

The Abandonment and Restoration of the Text of Article I, Section 27

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Pennsylvania is in an important constitutional moment

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



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

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Article I, Section 27 (1971)

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.

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Commonwealth v. Gettysburg Battlefield National Tower (1973)



- Suit by Attorney General against private developer on private land where there was no state or local approval. Attorney General lost.
- Claim based on first sentence of Article I, Section 27.
- Article I creates rights against government, not against private parties.
- Commonwealth Court nonetheless held Article I, Section 27 was self executing; while Supreme Court affirmed Commonwealth Court, there was no majority on that issue.

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Payne v. Kassab (1973; Commonwealth Court)



- Challenge to street widening project in Wilkes-Barre. Challenge lost.
- Project required .59 acres of public park, less than 3% of park's total acreage.
- Claimed based on second and third sentences of Section 27—public trust provisions.
- Commonwealth Court: Judicial review under Section 27 “must be realistic and not merely legalistic.”

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Commonwealth Court adopts a three-part balancing test as a *substitute* for the text of Section 27.

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

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This test, not Section 27, was applied for more than four decades.

- This test greatly diminished effectiveness of Section 27.
- Of 24 reported court cases involving Section 27 challenge, only 1 held that government decision failed *Payne* test.
- Of 55 reported Environmental Hearing Board cases involving Section 27 challenge, only 8 had outcomes that could be considered favorable to challenging party.

Dernbach & Prokopchak, 53 Duquesne L. Rev. 335 (2015)

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Robinson Township v. Commonwealth (2013)



- Challenge to Act 13 (Marcellus shale regulatory statute) for, among other things, preempting local regulation of oil and gas operations and compelling local governments to allow certain gas operations in all zoning districts.
- Petitioners argued, among other things, that this violated Article I, Section 27.
- Supreme Court held these provisions (and another provision) unconstitutional.
- Three justices based their decision on Section 27; a fourth justice based his decision on another ground (substantive due process)

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Pennsylvania Environmental Defense Foundation v. Commonwealth (2016)



- PEDF claimed violation of public trust provisions of Section 27 because of legislative diversion of funds from gas leasing to for purposes other than conservation of state forests and parks
- On June 20, 2017, Supreme Court agreed—in a sweeping endorsement of text of Section 27.
- Majority vote, not a plurality.

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Leasing state land for shale gas— a brief history

- State ran modest oil and gas leasing program on state forests and parks since 1947. Then Marcellus Shale boom and economic recession happened.
- State expanded drilling on state lands to help balance budget—several hundred million dollars/year.
- Lease fund proceeds appropriated by legislature, not automatically appropriated to DCNR.
- DCNR gets up to \$50 million/year in royalties for state forests and parks.
- Majority of lease fund proceeds appropriated to General Fund, and no longer used for conservation purposes.

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Payne Test Categorically Rejected

- Court said:
 - the test “is unrelated to the text of Section 27 and the trust principles animating it,” and
 - “strips the constitutional provision of its meaning.”

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Restoration of Text

- “[T]he proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”
- The Court held Section 27 grants two sets of rights to the people.
- Section 27 is located in Article I, which is the constitutional declaration of rights. It is thus self-executing against government.

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First sentence (first clause)

- First sentence reads: “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.”
- Court said:
 - “This clause places a limitation on the state’s power to act contrary to this right, and
 - while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.”

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Second and third sentences (second clause)

- Second and third sentences: “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”
- The corpus, or body, of the trust, is public natural resources, which the Court said includes state parks and forests, as well as the oil and gas they contain.
- The people, including present and future generations, are “the named beneficiaries” of this trust.
- “[A]ll agencies and entities of the Commonwealth government, both statewide and local,” have a constitutional trust responsibility. Footnote 23.

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Duties of Trustee(s)

- “First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. “
- Second, the Commonwealth must act affirmatively via legislative action to protect the environment.”

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Private trust law to be used to determine meaning of public trust

- The use of trust language in the public trust sentences indicates value of drawing on pre-existing private trust law to determine their meaning.
- In exercising its public trust duties, the Commonwealth is bound by private trust duties:
 - Loyalty (administering the trust for the benefit of the people),
 - Impartiality (managing the interests of all beneficiaries, including the interests of current and future generations), and
 - Prudence (exercising “reasonable care, skill, and caution”).

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Diversion of oil and gas revenues to general fund violates trust

- Commonwealth “may use the assets of the trust ‘only for purposes authorized by the trust or necessary for the preservation of the trust....’”
- “[P]roceeds from the sale of trust assets are part of the corpus of the trust.”
- Because proceeds from the sale of the trust corpus are subject to public trust restrictions, royalties based on gross production from oil and gas wells are subject to the public trust.
- Court remanded to Commonwealth Court question of how to categorize other income to the state from leasing, particularly annual rental fees.

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Why PEDF matters: summing up

- Majority decision, not plurality
- Text and private trust law given primary role in interpretation of public trust.
- Legislative history of Section 27 also to be used in interpretation.
- *Payne* test discarded
- Public trust is self executing against government
- Restates detailed explanation from *Robinson Township* of how Section 27 should be applied
- First time Supreme Court invalidates statute based entirely on Section 27
- Diversion of funds from oil and gas leasing to general fund held unconstitutional.

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Supporting roles for Section 27



- 1. Confirmation and extension of police power
- 2. Guidance in statutory or ordinance interpretation
- 3. Constitutional authority for laws whose constitutionality is challenged on other grounds

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State of play now: many remaining issues

- Remand in Commonwealth Court
- Other cases:
 - Commonwealth and Supreme Court
 - Common Pleas Court
 - Environmental Hearing Board

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1. How can royalty and other money be spent?

- Options:
 - Day-to-day work of DCNR (\$610 million since 2009)
 - Restoration of state forests and parks
- What fiscal years does this apply to, and what does it mean for annual budget?
- At stake:
 - \$400 million subject to *PEDF*
 - *PEDF*: "In total, Respondents have removed over \$1.1 billion in assets from the Section 27 Public Trust since 2009."

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2. What role does first clause now have?

- *Robinson Township* and *PEDF* focused on public trust clauses, not first clause.
- *Gettysburg Tower* is still precedent.
- Lots of concern in private sector about private vs. private lawsuits based primarily on *Gettysburg Tower*.
- Suggested answer:
 - *Gettysburg Tower* is only self executing against government.
 - Reinforces and adds meaning to public trust clauses.

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3. Duty to consider and analyze impacts prior to decision

- Origin in common law of public trust
- Even dissenting opinion acknowledged this duty
- Private trust duty of prudence
- Like NEPA in some ways
- Programmatic analysis required for some issues (e.g., large scale pipelines)?

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4. Role in permitting

- *Robinson Township* & *PEDF* both involved challenges to legislation.
- Hundreds of DEP permit decisions every year.
- Uncertainty: it is no longer enough for DEP and applicant to simply comply with statutes and regulations.
- Practical answer:
 - Violations must be proved, not alleged.
 - Permitting agencies need to look for and fix gaps in their programs (e.g., cumulative effects).

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5. Best method of implementation

- Litigation to force implementation
- Direct implementation by state agencies and state legislature
 - Guidance
 - Regulations
 - Legislation

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6. What must local governments do?

- Municipalities are almost certainly part of Commonwealth for purposes of both clauses.
- First Clause (Environmental Rights)—is municipality acting in ways that infringe on these public rights?
- Second Clause (Public Trust)
 - What public trust resources are located within municipal boundaries?
 - Are they being conserved and maintained?
- Supporting roles—is municipality interpreting and applying existing ordinances consistent with Section 27?

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7. What about climate change?

- Section 27 almost certainly applies to human-caused climate change.
- Robinson Township and PEDF provide additional support for state cap-and-trade regulation to reduce greenhouse gas emissions.

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8. How to navigate in uncertain waters?

- Constitutional violations must be proven, not simply alleged.
- Commonwealth is most vulnerable when there are major gaps or omissions—and significant adverse effects.
- New decisions make it harder to sacrifice environment in name of economic development.
- Better approach: economic development *and* environmental protection.

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9. Who cares outside Pennsylvania?

- Many states, and most countries, have environmental amendments in their constitutions.
- Effective implementation held back because of lack of judicially cognizable standards. Pennsylvania cases help change that.
- Pennsylvania cases encouraging adoption of comparable amendments in other states (e.g., Maryland).

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10. How big a deal is this?

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| <ul style="list-style-type: none"> ● It is a big deal: <ul style="list-style-type: none"> ● Moves public and legal conversation from simply costs and benefits to rights. ● Fiduciary duties impose higher standard on Commonwealth than simply managing degradation of environment at politically acceptable level. ● There are now judicially enforceable—and meaningful—standards. ● Anti-backsliding value at time when environmental law is under attack. | <ul style="list-style-type: none"> ● It is no big deal: <ul style="list-style-type: none"> ● Environmental law is now well developed, and creates more precise and meaningful standards than general statements in Section 27. ● Section 27 is not likely to have a discernible effect on most environmental permitting. ● Section 27 will mostly be used to fill gaps. |
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For more information on Section 27:

- <https://widenerenvironment.wordpress.com/environmental-law/art-1-sec-27-resources/>

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