

The Robinson Township Decision and the Future of Article I, Section 27

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April 21, 1969

- Mister Speaker, I rise to introduce a natural resource conservation amendment to Pennsylvania's Bill Of Rights. I do so because I believe that the protection of the air we breathe, the water we drink, the esthetic qualities of our environment, has now become as vital to the good life—indeed to life itself—as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and privacy.

--Rep. Franklin Kury

May 18, 1971

Article I, Section 27:

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

Section 27 has been marginalized by courts since it was first adopted

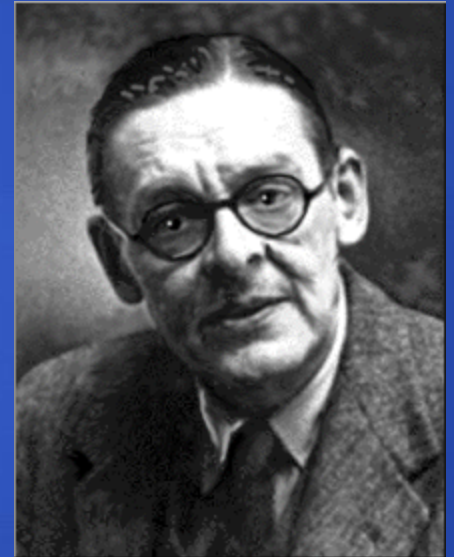
- Commonwealth v. Gettysburg Tower—has led many courts to conclude that Section 27 applies only when and to the extent that General Assembly says it applies—that it is not self executing.
- Payne v. Kassab—amendment applied through three-part balancing test that departs from text of Section 27.
 - (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
 - (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
 - (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

December 19, 2013

- *Robinson Township v. Commonwealth* (Pa. Supreme Court):
 - First time that Article I, Section 27 had ever been used (even by a plurality) to hold a statute unconstitutional.
 - Recognized for first time in decades that Article I, Section 27 is in Pennsylvania's Declaration of Rights.
 - Decided based on the text of Article I, Section 27 and traditional rules of constitutional interpretation.
 - Plurality, not a majority, on Article I, Section 27

We are at an important constitutional moment

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.



T.S. Eliot, *Little Gidding* (1942)

Act 13 of 2012

- Comprehensive revision of state's oil and gas law
- Adopted to facilitate Marcellus Shale gas development, which is different in many ways from conventional oil and gas development
- Main features:
 - Imposes fee on unconventional oil and gas development
 - Allocates proceeds from fee to various municipalities and several state agencies
 - Imposes operating and permitting requirements on unconventional oil and gas development
 - Limits ability of local governments to regulate these operations through traditional zoning and planning

Three Act 13 provisions are central to *Robinson Township* case

- 1) Section 3303: “preempts and supersedes” all “local regulation of oil and gas operations” regulated under the state’s various environmental laws.
- 2) Section 3304: compels local governments to allow certain gas operations in all zoning districts, including residential districts.
- 3) Section 3215(b) (4): which requires DEP to grant waiver of buffer zone for certain water resources, and gives DEP broad discretion in doing so.

Commonwealth Court challenge to Act 13

- **Petitioners:**
 - Robinson Township and six other local governments
 - Two individuals
 - Maya van Rossum and Delaware Riverkeeper Network
 - Dr. Mehernosh Khan
- **Respondents:**
 - Commonwealth of Pennsylvania
 - Public Utility Commission
 - Robert Powelson, Chair, PUC
 - Linda Kelly, Attorney General
 - Michael Krancer, Secretary, DEP
- Twelve separate constitutional challenges

Commonwealth Court Decision— July 26, 2012

- Section 3304—which compels local governments to allow gas operations in all zoning districts—violates substantive due process.
- Substantive requires reasonable relationship between law and protection of public health, safety, welfare, and morals.
- Section 3215(b)(4) –which requires waiver of water resource buffer zone without establishing standards—violates non-delegation doctrine under Article 2, § 1.

“Petitioners have not made out a cause of action under Article I, § 27 .”

- Article I, Section 27 is not self executing.
- Act 13 relieved municipalities “of their responsibilities to strike a balance between oil and gas development and environmental concerns” under Article I, § 27.

Supreme Court decision— December 19, 2013

- Affirmed Commonwealth Court's decision concerning the two provisions it held unconstitutional, and also held Section 3303 to be unconstitutional.
- Four opinions; total of 206 pages.
- Plurality opinion—162 pages--Chief Justice Ronald Castille and two other justices, Debra McCloskey Todd and Seamus McCaffery, based their decision on merits on Article I, Section 27 of the Pennsylvania Constitution.
- Concurring opinion—Justice Max Baer—based his decision on merits on substantive due process.
- Two dissenting opinions-- Justice Thomas Saylor and Justice J. Michael Eakin.
- Not participating: newly appointed Justice Correale Stevens.

What Court (not just plurality) decided

- Standing
- Political question
- Remand to Commonwealth Court
 - Doctor's claim concerning confidentiality of fracking fluids
 - Special legislation claim
 - Eminent domain claim

Plurality—Article I, Section 27

- State's position:
 - the amendment “recognizes or confers no rights upon citizens and no right or inherent obligation upon municipalities.”
 - “ the amendment exists only to guide the General Assembly, which alone determines what is best for public natural resources, and the environment generally, in Pennsylvania.”
- Citizens' position: Article I, Section 27 provides a self-executing limit on governmental authority that is judicially enforceable.
- Plurality (three justices): Article I, Section 27 is self-executing limit on authority of General Assembly, and the text matters.

Article I—Declaration of Rights

- Section 27 is in Pennsylvania Bill of Rights.
- Only two other states have environmental amendments in their bill of rights—Rhode Island and Montana.
- [Other states with environmental rights include Hawaii and Illinois]

Plurality: Article I, Section 27 as a restraint on governmental power

- “For the most part, to date, the promise of the Environmental Rights Amendment to protect and conserve the quality of our environment has been realized via legislative enactments and executive agency action. The question of how Article I, Section 27 obligations ***restrain the exercise of police power by the government (e.g., to regulate an industry)***, although a significant matter, has not presented itself for judicial resolution and ***this Court has had no opportunity to address the original understanding of the constitutional provision in this context until now.***” (emphasis supplied).
- Before analyzing citizen petitioner claims, plurality therefore sets out “foundational principles” to guide future courts and decision makers.

Plurality: First sentence

- Constitutional interpretation must begin with the plain language of Article I, Section 27 itself.
- First sentence: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. ”
- The first sentence establishes two rights in the people:
 - First: a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.
 - Second: “a limitation on the state’s power to act contrary to this right.”
- These rights:
 - Bind state government and local governments.
 - Are equal in status and enforceability to any other rights included in Article I of the state constitution, including property rights.

Plurality: Second and third sentences

- Text: “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.”
- The second and third sentences involve a public trust.
- “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.”

Plurality: What are public natural resources?

- “The public natural resources implicated by the ‘optimal’ accommodation of industry here are resources essential to life, health, and liberty: surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest.”

Plurality: What are state's obligations as trustee?

- 1: “a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources.”
- 2: a duty “to act affirmatively to protect the environment, via legislative action.”
- These duties foster “legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.”

Plurality: Use history to interpret Article I, Section 27

- Constitutional provisions are to be interpreted based on “the mischief to be remedied and the object to be attained.”
- Pennsylvania’s history includes massive deforestation, the loss of game, and industrialization and coal mining.
- “It is not a historical accident that the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights.”

Plurality is critical of Payne v. Kassab test

- “First, the Payne test describes the Commonwealth’s obligations -- both as trustee and under the first clause of Section 27 -- in much narrower terms than the constitutional provision.”
- “Second, the test assumes that the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action.”
- [F]inally, the Commonwealth Court’s Payne decision and its progeny have the effect of minimizing the constitutional duties of executive agencies and the judicial branch, and circumscribing the abilities of these entities to carry out their constitutional duties independent of legislative control.”

Plurality: limits use of Payne test

- “Because of these critical difficulties, we conclude that the non-textual Article I, Section 27 test established in Payne and its progeny is inappropriate to determine matters outside the narrowest category of cases, i.e., those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests. ”

How plurality applied Article I, Section 27 to Act 13

- This is a facial challenge, plurality says.
- Significant factual record is not necessary.

Plurality: Section 3303

- Section 3303, which preempted local regulation of oil and gas operations, violates Article I, Section 27 “because the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.”
- The Commonwealth is the trustee under the amendment, which means that local governments are among the trustees with constitutional responsibilities.

Plurality: Section 3304

- Section 3304 requires “all local ordinances” to “allow for the reasonable development of oil and gas resources” and imposes uniform rules for oil and gas regulation.
- Section 3304 violates Article I, Section 27 for two reasons.
 - “First, a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential] is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life.”
 - Second, under Act 13 “some properties and communities will carry much heavier environmental and habitability burdens than others.” This result is inconsistent with the obligation that the trustee act for the benefit of “all the people.”

Plurality: Section 3215(b)(4)

- Section 3215(b)(4) requires DEP to waive setback distances to protect streams and other water bodies
- Section 3215(b)(4) violates Article I, Section 27 because:
 - The legislation provides no ascertainable standards for granting a waiver.
 - If applicant appeals, burden of proof and persuasion is on DEP.
 - Section 3215(d), municipalities have no appeal rights from DEP decision on waiver.

Concurring opinion—Justice Baer

- Justice Baer saw the primary argument of the petitioners to be based on substantive due process, and also viewed that approach as “better developed and a narrower avenue to resolve this appeal.”
- In “a state as large and diverse as Pennsylvania, meaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level.”
- The challenged provisions, he said, “force municipalities to enact zoning ordinances” that “violate the substantive due process rights of their citizenries.”

Concurring opinion: substantive due process

- “[O]nce a state authorizes political subdivisions to zone for the “best interests of the health, safety and character of their communities,’... and zoning ordinances are enacted and relied upon by the residents of a community, the state may not alter or invalidate those ordinances, given their constitutional underpinning. “
- “This is so even if the state seeks their invalidation with the compelling justification of improving its economic development. “

Commonwealth Court remand (July 17, 2014)

- Commonwealth court dismissed all remaining substantive claims:
 - Doctor's claim concerning confidentiality of fracking fluids
 - Special legislation claim
 - Eminent domain claim
- Commonwealth Court enjoined nearly all other provisions of Act 13 limiting local zoning authority over *where* gas operations are conducted (including PUC review of ordinances)
- Note: State preemption of *how* gas operations are conducted appears intact.

Future of Article I, Section 27

- Most obviously: this decision does not constitute binding precedent on Article I, Section 27.
- Binding precedent here is affirmation of Commonwealth Court decision on substantive due process.
- But:
 - For the first time, Supreme Court used Article I, Section 27 to hold a statute unconstitutional .
 - Justice Baer did not disagree substantively with plurality opinion; he simply said substantive due process was better developed and narrower basis for decision in this case.
 - Plurality opinion forces us to look again at Article I, Section 27 as if for the first time.
 - Consequences of this opinion are likely to be felt for a long time.

And: plurality and concurring opinions are similar in many ways

- Both recognize that "some properties and communities will carry much heavier environmental and habitability burdens than others" from Marcellus Shale development (Plurality at 125-26, concurring opinion at 18).
- For these four justices, the question is not about whether there are benefits in Marcellus Shale development; they all understand that.
- The problem is that Act 13 unconstitutionally reduces governmental authority to protect individuals and communities from unnecessary harm from Marcellus Shale development .

Future constitutional challenges to a statute under Article I, Section 27

- Likely to be based on text of amendment, rather than *Payne v. Kassab* test.
- Does the *Payne v. Kassab* test look like an appropriate test for challenging the constitutionality of a statute?
 - (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
 - (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
 - (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Marcellus Shale gas leasing on state forest and park lands.

- State land has been leased for oil and gas since 1947.
- Under 1955 Oil and Gas Lease Fund Act, lease revenues go to special fund, called Oil and Gas Lease Fund.
- Under Conservation and Natural Resources Act, lease proceeds appropriated directly to DCNR or predecessor agency
- Until 2008, annual revenues averaged \$2-3 million.
- Then: recession and Marcellus Shale revolution both happened.

Legal and policy history in nutshell

- State expanded drilling on state lands to help balance budget—several hundred million dollars/year.
- Lease fund proceeds appropriated by legislature, not automatically appropriated to DCNR.
- DCNR gets up to \$50 million/year in royalties for state forests and parks.
- Majority of lease fund proceeds appropriated to General Fund, and no longer used for conservation purposes.

Two key cases in Commonwealth Court challenge

- **Pennsylvania Environmental Defense Foundation v. Corbett (No. 228 M.D. 2012, cross-motions for summary judgment decided January 7, 2015)**
- **Delaware Riverkeeper Network v. Corbett (No. 573 M.D. 2014, filed Oct. 30, 2014)**

PEDF Opinion: Role of Robinson Township plurality

- Plurality is not binding precedent
- “[I]t does not appear that any of the concurring and dissenting justices disputed the plurality’s construction of the Environmental Rights Amendment, including the rights declared therein and attendant duties imposed thereby on the Commonwealth.”
- “[W]e find the plurality’s construction of Article I, Section 27 persuasive only to the extent it is consistent with binding precedent from this Court and the Supreme Court on the same subject,” and cites *Payne v. Kassab*.
- On all four issues that court addresses, it applies text of Article I, Section 27.

Issue 1

- PEDF argued that the legislature violated Article I, Section 27 by preventing DCNR from spending any Oil and Gas Lease Fund Act royalties without prior legislative authorization.
- The court was not persuaded that the legislation is “clearly, palpably, and plainly unconstitutional.”
- This legislation does not change DCNR’s authority to decide whether to lease, the court explained, and it applies only to royalties, not rents. *Id.* at 36-37.

Issue 2

- PEDF challenged legislation that appropriated up to \$50 million in royalty money to DCNR (subject to the availability of funds) and required DCNR to prioritize expenditure of those funds for state forests and parks.
- This legislation, PEDF argued, limits funds to \$50 million “*without any fiduciary analysis* of the financial needs of DCNR to meet its statutory and constitutional responsibilities,” including its responsibilities under Article I, Section 27 (emphasis supplied).
- “PEDF has presented no evidence that the current funding appropriated to DCNR from all sources is inadequate—i.e., that the funding is so deficient that DCNR cannot conserve and maintain our State natural resources .”

Issue 3

- PEDF sought a judicial declaration that money received from oil and gas leasing on state land can only be used for public trust purposes under Article I, Section 27.
- Article I, Section 27 does not “expressly command that all revenues derived from the sale or leasing of the Commonwealth’s natural resources must be funneled to those purposes and those purposes only.”
- Other provisions of the constitution, by contrast, require that moneys be expended for a particular purpose.

Issue 4

- Future Leasing: State argued that “the Governor may override any and all decisions made by the DCNR Secretary. ”
- Court held: DCNR Secretary “has the exclusive statutory authority to determine whether to sell or lease the Commonwealth’s natural resources for oil and natural gas extraction.”
- The Governor may attempt to influence those decisions, the Court said, but the ultimate responsibility for making and defending them rests with DCNR.
- In future leasing, therefore, “DCNR must also consider whether even entering into further leasing would be in the best interests of the Commonwealth *and* consistent with the rights, duties, and obligations embodied in the Environmental Rights Amendment.”

Delaware Riverkeeper Network v. Corbett

- Count I: Breach of obligation to refrain from permitting or encouraging the degradation, diminution, or depletion of public trust resources.
- Count II: Breach of duty of impartiality toward present and future generations.
- Count III: Breach of the duty to provide an accounting.

Delaware Riverkeeper Network, cont'd

- Count IV: Breach of the duty of prudence, including by acting without a pre-action analysis.
- Count V: Further leasing would cause unreasonable infringement on individual environmental rights, in violation of Article I, Section 27.
- Count VI: Further leasing would cause a public nuisance, which must be enjoined in advance.

Common Pleas Courts

- *Fegley v. Lehigh County Board of Elections* (Lehigh County Ct. of Common Pleas, Oct. 3, 2014)
 - Plaintiffs sought referendum on proposal to give Allentown significant air regulatory authority over proposed incinerator based on Article I, Section 27, in spite of law prohibiting city from regulating air pollution without prior approval from DEP.
 - “*Robinson* makes it clear that the relief Plaintiffs seek would unconstitutionally deprive the Pennsylvania Department of Environmental Protection and the City of the ability to fulfill their duties as a trustee of the environmental resources of the Commonwealth, as required under Article I §27 of the PA Constitution.”

Resources from Widener Environmental Law Center

- Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications (John Dernbach, James May, and Ken Kristl),
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412657
- A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania (John Dernbach & Ed Sonnenberg),
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660

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