

## ROBINSON TOWNSHIP v. PENNSYLVANIA: A MODEL FOR ENVIRONMENTAL CONSTITUTIONALISM

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*“By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction. The litigation response was not available in the nineteenth century, since there was no Environmental Rights Amendment. The response is available now.”<sup>1</sup>*

The natural environment can be and is protected by laws at all levels, from municipal zoning ordinances, to national statutes and regulations, to regional and international treaties and conventions. But a nation’s *constitutional* law provides a unique and indispensable source of protection that warrants special attention. The constitutional law of a nation speaks for all the people and it speaks across time; it represents the love letters that present generations write to those that follow. It speaks in the enduring words of the constitutional text, and in the evolving language of judicial interpretation and application. Constitutions provide indelible and enduring modalities for society. But, these norms wither without a capable, competent judiciary to stand behind them. Often times, it takes just one jurist or one bench to elevate the constitutional conversation.

The Pennsylvania Supreme Court’s opinion in *Robinson Township v. Pennsylvania*<sup>2</sup> is one such decision. There, a plurality of the court held that a controversial law encouraging fracking violated the state’s constitutional Environmental Rights Amendment, the provisions of which were held to be enforceable and “on par” with political rights.<sup>3</sup>

The decision highlights the challenges of engaging constitutional environmental provisions but demonstrates that, with sufficient creativity and commitment, meeting these challenges lies well within the bounds of judicial capability and authority. Because courts around the world are increasingly being asked to engage environmental constitutionalism, *Robinson Township’s* thorough examination of the issues is instructive, not only for cases involving fracking but for cases involving all manner of environmental concerns.

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<sup>1</sup> *Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 976 (Pa. 2013) (plurality opinion).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 960.

Further, it contextualizes it in light of other constitutional rights and obligations such as notions of public trust and sustainability. Most importantly, this kind of case shows what a difference a constitutional environmental right can make.

The unique legal and cultural power of constitutional law is perhaps the best explanation for the growth of environmental constitutionalism over the past few decades. Whereas in the 1970s, constitutions only sporadically sought to protect the environment, constitutions are now rarely adopted or amended without some meaningful attention to environmental protection and the preservation of natural resources. And increasingly, constitutions contain not only fleeting references in unenforceable sections, but also lengthy provisions detailing the care that must be taken to ensure a quality, healthy, and balanced environment, with pure air, clean water and lush forests, and hold such resources in public trust for an ecologically sustainable future.

Constitutional environmental rights have qualities that are timeless and transformative. They protect and value the geography that people own, care about, associate with, and are willing to defend. These provisions value the landscape around which people build their sense of collective and sometimes individual identity. And they recognize the multiple ways in which natural resources contribute to social and ecological well-being: because of their intrinsic beauty, because they provide balance in ecosystems, because they nourish life and ensure biodiversity, because they provide enjoyment to people, and because they contribute to local and national economies.

Yet, without enforcement, these provisions cannot reach their full potential. Courts face serious challenges in interpreting, applying and implementing most constitutional environmental provisions. In part, this is because litigants are often not sufficiently aggressive in asserting environmental rights; in part, it is because even when constitutional environmental claims are raised, courts are reluctant to engage them: interpretation can be difficult because the words are often vague and aspirational and enforcement can be time-consuming or impossible because of a defendant's unwillingness or inability to comply with a judicial order. And then there is the fear of political intransigence or even retribution if the claim concerns a project in which the government or its political or economic allies are particularly invested, as typically happens in cases involving energy generation or extractive resources.

And yet, some courts will not let these obstacles get in the way. There are examples from around the world of courts accepting the interpretive challenges, standing up to the political pressures, and imbuing constitutional environmental provisions with full meaning. Courts engaging these provisions have stopped improvident dams, protected pristine forests, saved miles of coastline, and moderated the effects of mining, to give just a few examples.

When courts do engage with these constitutional provisions, laws can change and, more importantly, minds can change. When courts breathe life into the provisions of a constitutional text, they can create rights that people

can assert or impose limits on the otherwise boundless power of governmental authority.

Judicial opinions are not just assertions of applicable legal principles; they have educational impact and provide normative guidance to people. Through their opinions, courts can help people understand why claiming rights is important, and why it is critical for a free people to insist that those in power respect the limits of their authority. They can create and promote not only the rights written into the text, but also the values implicitly enshrined therein, so that others, and still others after them, may insist that their rights be respected. It can take a generation or many generations for a court to give a constitutional provision its due. But when it happens, it can change the cultural mindset of the people; when it concerns the environment, this kind of engagement can make obsolete unsustainable practices that were once accepted. Some laws, in some countries, can approach this kind of impact, but it is most likely to take place at the constitutional level—where the people invested their emotional energy in an effort to protect what is most sacred to them.

The impact of such opinions can even transcend national boundaries: a court's vindication of a constitutional environmental right can resonate in the constitutional jurisprudence of courts around the world and in that way, be transported beyond the immediate locale that gave rise to the claim in the first place. This is rare when it comes from a national constitutional court, and rarer still for it to come from a subnational supreme court. But a recent case from the Supreme Court of Pennsylvania may well have such far-reaching implications. *Robinson Township* embodies the hope that constitutionalism affords for current and future generations within and outside Pennsylvania.

This article situates *Robinson Township* within comparative constitutionalism. Part I provides an overview of Act 13 and the state constitutional Environmental Rights Amendment. Part II examines how the state supreme court overcame impediments to judicial authority in reaching the merits. Part III considers how the court dispensed with some structural issues involving justiciability. Issues of whether and the extent to which constitutional environmental rights are on par with political rights are the focus of Part IV. How the court decided that the Commonwealth of Pennsylvania had violated its public trust responsibilities is addressed in Part V. Part VI then explains how to reconcile the court's analysis with notions of ecological sustainability.

Robinson Township is worth examining in detail because it provides a roadmap for how courts can maneuver through the factual, legal, and political complexities of environmental constitutionalism. The main opinion is general and transcendent on the one hand and locally tethered on the other. It takes the words of the Environmental Rights Amendment seriously, and then reads the provision broadly and forcefully. It respects the limits imposed by separation of powers but asserts the full measure of judicial authority to push the limits of constitutional environmental law. We conclude that *Robinson Township* is a bellwether decision not only for Pennsylvania, but also for advancing environmental constitutionalism around the globe.

I. BACKGROUND: ACT 13 AND THE ENVIRONMENTAL RIGHTS  
AMENDMENT

In 1971, the people of Pennsylvania voted, by a 4 to 1 margin, to amend their state constitution to include the following three sentences, conjoined and incorporated as Article I, section 27 of the Pennsylvania Constitution and known as the “Environmental Rights Amendment”:

Natural Resources and the Public Estate—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>4</sup>

Two years after its adoption, the Pennsylvania Supreme Court virtually wrote the provision out of existence when it announced a three-part balancing test for its application that all but ensured that laws tested against it would be sustained.<sup>5</sup>

The Pennsylvania General Assembly in 2012, therefore, would have rightly felt fairly confident that no assertion of constitutional environmental rights would threaten its efforts to promote the exploitation of natural gas from the Marcellus Shale Formation when it adopted Act 13. Act 13 was designed to promote and facilitate drilling by horizontal hydraulic fracturing in municipalities throughout Pennsylvania.<sup>6</sup> Supplanting all local regulation, it established state-wide standards for the siting of pipelines and wells, precluding municipalities from establishing more stringent or industry-specific standards or from declining to allow natural gas exploitation at all.<sup>7</sup> Other challenged provisions of the law established limited setbacks from streams, wetlands, and other bodies of water but provided for ample and restricted opportunities for waiver of the setback provisions and then limited the rights of appeal by municipalities and other affected parties, while allowing industry

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<sup>4</sup> *Robinson Twp.*, 83 A.3d at 948-49 (quoting PA. CONST. art. I, § 27).

<sup>5</sup> *See Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973):

The court's role must be to test the decision under review by a threefold standard: (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?

*Id.*

<sup>6</sup> *Robinson Twp.*, 83 A.3d at 979.

<sup>7</sup> *Id.* at 971-72.

appeals from the denials of waivers.<sup>8</sup> Another challenged provision suppressed medical information necessary to treat people for adverse health effects resulting from the environmental consequences of horizontal hydraulic fracturing.<sup>9</sup>

The Act was challenged by property owners, a medical professional, and two municipal elected representatives who sued both as elected officials and “as individual landowners and residents.”<sup>10</sup> That is, they sued both because their power as elected representatives had been supplanted by the challenged law because they would be “required to vote for zoning amendments they believe are unconstitutional[.]”<sup>11</sup> and because the value of their existing homes was “affected negatively because the two can neither enjoy their properties as expected, nor guarantee to potential buyers the enjoyment of these properties without intrusion of burdensome industrial uses in their residential districts.”<sup>12</sup>

A three-justice plurality of the state supreme court recognized a variety of injuries in this case, both human and ecological. It acknowledged the diminished quality of life of the residents and the economic losses they suffered as a result of lowered property values, as well as the ecological degradation to the environment itself. As the court recounted:

Once drilling and fracking operations began, and over the next several years, the homeowner noticed significant degradation in the quality of the well water which had supplied her homestead and those of several neighbors with fresh and clean water during the century in which her family had owned the property. In the homeowner’s words: “my well water began to stink like rotten eggs and garbage with a sulfur chemical smell[.] . . . when running water to take a bath, my bathtub filled with black sediment and again smelled like rotten eggs.”<sup>13</sup>

The plurality recognized that the implications of this degradation affected both the plaintiffs’ non-economic interests in their quality of life and their economic interests in the value of their property and held both to be equally vital: “[A]t its core,” the plurality wrote,

[T]his 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>14</sup>

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<sup>8</sup> *Robinson Twp.*, 83 A.3d at 935, 940, 982.

<sup>9</sup> *See id.* at 923-24.

<sup>10</sup> *Id.* at 918.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 937-38.

<sup>14</sup> *Robinson Twp.*, 83 A.3d at 942.

Moreover, “[p]roperty values, according to the citizens, will decrease with the prospect of storing drilling wastewater ‘less than a football field’s distance from . . . homes,’ and the prospect of contamination of the soil, air, and water supply.”<sup>15</sup> Based on this assessment, the plurality found that plaintiffs had established that they had standing to pursue their claims.<sup>16</sup> “By any responsible account,” it said, “the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.”<sup>17</sup>

Part II explores how the court reached this conclusion.

## II. ASSERTION OF JUDICIAL AUTHORITY

The court first had to address the State’s argument that the judiciary should “play no role” in resolving this sort of dispute.<sup>18</sup> Many courts are wary of encroaching on the authority of the political branches because they know that the willingness of the public to abide by their orders rests primarily on their perceived legitimacy, and that legitimacy is best protected by judicial respect for coordinate branches of government. Constitutional environmental cases are especially susceptible to claims that they should be dismissed on separation of powers grounds because they are typically decided within a context of heightened political pressure and complexity. Powerful private interests seek to develop land in ways that, though lucrative, are claimed to be harmful to the environment or to the people. These interests are often championed by political allies who can influence both political processes and judicial outcomes. It is for this reason that, at a minimum, a judiciary that is independent in law and in fact is indispensable to the vindication of constitutional environmental rights. But even where courts enjoy meaningful protection from political influence, difficult questions concerning the scope of judicial authority remain.

In part, this is true because these claims are often novel and defendants are prone to argue that they are not amenable to judicial resolution, but that they should be left to the people or their representatives to decide. Viewing the claims as purely legal and constitutional, however, the *Robinson Township* court was emphatic in its rejection of this argument: “[t]he nature of the citizens’ claims requires nothing more than the exercise of powers within the courts’ core province: the vindication of a constitutional right.”<sup>19</sup> While this language is more explicit than that found in most judicial opinions, the sentiment is common to courts around the world that accept the challenge of engaging with constitutional environmental rights. In *Robinson Township*, the plurality elaborated:

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<sup>15</sup> *Robinson Twp.*, 83 A.3d at 938.

<sup>16</sup> *Id.* at 922-25.

<sup>17</sup> *Id.* at 976.

<sup>18</sup> *Id.* at 953.

<sup>19</sup> *Id.* at 930.

There are constitutional restraints upon all branches of government, and our finding that this particular legislation crosses this constitutional line is not a substitution of our own preferences for those of the General Assembly. It construes the organic command and thereby defines the parameters within which the General Assembly is fully free to act. This is true with all judicial decisions resolving constitutional challenges to legislation. In our view, the notion that judicial decisions passing upon such challenges represent “judicial legislation”—unless the legislative act is rubber-stamped—misconceives our own duty.<sup>20</sup>

The court then engaged in an extended examination of the political question doctrine, which, in American jurisprudence, precludes judicial review of questions that defy judicial resolution either because they do not implicate any judicially manageable standards against which to measure the challenged action or because they fall within the discretion of the political branches, or for some other reason.<sup>21</sup> Recognized in American law for more than 200 years, the political question doctrine derives from the principle of separation of powers that inheres in the American political and constitutional system at all levels.<sup>22</sup> Separation of powers requires, at a minimum, a respect for the distinct characters of the three branches of government and an acknowledgement that, while there is interplay among them, each has an expertise that should not be disturbed or encroached upon by any other.<sup>23</sup> In constitutional environmental cases, defendants seeking to dismiss claims on political question or separation of powers grounds argue that decisions like those relating to land development, timber licensing, or promoting oil and gas exploration and exploitation fall squarely within the discretion of the political branches and are therefore not governed by legal strictures of the type that courts have authority to enforce.

The *Robinson Township* court accepted that there are limits to judicial authority to review controversial matters. Yet, the plurality rejected the government’s political question argument, drawing a different line between legislative and judicial authority:

There is no doubt that the General Assembly has made a policy decision respecting encouragement and accommodation of rapid exploitation of the Marcellus Shale Formation, and such a political determination is squarely within its bailiwick. But, the instant litigation does not challenge that power; it challenges whether, in the exercise of the power, the legislation produced by the policy runs afoul of constitutional command.<sup>24</sup>

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<sup>20</sup> *Robinson Twp.*, 83 A.3d at 985 n.62.

<sup>21</sup> *Id.* at 925-30.

<sup>22</sup> *See id.* at 926, 927 n.16 (citing THE FEDERALIST NO. 48 (James Madison)).

<sup>23</sup> *Id.* at 926-28.

<sup>24</sup> *Id.* at 928.

Once the court identified the Environmental Rights Amendment as the basis on which plaintiffs were challenging the legislative action, it found the legal rule against which it could measure it: “[i]ndeed,” the court continued,

[I]n terms of the judicial function, at least, this case is not extraordinary at all: all that is required to resolve the parties’ various disputes is that we construe and apply constitutional provisions and determine whether aspects of Act 13 violate our charter. The task is neither more nor less intrusive upon a coordinate branch function than in other matters in which we are called upon to determine the constitutional validity of a legislative act.<sup>25</sup>

To be sure, the court noted:

That is not to say, however, that courts can play no role in enforcing the substantive requirements articulated by the Environmental Rights Amendment in the context of an appropriate challenge. Courts are equipped and obliged to weigh parties’ competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by the other branches of government. The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality.<sup>26</sup>

In fact, the plurality found that, far from being ill-suited to judicial resolution, environmental claims are particularly ill-suited to *political* resolution: “[i]n undertaking its constitutional cross-generational analysis, the Commonwealth trustee should be aware of and attempt to compensate for the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office.”<sup>27</sup> Far from a common good, the “present consumption of public resources” is a temptation to be guarded against. Questions concerning the environment are best decided by bodies that not only have structural independence from the political branches but that bring to bear perspectives that are different from and longer term than those that characterize political decisions.

Part of what seems to have motivated the court is that if it did not act, there would be no way to protect the state’s natural resources from what it saw as the obvious environmental degradation wrought by fracking. Indeed, the court undertook a lengthy assessment of Pennsylvania’s environmental history, beginning three hundred and fifty years ago and taking into account the legacy of the lumber and mining industries, as well as game hunting and

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<sup>25</sup> *Robinson Twp.*, 83 A.3d at 929.

<sup>26</sup> *Id.* at 953.

<sup>27</sup> *Id.* at 959 n.46.



other activities that have affected the state's natural resources.<sup>28</sup> The court recounted several highlights in the annals of the state's environmental disasters. It recalled that this “experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens’ quality of life.”<sup>29</sup> It then summarized Pennsylvania’s “notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its water, its air, its flora and fauna, and its people.”<sup>30</sup> All of this, the court said, rested in the “collective memory of the General Assembly,” as well, presumably, as of the voters who ratified the Environmental Rights Amendment in 1971.<sup>31</sup> What is critical here is that environmental issues in one place may be similar to and may share common characteristics with those in other states or in other countries, but they are ultimately unique to the location in which they arise.

As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects of Pennsylvania’s environment, which are part of the public trust. . . . Pennsylvania’s past is the necessary prologue here: the reserved rights, and the concomitant duties and constraints, embraced by the Environmental Rights Amendment, are a product of our unique history.<sup>32</sup>

Pennsylvania’s unique environmental and industrial history, the court said, explains why its inhabitants chose the Environmental Rights Amendment’s unique mode of environmental protection.<sup>33</sup>

This is typical in environmental constitutionalism. The localization of environmental rights explains not only why people litigate and seek to protect the environment around them, but also suggests the strong need for constitutional courts to engage with environmental provisions; in particular, it indicates an important advantage of domestic constitutional law over international environmental regimes in protecting natural resources. The *Robinson Township* Court knew and understood Pennsylvania’s ecological history not only because it sought readily available information or was well briefed, but because the judges themselves were familiar with the locale. “Pennsylvania’s very real and mixed past is visible today to anyone traveling across Pennsylvania’s spectacular, rolling, varied terrain,” the court said.<sup>34</sup> “The forests may not be primordial, but they have returned and are beautiful

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<sup>28</sup> *Robinson Twp.*, 83 A.3d at 960-61.

<sup>29</sup> *Id.* at 963.

<sup>30</sup> *Id.* at 976.

<sup>31</sup> *Id.* at 961.

<sup>32</sup> *Id.* at 975-76.

<sup>33</sup> *Id.* at 963.

<sup>34</sup> *Robinson Twp.*, 83 A.3d at 976.

nonetheless[.]”<sup>35</sup> The judges appreciated that “[i]n Pennsylvania, terrain and natural conditions frequently differ throughout a municipality, and from municipality to municipality. . . . Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions.”<sup>36</sup> To the court, location mattered:

Section 27 also separately requires the preservation of “natural, scenic, historic and esthetic values of the environment.” PA. CONST. art. I, § 27. By calling for the “preservation” of these broad environmental values, the Constitution again protects the people from governmental action that unreasonably causes actual or likely deterioration of these features. The Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain below, for the derailment of economic or social development; nor for a sacrifice of other fundamental values. But, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, as further explained in this decision, if it is to pass constitutional muster.<sup>37</sup>

Applying that history to the current controversy, the plurality examined the availability of natural gas in the ancient shale bedrock of central Pennsylvania, and explained how fracking technology had evolved to the point where it was finally commercially feasible to extract natural gas; it then explained the impact that the current technologies have on the environment and on the people who live in the area.<sup>38</sup> These techniques, the plurality concluded, “inevitably do violence to the landscape.”<sup>39</sup> As Justice Baer wrote in concurrence,

[T]hese industrial-like operations include blasting of rock and other material, noise from the running of diesel engines, sometimes nonstop for days, traffic from construction vehicles, tankers, and other heavy-duty machinery, the storage of hazardous materials,

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<sup>35</sup> *Robinson Twp.*, 83 A.3d at 976. The court continued:

[T]he mountains and valleys remain; the riverways remain, too, not as pure as when William Penn first laid eyes upon his colonial charter, but cleaner and better than they were in a relatively recent past, when the citizenry was less attuned to the environmental effects of the exploitation of subsurface natural resources. But, the landscape bears visible scars, too, as reminders of the past efforts of man to exploit Pennsylvania’s natural assets. Pennsylvania’s past is the necessary prologue here: the reserved rights, and the concomitant duties and constraints, embraced by the Environmental Rights Amendment, are a product of our unique history.

*Id.*

<sup>36</sup> *Id.* at 979.

<sup>37</sup> *Id.* at 953.

<sup>38</sup> *Id.* at 914.

<sup>39</sup> *Id.*

constant bright lighting at night, and the potential for life- and property-threatening explosions and gas well blowouts.<sup>40</sup>

The Pennsylvania court also recognized that “natural gas industry development in the Marcellus Shale Formation affects interests of citizens of neighboring states” because the Formation underlies approximately two-thirds of Pennsylvania’s territory and extends to about 36 percent of the Delaware River Basin, which spans Delaware, Pennsylvania, New Jersey, and New York.<sup>41</sup> Transboundary effects are particularly pronounced in cases involving bodies of water such as rivers and seas that often traverse or abut more than one jurisdiction or define their very boundaries. Such effects can also be prominent in other types of environmental cases, especially those involving the global effects of climate change. Moreover, as the court recognized, cases involving natural resources not only implicate environmental policy but may also raise questions about national security, particularly as here, where the exploitation of natural resources may enhance or reduce the nation’s energy independence.<sup>42</sup>

These reasons counsel judicial caution when courts approach constitutional environmental rights cases, but as the decision here shows, they do not counsel judicial abdication of the obligation to enforce the law.

### III. ENFORCEABILITY OF CONSTITUTIONAL PROVISIONS

Before turning to the merits, the court considered whether the Environmental Rights Amendment is self-executing or contemplates a predicate legislative act to be enforceable.<sup>43</sup> The variety in the language of constitutional environmental rights provisions around the world indicates that they have different effects: while some impose legal obligations on governments, others are statements of policy that urge or require implementing legislation, either explicitly or implicitly. The question of self-execution is critical to judicial review because if a provision is found not to be self-executing, then it is left to the legislature to define the scope of the constitutional right, which means that, *by definition*, the legislature can not violate it and the obligation imposed on government subjects it to political but not judicial or legal accountability.<sup>44</sup>

Prior to *Robinson Township*, the Pennsylvania Supreme Court’s view of whether Article 27 is self-executing waxed, waned, and wobbled.<sup>45</sup> In one case, the court declared that the Environmental Rights Amendment “recognizes or confers no rights upon citizens” not otherwise granted by the

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<sup>40</sup> *Robinson Twp.*, 83 A.3d at 1005 (Baer, J., concurring).

<sup>41</sup> *Id.* at 963 n.51.

<sup>42</sup> *Id.* at 1015 (Eakin, J., dissenting); see also John C. Dernbach & James R. May, *Can Shale Gas Help Accelerate the Transition to Sustainability?*, ENV’T, Jan./Feb. 2015, at 7.

<sup>43</sup> *Robinson Twp.*, 83 A.3d at 964 n.52.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

legislature.<sup>46</sup> Yet in another case, a divided court suggested that the provision probably *is* self-executing, a position the court resoundingly confirmed in *Robinson Township*.<sup>47</sup>

The Commonwealth's obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations. . . . As a corollary, the Legislature may not abridge, add to, or alter the constitutional qualification of a right by statute. We recognize that, along with articulating the people's rights as beneficiaries of the public trust, the Environmental Rights Amendment also encourages the General Assembly to exercise its trustee powers to enact environmental legislation that serves the purposes of the trust. 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.<sup>48</sup>

This opened the door to a review of the merits, examined in Part IV, next.

#### IV. ENVIRONMENTAL RIGHTS IN RELATION TO OTHER RIGHTS

The plurality's opinion is lengthy and is accompanied by one concurrence and two dissents. It addresses a plethora of issues on the merits, only the most significant of which—from a comparative perspective—are addressed here. The first of these is the court's interpretation of the Environmental Rights Amendment in relation to other constitutional provisions. This is important for courts around the world because any constitutional interpretive exercise entails relating the provision at issue to its textual environs: courts are likely to give less effect to environmental rights that are surrounded by provisions that seem hortatory or purely aspirational but are likely to give fuller effect to environmental provisions that are beside other enforceable rights, as is the case in the Pennsylvania Constitution.<sup>49</sup> Thus, in addition to interpreting the provision in its structural context, the *Robinson Township* Court also engaged in a close reading of the text.<sup>50</sup> Both of these interpretive efforts were done with care and an attention to detail that provides a model for other courts interpreting environmental provisions.

The most striking aspect of the court's opinion was its holding that environmental rights stand "on par" with all other rights enumerated in Article

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<sup>46</sup> *Robinson Twp.*, 83 A.3d at 941-42.

<sup>47</sup> *Id.* at 964-65.

<sup>48</sup> *Id.* at 974-75 (citation omitted).

<sup>49</sup> *Id.* at 976-77.

<sup>50</sup> *Id.* at 950-51.

I of the state constitution, including civil and political rights such as the right to free speech or the right of trial by jury:

The right delineated in the first clause of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I. *See* PA. CONST. art. I, § 25 (“everything” in Article I is excepted from government’s general powers and is to remain inviolate)[.] . . . This parity between constitutional provisions may serve to limit the extent to which constitutional environmental rights may be asserted against the government if such rights are perceived as potentially competing with, for example, property rights as guaranteed in Sections 1, 9, and 10.<sup>51</sup>

This is certainly one of the few American cases from any jurisdiction that recognizes the comparability of social and collective rights with individual political rights—if it has any precedence at all. The court took seriously the structure of the Constitution, which includes all individual rights in the first article and heeded the language of Article I § 25, which protects the people against the “transgressions of the high powers” which they have delegated by declaring that “everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”<sup>52</sup> The Court took this to mean that “everything in this article” was protected to the same extent and without implied limitation, whether individual or collective, whether political or social, and whether the beneficiaries are present or future generations.<sup>53</sup>

Looking at the clause itself, the court read the three sentences of the Environmental Rights Amendment individually and holistically. According to the court, the first sentence—“[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment”—establishes “two separate rights in the people of the Commonwealth:” it “affirms a limitation on the state’s power to act contrary to this right”<sup>54</sup> and it separately requires the preservation of the environment.<sup>55</sup> The second and third clauses, according to the court, create a trust for the benefit of the people of Pennsylvania, both present and future.<sup>56</sup> This recognizes that both human and ecological interests are at stake.<sup>57</sup>

The court noted, however, that the second clause—“Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come”—refers to “a narrower category of ‘public’ natural

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<sup>51</sup> *Robinson Twp.*, 83 A.3d at 953-54 (citations omitted); *see also id.* at 960 (“It is not a historical accident that the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights.”).

<sup>52</sup> PA. CONST. art. I, § 25; *Robinson Twp.*, 83 A.3d at 947.

<sup>53</sup> *Robinson Twp.*, 83 A.3d at 947.

<sup>54</sup> *Id.* at 948, 951.

<sup>55</sup> *Id.* at 951.

<sup>56</sup> *Id.* at 956, 959.

<sup>57</sup> *Id.* at 942 (citing PA. CONST. art. I, § 27).

resources than the first clause of the provision.”<sup>58</sup> And it read the third clause—“As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people”—as establishing “the public trust doctrine with respect to these natural resources (the corpus of the trust), and designat[ing] ‘the Commonwealth’ as trustee and the people as the named beneficiaries.”<sup>59</sup> It found that this last clause “establishes the Commonwealth’s duties with respect to Pennsylvania’s commonly-owned public natural resources, which are both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations).”<sup>60</sup>

Beyond this sentence-by-sentence analysis, the plurality then focused on the text of the provision, particularly those in the first sentence: “The terms ‘clean air’ and ‘pure water’ leave no doubt as to the importance of these specific qualities of the environment for the proponents of the constitutional amendment and for the ratifying voters.”<sup>61</sup> But like courts elsewhere, the Supreme Court of Pennsylvania was unable to identify the baseline against which clean air and pure water are measured, nor did it identify how much pollution would be tolerated before air and water quality were found wanting.

Indeed, the plurality recognized the difficulty of determining exactly what clean air and pure water are, and of measuring the distance between the ideal and the real.<sup>62</sup> This is where another court might have demanded serious evidence showing the degradation in the quality of the air or water, commensurate with the court’s initial assertion that the presumption of constitutionality imposes on challengers a heavy burden. But the plurality did not require the plaintiffs to demonstrate that Act 13 or any actions taken thereunder had in fact produced unclean air or impure water. Recognizing that “courts generally defer to agency expertise in making a factual determination whether . . . benchmarks were met,” the plurality acknowledged that “as a practical matter, air and water quality have relative rather than absolute attributes.”<sup>63</sup> Still, the plurality presumed that state action had contravened constitutional rights.<sup>64</sup>

The plurality further held that the textual command to preserve the environment “necessarily emphasizes the importance of each value separately, but also implicates a holistic analytical approach[.]”<sup>65</sup> This, the plurality said, reinforces the “conservation imperative: future generations are among the beneficiaries entitled to equal access and distribution of the resources, thus, the trustee cannot be short-sighted.”<sup>66</sup> Thus, the plurality read into all of these obligations the necessity to protect both present and future generations—in

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<sup>58</sup> PA. CONST. art. I, § 27; *Robinson Twp.*, 83 A.3d at 954-55.

<sup>59</sup> PA. CONST. art. I, § 27; *Robinson Twp.*, 83 A.3d at 956.

<sup>60</sup> *Robinson Twp.*, 83 A.3d at 955-56.

<sup>61</sup> *Id.* at 951; see also John C. Dernbach, *The Many And Diverse Potential Applications of a Constitutional Public Trust*, 45 ENVTL. L. REV. (forthcoming 2015).

<sup>62</sup> *Robinson Twp.*, 83 A.3d at 953.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 957.

<sup>65</sup> *Id.* at 951.

<sup>66</sup> *Id.* at 959.

part because of the textually explicit reference to future generations, in part because of the nature of the trust obligations that typically are owed to future generations, and in part because of the “conservation imperative” that the spirit of the Environmental Rights Amendment, even more than the letter, emblemizes.<sup>67</sup> Courts in other countries with less explicit constitutional language may also recognize the implicit, but no less important, obligation to protect the environment in perpetuity.

The plurality did read into the provision different levels of obligation, commensurate with, even if not as explicit as, those found in the jurisprudence of international socio-economic rights, including the obligation to protect from harm or damage and to “ensure the maintenance and perpetuation of an environment of quality[.]”<sup>68</sup> This further elaborates on its recognition that the trust obligations are both affirmative and negative.<sup>69</sup> In global environmental constitutional jurisprudence, courts, following the practice in socio-economic cases, have found that governments have obligations to protect, promote, preserve, and remedy environmental damage.<sup>70</sup>

This plain reading is useful and should be followed by other courts interpreting other constitutional provisions because environmental constitutional texts are often written in capacious language and, as in Pennsylvania, there is rarely any meaningful precedent to rely on. The plurality’s care in analyzing each clause in the provision individually and holistically is to be modeled because as a general matter adherence to the constitutional text and fidelity to the ambitions of the provisions’ drafters and ratifiers will more fully and effectively protect the environment. In this case, it led to a lengthy analysis of the constitutionalization of the public trust doctrine, covered next.

## V. THE OBLIGATIONS OF THE PUBLIC TRUST

The public trust doctrine is well recognized in global environmental constitutionalism. As the Supreme Court of India has explained: “The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life.”<sup>71</sup> Currently, only a handful of countries refer explicitly to holding the nation’s resources in trust;

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<sup>67</sup> *Robinson Twp.*, 83 A.3d at 959 (“Within the public trust paradigm of Section 27, the beneficiaries of the trust are ‘all the people’ of Pennsylvania, including generations yet to come.”).

<sup>68</sup> *Id.* at 951.

<sup>69</sup> *Id.* at 955-56. (“The third clause of Section 27 establishes the Commonwealth’s duties with respect to Pennsylvania’s commonly-owned public natural resources, which are both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations).”).

<sup>70</sup> *Id.* at 951-52, 954.

<sup>71</sup> *Mehta v. Nath*, (1996) 10 Suppl. S.C.R. 12 (India).

these tend to impose trust obligations on the government at all levels and usually in all branches to be exercised for the benefit of present and future generations.<sup>72</sup> These provisions are most commonly found in the constitutions of African nations and those of other countries whose legal roots are in Roman law and the English common law.<sup>73</sup> The public trust doctrine has also been implied from otherwise silent constitutional texts. In *Mehta v. Nath*, the Indian Supreme Court adopted the public trust doctrine as part of “the law of the land” in the following terms:

We see no reason why the public trust doctrine should not be expanded to include all eco-systems operating in our natural resources. Our legal system - based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea- shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources.<sup>74</sup>

The question for the *Robinson Township* Court was whether Act 13 violates the trustee’s obligations to “conserve and maintain” the trust—the natural resources of Pennsylvania—“for the benefit of all the people.”<sup>75</sup> The plurality had no difficulty answering this question in the affirmative. It applied the language of the Environmental Rights Amendment to the claims holding that, “[i]n constitutional terms, the Act degrades the corpus of the trust.”<sup>76</sup> As the plurality explained: “[t]he trust’s beneficiary designation has two obvious implications: first, the trustee has an obligation to deal impartially with all beneficiaries and, second, the trustee has an obligation to balance the interests

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<sup>72</sup> See, e.g., CONST. OF THE KINGDOM OF BHUTAN July 18, 2008, art. 5, 1, 2(b) (English original text of the Constitution of 2008); ETH. CONST. Nov. 4, 1955, art. 130 (b) (English text of the Revised Constitution of 1955); CONST. OF THE REPUBLIC OF GHANA Jan. 7, 1992, ch. 21, art. 257 (English original text of the Constitution of 1992 as scheduled to the Promulgation Law 1993); PAPUA N. G. CONST. Sept. 16, 1975, pmbl., no. 4(1) (English text of Constitution of 1975 as amended to Constitution Amendment No. 22 of 2001); CONST. OF THE KINGDOM OF SWAZILAND Act July 26, 2005, ch. XII, art. 210(2), 216(1), 217 (d) (English original text of the Constitution of 2005); INTERIM CONST. OF TANZ. July 9, 1965, pmbl. (English original text of the Constitution of 1965); UGANDA CONST. Feb. 15, 2006, ch. 15, art. 245(b) (English original text of the Constitution of 1995).

<sup>73</sup> See *Mehta*, 10 Suppl. S.C.R. 12. The Romans codified the right of public ownership of important natural resources: “the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore.” CAESAR FLAVIUS JUSTINIAN, *Of the Different Kind of Things*, in THE INSTITUTES OF JUSTINIAN 35, 35 (J. B. Moyle ed. & trans., Clarendon Press 4th ed. 1906) (1883). English common law continued the public trust tradition: “there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common . . . Such (among others) are the elements of light, air, and water . . .” 2 WILLIAM BLACKSTONE, COMMENTARIES \*14 (1766).

<sup>74</sup> *Mehta*, 10 Suppl. S.C.R. 12.

<sup>75</sup> *Robinson Twp.*, 83 A.3d at 948-49.

<sup>76</sup> *Id.* at 980.



of present and future beneficiaries.”<sup>77</sup> This, the plurality did so notwithstanding the fact that most of the claims were being brought on behalf of *private* property owners.<sup>78</sup> Yet, it said that “the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.”<sup>79</sup> The plurality explained:

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 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. The plain intent of the provision is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people in order to accomplish the purposes of the trust. This includes local government.<sup>80</sup>

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct. The *Robinson Township* Court explained that “[t]he explicit terms of the trust require the government to ‘conserve and maintain’ the corpus of the trust.”<sup>81</sup> The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.<sup>82</sup> And this, the plurality said, the General Assembly did not do when it adopted Act 13, thereby violating enforceable rights of the people of Pennsylvania.<sup>83</sup>

The plurality entwined its discussion of public trust with associated ecological sustainability norms, the subject of Part VI.

## VI. ENVIRONMENTAL RIGHTS INTO SUSTAINABLE VALUES

By giving full force to the Environmental Rights Amendment of the Pennsylvania Constitution and enforcing the trust and other obligations embedded in it, the plurality stressed the importance of the provision to

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<sup>77</sup> *Robinson Twp.*, 83 A.3d at 959. On the Court’s interpretation of the public trust clause of the Environmental Rights Amendment and its application in other cases, see Dernbach, *supra* note 61.

<sup>78</sup> *Robinson Twp.*, 83 A.3d at 918-22.

<sup>79</sup> *Id.* at 955.

<sup>80</sup> *Id.* at 956-57.

<sup>81</sup> *Id.* at 957.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 981-82.

citizens throughout the state.<sup>84</sup> Even though many may not be aware of or read the opinion, all will benefit not only from the state's improved physical landscape, but from its changed legal and political landscape as well. The plurality opinion's labored and methodical approach attempts to establish environmentalism not only as a right of the people but also as an obligation of the government, at all levels, and in everything it does. In this way, it simultaneously vindicates the rights of the people and establishes environmentalism as an enduring constitutional value, for present and future generations.

The requirement that all levels of government are subject to the constitutional environmental mandate was explicit and based on the fact that the people had vested this power and obligation in "the Commonwealth" and not in the General Assembly.<sup>85</sup> The plurality was particularly emphatic about the violence the challenged Act did to the normal course of zoning regulation, typically within the purview of local municipalities:

Reviewing the amended Act, few could seriously dispute how remarkable a revolution is worked by this legislation upon the existing zoning regimen in Pennsylvania, including residential zones. In short, local government is required to authorize oil and gas operations, impoundment areas, and location assessment operations (including seismic testing and the use of explosives) as permitted uses in all zoning districts throughout a locality.<sup>86</sup>

Moreover, part of the problem with Act 13 was that it prevented local governments from exercising their power to regulate the environment and

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<sup>84</sup> *Robinson Twp.*, 83 A.3d at 981-82.

<sup>85</sup> *Id.* at 952.

<sup>86</sup> *Id.* at 971. The court continued:

Local government is also required to authorize natural gas compressor stations as permitted uses in agricultural and industrial districts, and as conditional uses in all other zoning districts. Local governments are also commanded to authorize natural gas processing plants as permitted uses in industrial districts and as conditional uses in agricultural districts. Moreover, Section 3304 limits local government to imposing conditions: on construction of oil and gas operations only as stringent as those on construction activities for industrial uses; and on heights of structures, screening and fencing, lighting and noise only as stringent as those imposed on other land development within the same zoning district. Local government is also simply prohibited from limiting subterranean operations and hours of operation for assembly and disassembly of drilling rigs, and for operation of oil and gas wells, compressor stations, or processing plants. Localities also may not increase setbacks from uses related to the oil and gas industry beyond those articulated by Act 13. . . . That local government's zoning role is reduced to *pro forma* accommodation is confirmed by the fact that review under local ordinances of proposed oil and gas-related uses must be completed in 30 days for permitted uses, and in 120 days for conditional uses. The displacement of prior planning, and derivative expectations, regarding land use, zoning, and enjoyment of property is unprecedented.

*Id.* at 971-72.

invaded the rights; indeed, for one justice, this constituted a violation of due process rights and, for the court in general, it grounded the holding that municipal elected officials had standing to assert their environmental claims in their official capacity.<sup>87</sup>

Under the plurality's interpretation, all levels of government must consider environmental values when they exercise their other powers: "to achieve recognition of the environmental rights enumerated in the first clause of Section 27 as 'inviolable' necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment."<sup>88</sup> Thus, it reasoned, the state's police power "must be exercised in a manner that promotes sustainable property use and economic development."<sup>89</sup> Sustainability is therefore a right that the people can enforce against the government. Granted, sustainability is not an absolute good; it requires balancing ecological against economic interests. But it is important nonetheless when a court requires government to at least weigh the environment in the balance: it moderates what would otherwise be an almost unlimited right to development.

The plurality was guided in its expansive interpretation of the Environmental Rights Amendment by its ratification history.<sup>90</sup> The proposed amendment to the constitution received unanimous support in both houses of the state legislature on two separate occasions, and was ratified by the people of the Commonwealth by a four-to-one margin, receiving more votes than any candidate to statewide office that day.<sup>91</sup> Thus, the court ultimately held that "[t]he police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment."<sup>92</sup>

Yet, balancing, the court said, was necessary not only because environmental priorities must always be balanced against development and other economic values, but also because as one of many rights protected in the constitution, the rights protected by § 27 must be balanced against rights protected elsewhere, such as the property rights protected in sections 1, 9, and 10, so as to promote sustainability norms.<sup>93</sup> Indeed, in constitutional environmental rights cases throughout the world, it may be necessary to determine the extent of protection for private property ownership or, conversely, the bounds of the police power. In Pennsylvania, the *Robinson Township* court said, the state constitution "grants the General Assembly broad and flexible police powers embodied in a plenary authority to enact laws for the purposes of promoting public health, safety, morals, and the general welfare."<sup>94</sup> But the plurality was clear that its holding rested squarely on the Environmental Rights Amendment, and not on the constitution's or common

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<sup>87</sup> *Robinson Twp.*, 83 A.3d at 1001 (Baer, J., concurring).

<sup>88</sup> *Id.* at 954 (majority opinion).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 960.

<sup>91</sup> *Id.* at 961-62.

<sup>92</sup> *Id.* at 978.

<sup>93</sup> *Robinson Twp.*, 83 A.3d at 954.

<sup>94</sup> *Id.* at 946.

law's protection of private property ownership, or on general precepts of environmental sustainability.<sup>95</sup> In the plurality's view, sustainability is an inherent aspect of the Environmental Rights Amendment. The court's commitment to protecting the property rights of the plaintiffs through the Environmental Rights Amendment attests to the importance of constitutional environmental rights provisions as constitutional values.

## VII. CONCLUSION

Throughout the world, constitution-drafters are considering the worth of including constitutional environmental rights in their constitutions, and jurists are contemplating whether and if so, how, to enforce the environmental provisions they find there. From the courts' perspective, the challenges are daunting: vindicating these rights compels the courts to become technical and scientific experts in ecology and in the industrial exploitation of natural resources, it thrusts courts into the political quagmires usually involving powerful political and industrial interests, and it often requires courts to interpret and apply opaque constitutional language on an almost blank precedential slate. And yet, if one thing is clear from the *Robinson Township* opinion, it is that a constitutional environmental right can not only change the outcome in a case, but can change the way legislators balance competing interests and, ultimately, can change the way people think about their rights to a quality environment. As the Pennsylvania jurists noted, exploitation of natural resources went unchecked in the 19th and early 20th centuries precisely because there was no constitutional bulwark against it—but now there is.<sup>96</sup> This is the ultimate lesson that *Robinson Township* affords to litigants and courts throughout the world.

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<sup>95</sup> *Robinson Twp.*, 83 A.3d at 983.

<sup>96</sup> *Id.* at 960, 981.