different way that participants in a conflict use to characterize the dispute or the conflict resolution process. The characterizations are labeled by researchers as frames because they are not fixed, are not shared by all parties to the same dispute based on the same set of facts, are shaped by the individual's or group's relative position to the controversy, and are often unconscious.<sup>84</sup>

EPP conflict management researchers' distinction between identity frames ("who am I?") and characterization frames ("who are they?") is promising for anyone thinking of ways to move entrenched conflicts forward. Threats to identity are polarizing because they are fundamental; to compromise on a matter that affects a person's identity "[i]n the extreme, . . . would produce anomie—a lack of purpose, identity, or ethical values."<sup>85</sup> Characterization frames, on the other hand, relate only to the way an individual sees others, not the way the individual sees him or herself. Thus, "[c]haracterization frames lend themselves to reframing with the assistance of a skillful intervener who creates opportunities for positive direct interactions."<sup>86</sup>

For example, Deborah Shmueli and colleagues interviewed participants to a conflict about the siting of a landfill in Israel.<sup>87</sup> The conflict pitted officials in Tel Aviv, the urban center of Israel, against a citizens group in Beer Sheva, the central

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<sup>81</sup> See Gray, *supra* note 61, at 29–30 (identifying nine ways participants in case studies identified sources from which participants drew power, including authority/positional, resources, expertise, personal abilities, conditional/relational, sympathy/vulnerability, force/threat, moral/righteous, and voice or forum).

<sup>82</sup> Compare Shmueli et al., *Frame Changes*, *supra* note 61, at 213 (characterizing "risk and information" frames as based on participants' familiarity and comfort with relevant risks and sense of reliability of information), with Gray, *supra* note 61, at 31 (focusing on attitudes toward risk, including cost-benefit analysis and contingent valuation).

<sup>83</sup> See Gray, *supra* note 61, at 31–32 (identifying participants' "reference point" as determining whether potential environmental action is viewed as creating gain or loss). Social psychologists have established that individuals tend to value avoiding losses more highly than achieving commensurate gains. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Tversky & Kahneman, *supra* note 64.

<sup>84</sup> See generally Gray, *supra* note 61; Northrup, *supra* note 24.

<sup>85</sup> Gray, *supra* note 61, at 31. Northrup was similarly pessimistic about moving conflict by making changes to identity, at least in the short term. See Northrup, *supra* note 24, at 81.

<sup>86</sup> Shmueli, *Framing in Geographical Analysis*, *supra* note 61, at 2055.

<sup>87</sup> See *id.* at 2051–55.

city of the Negev region on Israel's periphery.<sup>88</sup> The central landfill for the Tel Aviv area had long been out of compliance with health and environmental regulations and became an acute threat after severe rainfall in 1997–98 collapsed the edges of the landfill.<sup>89</sup> When the Ministry of Environment began shipping waste to the landfill in Duda'im, seven kilometers from Beer Sheva, citizens of Beer Sheva mobilized.<sup>90</sup> Beer Sheva citizens identified as citizens on the periphery of Israeli population centers and power, and demonstrated this identity frame in statements such as those insisting that they “were not the nation's garbage dump.”<sup>91</sup> At the same time, both sides made statements characterizing the other side as “narrow and bureaucratic” or “not rational.”<sup>92</sup> While it would have been difficult to change either group's sense of identity, a skilled facilitator was able to shift the parties toward re-framing their characterizations of each other by clarifying each party's aspirations.<sup>93</sup> For instance, the central officials came to appreciate that the Beer Sheva lobby was involved in a process that aimed to change the image of Beer Sheva into the southern metropolis of Israel, to unite the Negev community, and to improve local quality of life.<sup>94</sup> During the course of a three-day conflict management workshop in 1999, the parties moved from reductionist labeling of the other side toward an eventual resolution of the dispute in which the landfill was located in Duda'im, but with more limited duration and land area and more compensation and general political influence for Beer Sheva.<sup>95</sup> By the end of the workshop, “the spokesperson for the Beer Sheva lobby expressed amazement at her own ability to communicate with national and district ministry representatives,”<sup>96</sup> and the parties were able to expand the discussion to more general issues of concern to the region.<sup>97</sup> In this dispute, movement in

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<sup>88</sup> *Id.* at 2053.

<sup>89</sup> *Id.* at 2053–54.

<sup>90</sup> *Id.* at 2053.

<sup>91</sup> *Id.* at 2055.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2051, 2055.

<sup>94</sup> *Id.* at 2051. This was apparent from a statement by a member of the Beer Sheva lobby that the landfill issue “is in fact a flag for other issues such as education and unemployment.” *Id.* at 2052.

<sup>95</sup> *Id.* at 2055.

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

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



characterization frames was essential to resolution; movement in identity frames was not.

## II. ENTRENCHMENT AND IDENTITY IN THE HYDRAULIC FRACTURING CONFLICT IN PENNSYLVANIA

Is the hydraulic fracturing debate in Pennsylvania an entrenched, identity-based conflict? While it may be too soon, with less than a decade of experience, to say whether a conflict is truly entrenched, there are elements of the conflict that suggest it may be moving in that direction. This Part examines the state of the conflict up to this point for evidence suggesting entrenchment or intractability.

If the conflict contains elements of identity conflict, theorists suggest that failure to bring out and deal with identity issues may cause the conflict to set root.<sup>98</sup> Can identity and characterization framing be observed in the discourse among participants to the hydraulic fracturing dispute in Pennsylvania? To answer that question, this Article looks at the conflict from a variety of sources. These sources include “top-down” processes such as administrative and judicial processes created by the state, which in Pennsylvania include formal input of several executive advisory commissions;<sup>99</sup> legislative processes that led to a new law, known as Act 13, that updated Pennsylvania’s oil and gas law to account for unconventional resource development;<sup>100</sup> and an extensive administrative rulemaking process with multiple proposed rules, comment periods, public hearings, and advisory committee consultations.<sup>101</sup> Other sources reviewed include “bottom-up” processes outside the legislative and executive/rulemaking mechanisms such as public demonstrations,<sup>102</sup>

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<sup>98</sup> See Pennsylvania Department of Environmental Protection, Oil and Gas Surface Regulations, PA.GOV, <http://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/Public-Resources/Pages/Oil-and-Gas-Surface-Regulations.aspx> (last visited Aug. 24, 2016).

<sup>99</sup> The Governor’s Marcellus Shale Advisory Commission was formed by Governor Tom Corbett on July 12, 2010, and issued its report one year later. See generally Marcellus Shale Advisory Comm’n, Links to the Commission’s Meeting Minutes and Final Report, PA. DEP’T ENVTL. PROTECTION, <http://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/MarcellusShale/Pages/default.aspx> (last visited Jan. 15, 2018).

<sup>100</sup> 58 PA. CONS. STAT. §§ 2301–2318 (2017).

<sup>101</sup> See *Oil and Gas Surface Regulations*, PA. DEP’T ENVTL. PROTECTION, <http://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/Public-Resources/Pages/Oil-and-Gas-Surface-Regulations.aspx> (last visited Jan. 15, 2018).

<sup>102</sup> See, e.g., Reid Frazier, *Parents Protest Fracking Near Schools*, STATE IMPACT (July 15, 2015), <https://stateimpact.npr.org/pennsylvania/2015/07/15/parents-protest-fracking-near-schools/>; Sue Gleiter,

information-gathering and dissemination activities;<sup>103</sup> civil disobedience;<sup>104</sup> media campaigns;<sup>105</sup> litigation challenging the constitutionality of Act 13;<sup>106</sup> proceedings from post-*Robinson Township* zoning actions;<sup>107</sup> and tort actions against individual drillers and developers.<sup>108</sup> Review of the rhetoric between the parties at different stages of this process helps to provide evidence about the extent of identity-based conflicts, including both identity frames and characterization frames, lurking beneath the surface of the obvious disputes over resources such as minerals, land and water that have been the focus of most discussions of the hydraulic fracturing conflict.

### A. *Evidence of Entrenchment in the Hydraulic Fracturing Debate*

Seven years since the first tort litigation related to hydraulic fracturing was filed in Pennsylvania,<sup>109</sup> and five years since Governor Corbett created a task force to

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*Protesters Share Anti-Fracking Message at 2016 PA Farm Show*, PENN LIVE (Jan. 9, 2016), [http://www.pennlive.com/news/2016/01/farm\\_show\\_fracking\\_rally.html](http://www.pennlive.com/news/2016/01/farm_show_fracking_rally.html).

<sup>103</sup> See, e.g., Jay Stanley, *Drilling Opponents Spied on Like Terrorists*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/jay-stanley/drilling-opponents-spied\\_b\\_719567.html](http://www.huffingtonpost.com/jay-stanley/drilling-opponents-spied_b_719567.html).

<sup>104</sup> See e.g., Eric Mayes, *Pa. Anti-Drillers: "Shut Them Down,"* PHILA. TRIBUNE (Sept. 8, 2011), [http://www.phillytrib.com/news/state-and-region/pa-anti-drillers-shut-them-down/article\\_54a0bbff-b280-5020-a67f-d0bf67c74442.html](http://www.phillytrib.com/news/state-and-region/pa-anti-drillers-shut-them-down/article_54a0bbff-b280-5020-a67f-d0bf67c74442.html); Kate Stringer, *Faced with a Fracking Giant, This Small Town Just Legalized Civil Disobedience*, YES! MAGAZINE (May 13, 2016), <http://www.yesmagazine.org/planet/faced-with-a-fracking-giant-this-small-town-just-legalized-civil-disobedience-20160513>.

<sup>105</sup> See, e.g., David Conti, *Shale Gas Industry's Ad Campaign Aims to Promote Fracking*, TRIB LIVE (Sept. 24, 2014), <http://triblive.com/business/headlines/6853292-74/industry-shale-pavone>; Eve Goodman, *Allegheny County Council, Don't be Seduced by Frackers' Promises*, PITT. POST-GAZETTE (Apr. 27, 2014), <http://www.post-gazette.com/opinion/letters/2014/04/27/Allegheny-County-Council-don-t-be-seduced-by-frackers-promises/stories/201404270056>.

<sup>106</sup> See *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

<sup>107</sup> See, e.g., Jacob Batchelor, *Gas Group Asks Pa. High Court to Enforce Drilling Decision*, LAW360 (June 22, 2015), <http://www.law360.com/articles/670642/gas-group-asks-pa-high-court-to-enforce-drilling-decision>; see also Brendan Gibbons, *Residents Beat Gas Company in Lycoming County Zoning Case*, TIMES-TRIBUNE (Sept. 4, 2014), <http://thetimes-tribune.com/news/residents-beat-gas-company-in-lycoming-county-zoning-case-1.1746707>.

<sup>108</sup> See, e.g., *Ely v. Cabot Oil & Gas Corp.*, 38 F. Supp. 3d 518 (M.D. Pa. 2014).

<sup>109</sup> See *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506, 508 (M.D. Pa. 2010) (complaint filed Nov. 19, 2009); Complaint, *Zimmerman v. Atlas America, L.L.C.*, C.D. No. 2009-7564 (Wash. Cty. Ct. Com. Pl. 2009).

study the issue of regulating the industry,<sup>110</sup> the development of unconventional oil and gas remains mired in controversy over regulatory reach, tort liability, property disputes, and constitutional protections for municipalities and the public. Despite years of study, many of these issues remain as unresolved and contentious as ever, with some apparently being sent back to the drawing board.

### 1. The Regulatory Morass

The regulatory process began with the creation of the Marcellus Shale Advisory Commission on March 8, 2011. Incoming governor Tom Corbett formed the Marcellus Shale Advisory Commission and charged its members with studying the issue and making recommendations for industry regulation within one year.<sup>111</sup> After receiving the Commission's report,<sup>112</sup> the Pennsylvania legislature in February 2012 enacted a law known as Act 13, which established parameters for unconventional oil and gas development and ordered the Department of Environmental Protection ("DEP") to update the state's oil and gas regulations in light of the new type of development.<sup>113</sup> On August 27, 2013, DEP issued its first proposed rule, which combined rules for both conventional and unconventional oil and gas production.<sup>114</sup> After DEP had received more than 23,000 comments in a 90-day comment period,<sup>115</sup> held nine public hearings,<sup>116</sup> and consulted with the state Oil and Gas Technical Advisory Board,<sup>117</sup> the legislature enacted the state budget with a rider that required DEP to recommence rulemaking and issue separate rules for conventional and

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<sup>110</sup> See 4 PA. CODE § 6.431 *et seq.* (2011); see also Exec. Order No. 2011-01, 41 Pa. Bull. 1754 (Mar. 8, 2011), <https://www.pabulletin.com/secure/data/vol41/41-14/548.html>.

<sup>111</sup> Exec. Order No. 2011-01, 41 Pa. Bull. 1754 (Mar. 8, 2011), <https://www.pabulletin.com/secure/data/vol41/41-14/548.html>.

<sup>112</sup> GOVERNOR'S MARCELLUS SHALE ADVISORY COMMISSION, REPORT (2011), [http://files.dep.state.pa.us/publicparticipation/marcellusshaleadvisorycommission/marcellusshaleadvisoryportalfiles/msac\\_final\\_report.pdf](http://files.dep.state.pa.us/publicparticipation/marcellusshaleadvisorycommission/marcellusshaleadvisoryportalfiles/msac_final_report.pdf).

<sup>113</sup> 58 PA. CONS. STAT. §§ 2301–2318 (2017).

<sup>114</sup> 43 Pa. Bull. 7377 (Dec. 14, 2013), <https://www.pabulletin.com/secure/data/vol43/43-50/2362.html>.

<sup>115</sup> See Press Release, DEP Newsroom, DEP Releases Revised Rulemaking Proposal for Environmental Protection Performance Standards at Oil and Gas Well Sites (Mar. 9, 2015), <http://www.ahs.dep.pa.gov/NewsRoomPublic/SearchResults.aspx?id=20700&typeid=1>; see also 46 Pa. Bull. 6431, 6441 (Oct. 8, 2016), [https://www.pabulletin.com/secure/data/vol46/46-41/46\\_41\\_p2.pdf](https://www.pabulletin.com/secure/data/vol46/46-41/46_41_p2.pdf) [hereinafter *Oil and Gas Surface Regulations*].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

unconventional oil and gas activities.<sup>118</sup> On April 4, 2015, DEP issued an Advanced Notice of Final Rulemaking, opening a 45-day comment period on its draft-final rules, which included Chapter 78 pertaining to conventional oil and gas operations and Chapter 78a pertaining to unconventional oil and gas operations.<sup>119</sup> After considering nearly 5000 additional comments and consulting with technical advisory boards for both conventional and unconventional oil and gas, Pennsylvania's Environmental Quality Board ("EQB") approved the rule for adoption as a single final-form rule on February 3, 2016.<sup>120</sup> The next step in the approval chain, the Independent Regulatory Review Commission ("IRRC"), voted by a tight 3-2 margin to approve the rule on April 21, 2016.<sup>121</sup>

The rulemaking process, already four years running, would not end so quietly, however. On March 24, 2016, an association representing the conventional oil and gas industry had filed a lawsuit alleging that the issuance of a single final-form rule unfairly prejudiced the interests of its members, since the rule was predominantly devoted to addressing impacts of unconventional oil and gas production.<sup>122</sup> Although the lawsuit was withdrawn on May 8, 2016,<sup>123</sup> legislators continued to press the issue.<sup>124</sup> The Pennsylvania Senate and House Environmental Resources and Energy committees, which had 14 days from the April 21 approval by the IRRC to put forth a resolution to approve or block the rule, had previously voted to reject the rule, and

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<sup>118</sup> H.B. 278, Reg. Sess. (Pa. 2013).

<sup>119</sup> 45 Pa. Bull. 1615 (Apr. 4, 2015) (30-day comment period); 45 Pa. Bull. 1951 (Apr. 18, 2015) (additional 15-day comment period).

<sup>120</sup> See *Oil and Gas Surface Regulations*, *supra* note 115.

<sup>121</sup> Regulation No. 7-484, INDEPENDENT REGULATORY REVIEW COMMISSION, APPROVAL ORDER (Apr. 21, 2016).

<sup>122</sup> See Petition for Review in the Nature of a Complaint for Declaratory, Injunctive, and Mandamus Relief, Pa. Indep. Petroleum Producers Ass'n v. Commonwealth, No. 219 M.D. 2016 (Pa. Commw. Ct. Mar. 24, 2016) ("*PIPP*"). The plaintiffs alleged that the industries should be considered separately in part because the conventional oil and gas industry includes many small, family-owned businesses, while the unconventional oil and gas industry is predominated by larger corporations. *Id.* at 8-13.

<sup>123</sup> Lawrence E. Cullen et al., *Hydraulic Fracturing Legal Update—November 2016*, ARNOLD & PORTER (Nov. 8, 2016), <https://www.apks.com/en/perspectives/publications/2016/11/hydraulic-fracturing-legal-update>.

<sup>124</sup> See Marcie Schellhammer, *Wolf signs bill protecting conventional oil and gas production in Pa.*, BRADFORD ERA (June 24, 2016), [http://www.bradfordera.com/news/wolf-signs-bill-protecting-conventional-oil-and-gas-production-in/article\\_577e3baa-39af-11e6-a623-fb14c27fe476.html](http://www.bradfordera.com/news/wolf-signs-bill-protecting-conventional-oil-and-gas-production-in/article_577e3baa-39af-11e6-a623-fb14c27fe476.html).

some commentators speculated that the entire rule would be blocked.<sup>125</sup> Instead, however, Governor Tom Wolf signed a bill that rejected only the regulations pertaining to conventional oil and gas.<sup>126</sup> The new law restarted the process of developing regulations for conventional oil and gas and created an advisory council, of which more than half of the members were required to be industry representatives, to advise the process.<sup>127</sup> Revision of the conventional oil and gas regulations was expected to take another two years.<sup>128</sup>

The new law, described as a “compromise” by Governor Wolf,<sup>129</sup> did not affect Chapter 78a, the unconventional oil and gas regulations.

Chapter 78a was submitted to the Office of the Attorney General for form and legality review on June 27, 2016.<sup>130</sup> After DEP made a few technical amendments, the Office of the Attorney General approved Chapter 78a on July 26, 2016.<sup>131</sup> The final rules were published on October 8, 2016, and were effective as of that date.<sup>132</sup>

But, the battle continues. On October 13, 2016, a trade industry group for the unconventional oil and gas industry sued the DEP seeking to block portions of the rule from taking effect.<sup>133</sup> The lawsuit alleged that the rulemaking was promulgated

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<sup>125</sup> See Stefanie L. Burt, *Revisions of Pa.'s Oil and Gas Regulations Mired in Politics*, LEGAL INTELLIGENCER (July 21, 2016), <http://www.thelegalintelligencer.com/id=1202763297831/Revisions-of-Pas-Oil-and-Gas-Regulations-Mired-in-Politics>.

<sup>126</sup> 2016 Pa. Laws 375, § 4(a); see also Susan Phillips, *Gov. Wolf Signs Bill That Rejects Conventional Drilling Regulations*, STATE IMPACT (June 23, 2016), <https://stateimpact.npr.org/pennsylvania/2016/06/23/gov-wolf-signs-new-oil-and-gas-drilling-rules/>.

<sup>127</sup> 2016 Pa. Laws 375, §§ 3–4; see also Phillips, *supra* note 126. The president of the industry association that filed the lawsuit challenging the single final-form regulation expressed a belief that industry would exercise regulatory influence on DEP through the new council. See Schellhammer, *supra* note 124 (“The people I’ve talked to in the industry believe that council is almost as big as the abrogation. . . . This council has some pull. It’s going to have a say in what DEP does. We think we can do really good things with this council.”).

<sup>128</sup> See Marie Cusick, *After Bitter Fight, New Marcellus Shale Regulations Set to Take Effect*, STATE IMPACT (Oct. 6, 2016), <https://stateimpact.npr.org/pennsylvania/2016/10/06/after-bitter-fight-new-marcellus-shale-regulations-set-to-take-effect/>.

<sup>129</sup> See Phillips, *supra* note 126.

<sup>130</sup> See 46 Pa. Bull. 6431 (Oct. 8, 2016).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 6431–32.

<sup>133</sup> Petition for Review in the Nature of a Complaint Seeking Declaratory and Injunctive Relief, Marcellus Shale Coal. v. Dep’t of Env’tl. Prot., No. 573-MD-2016 (Pa. Commw. Ct. Oct. 13, 2016), <https://www>

with both substantive and procedural defects, such as exceeding statutory authority, contradicting other laws and regulations, vagueness, violation of the state constitutional prohibition on special laws, and procedural irregularities in the drafting process.<sup>134</sup> The petition for review objected to protections that regulators have called the most significant, including a provision allowing for greater scrutiny of well permit applications near public resources.<sup>135</sup> Other counts challenged regulatory provisions relating to well monitoring;<sup>136</sup> onsite waste processing;<sup>137</sup> impoundment standards;<sup>138</sup> site restoration;<sup>139</sup> remediation of spills;<sup>140</sup> and waste generation reporting requirements.<sup>141</sup> On November 8, the judge temporarily enjoined sections of Chapter 78a related to public resource protections, well monitoring, site restoration, and impoundments.<sup>142</sup> DEP appealed the temporary injunction,<sup>143</sup> and the Supreme Court of Pennsylvania heard oral arguments on October 18, 2017.<sup>144</sup>

The legislative front also remained open, although perhaps at stalemate, after Chapter 78a's implementation: The Senate's bill removed some environmental

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.documentcloud.org/documents/3141987-MSC-Chapter-78a-Petition-for-Review.html [hereinafter *Petition for Review*]; see also Marie Cusick, *Gas Industry Sues Over New Drilling Rules*, STATE IMPACT (Oct. 14, 2016), <https://stateimpact.npr.org/pennsylvania/2016/10/14/-industry-sues-over-new-drilling-rules/>.

<sup>134</sup> *Petition for Review*, *supra* note 133, at ¶ 34.

<sup>135</sup> *Id.* ¶¶ 37–44; see also Cusick, *supra* note 133.

<sup>136</sup> *Petition for Review*, *supra* note 133, at ¶¶ 45–49.

<sup>137</sup> *Id.* ¶¶ 50–55.

<sup>138</sup> *Id.* ¶¶ 56–64.

<sup>139</sup> *Id.* ¶¶ 65–71.

<sup>140</sup> *Id.* ¶¶ 72–76.

<sup>141</sup> *Id.* ¶¶ 77–80.

<sup>142</sup> See Marie Cusick, *Judge Puts Sections of New Drilling Rules on Hold*, STATE IMPACT (Nov. 10, 2016), <https://stateimpact.npr.org/pennsylvania/2016/11/10/judge-puts-sections-of-new-drilling-rules-on-hold/>.

<sup>143</sup> Brief for Appellants, *Marcellus Shale Coal. v. Dep't of Env'tl. Prot.*, No. 115-MAP-2016 (Pa. Nov. 8, 2016).

<sup>144</sup> See Supreme Court of Pennsylvania, *Court Daily Argument Lists*, From 10/17/2017 to 10/18/2017, <http://www.pacourts.us/assets/opinions/Supreme/out/October2017DailyArgumentList.pdf?cb=1>.

protections in the House and faced a possible veto by Governor Tom Wolf.<sup>145</sup> Governor Wolf did veto a bill passed by a Republican-controlled legislature that would have given the legislature more power over a state commission that reviews all new regulations and currently has a Democratic majority.<sup>146</sup> The bill's sponsor said that the bill was not introduced as a response to the drilling rule controversy.<sup>147</sup>

## 2. The Scientific Debate

Experts continue to debate whether scientific evidence supports claims of environmental harm from hydraulic fracturing. For example, in 2013, scientists at Duke University published a study of 141 water wells in northeastern Pennsylvania,<sup>148</sup> around the area where plaintiffs filed one of the first Pennsylvania tort lawsuits alleging water contamination from hydraulic fracturing.<sup>149</sup> That study found that 82% of the sampled wells contained methane, and that contaminated wells within half a mile of oil and gas wells had methane concentrations six times higher than wells further away.<sup>150</sup> In 2015, however, a study led by a scientist at Syracuse University reported that analysis of over 11,300 samples of methane taken by Chesapeake Energy in northeastern Pennsylvania showed no statistically significant relationship between methane and proximity to oil and gas wells.<sup>151</sup> Other experts questioned whether the Syracuse study refuted the Duke study, since the purpose of the Duke study was to determine the source of methane in well water acknowledged to be contaminated, rather than to determine the severity of methane contamination

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<sup>145</sup> See Marie Cusick, *Senate Approves Bill Weakening Drilling Regulations*, STATE IMPACT (July 11, 2016), <https://stateimpact.npr.org/pennsylvania/2016/07/11/senate-approves-bill-weakening-drilling-regulations/>; see also Cusick, *supra* note 133.

<sup>146</sup> See Marie Cusick, *Wolf Vetoes Bill Aimed at Giving Legislators More Control Over Regulations*, STATE IMPACT (Oct. 28, 2016), <https://stateimpact.npr.org/pennsylvania/2016/10/28/wolf-vetos-bill-aimed-at-giving-legislators-more-control-over-regulations/>.

<sup>147</sup> *Id.*

<sup>148</sup> See Robert Jackson et al., *Increased Stray Gas Abundance in a Subset of Drinking Water Wells Near Marcellus Shale Gas Extraction*, 110 PROCEEDINGS NAT'L ACAD. SCI. 11250 (2013).

<sup>149</sup> See Complaint, *Fiorentino v. Cabot Oil and Gas Corp.*, No. 3:09-cv-02284 (M.D. Pa. Nov. 19, 2009) (alleging methane contamination of groundwater from hydraulic fracturing around Dimock and Montrose, Pennsylvania).

<sup>150</sup> Jackson et al., *supra* note 148.

<sup>151</sup> See Donald I. Siegel et al., *Methane Concentrations in Water Wells Unrelated to Proximity to Existing Oil and Gas wells in Northeastern Pennsylvania*, 49 ENVTL. SCI. & TECH. 4106 (2015).

of groundwater from hydraulic fracturing generally.<sup>152</sup> The Syracuse study has also been challenged on ethics grounds based on undisclosed payments from and ties with Chesapeake Energy.<sup>153</sup>

Studies by EPA of drinking water contamination from hydraulic fracturing have also failed thus far to produce a conclusive opinion on the magnitude of impacts. In a June 2015 draft assessment by EPA's Office of Research and Development, EPA stated a conclusion that "[w]e did not find evidence that these mechanisms have led to widespread, systemic impacts on drinking water resources in the United States."<sup>154</sup> This finding was widely reported in the press as redeeming the industry against claims made in tort lawsuits and enforcement actions.<sup>155</sup> In February 2016, however, a study by an advisory board of independent scientists had "concerns" with the draft assessment's methodology and conclusions, including the general finding that EPA's data showed no "systemic" or "widespread" impacts on drinking water.<sup>156</sup> The SAB suggested that the major findings expressed in the executive summary to the EPA report "are ambiguous and appear inconsistent with the observations, data, and levels of uncertainty presented and discussed in the body of the draft Assessment Report."<sup>157</sup> The SAB report advised EPA to tie its findings more closely to the data in the report and noted that the words "systemic" and "widespread" were not defined.<sup>158</sup>

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<sup>152</sup> See Neela Banerjee, *Fracking Study on Water Contamination Under Ethics Review*, INSIDE CLIMATE NEWS (Apr. 6, 2015), <https://insideclimatenews.org/news/06042015/fracking-study-water-contamination-under-ethics-review>.

<sup>153</sup> *Id.*

<sup>154</sup> EPA, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources ES-6, External Review Draft* (June 2015). These "mechanisms" include water withdrawals in times or areas of low water availability; spills of hydraulic fracturing fluid and produced water; hydraulic fracturing directly into groundwater used for drinking water; and migration of liquids and gases below ground; and inadequate treatment and discharge of wastewater. *Id.*

<sup>155</sup> See, e.g., Coral Davenport, *Report Finds No Effect on Water Supply From Fracking, But Warns of Potential*, N.Y. TIMES, June 4, 2015, at A12; Ben Wolfgang, *EPA Finds Fracking Poses No Direct Threat to Drinking Water*, WASH. TIMES (June 4, 2015), <http://www.washingtontimes.com/news/2015/jun/4/epa-fracking-doesnt-harm-drinking-water/>.

<sup>156</sup> See Letter from EPA Sci. Advisory Bd. to Gina McCarthy, EPA Adm'r at 2 (Feb. 16, 2016). The letter notes that the SAB draft report is not final and does not represent EPA policy. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*



### 3. The Litigation Proliferation

While significant scientific uncertainty remains, residents near unconventional wells continue to file and pursue lawsuits alleging torts related to unconventional oil and gas activities. Since 2009, more than 25 lawsuits have been filed in Pennsylvania alleging claims including negligence, gross negligence, private nuisance, strict liability, breach of contract, fraudulent misrepresentation, trespass, medical monitoring, negligent and intentional infliction of emotional distress, battery, and violations of the Pennsylvania Hazardous Sites Cleanup Act.<sup>159</sup> Many of those claims were settled or decided and a few were dismissed,<sup>160</sup> but at least seven claims remained pending as of fall 2017.<sup>161</sup>

One high-profile case has been the subject of see-sawing results and media attention. On March 10, 2016, a jury awarded a \$4.24 million verdict to plaintiffs on private nuisance claims in *Ely v. Cabot Oil & Gas Corp.*<sup>162</sup> On March 31, 2017, however, the trial court granted Cabot's motion for a new trial, holding that weaknesses in the plaintiff's case and missteps by counsel in the jury's presence undermined confidence in the jury verdict.<sup>163</sup> The court also stated that "the jury's award of more than \$4 million in damages for private nuisance bore no discernible relationship to the evidence."<sup>164</sup> As of October 2017, the parties appeared to be finalizing settlement.<sup>165</sup>

Other cases also reflect the increasing contentiousness of the controversy. In *Haney v. Range Resources*, landowners in southwestern Pennsylvania alleged that the defendant intentionally hid water test results, leading to illness of the plaintiffs' farm animals and increased risk of cancer from spills, leaks and air pollutants to the plaintiffs.<sup>166</sup> On February 5, 2015, the trial court held that the defendant was not entitled to object to a subpoena seeking information possessed by an engineering

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<sup>159</sup> See Blake Watson, *Hydraulic Fracturing Tort Litigation Summary* (Oct. 28, 2017), [https://udayton.edu/directory/law/documents/watson/blake\\_watson\\_hydraulic\\_fracturing\\_primer.pdf](https://udayton.edu/directory/law/documents/watson/blake_watson_hydraulic_fracturing_primer.pdf).

<sup>160</sup> See *id.* at 32–49.

<sup>161</sup> See *id.* at 36–49.

<sup>162</sup> See *id.* at 34.

<sup>163</sup> *Ely v. Cabot Oil and Gas Corp.*, No. 3:09-cv-02284, 2017 WL 1196510, at 8 (M.D. Pa. Mar. 31, 2017).

<sup>164</sup> *Id.* at 4.

<sup>165</sup> See Watson, *supra* note 159, at 36.

<sup>166</sup> See *id.* at 42–43.

consultant to the defendant.<sup>167</sup> The case of *Russell v. Chesapeake Appalachia*, in which plaintiffs in northeastern Pennsylvania complain of disruptions including intermittent leakage of natural gas and other toxic or radioactive substances from wells and daily discharges of toxic or radioactive substances into the air, was set for jury selection on November 7, 2016.<sup>168</sup> In *Armstrong v. Chesapeake Appalachia*, first filed in 2010, the court on November 18, 2015, granted plaintiffs' motion to add a claim for wrongful death, after one of the plaintiffs, Carl Stiles, died of intestinal cancer in 2012.<sup>169</sup> The media reported that Mr. Stiles' and his fiancée's blood tests showed high levels of barium and that their home had high radon levels three times the EPA standard limit.<sup>170</sup> In addition, contract and property disputes between mineral owners and lease-holding energy companies also continue to give rise to lawsuits.<sup>171</sup>

New litigation over the environmental impacts of unconventional oil and gas may spring up in the wake of the Supreme Court of Pennsylvania's July 2017 decision about the Environmental Rights Amendment to the Pennsylvania Constitution. In *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, the Court held that the Environmental Rights Amendment required the Commonwealth to act as trustee of the state's natural resources and prohibited the government from using proceeds from oil and gas leases for any purpose apart from natural resource conservation.<sup>172</sup> This ruling expanded upon a 2013 ruling in which a plurality of the Court relied on an expansive reading of the Environmental Rights Amendment to hold that the Commonwealth could not prohibit local jurisdictions from enacting zoning restrictions on oil and gas development activities within their boundaries.<sup>173</sup> Potential plaintiffs, who have been uncertain of the scope of protection under the Environmental Rights Amendment since the Court's 2013

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<sup>167</sup> See *Haney v. Range Res.-Appalachia, Inc.*, No. 1130 WDA 2014, 2015 WL 1812842, at 3 (Pa. Super. Ct., Apr. 14, 2015).

<sup>168</sup> See *Watson*, *supra* note 159, at 46.

<sup>169</sup> *Id.* at 38.

<sup>170</sup> See Nina Berman, *Meet the Families Whose Lives Have Been Ruined by Gas Drilling*, THE GUARDIAN (Apr. 12, 2011), <https://www.theguardian.com/environment/2011/apr/12/families-gas-drilling>.

<sup>171</sup> See Gregory J. Krock & Bridget J. Daley, *The Ongoing Battle Over Gas Royalty Calculations in Pennsylvania*, 87 PA. BAR ASS'N Q. 93 (2016).

<sup>172</sup> *Pa. Env'tl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

<sup>173</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

ruling,<sup>174</sup> are likely to be emboldened in challenging state policies for failing to protect the environment.

*B. Identity and Characterization Frames in the Hydraulic Fracturing Debate*

If the controversy around hydraulic fracturing in Pennsylvania is entrenched, are identity frames contributing to that entrenchment? While a rigorous scientific analysis of participants' identity frames is beyond the scope of this article,<sup>175</sup> a survey of that debate from 2009 to the present, drawn from both top-down and bottom-up sources, produces dozens of examples of identity framing and characterization framing by all participants to the conversation—industry leaders and laborers, regulators, landowners, and environmentalists. For participants who are members of more than one of these groups, identity and characterization frame statements suggest how different groups are constituted, and how they understand their identities and characterize their adversaries. These and many other statements showing identity and characterization frames from all groups in the debate are included as an appendix to this article.

One aspect of identity framing is that group members associate with a particular place, job, or role.<sup>176</sup> Statements by many people who work in the oil and gas industry show a strong identification with the occupation as connoting various virtues: industriousness, diligence, strength, and social usefulness. For example, one commenter in the DEP rulemaking proceedings said,

My husband has worked long backbreaking hours on his oil properties . . . because he loves what he does and is proud to be producing a valuable resource . . . . But as hard as the physical work has been it is the regulatory burden that has broken his spirit. And we live in constant fear of not knowing what will be coming next. His one-man operation does not have a tiny fraction of the impact that the deep non-conventional wells do. Each well averages only gallons of oil per day so the

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<sup>174</sup> See Brian J. Clark & Brian C. Wauhop, *Environmental and Regulatory Issues Involving Oil and Gas*, 87 PA. B. ASS'N Q. 114, 121–23 (2016).

<sup>175</sup> See generally Shmueli, *Framing in Geographical Analysis*, *supra* note 61, at 2051–53 (describing framing study methodology).

<sup>176</sup> See Gray, *supra* note 61.

economics to comply with regulations is finite. Please allow him to continue to do what he loves to do.<sup>177</sup>

Opponents of hydraulic fracturing also identified by their attachment to their land, their community, and the natural resources of those localities. One Pennsylvania farmer, speaking at his wife's memorial service, said,

Today I act to declare my farm, all that lives above its surface, the very air and sunlight that caresses and enlivens all of us here today, and all that lies below it as firmament, all of this I hereby declare off-limits from shale gas extraction and its toxic impacts, in perpetuity.<sup>178</sup>

Regulators also exhibited identity framing around their professional roles. One DEP official told a reporter, “[t]he Pennsylvania DEP is really an international leader in managing the potential environmental impacts of oil and gas development. We certainly did not start that way. We have nonetheless risen to these challenges and modernized our regulations across the board.”<sup>179</sup>

Another aspect of identity framing is that group members attribute to themselves certain virtues, and see those virtues as central factors to their identity and position in the debate.<sup>180</sup> One oil company manager told regulators,

The company that I represent employs six men. We frack them; I plug them; I pump them; I attend to them. 90% of the work is oil-related shale. These guys that work for me work today. It's 10° out. I ask them to go out and they go out. They are dedicated. They work an average of 50 to 70 hours a week. They have got kids to feed, mortgages to pay, got loans on their minivans. They have got dreams too.

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<sup>177</sup> Comment 2775 on Proposed Regulation for Oil and Gas Surface Activities Amending 25 Pa. Code Chapters 78 and 78a, Subchapter C (proposed Dec. 14, 2013).

<sup>178</sup> Sharon Abercrombie, *Pennsylvania farmer speaks out against fracking at memorial for wife*, NATIONAL CATHOLIC REPORTER (May 18, 2012), <https://www.ncronline.org/blogs/eco-catholic/pennsylvania-farmer-speaks-out-against-fracking-memorial-wife>.

<sup>179</sup> Maryam Jameel, *Is Pennsylvania Failing Citizens on Fracking-Related Water Issues?*, CENTER FOR PUBLIC INTEGRITY (June 24, 2016), <http://www.alleghenyfront.org/is-pennsylvania-failing-citizens-on-fracking-related-water-issues/>.

<sup>180</sup> See Northrup, *supra* note 24.

If DEP and EQB go through with these regs, will my employees still be able to chase their dreams?<sup>181</sup>

These values of industriousness and dedication appear frequently in identity frames of industry workers who support hydraulic fracturing. In identity frames of opponents to oil and gas development, the virtues of spirituality and relatedness are often emphasized. One commenter said,

Please keep them away from the Delaware River Basin—I love the Delaware—I don’t want another waste land! I have become quite the fanatic when it comes to our Mother Earth and her precious wildlife—these cannot be replaced once they are gone—clean air, clean water and state and federal parks should not fall to these “gas companies.”<sup>182</sup>

Identity frames may also be negative; group members may define themselves by their relative powerlessness in relation to the other group.<sup>183</sup> One resident of a small town in southwestern Pennsylvania told a reporter, “[w]e’ve been feeling like nobody since 2009,” after she overheard an industry worker saying that her small community wasn’t worth worrying about.<sup>184</sup> One industry worker told DEP,

I’m a victim of the oil business. We fracked a well two weeks ago and it took a week for my skin to grow back. Then when I finally got back on my feet, I went to my drilling rig and the drill cuttings made my hair fall out. Some of its coming back. . . . I need help here and you’ve got to help us. You’re doing a good job. I have a nine-month-old daughter. And her mother cares for her and loves her, just as much as I do. And I won’t do anything to put her in danger.<sup>185</sup>

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<sup>181</sup> Comment 2770 on Proposed Regulation for Oil and Gas Surface Activities Amending 25 Pa. Code Chapters 78 and 78a, Subchapter C (proposed Dec. 14, 2013).

<sup>182</sup> Comment 2992 on Proposed Regulation for Oil and Gas Surface Activities Amending 25 Pa. Code Chapters 78 and 78a, Subchapter C (proposed Dec. 14, 2013).

<sup>183</sup> See Shmueli, *Framing in Geographical Analysis*, *supra* note 61.

<sup>184</sup> Jameel, *supra* note 179 (statement of Jeannie Moten).

<sup>185</sup> Comment 3024 on Proposed Regulation for Oil and Gas Surface Activities Amending 25 Pa. Code Chapters 78 and 78a, Subchapter C (proposed Dec. 14, 2013).

Characterization frames in identity-based conflicts often demonize the opposing group. One Pennsylvania resident, when asked what hydraulic fracturing was doing to his community, answered, “Raping it. Tearing our roads apart—not to mention what it’s doing to the countryside.”<sup>186</sup> An anti-development protester shouted down an industry representative at a public information session, saying, “We are not interested in hearing from this liar.”<sup>187</sup> At the same time, non-violent demonstrations against hydraulic fracturing have been called “environmentalist activity or eco-terrorism” by a terrorism watch group hired by a Pennsylvania state agency. The report on the group law enforcement officials stated that “attack is likely . . . and might well be executed.”<sup>188</sup>

Because identity frames answer “who am I” and characterization frames answer “who are they,”<sup>189</sup> participants’ statements often include aspects of both frames, defining the self in opposition to the other. For example, one commenter in the rulemaking stated in relation to wildlife protection,

These cranes need all the help that we can give them so that our grandchildren can enjoy them. Those who wantonly kill these animals need to be prosecuted fully so that everyone knows that such behavior will not be tolerated. We owe it to those who will be following us on this amazing planet.<sup>190</sup>

These statements are often polarizing, equating the speaker with virtue and the opponent with vice. One commenter said, “My area is considered God’s country. I

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<sup>186</sup> Peter Marshall, *How fracking affects a community in Pennsylvania*, BBC (Nov. 28, 2011), <http://www.bbc.com/news/uk-england-lancashire-15919248>.

<sup>187</sup> Jon Hurdle, *Shale gas opponents shout down industry speaker at Philadelphia LNG session*, STATE IMPACT (Apr. 17, 2015), <https://stateimpact.npr.org/pennsylvania/2015/04/17/shale-gas-opponents-shout-down-industry-speaker-at-lng-session/>.

<sup>188</sup> See Federman, *supra* note 11; see also Letter from Glenn M. Cannon, Dir., Pa. Emergency Mgmt. Agency, to Gas Drilling Awareness Coal. (Dec. 18, 2014) (describing dissolution of Pennsylvania Office of Homeland Security and resignation of director after media published accounts of statements to OHS by Institute of Terrorism Research and Response), <https://www.documentcloud.org/documents/1507784-pema-letter-to-gdac.html>; Gas Drilling Awareness Coal. v. Powers, No. 1:10-CV-1997, 2012 WL 5862471 at \*1–2 (Nov. 19, 2012) (dismissing claims for defamation and for federal and state law conspiracy to violate civil rights).

<sup>189</sup> See Gray, *supra* note 61, at 21, 23.

<sup>190</sup> Comment 3111 on Proposed Regulation for Oil and Gas Surface Activities Amending 25 Pa. Code Chapters 78 and 78a, Subchapter C (proposed Dec. 14, 2013).

am sure that does not mean much to the Gas companies.”<sup>191</sup> Identity frames may more subtly characterize members of other groups. For example, the wife of a conventional oil and gas worker defended her family’s livelihood against claims or perceived claims of environmental irresponsibility from regulators, saying,

We live in the country and appreciate more than most city dwelling bureaucrats ever could the beauty of the land we live on. We as well as our oil producing friends would do nothing to harm the environment because that is where we live and work and play and we respect the land that has in many cases been in the family for generations. Putting a 150 year old [sic] industry out of business by promulgating onerous and unnecessary regulations would have devastating effects on the economy and the people of this entire area.<sup>192</sup>

### III. BETTER DISPUTE RESOLUTION DESIGN FOR ENGAGING IDENTITY-BASED CONFLICT

The conflict over shale seems to be about more than clean air, clean water, and surface rights. Certainly, the administrative and grassroots debates show that all parties want careful attention paid to determine optimal setback distances, emissions standards, and water storage and disposal requirements. Concerns over how to optimize resource use are apparent in all major moments of the hydraulic fracturing debate.<sup>193</sup> But beneath the surface of this debate over natural resources and property rights lies a conflict over who the people of Pennsylvania are and what they value. Core constructs of identity such as rurality, agrarianism, naturalism, and traditionalism compete with others such as nationalism, self-sufficiency, affluence,

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<sup>191</sup> Comment 3086 on Proposed Regulation for Oil and Gas Surface Activities Amending 25 Pa. Code Chapters 78 and 78a, Subchapter C (proposed Dec. 14, 2013).

<sup>192</sup> Comment 2775 on Proposed Regulation for Oil and Gas Surface Activities Amending 25 Pa. Code Chapters 78 and 78a, Subchapter C (proposed Dec. 14, 2013).

<sup>193</sup> See, e.g., Act No. 13 of Feb. 14, 2012, P.L. 87, 58 Pa. C.S. §§ 2301–3504 (governing conventional and unconventional oil and gas activities, including protection of water, air, and land resources and property rights); Pa. Rules 78 and 78A (establishing regulatory requirements for protection of natural resources and property rights related to conventional and unconventional oil and gas activities); *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (holding Act 13 in violation of state’s Environmental Rights Amendment by restricting municipal zoning ordinances governing oil and gas activities and permitting state regulatory exemptions to setback distances); *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506 (M.D. Pa. 2010) (alleging tort and contract claims related to contamination of water resources related to hydraulic fracturing), jury verdict awarded *sub nom.* *Ely v. Cabot Oil & Gas*, No. 09-CV-2284 (M.D. Pa. Mar. 10, 2016).

and business and technological leadership. Threats posed by different world views lead to distortion of the other side, and these distortions become increasingly rigid until compromises over setback distances or emissions standards become tantamount to denial of self.<sup>194</sup>

Are Pennsylvania's administrative processes sufficient to handle identity-based conflict around shale development? If the hydraulic fracturing controversy has evolved to include aspects of identity-based conflict, as the public rhetoric suggests, perhaps traditional administrative processes—no matter how carefully observed—will tend to escalate rather than resolve the controversy. Stakeholders who have come (through mutual sense of threat, distortions, rigidification, and collusion) to identify with the conflict itself may view the administrative process as an unacceptable, even inflammatory, invitation to capitulate to their own annihilation. Conflict resolution theory may serve as a useful guide for re-imagining legal systems.

*A. System Design Breakthroughs by the Identity-Based Conflict Theorists*

Traditional western legal systems may be ill-suited for resolving identity based conflicts. As conflict resolution scholar Jay Rothman has said, “[t]he Western culture of negotiation has developed on that foundation [of resource-based or interest-based conflict resolution], with the law being the most prototypical mechanism for dealing with interest-based conflicts. We legislate, adjudicate, and compromise.”<sup>195</sup> These processes do not readily recognize and shift the parties beyond their identity or characterization frames.

Conflict resolution scholars have recognized the need for a shift from the traditional power politics approach to a more nuanced approach when deeper and more complex identity issues are involved. The traditional approach viewed conflicts as primarily about resources to be allocated between competing claims.<sup>196</sup> “The language of this approach is ‘win-lose,’ ‘zero-sum,’ ‘pure conflict,’ ‘competitive,’ ‘legalistic,’ with tactics including ‘carrot and stick,’ ‘power-coercive,’ ‘threats, bluffs, concealment,’ and ‘compromise towards the middle.’”<sup>197</sup> Parties are expected

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<sup>194</sup> See *supra* Part II (citing examples of threat, distortion, rigidification, and collusion in the unconventional oil and gas regulation debate).

<sup>195</sup> ROTHMAN, *supra* note 18, at 9.

<sup>196</sup> Wilfred Graf et al., *Conflict Transformation Through Dialogue: From Lederach's Rediscovery of the Freire Method to Galtung's "Transcend" Approach*, 23 J. ENTWICKLUNGSPOLITIK 55, 57 (2006).

<sup>197</sup> *Id.*



to arrive with pre-determined preferential outcomes and work toward compromise with the help or authority of an administrative agency, legislative committee, or adjudicator.

Northrup's important 1989 article upended much of the received wisdom about conflict resolution and paved the way for conflict resolution procedures that can engage identity-based conflicts. Northrup identified four common assumptions underlying conflict resolution theory up to the late 1980s.<sup>198</sup> First, conflict resolution experts assumed that people were able to approach conflict in a rational manner, but that misperceptions about things like the quantity of the resource or the other party's motivation made communication difficult.<sup>199</sup> Second, they assumed that clearing up these misperceptions was the purpose of conflict resolution.<sup>200</sup> Third, the same principles were assumed to work across all settings (interpersonal, industrial, international, etc.), and finally, experts assumed that peaceful resolution of the conflict was desirable to all parties.<sup>201</sup>

By focusing on the role of identity in conflict, Northrup made a dramatic departure, questioning the applicability of these then-foundational principles of conflict resolution: The presumption of rationality complicated only by misperceptions, she argued, failed to accommodate the possibility that the parties had fundamentally different world views shaped by their situation or experience that are vastly more complex than mere misperception.<sup>202</sup> She also questioned the presumption that the conflict was really about the surface issues identified.<sup>203</sup> Instead, she argued, the problem may be multi-faceted, or the core issue may be found in social, historical, or cultural issues much larger than the parties themselves.<sup>204</sup> Northrup argued that different strategies may be necessary at different times as conflicts evolve and include different levels, and that some groups may see little to gain by peaceful resolution.<sup>205</sup> Since identity-based conflicts tend to evade

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<sup>198</sup> See Northrup, *supra* note 24, at 55.

<sup>199</sup> *Id.* at 56.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 57.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

resolution, traditional methods may effect change only at relatively surface levels. Providing new information or re-educating the parties, Northrup argued, may lead to superficial changes in the nature of the dispute but conversely may also be re-interpreted by the parties in a way that solidifies their misperceptions of each other.<sup>206</sup>

Northrup suggests a few means that may accomplish deeper change than traditional methods of immediate negotiation, bargaining, or re-educating. For instance, changes in the dynamics of the relationship between the parties may be caused if the parties unite around a superordinate and common threat, if a third party applies pressure that changes one party's self-perception, if a sub-group within one of the parties is able to establish and legitimate a relationship with the other party, or if conditions change unexpectedly in a way that the parties interpret as a game-changer in the relationship.<sup>207</sup> True transformation of the conflict, however, only occurs when the parties' rigid distinction between themselves and the opposing group (self/non-self) erodes.<sup>208</sup> "This does not imply that the parties become like each other but that they accept their differences, possibly even value them."<sup>209</sup> Northrup recommends that mediators begin with strategies that will change the dynamic of the relationship without threatening the self/non-self distinction, since the parties will initially resist changes to their identity.<sup>210</sup> Lasting change, however, will eventually have to move to the identity transformation level.<sup>211</sup>

### B. Exploring Identity-Based System Design

For interest-based conflicts, conflict resolution experts have pioneered a variety of approaches that seek to bring deeper identity issues to the surface before asking the parties to engage in compromise or concession.<sup>212</sup> While strategies differ in philosophy and emphasis, a few common themes emerge:

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<sup>206</sup> *Id.* at 78–79.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 80.

<sup>209</sup> *Id.* at 80–81.

<sup>210</sup> *Id.* at 81.

<sup>211</sup> *Id.*

<sup>212</sup> See, e.g., Ahmed Badawi et al., *From Antagonism to Resonance: Some Methodological Insights and Dilemmas*, in FROM IDENTITY-BASED CONFLICT TO IDENTITY-BASED COOPERATION 71, 73–74 (Jay Rothman ed., 2012); T.D. BERGDALL, METHODS FOR ACTIVE PARTICIPATION (1993); JOHN BURTON, CONFLICT: RESOLUTION AND PREVENTION (1990); CONFLICT: HUMAN NEEDS THEORY (John W. Burton ed., 1990); JOHAN GALTUNG, PEACE BY PEACEFUL MEANS: PEACE, CONFLICT, DEVELOPMENT AND CIVILIZATION (1996); JOHAN GALTUNG, TRANSCEND AND TRANSFORM (2004); Johan Galtung, *Scarcity*,

- The conflict process must *acknowledge that issues of identity are at stake* and recognize the characterization frames that both sides use to distort their views of each other. Most approaches to identity-based conflict assume that the parties will arrive with antagonistic worldviews, not mere misperceptions, and consciously acknowledge those differences.
- Most strategies employ some type of *dialogic process* designed to require the parties to move beyond stating their own views or interests to engaging in a dynamic exchange with the other party that supposes to re-shape the views with which all parties arrived to the conflict resolution process. Section III.B.2. more fully elaborates these strategies with an eye toward their usefulness for re-designing administrative processes over hydraulic fracturing.
- Many scholars recognize the constraints on government decision-makers and will initiate *multi-track negotiations*, stepping outside the halls of power to generate inventive resolution strategies from group members without decision-making authority and pressures.
- Many strategies encourage the use of *neutrality* of any arbiters and *equality* between parties to enable the parties to safely move from antagonism to empathy to creativity and to forge a new relationship beyond the conflict.

Sections III.B.1.–4. discuss these strategies in more detail.

### 1. Acknowledging an Identity-Based Conflict

The first step to crafting processes that deal effectively with identity-based conflicts is recognition that such conflicts exist within a particular dispute. Many disputes involve a complex of resources, interests, and identity issues.<sup>213</sup> Participants

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*Conflict and Identity*, in HUMAN IDENTITY IN NATURE, SCIENCE AND SOCIETY (1975); H.C. Kelman, *Social-Psychological Approaches to the Study of International Relations: Definition of Scope*, in INTERNATIONAL BEHAVIOR (H.C. Kelman ed., 1965); Johan Galtung, *Violence, Peace and Peace Research*, 6 J. PEACE RES. 167 (1969); H.C. Kelman, *Negotiating National Identity and Self-Determination in Ethnic Conflicts: The Choice Between Pluralism and Ethnic Cleansing*, 13 NEGOT. J. 327 (1997); H.C. Kelman, *The Political Psychology of the Israeli-Palestinian Conflict: How Can We Overcome the Barriers to a Negotiated Solution?*, 8 POL. PSYCH. 347 (1987). For a discussion of early experience in physically removing parties to secluded locations to engage and isolate identity issues, see JOHN W. BURTON, *CONFLICT AND COMMUNICATION: THE USE OF CONTROLLED COMMUNICATION IN INTERNATIONAL RELATIONS* (1969); RONALD J. FISHER, *INTERACTIVE CONFLICT RESOLUTION* (1996).

<sup>213</sup> Edmond, *supra* note 23, at 43; Rothman & Olson, *supra* note 20, at 296.

to the conflict may focus primarily on the resource issues, but that does not always mean that identity issues are absent—instead, it may indicate that a focus on resource issues feels less threatening or more concrete to the parties than a focus on values or identity.<sup>214</sup> Where participants display the classic patterns of identity-based conflict (threat to identity, distortion of the other side’s views and character, rigidification of both sides’ positions, and collusion in maintaining the conflict), facilitators should look beyond the surface resource issues to effectively engage the dispute.<sup>215</sup> Failure to address higher-level conflicts—for example, ignoring interests underlying ostensibly resource-based conflicts, or ignoring threats to group identity by focusing only on competing interests—can cause a conflict to escalate over time and potentially become intractable.<sup>216</sup>

While there may appear to be a large gap between, for example, the Israeli-Palestinian conflict and the hydraulic fracturing debate, lessons about resolving identity-based conflict from international and ethnic dispute resolution specialists can inform study of environmental disputes. As one participant to a dispute over re-development and pollution remediation in Chattanooga observed, “If you deal with residents like we do on the advisory panel, the first issue we have to address is like they do in the Middle East. You have to first acknowledge we all have the right to exist.”<sup>217</sup> A process that allows participants to explicitly voice their own identity claims and requires them to recognize others’ identity claims “helps to restore self-esteem and allow the parties to refocus their attention on substantive issues.”<sup>218</sup> Acknowledging identity claims can also trigger a mourning process, allowing parties to grieve past wrongs and injustices, a necessary step to moving forward to resolve substantive issues.<sup>219</sup>

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<sup>214</sup> See Northrup, *supra* note 24, at 57; see also Michael Elliott et al., *Lessons Learned about the Framing and Reframing of Intractable Environmental Conflict*, in MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS, *supra* note 61, at 409, 428.

<sup>215</sup> Northrup, *supra* note 24, at 63–82.

<sup>216</sup> See Edmond, *supra* note 23, at 38 (“Communicative-Affective Conflict can, with incorrect intervention and over time, become an Identity-Based Conflict.”).

<sup>217</sup> See Michael Elliott, *When the Parents Be Cancer-Free: Community Voice, Toxics, and Environmental Justice in Chattanooga, Tennessee*, in MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS, *supra* note 61, at 303, 321.

<sup>218</sup> Elliott et al., *supra* note 214, at 428.

<sup>219</sup> As Joseph V. Montville has written in the context of international or ethnic disputes,

A scientifically informed peacemaking will seek to figuratively and literally revisit those moments in history when the wounds and losses to group self-

It is important for conflict resolution processes to recognize that conflicts may begin as primarily resource-based, but evolve into identity-based conflicts when ignored or poorly handled.<sup>220</sup> As Jay Rothman has stated, “the longer a conflict continues, the more people connect their dignity and prestige with the dispute.”<sup>221</sup> Rothman sounds this as a warning, since identity conflicts are often overlooked and treated as resource conflicts due to the natural human preference for the concrete and measurable.<sup>222</sup> Disputes involving natural resource extraction or conservation may be particularly susceptible to being framed as purely resource disputes, but scholars have recognized that environmental conflicts may also be undergirded by or develop into fundamentally different views of the world and the identity of the human participants in it.<sup>223</sup> Moreover, conflict resolution scholars argue that choosing the wrong intervention or applying it at the wrong time in the conflict resolution process can lead to exacerbation rather than resolution of the underlying dispute.<sup>224</sup> Rothman and Olson suggest that the identity-conflict frame must be applied first when a dispute about resources or interests also invokes substantial identity issues.<sup>225</sup> In their review of eight case studies involving entrenched environmental conflicts, Elliott

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concept occurred and will attempt to reactivate the mourning process to a point of reasonable completion. And at that moment, the people or nation will become able to trust again in its relationships with former enemies and to regain some faith in its future.

See Joseph V. Montville, *Complicated Mourning and Mobilization for Nationalism*, in *SOCIAL PATHOLOGY IN COMPARATIVE PERSPECTIVE* 159, 172 (Jerome Braun ed., 1995).

<sup>220</sup> ROTHMAN, *supra* note 18, at 11.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 11–12.

<sup>223</sup> See, e.g., Michael L. Elliot & Sandra Kaufman, *Enhancing Environmental Quality and Sustainability through Negotiation and Management: Research into Systems, Dynamics, and Practices*, 9 *NEGOT. & CONFLICT MGMT. RES.* 199, 201 (2016) (discussing importance of identity framing for environmental conflict resolution researchers); Tim Hicks, *Another Look at Identity-Based Conflicts: The Roots of Conflict in the Psychology of Consciousness*, 17 *NEGOT. J.* 35, 41 (2001); Hunter, *supra* note 45, at 24–30 (describing competing “ontologies” of participants to dispute over conservation of Tahoe Basin).

<sup>224</sup> Rothman & Olson, *supra* note 20, at 291 (“It is even argued that the use of traditional approaches, which focus on resources and power politics, to resolve identity conflicts often has the effect of exacerbating or prolonging the struggle.”).

<sup>225</sup> *Id.*

and colleagues found that those processes that expressly acknowledged underlying identity issues were more likely to move toward resolution than those that did not.<sup>226</sup>

## 2. Dialogic Processes

Conflict resolution scholars have articulated several mechanisms that can help to acknowledge identity issues within a conflict. Using Jay Rothman's "ARIA" method, for example, facilitators begin not by urging conciliation between the parties but by encouraging "antagonism," in which participants voice their grievances against the opposing group.<sup>227</sup> After receiving this freedom to air their negative feelings and experiences with the other side, Rothman relates that parties generally feel bad and recognize the need for a more positive approach if conflict resolution is to continue.<sup>228</sup> At this stage, the facilitator encourages the parties' own tendency to move on to "resonance," shifting from a focus on the other party's wrongs to the participants' own tendencies and conditioned responses to conflict in response to those lived experiences.<sup>229</sup> The process encourages participants to become "reflexive" instead of merely reflective, moving from "this is what happened and how I reacted" to "this is what happened and I am examining why I reacted that way."<sup>230</sup> By allowing antagonism initially, "[a]dversaries gain insight into what is truly at stake in the conflict for each of them and why it matters to them so much."<sup>231</sup> Painful experiences are not minimized but voiced and, ideally, moved through to a deeper understanding of one's own and the other's genuine needs for belonging, competency, continuity, and transcendent values.<sup>232</sup> From this point of resonance, the "ARIA" model moves to "invention," which involves cooperative and creative problem-solving to resolve the core conflict, and "action," in which the 'how' of invention is translated into the 'what' of a specific plan of action.<sup>233</sup> Having laid the ground-work through the antagonism and resonance stages, these stages can proceed

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<sup>226</sup> See Elliott et al., *supra* note 214, at 419 tbl.15.1.

<sup>227</sup> ROTHMAN, *supra* note 18.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Badawi et al., *supra* note 212, at 72.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

much like traditional interest-based conflict interventions, as bargaining, negotiating, problem-solving and agenda-setting become more profitable tools.<sup>234</sup>

Johan Galtung's "Transcend" approach involves many of the same fundamental principles as Rothman's "ARIA" approach. The core principles of "Transcend" are creativity, empathy, and non-violence.<sup>235</sup> Creativity is the most important distinguishing capability of human beings, allowing us to imagine something that does not yet exist and work to achieve it.<sup>236</sup> Empathy is the capacity that "ensures that the creative power is used for peaceful purposes rather than violent ones."<sup>237</sup> The Transcend model also identifies four phases: In the first phase, understanding the goals of the parties, the aim is to move from antagonism to empathy, developing a more complex picture of the conflict.<sup>238</sup> The second phase moves from empathy to creativity, transforming unjust or illegitimate goals into just and legitimate ones that respect the basic human needs of all parties.<sup>239</sup> The third phase moves from creative invention to nonviolent action, constructing the frame of a new reality between the parties.<sup>240</sup> The fourth is the beginning of reconciliation, laying the foundation for peaceful coexistence between the parties.<sup>241</sup> The steps are not sequential but rather identify the phases that may appear in a conflict at the same time or in a different order.<sup>242</sup>

What kinds of mechanisms can conflict resolution systems use to encourage parties to take identity-based conflict through these steps? Michael Elliott and colleagues suggest several strategies, pioneered by experts in conflict resolution of diverse subjects such as industrial organizations, international, or ethnic disputes, that help to re-frame identity conflicts and loosen rigid characterization frames.<sup>243</sup> The first type of process, which Elliott and colleagues call imaging, encourages

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<sup>234</sup> Rothman & Olson, *supra* note 20, at 298–99.

<sup>235</sup> See Graf et al., *supra* note 196, at 69.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 78.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 78–79.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 79.

<sup>243</sup> See Elliott et al., *supra* note 214, at 427–30.

parties to expressly talk about their self-image and their image of the other party or parties to the dispute.<sup>244</sup> These conversations take place outside of official negotiations to create greater opportunity for sharing perspectives, validating the other party's identity, and reducing negative stereotypes than what would be available at the negotiating table.<sup>245</sup> Herbert Kelman, drawing on the work of human needs theorist John Burton, has astutely observed that the value of such "interactive problem-solving workshops" is due to the fact that "such psychological needs as identity and security—in contrast to more material interests like territory and resources—are not inherently zero-sum in nature."<sup>246</sup> When permitted to describe their own identities and to listen to other parties' descriptions of their own, parties to a dispute often discover solutions that enhance both parties' identity needs.<sup>247</sup>

A related tool, the narrative forum, seeks to reframe both identity and characterization issues by eliciting whole storylines concerning the other party's characteristics and actions.<sup>248</sup> The theory of narrative mediation posits that needs, interests, and values are shaped by the words and language people use to describe themselves and thus are created and re-created in the conflict resolution process itself.<sup>249</sup> In narrative mediation, the focus is not on the (apparent) facts of the dispute, but on the way each participant characterizes the dispute. John Winslade and colleagues have written, "[w]e might begin to develop a curiosity, not so much about the exact facts of the matter, but about the ways in which each participant organizes the details into a story."<sup>250</sup> The narrative forum thus changes the goal of mediation: not to find common ground within the underlying factual dispute but to help the

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<sup>244</sup> *Id.* at 429.

<sup>245</sup> *Id.*; see also Herbert C. Kelman, *Negotiation as Interactive Problem Solving*, 1 INT'L NEGOT. 99, 102 (1996).

<sup>246</sup> Kelman, *supra* note 245, at 105 (citing John W. Burton, *Conflict Resolution as a Function of Human Needs*, in THE POWER OF HUMAN NEEDS IN WORLD SOCIETY 187, 198 (Roger A. Coate & Jerel Rosati eds., 1988)). See also John Burton, *Conflict Resolution: The Human Dimension*, 3 INT'L J. PEACE STUD. (1998), [http://www.gmu.edu/programs/icar/ijps/vol3\\_1/burton.htm](http://www.gmu.edu/programs/icar/ijps/vol3_1/burton.htm) (articulating and defending human needs theory, positing that conflict arises from inappropriate social institutions that fail to meet basic human needs and which human beings can alter rather than from simple human aggressiveness); CONFLICT: HUMAN NEEDS THEORY (John Burton ed., 1990).

<sup>247</sup> Kelman, *supra* note 245, at 105.

<sup>248</sup> See JOHN WINSLADE & GERALD D. MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000).

<sup>249</sup> See John Winslade et al., *A Narrative Approach to the Practice of Mediation*, 14 NEGOT. J. 21, 24–25 (1998).

<sup>250</sup> *Id.* at 25–26.



participants explore the narrative behind their own conflict stories, and to identify alternative, preferred narratives that reduce the parties' sense of conflict.<sup>251</sup>

Another technique that can help to move through identity conflicts is the listening circle.<sup>252</sup> Listening circles (also called peacemaking circles or restorative justice circles) are inspired by practices used in many native cultures, especially in North America.<sup>253</sup> Essentially about community, listening circles are entirely voluntary processes that allow each participating individual an opportunity to tell his or her personal story as a key element of community connectedness and conflict resolution.<sup>254</sup> The circle is more than a mere hearing process; it is conceived of as a sacred space with power beyond the sum of the individuals.<sup>255</sup> As one circle participant said, ““What makes a circle a circle . . . is affirmation of shared values. You can feel when a circle is not a circle for there is lack of respect for others, for self, and for the process.””<sup>256</sup> A “circle keeper” will aim to guide the circle back to shared values such as love, respect, or trust.<sup>257</sup> Responsibility for processes is shared equally, and all decisions are made by consensus.<sup>258</sup>

These dialogic strategies are in sharp tension with conventional methods of conflict resolution used in Western cultures and embedded into Western legal systems in the form of administrative process and adjudication. Since Western legal systems have been routinely criticized for their failure to deal with the psychological effects of conflict, however,<sup>259</sup> moving entrenched conflict may require exploration of anachronistic approaches.

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<sup>251</sup> *Id.* at 25.

<sup>252</sup> See Elliott et al., *supra* note 214, at 429–30.

<sup>253</sup> See Robert B. Coates et al., *Restorative Justice Circles: An Exploratory Study*, 6 CONTEMP. J. REV. 265, 265–66 (2003); but see Roger MacGinty, *Indigenous Peace-Making Versus the Liberal Peace*, 43 COOPERATION & CONFLICT 139 (2008) (arguing that Western forms of peace-making are largely incompatible with indigenous peace-making forms).

<sup>254</sup> Coates et al., *supra* note 253, at 268.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* (quoting participant in South Saint Paul [Minnesota] Restorative Justice Circle, 1997–99).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> See MacGinty, *supra* note 253, at 155–56.

### 3. Multi-Track Negotiations

Some scholars recommend approaching identity-based conflicts outside of formal political and diplomatic channels (called “Track One” negotiations), and instead initiating discussions among stakeholders who are invested and involved in the conflict but not at the center of decision-making power.<sup>260</sup> Scholars have pointed out that diplomatic and political officials may be constrained by both external and internal pressures from exploring creative alternatives to resolve conflicts.<sup>261</sup> At the nation-state level, leaders face the possibility of external threat, and might reasonably fear that exploring new avenues of conflict resolution might be viewed as weakness and lead to increased aggression by outside forces.<sup>262</sup> At the regional level (such as in Pennsylvania), leaders may face less threat of aggressive violence from outside, but may nevertheless fear aggressive economic competition from other states or foreign competitors. While guarding against external threats, political leaders may also seek to avoid negative perceptions and reactions from their own constituents, often related to the external threat in the sense that constituents may fear the external forces even when the threat is not severe or increasing.<sup>263</sup>

As an alternative, conflict resolution scholars began in the 1950s to sponsor “Track Two” initiatives, later evolving into complex and multi-party “multi-track” approaches.<sup>264</sup> These approaches, often facilitated by NGOs and academics, aim to support Track One processes with informal civilian diplomacy, problem solving workshops, dialogue projects and development counseling.<sup>265</sup> According to Joseph V. Montville, one of the pioneers of this concept, Track Two diplomacy is “a process designed to assist official leaders . . . by exploring possible solutions out of the public

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<sup>260</sup> See, e.g., Graf et al., *supra* note 196, at 58.

<sup>261</sup> See William D. Davidson & Joseph V. Montville, *Foreign Policy According to Freud*, 45 FOREIGN POL’Y 145, 154–55 (1981).

<sup>262</sup> *Id.*

<sup>263</sup> Davidson & Montville, *supra* note 261, at 155–56.

<sup>264</sup> See Joseph V. Montville, *Track Two Diplomacy: The Work of Healing History*, WHITEHEAD J. DIPL. & INT’L REL. 15 (2006).

<sup>265</sup> Graf et al., *supra* note 196, at 58.

view and without the requirements of formal negotiation or bargaining for advantage.”<sup>266</sup>

Far from mere academic exercises, Track Two diplomacy in the international relations sphere has received high-level study and support. Harold Saunders, a former assistant secretary of state who helped President Carter negotiate the Camp David peace agreement, was one of the pioneers of Track Two negotiations. Saunders led processes between Russian and American civilians,<sup>267</sup> conducted an extended Track Two democracy-building process in Tajikistan,<sup>268</sup> and founded the International Institute for Sustained Dialogue to resolve global conflicts. Researchers have validated its potential to affect public perception of Track One efforts, moderate decision-making by leaders, supply new policy ideas to official negotiations, and influence the creation of institutions to carry out the functions of the unofficial dialogue.<sup>269</sup> In recent decades, conflict resolution professionals have classified multi-track peace efforts beyond Track One and Track Two, involving simultaneous and interactive peace efforts through efforts beyond government negotiations (Track One) and professional conflict resolution (Track Two).<sup>270</sup> The other tracks include business initiatives; private citizen activities; research, training and education; peace activism; religion; funding; and media and public opinion.<sup>271</sup> Track Two efforts have

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<sup>266</sup> Joseph V. Montville, *The Arrow and the Olive Branch: A Case for Track Two Diplomacy*, in *THE PSYCHODYNAMICS OF INTERNATIONAL RELATIONSHIPS: VOLUME II UNOFFICIAL DIPLOMACY AT WORK* 161, 163 (Vamik D. Volkan et al. eds., 1991).

<sup>267</sup> See JAMES VOORHEES, *DIALOGUE SUSTAINED: THE MULTILEVEL PEACE PROCESS AND THE DARTMOUTH CONFERENCE* (2002); HAROLD H. SAUNDERS, *A PUBLIC PEACE PROCESS: SUSTAINED DIALOGUE TO TRANSFORM RACIAL AND ETHNIC CONFLICTS* (1999).

<sup>268</sup> See Randa Slim & Harold Saunders, *The Politics of Compromise: The Tajikistan Peace Process*, 10 *ACCORD* 44 (2001), [http://www.c-r.org/downloads/Accord%2010\\_11The%20Inter-Tajik%20dialogue\\_2001\\_ENG.pdf](http://www.c-r.org/downloads/Accord%2010_11The%20Inter-Tajik%20dialogue_2001_ENG.pdf).

<sup>269</sup> See Montville, *supra* note 264, at 15–16.

<sup>270</sup> See LOUISE DIAMOND & JOHN McDONALD, *MULTI-TRACK DIPLOMACY: A SYSTEMS APPROACH TO PEACE* (1996); *What is multi-track diplomacy?*, INST. FOR MULTI-TRACK DIPLOMACY, <http://imtd.org/about/what-is-multi-track-diplomacy/> (last visited Jan. 15, 2017).

<sup>271</sup> See DIAMOND & McDONALD, *supra* note 270; see also INST. FOR MULTI-TRACK DIPLOMACY, *supra* note 270. Some scholars have even begun to identify a “Track Three” diplomacy, which primarily involve actions by civil society to raise public awareness that transcends borders or nationality. See Herman Joseph S. Kraft, *Track Three Diplomacy and Human Rights in Southeast Asia: The Asia Pacific Coalition for East Timor*, 2 *GLOBAL NETWORKS* 49 (2002). See also Stuart Murray, *Consolidating the Gains Made in Diplomacy Studies: A Taxonomy*, 9 *INT’L STUD. PERSP.* 22 (2008) (characterizing three schools of diplomacy focused on, respectively, state actors as primary (Track One or Traditionalist), non-state actors as primary (Track Two or Nascent), or both state and non-state actors as complementary (Innovative)).

been employed in some studies to generate new plans for environmental protection.<sup>272</sup>

Where a conflict involves resource, interest, and identity issues, interveners will have to decide which type of intervention—Track One or Track Two—is appropriate at a given point in the cycle of conflict resolution (and, of course, both may proceed simultaneously).<sup>273</sup> Although Track Two and multi-party processes have not replaced Track One negotiations, the initiation of a multi-track process may pave the way for traditional resource-allocation negotiations to occur in the first place.<sup>274</sup>

#### 4. Neutral Facilitators and Equal Participants

Many of the strategies described above are aimed in large measure toward accomplishing a sense of equal ownership of the process to all groups involved in the conflict. One level on which this can be accomplished is by designing procedures to ensure the neutrality of those marshaling the process. Any mediators, facilitators, interveners, or adjudicators must have sufficient neutrality that the parties feel safe to engage and explore options outside their pre-determined bargaining positions.

The level of appropriate intervention varies not just based on the type of conflict but the type of process being used for conflict resolution. Some conflict resolution scholars challenge the idea of professional interveners, even in entrenched identity-based conflict. Johan Galtung, for example, questioned the appropriateness of conflict resolution professionals at all, arguing that the individual who made a living from the stranger's conflict was inclined to invest his or her own identity into the conflict, altering or prolonging it. Similarly, listening circles require that all participants have equal ownership in the rules, process, and consensus decision-making, although one person may be chosen to serve as a "circle keeper," nudging the conversation back to shared values.<sup>275</sup>

More common, however, are systems designed to use the skills of a conflict resolution professional to guide the discussion.<sup>276</sup> Northrup believed that

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<sup>272</sup> See GLENN E. SCHWEITZER, SCIENTISTS, ENGINEERS, AND TRACK-TWO DIPLOMACY 78–79 (2004); Elliott et al., *supra* note 214, at 416 (reporting on efforts of citizen group to generate plan for National Forest management).

<sup>273</sup> Rothman & Olson, *supra* note 20, at 296.

<sup>274</sup> Graf et al., *supra* note 196, at 58.

<sup>275</sup> See Coates et al., *supra* note 253, at 268.

<sup>276</sup> See ROTHMAN, *supra* note 18; Edmond, *supra* note 23; GALTUNG, *supra* note 212.

professional third-party facilitation would likely be required to move most identity-based disputes past the levels of superficial change to more fundamental transformation.<sup>277</sup> John Paul Lederach's conception of the professional peace worker was a deferential one: His doctrine of conscientization posited that participants to a dispute are best able to recognize the nature of the conflict and to offer the most useful approaches for transforming it.<sup>278</sup> With this conception, the peace worker's job is to support self-reflection, empathy, creativity, and dialogue while engaging in critical self-reflection of his own approach.<sup>279</sup> The idea of dispute resolution with the parties presenting their respective cases to an arbiter who will pronounce a judgment or nudge the parties toward what he or she believes to be desirable compromise is generally relegated by identity conflict theorists to the realm of power politics or interest-based bargaining, inapposite for resolving identity-based conflicts.<sup>280</sup>

A second level to which process design can contribute a sense of equality of ownership is by careful design for choosing the individuals who will actually sit at the table. In reviewing eight cases studies collected for their book on identity in environmental conflicts, Elliott and colleagues concluded that equality of the participants themselves was one of the key distinctions between those conflicts that moved toward resolution, and those that remained mired in identity conflict.<sup>281</sup> This equality was observed in two respects. The first factor was whether the participants held positions of authority in their groups or were volunteers with no formal authority or representative capacity.<sup>282</sup> The second factor was whether the stakeholders at the table had relatively equal power and expertise on the issue.<sup>283</sup> When participants held positions of authority in their stakeholder group, they were more likely to display

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<sup>277</sup> See Northrup, *supra* note 24, at 56.

<sup>278</sup> See JOHN PAUL LEDERACH, PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES 112 (1995).

<sup>279</sup> See Graf et al., *supra* note 196, at 63.

<sup>280</sup> See, e.g., ROTHMAN, *supra* note 18, at 57–58; Rothman & Olson, *supra* note 20, at 298.

<sup>281</sup> See Elliott et al., *supra* note 214, at 422–23; see also Todd A. Bryan & Julia M. Wondolleck, *When Irresolvable Becomes Resolvable: The Quincy Library Group Conflict*, in MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS, *supra* note 61, at 63, 63–64 (describing successful effort by diverse and bi-partisan group of concerned citizens to develop a management plan for Plumas National Forest to stop declines in timber harvest); Elliott, *supra* note 217 (describing successful effort by diverse group of Chattanooga citizens to extend city's redevelopment to all neighborhoods and eliminate pollution from lower-income neighborhoods).

<sup>282</sup> Elliott et al., *supra* note 214, at 422–23.

<sup>283</sup> *Id.* at 422.

strong identity and characterization frames related to their positions within their institutions or groups, and were also more likely to elevate the conflict to higher levels of authority rather than working toward creative resolution within the established process.<sup>284</sup> When participants had unequal levels of social power or expertise, trust was undermined and participants showed stronger attachments to their sense of identity and their characterizations of the other side.<sup>285</sup>

#### IV. DOES PENNSYLVANIA ADMINISTRATIVE LAW ADDRESS IDENTITY CONFLICTS?

To this point, Pennsylvania's administrative and legal processes for hearing and resolving the hydraulic fracturing controversy have primarily focused on the obvious conflict over resources that comes along with unconventional oil and gas development. Those processes to resolve controversy over hydraulic fracturing have mostly failed to incorporate these key features identified by conflict resolution scholars: acknowledging identity-based conflict, establishing dialogic processes, using multi-track negotiations to suggest creative solutions, and involving neutral facilitators and equally-empowered participants.

Administrative rulemaking is designed to receive comment and to produce response but not to afford back-and-forth dialogue. As described in Part II, the rulemaking process for Chapter 78 and 78a has been exhaustive and is still ongoing. Representatives of DEP have expressed pride at the amount of transparency and procedure afforded during that process, and with some justification: For example, in a January 6, 2015 webinar, DEP presented a slide titled "Unprecedented Public Participation."<sup>286</sup> The slide details achievements in transparency: "20 Advisory Board/Committee Meetings; 2 public comment periods; 135 days of public comment; 12 public hearings; Almost 28,000 public comments received."<sup>287</sup> DEP Secretary John Quigley stated that "the public demanded a high level of participation and our goal is to be thoughtful, deliberate and transparent throughout this process"

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<sup>284</sup> *Id.* at 422–23.

<sup>285</sup> *Id.* Elliott and colleagues also observed that three of the eight factors that promoted tractability in their cases involved identity and characterization re-framing (acknowledgement of identity issues, construction of place-based identity frames, and reduction in polarizing characterization). *Id.* at 419. Other factors involved agreements about conflict management processes, power dynamics, and risk. *Id.*

<sup>286</sup> *Final Rulemaking for Environmental Protection Standards at Oil & Gas Well Sites*, PA. DEP'T ENVTL. PROTECTION, at 00:51 (Jan. 6, 2016), <http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/PublicResources/Chapter%2078%20Update-20160106%201629-1.mp4>.

<sup>287</sup> *Id.*

and concluded that “this process has been incredibly transparent with an unprecedented level of public participation.”<sup>288</sup> This is indeed a robust amount of public participation—and yet the regulations are still not complete, lawsuits continue to proliferate, and rhetoric suggests that parties are as divided as ever.

Although the comment process generated more than 28,000 comments, notice-and-comment procedure captures only static position statements by the public, followed by prepared responses by regulators.<sup>289</sup> No back-and-forth occurs. In many cases, the notice-and-comment process may even fan the flames of identity conflict by dismissing commenters’ most heartfelt identity concerns as irrelevant. For instance, one commenter described the deterioration of his property resulting first from strip mining and currently from a neighboring horizontal well pad. The commenter said,

These landowner[s] have the rights to upset my life, but I seem to have none. They are allowed to negatively impact me but again I have no rights, no way to stop them.

I had been looking forward to my retirement, having a peaceful life taking care of my home and gardens. All that is gone. I had instead dirt, noise, and a shaking home. It is a good thing I did not want to move, my home is now worth nothing—who in their right mind would want to live next to a Marcellus shale pad. Even the gas under my house will basically be stolen, I will receive no royalties since my contract is with Range and Rice is the company digging the well. . . . Give us our lives back.<sup>290</sup>

DEP responded, “[t]he Department acknowledges the comment. We cannot address your royalty and property rights concerns because it is beyond the scope of this

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<sup>288</sup> *Id.* at 1:07–1:50.

<sup>289</sup> *Comment Response Document Part 2 of 2, Environmental Protection Performance Standards at Oil and Gas Well Sites*, PA. DEP’T ENVTL. PROTECTION 3 (Feb. 3, 2016), <http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2016/February%203/Comment%20Response%20-%20Part%202.pdf> [hereinafter *Comment Response Document Part 2*].

<sup>290</sup> *Id.* at 992–93 (Comment 2380).

rulemaking. Regarding noise concerns, see the Department's response to comments submitted on § 78a.41.<sup>291</sup>

Another commenter submitted more than 1100 words describing his transition from employment as a welder and pipefitter to starting his own fabrication and construction business to serve the needs of the unconventional oil and gas industry in the Marcellus shale basin.<sup>292</sup> The commenter stated that his company employs 23 full time office employees and up to 200 union employees during peak season, more than 90% of whom are from Pennsylvania.<sup>293</sup> The comment concluded, “[o]ur state and this country has a great opportunity to become the world’s leader in gas production becoming energy independent in addition to creating thousands of jobs and small businesses like mine throughout PA.”<sup>294</sup> DEP responded, “[t]he Department acknowledges the comment.”<sup>295</sup> The next commenter complained about a Franklin Township ordinance that he felt favored heavy industry.<sup>296</sup> “They disregard my rights as a 100% service connected disabled veteran with disabilities to provide an environment that will not affect the health of my immune system, respiratory, circulatory and hearing difficulties. . . . How can you allow drilling . . . under a school for disabled children as they are proposing in Prospect, PA Cratty site by XTO?”<sup>297</sup> DEP responded, “[t]he comment is beyond the scope of this rulemaking.”<sup>298</sup>

DEP’s response is accurate; to the extent the commenters concerns were about the local zoning ordinance, *Robinson Township* held that the state, including DEP, lacks authority to direct the township’s exercise of its zoning jurisdiction.<sup>299</sup> The other comments also either demanded no specific response from DEP, raised issues that had been responded to in more detail in connection with more specific comments, or exceeded the scope of the rulemaking. The administrative process was not designed to acknowledge and create dialogue around identity frames like those

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<sup>291</sup> *Id.* at 993 (Response to Comment 2380).

<sup>292</sup> *Id.* at 1078–80 (Comment 2480).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 1080.

<sup>295</sup> *Id.* (Response to Comment 2480).

<sup>296</sup> *Id.* (Comment 2481).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* (Response to Comment 2481).

<sup>299</sup> *See Robinson Twp. v. Pennsylvania*, 83 A.3d 901 (Pa. 2013).



displayed by the commenters, and to try to do so in that forum would clog the rulemaking process into paralyzing delays that would render government ineffective.

The problem is that no other part of the legal or administrative process does so either, but identity framing pervades the controversy and contributes to its increasing entrenchment. The Governor's Marcellus Shale Advisory Commission was designed to "develop a comprehensive, strategic proposal for the responsible and environmentally sound development of Marcellus Shale" and was required to consist of between 25 and 35 members "representing, *inter alia*, the interests of environmental, conservation, industry, local and state government" chosen and serving at the pleasure of the Governor.<sup>300</sup> Critics alleged that the ultimate composition of the task force was biased because thirteen of its thirty members had ties to the oil and gas industry, and members represented more than \$1.4 million of campaign contributions to Governor Corbett.<sup>301</sup> Only four of the members were environmentalists; the remainder were state and local government officials and a geologist.<sup>302</sup> Even if the public were satisfied that the composition of the Marcellus Shale Advisory Commission was representative of the range of public interests, however, the Commission's proceedings were not designed to acknowledge identity framing or stimulate dialogue. The Commission held 5 public meetings of the full Commission,<sup>303</sup> as well as 16 public meetings of the Commission's individual working groups.<sup>304</sup> The meetings consisted of public presentations by subject matter experts and updates on activities of the working groups.<sup>305</sup> Although the Commission

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<sup>300</sup> Pa. Exec. Order No. 2011-01 (Mar. 8, 2011).

<sup>301</sup> See Tracie Mauriello & Laura Olson, *Marcellus Shale Advisory Commission: Out of Balance?*, PITT. POST-GAZETTE (Mar. 13, 2011), <http://www.post-gazette.com/news/environment/2011/03/13/Marcellus-Shale-Advisory-Commission-out-of-balance/stories/201103130373>.

<sup>302</sup> *Id.*

<sup>303</sup> GOVERNOR'S MARCELLUS SHALE ADVISORY COMMISSION REPORT, at 9 (July 22, 2011), [http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/MSAC\\_Final\\_Report.pdf](http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/MSAC_Final_Report.pdf); see also DEP, MARCELLUS SHALE ADVISORY COMMISSION MEETINGS, <http://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/MarcellusShale/Meetings/Pages/default.aspx> (listing meetings and providing agenda, minutes, and expert presentations).

<sup>304</sup> GOVERNOR'S MARCELLUS SHALE ADVISORY COMMISSION REPORT, *supra* note 303, at 9; see also DEP, MARCELLUS SHALE ADVISORY COMMISSION MEETINGS, *supra* note 303 (listing sixteen meetings of working groups on infrastructure; public health, safety and environmental protection; local impact and emergency response; and economic and workforce development).

<sup>305</sup> GOVERNOR'S MARCELLUS SHALE ADVISORY COMMISSION REPORT, *supra* note 303, at 9.

received comments from members of the public at the conclusion of the meetings,<sup>306</sup> the minutes of those meetings made, at most, cursory mention of the nature and substance of the comments and did not reflect any dialogue between the public and the members of the Commission.<sup>307</sup>

The administrative process also does not purport to involve participants with equal decision-making power. The state regulators, not the commenters, had the power to privilege certain issues or recommended solutions and to draft or adopt recommendations. The Marcellus Shale Advisory Commission members, not the members of the public from whom they received comment, were appointed by and made recommendations to the Governor. Problem-solving workshops and listening circles avoid the problem of power imbalance inherent in any Track One negotiations because they operate on Track Two, which does not include authorities with final decision-making responsibility.<sup>308</sup> These strategies must ultimately operate alongside and feed into Track One negotiations, but they offer the opportunity for more creative problem-solving in part because no participant in the exchange is more empowered to make decisions than another.

## V. THE SPECIAL COMMITTEE FOR PUBLIC POLICY DIALOGUE: A PATH FORWARD

Conflict resolution scholarship would suggest that those issues will persist, and the conflict will become entrenched, unless intervention brings those issues to the surface before parties are asked to bargain and negotiate over resource allocation. What, if anything, can identity-based conflict theory offer to help Pennsylvanians and other states work to re-frame the hydraulic fracturing conflict—or any public policy conflict that threatens to become intractable?

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<sup>306</sup> *Id.* at 10.

<sup>307</sup> See, e.g., PA. DEP, MARCELLUS SHALE ADVISORY COMMISSION MEETING MINUTES, at 7 (Mar. 25, 2011) (“Public comment was received from 2:00p.m. [sic] to 4:30p.m. [sic]. Many commenters expressed their concern over the impact of natural gas drilling, negative impacts on the Commonwealth’s air, water, land, resources, their homes, communities, and livelihoods. Other commenters expressed concern and objected to the composition of the Commission.”), [http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/March\\_25\\_2011\\_minutes.pdf](http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/March_25_2011_minutes.pdf); see also PA. DEP, MARCELLUS SHALE ADVISORY COMMISSION MEETING MINUTES, at 10 (Apr. 27, 2011) (“Public comment was received from 2:45 – 4:25 [sic].”), [http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/April\\_27\\_2011\\_minutes.pdf](http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/April_27_2011_minutes.pdf); PA. DEP, MARCELLUS SHALE ADVISORY COMMISSION MEETING MINUTES, at 13 (“Public comment was received from 2:30 p.m. until 2:55 p.m.”).

<sup>308</sup> See discussion *supra* Part III.

Design of legal institutions is critical. Identity-based conflict resolution processes are not part of traditional legal processes like agency rulemaking, but conflict resolution process can complement traditional legal institutions. Michael Hamilton and Dominic Bryan, in their study of the mediation of contested parades in Northern Ireland, have urged exploration of the ways that dispute resolution can be a bridge to greater democratic participation.<sup>309</sup> Hamilton and Bryan focus on “how law can construct, or leave open the possibility of, dispute resolution mechanisms beyond itself.”<sup>310</sup>

In Pennsylvania, the hydraulic fracturing conflict has become entrenched, if not yet intractable. The conflict has deepened despite legislative, regulatory, and judicial attempts to resolve it, and continues to cost the state and its citizens in terms of time, money, and rancor. But this very stalemate presents Pennsylvania with an opportunity to be a leader to other jurisdictions that have faced this conflict or are likely to face it if economic and technical hurdles to resource development in their region can be overcome. Pennsylvania can provide such leadership through its law by sponsoring and encouraging “dispute resolution mechanisms beyond itself” to loosen the stranglehold of identity conflict around hydraulic fracturing, drawing from the techniques developed by scholars and practitioners of conflict resolution.<sup>311</sup>

This Part suggests a new entity, a Special Committee for Public Policy Dialogue, that would meet this need. The Special Committee could be designed to promote the key aspects of identity-based conflict resolution discussed in Part III: recognizing the existence of identity-based conflict; convening dialogic processes; utilizing multiple tracks for diplomacy and problem-solving; and re-balancing the power as needed between participant groups and, where applicable, facilitators.

#### A. *Why Form a Special Committee for Public Policy Dialogue?*

Why should states create a Special Committee at all? If identity-based conflicts and entrenched environmental conflicts can already be addressed through *ad hoc* task forces convened by the governor, why bother creating a new legal institution? Wouldn't this entail spending political capital to convince others that such an entity is necessary? Wouldn't this entity create costs for a system already burdened by mounting costs of conflicts that resist legislative and regulatory resolution? Wouldn't

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<sup>309</sup> Michael Hamilton & Dominic Bryan, *Deepening Democracy? Dispute System Design and the Mediation of Contest Parades in Northern Ireland*, 22 OHIO ST. J. DISP. RESOL. 133, 136–42 (2006).

<sup>310</sup> *Id.* at 134–35.

<sup>311</sup> *See id.*

such a pre-existing entity just limit the government's flexibility in addressing identity-based conflicts?

### 1. Recognizing Identity-Based Conflicts

A Special Committee on Public Policy Dialogue could satisfy these questions. First, the creation of a special entity to address identity-based or other entrenched conflicts would satisfy the first and arguably most important of the features of effective conflict resolution processes: It would officially recognize that such conflicts exist, and that traditional zero-sum negotiation and bargaining does not resolve them. Simply memorializing this recognition through some form of standing entity would promote earlier recognition of those conflicts and earlier adaptation of legal and administrative processes to address them. Consequently, the existence of a special entity might by itself make participants to the conflict feel that their identity concerns are taken more seriously by decision-makers and therefore soften their framing of the conflict slightly from the outset. *Ad hoc* processes that may have been convened to deal with past conflicts (especially if never used in the relevant jurisdiction) do not memorialize the existence of identity-based conflicts and promise official recognition of the identity issues raised in emerging conflicts.

### 2. Saving Costs

Second, one of the greatest assets of a Special Committee is the opportunity to reduce costs. Entrenched conflicts are expensive, as Pennsylvania has learned. Special conflict resolution processes can be articulated *a priori* but implemented only in the rare cases that a policy controversy shows elements of identity conflicts and has become resistant to resolution by conventional legal processes. In this sense, the complementary mechanism is an exception to the general rule of legislative and regulatory processes.

In this respect, the Special Committee on Public Policy Dialogue could be structured similarly to the Endangered Species Committee (better known as “the God Squad”) created by the 1979 amendments to the federal Endangered Species Act.<sup>312</sup> Recognizing the occasionally harsh results of the ESA,<sup>313</sup> Congress enacted the amendments to allow petitions for exemption by any federal agency whose action

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<sup>312</sup> See 16 U.S.C. § 1536; see also 50 C.F.R. §§ 450–453 (implementing regulations); see also Jared des Rosiers, Note, *The Exemption Process under the Endangered Species Act: How the God Squad Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

<sup>313</sup> See 95TH CONG., 2D SESS. HOUSE OF REPRESENTATIVES, ENDANGERED SPECIES ACT AMENDMENTS OF 1978, H.R. REP. NO. 1804 (1978) (Conf. Rep.) (responding to Supreme Court of the United States application of ESA in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)).

was found to be prohibited under the ESA, a governor in whose state the activity was to occur, or an entity whose permit or license had been denied because of its potential to take endangered species.<sup>314</sup>

Petitions for exemption from the ESA first undergo a threshold review and formal hearing by the Secretary of Commerce or Interior (whichever is responsible for the species of concern).<sup>315</sup> Based on the record assembled at the hearing, the Secretary makes a report to the Endangered Species Committee (“Committee”).<sup>316</sup> The Committee consists of six cabinet-level agency heads as well as one representative from the affected state, appointed by the President.<sup>317</sup> The Committee may make a final determination to grant the exemption if five members determine, based on the hearing record, that there are no reasonable alternatives; the benefits of the action outweigh the benefits of alternatives and the action is in the public interest; the action is of national or regional significance; and no party has made prohibited commitments of resources.<sup>318</sup> The Committee is also required to establish mitigation and enhancement measures to minimize impacts on the endangered species.<sup>319</sup>

The ESA model contains standards that ensure that an exemption will be granted infrequently, such as its requirement that no reasonable and prudent alternatives exist and that the action is of national or regional significance.<sup>320</sup> A Special Committee for Public Policy Dialogue could similarly be triggered only where applicants make a showing that reliance on conventional legal processes has consumed and will continue to consume significant public resources; that expedient identification of alternative solutions to the controversy is in the public interest; and that the controversy is of statewide or regional significance.

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<sup>314</sup> 16 U.S.C. § 1536(g).

<sup>315</sup> *Id.* §§ 1536(g)(3)–(4).

<sup>316</sup> *Id.* § 1536(g)(5).

<sup>317</sup> *Id.* § 1536(e)(3).

<sup>318</sup> *Id.* § 1536(h)(1)(A).

<sup>319</sup> *Id.* § 1536(h)(1)(B).

<sup>320</sup> In fact, the Committee has granted only two exemptions in its history. *See* JAN LAITOS ET AL., NATURAL RESOURCES LAW 1122 (2d ed. 2012). At the state level, the frequency of conflict resolution processes authorized by a Special Committee would be guided by the stringency of the substantive standards described in the statute empowering the Committee, as well as state culture and practice over time.

### 3. Political Feasibility

The legal framework for a Special Committee on Public Policy Dialogue might be created through legislation, such as an amendment of Pennsylvania's Administrative Procedure Act.<sup>321</sup> If political momentum does not support a legislative solution, however, the Governor's office could simply outline a policy that recognizes the need for a Special Committee in cases of entrenched conflict that resist or seem likely to resist regulatory resolution. This type of policy is less formal than a legislative amendment and could be eliminated by an incoming administration, but it is a step up from a purely *ad hoc* process. Articulation of this policy by a gubernatorial administration would create a precedent for a special approach to identity-based conflicts and would allow the administration to outline some basic tenets of that approach based on the latest research in the field of peace and conflict studies.

Establishing this policy within the governor's office, and invoking the Special Committee when necessary, would allow the state to gain experience with special conflict resolution processes for identity-based conflicts and, perhaps, to move toward a more permanent legislative enactment after one or more successful and cost-saving experiments with the executively-created committee.

#### *B. Function of the Special Committee: Enhancing Dialogue*

Hamilton and Bryan emphasize that "inclusive modes of governance are underpinned by a dialogic imperative."<sup>322</sup> All of the conflict resolution techniques discussed in Part III—the ARIA method; the "Transcend" approach; imaging and interactive problem-solving workshops; narrative forums; listening circles; and deconstruction of identity and characterization frames—center around different methods for creating and enhancing dialogue between identity groups.<sup>323</sup> Any state-created or state-promoted process for resolving identity-based conflicts will need to incorporate some mechanism aimed at creating more meaningful dialogue than has proven possible in the open public policy debate.

First, the Special Committee could be assembled to review petitions to begin extra-legal processes to resolve entrenched disputes. After reviewing the petition for sufficiency and determining the need for a special conflict resolution process, the Special Committee could hold a special comment process focused on identity-based aspects of the conflict. Following completion of the special comment process, the

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<sup>321</sup> 2 PA. CONS. STAT. §§ 101–106 (1978).

<sup>322</sup> Hamilton & Bryan, *supra* note 309, at 135.

<sup>323</sup> See *supra* Part III.

Special Committee might decide to structure a conflict resolution process, which may or may not involve extra steps, like focus group discussions and Track Two engagement, to address the identity issues identified in the special comment process. Finally, the Special Committee could serve as a referee or funnel for recommendations of participants in the multi-track efforts to the governor's office, ensuring that novel solutions are incorporated into Track One decision-making.

### 1. Cautionary Note: Conflict Management Frames

As a preface to any discussion of structuring the process, it is important to consider the goals of the process and the parties' likely attitudes toward participating in some kind of unconventional, non-adjudicatory conflict management process. This goal suggests a third frame (in addition to identity and characterization frames) that Gray and Elliott and colleagues found pivotal to the tractability of entrenched conflicts: the parties' "conflict management frames."<sup>324</sup>

Conflict management frames refer to "disputants' preferences for how the conflict should be managed or dealt with."<sup>325</sup> Gray and her colleagues identified nine categories of conflict management frames, ranging from "avoidance/passivity" to "struggle, sabotage, and violence."<sup>326</sup> Conflict management frames do not refer to the actual details of the conflict resolution process; within a given process, different participants may see entirely different dynamics to the process based on their positions in the conflict, and therefore may take entirely different approaches in their participation. In between the extreme frames of avoidance at one end and violence on the other, participants may variously view the process as one centrally about fact finding, joint problem-solving, decision-making based on expertise, adjudication, appeals to political action, or appeals to the market economy.<sup>327</sup>

In a sense, conflict management frames are a type of matrix: though living in the same reality, each party may experience the power structures involved in the conflict resolution process very differently. For example, in the 1990s, the Ohio

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<sup>324</sup> See Elliott et al., *supra* note 214, at 419; Gray, *supra* note 61, at 20, 24–27. For earlier treatments of conflict management frames, see J.W. KELTNER, *THE MANAGEMENT OF STRUGGLE: ELEMENTS OF DISPUTE RESOLUTION THROUGH NEGOTIATION, MEDIATION, AND ARBITRATION* (1994); B.H. Sheppard et al., *Informal Thirdpartyship: Studies of Everyday Conflict Intervention*, in *MEDIATION RESEARCH* 166 (Kenneth Kressel et al. eds., 1989).

<sup>325</sup> Gray, *supra* note 61, at 24.

<sup>326</sup> *Id.* at 25–26.

<sup>327</sup> *Id.*

Environmental Protection Agency involved stakeholders in its efforts to comply with a court order regarding Ohio's implementation of antidegradation rules of the Clean Water Act.<sup>328</sup> Environmentalists differed from regulated industry representatives in their perception of and response to the Ohio External Advisory Group. Environmentalists, who saw themselves as purely acting in the public interest, identified the group's purpose as a primarily fact-finding or consensus-building forum.<sup>329</sup> For example, environmentalists characterized the process as one to "develop rules that the environmental and regulated communities and Ohio EPA would mutually agree upon. I'd like to have as much consensus as possible."<sup>330</sup> Accordingly, they tended to frame their comments as questions.<sup>331</sup> In contrast, the regulated entities' representatives and legal advocates viewed the process as a form of arbitration and presented their comments as argument or advocacy.<sup>332</sup> A representative of the regulated industry said, "consensus is nice, but that's not why I'm here. I'm here to make my best possible arguments to the Agency that advance our position on how the rule should look. That's my job."<sup>333</sup> These differences in conflict management frames, and resulting approaches to the conflict resolution process, led the regulated entity representatives to characterize the environmentalists as naïve and ignorant of the technical issues of antidegradation. "Thus identity frames interacted with conflict management frames, and together produced changes in the behavior of the disputants and the conflict dynamics that fed intractability."<sup>334</sup>

Gray and colleagues concluded from their case studies that parties with limited conceptions of conflict frames tended to default to "adjudication and struggle conflict management frames," which tended to lead to intractability.<sup>335</sup> In contrast, conflict resolution was enhanced in groups that managed to shift toward "problem-solving conflict management frames with broad/authorized representation and clear understanding of and buy-in to the process by all parties."<sup>336</sup>

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<sup>328</sup> See Wiethoff et al., *supra* note 61, at 225–26.

<sup>329</sup> *Id.* at 249.

<sup>330</sup> *Id.* at 421.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* See also Elliott et al., *supra* note 214, at 412.

<sup>333</sup> See Wiethoff et al., *supra* note 61, at 243.

<sup>334</sup> Elliott et al., *supra* note 214, at 412–13.

<sup>335</sup> *Id.* at 419 tbl.15.1.

<sup>336</sup> *Id.*



Changing conflict management frames may seem daunting in the abstract. It may be difficult, without context, to imagine regulated entities conditioned to an adjudicatory model to readily agree to have their obligations resolved through a “narrative forum” or “listening session.” The case studies collected by Gray and colleagues, however, give some real-world examples of how deeply divided communities did manage to shift from a struggle to a problem-solving conflict management frame. For example, Chattanooga residents frustrated about the inequities of economic redevelopment in their city started with a change in conflict management frames: Community organizers had begun to introduce community consensus building processes in more affluent areas of Chattanooga years earlier. Although these processes did not involve the concerns that drove the conflicts over inequality, they did influence the types of processes that community members in that later conflict were ready to consider. This early move toward problem-solving rather than struggle conflict management frames allowed residents to realize that they all valued a common ecology, economy, and equity for their city—a shared identity frame that made understanding easier.<sup>337</sup>

Gray and colleagues recommend beginning by shifting to problem-solving conflict management frames, because deep struggle tends to make shifting other frames difficult. However, they also point to examples where community members shifted identity frames first, which allowed them to move from adjudicatory frames to problem-solving frames. In Quincy, California, for example, timber workers and environmentalists divided about Forest Service policies for the Plumas National Forest shifted from interest-based identities (loggers v. environmentalists) to a shared place-based identity as a community with a shared interest in the health of the forest.<sup>338</sup> Conveniently, the parties united against a common enemy: the Forest Service.<sup>339</sup> The parties became more receptive to dialogue once both sides recognized that their alternative was to leave decisions to the regulators. As one industrialist said, “‘If it’s ‘us against them,’ then it’s all of us against the ninny bureaucrats who can never seem to do anything commonsensical.’”<sup>340</sup>

Importantly, both the Chattanooga and the Quincy cases began not with decisions to come to a resolution of the issues, but instead focused simply on

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<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 416.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

exploring options and building relationships.<sup>341</sup> The processes started with small goals and grew with successes.<sup>342</sup> These growing relationships are what allowed those communities to move toward resolution of conflicts.<sup>343</sup> As one participant stated,

The conversations, both formal and informal, that have occurred as a result of the efforts of the Quincy Library Group have been very positive. They have made us realize how dysfunctional a community we were before, always fighting each other, instead of trying to move forward on common goals. The social experiment of working together as neighbors is perhaps as important, or may be more important, than the forestry experiment we are now proposing.<sup>344</sup>

Design of the Special Committee for Public Policy Dialogue should similarly resist the temptation to function similarly to a Track One decision-making process focused on developing rules or resolving the dispute. Instead, parties to entrenched environmental conflicts should be encouraged to recognize the lose-lose situation of leaving the issue entirely to regulators. The patent dissatisfaction of both sides with the regulators' solution may serve as a powerful motivator for participants to consider sitting down in non-adjudicatory meetings to explore common interests and possible options.

## 2. The Petition to Trigger the Special Committee

With these principles in mind, the first question is how the Special Committee will be triggered. To ensure that the Special Committee process is invoked only in exceptional cases where traditional regulatory process is inadequate, some mechanism must exist to determine when special identity-based conflict resolution processes are appropriate. The role of the Special Committee could combine the functions of the Secretary and the Committee under the ESA to review petitions and grant further procedures only where circumstances warrant.

Petitions for exemption under the ESA are by nature more confined than petitions for special identity-based conflict resolution processes because the universe of affected parties is much more restricted under the ESA. Only a federal agency, a

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<sup>341</sup> *Id.* at 422.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

state government, or a prospective permittee or licensee who has been denied a permit under the ESA (and who is not able to negotiate an Incidental Take Statement or Incidental Take Permit to undertake the action) needs to seek exemption from the Endangered Species Committee.<sup>345</sup> Conceivably, any concerned citizen might seek to petition for a special conflict resolution process on any issue as to which he or she was unsatisfied with the progress or result of traditional administrative processes.

To avoid overrunning the government with petitions, the Special Committee could be constituted to consider petitions only where the petitioner has demonstrated that conventional legislative and administrative processes have failed to or are clearly unable to resolve the issue without significantly higher than average costs of state resources compared with other policy issues of comparable scope. The governor's office, like the relevant Secretary under the ESA, could conduct the initial screen of petitions for sufficiency.

Where the governor's office determines that a petition has demonstrated the existence of an entrenched conflict (i.e., one that cannot be resolved economically through conventional processes), the Special Committee should be constituted and the petition forwarded to the Special Committee for further consideration.

### 3. Constituting the Special Committee

Constituting the Special Committee only after a demonstration of sufficiency of a petition underlines the notion that extra-legal processes are special, costly, and should be used only where traditional processes have failed to produce a solution without inordinate delays, contention, and increasing entrenchment.

The procedure for constituting the Special Committee in the case of a meritorious petition will have a significant effect on the perceived legitimacy of the special conflict resolution processes. To avoid the perceptions of special favor that were raised around Governor Corbett's Marcellus Shale Advisory Commission, the process of constituting the Special Committee could roughly follow the model used to appoint members of independent regulatory agencies in the federal system such as the International Trade Commission or the National Labor Relations Board. Members or commissioners are appointed by the President and confirmed by the Senate.<sup>346</sup> Boards and commissions consist of an even number of members, and no

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<sup>345</sup> See 16 U.S.C. § 1536(g)(1) (identifying parties who may petition for exemption); *see also* LAITOS ET AL., *supra* note 320, at 1123 (describing ITS and ITP mitigation processes under ESA).

<sup>346</sup> See WILLIAM FUNK ET AL., ADMINISTRATIVE PROCEDURE 13 (5th ed. 2014).

more than half of the members or commissioners may be from a single political party.<sup>347</sup>

In the case of the Special Committee, the list supplied by the legislators should consist of parties with expertise in conflict resolution and administrative process, not the subject matter of the respective petition (which may not be known at the time that qualified individuals for the Special Committee are identified anyway). Qualified individuals could include former legislators or regulators; professional mediators, arbitrators, facilitators, and other conflict resolution experts from outside government; and academics specializing in alternative dispute resolution or peace and conflict studies. The Special Committee might also include non-voting members from government in order to facilitate the relationship between Track One decision-making and ideas from multi-track processes. In Pennsylvania, this might include representatives of the Governor's office, the Senate Intergovernmental Operations Committee,<sup>348</sup> and the House of Representatives State Government Committee.<sup>349</sup> Because the Special Committee is not charged with making substantive decisions about the controversy but only with initiating new processes to elucidate identity issues and interfacing between multi-track process groups and Track One decision-makers, the Special Committee need not include representatives of the identity groups themselves. If members of such interest groups are included at this level, however, research suggests that participants should be volunteers not representing the groups in an official capacity and that representation should be divided equally among identity groups.<sup>350</sup>

#### 4. Hosting a Special Comment Process

Once constituted, the Special Committee could undertake three functions not otherwise present in the conventional regulatory procedure: A special comment process focused on identity issues; additional problem-solving procedures as judged

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<sup>347</sup> *Id.* at 14.

<sup>348</sup> See PA. SENATE INTERGOV'TL OPERATIONS COMMITTEE, <http://intergovernmental.pasenategop.com> (last visited Jan. 16, 2018).

<sup>349</sup> See PA. HOUSE REPRESENTATIVES ST. GOV'T COMMITTEE, <http://www.legis.state.pa.us/cfdocs/cteeInfo/index.cfm?Code=36&CteeBody=H> (last visited Jan. 16, 2017).

<sup>350</sup> Elliott and colleagues concluded that the most successful conflict resolution processes were those that drew on volunteer participants from throughout the community and also a balanced representation of interests. Elliott et al., *supra* note 214, at 422–23 tbl.15.2. In contrast, processes that chose participants in their capacity as representatives of a firm, organization, or government entity were more likely to lead to deferral of resolution to the participants' superiors or entrenchment of organizational identities, and those that did not include a balanced representation of interests were more likely to lead to distrust. *Id.*

appropriate by the Special Committee after the special comment process; and a funneling of ideas from multi-track forums to Track One decision-makers like the legislator or regulators. The first of these functions, the special comment process, is discussed here.

As illustrated by excerpts from the hydraulic fracturing rulemaking record in Pennsylvania in Part IV, the notice-and-comment rulemaking process is ill-suited to the task of acknowledging identity conflicts and beginning to shift characterization or identity frames.<sup>351</sup> One of the most valuable roles for the Special Committee on Public Policy Dialogue would be to open a new and broader public comment process than that permitted by the circumscribed notice-and-comment framework.

Like the dialogic models discussed in Part III developed by peace and conflict studies practitioners,<sup>352</sup> this open comment process would be expressly focused on acknowledging, even inviting, participants' expression of how the policy issue impacts them personally: their values, priorities, sense of community and history, and way of life. Unlike those dialogic models, however, an open public comment process would invite participation by the whole community. Such inclusiveness of the whole body politic is important for a legal institution in a way that it may not be for, say, a privately-funded or university-sponsored conflict resolution process. Extension of the invitation to everyone lends buy-in and legitimacy necessary for successful democratic intervention.

Unlike notice and comment in informal rulemaking, in the Special Committee (or the regulators) would not be expected to respond to specific comments. Comments at this stage are likely to entrench identity conflicts further, either by dismissing participants' identity-based concerns or by inviting characterization framing of participants by Special Committee members.

Instead, the process should be presented for what it is: An opportunity for the community to go beyond the narrow boundaries of the policy issue and communicate the way the policy issue impacts them on a personal identity level. Special Committee members should be trained, prior to attending forums or reviewing written comments, to identify identity frames and characterization frames. In consultation with EPP conflict resolution trainers, the Special Committee should use this public comment process as an opportunity to recognize the different identity groups involved (as there may be several major groups), identify the major identity and characterization frames used by each, and consider ways that participants might be able, through future dialogue, to better understand other group's identity claims

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<sup>351</sup> See *supra* Part IV.

<sup>352</sup> See *supra* Part III.

and to soften their characterizations (in Northrup's terms, to soften their rigidification) of each other.

In some respects, this process may resemble what the Governor's Task Force undertook to do prior to legislation or rulemaking about hydraulic fracturing in Pennsylvania.<sup>353</sup> Indeed, where an issue is known to be a highly contentious one, a Special Committee process that occurs prior to legislative or regulatory activity could save time and money by creating a more conciliatory environment for the hard work of resource allocation between groups. The Governor's Task Force, however, appears to have been a missed opportunity. Although the Task Force meeting minutes show that public comments were received, no attention appears to have been focused by the Task Force on understanding the identity conflicts expressed in those comments, or on framing less conventional interventions to help soften the rigidity of the groups' characterizations of each other that might make resource allocation through rulemaking highly contentious and elusive.

### 5. Structuring Further Conflict Resolution Process

Based on the initial fact-finding of the special public comment process, the Special Committee might choose to structure and convene smaller dialogic sessions on identity conflicts that would operate on a second track from the legislative and regulatory apparatus. Elliott and colleagues suggest the initiation of forums with limited objectives of promoting effective communication about the most often-noted frames observed in their case studies: conflict management, identity, and characterization frames, with particular focus on characterization.<sup>354</sup> Research suggests that changing participants' views of the "other" may be easier than changing their views of themselves. Environmental conflict resolution scholars have argued that characterization frames will be easier to nudge than identity frames, since participants are more likely to soften their views of one another than to give up something they see as central to their identity.<sup>355</sup> Similarly, Northrup argued that minimizing distortion of the other is a necessary precursor to changing participants' perceptions of identity.<sup>356</sup>

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<sup>353</sup> See discussion *supra* notes 300–07 and accompanying text.

<sup>354</sup> Elliott et al., *supra* note 214, at 426.

<sup>355</sup> *Id.*

<sup>356</sup> It is important to remember that this is merely the first step: Northrup also cautioned that shifts in identity are ultimately necessary for stable conflict resolution. *Id.*

State complementary mechanisms can probably be most productive and cost-effective, then, by focusing attention on softening and shifting characterization frames. Most of the dialogic techniques discussed in Part III include mechanisms for shifting participants' way of viewing and talking about other groups, and these techniques are continually evolving in practice.<sup>357</sup> Experienced conflict resolution practitioners can shape mechanisms to the particular situation.

For example, environmental conflict resolution scholars challenge characterization framing in one of two ways: either by documenting a dialogue and then meeting with parties to illustrate the framing each is using, or by explaining the concept of framing to the parties at the outset of the dialogue and encouraging them to be conscious of the frames they may be using.<sup>358</sup> Facilitators may intervene during the dialogue to help the participants become more aware of the characterization frames they are using.

The narrative forum, while using a somewhat different lens, may accomplish similar goals of shifting these key frames. However, the concept of the narrative forum seems to go one step further than the concept of frame shifting, since the narrative forum presumes that the parties' characterization frames and identity frames do not merely reflect the conflict, but actually *constitute* the conflict. In other words, to narrative forum practitioners, the conflict does not exist *a priori* as an entity with measureable features independent of the way the parties think about and talk about the conflict and their roles within it. Instead, the discourse used by the participants, both internally and externally, consciously and unconsciously, forms and shapes the conflict itself. In this sense, the narrative forum may be analogized to quantum mechanics, in which physicists have been able to prove that the *a priori* physical properties of an object cannot be objectively known (and in some sense do not exist), because observation always affects measurement.<sup>359</sup>

Because the narrative forum equates the narrative with the conflict, effective use of narrative forums has the potential to shift not just the participants' views of each other (characterization frames) but the participants' views of themselves (identity frames). This is because of the insight suggested by John Burton: that

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<sup>357</sup> See *supra* Part IV.

<sup>358</sup> See *supra* Part III.

<sup>359</sup> See WERNER HEISENBERG, PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE 53–58 (1962).

psychological needs critical to identity are not always a zero-sum game.<sup>360</sup> In other words, once narratives are explored and alternatives to the existing narratives of characterization and identity are recognized with the help of facilitators, participant groups may be able to identify solutions that do not threaten either group's sense of survival, even though the material resource at issue is finite. This insight holds particular promise in the environmental context, where the physical limits of the resource at issue are often incorrectly perceived as creating a zero-sum game.

Above all, the Special Committee should have authority to decide what, if any, extra-legal problem-solving processes might be useful for moving the conflict toward resolution. There are no right or wrong answers to the question of what type of supplemental dialogic processes should be convened, and conflict resolution techniques are continually evolving. Different techniques may be appropriate for different types of controversies, or different stages in the controversy. The Special Committee, after conducting the special comment process, will have a real-time and expert sense of the best options for softening identity and characterization frames and moving the conflict forward.

## 6. Relationship to Track One Decision-Making

How will the process contribute to official decision-making? Gray and colleagues, in concluding remarks in their study on entrenched environmental conflicts, urge that new forms of conflict management operate alongside rather than displacing existing ones.<sup>361</sup> At this stage, “[t]he disputants still distrust each other, still believe the struggle will be necessary, but hold open the potential for dialogue to ameliorate some of the problems generated by this struggle.”<sup>362</sup> Thus, new processes should be geared toward complementing, not supplanting, traditional Track One negotiations like the legislative and rulemaking processes. If successful, these Track Two processes would help the parties to soften characterization frames. From that perspective, the parties might recognize the existence of win-win solutions to meet psychological needs even when compromises over resources are necessary.

Ideally, participants would identify creative solutions to resource competition and report their findings to the Special Committee. The report should describe the identity and affiliation (if any) of participants; the process used to select participants and to conduct the dialogue; the most important insights arrived at by participants;

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<sup>360</sup> See Kelman, *supra* note 245, at 105 (citing John W. Burton, *Conflict Resolution as a Function of Human Needs*, in *THE POWER OF HUMAN NEEDS IN WORLD SOCIETY* 187, 198 (Roger A. Coate & Jerel Rosati eds., 1988)).

<sup>361</sup> Elliott et al., *supra* note 214, at 425–26.

<sup>362</sup> *Id.* at 426.



alternatives considered by the group for resolving the controversy; and the group's recommendations for resolution. The Special Committee should review the report and make final recommendations to the Legislature and the Governor as to any legal or policy changes that might assist the Track One decision-makers in resolving the conflict in a way that does not further instigate identity and characterization frames that tend to make conflicts intractable.

### CONCLUSION

Within the United States, the divide between interest groups has morphed from being a dispute over ideology to a dispute over identity. Challenges to hydraulic fracturing practices, on the one hand, or to the conservationist ethos, on the other, are viewed by participants in the debate as an attack not just on what they believe but on who they are. As parties harden their ideologies into identities, conventional legal mechanisms like legislation and regulation become inadequate to address the parties' true differences and move the issue toward resolution. Construing the conflict as merely one over a finite resource misses the complexity of the problem.

Hydraulic fracturing is just one example of a policy issue around which this identity divide has grown. Because of the lengthy and so far troubled efforts of the conventional legislative and regulatory process to move this conflict toward resolution in Pennsylvania, this conflict provides a ripe controversy in which to experiment extra-legal interventions that focus on identity conflicts. These interventions can identify the identity positions involved, soften the groups' tendencies to rigidly characterize other groups as evil or wrong, and create problem-solving forums that offer new solutions to legislators and regulators. Because the shale oil and gas controversy has emerged in so many jurisdictions with different legal and political systems at roughly the same time, leadership by Pennsylvania in addressing identity and characterization frames may also offer an opportunity to begin studying framing techniques across political boundaries. Experimentation with dispute resolution techniques alongside more traditional conflict management tools may help Pennsylvania become a model of something besides intractability to other jurisdictions facing the issue of hydraulic fracturing.

Perhaps more importantly, the special mechanisms developed to deal with the identity-based conflict in the hydraulic fracturing controversy can be designed to be available for any other policy conflicts that threaten to become entrenched. Soon, these controversies might include policy issues at the federal level such as immigration, free trade, national security, education policy, and environmental protection generally. More experience with the techniques of identity-based conflict resolution using the states as laboratories could offer new models to help bridge the identity gulf that has opened between American groups. Resolving entrenched conflicts is never simple or guaranteed. But recognition and direct engagement with

the problem of identity and characterization offer new tools to create more meaningful communication and more creative problem-solving than are currently enabled by the conventional legislative, administrative, or judicial processes.

## APPENDIX

*Examples of Identity Frames*

1. “I remain a supporter of the responsible extraction of our natural resources, and I applaud the economic lifeblood that it has pumped into our region over the past few years.”<sup>363</sup>
2. “The Pennsylvania DEP is really an international leader in managing the potential environmental impacts of oil and gas development. We certainly did not start that way. We have nonetheless risen to these challenges and modernized our regulations across the board.”<sup>364</sup>
3. “We’ve been feeling like nobody since 2009.”<sup>365</sup>
4. “We want to harvest our own minerals in an environmentally responsible manner and we intend to do so.”<sup>366</sup>
5. “Our industry—this entire episode—is saving many farms. So the farmers that I’ve been in contact with endorse and embrace hydraulic fracturing.”<sup>367</sup>
6. “If I could go back to 2000, I’d show them the end of the road and say, ‘Don’t come back,’ but we’re in the situation now. Fight and go forward.”<sup>368</sup>

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<sup>363</sup> J. J.D. Prose, *Matzie bill would ban fracking within 4,000 feet of dams, reservoirs*, HERALD-STANDARD, Aug. 14, 2016, 2016 WLNR 24773672 (statement of Pennsylvania state Rep. Rob Matzie).

<sup>364</sup> Maryam Jameel, *Is Pennsylvania Failing Citizens on Fracking-Related Water Issues?*, CENTER FOR PUBLIC INTEGRITY (June 24, 2016), <http://www.alleghenyfront.org/is-pennsylvania-failing-citizens-on-fracking-related-water-issues/> (statement of Scott Perry, deputy secretary for DEP’s Office of Oil and Gas Management).

<sup>365</sup> *Id.* (statement of Jeannie Moten, Resident of Southwestern Pennsylvania).

<sup>366</sup> Jim Hamill, *Landowners File Suit to Frack in Wayne County*, ABC—16 WNEP (May 18, 2016), <http://wnep.com/2016/05/18/landowners-file-suit-to-frack-in-wayne-county/> (statement of Curt Cocodrilli, Wayne Land and Mineral Group).

<sup>367</sup> Marie Cusick, *No Fracking In New York? That’s OK With Pennsylvania*, WNYC (Dec. 18, 2014), <http://www.wnyc.org/story/no-fracking-in-new-york-thats-ok-with-pennsylvania/> (statement of George Stark, spokesman for Cabot Oil and Gas).

<sup>368</sup> Ellen Cantarow, *Fracking Ourselves to Death in Pennsylvania*, NATION (May 2, 2013), <https://www.thenation.com/article/fracking-ourselves-death-pennsylvania/> (statement of Angel Smith, resident of Clearville, Pennsylvania).

7. Noise, dust, smell, and vibrations from a fracking operation in her neighborhood “took away my American dream. Now I want to move. That’s a nuisance.”<sup>369</sup>
8. “These cranes need all the help that we can give them so that our grandchildren can enjoy them. Those who wantonly kill these animals need to be prosecuted fully so that everyone knows that such behavior will not be tolerated. We owe it to those who will be following us on this amazing planet.”<sup>370</sup>
9. “My area is considered God’s country. I am sure that does not mean much to the Gas companies.”<sup>371</sup>
10. “Why is it that we are willing to risk so much, SO MUCH for 100 years of fuel that is not sustainable, not clean, and not at all without risk? Please help us sensible citizens understand why we wouldn’t focus on truly clean energy solutions that are NOT short-sighted? As it seems there is simply no stopping this from moving forward, at the VERY least, you simply MUST protect innocent Americans by regulating this process by the absolute strictest means possible. Every American deserves to have clean water and clean air. Natural Gas is not a long-term solution, and the risks are TOO great.”<sup>372</sup>
11. “I’m a victim of the oil business. We fracked a well two weeks ago and it took a week for my skin to grow back. Then when I finally got back on my feet, I went to my drilling rig and the drill cuttings made my hair fall out. Some of its coming back. . . . I need help here and you’ve got to help us. You’re doing a good job. I have a nine-month-old daughter. And her

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<sup>369</sup> Felicia A. Petro, *Fracking Truth discusses water testing, anti-drill petitions*, ALLIED NEWS (Feb. 6, 2013), [http://www.alliednews.com/news/local\\_news](http://www.alliednews.com/news/local_news) (search “fracking petro 2013”; then follow “Fracking truth . . .” hyperlink) (statement of Pennsylvania resident Debbie Lambert).

<sup>370</sup> *Comment Response Document Part 1 of 2, Environmental Protection Performance Standards at Oil and Gas Well Sites*, PA. DEP’T ENVTL. PROTECTION 1205 (Feb. 3, 2016), <http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2016/February%203/Comment%20Response%20-%20Part%201.pdf> [hereinafter *Comment Response Document*] (Comment 3111).

<sup>371</sup> *Id.* at 1192 (Comment 3086).

<sup>372</sup> *Id.* at 1183 (Comment 3071).

- mother cares for her and loves her, just as much as I do. And I won't do anything to put her in danger."<sup>373</sup>
12. "Please. All of our grandchildren must have the beauty that our grandparents gave us. It isn't ours to give away to the greed of big business."<sup>374</sup>
  13. "I'm concerned about the open 'fracking' policies of Pennsylvania. I hate the fact that hydraulic fracking seems so popular these days; it's going to be our undoing! . . . Please keep them away from the Delaware River Basin—I love the Delaware—I don't want another waste land! I have become quite the fanatic when it comes to our Mother Earth and her precious wildlife—these cannot be replaced once they are gone—clean air, clean water and state and federal parks should not fall to these 'gas companies.'"<sup>375</sup>
  14. "I am writing on behalf of my company in opposition to the Environmental Quality Board (EQB) adopting the revisions proposed by the Pennsylvania Department of Environmental Protection (PADEP) to 25 Pa Code Chapter 78 'Oil and Gas Wells.' As a PA BASED consulting firm, I have seen and experienced the extraordinary efforts made by Pennsylvania's oil and gas industry to be good stewards to the environment and good neighbors to the communities where we live and work."<sup>376</sup>
  15. "My husband has worked long backbreaking hours on his oil properties . . . because he loves what he does and is proud to be producing a valuable resource . . . . But as hard as the physical work has been it is the regulatory burden that has broken his spirit. And we live in constant fear of not knowing what will be coming next. His one-man operation does not have a tiny fraction of the impact that the deep non-conventional wells do. Each well averages only gallons of oil per day so the economics to comply with regulations is finite. Please allow him to continue to do what he loves to do. We live in the country and appreciate more than most

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<sup>373</sup> *Id.* at 1153 (Comment 3024).

<sup>374</sup> *Id.* at 1120 (Comment 2995).

<sup>375</sup> *Id.* (Comment 2992).

<sup>376</sup> *Id.* at 1039 (Comment 2789).

city dwelling bureaucrats ever could the beauty of the land we live on. We as well as our oil producing friends would do nothing to harm the environment because that is where we live and work and play and we respect the land that has in many cases been in the family for generations. Putting a 150 year old industry out of business by promulgating onerous and unnecessary regulations would have devastating effects on the economy and the people of this entire area.”<sup>377</sup>

16. “The company that I represent employs six men. We frack them; I plug them; I pump them; I attend to them. 90% of the work is oil-related shale. These guys that work for me work today. It’s 10° out. I ask them to go out and they go out. They are dedicated. They work an average of 50 to 70 hours a week. They have got kids to feed, mortgages to pay, got loans on their minivans. They have got dreams too. If DEP and EQB go through with these regs, will my employees still be able to chase their dreams?”<sup>378</sup>
17. “We are a small producer in northwestern Pennsylvania that drills 8 to 10 conventional vertical wells per year. We have approximately 15 employees. We contribute to the Pennsylvania economy via payroll, royalties to landowners, taxes, and purchase supplies, materials, etc. We are not a multi-national company with unlimited funds drilling high-volume shale wells. . . . We are attempting to supply the State of Pennsylvania and the country with a valuable and necessary commodity, not different than a farmer. However, it sometimes feels like we are a target for elimination by the uninformed public and some legislators.”<sup>379</sup>
18. “I am against fracking in all its aspects and tired of the problems it is causing for the environment.”<sup>380</sup>
19. “Today I act to declare my farm, all that lives above its surface, the very air and sunlight that caresses and enlivens all of us here today, and all that lies below it as firmament, all of this I hereby declare off-limits from shale gas extraction and its toxic impacts, in perpetuity. . . . At best it will forever change our idyllic landscape. At worst, we could lose our clean air, our health, our herd, our water, our organic status and our farm. We

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<sup>377</sup> *Id.* at 1030 (Comment 2775).

<sup>378</sup> *Id.* at 1026 (Comment 2770).

<sup>379</sup> *Id.* at 1005 (Comment 2740).

<sup>380</sup> *Id.* at 901 (Comment 2552).

have already lost our peace of mind. . . . The politicians and the gas companies tell us we have to be polite to them, to listen to their side. You are no longer entitled to our being polite to you. We will come at you with informed anger and courage, and we will continue to love you. We are not here to demonize you as persons, but to name the demons you are unleashing before us.”<sup>381</sup>

20. “Everyone feels threatened. We’re doing a job, but they think we’re tearing up the land. Obviously we won’t put it back as perfectly as Mother Nature made it, but we’re doing the best we can.”<sup>382</sup>

*Examples of Characterization Frames*

1. “The people in this country deserve better than (*sic*) this. These fracking corporations should not be allowed to cause citizens harm and then have the federal government cover up the water contamination. Enough is enough. We aren’t going away until we have law, order and safe drinking water.”<sup>383</sup>
2. “In the last eight years, the fracking industry has spent over \$40 million dollars on lobbying in Pennsylvania . . . . So it’s no surprise that even though they’ve had over 4,000 violations, all they’ve gotten is just a slap on the wrist.”<sup>384</sup>

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<sup>381</sup> Sharon Abercrombie, *Pennsylvania farmer speaks out against fracking at memorial for wife*, NAT’L CATH. REP. (May 18, 2012), <https://www.ncronline.org/blogs/eco-catholic/pennsylvania-farmer-speaks-out-against-fracking-memorial-wife> (statement of Stephen Cleghorn).

<sup>382</sup> Katharine Q. Seelye, *Gas Boom Aids Pennsylvania, but Some Worry Over the Risk*, N.Y. TIMES (Oct. 14, 2011), <http://www.nytimes.com/2011/10/15/us/hydraulic-fracturing-brings-money-and-problems-to-pennsylvania.html> (statement of well worker Dee Stevens).

<sup>383</sup> Jesse Bacon, *Fracking-Harmed Residents Confront EPA and Demand Reopened Investigation*, ENVTL. ACTION (2017), <http://environmental-action.org/blog/fracking-harmed-residents-confront-epa-and-demand-reopened-investigation/> (last visited Jan. 16, 2017) (statement of Silver Lake Township resident Craig Stevens).

<sup>384</sup> Katie Colaneri, *Pa. Attorney General Candidates Weigh in on Fracking*, STATE IMPACT (Apr. 18, 2016), <https://stateimpact.npr.org/pennsylvania/2016/04/18/pa-attorney-generals-candidates-weigh-in-on-fracking/> (statement of Josh Shapiro, candidate for Pennsylvania attorney general).

3. “Cabot doesn’t care. Industry doesn’t care. They’re the big bucks. Their influence is wide and far . . . It’s fine with me if industry takes a big fat hit.”<sup>385</sup>
4. “You better get it on paper. Word of mouth and a handshake means nothing to these guys.”<sup>386</sup>
5. “We are not interested in hearing from this liar.”<sup>387</sup>
6. “You haven’t seen the infrastructure yet. You haven’t seen the ignorance of the pipeline people. I have . . . It’s a nightmare. This is just beginning here. It’s going to get a whole lot worse.”<sup>388</sup>
7. “The chemical spill that contaminated the drinking water of 300,000 residents of Charleston, West Virginia tragically demonstrates what happens when a polluting industry is not adequately regulated. Will the northern half of Westmoreland County become another scene of a mass water contamination crisis to be laid at the cold feet of a regulatory agency? Must 80,000 MAWC customers rely on CONSOL Energy *voluntarily* to institute the enhanced standards called for in these comments to safeguard their drinking water source?”<sup>389</sup>
8. “These cranes need all the help that we can give them so that our grandchildren can enjoy them. Those who wantonly kill these animals need to be prosecuted fully so that everyone knows that such behavior

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<sup>385</sup> Howard Gensler, *Pennsylvania couples from ‘Gasland’ doc win \$4.25 million from frackers*, PHILA. DAILY NEWS: INQUIRER (Mar. 11, 2016), [http://www.philly.com/philly/entertainment/movies/20160311\\_Pennsylvania\\_couples\\_from\\_Gasland\\_doc\\_win\\_4\\_25\\_million\\_from\\_frackers.html](http://www.philly.com/philly/entertainment/movies/20160311_Pennsylvania_couples_from_Gasland_doc_win_4_25_million_from_frackers.html) (statement of Leslie Lewis, attorney for prevailing plaintiffs).

<sup>386</sup> Tom Wilber, *Fracking’s Promise: Pennsylvania used bad math to inflate industry’s job numbers*, TIMES LEADER (Nov. 28, 2015), <http://timesleader.com/business/496518/frackings-promise-pennsylvania-used-bad-math-to-inflate-industrys-job-numbers> (statement of Springville, Pa. resident Warren Brooks, referring to Cabot Oil and Gas Corp.).

<sup>387</sup> Jon Hurdle, *Shale gas opponents shout down industry speaker at Philadelphia LNG session*, STATE IMPACT (Apr. 17, 2016), <https://stateimpact.npr.org/pennsylvania/2015/04/17/shale-gas-opponents-shout-down-industry-speaker-at-lng-session/> (statement of anti-fracking protester).

<sup>388</sup> Petro, *supra* note 369.

<sup>389</sup> Comment Response Document, *supra* note 370, at 1210 (Comment 3123).



- will not be tolerated. We owe it to those who will be following us on this amazing planet.”<sup>390</sup>
9. “It is criminal that the oil and gas industry, with the assistance of our paid off with campaign contributions officials, are destroying Pennsylvania’s wilderness and WATER for the sake of profit. I AM DISGUSTED with the actions of our governor who is destroying our children’s future for the sake of oil and gas industry profits. Our state parks should be OFF LIMITS to any industrial activity, PERIOD.”<sup>391</sup>
  10. “My area is considered God’s country. I am sure that does not mean much to the Gas companies.”<sup>392</sup>
  11. “Please. All of our grandchildren must have the beauty that our grandparents gave us. It isn’t ours to give away to the greed of big business.”<sup>393</sup>
  12. “I’m concerned about the open ‘fracking’ policies of Pennsylvania. I hate the fact that hydraulic fracking seems so popular these days; it’s going to be our undoing! . . . Please keep them away from the Delaware River Basin—I love the Delaware—I don’t want another waste land! I have become quite the fanatic when it comes to our Mother Earth and her precious wildlife—these cannot be replaced once they are gone—clean air, clean water and state and federal parks should not fall to these ‘gas companies.’”<sup>394</sup>
  13. “I find it deplorable that EPA isn’t all over this! Whatever happened to the value of human life over the value of money? Please do the right thing for our families and children counting on you!”<sup>395</sup>

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<sup>390</sup> *Id.* at 1205 (Comment 3111).

<sup>391</sup> *Id.* at 1201 (Comment 3105).

<sup>392</sup> *Id.* at 1192 (Comment 3086).

<sup>393</sup> *Id.* at 1120 (Comment 2995).

<sup>394</sup> *Id.* (Comment 2992).

<sup>395</sup> *Id.* (Comment 2991).

14. “There are horror stories of what gas and fracking companies are causing to people[’]s properties and lives. They need to be regulated in a serious way[.]”<sup>396</sup>
15. “No! to fracking! No! to fracking on our PUBLIC lands! UNACCEPTABLE! These are our PUBLIC lands NOT ‘private’ corporate lands, they have NO right to ruin these lands. NO right to ruin our air, water, soil! NO! to corporate-fascism in our so-called democracy.”<sup>397</sup>
16. “Fracking should be banned everywhere, it violates my civil rights. I have the right to live in a clean healthy environment not subjected to dangerous conditions. Fracking is the rape of my planet; it impregnates the ground water with cancer causing chemicals. Make fracking illegal NOW!”<sup>398</sup>
17. “The state of PA is not belonging to the oil and gas industry, or to the politicians who owe their electoral offices to the oil and gas industry or to the frackers who want to make a quick buck. This state belongs to the people who live here, work here and raise their children here. . . . Fracking is a cancer spreading all over the state. . . . Fracking is morally wrong, it is terribly dangerous and the residents of PA are suffering the consequences.”<sup>399</sup>
18. “Fracking is wrong. It’s bad for people, good for greedy corporations.”<sup>400</sup>
19. When asked what’s fracking doing to this community: “Raping it. Tearing our roads apart—not to mention what it’s doing to the countryside.”<sup>401</sup>

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<sup>396</sup> *Id.* at 1119 (Comment 2983).

<sup>397</sup> *Id.* at 917 (Comment 2571).

<sup>398</sup> *Id.* at 893 (Comment 2532).

<sup>399</sup> *Id.* at 913 (Comment 2565).

<sup>400</sup> *Id.* at 882 (Comment 2502).

<sup>401</sup> Peter Marshall, *How fracking affects a community in Pennsylvania*, BBC (Nov. 28, 2011), <http://www.bbc.com/news/uk-england-lancashire-15919248> (statement of Pennsylvania resident).

