Robinson Township, Subsequent Litigation, and the Potential Meanings of Article I, Section 27

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Sept. 24, 2015
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
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.
How it was buried---I

- Commonwealth v. Gettysburg Battlefield National Tower.
- Suit by Attorney General against private developer on private land where there was no state or local approval.
- Article I creates rights against government, not against private parties.
- Commonwealth Court nonetheless held Article I, Section 27 was self-executing; while Supreme Court affirmed Commonwealth Court, there was no majority on that issue.
- Every opinion expressing doubt about whether Article I, Section 27 is self-executing was based on use of constitution by government against private party.
- Feudale v. Aqua Pennsylvania (Commw. Ct. 7/22/15)—public trust under Article I, Section 27 does not apply to private party.
Payne v. Kassab—Commonwealth Court creates a three-part balancing test as a substitute for the 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?
Robinson Township—challenge to Marcellus legislation—Act 13

- Three provisions are central to 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.
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.
Why it matters

- *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
  - Includes detailed explanation of how Article I, Section 27 should be applied
  - Decided primarily on public trust
  - Plurality, not a majority, on Article I, Section 27
Pennsylvania is in 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)
Court held that petitioners had standing

- Rule: Petitioner must show that he or she has “a substantial, direct, and immediate interest in the outcome of the litigation.”

- The Supreme Court held that all of the petitioners have standing.
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.
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.
“At present, the concept of 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.”
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 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: 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.
“To put it succinctly, our citizens buying homes and raising families in areas zoned residential had a reasonable expectation concerning the environment in which they were living, often for years or even decades. Act 13 fundamentally disrupted those expectations, and ordered local government to take measures to effect the new uses, irrespective of local concerns.”
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.”
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.
Justice Baer 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. “
Real issues—expectation and destabilization

- “[T]he public trust doctrine should be employed to help us reach the real issues—expectation and destabilization—whether the expectations are those of private property ownership, of a diffuse public benefit from ecosystem protection or of a community's water supply....Our task is to identify the trustee's obligation with an eye toward insulating those expectations that support social, economic and ecological systems from avoidable destabilization and disruption.”

  --Joseph L. Sax
Potential meanings 1—explicit and implied constitutional obligations

- 1. Explicit constitutional obligations
- 2. Implied duty to consider impacts on constitutional rights prior to making a decision
Leasing state land for shale gas—a brief history

- State ran modest oil and gas leasing program on state forests and parks since 1947. Then Marcellus Shale boom and economic recession happened.

- 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.
Pennsylvania Environmental Defense Foundation v. Corbett

- Two kinds of challenges to leasing program
  - Legislative diversion of funds from gas leasing for purposes other than conservation of state forests and parks
  - Adverse impacts to state forests caused by expansion of leasing

- Commonwealth Court’s January 2015 decision focused on funding issues
  - Applied “conserve and maintain” test
  - PEDF lost on funding issues

- PEDF has appealed to Pa. Supreme Court

- Attorney General’s reply brief based on text of Article I, Section 27
Potential meanings 2—private trust duties that apply to public trust

1. Duty of prudence
2. Duty of loyalty
3. Duty of impartiality toward beneficiaries
4. Duty to provide an accounting
5. Limited delegation authority for trustee duties
Potential meanings 3—modification of governmental authority

- Prior to *Robinson Township*, Article I, Section 27 was used to:
  - Confirm and extend governmental authority
  - Guide statutory interpretation
  - Provide constitutional authority for laws whose constitutionality was challenged on other grounds

- Potential effect of *Robinson Township*:
  - Strengthens each of these
  - Imposes duties on government, not just confirming and extending governmental authority
Subsequent litigation on land use and shale gas

- Gorsline v. Board of Supervisors of Fairfield Township
- Court of Common Pleas overturned conditional use approval for natural gas well.
- Commonwealth Court reversed (9/24/15)
Post Robinson Resources Available on SSRN

- The Potential Meanings of a Constitutional Public Trust
- Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications
- Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille
- A Legislative History of Article I, Section 27 of the Commonwealth of Pennsylvania, Showing Source Documents
- A Legislative History of Article I, Section 27 of the Commonwealth of Pennsylvania