

STATE CONSTITUTIONAL LAW—ENVIRONMENTAL RIGHTS  
AMENDMENT—JUDICIAL ENVIRONMENTALISM HOLDS  
PENNSYLVANIA STATUTE IN VIOLATION OF THE STATE’S  
CONSTITUTION. *ROBINSON TOWNSHIP v. COMMONWEALTH*,  
83 A.3D 901 (PA. 2012).

*Sara Cutuli\**

I. INTRODUCTION

In *Robinson Township v. Commonwealth*,<sup>1</sup> the Pennsylvania Supreme Court issued a landmark decision for the Commonwealth when it determined that Act 13,<sup>2</sup> pro-fracking legislation, violated the Environmental Rights Amendment (ERA)<sup>3</sup> of the Pennsylvania Constitution.<sup>4</sup> This Comment will explore the court’s application of the self-executing doctrine to the ERA, the underlying environmental assumptions used to invoke the amendment, and the potential implications of the broad holding.

II. STATEMENT OF THE CASE

The Marcellus Shale Formation has become synonymous with the ever-growing fracking industry in Pennsylvania. Unconventional drilling, or “fracking,” is a method for extracting oil from the rich shale rock by injecting water into the pores of rock formations in order to fracture the rock and release the natural gas, allowing it to be recovered for the natural gas market.<sup>5</sup> Due primarily to public health and environmental concerns, fracking is highly controversial, and large efforts to oppose its further implementation have led to heavy litigation and a multitude of local zoning laws that have “zoned out” fracking in

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\* J.D., Rutgers Law School, May 2016.

1. 83 A.3d 901 (Pa. 2013).

2. 58 PA. CONS. STAT. §§ 2301–3504 (2015).

3. PA. CONST. art. I, § 27.

4. *Robinson Twp.*, 83 A.3d at 1000.

5. *Id.* at 914–15. See generally LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 1–49 (West, 6th ed. 2013).

or near residential areas.<sup>6</sup> However, in an effort to bolster both energy independence and the oil and gas industries in the Commonwealth, Governor Tom Corbett signed into law Act 13.<sup>7</sup> Act 13 repealed portions of the existing Pennsylvania Oil and Gas Act, and codified six new chapters.<sup>8</sup> At the heart of the controversy is chapter 33, “which prohibits any local regulation of oil and gas operations, including via environmental legislation, and requires statewide uniformity among local zoning ordinances with respect to the development of oil and gas resources.”<sup>9</sup> This incited a lawsuit from seven local governments,<sup>10</sup> four individuals,<sup>11</sup> and a non-governmental organization (the citizens),<sup>12</sup> who asserted that Act 13 violated several articles of the Pennsylvania Constitution, the separation of powers doctrine, and the Due Process Clause of the U.S. Constitution.<sup>13</sup> The citizens also alleged that Act 13 was unconstitutionally vague.<sup>14</sup> At the request of the Public Utility

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6. See, e.g., *Norse Energy Corp. U.S. v. Town of Dryden*, 108 A.D.3d 25, *aff’d sub nom.* *Wallach v. Town of Dryden*, 23 N.Y.3d 728 (App. Div. 2014); *The Story of Dryden: The Town that Fought Fracking*, EARTHJUSTICE, <http://earthjustice.org/features/the-story-of-dryden-the-town-that-fought-fracking-and-is-winning> (last visited Oct. 10, 2016); *Using Municipal Zoning to Limit or Ban Fracking in California Communities*, EARTHJUSTICE, <http://earthjustice.org/features/using-municipal-zoning-to-limit-or-ban-fracking-in-california-communities> (last visited Oct. 10, 2016); see *infra* notes 197–201.

7. Act 13 became law when Governor Corbett signed House Bill 1950 on February 14, 2012. See H.R. 1950, 2011 Leg., Reg. Sess. (Pa. 2011), <http://www.ctbpls.com/www/PA/11R/PDF/PA11RHB01950CC1.pdf>. The Act’s purpose and impact is described by the Department of Environmental Protection (DEP) as follows:

Act 13 of 2012 enacted stronger environmental standards, authorized local governments to adopt an impact fee and built upon the state’s ongoing efforts to move towards energy independence as unconventional gas development continues. Among the Act’s provisions are increased setback requirements for unconventional gas development; enhanced protection of water supplies; and strong, uniform, consistent statewide environmental standards. As a result of these provisions, the Department of Environmental Protection will continue to ensure the responsible development of this important resource.

*Act 13 of 2012*, PA.GOV, <http://www.dep.pa.gov/Business/Energy/OilandGasPrograms/Act13/Pages/default.aspx> (last visited Oct. 10, 2016).

8. The new chapters under the Oil and Gas Act are: chapters 23, 25, 27, 32, 33, and 35. 58 PA. CONS. STAT. §§ 2301–3504 (2015).

9. *Robinson Twp.*, 83 A.3d at 915.

10. *Id.* at 918 (Robinson Township, Township of Nockamixon, Township of South Fayette, Peters Township, Township of Cecil, Mount Pleasant Township, and Borough of Yardley).

11. *Id.* at 914 (Brian Coppola, David M. Ball, Mehernosh Khan, and Maya van Rossum).

12. *Id.* at 915–16 (Delaware Riverkeeper Network).

13. *Id.*

14. *Id.* The citizens claimed that Act 13 violated the inherent rights of mankind (article I, section 1), eminent domain (article I, section 10), natural resources and public

Commission and the Department of Environmental Protection (DEP), the matter was expedited and argued en banc on June 6, 2012.<sup>15</sup> The panel held that Act 13 was unconstitutional in part and enjoined the implementation of certain provisions.<sup>16</sup> On appeal before the Supreme Court of Pennsylvania, the court guffawed at the “remarkable . . . revolution” that Act 13 imposed on existing zoning regimen, including in residential zones.<sup>17</sup> Local governments were, in essence, required to remove nearly any impediment on oil and gas development, including the use of seismic testing, explosives, installation of compressor stations, limits on the height of structures, screening, lighting and noise, and setback requirements.<sup>18</sup> Sections 3305 through 3309 serve as the enforcement mechanism by authorizing the Public Utility Commission to issue advisory opinions to municipalities regarding compliance, issue orders to enforce compliance, and permit the Commonwealth Court to enjoin enforcement of local zoning ordinances that run contrary to the Act.<sup>19</sup> Moreover, section 3307(a) authorized cost shifting of attorneys’ fees to local governments if a court finds the local government “enforced a local ordinance with willful or reckless disregard.”<sup>20</sup> The court found that this section, along with the ineligibility of municipalities to receive unconventional gas well fees, created a significant financial burden on local governments.<sup>21</sup> While section 3215 purported to protect sensitive waters, the court focused on the “blanket accommodation” of the provision, which entitled oil and gas operators to automatic waivers of setbacks when a plan was submitted to the DEP.<sup>22</sup> The DEP was not obligated to respond to citizen comments, nor would a municipality have a right of appeal “notwithstanding any other law.”<sup>23</sup> The Supreme Court of Pennsylvania

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trust (article I, section 27), single subject bills (article III, section 3), and the relevant provision of special laws (article III, section 32) of the Pennsylvania Constitution. *Id.*

15. *Id.* at 916.

16. *Id.* The provisions enjoined were: “(1) Section 3215(b)(4) of Chapter 32, and (2) Section 3304 and any ‘remaining provisions of Chapter 33 that enforce [Section] 3304’ i.e., Sections 3305 through 3309.” *Id.* (quoting *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 494 (Pa. Commw. Ct. 2012)).

17. *Id.* at 971.

18. *Id.* at 972.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 973.

23. *Id.* at 973–74; see also 58 PA. CONS. STAT. § 3215(d) (2012), *invalidated by Robinson Twp.*, 83 A.3d at 1000.

subsequently held Act 13 to be in violation of the Commonwealth's constitution.<sup>24</sup>

### III. BACKGROUND

With the rise of environmental awareness, and greater need for protection against industry, many states have adopted provisions within their legislatures to ensure environmental protection. Pennsylvania's provision is unique in that it was an amendment to the Declaration of Rights; section 27 of article I provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>25</sup>

Since the passage of the amendment there have been few substantial applications of the amendment directly, until the General Assembly passed Act 13.<sup>26</sup> Act 13 presented the first major overhaul of the Pennsylvania Oil and Gas Act, Title 58 of the Pennsylvania Consolidated Statutes.<sup>27</sup> The intent of the act was to create uniformity that allowed for reasonable development of oil and gas resources, therefore preempting and superseding local regulations of the same nature.<sup>28</sup>

The Pennsylvania Commonwealth Court granted the citizens summary relief on the separation of powers and due process theories, holding that sections 3215(b)(4) and 3304 were unconstitutional.<sup>29</sup> Section 3215(b)(4) permitted the DEP to grant waivers to oil or gas well permit applicants for statutory setbacks between a water source and a gas well bore.<sup>30</sup> Section 3304 implemented and narrowed the parameters through which a local government could inhibit oil and gas development, thus creating a uniform and statewide regulatory regime.

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24. *Robinson Twp.*, 83 A.3d at 1000.

25. PA. CONST. art. I, § 27.

26. See generally Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123 (1991).

27. *Robinson Twp.*, 83 A.3d at 969.

28. *Id.*

29. *Id.* at 931.

30. *Id.* at 931-32.

The Pennsylvania Commonwealth Court held that each provision was unconstitutional: section 3304 for “command[ing] unconstitutional zoning outcomes,”<sup>31</sup> and section 3215(b)(4) because it gave the executive branch “the power to make legislative policy judgments otherwise reserved for the General Assembly.”<sup>32</sup> While the Commonwealth asserted the disruption in zoning was a mere exercise of its police power that is rationally related to its purpose, the court rejected this assertion and found the reasoning “not a creditable justification” for the new zoning regime.<sup>33</sup> On appeal, the citizens requested that the Pennsylvania Supreme Court declare Act 13, in its entirety, unconstitutional based primarily on sections 3303, 3304, 3215(b)(4) and (d), and, to a lesser extent, sections 3305 through 3309.<sup>34</sup>

#### IV. PLURALITY<sup>35</sup>

##### A. *Justiciability: Standing, Ripeness, and Political Question*

The court first addressed the standing and ripeness contentions for each of the parties. Brian Coppola, Supervisor of Robinson Township, and David M. Ball, Councilman of Peters Township, each sued, both as individuals and in their official capacity.<sup>36</sup> It was undisputed that Act 13 affected Coppola and Ball’s ability to enjoy their properties as expected, since both had homes in a residential district where, prior to Act 13, oil and gas drilling was not permitted.<sup>37</sup> While the Commonwealth asserted that local officials did not have the power to make land use determinations and, therefore, generally lacked standing, the court determined that it “need not address whether they have a separate interest as local elected officials,”<sup>38</sup> and upheld their standing to sue as landowners and residents.<sup>39</sup> In regard to the

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31. *Id.*

32. *Id.* at 932.

33. *Id.* The court also rejected the citizens’ claim regarding both the enjoined provisions and sections 3215(d) and 3303. *Id.*

34. *Id.* at 970. Sections 3303 through 3309 dictate the changes in local ordinances in relation to oil and gas operations. 58 PA. CONS. STAT. §§ 3303–3309 (2015). Section 3303 states that “environmental acts are a statewide concern,” and therefore “occupy the entire field of regulation” to the “exclusion of all local ordinances.” *Id.* § 3303.

35. Chief Justice Castillo authored the opinion, joined by Justices Todd and McCaffery; Justice Orie Melvin did not participate; Justice Baer joined parts I, II, IV, V, and VI(A), (B), (D)–(G) and authored the concurring opinion; Justice Eakin authored the dissent. *Robinson Twp.*, 83 A.3d at 913.

36. *Id.* at 914.

37. *Id.* at 918.

38. *Id.*

39. *Id.*

standing of the townships,<sup>40</sup> the Commonwealth conceded that each had standing to challenge the constitutionality of Act 13 based on the "substantial, direct and immediate obligations on [the townships] that affect their government[al] functions."<sup>41</sup> However, the Commonwealth asserted that the issue was not ripe because the harm claimed was "illusory" since local governments had "no inherent legal interest in the power to make land use determinations within their boundaries, and . . . do not enjoy constitutional protections similar to those of citizens."<sup>42</sup> The citizens responded with their core standing argument: that Act 13 displaced existing and well-established zoning laws and required the citizens to choose between violating Act 13 or violating the ERA of the Pennsylvania Constitution.<sup>43</sup> Citing to *Susquehanna County v. Commonwealth*<sup>44</sup> and *Franklin Township v. Commonwealth*,<sup>45</sup> the court reasoned that the local governments have a "substantial, direct, and immediate" interest in protecting the environment and the quality of life of their citizens.<sup>46</sup> The court swiftly dismissed the Commonwealth's ripeness claim as "merely a restyling of the remoteness concern already addressed in [the] standing discussion."<sup>47</sup> The Pennsylvania Commonwealth Court determined that Maya van Rossum, the Executive Director of the Delaware Riverkeeper Network, and the Delaware Riverkeeper Network itself, lacked standing because they failed to plead direct and immediate harm.<sup>48</sup> Van Rossum and the Delaware Riverkeeper Network challenged this finding, asserting that their members were residents of the areas affected by Act 13, and that their interest in home and property values, as well as the effects on their health and enjoyment of the natural beauty and recreation in the Delaware River corridor, was negatively affected by the legislation.<sup>49</sup> While the Commonwealth claimed that any harm alleged was speculative and remote, the appellate court reversed the decision of the Pennsylvania Commonwealth Court, finding that the record supported

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40. *Id.* (Robinson Township, Township of Nockamixon, Township of South Fayette, Peters Township, Township of Cecil, Mount Pleasant Township, and the Borough of Yardley).

41. *Id.*

42. *Id.* at 919.

43. PA. CONST. art. I, § 27.

44. 458 A.2d 929 (Pa. 1983).

45. 452 A.2d 718 (Pa. 1982).

46. *Robinson Twp.*, 83 A.3d at 918–20.

47. *Id.* at 920.

48. *Id.* at 921.

49. *Id.* at 922.

sufficient threat of injury to confer associational standing.<sup>50</sup> Similarly, the citizens appealed the Pennsylvania Commonwealth Court's decision that Dr. Mehernosh Khan's interest was too remote.<sup>51</sup> They argued that Dr. Khan had an interest in the case because Act 13's restrictions on obtaining and sharing information with other physicians regarding the chemicals used in drilling impaired his ability to properly treat his patients (who lived where drilling took place) and limited his access to a patient's history, dose, and duration of exposure.<sup>52</sup> Focusing on Dr. Khan's assertion that section 3222.1(b)<sup>53</sup> forced him, and other physicians, to choose between violating the Act and their ethical obligation to treat patients by refusing to treat a patient, the court granted standing.<sup>54</sup>

The court then addressed the issue of justiciability. The Commonwealth asserted that the court below "went beyond merely assessing the constitutionality of Act 13" and, therefore, violated the separation-of-powers doctrine by interfering with the General Assembly's constitutional police powers.<sup>55</sup> According to the Commonwealth, pursuant to article I, section 27<sup>56</sup> and article IX, section 1<sup>57</sup> of the Pennsylvania Constitution, the General Assembly has the "exclusive authority to retract local governments' powers," thereby giving it the exclusive authority to regulate oil and gas operations.<sup>58</sup> The Commonwealth asserted that the issues are not justiciable and that the lower court should have respected the legislative branch's

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50. *Id.* Associational standing was conferred if "at least one of its members [was] suffering immediate or threatened injury as a result of the action challenged." *Id.* The court analyzed the affidavits submitted by individual Delaware Riverkeeper Network members who were also Pennsylvania residents and/or owners of property or business interests in the areas near the Marcellus Shale Formation, where there were already likely to be natural gas operations. *Id.* Citing the "serious risk of alteration" of the physical nature of their municipality, the court found the affidavits surpassed the standing and ripeness requirements for associational standing and for van Rossum, in her official capacity. *Id.*

51. *Id.* at 923.

52. *Id.*

53. The "required disclosures" provision allows a physician to obtain the identity of the chemicals used in fracking for the purposes of treating a patient, but requires the physician to keep the identity of these chemicals confidential. 58 PA. CONS. STAT. § 3222.1(b) (2015).

54. *Robinson Twp.*, 83 A.3d at 924.

55. *Id.* at 925.

56. PA. CONST. art. I, § 27.

57. *Id.* art. IX, § 1 ("The General Assembly shall provide by general law for local government within the Commonwealth. Such general law shall be uniform as to all classes of local government regarding procedural matters.").

58. *Robinson Twp.*, 83 A.3d at 925.

power.<sup>59</sup> The Supreme Court of Pennsylvania agreed with the citizens and the Pennsylvania Commonwealth Court—it is precisely the role of the judiciary to evaluate whether the legislature had exceeded its authority granted by the state constitution.<sup>60</sup> Further, the court discussed how interpreting the political question doctrine as the Commonwealth did would indicate that “no action of the General Assembly, defended as an exercise of its police power, would ever be subject to a constitutional challenge.”<sup>61</sup> The court held the claim to be squarely within the court’s judicial power and “core province: the vindication of a constitutional right.”<sup>62</sup>

### *B. Scope and Standard of Review*

In analyzing the ERA, the court looked to the plain language, law and policy considerations, academic commentary, and extrajudicial case law from states that have similar provisions.<sup>63</sup> The court applied a de novo review of the lower court’s decision because Act 13 posed a pure question of law.<sup>64</sup>

### *C. The Applicable Constitutional Paradigm*

Article III, sections 1 through 27 of the Pennsylvania Constitution grant the General Assembly “broad and flexible police powers” within a “plenary authority to enact laws” to promote “public health, safety, morals, and the general welfare.”<sup>65</sup> While plenary, the police powers are not absolute, and their exercise must be “reasonable and nondiscriminatory.”<sup>66</sup> In fact, given the broad powers vested in the legislature, “nearly everything” in a state constitution operates as a restriction on the legislature.<sup>67</sup> Citing to the Declaration of Rights in the Preamble of the Pennsylvania Constitution, the court laid the foundation for the weight of the ERA—“The Declaration of Rights assumes that the rights of the people articulated in Article I of our

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59. *Id.*

60. *Id.* at 926–27.

61. *Id.* at 926.

62. *Id.* at 930.

63. *Id.* at 944. The court took into account some of the *Edmunds* factors but found them not strictly applicable. *Id.* (citing *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991)).

64. *Id.* at 943.

65. PA. CONST. art. III, §§ 1–27; *Robinson Twp.*, at 946.

66. *Robinson Twp.*, 83 A.3d at 946.

67. *Id.* at 947 (quoting Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 207–08 (2002)).



Constitution . . . are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution.”<sup>68</sup> The “inherent and indefeasible rights” of the citizens of Pennsylvania include the rights enumerated in section 27, the ERA, including the right to: “clean air, pure water, and to the preservation of the natural, scenic, historical, and esthetic values of the environment. . . . As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”<sup>69</sup>

*D. Plain Language: the ERA & the Public Trust*

The court then moved systematically through a plain language analysis of each provision of Act 13, beginning with an analysis of the ERA of the Pennsylvania Constitution. As the court explained, section 27 contains three mandatory clauses defining the rights and obligations to serve the twin goals of: 1) identifying protected rights and 2) establishing a framework for the Commonwealth to take affirmative steps.<sup>70</sup> The first clause restricts the ability of the state to act contrary to the citizens' rights to clean air and pure water and to the preservation of natural, scenic, historic, and esthetic values of the environment.<sup>71</sup> Any laws passed by the Commonwealth that unreasonably impair these rights are unconstitutional.<sup>72</sup> A challenge under this provision must be pursued through either a theory that the government has infringed on the rights set forth in section 27, that the government failed its obligation as a trustee, or both.<sup>73</sup>

First, the court looked to the intent of the legislature and the effect of the law while noting that the General Assembly's declaration of policy did not control the judicial inquiry.<sup>74</sup> While there was no affirmative obligation in the first clause on the government to promote preservation of the environment, “[t]he corollary . . . is an obligation on the government's behalf to refrain from unduly infringing upon violating the right, including by legislative enactment or executive action.”<sup>75</sup> Even further, the court reasoned that this clause required

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68. *Id.* at 948.

69. *Id.* at 948–49 (quoting PA. CONST. art. I, § 27).

70. *Id.* at 950.

71. *Id.* at 951.

72. *Id.*

73. *Id.* at 950.

74. *Id.* at 951.

75. *Id.* at 952; *see also* 35 PA. CONS. STAT. § 6026.102(4) (2015) (recognizing that the General Assembly has a duty to implement section 27 and devise environmental remediation standards).

each branch of government to consider, in advance of enactment or executive action, the environmental effect of the proposed action—the failure to obtain such information “does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.”<sup>76</sup> The court accepted the citizens’ argument that constitutional obligations bind all levels of government concurrently, and further reasoned that courts may fashion the appropriate remedy to “vindicate” the environmental right violated.<sup>77</sup> “The right to ‘clean air’ and ‘pure water’ set plain conditions by which government must abide;” although, the court recognized that these are “relative rather than absolute attributes.”<sup>78</sup> Again, the court then reasoned that the second clause, which requires the preservation of “natural, scenic and esthetic values of the environment,” “protects the people from governmental action that unreasonably causes actual or likely deterioration” of the environment.<sup>79</sup> Although the court recognized that this falls short of requiring preservation at the sacrifice of other fundamental values, the court also recognized that governmental actions must “on balance, reasonably” account for environmental impact; the State’s plenary power must be exercised in a manner that promotes “sustainable property use and economic development.”<sup>80</sup> Among such fundamental values, the court did not read section 27 to deprive persons of the use of their property, or “derail development leading to an increase in the general welfare, convenience, and prosperity of the people,” and recognized that the Commonwealth did have a legitimate state interest in developing the state’s economy.<sup>81</sup>

*E. The Second and Third Clauses of Section 27: The Public Trust*

The court read the second clause of section 27 to provide protection for a “narrower category of ‘public’ natural resources,” yet the court noted that the legislature did not qualify how broadly “public natural resources” should be applied, which suggested that it “fairly implicates [a] relatively broad” scope of the natural environment and may be adjusted as social and legal concerns change.<sup>82</sup> Citing to several provisions of different Pennsylvania codes, the court concluded that, at present, the concept of public natural resources included state-owned

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

77. *Id.*

78. *Id.* at 953.

79. *Id.*

80. *Id.* at 953–54.

81. *Id.* at 954.

82. *Id.* at 955.

lands, waterways, mineral reserves, and resources that “implicate the public interest,” including ambient air, surface and ground water, and flora and fauna that are not “purely private property.”<sup>83</sup> Looking further to the legislative history, the court supported this broad reading because the proposed amendment enumerated specific natural resources to be protected after being redrafted in a more flexible matter “to capture the full array of resources implicating the public interest.”<sup>84</sup> The third clause framed the Commonwealth’s prohibitive and affirmative duties regarding the commonly-owned, public natural resources.<sup>85</sup> It established the corpus of the trust (the broad interpretation of natural resources) and designated the Commonwealth as the trustee and the people as the named beneficiaries.<sup>86</sup> As trustee, the Commonwealth has a fiduciary obligation to its citizens to “conserve and maintain” natural resources—“measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources.”<sup>87</sup> The court focused on the plain meaning of the text, with support of several sections of the Restatement of Trusts.<sup>88</sup> The negative duties required that the Commonwealth restrain from unreasonably affecting the environment when acting as trustee.<sup>89</sup> As such, the Commonwealth could not permit or encourage the “degradation, diminution, or depletion . . . whether [it] would occur through direct state action or indirectly.”<sup>90</sup> To the court, this “complementary legislation” did not override the “plain conferral of rights” on the citizens.<sup>91</sup> Therefore, the public trust of section 27 had two major implications: the trustee must deal impartially with all beneficiaries, and must balance the interests of present and future beneficiaries.<sup>92</sup> The ERA offers protection equally for current and severe actions and

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83. *Id.*; see, e.g., 30 PA. CONS. STAT. § 721 (2015) (fish); *Id.* tit. 34, § 103(a) (game or wildlife); *Id.* tit. 71, § 1340.3.02(a) (state-owned forests).

84. *Robinson Twp.*, 83 A.3d at 955.

85. *Id.* at 955–56.

86. *Id.* at 956.

87. *Id.* at 956–57 (citing PA. LEGIS. J.–H., 1970 Leg., at 2273 (1970)).

88. *Id.* at 957 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 170, 174, 232 (AM. LAW INST. 1959)).

89. *Id.*

90. *Id.* The affirmative nature of the trustee is the duty to take affirmative legislative actions to protect the environment, which the Commonwealth has acted on through the enactment of the Clean Streams Act, the Air Pollution Control Act, and the Solid Waste Management Act. *Id.* at 958 (citing 35 PA. CONS. STAT. ANN. §§ 691.1–801, 4001, 6018.101 (2015)). The court used these as examples of “administrative details . . . appropriately addressed by legislation.” *Id.*

91. *Id.*

92. *Id.* at 959.

minimal actions that could have significant effects in the short or long term.<sup>93</sup>

#### F. Other Considerations

The court then discussed the statutory and historical context in which section 27 was enacted, finding that “[i]t is not a historical accident that the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights.”<sup>94</sup> The historic lumber, logging, and mining activity within the Commonwealth have led to dwindling wildlife, deforestation, and pollution, and the large exploitation by the coal and steel industries have confounded these impacts to levels that have required legislative action—the ERA passed with unanimous assent by both chambers during both the 1969 to 1970 and 1971 to 1972 legislatures.<sup>95</sup> While the court did recognize that, on a national level, it was rare for environmental rights to be in a declaration of rights provision alongside political rights, it gave great deference to the historical context that yielded a unanimous vote and the choice to deviate from most sister states.<sup>96</sup>

#### G. Existing Jurisprudence Regarding Article I, Section 27

The issue presented in *Robinson* was novel; prior claims relating to the ERA were either challenges to specific private or governmental projects or challenges to local or statewide environmental quality laws that implicated constitutional property law.<sup>97</sup> The court pointed to a lack of differentiation in previous precedent between claims based on the first and second clauses of section 27 as the cause for a convoluted analytical scheme and “imped[ing] efforts to develop a coherent

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93. *Id.*

94. *Id.* at 960.

95. *Id.* at 960–62; H.R.J. RES. 31, 1971 Gen. Assemb. (Pa. 1971); H.R.J. RES. 958, 1970 Gen. Assemb. (Pa. 1970).

96. *Robinson Twp.*, 83 A.3d at 962–63. In addition to Pennsylvania, only Montana and Rhode Island have adopted this level of environmental protection. *Id.* at 962 (citing MONT. CONST. art. II, § 3; R.I. CONST. art. I, § 17). There are at least 207 natural resource- or environment-related provisions in forty-six state constitutions that reach different categories of natural resources or the environment. John C. Dernbach et al., *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1192 (2015) [hereinafter Dernbach, *Examination and Implications*]; see, e.g., ILL. CONST. art. XI, § 2; LA. CONST. art. IX, § 1; ; MASS. CONST. art. XLIX; MICH. CONST. art. IV, § 51; N.Y. CONST. art. XIV, § 1; OHIO CONST. art. VIII, §2; S.C. CONST. art. XII, § 1; VA. CONST. art. XI, § 1.

97. *Robinson Twp.*, 83 A.3d at 963.

environmental rights jurisprudence.”<sup>98</sup> First, the court discussed *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,<sup>99</sup> where the Commonwealth claimed that the construction of an observation tower on private property neighboring the Gettysburg Battlefield would disrupt the skyline.<sup>100</sup> There, the local governments did not have land use legislation to restrict the development, so the Commonwealth sought relief under the ERA.<sup>101</sup> A divided lower court denied the relief, finding the amendment was not self-executing; the Pennsylvania Supreme Court affirmed, but did so with a plurality opinion.<sup>102</sup> Some justices thought the amendment was not self-executing, and therefore needed additional legislation implementing the amendment; others thought it was self-executing and would have reversed.<sup>103</sup>

In *Payne v. Kassab*,<sup>104</sup> Wilkes-Barre residents sought to enjoin the Pennsylvania Department of Transportation’s street-widening project that would reduce a local park and remove several large trees and a pedestrian walk.<sup>105</sup> There, the court denied relief because the residents failed to “balance interests in conservation of natural resources and maintenance of an adequate highway system.”<sup>106</sup> As trustee, the court found that the Commonwealth had a duty to avoid all environmental degradation, unless there was no feasible alternative.<sup>107</sup> The *Payne* test was subsequently applied in a variety of circumstances and has become the “benchmark” for section 27.<sup>108</sup>

In applying the *Payne* test, the *Robinson* Court found that courts had strayed from the plain language of the test, and instead leaned on the premise that implicating section 27 was limited by whether the

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98. *Id.* at 964.

99. 311 A.2d 588 (Pa. 1973) [hereinafter *Gettysburg*].

100. *Robinson Twp.*, 83 A.3d at 964–65.

101. *Id.* at 964.

102. *Gettysburg*, 311 A.2d at 588–89.

103. *Id.* The concurring opinion of Justice Roberts, joined by Justice Manderino, reasoned that prior to the adoption of the amendment, the Commonwealth had the “inherent sovereign power to protect and preserve for its citizens the natural and historic resources.” *Id.* at 595 (Roberts, J., concurring). In a dissent joined by Justice Eagen, Chief Justice Jones explicitly found the amendment to be self-executing. *Id.* at 597 (Jones, C.J., dissenting). Thus, four justices concluded that the public right of the amendment’s first sentence was self-executing. See John C. Dernbach, *Natural Resources and the Public Estate*, in *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* 683, 690–91 (Ken Gormley et. al. eds., 2004).

104. 312 A.2d 86 (Pa. Commw. Ct. 1973).

105. *Id.* at 94.

106. *Robinson Twp.*, 83 A.3d at 965 (explaining the approach that the court in *Payne* took).

107. *Id.*

108. *Id.* at 966.

General Assembly had acted on its policy choices.<sup>109</sup> The court, however, criticized the *Payne* test as overly constrictive of the constitutional provision, having the effect in its progeny of "minimizing the constitutional duties" of the executive and judicial branches, and restricting their ability to act independent of the legislature.<sup>110</sup> Therefore, the court held the test inappropriate for any matters outside the "narrowest category" of cases, reserving the test only for an alleged failure to comply with statutory standards enacted to advance section 27 interests.<sup>111</sup>

#### *H. Article 1, Section 27 Rights in Application*

The Commonwealth asserted a pure question of policy, which could be addressed only by the "exclusive discretionary policy judgment" of the General Assembly, thereby rendering judicial review null.<sup>112</sup> Similarly, according to the Commonwealth, the municipalities had no authority to pursue a different policy, nor did they have authority to claim a violation of the Pennsylvania Constitution.<sup>113</sup> The court, however, adopted the citizens' position that this was "about compliance with constitutional duties," declaring that "[u]nless the Declaration of Rights is to have no meaning, the citizens are correct."<sup>114</sup> The court reiterated that the ERA speaks "on behalf of the people, to the people directly, rather than through the filter of the people's elected representatives."<sup>115</sup> The obligations as trustee create a right in the people to seek to enforce the obligation.<sup>116</sup> The court cited *Commonwealth ex rel. Logan v. Hiltner*<sup>117</sup> for the well "settled rule of constitutional construction that prohibitive . . . provisions are self

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109. *Id.*

110. *Id.* at 967; see Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 368-71 (1993).

111. *Robinson Twp.*, 83 A.3d at 967. Through a second line of precedent, section 27 has been cited as a public policy favoring environmental interests when suits were brought under other environmental provisions, including the Clean Streams Law. *Id.* at 968 (citing *Nat'l Wood Preservers, Inc. v. Commonwealth Dep't of Env'tl. Res.*, 414 A.2d 37 (Pa. 1980)). Particularly, it had been asserted that the environmental law was an unconstitutional exercise of police power. *Id.* The court bolstered its support for its interpretation that the duty of the General Assembly to protect public natural resources was within the scope of the ERA. *Id.* at 969.

112. *Id.* at 974.

113. *Id.*

114. *Id.*

115. *Id.* (citing PA. CONST. art. I, §§ 25, 27).

116. *Id.*

117. 161 A. 323 (Pa. 1932).

executing and may be enforced by the courts independently of any legislative action.”<sup>118</sup> The court recognized that local governments derive their power from the General Assembly, as expressly granted by the Pennsylvania Constitution, and the General Assembly has the power to alter or remove any powers granted through a statute.<sup>119</sup> However, the constitutional obligations placed on municipalities cannot be abrogated or dissolved through a statute.<sup>120</sup> Furthermore, the court reiterated that local ordinances preempted the adoption of Act 13, and that the underlying fundamental right of Pennsylvania’s citizens is to have a reasonable expectation of the use of their property, including quality of the environment where they choose to buy homes and raise their families.<sup>121</sup> The court concluded that “[t]he constitutional command respecting the environment necessarily restrains legislative power with respect to political subdivisions that have acted upon their article I, section 27 responsibilities.”<sup>122</sup>

The court further concluded that the General Assembly could not relieve political subdivisions from this constitutional responsibility, nor could it remove the necessary authority from the local governments.<sup>123</sup> Even the broad police powers did not encompass the power to command municipalities to ignore their constitutional duties under section 27, according to the court.<sup>124</sup> Similarly, under the section 3304 analysis, the court reiterated the General Assembly’s duty under both its police powers and powers as trustee of the public natural resources.<sup>125</sup> Proper exercise of the trustee power is measured by benefits to the citizens, rather than by “balance sheet profits.”<sup>126</sup> Therefore, the use of the trust for any purpose other than that necessary for preservation of the trust corpus was outside the scope of discretion and contrary to the duties to the beneficiaries.<sup>127</sup>

The court focused on two primary reasons for finding section 3304 unconstitutional. First, due to the vast natural variation in terrain and natural conditions, as well as existing land uses and zoning districts,

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118. *Robinson Twp.*, 83 A.3d at 974 (quoting *Hiltner*, 161 A. at 325). Although the court later dismissed the *Payne* test for implementing the ERA, it cited *Payne* for the proposition that the amendment was self-executing. *Id.*; see *Payne v. Kassab*, 312 A.2d 263, 272 (Pa. 1976).

119. *Robinson Twp.*, 83 A.3d at 977.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 978.

125. *Id.*

126. *Id.* (citing PA. LEGIS. J.—H., 1970 Leg., at 2273 (1970)).

127. *Id.*

establishing a single regulatory regime that permitted industrial uses as a matter of right was "incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life."<sup>128</sup> For the court, protection of environmental values must be tailored to local conditions and was a "quintessential local issue."<sup>129</sup> The provision "compel[led] exposure" of protected environmental and habitability concerns, and it unacceptably altered the expectations of communities and property owners.<sup>130</sup> Thus, the court found that Act 13 degraded the corpus of the trust by sanctioning a "direct and harmful degradation of the environmental quality of life."<sup>131</sup> The second line of reasoning focused on the disproportionate burden some communities would bear.<sup>132</sup> This disparate effect was "irreconcilable with the express command that that the trustee will manage the corpus" for the benefit of all the citizens.<sup>133</sup> Again citing to the lowered "environmental and habitability" concerns, the court reasoned that those areas with more natural, scenic, and esthetic value would be more heavily impacted by a uniform regulation.<sup>134</sup>

The court was not swayed by the "compelling" policy arguments proffered by the Commonwealth centered on economic growth, energy supply, and the current "balkanization" of legal regimes that thwart energy development.<sup>135</sup> Because economic and energy benefits are not the only considerations, the court maintained that the constitutional requirement set forth through the ERA could not allow such an "immediate, disruptive effect upon how Pennsylvanians live their lives."<sup>136</sup> The court found that use of the term "necessary" for a waiver of setbacks in section 3215(b) remained "malleable and unpredictable."<sup>137</sup> If an operator sought a waiver of the setbacks, there was no standard by which there was assurance of environmental protection, particularly considering there was no requirement the DEP look to the environmental statutes when rendering permit decisions.<sup>138</sup> Further, requiring the DEP to determine "necessary" conditions "invite[d] arbitrary decision making with a disparate impact on trust

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128. *Id.* at 979.

129. *Id.*

130. *Id.*

131. *Id.* at 980.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 980.

136. *Id.* at 981.

137. *Id.* at 982-83.

138. *Id.* at 983-84.



beneficiaries.”<sup>139</sup> Due to the lack of environmental standards or assurance that, even with a setback waiver, the ERA would be satisfied, the court held section 3215(d) unconstitutional.<sup>140</sup>

### I. Other Claims

#### 1. Article III, Section 32 of the Pennsylvania Constitution (Special Laws)

Under article III, section 32 of the Pennsylvania Constitution, the legislature cannot enact special laws.<sup>141</sup> The citizens asserted that sections 3218.1, 3304 through 3307, and Act 13 as a whole violated this provision.<sup>142</sup> The citizens vehemently appealed the lower court’s “blanket conclusion” that the General Assembly’s justification for Act 13 was adequate, while the Commonwealth asserted that it could articulate statewide standards for an industry and have the proper justification backing the Act.<sup>143</sup> According to the Commonwealth’s interpretation of article III, section 32, the provision prohibited “granting special privileges to one person, one company, or one county” but not from creating a class consisting of ‘one type of member,’” and therefore it was not a special law within the meaning on the constitution.<sup>144</sup> The court found the Commonwealth Court’s analysis deficient and vacated the decision with respect to these claims.<sup>145</sup> The

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139. *Id.* at 984.

140. *Id.* at 985.

141. *Id.*; see also PA. CONST. art. III, § 32(1)–(8).

142. *Robinson Twp.*, 83 A.3d at 985.

143. *Id.* at 986.

144. *Id.* at 987. Article III, section 32 of the Pennsylvania Constitution is entitled “Certain local and Special laws,” and mandates that the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:
2. Vacating roads, town plats, streets or alleys:
3. Locating or changing county seats, erecting new counties or changing county lines:
4. Erecting new townships or boroughs, changing township lines, borough limits or school districts:
5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:
6. Exempting property from taxation:
7. Regulating labor, trade, mining or manufacturing:
8. Creating corporations, or amending, renewing or extending the charters thereof . . . .

PA. CONST. art. III, § 32(1)–(8).

145. *Robinson Twp.*, 83 A.3d at 988–89.

court articulated that the proper inquiry was whether the effect of the provisions allowing preferential treatment to the oil and gas industry was reasonable, not arbitrary, and had a "fair and substantial relationship to the object" of the provision.<sup>146</sup>

2. Article I, Sections 1 and 10 and Fifth Amendment of the U.S. Constitution (Eminent Domain)

The citizens argued that section 3241 of Act 13 improperly allowed private operators to use the State's eminent domain power to store natural gas, and therefore violated eminent domain provisions of the Pennsylvania and U.S. Constitutions.<sup>147</sup> Dissatisfied with the Commonwealth Court's dismissal of the claims based on a failure to demonstrate that any of the citizens' property had been or was in imminent danger of an uncompensated taking,<sup>148</sup> the court remanded for analysis under the Declaratory Judgment Act for relief against "uncertainty and insecurity," rather than under the Eminent Domain Code, which the lower court erroneously used for its analysis.<sup>149</sup>

3. Separation-of-Powers Doctrine

In regard to section 3305(b), the citizens posited two rationales for why the section violated the separation of powers doctrine: 1) all zoning challenges implicated constitutional claims, and 2) administrative agencies had no authority to pass on constitutional issues.<sup>150</sup> The court was unimpressed by the precedent the citizens presented in support of this claim, reasoning that the administrative agencies are rightly created by the General Assembly and, as such, the Public Utility Commission had jurisdiction over disputes pursuant to section 3305(b).<sup>151</sup> Section 3305(a) provides the municipality the ability to request a written advisory opinion from the Public Utility Commission, which is not subject to appeal, to determine if an ordinance violates Act 13.<sup>152</sup> The citizens argued that it created a separation-of-powers concern, because it would "encourage legislative irresponsibility" by encouraging legislative bodies to rely on outside entities for guidance.<sup>153</sup>

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146. *Id.* at 988.

147. *Id.*

148. *Id.* at 989-91.

149. *Id.* at 990.

150. *Id.* at 993.

151. *Id.* at 993-95.

152. *Id.* at 995.

153. *Id.*

The court recognized that the Public Utility Commission's obligation under the section was different than other agencies responsible for advisory opinions;<sup>154</sup> however, the court ultimately concluded that section 3305 did not violate the separation-of-power doctrine.<sup>155</sup> To the court, there was not a tension between co-equal branches; rather, the tension was between the local legislative authority and the state executive branch.<sup>156</sup>

#### V. CONCURRENCE

In his concurrence, Justice Baer agreed with the result of finding that sections 3215(b)(4), 3215(d), 3303, and 3304 of Act 13 were unconstitutional.<sup>157</sup> Justice Baer, however, viewed the "better developed" and "narrower" argument as a matter of substantive due process: Act 13 had unconstitutionally "usurped local municipalities' duty to impose and enforce community planning, and the concomitant reliance by property owners, citizens, and the like on that community planning."<sup>158</sup> Justice Baer focused on individual property rights protected by article I, section 1 of the Pennsylvania Constitution, the Fifth and Fourteenth Amendments of the U.S. Constitution, and the jurisprudential doctrine of "*sic utere tup ut alienum non laefas*—so use your own property as not to injure your neighbors."<sup>159</sup> While recognizing that the legislature can surely amend a state statute, including the Municipalities Planning Code (MPC), Justice Baer called into question the ability of the legislature to devise a statewide scheme that sufficiently protected due process.<sup>160</sup> Justice Baer's rationale aligned with the Pennsylvania Commonwealth Court: "[B]y requiring municipalities to forego their established zoning restrictions[,] . . . the General Assembly forced [them] to 'violat[e] substantive due process'" because they cannot protect the interests of neighboring landowners.<sup>161</sup> While some landowners may not object to having oil and gas operations

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154. Other agencies responsible for advisory opinions include the State Ethics Commission, the Office of Open Records, and the Office of the Attorney General. *Id.* at 996.

155. *Id.* at 996–1007.

156. *Id.* The court went on to address the issue of severability, finding that further inquiry was needed as to the viability of the statute notwithstanding its holding on sections 3215(b)(4), 3215(d), 3303, and 3304. *Id.* at 1000.

157. *Id.* (Baer, J., concurring).

158. *Id.* at 1000–01.

159. *Id.*

160. *Id.* at 1006.

161. *Id.* at 1002–03 (second alteration in original) (quoting *Robinson Twp. v. Commonwealth*, 52 A.2d 463, 485 (Pa. Commw. 2012)).

on their property, the removal of a means of relief for neighbors or municipalities was the critical fault in Act 13, which explicitly permitted the oil and gas activities in residentially and agriculturally zoned areas.<sup>162</sup> "Even more disturbing," for Justice Baer, was section 3215(b)(4), mandating DEP to waive setback requirements, which were established for protecting water quality, without having a method for neighbors or municipalities to seek appeal or review of the granting of the waivers.<sup>163</sup> Justice Baer then cited to several precedential cases that stand for the proposition that the state may not alter or invalidate ordinances that are enacted and relied upon by the residents of a community, particularly in light of Pennsylvania's extreme diversity in people, geography, and industry.<sup>164</sup> For Justice Baer, it was inconceivable that an act could protect the constitutional rights of all the landowners with such diverse citizenry and geography.<sup>165</sup> The lack of a mechanism for appeal, objection, or remedy for individualized concerns of citizens and municipalities was "the epitome of arbitrary and discriminatory impact."<sup>166</sup>

## VI. DISSENTS

Justice Saylor and Justice Eakin each filed dissenting opinions that opined on what they deemed judicial legislating.<sup>167</sup> For the dissenters, municipalities were pure creatures of the General Assembly, but the majority "redefine[d] the role of municipalities relative to the sovereign."<sup>168</sup> According to the dissenters, the court had impeded the General Assembly's role to make "basic, rational policy choices—through the democratic process—that balance the various and potentially conflicting purposes of Act 13."<sup>169</sup> They took particular issue with the court's failure to account for the protections which Act 13 provided to neighboring landowners and the population as a whole; a

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162. *Id.*

163. *Id.* at 1005–06.

164. *Id.* at 1006 (citing *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Cohen v. Bd. of Appeals of Saddle Rock*, 795 N.E.2d 619, 624 (N.Y. 2003); *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1343 (Pa. 1982)).

165. *Id.*

166. *Id.* at 1007.

167. *Id.* at 1009 (Saylor, J., dissenting). Justice Eakin joined Justice Saylor's dissent and authored his own, which echoed the concerns addressed by Justice Saylor. *Id.* at 1014–16 (Eakin, J., dissenting).

168. *Id.* at 1010–11 (Saylor, J., dissenting).

169. *Id.* at 1014.

picture quite different than the "distortion of how Act 13 actually impacts zoning" as presented by the lead opinion.<sup>170</sup>

## VII. ANALYSIS

The sheer volume of the court's opinion would lead a reader to assume that no stone had gone unturned in the court's analysis of each of the many issues. The court was successful in painting a picture of absolute abhorrence at the creation of a statute that would so detrimentally affect the Commonwealth's environment and force local governments to violate the Pennsylvania Constitution; however, the real issues are much more direct and narrow. The outcome was correct, and provisions of Act 13 at issue were unconstitutional, but, as Justice Baer described in his concurrence, it was because those provisions violated due process. It is necessary to curb the broad sweep of the court's presumptions because of the potentially large implications of hindering the General Assembly's ability to regulate the Commonwealth. The court has, perhaps unintentionally, created a statewide Not In My Backyard (NIMBY) issue. As presented, future attempts of the State to create a coherent and more uniform oil and gas regime would nearly be out of the question. This Comment's analysis will address whether the court appropriately: 1) delegated the municipalities with the power to enforce the ERA by finding the amendment to be self-executing; 2) relied on textual and historical analyses; and 3) relied on environmental assumptions that created the underlying tension between Act 13 and the ERA. This Comment will then address why the court's shortcomings support the concurrence and the framing of the case as an issue of due process.

### A. *Relationship Between Municipalities and the Commonwealth.*

The court emphasized that all levels of government are equally bound by the ERA. This allocation of a large power runs contrary to the more widely accepted "Dillon's Rule," which casts local governments as creatures of state legislature, thereby in need of delegated or enumerated powers.<sup>171</sup> Nevertheless, during the mid-nineteenth century, local governments began to receive recognition in state constitutions in the form of authority to delegate power to the local

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170. *Id.* at 1011.

171. Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 221-22 (1983).

government.<sup>172</sup> States with environmental rights amendments tended to recognize a right to a healthy environment as the duty of both the state and local governments to uphold.<sup>173</sup> In the 1970s a shift occurred, and courts began finding that local governments had “implied authority to regulate environmental harms under their existing police powers.”<sup>174</sup> The Pennsylvania Commonwealth Court, in *Community College of Delaware County v. Fox*, expressed that “it seems clear that many state and local governmental agencies doubtless share [the] responsibility” of implementing the ERA.<sup>175</sup> The court recognized that local governments were generally bound by authority delegated by the State, but in the case of the environment, “[r]egardless of the degree of specificity,” that authority was implied under the police powers.<sup>176</sup> In terms of self-execution, whether or not an environmental rights provision is self-executing varies by state.<sup>177</sup> Although the court found solace in neither the self-executing rationale in *Gettysburg* nor the self-execution test offered in *Payne*,<sup>178</sup> scholars have repeatedly asserted that it is settled that Pennsylvania’s ERA is self-executing.<sup>179</sup> Some scholars argue that

172. *Id.* The home-rule movement, on the other hand, centers the constitution itself as the source of local government powers, and the home-rule charter grants power to the local government. *Id.* The Commonwealth Court and Justice Baer’s concurrence disagree, finding that the zoning by municipalities was implemented through the Municipalities Planning Code, a power given to the municipalities by the Commonwealth, and can be taken away by statute when constitutionally permissible. *See Robinson Twp.*, 83 A.3d at 1002 (Baer, J., concurring).

173. Michelle B. Mudd, A “Constant and Difficult Task”: Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment, 38 *ECOLOGY L.Q.* 1, 2–3 (2011).

174. *Id.* at 5. The dissent was particularly concerned with the complete redefinition of the role of municipalities to their sovereign. *Robinson Twp.*, 83 A.3d at 1011 (Saylor, J., dissenting).

175. 342 A.2d 468, 481 (1975); *see also* Mudd, *supra* note 173, at 10.

176. Mudd, *supra* note 173, at 14.

177. Michigan and Louisiana’s environmental protection provisions are self-executing through legislative enactment of the state’s public trust common law. Matthew T. Kirsch, Note, *Upholding the Public Trust in State Constitutions*, 46 *DUKE L.J.* 1169, 1177 (1997).

178. *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973); *Payne v. Kassab*, 312 A.2d 86, 86 (Pa. Commw. Ct. 1973).

179. Fernandez, *supra* note 110, at 375; Kirsch, *supra* note 177, at 1179. Many of the environmental statutes administered by the DEP specifically included a statement that they were intended to implement article I, section 27. THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 684–88 (Ken Gormley et al. eds., 2004). These statutes are administered by the DEP and the Department of Conservation and Natural Resources and specifically include a statement that they are intended to implement article I, section 27. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 *DICK. L. REV.* 693, 729 (1999) [hereinafter Dernbach, *Taking the Pennsylvania Constitution Seriously*].

self-execution “gives more respect to citizens’ decisions to constitutionalize a value or a principle,”<sup>180</sup> while others suggest that, unless explicit, self-execution is “more properly resolved in the legislature.”<sup>181</sup> Fernandez (cited by the Pennsylvania Supreme Court)<sup>182</sup> argues that courts should avoid using the self-execution when making decisions that “may be perceived as illegitimate.”<sup>183</sup> For Fernandez, environmental rights lack the “political maturity” required for judicial action, unless society has come to a consensus on environmental issues, including the acceptable amount of risk, otherwise courts are open to accusations of “elitism and judicial ‘legislating.’”<sup>184</sup> Another reason that Fernandez asserts that Commonwealth courts tread lightly in enforcing section 27 is the potential for conflict between established constitutional rights and the “negative right[s]” of the environmental provisions.<sup>185</sup> The right to a particular level of environmental health, which is the central point of tension in *Robinson Township*, could infringe on the rights of other landowners to develop their property.<sup>186</sup> Whereas John Dernbach argues that substantive enforcement is most appropriate when legislation and regulation is not protecting the public; up until now, courts have been falling short.<sup>187</sup>

In apparent agreement, the *Robinson* Court saw the *Payne* test as minimizing the call of section 27 by couching the amendment in much narrower terms than the court’s textual approach.<sup>188</sup> With that, the court did not further address the self-execution issue.<sup>189</sup> Instead, the

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180. Kirsch, *supra* note 177, at 1178. Notably, Kirsh asserts this proposition in response to Fernandez, who asserted that environmental protection provisions should not be treated as self-executing because of the vagueness of the provisions. *Id.* Citing the same vagueness, scholars Kirsh, Lynda Butler, and Oliver Pollard argue for self-execution, while Robert McLaren and Fernandez argue against presumption of self-execution. Compare Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 854–60 (1990), and Kirsch, *supra* note 177, at 1178, and Oliver A. Pollard, Note, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351, 380–82 (1986), with Fernandez, *supra* note 110, at 334, and Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 132–37 (1990).

181. Fernandez, *supra* note 110, at 382.

182. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 958 (Pa. 2013).

183. Fernandez, *supra* note 110, at 387.

184. *Id.* at 376–81.

185. *Id.* at 374.

186. *Id.*

187. Dernbach, *Taking the Pennsylvania Constitution Seriously*, *supra* note 179, at 729; accord Kury, *supra* note 26, at 129.

188. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 967 (Pa. 2013).

189. See *id.*

court spent multiple paragraphs explaining the need for a plain-meaning approach and avoiding prior decisional law that "ha[d] obscured the manifest intent" of the constitutional provision.<sup>190</sup> Taking into account both political perspectives on the issue,<sup>191</sup> *Robinson Township* was the perfect opportunity to overcome its fears. The political atmosphere surrounding fracking and oil and gas development was highly debated, and environmental activism was surging. On one hand, it is reasonable for a court to disregard a well-established test, particularly when a substantial and untested set of facts is present, as in this case.<sup>192</sup> On the other hand, the court skirted the fundamental issue of whether article I, section 27 was self-executing. The broad scope of the textual analysis had an overtly political quality, particularly because of the heavy reliance on the history of environmental degradation in the Commonwealth. As Fernandez discussed, whether this was warranted may depend on the societal consensus on the willingness to accept certain environmental risks rather than others.<sup>193</sup> The court, however, failed to address the assumption of environmental degradation, upon which the self-execution doctrine would rely if accepting either Fernandez or Dernbach's rationale for applying the self-execution doctrine.<sup>194</sup>

*B. Textual and Historical Analyses—Did the Court Give the Appropriate Weight to the Environmental Rights Amendment?*

The textual and historical analyses demonstrate how the court forcefully interpreted this amendment. The legislative history of the ERA illuminates the need to interpret the amendment with flexibility while focusing on the conservation of the environment.<sup>195</sup> The court here repeatedly hounded on the phrase, "conserve and maintain,"<sup>196</sup> a phrase that the court used to describe preservation and strict

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190. *Id.* at 946.

191. *Id.* at 922.

192. "The question of how Article I, Section 27 obligations restrain the exercise of police power by the government . . . has not presented itself for judicial resolution . . . ." *Id.* at 964.

193. Fernandez, *supra* note 110, at 380–81.

194. See *supra* notes 174–79 and accompanying text.

195. *Robinson Twp.*, 83 A.3d at 945–63.

196. PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall *conserve and maintain* them for the benefit of all the people." (emphasis added)).



environmental safeguards.<sup>197</sup> In drafting the amendment, however, the legislature specifically used “conserve and maintain,” rather than “preservation,” because of a concern that “preservation” would inhibit resource management, including logging, and the drafters wanted the ERA to remain adaptable over time.<sup>198</sup> The court agreed that the ERA is not intended to “call for a stagnant landscape; nor . . . for the derailment of economic or social development,” and that government actions, on balance, must reasonably account for environmental features.<sup>199</sup> However, it is reasonable to supplement the protective interpretation of “conserve and maintain” with the historical context of the amendment<sup>200</sup> and the unanimous vote<sup>201</sup> that lead the amendment to be in the declaration of rights, rather than as a separate, lesser amendment as seen in other states.<sup>202</sup> Although the amendment is within the Declaration of Rights, it is different and broader than other similar provisions.<sup>203</sup> Rather than a “negative right,” the second and third sentences create an affirmative trusteeship which, when taken as a whole, suggests that the government has a much larger role in implementing the ERA than other provisions in the Declaration of Rights.<sup>204</sup> This bolsters the argument for giving the amendments a strong and forceful interpretation.<sup>205</sup>

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197. *Robinson Twp.*, 83 A.3d at 958. The court did recognize the argument of not inhibiting growth of the state. *Id.* 960–64. The repetition and emphasis on “conserve and maintain,” coupled with the holding, however, connotes that environmental protection was first, while concerns regarding industry and development were second. *Id.* at 958.

198. Dernbach, *Examinations and Implications*, *supra* note 96, at 684–88.

199. *Robinson Twp.*, 83 A.3d at 953; *see also* Dernbach, *Taking the Pennsylvania Constitution Seriously*, *supra* note 179, at 695.

200. *Robinson Twp.*, 83 A.3d at *passim*.

201. Kury, *supra* note 26, at 123.

202. The amendment passed both houses of the legislature in just one session. Dernbach, *Taking the Pennsylvania Constitution Seriously*, *supra* note 179, at 702. *See generally* Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73 (2002) (detailing the environmental rights provision of each state in the union).

203. Dernbach, *Taking the Pennsylvania Constitution Seriously*, *supra* note 179, at 724.

204. *Id.*

205. In fact, many scholars feel that the ERA is underused and regularly downplayed by the courts. *Id.* at 729–30; Fernandez, *supra* note 110, at 334; Kury, *supra* note 26, at 187.

*C. Environmental Impacts of Horizontal Drilling—Did the Court Make the Appropriate Environmental Assumptions?*

Interlaced amongst its 160 pages of analysis, the court consistently asserted the need and right of local governments to enforce the ERA, and the prohibition of the General Assembly from violating citizens' right to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."<sup>206</sup> However, nowhere in the decision did it reference the actual environmental degradation imposed. There are, however, many references to usurping land owner expectations and existing zoning laws—from the court's standing analysis down to its constitutional scrutiny of each provision of Act 13.<sup>207</sup> The following analysis serves two purposes. First, it demonstrates a lack of societal consensus on the acceptable risks associated with fracking, and therefore fails to fully account for the self-executing finding, per Fernandez's test.<sup>208</sup> Second, it shows the court's oversight of the actual environmental harm purported to violate the ERA supported the concurrence's due process analysis.<sup>209</sup> As referenced at the outset of this Comment, fracking is a highly controversial method of oil and gas extraction.<sup>210</sup> A scientific consensus on the environment public health issues appears to be at large.<sup>211</sup> While there is a significant amount of information reporting methane and other water contamination issues stemming from fracking, there is an equal and opposite assertion that fracking can be done safely.<sup>212</sup> Opponents of fracking point to strong evidence that, from observations within the Commonwealth, fracking has resulted in severe water quality issues.<sup>213</sup>

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206. PA. CONST. art. I, § 27.

207. Robinson Twp. v. Commonwealth, 83 A.3d 901, 930–85 (Pa. 2013).

208. *Id.* at 958; Fernandez, *supra* note 110, at 352, 371.

209. Robinson Twp., 83 A.3d at 954; *id.* at 1001–09 (Baer, J., concurring).

210. See *supra* Part II.

211. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-732, OIL AND GAS: INFORMATION ON SHALE RESOURCES, DEVELOPMENT, AND ENVIRONMENTAL AND PUBLIC HEALTH RISKS 32 (2012), <http://www.gao.gov/assets/650/647791.pdf> (finding that the extent of the environmental and public health risks are unknown and depend on many factors); Zachary H. Bowen et al., *Assessment of Surface Water Chloride and Conductivity Trends in Areas of Unconventional Oil and Gas Development—Why Existing National Data Sets Cannot Tell Us What We Would Like to Know*, 51 WATER RESOURCES RES. 704, 704–15 (2015) (finding no widespread trends in surface water quality in areas of unconventional oil and gas development and commenting on the lack of national databases and adequate reporting processes); *Just How Safe Is 'Fracking' of Natural Gas?*, YALE ENV'T360: FORUM (Jun. 20, 2011), [http://e360.yale.edu/feature/forum\\_just\\_how\\_safe\\_is\\_fracking\\_of\\_natural\\_gas/2417/](http://e360.yale.edu/feature/forum_just_how_safe_is_fracking_of_natural_gas/2417/) (discussing a multitude of views on whether or not fracking is safe).

212. See *supra*, note 211; *infra* note 217

213. *Supra* note 211.

The primary concern is that methane leakage into well water causes drinking water contamination,<sup>214</sup> particularly because unconventional well operations are exempt from Safe Drinking Water Act protections.<sup>215</sup> Other concerns include air pollution, ground and surface water contamination, public health effects, community effects, and increased risk of industrial accidents.<sup>216</sup> On the other hand, proponents of fracking emphasize that fracking itself is not dangerous.<sup>217</sup> Rather it is incorrect procedure or operator error (primarily inadequate casing which allows leakage) that would cause some type of health or environmental issue.<sup>218</sup> In a study conducted by National Energy Technology Laboratory in Pittsburgh, experimenters injected tracers into the fracking fluid to monitor whether it would spread toward drinking water sources.<sup>219</sup> The tracing fluids remained approximately 5000 feet below drinking water sources, which are relatively shallow

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214. Stephen G. Osborn et al., *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing*, 108 PNAS 8172, 8172 (2011).

215. Safe Drinking Water Act § 1421(d), 42 U.S.C. § 300h(d) (2012); *Natural Gas Extraction -- Hydraulic Fracturing*, ENVTL. PROTECTION AGENCY, [http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells\\_hydroreg.cfm](http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydroreg.cfm) (last visited Oct. 10, 2016); see also U.S. ENVTL. PROT. AGENCY, EXEMPTION OF OIL AND GAS EXPLORATION AND PRODUCTION WASTES FROM FEDERAL HAZARDOUS WASTE REGULATIONS 10–11 (2002), [https://yosemite.epa.gov/oaf/eab\\_web\\_docket.nsf/Attachments%20By%20ParentFilingId/945EF425FA4A9B4F85257E2800480C65/\\$FILE/28%20-%20RCRA%20E%26P%20Exemption.pdf](https://yosemite.epa.gov/oaf/eab_web_docket.nsf/Attachments%20By%20ParentFilingId/945EF425FA4A9B4F85257E2800480C65/$FILE/28%20-%20RCRA%20E%26P%20Exemption.pdf).

216. John L. Adgate et al., *Potential Public Health Hazards, Exposures and Health Effects from Unconventional Natural Gas Development*, 48 ENVTL. SCI. TECH. 8307, 8307–20 (2014); see also Mitchel J. Small et al., *Risks and Risk Governance in Unconventional Shale Gas Development*, 48 ENVTL. SCI. TECH. 8289, 8289–97 (2014). See generally R. A. Field et al., *Air Quality Concerns of Unconventional Oil and Natural Gas Production*, 16 ENVTL. SCI.: PROCESSES IMPACTS 954 (2014).

217. In a study of fugitive gas migration in the Marcellus and Barnett shales, there were eight fugitive gas clusters resulting in water quality degradation: rather than being from the hydraulic fracturing process itself, four were due to leaks in cement, three from production casings, and one from underground well failure. Thomas H. Darrah et al., *Nobel Gases Identify the Mechanisms of Fugitive Gas Contamination in Drinking-Water Wells Overlying the Marcellus and Barnett Shales*, 111 PNAS 14076, 14080–81 (2014); see also Henry Fountain, *Well Leaks, Not Fracking, Are Linked to Fouled Water*, N.Y. TIMES (Sep. 15, 2014), <http://www.nytimes.com/2014/09/16/science/study-points-to-well-leaks-not-fracking-for-water-contamination.html>.

218. See Darrah, *supra* note 217, at 14080–81; Fountain, *supra* note 217.

219. R. HAMMACK ET AL., U.S. DEP'T OF ENERGY, AN EVALUATION OF FRACTURE GROWTH AND GAS/FLUID MIGRATION AS HORIZONTAL MARCELLUS SHALE GAS WELLS ARE HYDRAULICALLY FRACTURED IN GREENE COUNTY, PENNSYLVANIA E4 (2014), [https://www.netl.doe.gov/File%20Library/Research/onsite%20research/publications/NETL-TRS-3-2014-Greene-County-Site\\_20140915\\_1\\_1.pdf](https://www.netl.doe.gov/File%20Library/Research/onsite%20research/publications/NETL-TRS-3-2014-Greene-County-Site_20140915_1_1.pdf); see also *NETL Releases Hydraulic Fracturing Study*, ENERGY.GOV (Sep. 15, 2014), <http://energy.gov/fe/articles/netl-releases-hydraulic-fracturing-study>.

water sources.<sup>220</sup> The real, or best, answer to the environmental and human health impacts of fracking may come when EPA issues its large-scale study later this spring.<sup>221</sup> In the present case, each reference to the environmental degradation was couched in terms of zoning and property expectations or references to historical industry.<sup>222</sup> The court began its background discussion with a brief discussion of the Marcellus Shale and an overview of horizontal drilling.<sup>223</sup> There, the only reference to the environmental problem with horizontal drilling was detailing the quantity of water used for unconventional wells.<sup>224</sup> Discussion of the “remarkable . . . revolution . . . worked by this legislation upon the existing zoning regime in Pennsylvania,”<sup>225</sup> however, was repeated throughout the opinion, as was a recount of historical problems with the coal and logging industries.<sup>226</sup> The uncertainty of the extent of environmental degradation played into the court’s oversight when examining the issue.

This Comment is far from suggesting that fracking is safe at all times; however, the sweeping scope of the opinion also bears the overly broad implication that all fracking is unsafe under all circumstances. It is unlikely, in a state as large and diverse as Pennsylvania, that all municipalities and all landowners are against fracking in their communities or on their land (independent of whether they support Act 13’s zoning provisions). Further, a blanket ban on the legislation has the potential to further hinder future attempts of the Commonwealth to

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220. Hammack et al., *supra* note 219.

221. U.S. ENVTL. PROT. AGENCY, EPA/600/R-15/047A, ASSESSMENTS OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING FOR OIL AND GAS ON DRINKING WATER RESOURCES 23–24, [https://www.epa.gov/sites/production/files/2015-06/documents/hf\\_es\\_erd\\_jun2015.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/hf_es_erd_jun2015.pdf) (detailing the EPA’s multiyear study on the environmental and human health impact of hydraulic fracturing). Pursuant to President Obama’s Executive Order, issued on April 13, 2012, the Department of Energy (DOE), the Department of the Interior (DOI), and the Environmental Protection Agency (EPA) issued guidance outlining a multiagency effort to develop timely science and technology to help minimize the environmental impacts of unconventional oil and gas efforts while maximizing economic and national security benefits. Exec. Order No. 13,605, 77 Fed. Reg. 23,107, 23,107 (Apr. 13, 2012); U.S. DEPT OF ENERGY ET AL., FEDERAL MULTIAGENCY COLLABORATION ON UNCONVENTIONAL OIL AND GAS RESEARCH 17 (2014), [http://unconventional.energy.gov/pdf/Multiagency\\_UOG\\_Research\\_Strateg.pdf](http://unconventional.energy.gov/pdf/Multiagency_UOG_Research_Strateg.pdf). Projects passed in West Virginia, Illinois, Ohio, Montana, Texas, California, and Texas are designed to fill the knowledge gaps in horizontal drilling. See NATHAN RICHARDSON ET AL., RESOURCES FOR THE FUTURE, REPORT, THE STATE OF STATE SHALE GAS REGULATION 23 (2013), [http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-Rpt-StateofStateRegs\\_Report.pdf](http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-Rpt-StateofStateRegs_Report.pdf).

222. Robinson Twp. v. Commonwealth, 83 A.3d 901, 930–31 (Pa. 2013).

223. *Id.* at 914–15.

224. *Id.*

225. *Id.* at 971.

226. *Id.* at 960–61, 976, 998, 1012–13.

better regulate the industry. By intervening, the court was, perhaps inadvertently, supporting a large-scale NIMBY issue, where the General Assembly will face a large uphill battle to encourage, to any extent, energy development anywhere in the state. This runs contrary to the intent of the ERA to promote—and not derail—economic development.<sup>227</sup> The crux of the unconstitutionality of Act 13 was, as the concurrence recognized,<sup>228</sup> the lack of due process and the usurpation of private property expectations of the citizens, in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.<sup>229</sup> This is evident in the plurality's focus on zoning and citizens' expectations regarding property.<sup>230</sup> Justice Baer recognized that the simple answer is the age-old axiom, "*sic utere tuo ut alienum non laedas*—so use your own property as not to injure your neighbors."<sup>231</sup> Further, the constitutional impermissibility cited by the court could be remedied with the appropriate due process procedures. For example, the court found section 3215(b) (the setback waivers) unconstitutional because the setbacks were "malleable and unpredictable" and because there was no requirement that DEP account for the environmental statutes in determining the waivers and no right of appeal.<sup>232</sup> However, if the provision required such analysis and provided for a method of appeal, then it would easily satisfy the court's concerns and would not be *per se* unconstitutional. This demonstrates that the due process concerns were really the central problem of Act 13.<sup>233</sup>

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227. *Id.* at 979.

228. *Id.* at 1001–09 (Baer, J., concurring).

229. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); *id.* amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law.").

230. *Robinson Twp.*, 83 A.3d at 979–80.

231. *Id.* at 1001 (Baer, J., concurring).

232. *Id.* at 983 (majority opinion).

233. Ironically, there is a concurrent line of litigation that stems from the Public Utility Commission granting public utility status to the natural gas industry, allowing the industry to bypass local zoning ordinances and, in effect, do just what Act 13 sought to permit despite the court's holding. The Mariner East pipeline is one prominent example from the Commonwealth. *See, e.g.*, Amended Petition of Sunoco Pipeline, L.P. at 2, No. P-2014-2411966 (Pa. Pub. Util. Comm'n May 8, 2014), <http://www.puc.pa.gov/pcdocs/1286674.pdf>; Jamison Cocklin, *Lengthy Fight Shaping Up over Sunoco's Mariner East Pipeline*, NATURAL GAS INTELLIGENCE (Oct. 13, 2014), <http://www.naturalgasintel.com/articles/print/100037-lengthy-fight-shaping-up-over-sunocos-mariner-east-pipeline>; Linda Loyd, *Pa. Regulator: Sunoco Pipeline Project Has Public Utility Status*, PHILLY.COM (Oct. 4, 2014), [http://articles.philly.com/2014-10-04/business/54603978\\_1\\_sunoco-pipeline-public-utility-corporation-sunoco-logistics-partners](http://articles.philly.com/2014-10-04/business/54603978_1_sunoco-pipeline-public-utility-corporation-sunoco-logistics-partners); *Natural Gas Liquids (NGLs) Segment*, SUNOCO LOGISTICS, <http://www.sunocologistics.com/Customers/Business-Lines/Natural-Gas-Liquids-NGLs/NGL-Projects/208/> (last visited Oct. 10, 2016).

## VIII. CONCLUSION

While the political atmosphere currently surrounding fracking in Pennsylvania may have given the court the opportunity to broaden the scope of its holding, the court failed to examine baseline issues. Consequently, the future ability of the Commonwealth to regulate the oil and gas industry, or any activity that it had delegated to the municipalities, will likely be met with fierce and possibly insurmountable litigation.