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‘CRACKS’ IN THE COURT’S ANALYSIS? COURT STRIKES  
BALANCING ACT BETWEEN CITIZENS’ CONSTITUTIONAL  
RIGHTS AND GOVERNMENT’S EXPLOITATION OF NATURAL  
GAS RESERVES IN *PENNSYLVANIA ENVIRONMENTAL  
DEFENSE FOUNDATION V. COMMONWEALTH*

I. INTRODUCTION

For more than fifty years, the Commonwealth of Pennsylvania has “struck it rich” in its ability to extract mineral resources, such as natural gas, from the Marcellus Shale Formation.<sup>1</sup> The Marcellus Shale Formation, located nine thousand feet below Pennsylvania’s surface, is comprised of rock formations that contain natural gas within their cracks, which is tapped for consumption.<sup>2</sup> Although the Commonwealth historically engaged in “steady” natural gas development, there recently has been a substantial increase in resource exploration due to technological innovations that more efficiently facilitate the extraction of natural gas.<sup>3</sup> Pennsylvania, consequently, has quickly achieved its status as one of the country’s foremost natural gas suppliers.<sup>4</sup>

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1. See Pa. Evtl. Def. Found. v. Commonwealth, 108 A.3d 140, 142 (Pa. Commw. Ct. 2015) (referencing Marcellus Shale Formation). See generally Amber R. Mondock, *Shale I Stay or Shale I Go? Pennsylvania’s “Marcellus Shale-Size” of a Debate over Fracking Severance Taxation*, 13 AVE. MARIA L. REV. 121, 123-24 (2015) (exploring Pennsylvania’s history of using Marcellus Shale Formation as energy source).

2. See Mondock, *supra* note 1, at 123-24 (describing components of Marcellus Shale Formation). “The untapped natural gas within the shale is enough to supply United States consumption for almost two decades.” *Id.* at 124 (footnote omitted). The success of the fracking process involves both vertical and horizontal drilling into the solid rock formation, “followed by injecting millions of gallons of water mixed with chemicals and sand at a high pressure to break up the rock, releasing gas[,] [and] allowing it to flow up . . . to the surface.” *Id.* at 125 (footnote omitted).

3. See *id.* at 124 (relaying technological innovations in hydraulic fracturing methods). These technological breakthroughs included improvements to the horizontal drilling procedure, which allowed operators to remove larger amounts of natural gas in a more effective manner. See *id.* Additionally, since 2009, the state’s “natural gas production more than quadrupled . . . averaging nearly 3.5 billion cubic feet per day in 2011.” *Id.* (footnote omitted); see also Laura C. Reeder, *Creating a Legal Framework for Regulation of Natural Gas Extraction from the Marcellus Shale Formation*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 999, 1003-04 (2010) (describing advantages of horizontal drilling for efficient natural gas extraction). The increase in hydraulic fracturing, due to technological innovations, dually creates property and environmental concerns. See *id.* at 1005.

4. See Mondock, *supra* note 1, at 123-25 (asserting Pennsylvania’s contribution to nation’s energy exploration).

This reinvigorated contact with the environment poses numerous concerns for citizens' inherent right to enjoyment and protection of the environment, and blurs the line between governmental boundaries and compliance with property rights.<sup>5</sup> Article I, Section 27 of the Pennsylvania Constitution, entitled the Environmental Rights Amendment (ERA),<sup>6</sup> guarantees present and future citizens the right to the state's "public natural resources," which the Commonwealth must dutifully safeguard and preserve.<sup>7</sup> Beginning in 2008, the state government began leasing state lands to private parties to encourage further natural resource exploration in the Marcellus Shale Formation.<sup>8</sup> Despite generating seven years of astronomical revenue, the Commonwealth fluctuated between prohibiting further, potentially harmful development on the Marcellus Shale Formation, and permitting non-destructive, yet "necessary" exploration on the land.<sup>9</sup>

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*,<sup>10</sup> several budget-related decisions, stemming from the Commonwealth's extensive land leasing from 2009 to 2015, became the center of a legal, environmental, and constitutional dispute.<sup>11</sup> In an attempt to foster the continued leasing of state lands and perpetuate its high revenue, former Governor Thomas Corbett (Governor Corbett) appropriated "up to [fifty] million" dollars to the Department of Conservation and Natural Resources (DCNR), the cabinet-level agency tasked with protecting the Commonwealth's public natural resources.<sup>12</sup> In the 2014 Fiscal Code Amendments, Gover-

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5. For an analysis of how the Pennsylvania Commonwealth Court dealt with the underlying tension between governmental actions and citizens' constitutional rights, see *infra* notes 123-143 and accompanying text.

6. PA. CONST. art. I, § 27 (declaring citizens' constitutional right to enjoyment and preservation of environment).

7. For a further discussion of the history and various interpretations of the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, see *infra* notes 62-89 and accompanying text.

8. See *Pa. Env'tl. Def. Found.*, 108 A.3d at 143-44 (describing state's success in first land lease). "In one month . . . [the] leasing activities generated more revenue than the prior sixty years of leasing activity combined." *Id.* at 144.

9. See *id.* at 144-50 (providing background of Marcellus Shale development within Pennsylvania). After the first lease of state land in 2008, the government became concerned with the potential hazards of drilling on the environment for the next five decades. See *id.* at 144; see also Mondock, *supra* note 1, at 122 (referring to effects of fracking). "The dangers of fracking are still not fully understood, and little if any regulation exists on how the process is conducted." *Id.*

10. 108 A.3d 140, 172 (Pa. Commw. Ct. 2015).

11. For a thorough discussion of the factual background in *Pa. Env'tl. Def. Found.*, see *infra* notes 23-40 and accompanying text.

12. See *Pa. Env'tl. Def. Found.*, 108 A.3d at 148 (describing governmental appropriation to agency to maintain conservation of state and forestlands).



nor Corbett transferred ninety-five million dollars of generated land leasing earnings to the General Fund to balance the Commonwealth's deficient budget.<sup>13</sup>

This Note explores the various environmental, constitutional, and social policy issues surrounding the Commonwealth Court of Pennsylvania's decision in *Pennsylvania Environmental Defense Foundation*.<sup>14</sup> In this case, the court upheld the monetary appropriations to the General Fund as passing constitutional muster under the Environmental Rights Amendment without offending citizens' constitutional right to environmental preservation.<sup>15</sup> The court not only denied the environmental group's application for summary relief, but it also condoned the controversial notion that the ERA serves as a concession of governmental power, not a check on its unfettered authority.<sup>16</sup>

This Note also discusses the potential ramifications that the Commonwealth Court of Pennsylvania's decision will produce on both the environment and future Pennsylvania decisions that concern challenged governmental actions affecting citizens' environmental rights.<sup>17</sup> Part II of this Note explains the case's factual background, its primary issues and arguments, and the court's holding.<sup>18</sup> Part III explores the legal background surrounding the history of the ERA, as well as traditional judicial ability to judge the adequacy of legislative and executive actions.<sup>19</sup> Part IV examines the Commonwealth Court of Pennsylvania's analytical reasoning, specifically emphasizing Article I, Section 27 interpretation and its effect on legislative actions to control the maintenance of environ-

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13. *See id.* at 152 (noting significant amount of money Governor Corbett transferred from Lease Fund to state's General Fund for budget-balancing purposes); *see also* 2014 Fiscal Code Amendments, 72 PA. CONS. STAT. ANN. § 1605-E(b) (West 2014) (relaying transfer of money to General Fund). The transfer of money granted by this Section "is [twenty million dollars] more than the transfer that Governor Corbett proposed in his Executive Budget." *Pa. Envtl. Def. Found.*, 108 A.3d at 152.

14. For a discussion of the Petitioner's various issues presented for the court's review, *see infra* notes 23-36 and accompanying text.

15. For a recitation of the court's holdings, *see infra* notes 37-40 and accompanying text.

16. For a further discussion of the court's legal conclusions, *see infra* notes 37-40 and accompanying text.

17. For a prediction of the decision's effect on future environmental claims, *see infra* notes 191-205 and accompanying text.

18. For a discussion of the factual background of the case, *see infra* notes 23-40 and accompanying text.

19. For a discussion of the various issues' respective legal backgrounds and histories, *see infra* notes 41-119 and accompanying text.



mental integrity.<sup>20</sup> Part V contributes a critique of the court's analysis, focusing on both Article I, Section 27 implications and the court's failure to sufficiently address Petitioner's claims due to its judicial 'constraint' in evaluating the constitutionality of legislative-executive actions.<sup>21</sup> Finally, Part VI addresses the predicted impact the Commonwealth Court of Pennsylvania's decision will have on future environmental decisions and land leasing activities within the state.<sup>22</sup>

## II. FACTS

On March 19, 2012, Petitioner Pennsylvania Environmental Defense Foundation (PEDF) initiated a declaratory judgment action against Respondent Commonwealth of Pennsylvania (Commonwealth) alleging that the Commonwealth made unconstitutional budget decisions in leasing state lands to private parties for oil and natural gas exploration.<sup>23</sup> The Commonwealth cross-motivated for summary judgment against PEDF's challenges of previous and future leasing of state lands for these purposes.<sup>24</sup> PEDF argued that leasing to private parties through the Pennsylvania General Assembly's (General Assembly) appropriation of monies in the Oil and Gas Lease Fund (Lease Fund) to the Department of Conservation and Natural Resources (DCNR) unconstitutionally infringed upon citizens' protected rights under the ERA.<sup>25</sup>

In 2009, the General Assembly and then Governor Edward Rendell (Governor Rendell) issued the year's Fiscal Code Amendments, in which Section 1603-E granted "up to [fifty million dollars] from 'royalties' in the Lease Fund to DCNR for uses permitted under the Lease Fund Act[.]"<sup>26</sup> Section 1602-E additionally

20. For a discussion of the court's legal reasoning on certain issues presented in the case, see *infra* notes 120-153 and accompanying text.

21. For a critique of the court's analysis, see *infra* notes 154-190 and accompanying text.

22. For a further discussion of the impact of the Commonwealth Court of Pennsylvania's decision, see *infra* notes 191-205 and accompanying text.

23. See Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140, 142 (Pa. Commw. Ct. 2015) (providing legal foundation for Petitioner's action against Commonwealth). Respondents included not only the Commonwealth, but also Thomas Corbett in his role as Governor of Pennsylvania. See *id.*

24. See *id.* at 140-42 (explaining procedural posture of case).

25. See *id.* at 154 (describing PEDF's position that leasing of state lands for gas and oil exploration violated individual rights granted to citizens under Article I, Section 27 of Pennsylvania Constitution to enjoy state's natural resources).

26. *Id.* at 145 (citation omitted) (detailing Section 1603-E's appropriation of monies to DCNR to fulfill purposes of Lease Fund Act); see also 72 PA. CONS. STAT. ANN. §§ 1602-E, 1603-E (West 2009) (displaying Governor Rendell's amendments to Fiscal Code).



granted the General Assembly sole discretion to appropriate funds from the Lease Fund to the General Fund.<sup>27</sup> In 2010, Governor Rendell signed Executive Order No. 2010-05 (Rendell Executive Order), which warned of the dangers that current and further drilling would produce on the environment, and enforced a suspension on future leasing of state lands.<sup>28</sup> Four years later, Governor Corbett issued Executive Order No. 2014-03 (Corbett Executive Order), which lifted Rendell Executive Order's ban, and asserted the necessity of "royalty revenue" generated by oil and natural gas leasing" to forestland preservation with some exceptions.<sup>29</sup>

PEDF, in its Second Amended Petition for Declaratory Relief (Petition), argued that the budget-related decisions from Governor Rendell's and Governor Corbett's respective documents, Fiscal Year 2009-2010 through Fiscal Year 2014-2015, violated the ERA's constitutionally-promised protections.<sup>30</sup> PEDF urged that the drilling and removal of natural resources, such as gas and oil, from the land would produce both "immediate and long term negative impacts" on the environment.<sup>31</sup> PEDF raised four arguments concerning the constitutionality of the legislative and executive actions under the ERA.<sup>32</sup>

First, PEDF argued that "all present and future Pennsylvanians" maintained a right to "the Commonwealth's scenic and natural resources[,]” pursuant to the ERA, and therefore, extraction of these

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27. *See Pa. Envtl. Def. Found.*, 108 A.3d at 160-61 (explaining Section 1602-E's appropriation of monies from Lease Fund to General Fund). From approximately 2009 to 2011, "there was a [two billion dollar] shortfall in the Pennsylvania general fund budget." *Id.* at 145; *see also* 72 PA. CONS. STAT. ANN. §§ 1602-E, 1603-E (providing 2009 Fiscal Code Amendments).

28. *Pa. Envtl. Def. Found.*, 108 A.3d at 148 (explaining significant toll natural gas and oil development has and will continue to take on land). Governor Rendell noted, "[I]n the next [ten] to [twenty] years, full development of the gas in the Marcellus [S]hale [F]ormation . . . currently subject to drilling will result in the use of more than [thirty thousand] acres for an estimated 1,100 well pads . . ." *Id.*; *see also* John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENVTL. L. 463, 489 (2015) (clarifying that banning of state land leasing still allowed Commonwealth to receive revenue from previous leasing transactions).

29. *Pa. Envtl. Def. Found.*, 108 A.3d at 150 (internal quotation marks omitted) (finding that revenue from leasing of state lands could be used to obtain privately-owned natural resources, refine state forest and park systems, and obtain conservatory tracts of land); *see also* Dernbach, *supra* note 28, at 489 (explaining permission of state land leasing unless it would lead to environmental degradation).

30. *See Pa. Envtl. Def. Found.*, 108 A.3d at 154 (explaining how PEDF's original petition to court was amended to include current arguments).

31. *Id.* at 155 (internal quotation marks omitted) (asserting PEDF's claims of drilling's harmful environmental effects).

32. *See id.* at 154-55 (analyzing PEDF's claims and questions presented to court).

minerals would inhibit the fulfillment of this right.<sup>33</sup> Second, the environmental organization challenged the adequacy of the General Assembly's monetary appropriations to DCNR, which was "without any fiduciary analysis of the financial needs of DCNR to meet its statutory and constitutional responsibilities to conserve and maintain" the Commonwealth's land.<sup>34</sup> Third, PEDF questioned the ability and authority of the General Assembly to assert itself into state land leasing decision-making.<sup>35</sup> Fourth, the group protested the appropriation of substantial revenue generated from land leasing in the Lease Fund to the General Fund in order to balance the Commonwealth's severe budget deficit.<sup>36</sup>

On January 7, 2015, the Commonwealth Court of Pennsylvania granted the Commonwealth's motion for summary judgment in part.<sup>37</sup> The court issued four primary holdings: 1) legislative funding to DCNR was adequate, as it was not sufficiently proved to be inadequate; 2) revenue generated from leasing of state lands did not have to be used solely toward the continued preservation of natural resources, pursuant to the ERA; 3) the statute granting the General Assembly the authority to use monies in the Lease Fund for natural gas and oil development did not violate the ERA; and 4) the Oil and Gas Lease Fund did not constitute a trust fund.<sup>38</sup> The court ultimately denied "all other claims subject to the parties' cross-applications for summary [judgment]."<sup>39</sup> Following the issu-

33. *Id.* at 154 (highlighting Petitioner's primary argument under ERA).

34. *Id.* at 161 (citation omitted) (discussing PEDF's argument stating monies appropriated to DCNR by General Assembly fail to aid organization in adequately fulfilling duties under ERA).

35. *Pa. Envtl. Def. Found.*, 108 A.3d at 159-60 (describing PEDF's contention that Section 1602-E of Fiscal Code unconstitutionally delegated power to General Assembly to appropriate monies from Lease Fund). Petitioner claimed that the authority "should have remained with DCNR as the agency with the scientific and technical expertise to understand how to best use those resources to enhance and protect [the] [s]tate parks and forests." *Id.* at 159.

36. *See id.* at 140-45 (illuminating Petitioner's challenge of governmental appropriation of leasing revenues to balance Pennsylvania General Fund budget). PEDF also argued that the General Assembly was more concerned with asserting its authority over monies than with fulfilling its trustee duties in protecting the environment. *See id.* at 160.

37. *See id.* at 172-73 (noting court's conclusion and grant of summary relief for Respondents on two constitutional challenges).

38. *Id.* at 140 (expressing court's holding on various issues of leasing of state lands for natural gas and oil development).

39. *Id.* at 173 (asserting valid claims that court considered and decided). The court denied Petitioner's request for reargument on February 3, 2015. *See id.* at 140. The court also explicitly denied addressing Petitioner's constitutional challenge of past lease sales from 2008 and 2010, as well as the 2010 Anadarko Lease Sale, because of a lack of indispensable parties to the matter. *See id.* at 172. Although DCNR asserted that there would be no further lease sales after 2008, it

ance of the opinion, however, PEDF appealed to the Supreme Court of Pennsylvania for relief.<sup>40</sup>

### III. BACKGROUND

Leasing Pennsylvania state lands to private parties for oil and natural gas extraction has existed for decades.<sup>41</sup> Nonetheless, the creation of various federal acts, constitutional amendments, federal agencies, and executive orders within recent years has molded the current state of natural resource exploration and its associated large revenues.<sup>42</sup> Currently, land leasing for these purposes has “increased exponentially” as a result of technological innovations that facilitate the effortless extraction of natural minerals from the Marcellus Shale Formation.<sup>43</sup> Tension still exists, however, between the legislative and executive authorities to lease state lands for both mineral exploration and financial gain, and citizens’ challenges regarding governmental non-compliance with the ERA.<sup>44</sup> The potential hazards on the environment that future drilling threatens require a careful weighing of environmental concerns with social policies, pursuant to both constitutional judicial scrutiny, and interpretation of precedent.<sup>45</sup>

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quickly changed its position, noting that “th[e] [2010] lease sale is a direct result of certain line items contained within the budget agreement and fiscal code for FY 2009-10.” *Id.* at 146. The year’s Fiscal Code proposed generating sixty million dollars for the General Fund. *See id.*

40. *See* Dernbach, *supra* note 28, at 493 (detailing PEDF’s appeal to state supreme court after loss).

41. *See Pa. Envtl. Def. Found.*, 108 A.3d at 142 (describing how leasing state lands for oil and natural gas development is not new occurrence). Since 1947, DCNR’s antecedent, the Department of Environmental Resources (DER), had leased state lands to private parties for extraction of natural gas. *See id.* at 143.

42. *See id.* at 144 (highlighting how “rents and royalties” generated from land leasing under Lease Fund Act amounted to 163 million dollars in 2008). Previously, however, generated revenue from land leasing amounted to only 150 million dollars. *See id.* at 143. By 2010, the government had appropriated approximately 200 million dollars in revenue to balance its budget through the leasing of 140 thousand acres of land. *See id.* at 148.

43. *Id.* at 142 (noting increase of state land leasing due to improvements in technological equipment to extract resources).

44. *See generally Pa. Envtl. Def. Found.*, 108 A.3d at 154-55 (highlighting citizens’ concerns over governmental violation of ERA).

45. *See generally Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973) (weighing citizens’ environmental and social concerns with legitimate governmental policy), *aff’d*, 361 A.2d 263 (Pa. 1976).





A. Limited Judicial Scrutiny of Challenged Legislative and Executive Actions: The Commonwealth's Constitutionally "Broad" Authority to Interpret the Constitution?

Although judicial review of challenged aspects of legislative activities and appropriations to federal agencies is not a recent occurrence, courts have historically remained reluctant to "second guess" the General Assembly's actions.<sup>46</sup> For example, in *Marrero v. Commonwealth*,<sup>47</sup> individuals, on behalf of the Philadelphia School District, sought declaratory relief against the Commonwealth for failing to provide sufficient academic funding to local schools.<sup>48</sup> The petitioners alleged that the inadequate funding directly violated the General Assembly's enumerated duties in Article III, Section 14 of the Pennsylvania Constitution, which asserts that the legislature must ensure a sufficient public school system that benefits the Commonwealth.<sup>49</sup> The court agreed with the Commonwealth that, because the state constitution "squarely ["places the responsibility for the maintenance and support of the public school system"] in the hands of the legislature[,] . . . this court [can] not inquire into the reason [or] wisdom . . . of the legislative policy with regard to education . . . ." <sup>50</sup> The court, consequently, dismissed the complaint for lack of judicial authority to properly review the decision.<sup>51</sup>

In *Mental Health Association in Pennsylvania v. Corbett*,<sup>52</sup> the court similarly dealt with complaints of inadequate funding by the Commonwealth and the limitations of judicial review.<sup>53</sup> In this case, the petitioners, several non-profit advocates of individuals with mental health disorders, brought suit against Governor Corbett for

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46. *Pa. Envtl. Def. Found.*, 108 A.3d at 166 (explaining traditional judicial hesitancy to question General Assembly's actions).

47. 709 A.2d 956, 966 (Pa. Commw. Ct. 1998), *aff'd*, 739 A.2d 110 (Pa. 1999).

48. *See id.* at 957-58 (laying foundation for petitioners' challenges to General Assembly's actions).

49. PA. CONST. art. III, § 14 (mandating General Assembly's funding for public education system); *see also Marrero*, 709 A.2d at 958 (explaining petitioners' arguments pursuant to Article III, Section 14 of Pennsylvania Constitution).

50. *Marrero*, 709 A.2d at 965 (citation omitted) (explaining judicial inability to define what constitutes sufficient funding for public school system). The court noted that issues, such as funding to academic institutions, "are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government." *Id.* at 965-66.

51. *Id.* at 966 (emphasizing reasoning for dismissal and holding of court).

52. 54 A.3d 100, 104 (Pa. Commw. Ct. 2012).

53. *Id.* at 104 (describing court's limited authority to decide how General Assembly allocates its funds, partly due to separation of powers doctrine).



cutting funding to the Department of Public Welfare (DPW) by twenty percent.<sup>54</sup> These entities alleged that the legislative branch violated its duties under the Mental Health and Intellectual Disability Act of 1996, which required that the General Assembly appropriate adequate funds to DPW for administration of mental health services.<sup>55</sup> The court, however, recognized that pursuant to Article VIII, Section 13 of the Pennsylvania Constitution, the General Assembly's appropriation of funds derives from "available revenues and surplus."<sup>56</sup> The court also noted that the General Assembly has a duty to balance the Commonwealth's budget.<sup>57</sup> Ultimately, the court found that the governor "was well within his constitutionally-granted powers" to decrease funding in order to balance the budget during a period of severe financial depression.<sup>58</sup> Given that the General Assembly's authority encompasses discretion to decide "how statutory budget obligations will be satisfied, . . . [t]here is no authority for this Court to insert itself into that process."<sup>59</sup> The court consequently dismissed the complaint for lack of non-justiciable questions for review.<sup>60</sup> Based upon precedent, Pennsylvania courts have assumed a traditionally passive role toward questioning legislative monetary actions, highlighting a constraint in judicial scrutiny and a lack of effective redress for concerned citizens.<sup>61</sup>

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54. *Id.* at 102-03 (detailing parties to suit). Governor Corbett submitted his proposed budget that cut funding to DPW for mental health services and appropriated funding into a Block Grant that prevented DPW from holding monies. *See id.* at 103.

55. *See id.* at 102 (explaining petitioners' primary argument against Commonwealth for inadequate funding).

56. *Id.* at 103 (highlighting court's reliance on Pennsylvania Constitution in determining constitutionality of legislative and executive actions).

57. *Mental Health Ass'n*, 54 A.3d at 105 (asserting discretionary right of Commonwealth to use funds for state purposes, such as balancing deficient budget). The court held, "the General Assembly . . . ultimately determines how statutory budget obligations will be satisfied . . ." *Id.*

58. *Id.* 54 A.3d at 105 (illuminating court's justification of government's actions).

59. *Id.* (explaining court's reasoning why judicial review of government's actions is unwarranted).

60. *See id.* at 106 (describing court's holding and reasoning for dismissal of complaint).

61. For a further discussion of the Pennsylvania courts' historical lack of inquiry into legislative actions, see *supra* notes 46-61 and accompanying text.

B. The “Self-Executing” Environmental Rights Amendment to the Pennsylvania Constitution and the Public Trust Doctrine

In 1971, Congress passed Article I, Section 27 of the Pennsylvania Constitution, which proclaims that “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic[,] and esthetic values of the environment.”<sup>62</sup> It subsequently provides in its second and third clauses that “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”<sup>63</sup> Thus, the ERA conveys two distinct yet intertwined constitutional roles: a citizen’s right to historic and scenic environmental preservation, and the Commonwealth’s duty, as trustee, to maintain these natural resources.<sup>64</sup> A sufficient action under the ERA “may proceed upon alternate theories that either the government has infringed upon citizens’ rights or the government has failed in its trustee obligations, or upon both theories. . . .”<sup>65</sup>

In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,<sup>66</sup> decided in 1973, the Supreme Court of Pennsylvania handed down one of its most controversial decisions affecting citizens’ environmental rights under Article I, Section 27.<sup>67</sup> The Attorney General, representing the Commonwealth, brought suit against a corporation seeking to build a 307-foot tall observation tower near a historic site, triggering the first clause of the ERA’s protection of

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62. PA. CONST. art. I, § 27 (asserting rights of people to use and enjoy environment’s public resources). In 1969, Franklin Kury, a state legislator, proposed the ERA to the Pennsylvania Constitution; see also John C. Dernbach & Mark Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 335-36 (2015) (explaining history of ERA interpretation).

63. PA. CONST. art. I, § 27 (explaining Commonwealth’s role as trustee of state’s natural resources). The Pennsylvania Constitution states, in part, that “each branch of government [must] consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013) (plurality opinion).

64. See Dernbach & Prokopchak, *supra* note 62, at 337 (summarizing purpose and rights under ERA).

65. *Robinson Twp.*, 83 A.3d at 950-51 (addressing elements of Article I, Section 27 claim).

66. 311 A.2d 588 (Pa. 1973).

67. See generally *id.* (detailing non-binding ruling that ERA is not self-executing).



citizens' right to historic preservation.<sup>68</sup> Before the case reached the Supreme Court of Pennsylvania, in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,<sup>69</sup> the Commonwealth Court of Pennsylvania first reasoned that the Amendment was self-executing and did not require additional legislation for enforcement.<sup>70</sup> On appeal, the Supreme Court of Pennsylvania rejected the Commonwealth Court of Pennsylvania's self-executing arguments, finding instead that the ERA is not self-executing because it created additional constitutional concerns under the Fourteenth Amendment of the U.S. Constitution.<sup>71</sup> The court determined that the ERA needed additional legislation to "define the values which the [A]mendment seeks to protect and to establish procedures by which the use of private property can be fairly regulated to protect those values."<sup>72</sup> Although the Supreme Court of Pennsylvania disagreed with the lower court's opinion of the Amendment's self-executing nature, the lower court's decision still constitutes binding precedent since the Supreme Court of Pennsylvania failed to reach a majority decision.<sup>73</sup>

That same year, in *Payne v. Kassab (Payne I)*,<sup>74</sup> the Commonwealth Court of Pennsylvania, sitting *en banc*, addressed a citizen class action lawsuit to terminate a governmental project to widen streets, which entailed eradicating portions of historical and public land.<sup>75</sup> The petitioners urged that the project violated both Act

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68. *See id.* at 589-90 (providing foundation for lawsuit and applicability under ERA).

69. 302 A.2d 886 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973).

70. *See id.* at 892 (holding Article I, Section 27 to be self-executing). The court emphasized that in cases involving "injury of historic and esthetic values of the environment," plaintiffs must successfully prove harm "by clear and convincing evidence." *Id.* at 894.

71. *See Nat'l Gettysburg Battlefield Tower*, 311 A.2d at 594-95 (rejecting lower court's ruling on self-executing nature, but affirming overall holding that construction near historic site did not violate ERA).

72. *Id.* at 595 (explaining need for supplemental legislation to make ERA protections effective).

73. *See* Dernbach & Prokopchak, *supra* note 62, at 340-41 (recognizing binding decision of Commonwealth Court of Pennsylvania that ERA is self-executing). Due to the confusion the Supreme Court of Pennsylvania's decision has caused, based on its inability to reach a majority, the fact that the Commonwealth Court of Pennsylvania's decision is still binding "was often lost on subsequent courts, which held that [A]rticle I, [S]ection 27 does not apply unless the General Assembly says so." *Id.* at 341. The Supreme Court of Pennsylvania's decision has consequently contributed to the viewpoint that the ERA serves as a concession, not check, of governmental power and autonomy. *See id.*

74. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

75. *See id.* at 88 (detailing nature of construction and petitioners' procedural actions); *see also* *Payne v. Kassab*, 361 A.2d 263, 264 (Pa. 1976) (reiterating petitioners' claims on appeal).

120, which banned construction on such sites if there existed another viable, less damaging option, and their constitutional rights under Article I, Section 27.<sup>76</sup> The court, however, realized the “difficult[y] [of] imagin[ing] any activity in the vicinity . . . that would not offend the interpretation of Article I, Section 27. . . .”<sup>77</sup> It subsequently held that the ERA “intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania.”<sup>78</sup>

Applying a now widely criticized three-pronged test, the court reasoned that, under the ERA, the project’s public benefits outweighed environmental concerns, as Respondents sufficiently proved that construction would reduce potential environmental hazards by replanting trees and reusing existing environmental landmarks.<sup>79</sup> The test comprised the following prongs: 1) adherence to statutes that functioned to preserve resources; 2) “reasonable effort[s]” to minimize harmful environmental ramifications; and 3) a balancing of negative impacts and potential benefits.<sup>80</sup> Applying this test, the court dismissed the complaint, concluding that the project passed constitutional muster under both Article I, Section 27 and Act 120.<sup>81</sup> On appeal, the Supreme Court of Pennsylvania, in *Payne v. Kassab (Payne II)*,<sup>82</sup> affirmed the lower court’s decision.<sup>83</sup> The court emphasized that the Commonwealth upheld

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76. *Payne*, 312 A.2d at 94 (listing petitioners’ challenges to Respondents’ construction project).

77. *Id.* (citation omitted) (analyzing difficulties in abiding by ERA).

78. *Id.* (balancing by court of social and constitutional rights associated with public land, and Commonwealth’s duty as trustee of public natural resources); see also Dernbach, *supra* note 28, at 463 (stating courts’ ignored meaning of ERA and its public trust doctrine for decades). Critics of precedential interpretations of the ERA note that “[t]he Amendment had been so thoroughly buried by judicial decisions that most lawyers had never given the text much thought.” *Id.*; see also Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENVTL. L. 431, 461 (2015) (explaining union between ERA clauses and need for them to “work together” to conserve and maintain environmental resources).

79. *Payne*, 312 A.2d at 95 (illustrating state government’s plan to minimize environmental hazards and drastic change to historic site during construction).

80. *Id.* at 94 (applying three-part test in assessing Commonwealth’s actions).

81. See *id.* (expressing court’s holding in favor of Commonwealth).

82. 361 A.2d 263 (Pa. 1976).

83. *Id.* at 273 (deciding constitutionality of Commonwealth’s actions as trustee); see also *Pa. Env’tl Def. Found.*, 108 A.3d at 158 (noting Supreme Court of Pennsylvania’s affirmation on appeal did not automatically insinuate agreement with three-pronged test).



its duties as trustee under Article I, Section 27, as the alterations to the historical site were minimally intrusive.<sup>84</sup>

The court reasoned that although citizens possessed an inherent right to enjoy esthetic and historical values associated with the environment, that right “create[d] no automatic right to relief.”<sup>85</sup> The fine line between an individual’s constitutional rights and right to remedy highlights the balancing test that the courts have employed to ensure adherence with Article I, Section 27.<sup>86</sup> Critics, however, have condemned this balancing test for its ignorance of the “history, purpose, and text” of the ERA.<sup>87</sup> The court’s “substitution of a three-part balancing test for the text of [A]rticle I, [S]ection 27 is not simply an activist reading of the text of the [ERA]; it steps outside the realm of what judges are supposed to do.”<sup>88</sup> The contentious test would later be challenged and subsequently rejected in a landmark 2013 Supreme Court of Pennsylvania decision.<sup>89</sup>

### C. The Conservation and Natural Resources Act and Creation of the Department of Conservation and Natural Resources: An Environmental Safeguard

In 1995, the Pennsylvania General Assembly enacted the Conservation and Natural Resources Act (CNRA) to uphold the provisions of the ERA in ensuring preservation of the state’s natural resources for citizens’ inherent right to enjoyment and use.<sup>90</sup> To achieve this goal, the Department of Environmental Resources (DER) became the Department of Environmental Protection

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84. *Payne*, 361 A.2d at 273 (affirming lower court’s ruling in favor of Commonwealth).

85. *Id.* (distinguishing between citizens’ constitutional rights and standard of relief).

86. For a further discussion of the courts’ balancing of citizens’ constitutional rights and the government’s right to economic development, see *supra* notes 62-89 and accompanying text.

87. Dernbach & Prokopchak, *supra* note 62, at 338 (noting disadvantages of *Payne*’s three-part balancing test for citizens’ rights). Due to this test, “the environmental plaintiff or petitioner has almost never succeeded. . . . [T]his test . . . is not only a remarkable example of a court substituting its own rule for that in the constitution; it has also had the effect of demonstrably and significantly limiting public rights.” *Id.*

88. *Id.* at 343 (footnote omitted) (highlighting court’s illicit overreach of its judicial authority in creating balancing test).

89. See *Robinson Twp.*, 83 A.3d at 965-67 (rejecting *Payne* three-part test on how to interpret ERA). The plurality opinion in *Robinson Twp.* criticized the test as inappropriate for analyzing a statute’s constitutionality. See *id.* at 967.

90. See *Pa. Env’tl. Def. Found.*, 108 A.3d at 142 (noting passage of Act to ensure conservation of state forest and park lands).



(DEP), and the Act created DCNR to champion the protection of state forestlands and parks.<sup>91</sup> Duties of DCNR, a cabinet-level agency, include maintenance and conservation of state forestlands to ensure environmental growth and sustainability.<sup>92</sup> The Lease Fund, containing “all rents and royalties from gas leases on Commonwealth lands,” granted DCNR discretion to use funds for “conservation, recreation, dams, or flood control. . . .”<sup>93</sup> Additionally, DCNR possesses the sole discretion to enter into land leasing contracts with private parties, while taking into account the best interests of the Commonwealth.<sup>94</sup>

In *Belden & Blake Corp. v. Commonwealth*,<sup>95</sup> however, the Supreme Court of Pennsylvania illuminated limitations on DCNR’s conferred, discretionary authority.<sup>96</sup> A private company that owned several oil and natural gas properties and planned to construct gas wells on parklands brought action against the Commonwealth for enforcing a “coordination agreement” on their activities.<sup>97</sup> DCNR argued that, pursuant to its fiduciary role as trustee of the Commonwealth’s resources under the ERA, its discretionary actions in controlling surface conditions were not only permissible, but consti-

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91. *See id.* (describing purpose of creation of DCNR in upholding CNRA and ERA).

92. Conservation and Natural Resources Act, 71 PA. CONS. STAT. ANN. § 1340.101(b)(1) (West 1995) (enumerating intent of CNRA in creating new department to spearhead environmental efforts). The CNRA describes the extent of DCNR’s constitutional obligations as follows below:

The primary mission of the Department of Conservation and Natural Resources will be to maintain, to manage [s]tate forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania’s ecological and geological resources and to administer grant and technical assistance to programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.

*Id.*

93. *Pa. Envtl. Def. Found.*, 108 A.3d at 140-43 (citation omitted) (demonstrating how revenue from gas leases on state land placed into fund must be used for conservation and beneficial environmental purposes only, pursuant to DCNR’s authority); *see also* Oil and Gas Lease Fund Act, 71 PA. CONS. STAT. ANN. §§ 1331-1333 (West 1955) (describing purpose of Act and allocation of monies).

94. *See* Conservation and Natural Resources Act, 71 PA. CONS. STAT. ANN. § 1340.302(a)(6) (West 1995) (explaining discretion granted to DCNR to enter into contracts with private companies in leasing state lands for oil and natural gas development).

95. 969 A.2d 528, 528 (Pa. 2009).

96. *See id.* at 532-33 (enforcing limitations on DCNR’s ability to influence how private parties use leased land).

97. *Id.* at 529 (explaining case’s basic facts and petitioner’s cause of action).



tutional as well.<sup>98</sup> Contrary to DCNR's argument that the ERA confers upon it "broad authority to protect state parks," the court reasoned that the agency could not intrude upon a private party's rights to land merely because the government owned its surface.<sup>99</sup> Thus, the court granted the petitioner partial summary judgment and held that a contrary holding "would be a departure from our jurisprudence."<sup>100</sup> The court's recognition of express limitations on DCNR's authority bolstered the notion that both the General Assembly and Governor act as an ultimate check on the agency's power.<sup>101</sup>

#### D. Act 13 and *Robinson Township v. Commonwealth's* Impact on Article I, Section 27 Interpretation

In 2012, in response to the astronomical revenues generated from the extraction of natural gas in the Marcellus Shale Formation, Governor Corbett approved Act 13.<sup>102</sup> Act 13 amended the Pennsylvania Oil and Gas Act, which added provisions that prohibited local municipalities' regulation of gas and oil activities, enforced strict limitations on their development, and implemented unconstitutional zoning regulations.<sup>103</sup>

*Robinson Township v. Commonwealth*,<sup>104</sup> perhaps one of the most influential and recent cases interpreting the ERA, is regarded as the "recovery" of Article I, Section 27's original and intended meaning, as it criticized and rejected the three-part balancing test established in *Payne I*.<sup>105</sup> In *Robinson Township*, the petitioners, a group of citizens, brought an action against the Commonwealth, arguing that Act 13 violated Article I, Section 27, among other Article I provisions that grant citizens property rights.<sup>106</sup> Specifically, the petitioners argued that mineral excavation entailed toxic gaseous

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98. *See id.* at 530 (addressing DCNR's trustee argument pursuant to broad interpretation of ERA).

99. *Id.* at 532 (illustrating court's distinction between subsurface and surface owners' land rights).

100. *Belden & Blake Corp.*, 969 A.2d at 532 (providing court's holding).

101. *See Pa. Envtl. Def. Found.*, 108 A.3d at 160-61 (displaying General Assembly's and Governor's check on DCNR authority).

102. *Robinson Twp.*, 83 A.3d at 915 (explaining enactment of Act 13).

103. *Id.* (listing new provisions that Act 13 added to Title 58, Oil and Gas Act).

104. 83 A.3d 901 (Pa. 2013).

105. *See* Dernbach & Prokopchak, *supra* note 62, at 338, 352-56 (explaining *Robinson Twp.*'s impact on environment and *Payne*'s balancing test as constitutionally ineffective).

106. *Robinson Twp.*, 83 A.3d at 936 (detailing petitioners' primary constitutional challenges of Act 13).





excretions, noxious fumes, and noise pollution that adversely impacted the environment.<sup>107</sup> Furthermore, the petitioners alleged that the Act denied municipalities “the ability to strike th[e] balance between oil and gas development and the preservation of the natural, scenic, historic[,] and esthetic values of the environment. . . .”<sup>108</sup> The Commonwealth contended that the General Assembly was permitted to use its “broad,” yet non-arbitrary, “police power” to promote development of valuable natural gas reserves.<sup>109</sup> Ultimately, the court reasoned that, because the state maintains an interest in the wellbeing of its citizens, governmental “police power [must be used] to promote [the economic] welfare [of the citizens] . . . in a manner that promotes sustainable property use and economic development.”<sup>110</sup>

The court also addressed the Commonwealth’s obligation, as trustee, to prevent environmental harm.<sup>111</sup> Certain provisions of the Act, thus, violated the ERA and were unconstitutional because they contradicted the Commonwealth’s duty as trustee of public natural resources.<sup>112</sup> The court reasoned that Act 13’s elimination of local government’s involvement in natural gas development “command[ed] municipalities to ignore their obligations under Article I, Section 27.”<sup>113</sup> The decision held Sections 3215(b)(4), 3215(d), 3303, and 3304 to be unconstitutional.<sup>114</sup> Section 3215(b)(4) permitted DEP to authorize waivers from specific “statutory protections” to those wishing to operate on gas wells, and Section 3304 restricted the ability of local government to regulate the oil and gas industry.<sup>115</sup> By declaring these acts to be infringements upon both citizens’ constitutional rights and the Commonwealth’s

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107. *See id.* at 937 (enumerating list of harmful effects fracking produced on environment and human safety).

108. *Id.* at 940 (internal quotation marks omitted) (explaining Act’s denial of local government’s role in serving as public trustee under ERA).

109. *Id.* at 933 (explaining Commonwealth’s position regarding General Assembly).

110. *Id.* at 954 (citation omitted) (discussing balance of state’s legitimate police power, authority under ERA, and promotion of citizens’ welfare).

111. *See Robinson Twp.*, 83 A.3d at 957 (describing Commonwealth’s duties as trustee of state’s public and natural resources).

112. *Id.* at 999-1000 (determining unconstitutionality of certain provisions of Act).

113. *Id.* at 978 (analyzing General Assembly’s transgression of police power, which was limited by ERA).

114. *Id.* at 878-84 (discussing court’s analysis of provisions of Act 13 in dispute and subsequent failures to abide by constitutional parameters).

115. *See id.* at 931 (describing purpose of Sections 3215(b)(4) and 3304). The court stated, “In enjoining Section 3304, the Commonwealth Court [of Pennsylvania] held that the provision violated the citizens’ due process rights by requir-



obligation to protect the state's natural resources, *Robinson Township* represented an unprecedented check on unfettered legislative authority.<sup>116</sup>

*Robinson Township's* interpretation of the ERA, however, supported by only three justices, consequently constitutes non-binding precedent.<sup>117</sup> Despite its merely persuasive authority, the Supreme Court of Pennsylvania's plurality decision, for the first time, looked to the history and original intent of Article I, Section 27 in determining portions of Act 13 to be unconstitutional.<sup>118</sup> *Robinson Township's* influential interpretation of Article I, Section 27 set the stage for the Commonwealth Court of Pennsylvania's similarly presented issues, arguments, and decision two years later in *Pennsylvania Environmental Defense Foundation*.<sup>119</sup>

#### IV. NARRATIVE ANALYSIS

The Commonwealth Court of Pennsylvania considered various arguments and relied on precedent in ultimately denying Petitioner's constitutional claims for summary judgment under the ERA.<sup>120</sup> The primary challenge before the court involved its ability

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ing local governments to amend their existing zoning ordinances without regard for basic zoning principles. . . ." *Id.*

116. For a further discussion of the legislature's traditionally recognized authority in deciding funding for the Commonwealth, see *supra* notes 46-61 and accompanying text.

117. For a further discussion of the court's analysis of citizens' rights and the Public Trust Doctrine, see *supra* notes 62-89 and accompanying text. Although the court's decision in Part III of *Robinson Twp.* is persuasive, rather than binding, authority, "the plurality opinion is likely to have significant persuasive power, in no small part because it contains a lengthy, detailed, and thoughtful exposition of the original meaning and understanding of [A]rticle I, [S]ection 27." Dernbach & Prokopchak, *supra* note 62, at 359.

118. See *Robinson Twp.*, 83 A.3d at 950 (analyzing meaning of ERA and its equality to all Article I rights). Chief Justice Castille, representative of the Supreme Court of Pennsylvania's plurality opinion in Part III of the opinion, asserted:

The actions brought under Section 27 since its ratification . . . have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision. Moreover, it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways. As a jurisprudential matter . . . these precedents [like *Payne*] do not preclude recognition and enforcement of the plain and original understanding of the [ERA].

*Id.*

119. For a further discussion of how the Commonwealth Court of Pennsylvania relied on *Robinson Twp.* as persuasive authority, see *infra* notes 134-143 and accompanying text.

120. See *Pa. Env'tl. Def. Found. v. Commonwealth*, 108 A.3d 140, 154-55 (Pa. Commw. Ct. 2015) (providing Petitioner's list of issues for judicial review under



to inquire into the constitutionality of legislative and executive monetary actions.<sup>121</sup> Ultimately, the court emphasized its limited ability to question the activity of other branches “unless it clearly, palpably[,] and plainly violate[d] the Constitution, without any doubts being resolved in favor of constitutionality.”<sup>122</sup>

#### A. Addressing Section 1602-E of the 2009 Fiscal Code and the ERA’s Check on Legislative Actions

The Commonwealth Court of Pennsylvania first balanced the purpose of the ERA against PEDF’s claim that the General Assembly violated Article I, Section 27 through its appropriation of monies in the Lease Fund for its own, self-serving purposes and only granting “up to fifty million dollars” to DCNR, thereby placing limitations on the agency’s ability to properly function.<sup>123</sup> The court noted the first clause of the Amendment requires the government to carefully contemplate the ramifications that the legislation would have on constitutionally safeguarded environmental resources.<sup>124</sup> Additionally, the court, relying on *Robinson Township’s* plurality interpretation of Article I, Section 27 as non-binding precedent, recognized the interplay between the state and the ERA in that the Commonwealth maintains a legitimate interest in its citizens’ economic well-being and thus, the ERA protects against the government’s unreasonable, harmful acts to the environment.<sup>125</sup> The court also noted that judging the General Assembly’s motives was “not part of our constitutional inquiry.”<sup>126</sup> Under this analytical framework, the court first reasoned that, although DCNR’s authority includes protection of state lands, “[it] exists by act of the Gen-

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ERA and Declaratory Judgments Act). The court noted that PEDF’s arguments about citizens’ inherent right to enjoy the environment “place the [c]ourt at a crossroad where the law and policy intersect.” *Id.* at 154.

121. *See id.* at 154-55 (explaining heavy burden petitioners bear in challenging legislative actions).

122. *Id.* at 154 (citation omitted) (emphasizing rule courts use to determine constitutionality of governmental actions).

123. *See id.* at 155 (laying foundation for PEDF’s arguments pursuant to ERA).

124. *Id.* at 156 (plurality opinion) (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 950-51 (Pa. 2013)) (requiring government to consider potential environmental degradation before enacting laws).

125. *See Pa. Env’tl. Def. Found.*, 108 A.3d at 156-57 (highlighting Commonwealth’s duties as trustee under ERA and its simultaneous ability to economically develop environment); *see also* Dernbach, *supra* note 28, at 490 (explaining Commonwealth Court of Pennsylvania’s admission in beginning of analysis that *Robinson Twp.* plurality opinion does not constitute binding precedent).

126. *Pa. Env’tl. Def. Found.*, 108 A.3d at 160 (explaining court’s limited role in interpreting legislative actions and “motives”).



eral Assembly. . . . [I]t does not exercise that authority to the exclusion of the General Assembly, the Governor, or even this Court,” contrary to Petitioner’s argument.<sup>127</sup> The General Assembly, therefore, acted within its constitutional discretion to appropriate monies to DCNR to maintain conservation of state parks and forestlands.<sup>128</sup>

Furthermore, the court justified the General Assembly’s appropriation of monies from the Lease Fund for its own state purposes by analogizing this action to its right to grant monies to DCNR to use within its discretion.<sup>129</sup> The court noted, “[W]e do not view it any less constitutional for the General Assembly, through Section 1602-E, to reassert some control over the use of funds within that special fund.”<sup>130</sup> In interpreting the plain language of Section 1602-E, the court found that the provision did not impede the performance of DCNR’s duties enumerated under the CNRA.<sup>131</sup> Considering the heavy burden petitioners bear in challenging legislative actions, for which the court has limited scrutiny to review, the court concluded that the General Assembly’s monetary appropriations did not infringe upon citizens’ rights.<sup>132</sup> Consequently, PEDF failed to show that the Fiscal Code Amendments “clearly, palpably, and plainly [were] unconstitutional.”<sup>133</sup>

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127. *Id.* (citations omitted) (clarifying DCNR’s limited vested ability under General Assembly). Relying on the plurality opinion in *Robinson Twp.*, the court restated that the ERA grants the status of trustee of the state’s natural resources to the Commonwealth, rather than DCNR. *See id.* (citing *Robinson Twp.*, 83 A.3d 901 at 957).

128. *See id.* at 159-60 (concluding General Assembly did not violate citizens’ constitutional rights by appropriating monies in Lease Fund).

129. *See id.* at 160 (reasoning General Assembly possesses right to use monies from Lease Fund for state purposes).

130. *Id.* (highlighting General Assembly’s ability to direct appropriations of money within Lease Fund). The court also justified its position by explaining that the Lease Fund existed fifteen years before the enactment of the ERA to the Pennsylvania Constitution. *See id.*

131. *See Pa. Envtl. Def. Found.*, 108 A.3d at 160-61 (establishing court’s interpretation of Section 1602-E). The language of Section 1602-E is as follows:

Notwithstanding any other provision of law and except as provided in section 1603-E, no money in the [Lease] [F]und from royalties may be expended unless appropriated or transferred to the General Fund by the General Assembly from the [Lease] [F]und. In making appropriations, the General Assembly shall consider the adoption of an allocation to municipalities impacted by a Marcellus well.

*Id.*

132. *See id.* at 161 (asserting constitutionality of General Assembly’s actions).

133. *Id.* (noting PEDF’s lack of evidence to support claims). The court also addressed PEDF’s constitutional challenge of Section 1603-E of the Fiscal Code, which provided DCNR up to fifty million dollars from the Lease Fund to maintain state and park land sustainability. *See id.* PEDF argued the inadequacy of the General Assembly’s appropriation, as it limited DCNR’s capacity to perform its legal



B. Article I, Section 27 and its Impact on the Commonwealth's Duty as Trustee of the State's Public Natural Resources

Subsequent to its conclusion that the General Assembly did not violate the ERA by allocating a limited amount of Lease Fund monies to DCNR, the Commonwealth Court of Pennsylvania next addressed whether the Commonwealth's duty as trustee prevented it from using the generated revenue to balance the state's deficient budget.<sup>134</sup> The court attempted to find a restriction on how the General Assembly may use Lease Fund monies by looking to the text of the ERA itself.<sup>135</sup> The court noted that Petitioner's challenges concerned the ERA's second and third clauses, which involve the Commonwealth's duty as trustee to protect the state's public natural resources "for the benefit of all people."<sup>136</sup> The court recognized that, under the ERA, the state possesses a fiduciary commitment to comply with its title as trustee and to dutifully safeguard the trust's assets.<sup>137</sup>

The court, however, confronted a problem in deciding the scope of the ERA as it related to "public natural resources."<sup>138</sup> In resolving this issue, the court looked to *Robinson Township* as guid-

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duties, pursuant to the ERA. *See id.* The court, however, asserting its 'limited' judicial power to determine what constitutes adequate funding, determined that the General Assembly's appropriation was not "so deficient that DCNR [could not] conserve and maintain [the] [s]tate natural resources." *Id.* at 166.

134. *See id.* at 166-67 (laying foundation for PEDF's trustee argument). Petitioners asserted that the capital within the Lease Fund "must be committed to furthering the purposes, rights, and protections afforded under the Environmental Rights Amendment." *Id.* at 167.

135. *See id.* at 167 (determining whether limitations exist on General Assembly's ability to use monies from Lease Fund).

136. PA. CONST. art. I, § 27 (highlighting Commonwealth's legal obligations as trustee of state's public natural resources); *see also Pa. Env'tl. Def. Found.*, 108 A.3d at 167 (explaining purpose of ERA). In the 2014 Fiscal Code Amendments, the General Assembly found that leasing oil and gas rights to private parties was in the best interest of the Commonwealth's people, as the two standards were sufficiently met:

The first criteria is if DCNR, in consultation with the Governor, constitutes strong and effective lease protections, best management practices and ongoing monitoring programs on the impact of gas operations. The second criteria is if DCNR maintains a balance of money in the [Lease] [F]und to carry out [DCNR's] statutory obligation to protect [s]tate forest and park land and other environmental activities.

2014 Fiscal Code Amendments, 72 PA. CONS. STAT. ANN. § 1601.1-E (West 2014).

137. *See Pa. Env'tl. Def. Found.*, 108 A.3d at 167 (quoting *Robinson Twp.*, 83 A.3d at 957) (recognizing Commonwealth's fiduciary duty toward public natural resources "trust").

138. *See id.* (noting lack of explicit definition of "public natural resources" in Article I, Section 27); *see also* Dernbach & Prokopchak, *supra* note 62, at 337 (explaining legislature did not define "public natural resources" because list would "limit, rather than expand" protection).



ing precedent, which recognized that the drafters' lack of explanation for the phrase "fairly implicates relatively broad aspects of the environment, and is amenable to change over time. . . ." <sup>139</sup> The Commonwealth Court of Pennsylvania, espousing *Robinson Township's* expansive view of "public natural resources," determined the ERA did not explicitly mandate that monies generated from land leasing be used solely for further conservatory purposes. <sup>140</sup> Lacking explicit language, the court subsequently reasoned that the General Assembly maintained discretion to use Lease Fund revenue "so long as the Commonwealth is fulfilling its Article I, Section 27 obligations" by using the monies for the greater welfare of its citizens. <sup>141</sup> The court distinguished the present case from *Robinson Township* by noting that the latter dealt with the Commonwealth's legislative regulation of natural mineral development "throughout the Commonwealth, and not just on Commonwealth-owned lands." <sup>142</sup> Finally, the court dismissed the Petitioner's argument that the Commonwealth overstepped its boundaries as trustee, recognizing that the legislative branch "retain[s] authority to control the fate of special funds in order to serve the changing needs of the government." <sup>143</sup>

### C. Future Leasing of State Lands and Judge Cohn Jubelirer's Dissent: The Majority Oversteps its Judicial Boundaries

The Commonwealth Court of Pennsylvania refused to consider the constitutionality of past leasing to private parties, and instead addressed the decision-making process regarding future leasing of

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139. *Pa. Env'tl. Def. Found.*, 108 A.3d at 167 (citing *Robinson Twp.*, 83 A.3d at 955) (referring to court's decision to look to *Robinson Twp.* for guidance on definition interpretation).

140. *Id.* at 168 (describing court's interpretation of legislative rights under ERA).

141. *Id.* (explaining General Assembly's discretionary right to use monies to promote citizens' welfare).

142. *Id.* at 169 (distinguishing present case from precedent). The court further noted that the balancing test in *Robinson Twp.*, used to decide the constitutionality of the use of revenue from natural resource development, was not "necessary" here because the revenue in this case was from the leasing of lands. *See id.* at 170.

143. *Id.* at 168-69 (citing *Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 604 (Pa. 2013)) (internal quotation marks omitted) (providing part of court's holding). The court noted that "the General Assembly[']s . . . appropriate[ion] [of monies]" met the requisite standard of aiding Pennsylvania citizens. *See id.* at 169. The court also declared that "[t]he decision to use [s]tate lands for revenue-generating activities and development lies exclusively within the Commonwealth's control." *Id.* at 170 (citation omitted).



state lands in the last part of its opinion.<sup>144</sup> Although there had been no final decision regarding the future leasing of Commonwealth lands, the court believed the discussion to be warranted because of the high probability of continued leasing based on past financial successes.<sup>145</sup> The court then rejected the Commonwealth's argument that because the ERA did not vest DCNR with unlimited discretion to make leasing decisions, the Governor may veto any decision promulgated by the agency.<sup>146</sup> The court reasoned that, despite the Governor's title of Chief Executive, the CNRA constitutionally granted DCNR the right to create contracts for the leasing of state lands for extraction of natural minerals.<sup>147</sup> The court, however, clarified that while the Governor may have his own opinion on leasing decisions, it is ultimately up to DCNR to make agreements, especially because the discussion of future land leasing remains ongoing.<sup>148</sup>

Judge Cohn Jubelirer dissented with regard to the court's analysis of further leasing, notwithstanding her concurrence with respect to the rest of the majority's opinion.<sup>149</sup> Judge Cohn Jubelirer challenged the court's ability to address the future leasing of state lands when no final decision had been rendered, and deemed the court to have issued an unconstitutional advisory opinion.<sup>150</sup> Judge

144. *Pa. Env'tl. Def. Found.*, 108 A.3d at 169-72 (discussing court's decision to address future leasing of state land for oil and natural gas extraction).

145. *Id.* at 169 (explaining why court addressed issue of future leasing). Respondents, including the Commonwealth of Pennsylvania, raised this issue in its cross-application for summary judgment. *See id.* The court, in justifying its position to address this 'non-existent' issue, asserted that "[o]ne would have to ignore the history of the Commonwealth's leasing activities during the Marcellus Shale era to conclude otherwise." *Id.*

146. *Id.* at 171 (discussing reason for court's rejection of Respondent's argument).

147. *See id.* (holding CNRA vests DCNR with exclusive power to make leasing decisions, so long as in best interest of people); *see also* Conservation and Natural Resources Act, 71 PA. CONS. STAT. ANN. § 1340.302(a)(6) (West 1995) (granting DCNR discretionary authority). Although DCNR, a cabinet-level agency, "serves at the pleasure of the Governor," the ability to execute contracts for sale of land infers a constitutionally vested right. *Pa. Env'tl. Def. Found.*, 108 A.3d at 171.

148. *Pa. Env'tl. Def. Found.*, 108 A.3d at 172 (distinguishing Governor's rights from actions that overstep position's power). DCNR officials must faithfully perform their duties, "even when faced with overwhelming political pressure, perhaps from the Governor, to act against their better judgment." *Id.* Before asserting its holding, the court cautioned that DCNR must give public notice of future land leases. *See id.* at 172; *see also* PA. CONST. art. VI, § 3 (describing Oath of Office).

149. *See Pa. Env'tl. Def. Found.*, 108 A.3d at 173-74 (Cohn Jubelirer, J., dissenting) (discussing judge's concurring and dissenting opinion).

150. *See id.* at 174 (highlighting judge's concern with majority's decision to address future leasing of state lands). Judge Cohn Jubelirer emphasized the necessity of "[j]udicial constraint" in addressing non-existent issues. *See id.* at 173. She noted that the "[m]ajority's concern about 'the history of the Commonwealth's

Cohn Jubelirer emphasized that the Commonwealth's request that the court discuss future leasing did not automatically constitute an addressable concern.<sup>151</sup> Here, she asserted that "[w]ithout an actual controversy there is a lack of facts . . . thus, making it difficult to determine the parameters of the Governor and DCNR's decision-making authority vis-à-vis oil and natural gas leasing."<sup>152</sup> Ultimately, Judge Cohn Jubelirer criticized the court for lending itself to deciding an issue that may or may not come to fruition, and labeled this section of the majority's opinion mere dicta.<sup>153</sup>

## V. CRITICAL ANALYSIS

The Commonwealth Court of Pennsylvania's decision in *Pennsylvania Environmental Defense Foundation* represents a critical departure from the traditional one-sided analysis in precedent of Article I, Section 27 and its accompanying public trust doctrine.<sup>154</sup> The court's decision not to apply *Payne's* "non-textual," three-pronged test signified an affirmation of the Supreme Court of Pennsylvania's decision in *Robinson Township*, by which the Amendment's original intent was "reinvigorated."<sup>155</sup> The court, however, throughout its analysis, provided unclear bases for both its reasoning and deference to the Commonwealth's discretion to appropriate monies from the Lease Fund, so long as it was "for the benefit of all the people."<sup>156</sup> Despite affirming *Robinson Township's* "original meaning" interpretation of the ERA, the court's decision essentially per-

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leasing activities during the Marcellus Shale era,' does not create the necessary controversy to justify a declaratory judgment." *Id.* at 173-74 (quoting *Pa. Envtl. Def. Found.*, 108 A.3d at 169).

151. *See id.* at 173-74 (distinguishing between addressable issues and those that fail to create "necessary controversy").

152. *Id.* at 174 (explaining challenges of addressing situation that has not yet created legitimate issue). "[D]eclaratory 'relief cannot be used in anticipation of events that may never occur. . . . [T]here must be a real controversy.'" *Id.* (emphasis in original).

153. *See id.* (quoting *Citizen Police Review Bd. of Pittsburgh v. Murphy*, 819 A.2d 1216, 1222 (Pa. Commw. Ct. 2003)) (highlighting impossibility of challenging decision not yet rendered).

154. For a further discussion of the court's interpretation of the ERA's text, see *supra* notes 134-143 and accompanying text; see also Dernbach, *supra* note 28, at 499 (emphasizing court's reliance on text of ERA for interpretation purposes).

155. *See* Dernbach, *supra* note 28, at 499 (explaining court's non-adoption of *Payne's* three-pronged balancing test). Although the court refused to utilize the three-pronged balancing test made available in *Payne*, "[i]n an earlier procedure decision . . . the court indicated that *Payne* would be the applicable test." *Id.* (emphasis in original) (citing *Pa. Envtl. Def. Found. v. Commonwealth*, No. 228 M.D.2012, 2013 WL 3942086, at \*3 (Pa. Commw. Ct. Jan. 22, 2013)).

156. For a further discussion of the court's analysis and reasons asserted for its conclusions, see *supra* notes 120-143 and accompanying text. Notably, the Gen-





petuates substantial governmental, economic development at any expense, specifically environmental exploitation and degradation.<sup>157</sup>

#### A. The Court's "Abandonment" of the *Payne* Test and Modern Article I, Section 27 Implications

The Commonwealth Court of Pennsylvania's implicit refusal to apply the controversial three-pronged *Payne* test arguably marks a trend, beginning with *Robinson Township*, toward interpreting the ERA in accordance with its true legislative intent.<sup>158</sup> Furthermore, the court's adoption of the plain meaning of the ERA's public trust doctrine allowed it to re-label the "misunderstood" Amendment as self-executing and not relying on other legislation to officially enforce it.<sup>159</sup> Thus, in analyzing PEDF's claim that the Commonwealth's self-appropriations violated its trustee duties, the court properly looked to the text of Article I, Section 27.<sup>160</sup> Whether this decision, however, coupled with the persuasive authority of *Robinson Township's* interpretation of the ERA, signifies the end of the *Payne* test for future Article I, Section 27 interpretation remains uncertain.<sup>161</sup> Two recent court decisions emphasized the necessity of a plain meaning interpretation of the ERA, which lends promise that future cases in Pennsylvania courts involving citizens' environmental concerns against governmental actions will interpret Article I, Section 27 similarly.<sup>162</sup>

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eral Assembly is afforded discretion in appropriating monies. See *Pa. Env'tl. Def. Found.*, 108 A.3d at 168.

157. For a complete explanation of the court's analysis and prediction concerning future leasing of state land, see *supra* notes 120-143 and accompanying text. For a discussion of the ERA's enactment during politically-changing times, see Dernbach, *supra* note 28, at 469.

158. See *Pa. Env'tl. Def. Found.*, 108 A.3d at 167 (applying public trust doctrine text to PEDF's claims). The court, however, noted that because no majority was reached in Part III of *Robinson Twp.* to overrule *Payne, Payne*, along with its three-pronged test, is still considered binding precedent. See *id.* at 159.

159. See *id.* at 158 (describing self-executing nature of ERA constitutes binding precedent pursuant to past court decisions).

160. See *id.* at 156-57 (providing full text of ERA).

161. For a further discussion of *Pa. Env'tl. Def. Found.*'s predicted impact on other Pennsylvania courts' future use of the *Payne* test, see *infra* notes 191-205 and accompanying text.

162. See *Pa. Env'tl. Def. Found.*, 108 A.3d at 167 (using *Robinson Twp.*'s interpretation of ERA as guiding, albeit persuasive, precedent). See generally *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 950-64 (Pa. 2013) (plurality opinion) (discussing plain interpretation of ERA balanced against Commonwealth's duty as trustee).



Despite construing the ERA in accordance with its plain, legislative intent, parts of the court's holding evoke concerns over the preservation of citizens' environmental rights.<sup>163</sup> Primarily, the court's emphasis on an individual's inherent right to question the Commonwealth's duty to "prevent and remedy the degradation, diminution, [and] depletion of [the] public natural resources," ultimately becomes an illusory promise.<sup>164</sup> Although the court departed from prior precedent's application of constitutionally questionable tests, its decision solidifies the difficulties and burdens that challengers face in effectively bringing claims against legislative and executive actions under Article I, Section 27.<sup>165</sup>

Although the court strove to strictly interpret the ERA pursuant to its plain text, it failed to consider other intended, yet less explicit, meanings of the Amendment.<sup>166</sup> Analyzing the plain meaning of the text of Article I, Section 27 in accordance with its interpretation in *Robinson Township*, the Commonwealth Court of Pennsylvania rejected the state's "duty to prevent and remedy the degradation . . . of our public natural resources" as automatically implying that all generated revenue from land leasing must be used to protect the environment.<sup>167</sup> The court's reasoning, however, is concerning with regard to its assertion that without explicit language mandating that monies be reinvested into conservation, the General Assembly automatically has discretion under Article VIII, Section 13 of the Pennsylvania Constitution to use it for other purposes.<sup>168</sup> A plain meaning interpretation of a text does not necessarily indicate that the absence of express language signifies

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163. See *Pa. Envtl. Def. Found.*, 108 A.3d at 167 (providing plain text interpretation of Article I, Section 27 and applying it to Petitioner's claim). "[I]t is evident that in ratifying the [ERA][,] the citizens of this Commonwealth intended to place Pennsylvania's 'public natural resources' in trust and to impose a duty on the Commonwealth, as trustee, to 'conserve and maintain them for the benefit of all the people.'" *Id.* (emphasis in original) (quoting PA. CONST. art. I, § 27).

164. *Id.* at 168 (quoting *Robinson Twp.*, 83 A.3d at 957) (referring to Commonwealth's affirmative duty under ERA).

165. See *id.* (asserting holding that ERA grants discretion to General Assembly to fulfill legislative intent). Interestingly, "[o]f the twenty-four reported court cases where parties raised an [A]rticle I, [S]ection 27 challenge to some type of governmentally-approved action . . . only a single case held that the benefits of the government's action were clearly outweighed by its environmental harm. . . ." Dernbach & Prokopchak, *supra* note 62, at 344.

166. For a critique of the Commonwealth Court of Pennsylvania's strict interpretation of the ERA, see *supra* notes 158-172 and accompanying text.

167. *Pa. Envtl. Def. Found.*, 108 A.3d at 168 (quoting *Robinson Twp.*, 83 A.3d at 957) (noting Commonwealth's obligation to conserve and maintain environmental resources).

168. See *id.* (expressing court's reasoning).



legislature's intent to definitively exclude it.<sup>169</sup> Just as Article I, Section 27 includes the broad term "public natural resources" to encompass a variety of protected resources, the legislature's reasoning that a list of specific resources would "limit, rather than expand" protection could have been easily applied to the Petitioner's argument in this case.<sup>170</sup> Instead, the court held itself to the mercy of what the ERA explicitly stated, predicting troublesome consequences for the future of Article I, Section 27 interpretation.<sup>171</sup> The denial of each one of PEDF's contentions, despite being deeply rooted in constitutional law, strikes a chord consistent with traditional precedent in favor of the Commonwealth in ERA-based claims.<sup>172</sup>

#### B. Cracks in the Majority's Analysis: A Failure to Sufficiently Address PEDF's Claims

Although the court looked to the plain meaning of the ERA in analyzing PEDF's claims, it blundered when discussing the constitutionality of Section 1603-E of the Fiscal Code, which appropriated "up to fifty million dollars" to DCNR to execute its conservationist duties.<sup>173</sup> Instead of evaluating PEDF's concerns that the General Assembly illicitly appropriated monies without regard as to how much DCNR truly required in order to fulfill its obligations under the ERA, the court refused to even address the issue, asserting that the funding did not appear to be "so deficient" as to be considered inadequate.<sup>174</sup> The court's vague attribution to the Supreme Court of Pennsylvania for its reasoning provided no reference to case law

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169. See Dernbach & Prokopchak, *supra* note 62, at 337 (explaining legislative intent in amending ERA).

170. *Id.* (footnote omitted) (internal quotation marks omitted) (detailing changes made to proposed ERA); see also *Pa. Envtl. Def. Found.*, 108 A.3d at 167 (citing *Robinson Twp.*, 83 A.3d at 955) (including resources encompassed under "public natural resources"). According to the plurality opinion in *Robinson Twp.*, public natural resources includes "not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property." *Robinson Twp.*, 83 A.3d at 955.

171. For a further discussion of the decision's predicted impact on the interpretation of Article I, Section 27 rights, see *infra* notes 191-205 and accompanying text.

172. For a further discussion of past petitioners' challenges in succeeding against legislative and executive actions affecting constitutional rights, see *supra* notes 46-61 and accompanying text.

173. See *Pa. Envtl. Def. Found.*, 108 A.3d at 161-66 (asserting that General Assembly's appropriation to DCNR was not inadequate, and thus constitutional).

174. *Id.* at 166 (concluding lack of evidence of General Assembly's 'insufficient' appropriation to DCNR).

or other interpretive illustrations of how “the amount funded [could be] so inadequate that it impairs the proper functioning of the . . . DCNR.”<sup>175</sup>

The court’s strict interpretation, namely that DCNR funding was not so deficient that the agency could not “conserve and maintain our [s]tate natural resources,” misinterprets the Supreme Court of Pennsylvania guideline’s arguably broader, plain meaning.<sup>176</sup> On its face, the standard simply requires a court to review whether a certain amount of funding “impairs the proper functioning of . . . DCNR,” not whether, as the court claimed, the agency was unable to perform its job at all.<sup>177</sup> In this sense, the Commonwealth Court of Pennsylvania did not provide the Petitioner with a fair review of whether a maximum amount of fifty million dollars could impede DCNR’s ability to satisfactorily preserve the Commonwealth’s public natural resources, pursuant to Article I, Section 27.<sup>178</sup>

Although the court completed a thorough historical inquiry into the ability to question the sufficiency of legislative funding, it failed to adequately address PEDF’s 1603-E argument.<sup>179</sup> The court’s historical “reluctance” to “second guess” the General Assembly’s monetary grants to agencies produced an overly simplistic response that determined the funding to be adequate because it was not “so deficient” as to be considered inadequate.<sup>180</sup> Unfortunately, the court’s reluctance to judge the adequacy of legislative funding to DCNR perpetuates the ongoing struggle petitioners endure when challenging the constitutionality of governmental actions.<sup>181</sup>

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175. *Id.* (citing to Supreme Court of Pennsylvania’s guideline on evaluating legislative funding sufficiency).

176. *Id.* (asserting judicial reasoning for denying Petitioner’s claim).

177. *Id.* (applying Supreme Court of Pennsylvania standard to present case).

178. *See Pa. Env’tl. Def. Found.*, 108 A.3d at 166 (refusing to address Petitioner’s claim of insufficient legislative funding).

179. *See id.* (expressing court’s holding on constitutionality of Section 1603-E).

180. *Id.* (explaining court’s mixed feelings about judging legislative appropriations to governmental agencies).

181. For a further discussion of past petitioners’ challenges in succeeding in judicial actions against legislative and executive actions, see *supra* notes 46-61 and accompanying text.

### C. Did the Dissent Get it Right? The Majority Creates More Uncertainty Over Future Leasing of State Lands

By promulgating an advisory opinion about the future leasing of state lands, the Commonwealth Court of Pennsylvania overstepped its judicial boundaries.<sup>182</sup> Throughout the entire opinion, the court appeared hesitant, ultimately refusing to judge the “wisdom, reason [and] expediency” behind the adequacy of the General Assembly’s appropriations.<sup>183</sup> The court failed to sufficiently address legislative funding to DCNR to maintain and conserve natural resources by limiting its inquiry to “insur[ing] that the enactment does not transgress some specific constitutional prohibition.”<sup>184</sup> Because the General Assembly constitutionally possesses discretion to appropriate monies, the court decided that there were no constitutional breaches in this case.<sup>185</sup>

While the court assumed a passive stance toward injecting itself into legislative affairs, it directly addressed the future of state land leasing, a non-contested issue, albeit one which the Commonwealth raised in its cross-application for declaratory relief.<sup>186</sup> Judge Cohn Jubelirer’s dissent is valid in asserting the lack of an actual dispute at the time the lawsuit was brought, as well as the unconstitutionality of courts providing advisory opinions.<sup>187</sup> The dissenting opinion’s reliance on precedent illustrates that relief cannot be sought for events that have not occurred, or are even likely to occur, such as the future leasing of state lands in this case.<sup>188</sup> If the court was able to effectively inquire into both DCNR’s ability to execute future, non-existent contracts, and its duties pursuant to Article I, Section 27, then perhaps it could have more thoroughly evaluated the constitutionality of the General Assembly’s budget-balancing ac-

182. See *Pa. Env’tl. Def. Found.*, 108 A.3d at 173-74 (Cohn Jubelirer, J., dissenting) (criticizing court for issuing advisory opinion).

183. *Id.* at 160 (quoting *Commonwealth v. Sutley*, 378 A.2d 780, 782 (Pa. 1977)) (emphasizing judicial constraint in analyzing legislative actions). For a thorough discussion on the court’s analysis, see *supra* notes 120-153 and accompanying text.

184. *Pa. Env’tl. Def. Found.*, 108 A.3d at 160 (quoting *Sutley*, 378 A.2d at 782) (explaining permissible judicial inquiry of legislative enactments).

185. For a thorough discussion on the court’s analysis and conclusions, see *supra* notes 120-153 and accompanying text.

186. See *Pa. Env’tl. Def. Found.*, 108 A.3d at 169 (Cohn Jubelirer, J., dissenting) (addressing likelihood of future leasing of land).

187. See *id.* (arguing mere concern over future leasing and impact on environment does not give rise to legitimate controversy).

188. See *id.* at 174 (expressing lack of present disagreement over further leasing).



tions under the ERA.<sup>189</sup> Ironically, these cracks in the court's analysis illuminate a lack of judicial 'constraint' and arguable overreach in addressing the future leasing of lands for oil and natural gas exploration.<sup>190</sup>

## VI. IMPACT

The Commonwealth Court of Pennsylvania's decision in *Pennsylvania Environmental Defense Foundation* seemed to optimistically foreshadow continued leasing of state lands to private parties, despite acknowledging the toll that natural mineral extraction has and will continue to inflict on the environment.<sup>191</sup> Two weeks after the court handed down its opinion, however, current Governor Thomas Wolf (Governor Wolf) took office.<sup>192</sup> Governor Wolf's 2015 Executive Order effectively nullified Governor Corbett's 2014 Executive Order and restored Governor Rendell's 2010 ban on future leasing of state lands, "subject to future advice and recommendations made by DCNR."<sup>193</sup> Although the court expressed its opinion on the high probability of future land leasing, Governor Wolf's reinstated moratorium leads the Commonwealth back on a path to better protect, conserve, and maintain environmental integrity, pursuant to the ERA.<sup>194</sup>

While Governor Wolf's prohibition may temporarily curtail the substantial oil and natural gas development on state lands, the Commonwealth Court of Pennsylvania's decision creates uncertainty over the interpretation of Article I, Section 27 and its effect on governmental authority to make environmentally-impactful decisions.<sup>195</sup> The court's holding on the constitutionality of the General Assembly's budget-related decisions and monetary appropriations to DCNR exacerbates the exploitation of public natural resources and the burden petitioners bear in questioning legis-

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189. For a further discussion of Judge Cohn Jubelirer's concurrence in the majority's opinion, as well as dissent in part of its holding, see *supra* notes 144-153 and accompanying text.

190. See *Pa. Envtl. Def. Found.*, 108 A.3d at 173 (Cohn Jubelirer, J., dissenting) (addressing need for judicial constraint when discussing other branch's actions).

191. See *id.* at 169-72 (majority opinion) (expressing opinion that future leasing will most likely occur based on fiscal appropriations).

192. Dernbach, *supra* note 28, at 492 (noting timing between court's decision and election of Governor Wolf).

193. *Id.* (footnote omitted) (internal quotation marks omitted) (describing Wolf's recent election as Pennsylvania Governor).

194. See *id.* (predicting Governor Wolf's environmental impact on future leasing of state lands).

195. For a further discussion of the court's analysis of Article I, Section 27, see *supra* notes 158-190 and accompanying text.



lative actions.<sup>196</sup> The court's tolerance of legislative interference with the environment, unless "clearly [and] palpably . . . violat[ing] the Constitution," condones the heavy burden challengers have historically assumed in objecting to governmental actions.<sup>197</sup> Although the court looked to the self-executing meaning of the ERA, its broad interpretation of discretion inherently granted to the government foreshadows a slippery precedent of too easily giving the Commonwealth's actions the benefit of the doubt.<sup>198</sup>

Furthermore, despite the right of Pennsylvania's citizens to question the state's activities in preventing environmental degradation, the court's stringent stance on limited judicial inquiry into executive-legislative actions will arguably resurface in future cases within the court's jurisdiction.<sup>199</sup> By reiterating the history and examples of the court's constrained power to judge the sufficiency of legislative and executive funding, the court bound itself to this traditional notion and implicitly encouraged the judiciary to continue doing so.<sup>200</sup> The Commonwealth Court of Pennsylvania's refusal to inject itself into this particular inquiry, while demonstrating a willingness to discuss the future leasing of state lands, creates an unstable example for future cases.<sup>201</sup> The court's choice to divulge the latter discussion perhaps reveals the judiciary's implicit support for the leasing of state and forestlands for the extraction of natural minerals.<sup>202</sup>

Whether future courts will follow the Commonwealth Court of Pennsylvania in neglecting to apply the subjective, three-pronged *Payne* test is undetermined.<sup>203</sup> Regardless, based on the court's compliance with the 2013 plurality interpretation in *Robinson Township*, the first case to criticize the test as "non-textual" and narrow, there is promise that similar, future constitutional issues will be ad-

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196. See *Pa. Envtl. Def. Found.*, 108 A.3d at 172-73 (asserting court's conclusions).

197. *Id.* at 154 (explaining legal foundation for deeming legislative act unconstitutional).

198. For a critical analysis of the court's affirmation of governmental authority, see *supra* notes 158-172 and accompanying text.

199. For a discussion on the legal background of judicial scrutiny into legislative and executive actions, see *supra* notes 46-61 and accompanying text.

200. See *Pa. Envtl. Def. Found.*, 108 A.3d at 160-66 (providing historical background for limited judicial scrutiny).

201. For additional information about the court's issuance of an "advisory opinion," see *supra* notes 144-153 and accompanying text.

202. For further discussion on the court's analytical reasoning of the presented issues, see *supra* notes 120-153 and accompanying text.

203. See Dernbach, *supra* note 28, at 497-500 (discussing shortcomings of test and inapplicability in analyzing governmental actions).



dressed by looking to the ERA's legislatively intended meaning.<sup>204</sup> Although binding precedent has not yet overruled *Payne* and its controversial test, the Commonwealth Court of Pennsylvania's implicit support of returning to the "original meaning" of the ERA in *Pennsylvania Environmental Defense Foundation* creates a powerful precedent for future interpretation of Article I, Section 27.<sup>205</sup>

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204. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 967 (Pa. 2013) (plurality opinion) (criticizing narrow application of *Payne* test).

205. For a discussion of the court's emphasis on the ERA's plain meaning, see *supra* notes 138-143 and accompanying text.

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