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## Contaminated Jurisprudence: Muddy Categories in Robinson Township v. Commonwealth

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## NOTE

### CONTAMINATED JURISPRUDENCE: MUDDY CATEGORIES IN *ROBINSON TOWNSHIP V.* *COMMONWEALTH*

*Ian S. Lamont*<sup>†</sup>

#### I. INTRODUCTION

In *Robinson Township v. Commonwealth*,<sup>1</sup> a plurality of the Pennsylvania Supreme Court held that Pennsylvania's recently enacted legislative scheme for regulating the oil and gas industry, known as Act 13, violated the Environmental Rights Amendment ("E.R.A.") to the Pennsylvania Constitution. That amendment requires the state government to (a) take into account the impact that laws and government activities will have on the environment, and (b) to act as the trustee of the state's natural resources. According to the plurality, since hydraulic fracturing ("fracking") is "undeniably detrimental"<sup>2</sup> to the environment, the Pennsylvania legislature violated both prongs of the E.R.A. when it passed a law that restricted the ability of local municipalities to contain fracking-related activities by means of zoning ordinances. Environmental activists as well as legal theorists praised the opinion's novel application of the amendment and its severe condemnation of fracking. Other observers, however, have criticized the opinion for oversimplifying a complex legal and scientific issue. What cannot be disputed is that the case resulted in uncertainty. The concurring opinion would have struck down the law on substantive due process grounds. The two dissenting opinions argued that the plurality opinion conflated legislative and judicial reasoning. However, in finding the statute to be a valid exercise of the state's police power, the dissenting justices applied minimal

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<sup>†</sup> *Symposium Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 10. J.D. Candidate, Liberty University School of Law (2016). My highest gratitude goes to my Heavenly Father, who has guided my path and provided every good thing. I dedicate this note to my parents, Gary and Pam Lamont, who are deserving of more thanks than I can ever express for investing in me their love, provision, and teaching. I dedicate it to my siblings—Meredith, Hannah, and Jacob—who have been my stalwart friends and confidants for my whole life. And I dedicate it to my wife, Elizabeth, who is my greatest treasure on earth. "The LORD is my chosen portion and my cup; you hold my lot. The lines have fallen for me in pleasant places; indeed, I have a beautiful inheritance." Psalm 16:5-6. I would also like to thank the faculty, staff, and students of the Liberty University School of Law for these incredible three years.

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

2. *Id.* at 975.

scrutiny to Act 13. Although many portions of the law were struck down, there was no majority rationale. Thus, no one knows whether a future court will strike down similar laws on the same grounds as the plurality.

As a proposed alternative to the approaches taken by the plurality, concurring, and dissenting opinions, this Note analyzes portions of Act 13 according to the principles and methods of judicial review articulated by Chief Justice John Marshall in *Marbury v. Madison* and *McCulloch v. Maryland*. Although those cases were seminal in the development of judicial review by the United States Supreme Court, the principles upon which Marshall based his rationale are not exclusive to the federal judiciary, but instead inhere in the very nature of a constitution. It is thus possible—indeed, necessary—for state supreme courts to assess state laws according to the same basic analytical framework as federal laws. The Marshall analysis does not confuse the difference between legislative and judicial reasoning, like the plurality did in *Robinson*. Nor does it allow the court to fall back on minimal scrutiny, like the dissenting opinions did, thereby abdicating its responsibility to ensure statutes are in accord with the constitution and general principles of law. Furthermore, because Marshall's analysis takes into account general principles of law in evaluating the validity of the statute in question, it offers an opportunity to apply a Christian legal philosophy to the subject matter of the statute.

Assessing the constitutionality of Act 13 in its entirety is beyond the scope of this Note. Instead, I will demonstrate the Marshall analysis by applying it to two sections of the act that the plurality held to have violated the E.R.A. While I reach the conclusion that the provisions were not unconstitutional, that is almost beside the point, since my aim is to show how Marshall's method of analysis can and must be used in a state law context if we are to take seriously the nature and function of a constitution.

At a general level, this proposed analysis is relevant because it demonstrates how consistent, principled judicial reasoning is necessary and effective for resolving contemporary disputes at the state level. More practically, it is relevant because the proper application of the E.R.A. remains uncertain in Pennsylvania, so a future court will have to revisit the questions raised in *Robinson Township*. It is the author's hope that the justices on that future court will make their decision according to general principles of law and the framework of our constitutional system.

II. *ROBINSON TOWNSHIP V. COMMONWEALTH OF PENNSYLVANIA*A. *Background*

Beneath the wooded hills of the Northeast is the Marcellus Shale, “a black shale formation extending deep underground from Ohio and West Virginia northeast into Pennsylvania and southern New York.”<sup>3</sup> Researchers estimate that the formation may contain up to 363 trillion cubic feet of natural gas.<sup>4</sup> When reports first started to circulate about the vast size of this reservoir and the potential of accessing it through improved technology, investors and energy producers descended on the region to snatch up leases.<sup>5</sup>

The rate at which gas has been extracted from the Marcellus Shale has exceeded the predictions of industry experts.<sup>6</sup> In less than seven years, the formation went from yielding just two percent of the U.S. supply of natural gas to almost twenty percent. The U.S. Energy Information Institute (“EIA”) estimated that by October 2014, the formation would account for nearly a quarter of U.S. natural gas production.<sup>7</sup> This extraordinary productivity has been an economic boon to a region that has suffered economic decline for decades, turning farmers into millionaires in a few short years.<sup>8</sup>

Along with the economic rewards, though, have come burdens on local infrastructure and concerns that the extraction process might have detrimental effects on the environment as well as on local residents’ health

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3. See *Demographics*, WETZEL COUNTY CHAMBER OF COM., [http://www.wetzelcountychamber.com/demographics\\_natural\\_res.html](http://www.wetzelcountychamber.com/demographics_natural_res.html). (last visited Feb. 12, 2016).

4. See Crystal Sarakas, *Natural Gas Drilling in the Marcellus Shale*, WSKA NEWS (Feb. 9, 2010), <http://wskgnews.org/post/natural-gas-drilling-marcellus-shale#stream/0> (“To put this into context, New York State uses about 1.1 trillion cubic feet of natural gas a year.”).

5. Elwin Green, *Natural Gas Locked in the Marcellus Shale has Companies Rushing to Cash in on Possibilities*, PITTSBURGH POST-GAZETTE (Dec. 6, 2009), <http://www.post-gazette.com/stories/business/news/natural-gas-locked-in-the-marcellus-shale-has-companies-rushing-to-cash-in-on-possibilities-370058/>.

6. Chris Pedersen, *Marcellus Shale Continues to Prove Analysts Wrong*, OILPRICE.COM (Aug. 17, 2014), <http://oilprice.com/Energy/Natural-Gas/Marcellus-Shale-Continues-to-Prove-Analysts-Wrong.html>.

7. *Id.*

8. Rob Wile, *Why Letting An Oil Company Frack In Your Backyard Is Actually An Awesome Idea*, BUSINESS INSIDER (Oct. 15, 2012, 4:03 PM), <http://www.businessinsider.com/if-you-want-to-become-a-millionaire-let-an-oil-company-frack-your-backyard-2012-10?op=1>.

and quality of life.<sup>9</sup> In some communities, these concerns have spurred opposition to hydraulic-fracturing and led to initiatives to prohibit the practice.<sup>10</sup> Oil and gas extraction and processing activities, however, are typically regulated directly by state governments,<sup>11</sup> with state oil and gas statutes preempting any attempts by local governments to regulate the production methods used by energy companies.<sup>12</sup> To circumvent this preemption, towns and cities turned instead to their zoning ordinances and classified a range of heavy industrial uses, “including oil, gas and solution mining and drilling,” as conditional or prohibited uses.<sup>13</sup> These classifications allowed the municipalities to review the given use and to restrict or deny it as they saw fit.

The Pennsylvania Oil and Gas Act 39 prohibited municipalities from using zoning ordinances to completely exclude mining operations, but did permit municipalities to regulate the location of mining operations.<sup>14</sup> Thus, a municipality could restrict the location of mining activity and oil and gas drilling, but could not require additional permits or regulate the mining or drilling process directly.<sup>15</sup> In 2009, a Pennsylvania appellate court held that the Oil and Gas Act allowed Nockamixon Township to enforce a zoning

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9. Carol French, *A Dairy Farmer Shares Her Story About Fracking: “What Have We Done?”*, PUBLIC HERALD (Oct. 30, 2012), <http://www.publicherald.org/archives/16845/investigative-reports/energy-investigations/>.

10. Brendan DeMelle, *Pittsburgh Bans Natural Gas Drilling Over Fracking Threat*, HUFFPOST GREEN (May 25, 2011), [http://www.huffingtonpost.com/brendan-demelle/pittsburgh-bans-natural-g\\_b\\_784489.html](http://www.huffingtonpost.com/brendan-demelle/pittsburgh-bans-natural-g_b_784489.html).

11. See, e.g., VA CODE ANN. § 45.1-361.3.

12. For instance, Pennsylvania law at one point provided that:

Except with respect to ordinances adopted pursuant to . . . the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code, and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

58 PA. CONS. STAT. ANN. § 601.602 (repealed 2014) (citations omitted).

13. *Matter of Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1193 (N.Y. 2014).

14. Joshua P. Fershee, *Facts, Fiction, and Perception in Hydraulic Fracturing: Illuminating Act 13 and Robinson Township v. Commonwealth of Pennsylvania*, 116 W. VA. L. REV. 829, 827 (2014).

15. *Id.*

ordinance that permitted oil and gas drilling only in specified zones since the “challenged provisions are part of the land use process and not unique operational regulations that become pertinent only after land use approval is granted.”<sup>16</sup> The local ordinances, therefore, did not impermissibly “regulate the operation of oil and gas drilling in the Township in addition to location and physical configuration.”<sup>17</sup> In contrast, in the same year, the Pennsylvania Supreme Court held that the Oil and Gas Act did preclude local municipalities from regulating oil and gas operations that were already covered.<sup>18</sup>

This patchwork of local ordinances across the Marcellus Shale region of the Commonwealth posed a significant challenge to the energy companies engaged in natural gas exploration as the natural gas boom proceeded.<sup>19</sup> Desiring to ensure continued development of the Marcellus Shale, the Pennsylvania legislature revoked the Oil and Gas Act and passed House Bill 1959, commonly referred to as “Act 13.”<sup>20</sup> Thus, in large part, Act 13 was a response by state legislators to complaints by oil and gas companies about inconsistent local practices and requirements concerning oil and gas production.<sup>21</sup> The expansive law included new regulations related to the operation of gas wells, imposed levies on new gas wells, and provided for the distribution of impact fees to local governments.<sup>22</sup> Act 13, however, also prohibited local governments from enacting environmental laws and zoning code provisions related to oil and gas operations,<sup>23</sup> expressly preempting nearly all local regulation, and sparing only certain setbacks.<sup>24</sup>

It is against this background that the case of *Robinson Township v. Commonwealth* arose.<sup>25</sup> The petitioners—a group of seven municipalities, a non-profit environmental organization, and a doctor (collectively, the “citizens”)<sup>26</sup>—challenged the constitutionality of Act 13 in the

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16. *Arbor Res. L.L.C. v. Nockamixon Twp.*, 973 A.2d 1036, 1046 (Pa. Commw. Ct. 2009).

17. *Id.*

18. *Range Res. - Appalachia L.L.C. v. Salem Twp.*, 964 A.2d 869, 877 (Pa. 2009).

19. See generally Blaine A. Lucas, *Survey of recent Pennsylvania municipal ordinance activity impacting the development of the Marcellus Shale play*, PIOGA PRESS (Pa. Indep. Oil & Gas Ass’n), <http://www.babstcalland.com/articles/PiogaPressOctober2011Lucas.pdf>.

20. Fershee, *supra* note 14, at 838.

21. *Id.* at 827.

22. *Id.* at 828.

23. *Id.*

24. *Id.*

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

26. *Id.* at 914, n.3 (plurality defending its choice of words).

Commonwealth Court in March of 2012.<sup>27</sup> Among other requests, the petitioners filed a fourteen-count petition for review in which they requested a declaration that Act 13 was unconstitutional and a permanent injunction against application of the Act.<sup>28</sup> The citizens argued that Act 13 violated five sections of the Pennsylvania Constitution, namely, article I, section 1 (reciting inherent rights of mankind); article I, section 10 (as it pertains to eminent domain); article I, section 27 (the “Environmental Rights Amendment”); article III, section 3 (pertaining to single subject bills); and article III, section 32 (as it pertains to special laws).<sup>29</sup> The citizens further claimed that Act 13 was unconstitutionally vague, and that it violated the separation of powers doctrine and the Due Process Clause of the United States Constitution.<sup>30</sup>

In ruling on the parties’ preliminary objections and cross-motions for summary relief, the *en banc* panel of the court enjoined enforcement of sections 3215(b)(4) and 3304 of Act 13, along with other sections that enforced section 3304.<sup>31</sup> The injunction effectively permitted local governments to enforce existing zoning ordinances and adopt new ordinances that would contravene the Act 13 regulatory scheme. The court reasoned:

[b]ecause 58 Pa. C.S. §3304 requires all oil and gas operations [to be permitted] in all zoning districts, including residential districts, as a matter of law, we hold that 58 Pa. C.S. §3304 violates substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications.<sup>32</sup>

The injunction also effectively prohibited the Department of Environmental Protection from granting waivers of mandatory setbacks from waters of the Commonwealth.<sup>33</sup>

The commonwealth court dismissed the balance of the citizens’ claims.<sup>34</sup> Most significant to the subject of this Note, the court sustained the

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27. *Id.* at 915.

28. *Id.*

29. *Id.* at 915-16.

30. *Id.* at 916.

31. *Id.* at 930.

32. *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 485 (Pa. Commw. Ct. 2012).

33. *Robinson Twp.*, 83 A.3d at 930.

34. *Id.*

Commonwealth's preliminary objection to the citizens' contention that parts of Act 13 violated the Environmental Rights Amendment.<sup>35</sup>

In a flurry of cross-appeals,<sup>36</sup> the Commonwealth supported the affirmance of the commonwealth court's decision on all counts except for its holding that section 3215(b)(4) and sections 3304 through 3309 were unconstitutional. The citizens, for their part, offered additional reasons and theories in support of the claim that the other provisions of Act 13—indeed the entire act—were unconstitutional, bringing the total number of issues on appeal to fourteen.<sup>37</sup>

In its decision, the Supreme Court of Pennsylvania discussed at length the issue of whether the various petitioners had standing to bring suit.<sup>38</sup> This Note, however, will focus on the court's primary concern: the constitutionality of Act 13.

### *B. Plurality Opinion*

In the plurality decision, Justice Castille limited himself to neither the commonwealth court's rationale, nor the primary arguments made by the parties. Instead of focusing on the due process issues raised by the zoning and agency discretion provisions of Act 13, the plurality justices went deeper.<sup>39</sup> They announced that:

at its core, this dispute centers upon an asserted vindication of citizens' rights to quality of life on their properties and in their hometowns, insofar as Act 13 threatens degradation of air and water, and of natural, scenic, and esthetic values of the environment, with attendant effects on health, safety, and the owners' continued enjoyment of their private property.<sup>40</sup>

The dispositive issue, therefore, was the very constitutionality of Act 13, under article I, section 27 of the Pennsylvania Constitution: the Environmental Rights Amendment.<sup>41</sup>

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35. *Id.*

36. *Id.* at 916.

37. *Id.* at 916-930.

38. *Id.* at 916-930.

39. *Id.* at 942.

40. *Id.*

41. *Id.*



### 1. The Constitutionality of Act 13

In setting out the standard of review for evaluating Act 13, the plurality noted that the issue was purely a question of law, and thus the court could review the commonwealth court's decision *de novo*.<sup>42</sup> Since the matter centered on a statute, the analysis had to begin with the presumption that the General Assembly did not intend to violate the Constitution.<sup>43</sup> Thus, any doubts were resolved in favor of finding the statute constitutional.<sup>44</sup> Moreover, the plurality stated that its decision would be based on the construction and application of the E.R.A., so the actual language of the amendment would be controlling, and would be interpreted "as understood by the people when they voted on its adoption."<sup>45</sup>

The plurality then described the constitutional paradigm for the E.R.A. and the consequent framework for analyzing the constitutionality of Act 13.<sup>46</sup> After reciting the fundamentals of a state constitutional system, such as the constitutional grant of plenary authority to the legislature to exercise broad police powers, the plurality described the role of Article I of the Pennsylvania Constitution. Article I, the Commonwealth's Declaration of Rights, "delineates the terms of the social contract between government and the people that are of such 'general, great and essential' quality as to be ensconced as 'inviolable.'"<sup>47</sup> Among these rights, which are "inherent in man's nature and preserved rather than created by the Pennsylvania Constitution,"<sup>48</sup> are those found in the E.R.A., which states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all 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>49</sup>

The plurality acknowledged that the task of discerning judicial standards in the sphere of constitutional rights is a difficult one.<sup>50</sup> Compounding this

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42. *Id.* at 943.

43. *Id.*

44. *Id.*

45. *Id.* (citation omitted).

46. *Id.* at 946.

47. *Id.* at 947 (quoting PA. CONST. art. I, Preamble & § 25).

48. *Id.* at 948.

49. PA. CONST. art. I, § 27.

50. *Robinson Twp.*, 83 A.3d at 949.

inherent challenge was the development of the jurisprudence relating to the E.R.A. in particular.<sup>51</sup>

The plurality identified two primary goals in the E.R.A.: (1) to prevent the state from infringing on certain rights identified in the amendment, and (2) to establish a “nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights.”<sup>52</sup> A cause of action arising under the E.R.A., therefore, could use one or both of two theories: (1) that the state encroached upon citizen’s individual rights, or (2) that the state failed to perform its duties as trustee.<sup>53</sup>

a. Individual Environmental Rights

The first clause of the E.R.A. is prohibitory. This affirmative right of the people to “clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment” is a limitation on the state’s power to act in a way that compromises that “right.”<sup>54</sup> Although the E.R.A. refers generally to the “people,” the plurality construed the right as a guarantee to each citizen.<sup>55</sup> Furthermore, though the clause does not require the political branches to take any specific actions to promote the environmental rights, it does require each branch of government—at both state and local levels—to “consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.”<sup>56</sup> Likewise, the judicial branch is required to “vindicate” E.R.A. rights, and has the authority to fashion appropriate remedies toward that end.<sup>57</sup> Recognizing that cleanness of air and purity of water are relative, not absolute, qualities, the plurality noted that the courts would look to “agency expertise” to determine whether the standards were being met.<sup>58</sup> Nevertheless, a court’s “benchmark” must be the “express purpose” of the E.R.A.: to hold back “actual or likely degradation” of the quality of air, water, etc.<sup>59</sup> In addition, the E.R.A. requires the “preservation of the natural, scenic, historic and esthetic values of the environment.”<sup>60</sup> According to the plurality,

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51. *Id.* at 950.

52. *Id.*

53. *Id.*

54. *Id.* at 951.

55. *Id.* at n.39.

56. *Id.* at 952.

57. *Id.* at 952-53.

58. *Id.* at 953.

59. *Id.*

60. PA. CONST. art. I, § 27.

this means that state and local government action must take into account the “environmental features of the affected locale” in order to be constitutional.<sup>61</sup>

The plurality next addressed the intersection of environmental rights with economic and property rights. As a constitutional provision “on par with” other provisions in Article 1, the E.R.A. and the rights contained therein must be balanced against other fundamental rights, including those protecting private property.<sup>62</sup> The plurality emphasized that the E.R.A. does not reflect an intent on the part of the legislators or voters to “deprive persons of the use of their property” or “derail” beneficial development.<sup>63</sup> Nevertheless, the E.R.A. does require that any property use and economic development be sustainable, and not be carried out in a way that unreasonably degrades the environment.<sup>64</sup> Exercises of state police power must likewise promote sustainability.<sup>65</sup>

b. The Public Trust

The second and third clauses of the E.R.A. delineate the state’s trusteeship of “public natural resources.”<sup>66</sup> This malleable category encompasses the full array of resources that implicate the public interest, as defined by statute or common law.<sup>67</sup> Examples include “state-owned lands, waterways, and mineral reserves;” as well as interests beyond the scope of private property, such as surface and ground water and wild flora and fauna.<sup>68</sup> The third clause entrusts these resources to “the Commonwealth,” and names the people as beneficiaries.<sup>69</sup> As the trustee, the state has both negative and affirmative duties.<sup>70</sup> To illumine the specialized concepts of “trust” and “trustee” as they applied at the time the amendment was passed, the plurality quoted from the E.R.A.’s legislative history: “Under the trust theory, [the government] deals with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.”<sup>71</sup> The trust relationship gives the trustee broad, but not unlimited

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61. *Robinson Twp.*, 83 A.3d at 953.

62. *Id.* at 953-54.

63. *Id.* at 954.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 955.

68. *Id.*

69. *Id.* at 956.

70. *Id.* at 955.

71. *Id.* at 956.

discretion, which is subject to control by the settlor.<sup>72</sup> As the common owners of the Commonwealth's natural resources, the people of Pennsylvania—who are both the settlors and the named beneficiaries—created the environmental public trust.<sup>73</sup> Since “the Commonwealth” was named as trustee, the E.R.A. trustee powers were not vested solely in one branch of the government but apportioned among the branches according to the usual division of power.<sup>74</sup>

According to the plurality, the E.R.A.'s environmental public trust entails both explicit and implicit obligations. The explicit obligations are to “conserve and maintain” the “corpus of the trust,” i.e., the public natural resources.<sup>75</sup> This entails preventing and remedying the “degradation, diminution, or depletion” of the resources.<sup>76</sup> The plurality included within the explicit obligations the fiduciary duties of “prudence, loyalty, and impartiality.”<sup>77</sup>

The plurality found two separate obligations as implicit in the nature of the trust relationship.<sup>78</sup> The first is negative, or prohibitory, and the second is affirmative. The first obligation is that the Commonwealth has a duty to “refrain from performing its trustee duties respecting the environment unreasonably,” which applies to both legislative enactments and executive acts.<sup>79</sup> It requires the Commonwealth to refrain from directly causing harm to the natural resources in its care, and also from indirectly causing harm by permitting third parties to do so.<sup>80</sup> The second obligation arising from the trustee-beneficiary relationship is the duty to “act affirmatively to protect the environment, via legislative action.”<sup>81</sup> The plurality recited a number of instances in which the Pennsylvania General Assembly passed legislation in furtherance of this obligation. Notable examples were the Clean Streams Act, the Air Pollution Act, and the Solid Waste Management Act.<sup>82</sup> These detailed regulatory enactments were necessary to give effect to a “great ordinance” like the E.R.A., which contains only general, unarticulated terms.<sup>83</sup> On the

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 957.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 958.

82. *Id.*

83. *Id.*

other hand, the fact that these statutes gave effect to the broad constitutional rights does not preclude citizens from bringing suit to independently enforce and defend those rights.<sup>84</sup> As in its discussion of the individual rights clause of the E.R.A., the plurality emphasized that the “conserve and maintain” standards are meant to promote sustainable development, not hamper it.<sup>85</sup>

The plurality identified two implications of the beneficiary status of “all the people” of the Commonwealth.<sup>86</sup> The first is the necessity for the trustee to “deal impartially” with respect to all beneficiaries.<sup>87</sup> The second is intergenerational: a duty to “balance the interests of present and future beneficiaries.”<sup>88</sup> “[T]his aspect of [s]ection 27 recognizes the practical reality that environmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations.”<sup>89</sup> The E.R.A., therefore, “offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.”<sup>90</sup>

## 2. Historical Context of the Environmental Rights Amendment

Next, the plurality addressed the statutory construction of the E.R.A., including the object of the provision, the harm it was intended to remedy, and the legislative history and circumstances of enactment.<sup>91</sup> The court identified three main environmental events that, after a century and a half of industrial activity, led the Pennsylvania legislature to gradually adopt environmental protection measures, and ultimately led to the enactment of the E.R.A. First, by the 1920s, the logging industry had deforested vast

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84. *Id.*

85. *Id.*

86. *Id.* at 959.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Few other states address environmental protection or conservation in their state constitutions at all, and even fewer actually enumerate the people’s environmental rights in their Bill or Declaration of Rights. *Id.* at 962. Some states, at most, express policy directives in their constitution to guide legislative decision-making. According to the court, Pennsylvania’s constitution stands virtually alone in its imposition of duties that require both responsive and anticipatory action for the protection of the environment. *Id.* at 963. The court attributes this unique stance to the Commonwealth’s long experience with environmental exploitation and its multi-generational consequences. *Id.*

portions of the state and left the landscape bare.<sup>92</sup> Second, deforestation, pollution, and lax regulation of hunting, trapping, and fishing drastically had diminished the state's wild game population.<sup>93</sup> Finally, the coal and steel industries had inflicted devastating effects on the quality of soil, water, and air in the mining regions of the state.<sup>94</sup> With these events, and their devastating costs still fresh in their "collective memory," both houses of the General Assembly unanimously approved the proposed amendment in two separate legislative sessions.<sup>95</sup> Likewise, when the amendment was put to the citizens of the Commonwealth, the voters approved it by a margin of nearly four to one.<sup>96</sup>

Without offering any specific examples, the court noted that legislative enactments and executive agency actions previously had been the primary means for realizing the E.R.A.'s mandate.<sup>97</sup> There had not yet been an opportunity for the judiciary to resolve the question of how the E.R.A. might "restrain the exercise of police power by the government."<sup>98</sup> Likewise, the Pennsylvania Supreme Court had not yet had occasion to "address the original understanding of the constitutional provision."<sup>99</sup> The court's jurisprudence with respect to Article 27 historically fell into two lines of cases, which arose in two types of factual scenarios: (1) private or governmental projects that allegedly violated environmental rights, and (2) state or local environmental regulations that allegedly violated private property rights.<sup>100</sup> Further, the court's prior jurisprudence did not take the first step of determining whether the people's rights had been violated, or instead whether the state had failed to perform its duty as trustee.<sup>101</sup>

Ultimately, the plurality found that neither line of cases addressed a situation like the one in the case before it.<sup>102</sup> Lacking in both lines was a

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92. *Id.* at 960.

93. *Id.*

94. *Id.* at 961.

95. *Id.*

96. *Id.* at 962.

97. *Id.* at 963-64.

98. *Id.* at 964.

99. *Id.*

100. *Id.*

101. *Id.*

102. The plurality's primary contention with the first line of cases—those involving challenges to projects allegedly violating environmental rights—was over whether the E.R.A. is self-executing. In *Payne v. Kassab*, the commonwealth court essentially answered "no" and reduced the inquiry to a balancing test. Under the *Payne* test, any relief under the E.R.A. required a consideration of three factors:

definitive role for the judiciary in applying the amendment and developing its own “environmental rights jurisprudence comparable to the tradition of political rights jurisprudence.”<sup>103</sup> This, according to the court, was contrary to the drafters’ intentions and, thus, the court had a duty to “vindicate the rights of its citizens.”<sup>104</sup>

### 3. Contested Provisions of Act 13

Having set out its framework for analysis under the E.R.A., the plurality then applied that analysis to the challenged provisions of Act 13.<sup>105</sup> Before addressing specific sections, however, the court made comments about the Act as a whole. First, the court contrasted the divergent applications of the E.R.A. to Act 13 made by the Commonwealth and by the citizens. The Commonwealth’s perspective was that Act 13 had been enacted according to legitimate objectives and “falls properly within its exclusive discretionary policy judgment.”<sup>106</sup> Municipalities, therefore, had no right to challenge that

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(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resource? (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 Twp.*, 83 A.3d at 966 (quoting *Payne v. Kassab*, 312 A.2d 86, 97 (Pa. Commw. Ct. 1973)). This analysis became the “benchmark” for the commonwealth court’s E.R.A. decisions, despite the fact that it is not based on the constitutional text. The *Robinson Township* plurality gave three reasons for why the *Payne* test was inadequate for the majority of cases implicating the E.R.A.: (1) it is too narrow in its description of the Commonwealth’s duties, (2) it assumes that no judicial relief is available under the amendment unless there has been some kind of legislative action, and (3) it has “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.” *Id.* at 967.

The court looked more favorably on the second line of cases applying the E.R.A. In those cases, the supreme court had cited the amendment to demonstrate the state’s public policy in favor of environmental protection as opposed to other Article I interests, such as property or economic rights. *Id.* at 967-968. According to the court, this line of cases supports an interpretation of the E.R.A. that requires the state to “act in a manner that protects Pennsylvania’s public natural resources from degradation and diminution.” *Id.* at 969.

103. *Id.*

104. *Id.*

105. Since the purpose of this Note is to illustrate the application of the Marshall Analysis to state statutes, it is unnecessary to examine each section of Act 13 with which the court dealt. Thus, I have passed over other sections dealt with by the court in order to focus on the primary two offending sections.

106. *Id.* at 974.

judgment or attempt to adopt a different policy.<sup>107</sup> The citizens, on the other hand, viewed the E.R.A. as imposing the duty on the Commonwealth's political branches to protect individual rights.<sup>108</sup> It likewise gave citizens the ability to vindicate those rights in court in the event the Commonwealth breached its duty.<sup>109</sup> Thus, the issue was not about the power of municipalities, but about the Commonwealth's faithfulness in performing its duties under the E.R.A.<sup>110</sup> The court unequivocally agreed with the citizens.<sup>111</sup>

Next, the court addressed the purpose of Act 13. Citing the "Declaration of Purpose" section of Act 13,<sup>112</sup> the court described the purpose of the Act to be "to provide a maximally favorable environment for industry operators to exploit Pennsylvania's oil and gas resources, including those in the Marcellus Shale Formation."<sup>113</sup> Like the coal industry before it, the natural gas industry was seeking to exploit the natural resources of Pennsylvania at the expense of the environment and to the detriment of future generations. But, unlike in the earlier era, there was a constitutional means of ensuring that history would not be repeated: the E.R.A.<sup>114</sup> The court then proceeded to examine the individual provisions of the challenged statute.

The first section of Act 13 that the court addresses is § 3303, which states:

Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that they regulate

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. 58 PA. CONS. STAT. ANN. § 3202.

113. *Robinson Twp.*, 83 A.3d at 975. In framing the purpose in this way, the court very selectively quotes § 3202, including only the phrase "optimal development of oil and gas resources." The full section reads:

The purposes of this chapter are to:

(1) Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, *environment* and property of Pennsylvania citizens.

(2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.

(3) Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.

(4) *Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.*

58 PA. CONS. STAT. ANN. § 3202 (emphasis added).

114. *Robinson Twp.*, 83 A.3d at 976.



oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.<sup>115</sup>

To determine the constitutionality of this section, the court considered the basic relation of local municipalities to the state government and their respective duties under the constitution. Fundamentally, local municipalities derive their authority solely from the Commonwealth.<sup>116</sup> The constitution or the General Assembly may expressly grant power, and the municipality may have implicit authority to execute those powers.<sup>117</sup> The General Assembly, however, does not have the authority to strip a municipality of its power to perform the municipality's constitutional duties.<sup>118</sup> According to the court, the latter principle becomes relevant in the context of the E.R.A. The Commonwealth—the trustee named in the E.R.A.—encompasses not only the General Assembly but also local municipalities. Local governments, therefore, have a fiduciary duty to act in accordance with the E.R.A., which is not mediated through the General Assembly. The General Assembly, therefore, may not relieve the municipalities of that duty.<sup>119</sup> Since the local zoning ordinances predated Act 13, “citizens buying homes and raising families in areas zoned residential had a reasonable expectation concerning the environment in which they were living . . . .”<sup>120</sup> By completely superseding local ordinances and ordering localities to ignore their existing use restrictions, Act 13 “fundamentally disrupt[ed]” the expectation of those citizens. Moreover, such a sweeping preemption forced local governments to ignore their independent obligations under the E.R.A. to take affirmative measures for environmental protection.<sup>121</sup> The court, therefore, held that § 3303 was unconstitutional because it overstepped the bounds of its police power.<sup>122</sup>

The plurality similarly dispensed with § 3304.<sup>123</sup> The section violated the E.R.A. because it degraded the corpus of the Commonwealth's trust and

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115. 58 PA. CONS. STAT. ANN. § 3303.

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

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 978.

122. *Id.*

123. Section 3304 provides:

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(a) **General rule.** -- In addition to the restrictions contained in sections 3302 (relating to oil and gas operations regulated pursuant to Chapter 32) and 3303 (relating to oil and gas operations regulated by environmental acts), all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources.

(b) **Reasonable development of oil and gas resources.** -- In order to allow . . . for the reasonable development of oil and gas resources, a local ordinance:

(1) Shall allow well and pipeline location assessment operations, including seismic operations and related activities conducted in accordance with all applicable Federal and State laws and regulations relating to the storage and use of explosives throughout every local government.

(2) May not impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than conditions, requirements or limitations imposed on construction activities for other industrial uses within the geographic boundaries of the local government.

(3) May not impose conditions, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations that are more stringent than the conditions, requirements or limitations imposed on other industrial uses or other land development within the particular zoning district where the oil and gas operations are situated within the local government.

(4) Shall have a review period for permitted uses that does not exceed 30 days for complete submissions or that does not exceed 120 days for conditional uses.

(5) Shall authorize oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as a permitted use in all zoning districts.

(5.1) Notwithstanding section 3215 (relating to well location restrictions), may prohibit, or permit only as a conditional use, wells or well sites otherwise permitted under paragraph (5) within a residential district if the well site cannot be placed so that the wellhead is at least 500 feet from any existing building. In a residential district, all of the following apply:

(i) A well site may not be located so that the outer edge of the well pad is closer than 300 feet from an existing building.

(ii) Except as set forth in paragraph (5) and this paragraph, oil and gas operations, other than the placement, use and repair of oil and gas pipelines, water pipelines, access roads or security facilities, may not take place within 300 feet of an existing building.

(6) Shall authorize impoundment areas used for oil and gas operations as a permitted use in all zoning districts, provided that the edge of any impoundment area shall not be located closer than 300 feet from an existing building.

(7) Shall authorize natural gas compressor stations as a permitted use in agricultural and industrial zoning districts and as a conditional use in all other zoning districts, if the natural gas compressor building meets the following standards:

imposed a disparate impact on some citizens.<sup>124</sup> Section 3304 implements a new regulatory regime for oil and gas operations, which supersedes all local ordinances.<sup>125</sup> The section requires municipalities to permit a wide range of activities and limits the ability of the local government to place restrictions.<sup>126</sup> Since § 3304 “permits industrial oil and gas operations as a uses ‘of right’ in **every zoning district throughout the Commonwealth**,” the plurality found that it could not meet the needs of the wide range of natural and social conditions represented in different parts of Pennsylvania, and that it would disrupt the expectations and ownership interests that had developed over three centuries of history.<sup>127</sup> The court posited that such inflexibility would expose sensitive landscapes to industrial noise, traffic, and pollution.

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(i) is located 750 feet or more from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot; and

(ii) the noise level does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

(8) Shall authorize a natural gas processing plant as a permitted use in an industrial zoning district and as conditional uses in agricultural zoning districts if all of the following apply:

(i) The natural gas processing plant building is located at the greater of at least 750 feet from the nearest existing building or at least 200 feet from the nearest lot line unless waived by the owner of the building or adjoining lot.

(ii) The noise level of the natural gas processing plant building does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

(9) Shall impose restrictions on vehicular access routes for overweight vehicles only as authorized under 75 Pa.C.S. (relating to vehicles) or the MPC.

(10) May not impose limits or conditions on subterranean operations or hours of operation of compressor stations and processing plants or hours of operation for the drilling of oil and gas wells or the assembly and disassembly of drilling rigs.

(11) May not increase setback distances set forth in Chapter 32 (relating to development) or this chapter. A local ordinance may impose setback distances that are not regulated by or set forth in Chapter 32 or this chapter if the setbacks are no more stringent than those for other industrial uses within the geographic boundaries of the local government.

58 PA. CONS. STAT. ANN. § 3304 *invalidated by Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

124. *Robinson Twp.*, 83 A.3d at 981.

125. 58 PA. CONS. STAT. ANN. § 3304.

126. 58 PA. CONS. STAT. ANN. § 3304(b).

127. *Robinson Twp.*, 83 A.3d at 979 (emphasis in original).

Additionally, it would fundamentally alter aesthetic values that communities have come to rely upon.<sup>128</sup> “In constitutional terms,” this amounted to a degradation of the corpus of the trust.<sup>129</sup>

The broad-brush approach taken by § 3304 was also the cause of the plurality’s other concern: the new regulatory scheme had a greater environmental impact on some communities than on others. Section 3304 imposed “conditions, requirements or limitations” applicable in every zoning district in every part of the Commonwealth, and it prohibited localities from tailoring their own regulations to meet the specific needs of each district.<sup>130</sup> The application of this statute would mean that even the most sensitive zoning district must permit industrial oil and gas production activities, regardless of the zone’s actual conditions. Thus, a sensitive zoning district would suffer a greater burden on its environmental conditions as a result of the statute than would a district already zoned for heavy industry.<sup>131</sup> Since the E.R.A. commands the Commonwealth as trustee to manage the corpus of the trust for the benefit of “all the people,” the plurality held this disparate impact on sensitive zoning districts to be unconstitutional.<sup>132</sup>

### C. Justice Baer’s Concurring Opinion

Justice Baer lauded the “pioneering opinion” of Chief Justice Castille,<sup>133</sup> but agreed with the commonwealth court’s decision that the challenged portions of Act 13 were unconstitutional primarily on Due Process grounds.<sup>134</sup> Justice Baer premised his opinion on the notion that states have a “constitutionally ordained mandate” to enact zoning laws under the Fifth and Fourteenth Amendments to the United States Constitution.<sup>135</sup> According to Justice Baer, the prohibition against government takings of property embodied in those amendments, combined with the common law principle of *sic utere tuo ut alienum non laedas*,<sup>136</sup> requires the state to provide for

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128. *Id.*

129. *Id.* at 980.

130. *Id.* at 980.

131. *Id.*

132. *Id.*

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

134. *Id.*

135. *Id.* at 1001-02.

136. “Use your own property in such a way that you do not injure other people’s.” *sic utere tuo ut alienum non laedas*, OXFORD REFERENCE, available at <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100504563#> (last viewed Feb. 2, 2016).

zoning ordinances so that the obnoxious land use of one landowner does not harm the interests of his neighbor.<sup>137</sup> With that assumption as a starting point, Justice Baer framed the issue at hand: “May the General Assembly, through a law applicable statewide, remove *en toto* from local municipalities the apparatus it provided to vindicate the individual substantive due process rights of Pennsylvania landowners?”<sup>138</sup> Justice Baer said “no.”<sup>139</sup> Because Act 13 took a “one size fits all” approach,<sup>140</sup> the law contravened one of the fundamental principles of constitutional zoning schemes in that it had “an arbitrary and discriminatory impact” on different landowners in different parts of the state.<sup>141</sup> The Commonwealth made it impossible for the local governments to protect the interests of landowners against the “unquestionable damage to their private enjoyment of property.”<sup>142</sup> The protections that Act 13 did provide were, in Justice Baer’s view, insufficient and ultimately so arbitrary and discriminatory that they essentially forced municipalities to invite pigs into every parlor.<sup>143</sup>

#### *D. Dissenting Opinions*

Justices Eakin and Saylor dissented on grounds that the court’s review of a political branch’s social policy should have been “highly deferential and closely constrained.”<sup>144</sup> Justice Saylor, whose opinion Justice Eakin joined in its entirety,<sup>145</sup> criticized the plurality opinion for straying from the record and from the parties’ arguments by making “broad-scale pronouncements” about the General Assembly’s disregard for the Environmental Rights Amendment.<sup>146</sup>

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137. *Robinson Twp.*, 83 A.3d at 1001-02.

138. *Id.* at 1002.

139. *Id.* at 1002-03.

140. *Id.* at 1006.

141. *Id.* at 1006-07.

142. *Id.* at 1008. It is important to note that although this argument is similar to that made by the plurality, Justice Baer grounds his reasoning in the United States Constitution, and not on the Pennsylvania Constitution.

143. *Id.*

144. *Id.* at 1009-10.

145. *Id.* at 1014.

146. *Id.* at 1009.

## III. PROPOSED ANALYSIS

## A. Introduction

The plurality opinion takes Pennsylvania's constitution very seriously by endeavoring to give effect to the Environmental Rights Amendment. That much is commendable. What is less salutary is the plurality's failure to fully recognize the structural relationship between the commonwealth's legislature and its municipalities—which is that of creator and creature. Furthermore, under the guise of enforcing the terms of a trust—the E.R.A.—the plurality focused on the assumed effects that Act 13 would have on the environment. This focus was more in the nature of a legislature rather than a court. This part of the Note will show how both of these errors stem from a wrong understanding of what a constitution is and what a court's role is in applying it. It will also describe and apply the Marshall analysis to show how this alternative approach to constitutional interpretation can be used in a state law context.

## 1. Nature of a Constitution

Before determining whether a law is constitutional, it is necessary to consider the nature of a constitution. This consideration entails defining two aspects of a constitution: what it is and what it does. How one defines these two aspects will be decisive in how that person assesses and passes judgment on the statute in question. Chief Justice John Marshall set out a classic formulation of these considerations in *Marbury v. Madison*,<sup>147</sup> and this Note adopts his definitions.

According to Justice Marshall, a constitution is an expression of the people's original will. This is a more fundamental and permanent expression of will than any statute passed by a legislature.<sup>148</sup> Thus, while statutes do manifest the will of the people as expressed through the acts of their elected representatives, statutes must always be subservient to and limited by the original expression of will.<sup>149</sup> A change to this fundamental expression of will demands a much stricter process than that required for ordinary legislation.<sup>150</sup>

As to the function of a constitution, Justice Marshall described it as setting up the basic framework of government. It “organizes the government, and assigns, to different departments, their respective powers. It may either stop

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147. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

148. *Id.* at 176.

149. *Id.* at 176-77.

150. *Id.* at 177.

here; or establish certain limits not to be transcended by those departments.”<sup>151</sup> Of course, as Justice Marshall notes later in the same passage, the U.S. Constitution does establish additional limits on the federal government; limits on Congress, on the Judiciary, and on the Executive. What a constitution does not—indeed cannot—do is grant fundamental rights, though it may enumerate some of those rights.

## 2. Judicial Review

In *Marbury*, Justice Marshall famously described the process of judicial review. What is perhaps less widely acknowledged is the fact that Justice Marshall’s approach to judicial review is part of his theory of the nature of a constitution as described above, and is dependent on it.<sup>152</sup> Indeed, his view is that a court derives its power to strike down statutes from the superior position a constitution holds over ordinary legislation.<sup>153</sup> Using the Constitution as a measuring stick, as it were, the Judiciary has the power to say which legislative acts qualify as law and which fall short. As between the Constitution and a statute, a court must apply the Constitution; a law that does not accord with the Constitution is not law and does not bind courts.<sup>154</sup>

## 3. Legislative Power

Fundamental to our system of representative democracy—and indeed to a Christian philosophy of authority—is the principle that no person or government has power unless it has been delegated by the sovereign.<sup>155</sup> Congress, thus, has only the power delegated to it by the People in the Constitution. This principle is the basis for Chief Justice Marshall’s approach

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151. *Id.* at 176.

152. *Id.* at 176-78.

153. *Id.* at 177-78.

154. *Id.*

155. See, e.g., *John* 19:11 (ESV) (“Jesus answered him, ‘You would have no authority over me at all unless it had been given you from above.’”), *THE FEDERALIST* NO. 22, at 146 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) (“The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority.”); *THE FEDERALIST* NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) (“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.”).

to assessing the constitutionality of congressional legislation, as he described it in the seminal case of *McCulloch v. Maryland*.<sup>156</sup> Marshall wrote:

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted [sic] to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and [is] calculated to effect [the] objects intrusted [sic] to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.<sup>157</sup>

As explicated by Dean Jeffrey Tuomala, Justice Marshall's path of analysis examines both the subject matter of the statute and the purpose for which it was enacted.<sup>158</sup> A statute may be found unconstitutional either because it deals with a subject matter that the Constitution has prohibited Congress from addressing (i.e., the establishment of religion), or because the law has been passed, explicitly or implicitly, for an illegitimate purpose. An object may be illegitimate either because it was not granted to Congress by the Constitution (i.e., a government function reserved to the states or the people), or because it is not a valid purpose for governmental involvement in the first place (i.e., the education of children, to use a controversial example).

#### 4. Difference between Federal and State Analysis

It is important to note at this point that, while the nature of a constitution remains the same whether it is a state or federal constitution, each type of constitution grants a different kind of power. In the American system, the Federal Government is one of enumerated powers, whereas the state

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156. *McCulloch v. Md.*, 17 U.S. (4 Wheat.) 316 (1819).

157. *Id.* at 423.

158. Jeffrey C. Tuomala, *The Casebook Companion Pt. Three: Ch. 2, p. 9* (2014) (unpublished manuscript) (on file with author) ("Identifying the subject of a statute and defining the language of an enumerated power is a necessary first step in constitutional analysis; however, discerning the object is the lost key in analyzing an enumerated-power case."). Dean Tuomala was the founding Associate Dean for Academic Affairs of the Liberty University School of Law, and currently teaches courses on constitutional law, legal history, and jurisprudence. I may never have come to law school had I not encountered Dean and Mrs. Tuomala at a conference in 2009.



governments possess plenary power.<sup>159</sup> This difference has a crucial impact on how a court should evaluate the constitutionality of a state law. Because the state's authority is not limited to powers enumerated in the state constitution, it is usually not necessary to tie a state statute to any enumerated power, as is necessary at the federal level. The emphasis in the analysis is on determining whether there is an explicit or implicit prohibition against the legislative action in the state or federal constitutions, or in the law of nature and of Nature's God. State jurisdiction, therefore, has a much broader range of subject matters to regulate than does Congress, but it is still limited to regulating only those objects which are entrusted to civil government and not withheld by the state or federal constitutions.

### *B. Application of Framework*

This Note will now apply the framework set out above to two of the sections of Act 13 that the plurality held to be unconstitutional. The first section of Act 13 addressed by the court was § 3303, which preempts all local environmental ordinances to the extent that they regulate oil and gas operations.<sup>160</sup> Section 3304 establishes uniformity of local ordinances throughout the Commonwealth and requires all local ordinances to permit the "reasonable development of oil and gas resources."<sup>161</sup> The balance of section 3304 defines what the legislature means by "reasonable development."<sup>162</sup> The statute prescribes detailed specifications for what local ordinances "shall allow" or "may not" restrict or prohibit: setback distances, a review period, impoundment areas, etc. are required, but municipalities are forbidden from enacting ordinances that are more stringent than those which cover other industrial uses.<sup>163</sup>

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159. *McCulloch*, 17 U.S. (4 Wheat.) at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.").

160. 58 PA. CONS. STAT. ANN. § 3303 ("Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.").

161. 58 PA. CONS. STAT. ANN. § 3304(a).

162. 58 PA. CONST. STAT. ANN. § 3304(b).

163. *Id.*

The subject matter of both sections is the removal of a particular field of regulation—aspects of the oil and gas industry—from the jurisdiction of counties, towns, and villages. The purpose of the Act as a whole is to (1) encourage oil and gas development and (2) protect persons and natural resources associated with oil and gas activities.<sup>164</sup> As considered above, states have plenary authority, which means that they have jurisdiction over anything which is appropriate to civil government and which is not prohibited by the federal or state constitutions. For this statute to be unconstitutional, therefore, either its purpose must be prohibited, or its subject matter must fall outside the sphere of civil government.

Before determining whether these sections of Act 13 are unconstitutional, it is important to first view them in the context of the framework of government established by the Pennsylvania Constitution. In its constitution, the People of the Commonwealth of Pennsylvania vested the legislative power of the Commonwealth in the General Assembly.<sup>165</sup> All political subdivisions in Pennsylvania are “creations of the state with no powers of their own, except those powers expressly granted to them by the Constitution of the Commonwealth or by the General Assembly, and other authority implicitly necessary to carry into effect those express powers.”<sup>166</sup> The Pennsylvania Constitution permits municipalities to adopt home rule charters, which grant them a measure of self-governance, but that power is always limited explicitly or implicitly by the Constitution, by the charter itself, and by acts of the General Assembly.<sup>167</sup> Furthermore, the

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164. Act 13’s statement of purpose is contained in 58 PA. CONS. STAT. ANN. § 3202, which states,

The purposes of this chapter are to:

- (1) Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.
- (2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.
- (3) Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.
- (4) Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.

58 PA. CONS. STAT. ANN. § 3202.

165. PA. CONST. art. II, § 1 (“The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.”).

166. *Fross v. Cty. of Allegheny*, 20 A.3d 1193, 1202 (Pa. 2011).

167. PA. CONST. art. IX, § 2 (“Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. . . . A municipality which has a home rule charter may exercise any power or

Commonwealth can always take away power it has previously granted to the municipalities.<sup>168</sup>

### 1. U.S. Constitution

The first inquiry is to determine whether a statute governing oil and gas activities would violate the U.S. Constitution. The three portions of the Constitution relevant to this inquiry are sections 8 and 10 of Article I, and Amendment XIV. Act 13 implicates neither section 8 nor section 10.<sup>169</sup>

The Fourteenth Amendment to the U.S. Constitution prohibits states from abridging the privileges and immunities of citizens of the United States, from depriving any person of life, liberty, or property without due process of law, and from denying equal protection of law to any person within its jurisdiction.<sup>170</sup> Act 13 violates neither the Privileges and Immunities Clause nor the Equal Protection clause.<sup>171</sup>

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perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.”).

168. *Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855, 862 (Pa. 2009) (“Even where the state has granted powers to act in a particular field, moreover, such powers do not exist if the Commonwealth preempts the field.”).

169. Article 1, section 8 enumerates the specific powers of Congress. A state law violates that section if it seeks to regulate one of those fields of law. The only portion of section 8 that could possibly be relevant to the sections of Act 13 under review is the Commerce Clause, specifically, a doctrine known as the “dormant” Commerce Clause. This doctrine, implicit in the Commerce Clause, but first outlined by Justice Johnson’s concurring opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), holds that a court may strike down a state law when it explicitly or implicitly regulates interstate commerce, since Congress alone has that authority. Here, removing the power of local municipalities to regulate oil and gas activities is clearly an intrastate matter, so section 3303 is not prohibited by Article 1, section 8. Article I, section 10 specifically restricts the states’ power to engage in certain activities, such as entering into treaties, coining money, impairing the obligation of contracts, etc. None of these prohibitions is implicated by sections 3303 or 3304 of Act 13.

170. U.S. CONST. amend. 14, § 1.

171. The Privileges and Immunities Clause is not implicated here, because zoning laws are not among the privileges and immunities of citizens of the United States. *See, e.g.*, 16B AM. JUR. 2D *Constitutional Law* § 819 (2015) (listing rights of national citizenship recognized by various courts). The Equal Protection Clause enables the Federal government to intervene when a state denies a person or class of persons the same protection of law on the basis of some suspect category, such as race or religion. Act 13 would surely overcome minimal scrutiny, since unless a law discriminates on the basis of certain protected classes, modern 14th Amendment jurisprudence applies only a rational basis test. That test would be easily satisfied by this statute, given the Commonwealth’s interest in economic development. Considering the fact that Act 13 is highly favorable toward the oil and gas industry, suggesting a certain degree of legislative favoritism, the Equal Protection Clause would likely have had a far greater

The Due Process Clause prohibits the deprivation of the fundamental rights of life, liberty, and property, and is implicated when one of those rights is jeopardized. For over a century, though, the U.S. Supreme Court has found that there are certain other rights that are also fundamental since they are “implicit in the concept of ordered liberty.”<sup>172</sup> This concept is known as “substantive due process.” Although during the “*Lochner* Era” at the beginning of the 20th century, the Court recognized the right to contract as being a substantive due process right, the focus of current substantive due process jurisprudence is focused on privacy and intimate relationships. Depending on whether a fundamental right is restricted, courts will apply either minimal or heightened scrutiny to determine whether a challenged statute satisfies due process. In this case, the subject matter of the statute is zoning laws.

Ordinarily, when a zoning ordinance is challenged, the issue is whether the challenged ordinance is essentially a taking under the Due Process clauses of the 5th and 14th Amendments; the challenger claims that his own property rights are being violated by the excessively restrictive zoning ordinance.<sup>173</sup> Not so here. Instead, Pennsylvania removed the restrictions imposed by the local municipalities, and expanded the ability of landowners to engage in oil and gas activity on their properties. Since this is not a taking and does not violate the landowner’s due process rights, substantive or otherwise, Act 13 survives a challenge under the Due Process Clause. Nevertheless, both the commonwealth court and Justice Baer’s concurring opinion found that Act 13 did violate the Due Process Clause.

The due process argument proffered by the citizens in their challenge to Act 13 can be stated as a series of propositions: (1) property owners have a due process right to not be interfered with by the government or by neighbors; (2) municipalities have a constitutional duty to “preserve the character of neighborhoods”, etc.;<sup>174</sup> (3) zoning ordinances are constitutionally necessary means by which to fulfill that duty; (4) municipalities have a constitutional obligation to enforce ordered zoning schemes; (5) Act 13 limits the ability of municipalities to zone in a way that “preserves” the community character; (6) Act 13 forces municipalities to

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significance if the U.S. Supreme Court treated economic rights with the same regard as individual civil rights.

172. *Griswold v. Connecticut*, 381 U.S. 479, 500 (U.S. 1965) (Harlan, J., concurring) (internal citation omitted).

173. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 1004 (Pa. 2013) (Baer, J., concurring).

174. *Id.* (quoting *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732-33 (1995)).

breach their constitutional responsibility; and (7) therefore, Act 13 unconstitutionally violates property owners' due process rights.

As discussed above, a constitution does not itself grant rights, but instead provides a mechanism for protecting inherent human rights by dividing up government power and setting out how that power is administered. Both the plurality and the concurrence do violence to this principle. Uncomfortable with the notion that the Commonwealth could completely override the ability of local municipalities to limit industrial oil and gas activity on the local level and that Act 13 creates a one-size-fits-all rule for zoning, both opinions attempt to craft substantive grounds in the state or federal constitutions for why the state cannot remove zoning power from the municipalities.

Justice Baer tried to find a substantive due process right to zoning ordinances that municipalities are bound to fulfill, and the state is bound to respect. Justice Baer's argument is problematic because of (a) his faulty interpretation of the zoning cases, and (b) the structurally inconsistent result of that interpretation.

First, Justice Baer interprets cases that describe the requirements for permissible zoning ordinances as inherently containing a constitutional right to have zoning ordinances.<sup>175</sup> *Village of Euclid v. Ambler Realty Co.*<sup>176</sup> is the classic U.S. Supreme Court case that held a municipality may enact zoning ordinances as a valid exercise of its police power unless it is arbitrary, discriminatory, and bears "no substantial relation to the public health, safety, morals, or general welfare."<sup>177</sup> Baer reads the most famous portion of the opinion, which describes land uses that are not suited to the circumstances of the locality as a "pig in the parlor,"<sup>178</sup> as being an implicit prohibition against the state changing the zoning scheme developed by a locality. Instead, Justice Sutherland is merely describing how the authority implementing a zoning ordinance is to determine whether there is nuisance that would warrant an exercise of the police power.<sup>179</sup> Similarly, the passage Justice Baer cites from *City of Edmonds v. Oxford House Inc.* describes the purpose behind enacting zoning ordinances, but does not mandate them as a constitutional requirement.<sup>180</sup> Indeed, of the cases Justice Baer cites for his view, only a New

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175. *Id.* at 1006.

176. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (U.S. 1926).

177. *Id.* at 395 (internal citations omitted).

178. *Id.* at 388.

179. *Id.* at 387-88.

180. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732-33 (1995).

York case, *Cohen v. Board of Appeals of Village of Saddle Rock*,<sup>181</sup> suggests that the state could “impermissibly attempt to usurp the local zoning authority or violate home rule powers.”<sup>182</sup> Even this language, though, does not establish a mandate on states and municipalities under the Due Process Clause to enact zoning ordinances to “vindicate the individual substantive due process rights of Pennsylvanian landowners.”<sup>183</sup>

Second, having confused constitutional permissibility with a constitutional mandate, Justice Baer is confronted by structural inconsistency. Baer seems to argue that due process intrinsically requires zoning ordinances in order to protect property owners against neighbors’ obnoxious uses and to maintain order. If the state wants to occupy that whole field of regulation, it may do so as long as it complies with the constitutional requirements of the *Euclid/Edmonds* line of cases. But once the state legislature has given authority to the municipalities to promulgate zoning ordinances, as Pennsylvania did in its Municipal Planning Code (“MPC”), then Justice Baer would hold that “the state may not alter or invalidate those ordinances.” This position is untenable. If due process demands that municipalities enact zoning ordinances, independently of whether the state legislature has given or removed that authority, then that renders the constitution contradictory. This principle advocated by Justice Baer would strip the General Assembly of the power to preempt or place restrictions of any kind on a municipality’s “duty” to zone. Any ordinance that a city deems to be for the “best interests of the health, safety and character of their communit[y],” would be unassailable under Justice Baer’s view because the state would be attempting to take back a right it has previously conferred and which its citizens have subsequently relied on. Furthermore, wouldn’t it also be a due process violation if the city itself repealed a zoning ordinance that the citizens had formerly relied on? And how are we to know if a particular zoning scheme or ordinance has reached the constitutionally untouchable level? Clearly, having found a right where none exists, Justice Baer paves the way for a substantive due process issue in the most mundane of zoning situations. It would be far better to just accept that the Pennsylvania Constitution authorizes the General Assembly to allow or disallow municipalities to enact zoning ordinances.<sup>184</sup>

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181. *Cohen v. Bd. of Appeals of Village of Saddle Rock*, 795 N.E.2d 619 (N.Y. 2003).

182. *Id.* at 624 (“Localities remain free to enact zoning regulations in the best interests of the health, safety and character of their communities.”).

183. *Robinson Twp.*, 83 A.3d at 1002.

184. See, e.g., PA. CONST. art. IX, § 2 (“Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. . . . A municipality which has a home rule charter may exercise any

## 2. Pennsylvania Constitution and General Principles of Law

Once a state statute has cleared the hurdles posed by the United States Constitution, the next step of analysis is to determine whether there are any prohibitions against it in the state constitution or in the general principles of law.<sup>185</sup> For this step, the subject matter of Act 13 is the regulation of the oil and gas industry.<sup>186</sup> After determining whether the constitution authorizes regulation of this subject matter it will be necessary to discern the purposes of Act 13, and determine whether those purposes are consistent with the constitution and whether the means employed by the statute are calculated to effect those purposes.

### a. Subject Matter and Purposes

The first and primary subject matter of this statute is the regulation of oil and gas extraction and production activities. The Pennsylvania Constitution does not contain an express or implicit prohibition against the legislature's regulation of oil and gas extraction and production activities.<sup>187</sup> Furthermore, since state governments, unlike the federal government, have general power rather than enumerated power, the presumption is that the state has the jurisdiction to regulate for the purpose of health, safety, welfare, or morals unless the federal or state constitution provides otherwise.<sup>188</sup> Thus, while the Pennsylvania Constitution does not have to enumerate a power of the Commonwealth to regulate oil and gas activities, the Pennsylvania legislature may legislate in that area as part of its plenary power—as long as it is for a proper purpose and does not adopt means which violate the constitution.

As for the Laws of nature and of nature's God, the purpose of civil government is to protect the life, liberty, and property of those within its

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power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.”); *Fross v. Cty. of Allegheny*, 20 A.3d 1193, 1202 (Pa. 2011).

185. These general principles are the higher law on which all law depends, and are known in the Declaration of Independence as “The Laws of Nature and of Nature’s God.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

186. 58 PA. CONS. STAT. ANN. § 3201 (“This chapter relates to oil and gas.”).

187. See generally PA. CONST.

188. See, e.g., *Khan v. State Bd. of Auctioneer Exam’rs*, 842 A.2d 936, 945 (Pa. 2004) (“One of the most important functions of government, as previously set forth by this Court, is: ‘[T]he exercise of the police power for the purpose of preserving the public health, safety and morals, and it is true that, to accomplish that purpose, the legislature may limit the enjoyment of personal liberty and property.’”) (quoting *Gambone v. Commonwealth*, 101 A.2d 634, 636-37 (Pa. 1954)).

jurisdiction.<sup>189</sup> This is, of course, the purpose as viewed at a high level of generalization. If the government exceeds those purposes, then it has exceeded the bounds of its authority and has, to use Locke's term, devolved into tyranny.<sup>190</sup>

Turning to the purposes of the statute, section 3202 delineates the purposes of Act 13, which are, of course, the purposes of §§ 3303 and 3304. Those purposes were to:

- (1) Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.
- (2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.
- (3) Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.
- (4) Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.<sup>191</sup>

It is clear that the first three purposes of the statute are proper under the Pennsylvania Constitution, since they aim to protect the health, safety, and welfare of those involved in the oil and gas industry. Thus, they fall within

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189. See *Romans* 13:1-5. See also R.J. RUSHDOONY, *LAW AND LIBERTY* 7 (1984) ("The purpose of Biblical law, and all laws grounded on a Biblical faith, is to punish and restrain evil, and to protect life and property, to provide justice for all people."); JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT*, §§ 123-24 (digitized by The University of Adelaide) (1690) ("IF man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? why will he give up this empire, and subject himself to the dominion and controul [sic] of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property. . . . The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting."); *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

190. LOCKE, *supra* note 189, at §§ 199-202.

191. 58 PA. CONS. STAT. ANN. § 3202.



the plenary police power of the state. The fourth purpose is constitutional because it links the purpose of Act 13 to the rights delineated in the E.R.A.<sup>192</sup>

Likewise, using the broadly defined purposes of civil government given above, the first three purposes of Act 13 comport with purposes of civil government found in the general principles of law: the protection of life, liberty, and property. The first purpose, which is to “permit optimal development of oil and gas resources” doesn’t actually entail action or exercise of power on the part of the state, but rather self-restraint in order to encourage private industry. The next two purposes aim to protect the lives and property of persons associated with or impacted by the oil and gas industry. It is much less clear to what extent the protection of natural resources or “environmental rights” is a proper purpose of the civil government.<sup>193</sup> If the purpose, though, is to implement “government-initiated management of the environment,” then it would seem that regardless of whether such management is authorized by the Pennsylvania Constitution, it is a breach of the jurisdiction of civil government.<sup>194</sup> This Note assumes, however, that some level of regulation for the purpose of environmental protection—e.g., to prevent the pollution of air or water—*does* properly fall within the sphere of the civil government, especially when it relates to the public health.<sup>195</sup>

b. Means

Once it has been determined that the statute was enacted for proper purposes, the focus of the analysis shifts to the means adopted by the statute to accomplish those purposes. The goal is to discover whether there is a “nexus” between the means taken by the statute and the purpose for which it

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192. Cf. PA. CONST. art. I, § 27 (The “Environmental Rights Amendment”).

193. I leave it to the symposium speakers to discuss the legitimacy of environmental law in the context of the Law of Nature and of Nature’s God. It is sufficient for my purposes to recognize that this is a necessary consideration for a court to make when evaluating the validity of a statute in light of general principles of law.

194. The Cornwall Alliance for the Stewardship of Creation, THE CORNWALL DECLARATION ON ENVIRONMENTAL STEWARDSHIP, <http://www.cornwallalliance.org/docs/the-cornwall-declaration-on-environmental-stewardship.pdf> (last accessed Feb. 5, 2016). Just because an action is condoned by a constitution does not mean it comports with general principles of law. For example, if the state constitution provides that the state legislature shall take all firstborn daughters and sell them to China to repay the state’s debts, that action would be constitutional, but it would not be lawful according to the Law of Nature and of Nature’s God.

195. For an example of some case laws in the Mosaic law with a potentially environmental or public health purpose, see *Deuteronomy* 23:12-14 (covering of excrement), *Leviticus* 14:33-57 (cleansing and quarantine of diseased houses), and *Deuteronomy* 20:19-20 (conservation of fruit-bearing trees).

was enacted. If no nexus exists, or if it is so attenuated as to be merely a pretext for some other purpose, then the statute is unconstitutional. Additionally, the means must not be prohibited by the constitution or by the Law of Nature and of Nature's God.

The means adopted in both §§ 3303 and 3304 to accomplish the purposes of Act 13 was to remove specific types of regulation from the control of municipalities.<sup>196</sup> Section 3303 made environmental acts, insofar as they regulated oil and gas operations, purely a state matter and preempted the "entire field of regulation."<sup>197</sup> Section 3304 restricted local municipal zoning authority to only enact ordinances that allowed for "reasonable development of oil and gas resources," and then went on to define such reasonable development by limiting the permissible scope of the ordinances that a municipality could pass.<sup>198</sup>

The first question is whether these means are "calculated to effect" the purposes of Act 13.<sup>199</sup> The issue here is simply determining whether the legislature adopted these means to accomplish the purpose of the statute, or whether the stated purpose was merely a pretext and the means employed were aimed toward a different object altogether. In considering this question, it is important to be reminded of the nature of judicial reasoning. It is not the role of the court to determine whether the legislature used the best means possible—that would be an exercise of political reasoning. The job of the court is to decide whether the means were legal.<sup>200</sup> Given the stated purposes of Act 13, there is no evidence that preempting the field and specifying the scope of zoning ordinances is a pretext for any purpose other than to "permit optimal development of oil and gas resources."<sup>201</sup>

The next inquiry is to determine whether there are constitutional prohibitions against the means adopted in these two sections. The answer is no. Again, it is essential to keep in mind the purpose and function of a constitution. As detailed above, municipalities in Pennsylvania are creatures of the Commonwealth. Counties, towns, and villages only exist at the behest of the General Assembly. If the People of the Commonwealth wished to structure the relationship between the state and local governments differently, it was, and is, in their power to do so. The Constitution may be

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196. See 58 PA. CONS. STAT. ANN. § 3303 and 58 PA. CONS. STAT. ANN. § 3304.

197. 58 PA. CONS. STAT. ANN. § 3303.

198. 58 PA. CONS. STAT. ANN. § 3304.

199. *McCulloch v. Md.*, 17 U.S. (4 Wheat.) 316, 423 (U.S. 1819).

200. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 1009-10 (Pa. 2013) (Saylor, J., dissenting).

201. 58 PA. CONS. STAT. ANN. § 3202.

amended to reorder the division of power. Under the current regime, however, the Pennsylvania General Assembly has authority under the Constitution to remove power from the local municipalities.<sup>202</sup> The removal of local power was the means that the General Assembly chose to use to accomplish the purposes of Act 13. If those are legitimate objects, and we've seen that they are, and the means are not a pretext, then the judiciary does not have the right to say whether the means chosen were the best possible.

The plurality, however, spent a great deal of space arguing that Article 1, § 27 of the Pennsylvania Constitution—the E.R.A.—was just such a prohibition. The E.R.A. prohibited § 3303, because it forced municipalities to violate the amendment, and it prohibited § 3304 because the uniform regulatory scheme would itself be a degradation of the trust corpus.

The plurality effectively argues that the court has broader judicial review of the General Assembly's actions when the legislature is acting as a trustee than when the General Assembly is acting as a legislature, since it can overrule a statute for violating the trust that would otherwise be constitutional.<sup>203</sup> This is an extraordinary grant of power to the judiciary and fundamentally changes the nature of the relationship between two branches of government. The plurality's interpretation would make the legislature accountable to the supervision of the courts and would ignore the fact that the legislature is principally accountable to the citizens who elect it to office. But even aside from this startling implication of the public trust doctrine, striking down the statutes on the trust theory is problematic for a relatively technical flaw that is inherent in the very idea of enforcing the E.R.A. like a common law trust, which Justice Castille strenuously tried to do in the plurality opinion.<sup>204</sup> The issue is that this so-called trust violates the legal

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202. *Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855, 862 (Pa. 2009) ("Even where the state has granted powers to act in a particular field, moreover, such powers do not exist if the Commonwealth preempts the field.").

203. *Robinson Twp.*, 83 A.3d at 975 ("But, in this litigation, the citizens' constitutional challenge is not to the General Assembly's power to enact such legislation; that is a power the General Assembly unquestionably possesses. The question arising from the Commonwealth's litigation stance is whether the General Assembly can perform the legislative function in a manner inconsistent with the constitutional mandate [to act as trustee].").

204. *Id.* at 956 ("[The third clause of Section 27] establishes the public trust doctrine with respect to these natural resources (the corpus of the trust), and designates 'the Commonwealth' as trustee and the people as the named beneficiaries. The terms of the trust are construed according to the intent of the settlor which, in this instance, is 'the people.'"). *See id.* ("'Trust' and 'trustee' are terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted."); *id.* ("This environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth's public natural resources; this concept is consistent with the ratification

structure of a trust, because “the creator, trustee, and beneficiary are all one in the same.”<sup>205</sup> the People of Pennsylvania. Thus, simply on the basis of ordinary trust law, this environmental trust is unenforceable.

In addressing § 3303 and 3304, what the plurality has done is said that the constitutional mandate applies not just to the General Assembly, but also to municipalities. Under this interpretation, the General Assembly is violating the Constitution by prohibiting the local government from carrying out their supposed constitutional duties. The problem with that, however, is that the towns and villages only have the duty to uphold the Constitution while they possess authority granted by the General Assembly. Once that authority is removed, then the local governments no longer have the power or the duty to uphold the Constitution. There is an agency relationship between the General Assembly and the local governments, so the primary constitutional duty falls on the principal—the General Assembly. The General Assembly has chosen to delegate some of that authority to the local governments, but it may withdraw that authority when it sees fit to do so.

The plurality, however, is essentially saying that the Constitution requires the General Assembly to grant certain powers to the local municipalities. This would fundamentally alter the creator/creature distinction between the Commonwealth of Pennsylvania and her municipalities that the people of the Commonwealth judged best at the time the Pennsylvania Constitution was enacted. If the people wish to strengthen the power of their municipalities to make these sorts of decisions, then the people should amend the constitution. The court has no business doing so.

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process of the constitutional amendment delineating the terms of the trust. The Commonwealth is named trustee and, notably, duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania’s government.”).

205. James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENVTL. L. 337, 368 (2015) (“[T]he public trust doctrine cannot be explained or understood as a branch of the law of trusts. While we might describe the government as trustee holding legal title and the public as beneficiary holding equitable title, we will search in vain for a creator who, under trusts law, cannot be either the trustee or the beneficiary. Without a creator, we cannot know the terms of the trust. In a government founded on popular sovereignty, where sovereignty implies exclusive jurisdiction over (rather than title to) the geographic territory of the state or nation, the only possible creator of a trust with respect to resources within that territory is the sovereign people. But under the trust law theory of the public trust doctrine, the people are the beneficiary. And in a democratic republic the people are also the trustee acting through the agency of elected officials.”).

#### IV. CONCLUSION

When a court strays from the basic principles of judicial reasoning and the underlying structure of a constitution system, it will inevitably fall prey to convoluted reasoning and black-robed legislating. It is understandable that the Supreme Court of Pennsylvania may have disagreed with the sweeping overhaul of the Commonwealth's oil and gas law, but the proper solution would have been for the public to petition the General Assembly to change course. Finding illusory constitutional rights and transforming the General Assembly into a trustee in order to stave off a feared environmental disaster has simply polluted the water for those downstream.