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2015]

‘DID THE COURT DIG TOO DEEP?’:
AN ANALYSIS OF THE PENNSYLVANIA SUPREME COURT’S
DECISION IN *ROBINSON TWP., WASHINGTON COUNTY V.*
COMMONWEALTH OF PENNSYLVANIA, ET AL.

I. INTRODUCTION

The Pennsylvania legislature codified its citizens’ right to sustained, pure natural resources in 1971.¹ The Pennsylvania Supreme Court addressed this right in 2013 in *Robinson Twp., Washington County v. Commonwealth of Pennsylvania, et al.*² The Commonwealth boasts a long history of producing one of these protected pure natural resources, energy, dating back to the world’s first successful oil well drilling in 1859.³ More recently, Pennsylvania explored utilizing another source of energy other than oil: natural gas, which exists in pockets rather than sustainable flows, as originally thought.⁴

Drillers tapped a previously untouched source of natural gas, the Marcellus Shale Formation, in the 1930s, exposing the pocketed nature of natural gas, and capturing the attention of the entire industry.⁵ The Marcellus Shale Formation consists of black shale deposited nearly four hundred million years ago throughout the Appalachian basin, spreading from West Virginia to Eastern Ohio,

1. PA. CONST. art. I, § 27 (articulating Pennsylvania’s citizens’ right to public natural resources: clear air, pure water, and preservation of esthetic values of environment).

2. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 984 (Pa. 2013) (describing court’s address).

3. See PENNSYLVANIA DEP’T OF ENVTL. PROT., *Oil & Gas Well Drilling and Prod. in Pennsylvania* (March, 2011), available at <https://thompson.house.gov/sites/thompson.house.gov/files/PA%20DEP%20Oil%20and%20Gas%20Well%20Drilling%20and%20Production.pdf> (describing first successful commercial oil well drilling); see also John A. Harper, *The Marcellus Shale – An Old ‘New’ Gas Reservoir in Pennsylvania*, 38 PA. GEOLOGY, no.1, at 2, (2008), available at http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_006811.pdf (noting first natural gas well drilled in 1821 in Fredonia, N.Y.). Drilling companies targeted “Pennsylvania grade” crude oil in Pennsylvania by constructing oil wells in Western, Northern, and Central Pennsylvania, as well as in Eastern Ohio and upstate New York. *Marcellus Shale*, PA. DEP’T OF CONSERVATION & NATURAL RES., http://www.dcnr.state.pa.us/topogeo/econresource/oilandgas/marcellus/marcellus_fa/marcellus_shale/index.htm (last visited Jan. 3, 2015).

4. See *Marcellus Shale*, *supra* note 3 (explaining importance of Marcellus Shale to drillers).

5. See *Marcellus Shale*, *supra* note 3 (explaining Marcellus Shale Formation discovery in 1930s and importance to drillers). When tapped by creating fissures in the shale, the Marcellus Shale Formation provides flowing gas. *Id.*

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Western, Central, and Northern Pennsylvania, and upstate New York.⁶ Natural gas is trapped within the fissures and cracks of the slowly decomposing shale.⁷ Hydraulic fracturing (fracking) is a process where fluid and sand are pumped into the shale formation under extremely high pressure to create fissures in the shale, releasing natural gas.⁸

In the wake of the 1973 energy crisis, the United States Department of Energy funded the Eastern Gas Shales Project (EGSP) to determine shale's production potential in the Appalachian, Illinois, and Michigan region; the EGSP also strove to develop and implement new drilling and energy production technologies.⁹ During the EGSP, oil and gas companies drilled five wells throughout Pennsylvania, discovering potentially large gas reservoirs, and determined that enhanced fracking technology would provide a much-needed alternative energy source.¹⁰ Technology has improved drilling techniques in the Marcellus Shale Region, allowing drillers to efficiently access shale and recover natural gas in large quantities.¹¹ Due to the construction of more than 350,000 oil and gas

6. *Id.* (describing nature and location of Marcellus Shale).

7. See Chris Amico et al., *Shale Play: Natural Gas Drilling in Pennsylvania*, STATEIMPACT (2011), <http://stateimpact.npr.org/pennsylvania/drilling/> (noting natural gas locations). The depth of Marcellus Shale in Pennsylvania ranges from zero feet to nine thousand feet, and the thickness ranges from twenty feet to several-hundred feet. See *Marcellus Shale*, *supra* note 3.

8. See Amico, *supra* note 7 (describing process of fracking); see also WHAT IS FRACKING, <http://www.what-is-fracking.com> (last visited Dec. 19, 2014) (providing visual demonstration of fracking). Fracking existed in Pennsylvania as early as the 1960s. *Id.* Early on in the history of natural gas drilling, however, accessing the gas from the Marcellus Shale Formation proved to be a formidable obstacle for drillers, and therefore they largely ignored the Formation. See Harper, *supra* note 3.

9. See generally WHAT IS FRACKING, *supra* note 8 (explaining effects of energy crisis); see also ENERGY FROM SHALE, www.energyfromshale.org (last visited Jan. 24, 2015) (describing fracking techniques used in drilling Marcellus Shale); see also *Milestones: 1969-1976*, UNITED STATES DEP'T OF STATE OFFICE OF THE HISTORIAN (last modified Oct. 31, 2013), <https://history.state.gov/milestones/1969-1976/oil-embargo> (explaining effects and history of oil embargo); Harper, *supra* note 3 (providing history and purpose of Eastern Gas Shales Project); *Eastern Gas Shales Project*, PENNSYLVANIA DEP'T OF CONSERVATION & NATURAL RES., http://www.dcnr.state.pa.us/topogeo/econresource/oilandgas/marcellus/marcellus_egsp/index.htm (last visited March 13, 2015) (describing purpose of Eastern Gas Shales Project).

10. See *Eastern Gas Shales Project*, *supra* note 9 (describing scope and results of EGSP). Drillers were initially only interested in shale close to the surface, which was present in Western and North Central Pennsylvania. See Harper, *supra* note 3 at 4-5. Access to deeper shale became of heightened interest in the 2000s. *Id.*

11. See *id.* (identifying current fracking methods); see also *Marcellus Shale*, *supra* note 3 (explaining current fracking methods). Particularly, horizontal drilling allows drillers better and more efficient access to shale, and allows drillers to recover gas in larger quantities using twenty times the fluids that would otherwise be used. *Id.* See generally *The Pennsylvania Guide to Hydraulic Fracturing, or "Fracking"*,

Marcellus Shale wells later, petroleum and natural gas have displaced “Pennsylvania grade” crude oil from its former post as the main source of energy in the Commonwealth.¹² Fracking is steadily taking over a large portion of Pennsylvania’s energy production industry; in fact, 6,634 active wells are currently spread over thirty of the commonwealth’s sixty-seven counties.¹³

This Note examines the Pennsylvania Supreme Court’s decision in *Robinson Twp., Washington County v. Commonwealth of Pennsylvania, et al.*, which held multiple provisions of Act 13 unconstitutional.¹⁴ Act 13, an amendment to Title 58 of the Pennsylvania Oil and Gas Act, drastically altered the landscape of property owners’ energy production rights.¹⁵ This Note predicts the potential impact of the Pennsylvania Supreme Court decision on environmental and state constitutional jurisprudence in the Com-

STATEIMPACT, <http://stateimpact.npr.org/pennsylvania/tag/fracking/> (last visited May 3, 2015) (providing background and guide to understanding fracking). Reports indicate that more than sixty billion cubic feet per day was recovered by fracking in the United States in 2012. See Wendy Koch, *Fracking puts U.S. first in shale gas production*, USA TODAY (Oct. 23, 2013, 4:48 PM), <http://www.usatoday.com/story/news/nation/2013/10/23/fracking-shale-gas-us-global-leader/3170255/>.

12. See *Pennsylvania Guide to Hydraulic Fracturing, or “Fracking”*, *supra* note 10 (explaining transition from crude oil to petroleum and natural gas). While Pennsylvania was a leading producer of oil in the 1800s, the Commonwealth now “consumes much more natural gas than it produces.” *Id.* In 2009, Pennsylvania produced an estimated 3.6 million barrels of crude oil and 273 billion cubic feet of natural gas. *Id.* While fracking sites are located on hundreds of acres of land, crude oil sites usually encompass less than one hundred acres. See Jim Martin, *What’s the Difference? Natural Gas or Conventional Crude*, BEAVER COUNTY TIMES, Dec. 1, 2013, at A7. Additionally, while a fracking site uses hundreds or millions of gallons of water, a crude oil site uses hundreds of gallons of water. *Id.*

13. See Amico, *supra* note 7 (defining active wells as *producing* wells). A diverse state in terms of its geography and population, the 46,055 square-mile Pennsylvania spans 46,055 square-miles and has a population of 12.77 million people spread throughout its sixty-seven counties. See *State & County QuickFacts: Pennsylvania*, UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42000.html> (last visited March 13, 2015) (listing population and geography of Pennsylvania). Home to the Appalachian Mountain Region, over six major rivers, many layers of sandstone, shale, and coal, coastal plain, and multiple major plateaus, Pennsylvania’s topography is widely varied. See *id.* See also *Pennsylvania – Topography*, CITY DATA, <http://www.city-data.com/states/Pennsylvania-Topography.html> (last visited March 13, 2015) (describing wide-ranging topography of Pennsylvania).

14. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 985 (Pa. 2013) (stating Pennsylvania Supreme Court’s holding).

15. See *id.* at 913 (depicting Act 13’s wide effects on Pennsylvania’s natural resources and environmental rights).

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monwealth.¹⁶ Part II offers a factual summary of *Robinson Twp.*¹⁷ Part III provides a legal background of the jurisprudence and statutory framework that influenced the Court's decision.¹⁸ Part IV reviews the Pennsylvania Supreme Court's legal analysis in *Robinson Twp.*, with a particular focus on the Environmental Rights Amendment of the Pennsylvania Constitution.¹⁹ Part V explores the potential impact of the *Robinson Twp.* on future environmental jurisprudence.²⁰

II. FACTS

Less than a month after Pennsylvania Governor Tom Corbett signed Act 13 into law in March 2012, Petitioners filed for review of original jurisdiction, requesting that the Commonwealth Court declare Act 13 unconstitutional and that the Court issue an injunction to prohibit its implementation.²¹ Act 13, a major overhaul of the Pennsylvania Oil and Gas Act, aimed at advancing the development of Pennsylvania's oil and gas initiatives.²² In accomplishing these

16. For a narrative analysis of *Robinson Twp.*, see *infra* notes 90-206 and accompanying text. For a critical analysis of *Robinson Twp.*, see *infra* note 207-30 and accompanying text.

17. For a discussion of the relevant facts of *Robinson Twp.*, see *infra* notes 21-36 and accompanying text.

18. For a discussion of the relevant legal background information regarding Pennsylvania environmental jurisprudence and related cases, see *infra* notes 37-89 and accompanying text.

19. For a narrative analysis of the Pennsylvania Supreme Court's decision in *Robinson Twp.*, see *infra* notes 90-206 and accompanying text; see generally PA. CONST. art. I, § 27 (stating Environmental Rights Amendment).

20. For an analysis of the potential impact of the Pennsylvania Supreme Court's holding in *Robinson Twp.*, see *infra* notes 230-47 and accompanying text.

21. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 915 (Pa. 2013) (identifying Petitioners and stating timing and elements of petition). Petitioners, or 'citizens,' include seven Pennsylvanian municipalities: Robinson Township, Washington County, Pa.; Township of Nockamixon, Bucks County, Pa.; Township of South Fayette, Allegheny County, Pa.; Peters Township, Allegheny County, Pa.; Township of Cecil, Washington County, Pa.; Mount Pleasant Township, Washington County, Pa.; Borough of Yardley, Bucks County, Pa.; environmental association Delaware Riverkeeper Network; and several individuals: Supervisor of Robinson Township Brian Coppola, Councilman of Peters Township David M. Ball in both individual and official capacity, Delaware Riverkeeper Maya Van Rossum, and Mehernosh Khan, M.D. *Id.* at 901. Plaintiffs' full petition includes a broad request to declare Act 13 unconstitutional, that a permanent injunction be issued against the application of Act 13, and that Plaintiffs be awarded legal fees and costs. *Id.*

22. See Anna M. Clovis & Ross H. Pifer, *The Pennsylvania Oil & Gas Act: Summary of the Statutory Provisions 58 P.S. §§ 601.101-601.607*, THE AGRIC. LAW RES. AND REFERENCE CTR., PA. STATE UNIV. DICKINSON SCHOOL OF LAW (March 2009), available at https://pennstatelaw.psu.edu/_file/aglaw/SummaryOfPennsylvaniaOilAndGasAct.pdf (summarizing purpose of Act 13). Pennsylvania aimed to develop alternative(s) to crude oil energy. *Id.*

aims, however, it restructured zoning requirements, authorized drilling in all zoning districts, and altered prohibitions on the construction location of new wells.²³ Chapter 32 of Act 13 set forth limitations and allowances for drilling development and Chapter 33 described zoning ordinances and regulation of drilling operations.²⁴

Petitioners argued that “Act 13 violated the Pennsylvania Constitution . . . [because it] was unconstitutionally vague, and violated the separation of powers doctrine and the due process clause of the U.S. Constitution.”²⁵ Specifically, Petitioners alleged that Act 13 violated the following sections of the Pennsylvania Constitution: Article I, Section 1; Article I, Section 10; Article I, Section 27; Article III, Section 3; and Article III, Section 32.²⁶

In July 2012, four months after Petitioners filed suit, the Commonwealth Court denied the Commonwealth’s request for summary relief.²⁷ The Commonwealth Court, sitting *en banc*, held Act 13 unconstitutional in part, and enjoined the application of certain provisions of Chapters 32 and 33 of the Pennsylvania Constitution.²⁸ The effect of this injunction:

[W]as to prohibit the Department of Environmental Protection from granting waivers of mandatory setbacks from certain types of waters of the Commonwealth . . . [] and to permit local government to enforce existing zone ordinances, and adopt new ordinances, that diverge from the Act 13 legal regime, without concern for the legal or fi-

23. 58 PA. C.S. §§ 3303-3304, 3215 (West 2012). For a further discussion of Act 13 and its effects, see *infra* notes 152-06 and accompanying text.

24. See *Robinson Twp.*, 83 A.3d at 915 (describing Chapters 32 and 33 of Act 13); see also 58 PA. C.S. § 3202-03 (stating text of Act 13 Sections 3302 and 3303).

25. See *Robinson Twp.*, 83 A.3d at 915 (stating Plaintiffs’ original claims); see also U.S. CONST. amend. XIV, § 1.

26. *Robinson Twp.*, 83 A.3d at 916 (describing Petitioners’ request to declare Act 13 unconstitutional and to enact a permanent injunction prohibiting Act 13’s implementation); see also PA. CONST. art. III, § 32. In response to the petition, the Commonwealth filed preliminary objections and cross-applications for summary relief. *Robinson Twp.*, 83 A.3d at 916. At the request of the Public Utility Commission and the Department of Environmental Protection, this matter was expedited and set for argument as soon as possible in front of the Commonwealth Court *en banc*. *Id.*

27. *Robinson Twp.*, 83 A.3d at 916 (describing Commonwealth Court’s treatment of Commonwealth’s motion for summary relief). The Commonwealth Court sustained eight of the Commonwealth’s preliminary objections and overruled four with grants of summary relief. *Id.*

28. *Id.* (stating Commonwealth Court’s holding). The Commonwealth Court enjoined the application of Sections 3215(b)(4) and 3304 of Chapter 32 of the Pennsylvania Constitution. *Id.*

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nancial consequence that would otherwise attend non-compliance with Act 13.²⁹

The Commonwealth Court enjoined provisions of Act 13 that established waivers on the limitations of well drilling locations and provisions that allowed for additional development of oil and gas operations, specifically Sections 3215(b)(4) and 3304-3309.³⁰ The Commonwealth Court found Act 13 violated citizens' due process rights.³¹

In expedited, direct cross-appeals filed with the Pennsylvania Supreme Court, Petitioners and Defendants raised twelve unique issues.³² On the merits, Defendants challenged the Commonwealth

29. *Id.* at 930 (stating Pennsylvania Supreme Court's interpretation of effect of Commonwealth Court's holding).

30. *Id.* at 916 (stating Commonwealth Court's holding regarding Sections 3304 and 3215(b)(4)); *see also* 58 Pa. C.S. § 3304 (West 2012) (enacting additional regulations to promote the development of oil and gas operations); *see also* § 3215(b)(4) (stating the circumstances in which distance restrictions of well site preparation or drilling shall be waived). The Commonwealth Court rejected the following Petitioner claims: (1) provisions of Act 13 violate Article I, Section 27 of the Pennsylvania Constitution (the Environmental Rights Amendment); (2) "that Act 13 is a 'special law,' in violation of Article II, Section 32 of the Pennsylvania Constitution;" (3) Section 3241(a) violates Article I, Sections 1 and 10 of the Pennsylvania Constitution by allowing for a taking of property; (4) "Section 3305(a)-(b) delegates judicial and legislative powers to the Public Utility Commission, an executive agency, in violation of the separation of powers doctrine; and (5) that provisions of Act 13 are unconstitutionally vague." *Id.*

31. *See generally Robinson Twp.*, 83 A.3d at 931 (stating grounds for Commonwealth Court's findings). The Commonwealth Court determined Act 13, specifically Section 3304, violated citizens' "due process rights by requiring local governments to amend their existing zoning ordinances without regard for basic zoning principles and, thereby, failing to protect interests of property owners from harm and altering the character of neighborhoods." *Id.*; *see also Robinson Twp. v. Commonwealth*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012) (explaining Commonwealth Court's reasoning).

32. *Robinson Twp.*, 83 A.3d at 916 (stating parties' agreement to expedite petition); *see also Commonwealth Court Nullifies Two Key Provisions of Act 13*, BLANKROME (Aug. 2012), <http://www.blankrome.com/index.cfm?contentID=37&itemID=2872> (explaining implications of expedited petition). The parties agreed to expedite briefs and arguments in front of the Supreme Court; however, this left the Court shorthanded. *Id.* Justice Joan Orié Melvin was suspended from the Court on May 18, 2012, leaving the bench with six instead of seven justices. *See Lily Kuo, Pennsylvania Supreme Court Judge Charged with Corruption*, REUTERS (May 18, 2012, 4:42 PM), <http://www.reuters.com/article/2012/05/18/us-usa-pennsylvania-corruption-idUSBRE84H13J20120518> (explaining Pennsylvania Supreme Court was short one justice at time *Robinson Twp.* was heard). With Justice Orié Melvin's absence, the Supreme Court decided this case 4-2. *Robinson Twp.*, 83 A.3d at 901. Chairman Robert F. Powelson of the Public Utility Commission and then-Secretary Michael L. Krancer of the Department of Environmental Protection filed on behalf of the Commonwealth (Agencies' Brief as Appellants), separately from appellants Office of the Attorney General and then-Attorney General Linda L. Kelly (OAG's Brief as Appellant). *Id.* Plaintiffs responded to Commonwealth ap-

Court's finding that Sections 3215(b)(4) and 3304-3309 of Act 13 were unconstitutional, which waived limitations on well drilling locations and allowed for additional development of oil and gas operations.³³ Petitioners challenged the lower court's finding to sustain Defendants' objection that various provisions of Act 13 violated the Pennsylvania Constitution, which therefore declared Act 13 was unconstitutional in its totality.³⁴ The Supreme Court found that Sections 3215(b)(4), 3215(d), 3303, and 3304 violated the Environmental Rights Amendment.³⁵ In a 4-2 decision, the Supreme Court held the following Sections of Act 13 unconstitutional: 3303, 3304, 3215(b)(4), and 3215(d).³⁶

III. BACKGROUND

A. Pennsylvania Constitution: The Environmental Rights Amendment

The Environmental Rights Amendment of the Pennsylvania Constitution, unanimously approved in 1971, enumerated the Declaration of Rights to the people of the Commonwealth.³⁷ Article I Section 1 declares fundamental rights that are reserved by the people.³⁸ Article I, Section 27, the Environmental Rights Amendment,

peals in "Citizens' Brief as appellees" and "Citizens' Brief as cross-appellants." *Id.* The Supreme Court expedited arguments at the parties' request. *Id.*

33. *Robinson Twp.*, 83 A.3d at 916 (describing Defendant's challenge to Commonwealth Court's holding that Sections 3215(b)(4) and Sections 3304-3309 are unconstitutional); *see also* 58 PA. C.S. § 3215(b)(4), 3304-09 (West 2012) (stating text of Sections of the Act at issue). When the case reached the Pennsylvania Supreme Court, the Court first addressed questions of justiciability, particularly whether Petitioners Brian Coppola, David M. Ball, and the seven municipalities had standing. *Robinson Twp.*, 83 A.3d at 918. The Supreme Court affirmed the Commonwealth Court's decision, finding Petitioners Coppola, Ball, and the seven municipalities had standing, and dismissed Defendant's ripeness claim. *Id.* at 920. The Supreme Court further found Plaintiffs Maya van Rossum, the Delaware River Keeper Network, and Dr. Mehernosh Kohn had standing with respect to ripeness, reversing the decision of the Commonwealth Court. *Id.* at 922, 925. In addressing whether Petitioners presented a justiciable question, the Supreme Court affirmed the lower court's decision, holding that Petitioners' claims were justiciable. *Id.* at 930.

34. *Robinson Twp.*, 83 A.3d at 916 (discussing Plaintiffs' challenge to Commonwealth Court's decision). The decision was to sustain Defendants' objections to Plaintiffs' claim that Act 13 violated the following provisions: Article I, Section 27; Article II, Section 32; Article I, Section 10; separation of powers doctrine; and vagueness. *Id.*

35. *See id.* at 1000 (explaining court's holding).

36. *Id.* at 910 (stating court's holding). The Supreme Court held the following Sections of Act 13 unconstitutional as not severable: 3305, 3306, 3307, 3309, 3215(b), 3215(c), 3215(e). *Id.*

37. PA. CONST. art. I, § 27 (detailing Environmental Rights Amendment).

38. *Id.* (declaring citizens' protected rights under Pennsylvania Constitution).

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establishes the people's right to clean, pure, and preserved public natural resources, as well as the Commonwealth's responsibility to ensure the maintenance of these resources for years to come.³⁹ The opening paragraph of the Environmental Rights Amendment, Article I, Section 27, states:

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.⁴⁰ Pennsylvania's public natural resources are the common property of all people, including generations yet to come.⁴¹ As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.⁴²

Prior to *Robinson Twp.*, the claims examined by the Pennsylvania Supreme Court regarding the application of Section 27 of the Environmental Rights Amendment were either: (1) claims that implicated alleged "violations of constitutional rights," specifically, challenges to private or governmental development projects, or (2) claims that implicated alleged "violations of property rights," specifically, challenges to environmental quality laws.⁴³ These challenges established that constitutional rights are broadly applied to statutes and determined the Environmental Rights Amendment should not be narrowly applied.⁴⁴ Further, previous case law implicating the Environmental Rights Amendment has not required the Court to distinguish rights guaranteed under the first, second, or third clauses of the Amendment.⁴⁵

39. *Id.* (proclaiming declaration of rights). The text of Article I Section 1 reads: "Inherent rights of mankind. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and attracting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1.

40. PA. CONST. art. I, § 1 (stating Individual Rights Clause).

41. *Id.* (discussing citizens' rights).

42. *Id.* (stating Public Trust Doctrine).

43. *Robinson Twp.*, 83 A.3d at 964 (stating two categories of Section 27 challenges faced by Pennsylvania Supreme Court).

44. *Id.* (explaining application of Environmental Rights Amendment).

45. *Id.* (noting past courts' lack of distinguishing requirements under each clause of Environmental Rights Amendment). The failure to distinguish rights guaranteed by the clauses poses difficulty for future courts when deciding cases implicating section 27. *Id.* For further discussion of clauses 1-3 of Section 27, see *supra* note 27 and accompanying text.

B. Existing Jurisprudence Challenges to Private or Government Development Projects

In 1973, the Pennsylvania Supreme Court decided *Commonwealth v. National Gettysburg Battlefield Tower*,⁴⁶ a case in which the Commonwealth sought to enjoin Adams County from constructing an observation tower on private property in Cumberland Township located near the Gettysburg Battlefield.⁴⁷ The Commonwealth's challenge to the construction alleged that the tower would erode the natural beauty and environment of the historic battlegrounds.⁴⁸ Because the County lacked specific land use regulation legislation restricting the development, the Commonwealth was only able to seek relief under Article I, Section 27.⁴⁹ A divided Pennsylvania Supreme Court upheld the lower court's decision to deny the Commonwealth relief under Article I, Section 27, finding that the Environmental Rights Amendment was insufficient to regulate private property to protect the trust's values.⁵⁰ As the opinion failed to yield a majority rule, it lent minimal guidance for future courts in deciding how to apply Section 27.⁵¹

In *Payne v. Kassab*,⁵² a 1975 decision, the Pennsylvania Supreme Court again provided little guidance for future courts attempting to determine the proper applications of Section 27.⁵³ Residents of Wilkes-Barre sought to enjoin the Pennsylvania Department of Transportation's plan to widen a street at the expense of

46. 311 A.2d 588 (Pa. 1973).

47. *Robinson Twp.*, 83 A.3d at 964 (introducing claims in relevant prior case law); see also *National Gettysburg*, 311 A.2d at 590 (interpreting Environmental Rights Amendment). Gettysburg and Cumberland Township are located in Adams County, Pennsylvania. *Id.*

48. *Robinson Twp.*, 83 A.3d at 964 (stating claims in *National Gettysburg*).

49. *Id.* (stating outcome related to Commonwealth); see also *National Gettysburg*, 311 A.2d at 591 (stating that Commonwealth's suit is entirely built upon Article I section 27).

50. See *National Gettysburg*, 311 A.2d at 595 (concluding Section 27 was insufficient for Commonwealth to rely on in attempted regulation).

51. See *Robinson Twp.*, 83 A.3d at 960 (showing no rule developed). Three justices wrote that Section 27 was not self-executing, and therefore the Commonwealth could not seek relief absent legislation implementing the Amendment. *Id.* Therefore, those justices would have dismissed the case before reaching the merits. *Id.* Three justices would have affirmed the lower court's decision finding the Commonwealth failed to carry its burden of proof. *Id.* Two justices believed Section 27 was self-executing and would have reversed the lower court's decision on the merits. *Id.*

52. 312 A.2d 86 (Pa. Commw. Ct. 1973).

53. *Robinson Twp.*, 83 A.3d at 965 (introducing *Payne*); see also *Payne*, 312 A.2d at 86 (addressing Environmental Rights Amendment and duties of Commonwealth).

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one-half acre of a local park.⁵⁴ The residents alleged that the Commonwealth had violated its duty as a trustee of public natural resources under Section 27 by approving the project.⁵⁵ The Pennsylvania Supreme Court affirmed the Commonwealth Court's denial of the residents' relief and held that "*inter alia*, the residents had not met their burden of proof."⁵⁶ The Court asserted that the Commonwealth's role as trustee required it, via agency action, to prevent and avoid environmental harm.⁵⁷ The Supreme Court reasoned that when a reasonable, feasible alternative was not available, the Commonwealth had to allow land use where the environmental impact of the use was limited.⁵⁸

Arguably more important than the Pennsylvania Supreme Court's holding in *Payne* is the lower Commonwealth Court's articulation of a three-part test that it applied in determining whether the residents had met their burden of proof under Section 27.⁵⁹ In *Payne*, this three-part test was developed in the context of a clause 2 and 3 challenge of Section 27; however, future Commonwealth Court jurisprudence applied the test universally to environmental rights claims.⁶⁰ The test, as applied in *Payne*, stated that for a party to gain relief in a Section 27 challenge, the Court must consider the following three factors: (1) compliance with relevant statutes and regulations related to the Commonwealth's duty to protect public natural resources; (2) demonstration of a "reasonable effort to reduce the environmental incursion to a minimum"; and (3) an "abuse of discretion" resulting from the Act and the environmental harm that "clearly outweigh[s] the benefits to be derived."⁶¹

54. *Robinson Twp.*, 83 A.3d at 965 (stating facts of *Payne*); *see also Payne*, 312 A.2d at 97 (stating holding). The Department of Transportation's project also included removing several trees and eliminating a pedestrian sidewalk. *Robinson Twp.*, 83 A.3d at 965.

55. *Robinson Twp.*, 83 A.3d at 965 (stating claims in *Payne*).

56. *Id.* (stating Court's holding). The Court concluded rather than "merely asserting a common right to a protected value under the trusteeship of the state," the challengers must balance the purpose of action in accordance with legislation (such as the project in question and the approved Act 120 of 1970), in the interest of conserving natural resources. *Id.*

57. *Id.* (applying Public Trust Doctrine to facts).

58. *Id.* (explaining application of public trust doctrine used to determine holding).

59. *Id.* at 966 (introducing *Payne* three-part test).

60. *Robinson Twp.*, 83 A.3d at 966 (explaining courts' application of *Payne* test).

61. *Id.* (stating *Payne* three-part test).

C. Existing Jurisprudence on Challenges that Implicate Weighing Article I Rights

Other previous challenges the Supreme Court addressed included claims challenging environmental legislation enacted to implement the protective duties of Section 27.⁶² In 1980, the Court decided a dispute between property owner lessees and the former Department of Resources, *National Wood Preservers, Inc. v. Commonwealth Dep't of Env'tl. Res.*⁶³ The property owners leased land to a company who used it for business activities involving chemicals preserving wood.⁶⁴ The business had dumped liquid containing toxic chemicals into a well that drained into groundwater and flowed into a stream, and the Department ordered the business to cease this activity, citing the Clean Streams Law.⁶⁵ The Pennsylvania Supreme Court upheld the Department's orders under Section 27 of the Pennsylvania Constitution, and rejected the business' argument that Section 27 was an overbroad exercise of police power, instead holding that balancing the interests of the community with the state exercise of its police power required corrective orders relating to ownership or occupancy.⁶⁶

In a different challenge, *United Artists' Theater Circuit, Inc. v. City of Philadelphia*,⁶⁷ the Supreme Court rejected a theater owner's Article I, Section 27 challenge that alleged the historic landmark designation of the interior and exterior of the Boyd Theater in Philadelphia violated the United States Constitution's Takings Clause.⁶⁸ In its decision, the Court determined that designating the interior of the theater as a historic landmark exceeded the scope of the City's statutory authority, and the City's action did not constitute a taking under either the Pennsylvania or United States Constitutions.⁶⁹ The Court, however, stated that the Pennsylvania Constitution did not guarantee more expansive rights than its fed-

62. *Id.* at 967-68 (addressing other past challenges faced by Supreme Court in environmental rights jurisprudence); *see also* PA. CONST. art I, § 27.

63. *National Wood Preservers, Inc. v. Commonwealth Dep't of Env'tl. Res.*, 414 A.2d 37 (Pa. 1980) (discussing court's address).

64. *Robinson Twp.*, 83 A.3d at 967-68 (describing key facts of *Nat'l Wood Preservers*).

65. *Robinson Twp.*, 83 A.3d at 967-68 (describing Court's reasoning in *Nat'l Wood Preservers*); *see also* 35 P.S.C.A. § 69.1.

66. *Robinson Twp.*, 83 A.3d at 968 (stating Court's holding).

67. 635 A.2d 612 (Pa. 1990).

68. *Robinson Twp.*, 83 A.3d at 968 (explaining facts of *United Artists*); *see also* U.S. CONST. amend. V.; *United Artists*, 635 A.2d 612 (Pa. 1990) (stating court's holding).

69. *See Robinson Twp.*, 83 A.3d at 968 (explaining *United Artists* court's reasoning).

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eral counterpart, and Section 27 “reflects a state policy encouraging the preservation of historic and aesthetic resources.”⁷⁰ In cases such as *United Artists* in which private interests challenge legislation that was intended to protect the rights described in the Environmental Rights Amendment, the Court has generally determined Section 27 outweighs private interests, largely relying on its requirement that the Commonwealth act to protect public natural resources in Pennsylvania.⁷¹

D. Act 13 and the Pennsylvania Oil and Gas Act

In 1984, Pennsylvania passed Title 58, the Oil and Gas Act, which established regulations for natural gas wells and drilling in the Commonwealth.⁷² The Oil and Gas Act aimed to promote the safe production and development of natural gas resources, to protect individuals and facilities in the oil and gas industry, to protect the people and property rights of those living in areas affected by oil and gas production, and to protect Pennsylvania’s public natural resources as prescribed by Article I Section 27 of the Pennsylvania Constitution.⁷³ Act 13 amended the Oil and Gas Act by creating additional regulations for well permits, well location restrictions, water supplies, well requirements, and disclosure of fracking chemicals, among other issues.⁷⁴ Specifically, Act 13 amended the following chapters of Title 58: Chapters 23, 25, and 27; and created the following chapters: Chapters 32, 33, and 35.⁷⁵

70. *Id.* at 968-69 (quoting *United Artist’s* description Pennsylvania Constitution Section 27).

71. *Id.* at 969 (explaining trend in court’s decisions regarding challenges to General Assembly’s police power).

72. *See Oil & Gas Well Drilling Prod. In Pennsylvania*, *supra* note 3 (summarizing Oil and Gas Act of 1984); *see also* 58 PA. C.S. § 601.101 *et. seq* (stating applicability of Pennsylvania Oil and Gas Act).

73. *See* 58 PA. C.S. § 601.102 (explaining purposes of Oil and Gas Act); *see also* Clovis, *et. al*, *supra* note 21 (summarizing Oil and Gas Act). The DEP’s Oil and Gas Management Program works in conjunction with the Oil and Gas Act to develop and enforce regulations supporting the Oil and Gas Act’s aims regarding exploration, development, management, and disposal of natural gas wells. *See Oil and Gas Well Drilling and Prod. in Pennsylvania*, *supra* notes 3, 72.

74. *See* Pa. S.B. 1359 (2013-2014) (describing Act 13’s effect on Oil and Gas Act).

75. *See* Pa. H.B. 1950 (2011-2012); *see also* *Act 13 of 2012*, PENNSYLVANIA DEP’T OF ENVTL. PROT., http://www.portal.state.pa.us/portal/server.pt/community/act_13/20789 (last visited March 15, 2015) (explaining provisions of Act 13); *see also* *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *see also* *Commonwealth Court Nullifies Two Key Provisions of Act 13*, *supra* note 31.

Act 13 was a major overhaul of Title 58, the Oil and Gas Act, of the Pennsylvania Consolidated Statutes.⁷⁶ The declared purposes of Title 58 were: (1) “Permit optimal development of oil and gas resources” in the Commonwealth that is consistent with the “protection of the health, safety, environment and property of Pennsylvania citizens”; (2) Protect the safety of employees employed in coal mining, exploration, development, storage, and production of natural gas or oil; (3) “Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs”; and (4) “Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.”⁷⁷ Act 13 was introduced in November 2011, and underwent extensive debate and alteration before Governor Corbett, signed the Bill into law on February 14, 2012.⁷⁸

Act 13 targets provisions within Chapters 33 and 32 of Title 58—Sections 3303 through 3309—by restructuring ordinances relating to oil and gas operations.⁷⁹ For example, Section 3303 states that the intent of Act 13 “is to preempt and supersede local regulation of oil and gas operations regulated by the [statewide] environmental acts, as provided.”⁸⁰ Section 3304 imparts requirements on political subdivisions aiming to ensure uniformity among local ordinances regarding maintenance and development of oil and gas resources.⁸¹ Section 3304 imposes revolutionary changes upon existing Pennsylvania zoning, particularly in residential areas.⁸² For example, Section 3304 requires local government to authorize oil

76. See *Robinson Twp.*, 83 A.3d at 969 (describing effect of Act 13 on Pennsylvania Oil and Gas Act); see also 58 PA. C.S. § 3202 (stating text of Act 13 Section 3302).

77. 58 PA. C.S. § 3202 (stating ‘Declaration of purpose’ of Oil and Gas Act); see also *Robinson Twp.*, 83 A.3d at 969.

78. *Id.* (explaining introduction of House Bill 1950). The House adopted the Bill in November 2011 by a vote of 107 to 76. *Id.* The Senate amended the bill in December 2011 by a vote of 28 to 22. *Id.* The House did not accept the amendments, so the Bill was sent to a conference committee in February 2012. *Id.* After the conference committee adopted the Bill, it was sent to both houses. *Id.* The Senate adopted the Bill in February 2012 by a vote of 101 to 90 and the House adopted it later that month, also by a vote of 101 to 90. *Id.*

79. 58 PA. C.S. § 3303-3309.

80. *Robinson Twp.*, 83 A.3d at 970 (quoting Act 13); see also 58 PA. C.S. § 3303 (stating text of Act 13 Section 3303).

81. 58 PA. C.S. § 3304; see also *Robinson Twp.*, 83 A.3d at 970 (explaining effects of Section 3304 on local government activity).

82. *Robinson Twp.*, 83 A.3d at 970 (describing effects of Section 3304).

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and gas operations in all zoning districts and authorize the operation of natural gas processing plants in industrial districts.⁸³

Through Section 3215, Act 13 dictates prohibitions and allowances of oil and gas well locations implicating “sensitive water sources.”⁸⁴ Additionally, when oil and gas well operators submit a plan for well site construction, drilling, and operation, Section 3215(b)(4) grants the operators automatic waivers that allow them to avoid otherwise applicable location restrictions.⁸⁵ Under Section 3215(d), local municipalities may submit written comments to the Department of Environmental Protection (DEP) detailing local conditions and existing circumstances for DEP evaluation; however, the DEP is not required to act upon these comments.⁸⁶

83. *See id.* at 971 (identifying effects of Section 3304); *see also* 58 PA. C.S. § 3304 (stating text of Act 13 Section 3304). Section 3304 also authorizes conditional use of the operation of natural gas processing plants in agricultural districts. *Robinson Twp.*, 83 A.3d at 971. Chapter 33 Sections 3305 through 3309 create an “enforcement mechanism to facilitate” the implementation of legislation and the provisions set out by Section 3304. *Id.* at 972. Section 3305, for example, authorizes the Public Utility Commission (PUC) to relay advisory opinions to municipalities regarding their compliance with local ordinances and Act 13, and authorizes the PUC to issue mandates requiring municipalities’ compliance. *See id.* While advisory opinions are not appealable, the Commission’s orders are subject to de novo review by the Commonwealth Court. *Id.* Section 3306 “authorizes civil action in the Commonwealth Court to enjoin the enforcement of a local ordinance” that is allegedly contrary to Act 13 Chapters 32 and 33. *Id.* Through Section 3307, the Act created strict financial penalties for local governments whose newly-enacted legislation fails to comply with its provisions. *Id.* Possible penalties include shifting court costs to the local government for “willful or reckless disregard of Act 13.” *Id.* Section 3308 states a local government may be ineligible for unconventional gas well fees if a court or the Public Utility Commission determines the local government violated Act 13. *Id.* Additionally, Section 3309 creates a 120 day grace period after the effective date of Act 13 for local governments to bring their ordinances and land-use planning schemes in compliance with the Act. *Id.*

84. *See Robinson Twp.*, 83 A.3d at 972 (explaining permissible oil and gas well locations enumerated in Section 3215 with respect to sensitive water resources). The court cited the United States Geological Survey to determine that sensitive water sources included blue lined streams, wetlands greater than one acre, and any “spring or body of water as identified on the most current” topographic map according to the United States Geological Survey. *Id.*

85. *See id.* at 973 (explaining extent of oil and gas operators’ entitlements under Section 3215(b)); *see also* 58 PA. C.S. § 3215(b) (stating text of Act 13 Section 3215(b)). Additionally, the Pennsylvania Department of Environmental Protection (DEP) enjoys broad authority to grant waivers to circumvent gas well restrictions under Section 3215(b). *Robinson Twp.*, 83 A.3d at 973. If a drilling waiver is appealed, the DEP, rather than the well operator, has the burden of proving the conditions set forth in the waiver were necessary to protect against probable harm impacting the natural resources as a result of the drilling. *Id.*

86. *Robinson Twp.*, 83 A.3d at 973 (describing lack of required communication between Commonwealth agency and municipalities); *see also* 58 PA. C.S. § 3215(d) (stating text of Act 13 Section 3215(d)). Additionally, municipalities do not have the right to appeal the DEP’s determination of waiver. *Id.*

E. Substantive Due Process

Under the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment, substantive due process prohibits states from intruding upon or depriving any persons of life, liberty, or property without due process of law.⁸⁷ State intrusions into these rights must be fair, reasonable, and for the purpose of advancing a legitimate government interest.⁸⁸ During the initial proceeding, the Commonwealth Court found Act 13 an unconstitutional violation of due process.⁸⁹

IV. NARRATIVE ANALYSIS

Prior to *Robinson Twp.*, the Pennsylvania Supreme Court had not encountered the opportunity to examine the original text and meaning of Article I Section 27 of the Pennsylvania Constitution.⁹⁰ When the case reached the Pennsylvania Supreme Court, it examined the constitutionality of central provisions Act 13 with respect to the Commonwealth's duty as trustee of Pennsylvania's public natural resources.⁹¹ First, the court analyzed Article I, Section 27 of the Pennsylvania Constitution, the Environmental Rights Amendment, which states:

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 people,

87. U.S. CONST. amend. V.; U.S. CONST. amend. XIV. For further discussion of substantive due process see *infra* note 199 and accompanying text; see generally *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (describing why due process clause encompasses substantive due process).

88. See *Lewis*, 523 U.S. 833 (explaining interplay between due process clause and substantive due process); see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (holding that municipality's zoning ordinance did not violate realty company's substantive due process rights under Fourteenth Amendment); see generally Ira Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979) (expanding on substantive due process and intricacies of Fourteenth Amendment).

89. *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 484-85 (Pa.Comm. Ct. 2012) (describing Commonwealth Court's reasoning). Affirmed in part and reversed in part. *Robinson Twp.*, 83 A.3d at 901, 984.

90. See *Robinson Twp.*, 83 A.3d at 964 (discussing Supreme Court's environmental jurisprudence).

91. See *id.* at 914 (stating Court's findings regarding Act 13 and Commonwealth's duty as trustee). The court focused on Act 13 Sections 3215(b)(4), 3215(d), 3303, and 3304, and depleted the Commonwealth's duty as trustee. *Id.* at 930. The Pennsylvania Environmental Rights Amendment prescribed the Commonwealth's duty to act as protector of rights under the Public Trust Doctrine. *Id.* at 956.

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including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.⁹²

The court next turned to analyzing four key provisions of Act 13 with respect to the Environmental Rights Amendment.⁹³ In particular, it will focused on Sections 3303, 3304, 3215(b), and 3215(d).⁹⁴ Finally, Justice Baer's concurring opinion veered from the majority's finding Act 13 unconstitutional using the Environmental Rights Amendment as its basis, and instead he relied on a substantive due process analysis.⁹⁵ The Supreme Court declared:

At its core, this dispute centers upon an asserted vindication of citizens' rights to quality of life on their properties and in their hometowns, insofar as Act 13 threatens degradation of air and water, and of natural, scenic, and esthetic values of the environment, with attendant effects on health, safety, and the owners' continued enjoyment of their private property.⁹⁶

When the case reached the Pennsylvania Supreme Court, Defendants challenged the lower court's decision that Sections 3215(b)(4) and 3304-3309 of Act 13, waiving limitations on well drilling locations and allowing for additional development of oil and gas operations, were unconstitutional.⁹⁷ Petitioners challenged

92. See PA. CONST. art. I, § 27. For further discussion of the Environmental Rights Amendment to the Pennsylvania Constitution, see *supra* note 37 and accompanying text.

93. See PA CONST. art. I, § 27 (stating Environmental Rights Amendment); see also *Robinson Twp.*, 83 A.3d at 974 (expanding Environmental Rights Amendment analysis); see also 58 PA. C.S. §§ 3303, 3304, 3215(b)(4), 3215(d) (stating text of applicable Act 13 provisions). For discussion of the court's analysis of Act 13, see *infra* notes 108-14 and accompanying text.

94. See 58 PA. C.S. §§ 3303, 3304, 3215(b)(4), 3215(d) (stating text of relevant provisions of Act 13). For a discussion of Section 3303, see *infra* note 134 and accompanying text. For discussion of Section 3304, see *infra* note 144 and accompanying text. For a discussion of Section 3215(b)(4), see *supra* note 157 and accompanying text. For discussion of Section 3215(d), see *infra* note 169 and accompanying text.

95. See *Robinson Twp.*, 83 A.3d at 55-273 (explaining court's analysis). The Pennsylvania Supreme Court reviewed the lower court's decision de novo. *Id.* at 943. For discussion of severability, the justices' concurrences, and justices' dissents, see *supra* note 33. The Supreme Court heard Petitioners' claims regarding the following provisions of Act 13: 3303, 3304, 3215(b)(4), 3215(d), 3305-3309. *Robinson Twp.*, 83 A.3d at 969.

96. *Robinson Twp.*, 83 A.3d at 942 (describing core issue).

97. See *id.* (describing Defendant's challenge to Commonwealth Court's holding that Sections 3215(b)(4) and Sections 3304-3309 are unconstitutional); see also 58 PA. C.S. § 3215(b)(4) (stating text of Act 13 Section 3215(b)(4)); see also 58 PA.

the lower court's decision to sustain Defendants' objection to Plaintiffs' claim that various provisions of Act 13 violated the Pennsylvania Constitution, rendering the entire Act unconstitutional.⁹⁸ The Pennsylvania Supreme Court found Sections 3215(b)(4), 3215(d), 3303, and 3304 violated the Environmental Rights Amendment.⁹⁹ In a 4-2 plurality decision, it held the following Sections of Act 13 unconstitutional: 3303, 3304, 3215(b)(4), and 3215(d).¹⁰⁰ Further, the following Sections of Act 13 were held unconstitutional and not severable: 3305, 3306, 3307, 3309, 3215(b), 3215(c), 3215(e).¹⁰¹ This Note focuses on the Pennsylvania Supreme Court's analysis of the Environmental Rights Amendment, and its decision with respect to Sections 3303, 3304, 3215(b)(4), 3215(d) of Act 13.¹⁰²

A. Addressing Past Environmental Jurisprudence

The Supreme Court addressed the three-part *Payne* test to determine whether it provided an appropriate basis for analyzing Act 13; however, it noted at least three substantial difficulties in applying the test to the environmental rights jurisprudence implicated in *Robinson Twp.*¹⁰³ According to the Court, the *Payne* test too nar-

C.S. §§ 3304-3309 (stating text of Act 13 Sections 3304-3309). When the case reached the Pennsylvania Supreme Court, it first addressed questions of justiciability, particularly whether Petitioners Brian Coppola, David M. Ball, and the seven municipalities had standing. *Robinson Twp.*, 83 A.3d at 920. The Pennsylvania Supreme Court affirmed the Commonwealth Court's decision, finding Petitioners Coppola, Ball, and the seven municipalities had standing and dismissed Defendant's ripeness claim. *See id.* at 922, 925. The court further found that Plaintiffs Maya van Rossum, the Delaware River Keeper Network, and Dr. Mehernosh Kohn had standing with respect to ripeness in this suit, reversing the Commonwealth Court's decision. *See id.* at 930. In addressing whether Petitioners presented a justiciable question, the Pennsylvania Supreme Court affirmed the lower court's decision, holding that Petitioners' claims were justiciable. *Id.*; *see also* 58 PA. C.S. § 3215(b)(4); 58 PA. C.S. §§ 3304-3309.

98. *Robinson Twp.*, 83 A.3d at 930 (explaining Plaintiffs challenge to Commonwealth Court's decision to sustain Defendant's objections claimed the following provisions were violated by Act 13: Article I, Section 27; Article II, Section 32; Article I, Section 10; separation of powers doctrine; and vagueness).

99. *See Robinson Twp.*, 83 A.3d at 1000 (explaining court's holding). For further discussion of Sections 3303 through 3309 and Section 3215 of Act 13, *see infra* 114 and 124 and accompanying text.

100. *Robinson Twp.*, 83 A.3d at 910 (stating court's holding).

101. *See id.* (stating court's holding).

102. *See id.* at 985 (elaborating on court's holding of non-severable provisions). While Petitioners raised several secondary claims, including claims Act 13 violated the prohibition against enactment of special laws, claims Act 13 violated the Takings Clause of the Fifth Amendment, and claims Act 13 violated the separation of powers doctrine. These issues will not be addressed in this piece. *See id.* at 986, 989, 991.

103. *See id.* (identifying difficulties with applying the *Payne* test).

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rowly construed the Commonwealth's obligations under Section 27; the actual text of the first clause of Section 27 is much more open-ended than described in *Payne*.¹⁰⁴ Second, "the test assumes the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action."¹⁰⁵ Lastly, *Payne* minimized the reach of the executive and judicial branch's power and prescribes avenues for them to sidestep legislative control to carry out their duties.¹⁰⁶ With this analysis in mind, the Pennsylvania Supreme Court determined that the *Payne* test was too narrow, and instead turned to the Environmental Rights Amendment of the Pennsylvania Constitution to analyze the constitutionality of Act 13.¹⁰⁷

While the Pennsylvania Supreme Court recognized the four aforementioned cases provided substantive and controlling guidance in some cases of environmental rights jurisprudence, it concluded they were not controlling over the Appellant's claims in *Robinson Twp.*¹⁰⁸ The court noted, contrary to the Environmental Rights Amendment drafters' expectations, environmental jurisprudence had not developed in the same way as political rights jurisprudence.¹⁰⁹ The court stated that lack of environmental jurisprudence, however, did not release it from an obligation to defend its citizen's rights, and fulfill its Section 27 obligations.¹¹⁰

B. Identifying Commonwealth's Duty to its Citizens

The court characterized the citizens' claims as primarily implicating "the Commonwealth's duties as trustee under the Environmental Rights Amendment," thereby activating the Public Trust Doctrine.¹¹¹ Petitioners challenged the Commonwealth Court's finding that the General Assembly's exercise of police power was constitutional under the individual citizens' guarantees established

104. *See id.* at 967 (identifying tendency of too narrowly construing Commonwealth's obligations under Section 27).

105. *Robinson Twp.*, 83 A.3d at 967 (identifying limits of judicial relief).

106. *See id.* (explaining judicial and executive branch's ability to avoid executive control).

107. *See id.* (explaining court's reasoning for not applying *Payne* test).

108. *See id.* at 969 (discussing past environmental jurisprudence).

109. *See id.* (recounting evolution of environmental jurisprudence, or lack thereof).

110. *See Robinson Twp.*, 83 A.3d at 969 (identifying court's responsibility in adjudicating claim).

111. *See id.* at 974 (framing Petitioners' challenges as implicating Article I Clause 1 of Pennsylvania Constitution). For discussion of the Public Trust Doctrine, see *infra* note 129 and accompanying text.

in the Environmental Rights Amendment.¹¹² The Supreme Court characterized Petitioners' theory as a challenge to Act 13's attempt to threaten and degrade the citizens' right to the pre-established quality of life of their properties and hometowns.¹¹³ It also noted the language of the Pennsylvania Constitution drove the court's interpretation and application of the Environmental Rights Amendment, explaining that it must be interpreted in the manner understood by the people when it was adopted, favoring a plain language reading that aligns with the original intent.¹¹⁴

By first outlining the terms and purposes of the Commonwealth's Declaration of Rights, the Supreme Court emphasized that the Constitution preserved the government created by the people and highlighted specific limits on state governmental power.¹¹⁵ The Supreme Court identified two goals of the Environmental Rights Amendment: (1) to identify protected rights to prevent certain state action, and (2) to establish a "framework for the Commonwealth to participate affirmatively in the development and enforcement of" the protected rights.¹¹⁶ The Supreme Court focused on identifying the intent of the legislature in creating the law, and the effect of the law on the rights allegedly violated.¹¹⁷

C. Article I, Section 1 of Pennsylvania Constitution: Inherent Rights

The Commonwealth claimed municipalities had no role in oil and gas operations and land use policy regulation, and that the judiciary had no role in deciding the dispute in question.¹¹⁸ In the Commonwealth's view, neither the municipalities nor the judiciary

112. For discussion of the Environmental Rights Act, see *supra* note 44 and accompanying text; see also PA. CONST. art. I, § 27; *Robinson Twp.*, 83 A.3d at 942 (expanding Environmental Rights Amendment analysis).

113. See *Robinson Twp.*, 83 A.3d at 942 (characterizing issue in Petitioners' Environmental Rights Amendment claim).

114. *Id.* at 943 (explaining Pennsylvania Supreme Court's reading). The Supreme Court applied the de novo standard of review in addressing Petitioners' appeal challenging the lower court's finding Act 13 did not violate the Environmental Rights Amendment. *Id.*

115. See *id.* at 947 (quoting Appeal of Lord, 81 A.2d 533, 537 (Pa. 1951)) (recounting purpose of Declaration of Rights); see also PA. CONST. § 1 (stating text of Pennsylvania Constitution Section 1).

116. See *Robinson Twp.*, 83 A.3d at 950 (explaining organization of Environmental Rights Amendment).

117. See *id.* (quoting *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 270-1 (Pa. 2003)) (identifying Supreme Court's approach in analyzing merits).

118. See *Robinson Twp.*, 83 A.3d at 974 (describing Commonwealth's claims regarding Section 3303 and Pennsylvania Constitution Article I Section 27).

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had a role in questions of policy.¹¹⁹ Petitioners, contrastingly, construed the claim as a violation of individual rights under the Environmental Rights Amendment.¹²⁰ The court characterized the Petitioners' claim as a violation of the Commonwealth's constitutional duties under Article I, Section 1, rather than a dispute over municipal power.¹²¹ The court sided with Petitioners and declared the Commonwealth's attempt to minimize the Petitioners' claim by mischaracterizing it as a dispute over public policy "requires a blindness to the reality here and to Pennsylvania history."¹²² The court emphasized that the Commonwealth's position "ignores the reality that Act 13 has the potential to affect the reserved rights of every citizen of this Commonwealth now, and in the future."¹²³

D. Article I, Section 27 of the Pennsylvania Constitution: The Environmental Rights Amendment

Because of the way in which Act 13 implicated the Pennsylvania Constitution, the Pennsylvania Supreme Court began by first analyzing the language of Article I, Section 27 of the Pennsylvania Constitution.¹²⁴ Act 13 implicated both the Commonwealth's police power, and citizens' rights with respect to the Pennsylvania Constitution.¹²⁵ Specifically, the Pennsylvania Supreme Court analyzed Article I, Section 27 to determine what the Pennsylvania Constitu-

119. *See id.* (explaining Commonwealth's claim that Act 13 is valid within General Assembly discretionary policymaking).

120. *See id.* (describing Petitioners' characterization of claim).

121. *See id.* (describing Petitioners' claim).

122. *See id.* (characterizing Commonwealth's argument as off-target and simplistic). The court characterizes Act 13 as "not generalized environmental legislation, but [] instead a statute that regulates a single, important industry – oil and gas extraction and development." *Id.* The Commonwealth's argument therefore incorrectly minimizes the importance and potential effect of Act 13. *Id.*

123. *See Robinson Twp.*, 873 A.3d at 976-77 (explaining Pennsylvania Supreme Court's view of Commonwealth's characterization of Petitioners' claim). The court noted the Environmental Rights Amendment "speaks on behalf of the people," which weighed into the court's emphasis of the duty owed to the people by the Commonwealth. *Id.* at 974. Additionally, in emphasizing the court's obligations as trustee, the court emphasized the people's right to seek the enforcement of the Commonwealth's obligations. *Id.*

124. *See id.* at 947 (declaring General Assembly's plenary police power is derived from Pennsylvania Constitution Article III, but noting "express exception of certain fundamental rights reserved to the people in Article I"). Article I is appropriate for analysis in this case, as it reflects the original design of the Pennsylvania Constitution: "one part establishes a government and another part limits that government's powers." *Id.*

125. *Id.* (explaining Article I gives both power of governance and ability to limit governance).

tion required in terms of protecting citizens' rights.¹²⁶ The court also analyzed Article I, Section 27 to determine whether Act 13 complied with the Commonwealth's protective duties under the Pennsylvania Constitution.¹²⁷

1. Clause 1 Section 27 of Pennsylvania Constitution: Individual Environmental Rights

The Pennsylvania Supreme Court first analyzed the plain language of the first clause of Section 27.¹²⁸ It indicated that this initial prohibitory clause established declared rights of citizens, such as the right to clean air and the preservation of values of the environment.¹²⁹ The court identified the prohibitive nature of the clause, noting that this clause "affirms a limitation on the state's power to act contrary to this right," and thus characterized this provision as establishing the Commonwealth's obligation to refrain from violating this right through legislative action, executive action, or otherwise.¹³⁰ The Supreme Court further stated that Clause 1 requires the Commonwealth to consider these protections before taking governmental action and predict the environmental impact of its action, regardless of whether a statute addresses the specific action.¹³¹

Next, the Pennsylvania Supreme Court noted that the statute's plain language provides substantive provisions by which the judiciary decides a claim for violations of a protected right under Clause 1 of Section 27, such as the right to 'clean air' and 'pure water.'¹³² Though courts defer to agency expertise in assessing whether these standards are met, the court concluded that courts should draw on "the express purpose of the Environmental Rights Amendment to

126. *See id.* at 948-49 (explaining Environmental Rights Amendment must be defined and understood before applying its requirements to Act 13).

127. *See id.* at 949 (identifying Act 13 must comply with Commonwealth's duties under Environmental Rights Amendment).

128. *See Robinson Twp.*, 873 A.3d at 950 (explaining merits will be determined based on plain language, legislative intent, and effect of law).

129. *See id.* at 951 (discussing Pennsylvania Supreme Court's analysis). The text of Pennsylvania Constitution Section 27 Clause 1 states: "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." *See generally* PA. CONST. art. I, § 27.

130. *Robinson Twp.*, 873 A.3d at 951 (establishing requirements of Section 27 Clause 1); *see also* PA. CONST. art. I, § 27 (stating text of Environmental Rights Amendment).

131. *Robinson Twp.*, 83 A.3d at 951 (imposing responsibility on Commonwealth to act *a priori*). This obligation binds both state and local government. *Id.*

132. *Id.* (noting rights and substantive standards identified by Section 27 Clause 1).

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be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality.”¹³³ It found, therefore, that courts should appropriately weigh in on constitutional compliance of branches’ actions in alleged violations.¹³⁴ The Pennsylvania Supreme Court applied similar analysis to the guarantees of preservation of “natural, scenic, historic, and esthetic values of the environment,” concluding that citizens enjoy a right of freedom from governmental action that unreasonably interrupts or causes actual harm or deterioration to these values of the environment.¹³⁵ Based on this conclusion, the Pennsylvania Supreme Court again required that to pass constitutional scrutiny, the government must evaluate potential preservation effects on environmental values.¹³⁶

The Pennsylvania Supreme Court recognized the important state interest of promoting citizens’ economic well-being was particularly influential in the development of Clause 1 of Section 27; these interests were not initially enumerated in the Pennsylvania Declaration of Rights, but later introduced in the Environmental Rights Amendment.¹³⁷ In noting this, however, the court declared that there must be a balance between the Declaration of Rights, which was void of identified economic rights, and Clause 1 of Section 27, which lacked restrictions on pursuits promoting economic development.¹³⁸ The court determined that the state’s plenary police power must be utilized to balance “sustainable property use” and “economic development.”¹³⁹ The provisions of the Act that allowed for extensive energy production development, specifically in-

133. *Id.* at 953 (describing court’s method for considering agency expertise, court’s role in deciding substantive matters, and language and purpose of Environmental Rights Amendment).

134. *Id.* at 950 (identifying courts’ roles when addressing guaranteed standards and rights).

135. *See* PA. CONST. art. I, § 27 (stating text of Environmental Rights Amendment); *see also* *Robinson Twp.*, 83 A.3d at 953 (discussing preservation of environmental values).

136. *Robinson Twp.*, 873 A.3d at 953 (stating court’s reasoning).

137. *See id.* at 954 (acknowledging legislative intent of Section 27). The economic well-being and rights are not specifically mentioned in the Pennsylvania Declaration of Rights. *Id.*; *see also* PA. CONST. art. I. For more information regarding the Pennsylvania Declaration of Rights, *see supra* notes 37-45 and accompanying text.

138. *See Robinson Twp.*, 83 A.3d at 954 (determining there is no state legal authority providing middle ground on economic well-being and development). The Pennsylvania Supreme Court warned that finding Section 27 Clause 1 free of error would open the door to citizens being deprived of their personal property rights to promote the general welfare and economic prosperity. *Id.*

139. *See id.* (identifying responsibility of state’s policing power).

voked the Commonwealth's plenary police power to balance property use interest and economic development.¹⁴⁰

2. *Clauses 2 and 3, Section 27 of The Pennsylvania Constitution: The Public Trust Doctrine*

The Supreme Court articulated that the second clause of Section 27 of the Pennsylvania Constitution delegates ownership of Pennsylvania's public natural resources to the citizens, and provides for future generations.¹⁴¹ Public natural resources include state-owned property, such as waterways, lands, and mineral reserves, in addition to "resources that implicate the public interest," such as air, ground water, fauna, flora, and fish.¹⁴² The court supported its plain-language interpretation with legislative history; for example, the court highlighted the General Assembly's proposed amendment to expand the concept of public natural resources.¹⁴³

Lastly, the court described the third clause as establishing the Commonwealth's affirmative and prohibitive duties regarding public natural resources, thereby formulating the 'Public Trust Doctrine' between the resources and the Commonwealth.¹⁴⁴ The court articulated the legal implications of the terms 'trustee' and 'trust' to illustrate the discretionary, fiduciary relationship that exists between the Commonwealth and the public natural resources under Clause 3 of Section 27.¹⁴⁵ As part of the Public Trust Doctrine, the

140. *See id.* (explaining Section 27 Clause 1 required Commonwealth to use its plenary power to balance property and economic interests).

141. *Id.* The court suggested that, though it was not explicit, this Clause referenced a narrower category of 'public' resources than Clause 1. *Id.* at 955. Through legislative history, however, the court determined aspects of the environment were subject to change over time. *Id.*; *see also* PA. CONST. art. I, § 27 (stating text of Environmental Rights Amendment of Pennsylvania Constitution). The court emphasized that duties and powers going along with the trust were not delegated to any one branch of the government, and therefore, checks and balances should be fully activated. *Robinson Twp.*, 83 A.3d at 957. The text of Pennsylvania Constitution Article I Section 27 Clauses 2 and 3 reads: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustees of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people." *See generally* PA. CONST. art. I, § 27.

142. *Robinson Twp.*, 83 A.3d at 957 (describing public natural resources).

143. *Id.* (recounting legislative history).

144. *Id.* at 955-56 (introducing 'public trust doctrine'). For further description of Clause 3 of Article I Section 27 of the Pennsylvania Constitution, *see infra* notes 141-51 and accompanying text.

145. *Robinson Twp.*, 83 A.3d at 956. The Pennsylvania Supreme Court relied on the General Assembly's statements for its understanding of the trust theory. *Id.*; *see also* 1970 Pa. Legislative Journal-House at 2273. A trust theory treats citizens as a fiduciary, while a propriety theory handles its citizens "at arms' length." *Id.* While a trust theory measures success by its citizens' use of natural resources

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Court noted that the Commonwealth was “obligated to comply with the terms of the trust,” explaining that the Commonwealth must conserve and maintain the public natural resources, as well as prevent and remedy any negative effects on these resources.¹⁴⁶

The court noted that two Commonwealth obligations arose out of the Public Trust Doctrine: (1) the Commonwealth’s obligation “to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources” through state and/or private acts that deplete, diminish, or degrade public natural resources, or through the state’s “failure to restrain the actions of private parties”; and (2) “to act affirmatively to protect the environment, via legislative action.”¹⁴⁷ Regarding the trust beneficiaries, the court identified two Commonwealth obligations: (1) the obligation to treat all beneficiaries impartially; and (2) the obligation to “balance the interests of present and future beneficiaries.”¹⁴⁸

In addition to the Section 27 clauses, the court identified additional considerations regarding Section 27 legislative history and interpretations.¹⁴⁹ The court noted that the legislature passed environmental protection statutes with increasing frequency because of the difficulty of repairing and regenerating natural resources.¹⁵⁰ The Pennsylvania Supreme Court acknowledged that this affirmation of environmental rights in conjunction with politi-

granted to them, a propriety theory focuses on “balance sheet profits” and appreciation. *Id.*

146. *Robinson Twp.*, 83 A.3d at 957 (identifying Environmental Rights Amendment).

147. *Id.* (quoting Environmental Rights Amendment). With respect to the first obligation, Section 27 Clause 3 established “broad but concrete substantive parameters within which the Commonwealth may act.” *Id.* The second provision, according to the Court, defines and describes regulatory powers, prohibits conduct by individuals, procedural safeguards, and technical standards. At the same time, it does not supersede any rights conferred to the people under Article I Section 1 of the Pennsylvania Constitution. *Id.*

148. *Robinson Twp.*, 83 A.3d at 959 (identifying Commonwealth obligation as prescribed by Pennsylvania Constitution). The beneficiaries must be treated in accordance with the purposes and goals of the trust. *Id.* The court identified the beneficiary designation implicated questions of access to public natural resources, the need for conservation of resources, and the reality of environmental changes. *Id.*

149. *Id.* at 959-60 (stating Pennsylvania Constitution intentionally places equal importance on citizens’ environmental rights and citizens’ political rights).

150. *Id.* at 961 (recounting legislative history). Disasters such as the 1948 industrial smog which caused at least twenty deaths due to asphyxiation, the 1961 mine water discharge that contaminated water and killed 300,000 fish, and the 1962 mine fire that displaced all of the town’s residents, are examples of increasing environmental degeneration leading to increased legislative activity. *Id.*

cal rights was rare, particularly at the time Section 27 was enacted, which stressed the importance of protecting environmental rights.¹⁵¹

E. Analyzing Act 13

The court stated that because Act 13 intended to regulate all oil and gas operations throughout the state, both public and private, the inherent power of the General Assembly invariably comes into play.¹⁵² If it intended to regulate solely public operations, then analysis of the Public Trust Doctrine alone would be sufficient.¹⁵³ Because Act 13 sought to regulate private oil and gas enterprises as well, the court stated that it must analyze the General Assembly's plenary power "to enact laws for the purpose of promoting the general welfare, including public convenience and general prosperity, rather than from its corresponding duties as trustee of Pennsylvania's public natural resources."¹⁵⁴

1. *Section 3303 Oil and Gas Operations Regulated by Environmental Acts*

Before the Pennsylvania Supreme Court determined that Section 3303 of Act 13 was unconstitutional, it addressed the authority of the General Assembly to analyze Section 3303.¹⁵⁵ The court noted that, though the General Assembly had the authority to alter local governments' powers and obligations, it did not have the authority to decrease a local government's constitutionally-required authority.¹⁵⁶ Additionally, the court stated that constitutionally-imposed duties on local governments cannot be extirpated by statute.¹⁵⁷

151. *Id.* at 962 (stating court's view of evolution of environmental rights). Pennsylvania's vast availability of natural resources and largely untapped potential to exploit them are particularly note-worthy. *Id.* at 963. The General Assembly unanimously approved the Environmental Rights Act during the 1969-70 and 1971-72 sessions. *Id.* Montana and Rhode Island were the only other states to articulate environmental rights. *Id.*

152. *Robinson Twp.*, 83 A. 3d at 975 (explaining breadth of Act 13's intent to closely regulate one particular industry).

153. *Id.* (describing Commonwealth's ability to protect public natural resources).

154. *Id.* (identifying why General Assembly's plenary power is necessary to analyze).

155. *See id.* at 977 (describing General Assembly's powers).

156. *See Robinson Twp.*, 83 A.3d at 977 (describing powers and limits of General Assembly's authority).

157. *See id.* (addressing constitutionally-imposed authority).

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The Pennsylvania Supreme Court framed its analysis of Section 3303 by stating that Article I, Section 27 names the Commonwealth, not the General Assembly, as trustee.¹⁵⁸ The court highlighted that citizens affected by Act 13 had homes, lives, and certain residential and property expectations that existed prior to the existence and enactment of Act 13.¹⁵⁹ The court described the effects of the enactment as a fundamental disruption to these citizens' expectations.¹⁶⁰ The Act, according to the court, necessitated that local governments be entirely complicit with the environmental requirements of Act 13, regardless of whether local government charters indicated otherwise.¹⁶¹ The court determined that Act 13 directed local municipalities to abandon their Article I, Section 27 obligations and "take affirmative actions to undo existing protections of the environment in their localities."¹⁶² Based on these findings, the Pennsylvania Supreme Court held that Section 3303 of Act 13 overstepped the General Assembly's policing authority, an authority limited by the constitutional requirements of the Environmental Rights Amendment.¹⁶³ The Supreme Court found this provision inconsistent with the Environmental Rights Amendment, holding it unconstitutional.¹⁶⁴

2. Section 3304 Uniformity of Local Ordinances

With respect to Section 3304 of Act 13, the Pennsylvania Supreme Court found the provision unconstitutional as well.¹⁶⁵ The court determined that the enactment of Section 3304 violated the General Assembly's constitutional duty under Article I, Section 27 "to prevent degradation, diminution, and depletion of" public natural resources, and the Commonwealth's duty to uphold the trust-

158. *Id.* (explaining Article I, Section 27 of the Pennsylvania Constitution); *see also* PA. CONST. art. I, § 27 (stating text of Environmental Rights Amendment).

159. *See Robinson Twp.*, 83 A.3d at 977 (explaining pre-Act 13 residential and zoning conditions).

160. *See id.* (describing disruptions to everyday life posed by enactment of Act 13). The court concluded Act 13 required local governments to take serious measures to implement its requirements. *Id.* The effect of the implementation, the court reasoned, would seriously disrupt the established lives, homes, and living expectations of citizens in affected residential zones. *Id.*

161. *Id.* (describing nature of Act 13's requirements imposed on local governments).

162. *Id.* at 978 (interpreting Act 13's directive to local governments). For further discussion of Article I, Section 27 of the Pennsylvania Constitution, *see infra* notes 124-51 and accompanying text.

163. *Robinson Twp.*, 83 A.3d at 978 (stating court's holding with respect to Act 13 Section 3303).

164. *Id.* (stating holding regarding Section 3303).

165. *Id.* at 979 (stating court's holding on Section 3304 of Act 13).

trustee relationship codified in the Public Trust Doctrine.¹⁶⁶ The court identified two reasons Section 3304 did not satisfy these constitutional requirements.¹⁶⁷

The court's first reason involved a new regulatory scheme proposed by Section 3304 permitting industrial fracking in pre-existing zoning districts; this scheme essentially sanctioned degradation of public environment, natural resources, and established quality of life.¹⁶⁸ The court identified that Act 13 permitted "industrial oil and gas operations as a use 'of right' in *every zoning district throughout the Commonwealth*, including in residential, commercial, and agricultural districts."¹⁶⁹ Consequently, Act 13 effectively set aside the pre-existing regulatory structure citizens had come to rely upon in affected districts, and permitted the degradation of environmental quality of life.¹⁷⁰

The second reason identified by the court as to why Section 3304 violated the Pennsylvania Environmental Rights Amendment

166. *See id.* (explaining General Assembly's constitutional duties implicated by Section 3304); *see also* PA. CONST. art. I, § 27 (stating text of Environmental Rights Amendment). For further discussion of the General Assembly's constitutional duties with respect to the Pennsylvania Oil and Gas Act, *see supra* notes 72-86 and accompanying text. Under Title 58 of the Pennsylvania Oil and Gas Act, the General Assembly's constitutional duties include ensuring the general welfare and prosperity of environmental rights by allowing for development of oil and gas in Pennsylvania, and protecting public natural resources and environmental rights. *Robinson Twp.*, 83 A.3d at 979; *see also* 58 PA. C.S. § 3202 (2012) (stating text of Act 13 Section 3202).

167. *Robinson Twp.*, 83 A.3d at 979 (identifying two reasons that Section 3304 prevents General Assembly from meeting its constitutional obligations).

168. *See id.* at 979-80 (identifying first reason Section 3304 violates General Assembly's constitutional requirements). The Court reasoned that the regulatory scheme set out by Section 3304 made it impossible for the General Assembly to preserve Pennsylvania's constitutionally-protected public natural resources. *Id.* at 979. The court observed the interest in preserving natural resources and the impact of Section 3304 on local communities could not be achieved by issuing a blanket-rule across the Commonwealth; protection of environmental values required considering the needs of local communities. *See id.*

169. *Id.* at 979 (interpreting Section 3304 to give fracking operations right to operate in every zoning district). The Pennsylvania Supreme Court noted Act 13 essentially displaced pre-existing guidelines limiting industrial use of residential zoning districts. *Id.* The court concluded that because the Commonwealth, its communities, and the ownership and environmental rights expectations of its communities existed long before the enactment of Act 13, the Act impermissibly infringed on the trust-trustee relationship created by the Environmental Rights Amendment of the Pennsylvania Constitution. *Id.* For further discussion of the Environmental Rights Amendment of the Pennsylvania Constitution, *see supra* notes 111-17 and accompanying text.

170. *See Robinson Twp.*, 83 A.3d at 980 (analyzing effects of Act 13 Section 3304 on affected communities). A secondary effect of Section 3304 was to expose otherwise protected areas of the environment, such as air, water, soil, noise, lighting, and traffic, to industrial tampering. *Id.* at 979.

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was that allowing industrial uses in all districts impermissibly burdened communities and properties that would effectively carry greater environmental burdens than others.¹⁷¹ Section 3304 did not treat all trust beneficiaries equitably, as it did not provide affected communities with any opportunity to tailor regulations, nor allow local governments to mitigate the impact of the provision on the affected communities.¹⁷² The court reasoned that development of sustainable resources might require some degradation of the trust and public natural resources; however, any requirement competing with constitutional commands would be impermissible.¹⁷³

In concluding that Section 3304 was unconstitutional, the court noted it would not allow policy arguments to sway its decision in instances where the constitutional declaration is clear.¹⁷⁴ Here, the court did not find the Act's economic and energy goals sufficient to outweigh the constitutional commands of Article I, Section 27 of the Pennsylvania Constitution.¹⁷⁵ The court postulated that the Environmental Rights Amendment was intended to act "as a bulwark against enactments, like Act 13, which permit development with such an immediate, disruptive effect upon how Pennsylvanians live their lives."¹⁷⁶ The Pennsylvania Supreme Court thus held that Section 3304's degradation of the Public Trust Doctrine did not square with the constitutional demands of the Environmental Rights Amendment.¹⁷⁷

171. *See id.* at 980 (identifying uniformity of Section 3304 does not recognize differences in properties and communities). The Pennsylvania Supreme Court characterized Act 13 as a "blunt approach" failing to account for the constitutional requirement of Article I, Section 27 commanding the Commonwealth to manage the trust-trustee relationship for the benefit "of all people." *Id.* *See also* PA. CONST. art. I, § 27 (stating text of Environmental Rights Amendment).

172. *See Robinson Twp.*, 83 A.3d at 980 (reasoning Section 3304 is impermissibly at odds with constitutional requirements).

173. *Id.* at 980-81 (conceding trust might suffer some decay in interest of promoting sustainable development).

174. *Id.* at 981 (stating Section 3304 does not carry enough weight to overcome Pennsylvania Constitution requirements).

175. *See id.* (analyzing mindset of framers and ratifiers of Environmental Rights Amendment).

176. *Id.* (identifying Environmental Rights Amendment as protective measure against environmental disruptions into citizens' lives).

177. *See Robinson Twp.*, 873 A.3d at 981-82 (explaining Court's holding and reasoning). The court credited the intent of the Act, however it found that the legislation was too sweeping, and effectively pushed aside the General Assembly's responsibilities under Article I, Section 27. *Id.*

3. Section 3215(b)(4) Limitations to Well Locations

The Pennsylvania Supreme Court next determined that Section 3215(b) was unconstitutional and impermissibly at odds with the Environmental Rights Amendment.¹⁷⁸ The court articulated that a primary problem with Section 3215(b) was due to the DEP's ability to waive aspects of the well permit application that drillers were required to submit under 3215(b).¹⁷⁹ The court determined that the effect of the DEP's authority was that the Act authorized the DEP to review industry concerns through comments and hear industry appeals to rejected permits, but did so without allowing the DEP to hear the concerns or appeals of local governments.¹⁸⁰

Additionally, the Pennsylvania Supreme Court found Section 3215(b)'s grant of power to the DEP to waive the mandatory setbacks for the gas industry problematic.¹⁸¹ The court concluded that no provision of Act 13 adequately identified the measures "necessary" for to grant waivers of setbacks.¹⁸² The court found that Act 13 lacked necessary protections guarding public natural resources from damage caused by oil and gas operations, primarily due to the broad language of Section 3215.¹⁸³

The Pennsylvania Supreme Court further scrutinized the language of Section 3215, finding that the term 'necessary' is "malleable" and "unpredictable" because the provision did not enumerate ascertainable standards protecting public natural resources if the DEP were to setback waivers for drilling location distance requirements for drilling locations.¹⁸⁴ According to the provision, new wells were to be at least 300 feet from protected waterways; how-

178. *See id.* at 982 (stating court's holding with respect to Section 3215(b)). The court noted that Section 3215(b) regulated the Commonwealth's waters, which are inclusive in the Article I, Section 27 trust-trustee relationship. *Id.* at n. 59. The court observed the overall broad regulation decision process of Section 3215(b), rather than considering the provision in isolation. *Id.* at 982.

179. *See id.* at 982 (identifying primary concern of Section 3215(b)).

180. *See id.* (articulating effect of Act empowering DEP to consider comments and hear appeals of industry).

181. *See id.* (finding issue with DEP's ability to waive mandatory industry setbacks per Section 3215(b)).

182. *Robinson Twp.*, 83 A.3d at 982 (stating court's lack of findings).

183. *Id.* (identifying failure of Commonwealth to outline substantive reasons for conditions of Section 3215). Act 13 directed DEP to consider the Environmental Quality Board's standards for determining whether to grant well permits. *Id.* at 982-83. The Court found this impermissibly deprived citizens and local governments the opportunity to appeal the DEP's decisions to grant particular permits. *Id.*

184. *See id.* at 982-83 (concluding language of Section 3215 did not adequately protect public natural resources from oil and gas operators when waiver of permit granted).

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ever, this court determined, however, that Act 13 allows the DEP to waive these setback requirements.¹⁸⁵ This can only be done when the DEP determines that a driller's application demonstrates the waterway in question will be protected.¹⁸⁶ The court concluded that the provision's language provided no identifiable and enforceable standards for granting well permits and setback waivers.¹⁸⁷ From this conclusion, the court reasoned the language itself rendered the provision's terms arbitrary and ineffective for protecting the Commonwealth's waters.¹⁸⁸ The court found that this provision, like Sections 3303 and 3304, failed to comply with the Environmental Rights Amendment.¹⁸⁹ Additionally, this specific provision did not satisfy the trust-trustee responsibility to 'conserve and maintain' public natural resources.¹⁹⁰ The court determined the language of Chapter 32 of Act 13 reduced the DEP's authority to control environmental standards, and instead encouraged the DEP to stray from sustainable development of public natural resources.¹⁹¹

4. *Section 3215(d) Consideration of Municipality and Storage Operator Comments and Additional Protective Measures in Well Location Restrictions*

In the court's last finding regarding Section 3215 of Act 13, it decided 3215(d) effectively discouraged and decreased affected resident and property owner participation in the process of sustaining and protecting public natural resources.¹⁹² The court concluded this would fail, as it does not address individual environmental conditions of local municipalities and fails to ensure equitable, impar-

185. *Id.* at 984. Procedurally, if an applicant were to appeal the DEP's decision to deny its permit or waiver, the DEP would then be required to prove its determination was 'necessary' to protect public natural resources. *Id.* The Court characterized these procedural mandates as "topsy-turvy" because they effectively required the DEP to dictate minimal 'necessary' standards to avoid litigation by the applicant. *Id.*

186. 58 PA. C.S. § 3215(b) (2012) (stating text of Act 13 Section 3215(b)); see also *Robinson Twp.*, 83 A.3d at 983-984 (describing effects of Section 3215(b)).

187. See *Robinson Twp.*, 83 A.3d at 984 (concluding Chapter 32 of Act 13 did not sufficiently identify standards to determine when to grant permits and waivers).

188. See *id.* (determining language of Chapter 32 established arbitrary terms causing provision to become ineffective given vague standards).

189. See *id.* (stating court's finding with respect to Section 3215(b)).

190. See *id.* at 984 (stating court's conclusion with respect to trust-trustee relationship and water as public natural resource).

191. See *id.* (identifying effect of Chapter 32 on DEP's authority).

192. See *Robinson Twp.*, 83 A.3d at 984 (describing Chapter 32).

tial treatment of all trust beneficiaries.¹⁹³ In light of these findings, the court deduced that Act 13 did not permit the Commonwealth to abandon its responsibilities to the people in the Public Trust Doctrine of Article I, Section 27 of the Pennsylvania Constitution by discharging the responsibility to the DEP.¹⁹⁴ The Pennsylvania Supreme Court held that Sections 3303, 3304, 3215(b)(4), and 3215(d) were an impermissible exercise of the Commonwealth's police power, unconstitutionally infringing upon the Commonwealth's duty as trustee to protect public natural resources.¹⁹⁵

F. Justice Baer's Concurrence: Act 13 Violates Substantive Due Process Requirements

Justice Baer concurred with the majority's opinion of Sections 3303, 3304, 3215(b), and 3215(d); however, he diverged from the majority's analysis of Petitioners' substantive due process claims.¹⁹⁶ Justice Baer declared that the majority improperly decided the issues through the lens of Article 1, Section 27, of the Pennsylvania Constitution.¹⁹⁷ He stated the proper way to settle the issues was to resolve Petitioners' claim that the General Assembly unconstitutionally extended its police power as a matter of substantive due process.¹⁹⁸ Justice Baer therefore, also found Sections 3303, 3304, 3215(b), and 3215(d) unconstitutional, although he did so for different reasons.¹⁹⁹

193. *See id.* (finding inequitable treatment of local conditions and local municipalities due to Section 3215).

194. *See id.* (stating court's finding with regards to Section 3215).

195. *Id.* at 985 (stating court's mandate). The court found these provisions unconstitutional, thereby affirming in part (on different grounds) and reversing in part the Commonwealth Court's decision. *Id.* The court did not address claims related to Sections 3215(b)(4) and 3304 because it determined they violated the Environmental Rights Amendment. *Id.* The court also failed to address the separation of powers doctrine or the due process clauses of the Pennsylvania Constitution and United States Constitution. *Id.*

196. *See id.* at 1000 (Baer, J., concurring) (stating Justice Baer's concurrence). Justices Saylor and Eakin dissented in the opinion. *See id.* at 1009, 1014 (Saylor, J., dissenting) (Eakin, J., dissenting). Justice Saylor based his dissent on a belief judicial review should be highly deferential to the legislature; and therefore, the judiciary should have deferred to the legislature's findings in enacting Act 13. *Id.* at 1010 (Saylor, J., dissenting). Justice Eakin agreed with Justice Saylor's dissent and additionally noted the majority's decision would increase litigation by municipalities and individuals. *Id.* at 1015 (Eakin, J., dissenting).

197. *Robinson Twp.*, 83 A.3d at 1000-01 (Baer, J., concurring) (declaring substantive due process analysis more important than Environmental Rights Amendment analysis).

198. *See id.* at 1001 (Baer, J., concurring) (discussing alternative basis upon which to resolve issue).

199. *See id.* (noting diversity and largeness of Pennsylvania land better suits substantive due process than Environmental Rights Amendment adjudication); *see*

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While the majority determined the Environmental Rights Amendment protected citizens' use of public natural resources, Justice Baer found that substantive due process protected these rights.²⁰⁰ Justice Baer agreed with the Commonwealth Court that through Act 13, the General Assembly "forced municipalities to 'violat[e] substantive due process because [municipalities can no longer] protect the interests of neighboring property owners from harm,' and further because Act 13 'alters the character of neighborhoods, and makes irrational classifications.'"²⁰¹ Justice Baer noted that Act 13 was not a "run of the mill" zoning ordinance creating a government intrusion into private property.²⁰² Instead, Act 13 expanded private property rights to allow landowners to permit drilling operations on their land.²⁰³ Justice Baer argued Act 13 intruded on the private property rights of neighbors to drilling operations.²⁰⁴ This, he noted, effectively permitted landowners to violate *sic utere tuo ut alienum non laedas* by diminishing these neighbor's enjoyment of the land.²⁰⁵

Justice Baer also highlighted Pennsylvania's "extreme diversity."²⁰⁶ He criticized the Act for its overbroad generalization of Pennsylvania, which failed to recognize the diversity of its citizens

also Robinson Twp. v. Commonwealth, 52 A.3d 463, 483 (Pa. Commw. Ct. 2012) (noting that state's interests in oil and gas development "is centered primarily on the efficient production and utilization of the natural resources on the state," while state's interests in zoning is to promote proper development and land use).

200. *See Robinson Twp.*, 83 A.3d at 1003 (Baer, J., concurring) (agreeing with Commonwealth Court's reasoning). Justice Baer noted the tension in this appeal resulted from determining whether the General Assembly has the authority to, by law, remove local municipalities' power to vindicate Pennsylvania landowners' individual substantive due process rights. *Id.* at 1002 (Baer, J., concurring).

201. *Id.* at 1003 (Baer, J., concurring) (stating Justice Baer's reasoning and quoting Commonwealth Court); *see also Robinson Twp.*, 52 A.3d at 485 (majority) (contrasting Commonwealth Court's majority opinion).

202. *See Robinson Twp.*, 83 A.3d at 1004-05 (Baer, J., concurring) (explaining complexities of Act 13's mandate).

203. *Id.* at 1005 (Baer, J., concurring) (characterizing effect of Act 13).

204. *Id.* (Baer, J., concurring) (identifying governmental interference of Act 13 zoning mandate affected private property rights of neighbor, rather than landowner).

205. *See id.* (Baer, J., concurring) (noting effect of mandate permitting landowners to drill on their property); *see also Black's Law Dictionary* 1872 (9th ed. 2009). '*Sic utere tuo ut alienum non laedas*' defined as: use your own so as not to injure another's property. *Id.*

206. *See Robinson Twp.*, 83 A.3d at 1006 (Baer, J., concurring) (describing Pennsylvania's population, residents, population density, geographic makeup, and size).

and geographical makeup.²⁰⁷ Additionally, Justice Baer purported this violation of substantive due process was “the epitome of arbitrary and discriminatory impact” because it failed to provide any mechanism or remedy for municipalities objecting to the Act’s requirements.²⁰⁸ Though Justice Baer reached the same conclusion as Justice Castille’s plurality opinion, his conclusion rested on the principle that Act 13 forced local municipalities “to enact zoning ordinances, [thereby violating] the substantive due process rights of their citizenries,” which “cannot survive strict constitutional scrutiny.”²⁰⁹

V. CRITICAL ANALYSIS

Robinson Twp. represents a monumental decision in Pennsylvania environmental law.²¹⁰ The Pennsylvania legislature had never enacted an environmental law so thoroughly implicating the right to public natural resources through the Environmental Rights Act.²¹¹ As such, the Pennsylvania Supreme Court had never decided such an extensive environmental issue.²¹² *Robinson Twp.* required the Pennsylvania Supreme Court to analyze the Pennsylvania Constitution’s Environmental Rights Amendment to determine the constitutionality of Act 13, and it arrived at a reasonable conclusion in determining the provisions were unconstitutional.²¹³ Justice Castille’s opinion rejected the Commonwealth Court’s findings that Sections 3303, 3304, 3215(b), and 3215(d) were unconstitutional on zoning, agency discretion, or substantive

207. *See id.* at 1006-07 (Baer, J., concurring) (critiquing Act 13’s failure to protect interests of neighboring property owners and irrational characterization of municipalities as homogenous).

208. *See id.* at 1007 (characterizing Act 13 and its effects).

209. *See id.* at 1008 (stating Justice Baer’s conclusion). Justice Baer emphasized that Act 13 subjected Pennsylvania landowners and Pennsylvania land to the same arbitrary impact, despite differences in neighborhoods and topography. *Id.* He described Act 13 as setting the Commonwealth’s municipalities in a vacuum. *Id.* In addressing severability, Justice Baer found to enjoin Sections 3305-3309 of Act 13 “as ‘incapable of execution’ upon the striking of Sections 3303 and 3304.” *Id.*

210. *See* Marie Cusick, *Did Pennsylvania’s Highest Court Unravel Environmental Protections for Oil and Gas?*, STATEIMPACT (Jan. 10, 2014, 5:08 PM), <https://stateimpact.npr.org/pennsylvania/2014/01/10/did-pennsylvanias-highest-court-unravel-environmental-protections-for-oil-and-gas/> (highlighting extreme importance of Supreme Court’s decision).

211. For further discussion of existing environmental jurisprudence, see *supra* notes 37-71 and accompanying text.

212. *See Robinson Twp.*, 83 A.3d at 964-68 (explaining first time Supreme Court has faced such extensive provisions and effects).

213. *See id.* at 964 (identifying lack of Pennsylvania jurisprudence).

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due process grounds.²¹⁴ The majority instead focused its analysis on Act 13's threat to degrade public natural resources, which the Commonwealth is required to protect under the Environmental Rights Amendment.²¹⁵

As the four-justice majority failed to thoroughly address substantive due process issues surrounding Sections 3303, 3304, 3215(b), and 3215(d), and instead focused its analysis on the Environmental Rights Amendment, the court effectively emphasized the importance of deciding these issues under the Pennsylvania Constitution's Public Trust Doctrine, rather than through a substantive due process analysis.²¹⁶ The court's opinion stressed the importance of protecting public natural resources under the Pennsylvania Constitution, and emphasized the limits of the General Assembly's plenary police power.²¹⁷ Through the Environmental Rights Amendment, the majority determined the Commonwealth was required to protect the Commonwealth's public natural resources on behalf of all citizens.²¹⁸ The majority's pointed concentration on the Environmental Rights Amendment effectively highlighted the absence of a substantive due process analysis.²¹⁹

Courts are careful when deciding cases on substantive due process grounds, because this lends itself to controversy.²²⁰ Deciding this particular case on substantive due process grounds would inflame the hotly debated fracking issue with emotionally charged jurisprudence.²²¹ This case also has no clear resolution considering

214. *See id.* at 942 (rejecting Commonwealth Court's reasoning).

215. *See id.* at 973 (stating Commonwealth's duties under Environmental Rights Amendment).

216. *See id.* at 942 (stating grounds for decision).

217. *See Robinson Twp.*, 83 A.3d at 974 (discussing appropriate analysis under Pennsylvania Constitution).

218. *Id.* at 965 (establishing Commonwealth's duties under Public Trust Doctrine). The Supreme Court's analysis only addressed environmental rights protection issues under the Pennsylvania Constitution. *See generally id.* at 942.

219. *See Robinson Twp. v. Commonwealth*, 52 A.3d 463, 482 (Pa. Commw. Ct. 2012) (discussing substantive due process analysis); *see also In re Appeal of Realen Valley Forge Greenes Assocs.*, 838 A.2d 718 (Pa. 2003) (describing balancing landowners' rights against public interests).

220. *See Erwin Chemerinsky, Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1502 (Summer 1999) (discussing controversial and confusing nature of substantive due process).

221. *See generally Robinson Twp.*, 52 A.3d at 480-84 (discussing Commonwealth Court's holding). For discussion of commonality of fracking in Pennsylvania, *see supra* notes 5-13 and accompanying text.

Pennsylvania's geographical diversity and the varying interests of its population.²²²

Instead of grounding this controversial decision in substantive due process, the majority sunk its teeth deep into the Environmental Rights Amendment.²²³ In fact, the majority glazed over the Commonwealth Court's substantive due process analysis of zoning ordinances, and failed to address Justice Baer's concurrence agreeing with the lower court's reasoning.²²⁴ The Supreme Court majority's analysis, Justice Baer's concurrence, and the Commonwealth Court's analysis each sought to protect public natural resources and private property owners' rights from harm, yet sought to achieve these ends through differing avenues.²²⁵

The majority's explanation for finding sections of Act 13 unconstitutional provided an in-depth, concrete basis in the Pennsylvania Constitution, that Justice Baer's concurrence lacked.²²⁶ Justice Baer's reasoning, however, provided insight into the majority's omission of Fifth and Fourteenth Amendment analyses of Sections 3303, 3304, 3215(b), and 3215(d).²²⁷ Justice Baer's substantive due process analysis critically touched upon the rights protecting a landowner's property rights from his neighbor's utilization of Act 13 zoning mandates.²²⁸ Because Act 13 mandated that well operations be permitted in every zoning district in the Commonwealth, Justice Baer properly expanded private property rights

222. For discussion of Pennsylvania's geographic diversity, see *supra* notes 6-13 and 208-22 and accompanying text.

223. See *Robinson Twp.*, 83 A. 3d at 1000 (Baer, J., concurring) (discussing court's analysis). For discussion of the court's Environmental Rights Amendment reasoning, see *supra* notes 111-17 and accompanying text.

224. See *Robinson Twp.*, 52 A.3d at 481-82 (stating zoning extends public nuisance concept and Fourteenth Amendment's substantive due process inquiry was warranted); see generally *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995) (discussing public nuisance and zoning).

225. See *Robinson Twp.*, 83 A.3d at 1000 (Baer, J., concurring) (concluding Act 13 threatened Commonwealth's diversity of resources); see generally *id.* at 983 (majority) (stating Act 13 violated Pennsylvania Constitution by degrading public natural resources); see also *Robinson Twp.*, 52 A.3d at 484-85 (concluding Section 3304 failed to protect neighboring property owners' interests in resources from harm).

226. See *Robinson Twp.*, 83 A.3d at 1000 (Baer, J., concurring) (reasoning Sections 3303, 3304, 3215(b), and 3215(d) should be held unconstitutional as matter of substantive due process).

227. See *id.* at 1003 (Baer, J., concurring) (addressing Fifth and Fourteenth Amendments). Zoning in this case implicates the Fifth and Fourteenth Amendments, as zoning is a governmental interference affecting private property interests of a landowner's neighbor. *Id.* at 1004.

228. See *id.* at 1003 (Baer, J., concurring) (addressing Fifth and Fourteenth Amendments). Zoning in this case implicates the Fifth and Fourteenth Amendments because it is a governmental interference that affects private property interests of a landowner's neighbor. *Id.* at 1004.

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to include the rights of a landowner whose neighbor utilized Act 13's allowance of well operations in the district.²²⁹ This expansion of rights, therefore, implicated substantive due process.²³⁰ In support of this proposition, Justice Baer wrote in his concurrence: "While I acknowledge that it might be possible, I am skeptical that the legislature could devise a scheme of statewide scope that sufficiently protects substantive due process."²³¹

While the majority's treatment of the Environmental Rights Amendment was fair, adequate, and correct, its decision to dig deep into Environmental Rights Amendment analysis and not address the controversial substantive due process jurisprudence is notable.²³² Instead of deciding the issue on potentially confusing, controversial grounds, the majority looked to the Pennsylvania Constitution to determine whether Act 13 complied with constitutionally-mandated requirements.²³³

VI. IMPACT

Robinson Twp. affects future interpretations of environmental rights afforded to citizens of Pennsylvania by the Environmental Rights Amendment to the Pennsylvania Constitution.²³⁴ As the majority touched upon in its analysis, past Pennsylvania case law has not significantly involved the Environmental Rights Amendment.²³⁵ In the few instances the Amendment was implicated, the Court was not required to thoroughly parse the Amendment's language and

229. *See id.* at 1005 (Baer, J., concurring) (arguing Act 13 expands private property rights because of secondary effects of well operations felt by neighbors of land with well operations). For further discussion of substantive due process see *supra* notes 87-89 and accompanying text.

230. *See Robinson Twp.*, 83 A.3d at 1000 (Baer, J., concurring) (explaining why substantive due process is implicated).

231. *Id.* at 1003 (agreeing with Commonwealth Court's conclusion finding Act 13 unconstitutional on substantive due process grounds).

232. *See id.* at 1005 (explaining Justice Baer's reasoning for substantive due process analysis); *see also id.* at 942 (majority opinion) (stating violations of Environmental Rights Amendment as grounds for finding Act 13 unconstitutional). It is noteworthy that the majority opinion does not spend much time delving into the substantive due process analysis. The majority neither affirms the lower court's substantive due process analysis, nor denies it as incorrect. *Id.*

233. *Id.* at 944-45 (majority) (articulating decision to review issue through lens of Environmental Rights Amendment).

234. *See id.* at 942 (premising determining issues on Environmental Rights Amendment). For further discussion of the Environmental Rights Amendment, see *supra* notes 111-17 and accompanying text.

235. *See Robinson Twp.*, 83 A.3d at 964 (articulating lack of Environmental Rights Amendment challenges faced by Supreme Court).

meaning.²³⁶ The court's decision in *Robinson Twp.* is a great leap forward from this past jurisprudence; however, it is consistent with past case law because the Environmental Rights Amendment had never been directly challenged.²³⁷ The Supreme Court's decision in *Robinson Twp.* defined and explained each clause of the Amendment: the individual rights clause, and the public natural resources clause, as well as the Public Trust Doctrine.²³⁸

Given the depth of this decision, it this Amendment will likely be implicated more often in the future as lower courts benefit from clearer standards.²³⁹ The Supreme Court has now affirmed citizens' individual rights to natural resources such as clean air and water, requires the Commonwealth not to infringe upon these rights, and states that the Commonwealth had an affirmative duty to protect these rights and resources.²⁴⁰ Because the Commonwealth's obligations and the citizen's guaranteed rights are more clearly defined, future environmental endeavors are likely to feel the effects of this decision.²⁴¹ Energy development and oil and gas well drilling in Pennsylvania will likely be affected by this decision, as fracking operations expand in frequency and quantity in the Commonwealth.²⁴²

To the extent this decision applies to fracking operations, this decision will substantially affect interpretation of Act 13 as an amendment to the Oil and Gas Act.²⁴³ Any future application of this decision will complicate drillers' ability to obtain waivers from the mandatory setback distances of well locations from protected waterways.²⁴⁴ These limitations will impact local municipalities attempting to restrict well locations and drillers attempting to con-

236. *See id.* (stating previous challenges did not fully implicate extent of Environmental Rights Amendment).

237. *See id.* at 950 (explaining Environmental Rights Amendment).

238. *See id.* at 957 (identifying court's need to unpack and apply Environmental Rights Amendment).

239. *See* John C. Dernbach et al., *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, WIDENER LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES no. 14-10, at 9 (Mar. 1, 2014) found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412657 (characterizing effect of decision as revitalization of Environmental Rights Amendment).

240. *See Robinson Twp.*, 83 A.3d at 942 (addressing Environmental Rights Amendment).

241. *See* Dernbach et al. *supra* note 221, at 14 (identifying trend of environmental law and awareness it may grow).

242. *See* Cusick, *supra* note 194 (tracking gas production in Pennsylvania).

243. *See Robinson Twp.*, 83 A.3d at 910 (stating court's holding).

244. *See id.* at 982 (noting that Section 3215(b) aimed to regulate Commonwealth's waters). Though Act 13 created a process of granting and receiving setback waivers for drilling operations, the court effectively pulled the punch of this

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struct new wells.²⁴⁵ Further, this decision will affect the lives of Commonwealth residents: any person working in the fracking industry, any landowner with wells on their property, any researcher, doctor, or medical professional interacting with environmental and health effects of fracking, any neighbors living in areas near fracking wells, local government officials, and many others.²⁴⁶ Given fracking's rapid growth, all residents involved in the development, harvesting process, or regulatory oversight will likely feel the effects of the Supreme Court's decision.²⁴⁷ In conclusion, this case more clearly defines and enumerates public natural resources to citizens than had been done so in the past, and cuts back on fracking's expansive operations allowances.²⁴⁸ The 4-2 decision, comprised of Justice Baer's commanding concurrence alongside the four-justice majority, however, provides many possibilities of interpretation by future lower courts.²⁴⁹ This seemingly monumental decision may in fact result in open interpretation in lower courts due to its lack of commanding majority.²⁵⁰

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process by finding Section 3215(b) unconstitutional. *Id.* For further discussion of setback waivers, see *supra* notes 178-88 and accompanying text.

245. See generally *Robinson Twp.*, 83 A.3d at 982 (explaining location restrictions of wells and granting well location permits).

246. See *id.* at 1015 (Eakin, J., dissenting) (articulating majority's findings will increase litigation). Justice Eakin emphasized in dissent that the effect of this decision will deprive more than 2,000 local municipalities of constitutional rights. *Id.*

247. See generally *id.* (emphasizing in depth litigation to follow this decision).

248. See *id.* (emphasizing extent of litigation to follow this decision); see also *The Fracking of Act 13: How the Supreme Court Torpedoed Marcellus Law*, THE ALLEGHENY FRONT (Jan. 10, 2014), <http://www.alleghenyfront.org/story/fracking-act-13-how-supreme-court-torpedoed-marcellus-law> (predicting effects decision will have on all future Pennsylvania courts deciding environmental law issues).

249. See generally *Robinson Twp.*, 83 A.3d 901, 984 (Pa. 2013) (holding Sections 3215(b)(4), 3215(d), 3303, and 3304 unconstitutional on grounds of Environmental Rights violation). For a discussion of Justice Baer's concurrence, see *supra* notes 193-06 and accompanying text. A controlling majority failed to materialize in this opinion due to expedited arguments and Justice Orvie Melvin's absence. See *Commonwealth Court Nullifies Two Key Provisions of Act 13*, *supra* note 32.

250. See *Kuo*, *supra* note 32 (identifying Justice Orvie Melvin's absence). Justice Baer's reasoning, and the Commonwealth Court's reasoning, provides an alternative method of interpreting the constitutionality of fracking regulations. See *supra* notes 192-206 and accompanying text.

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