

Recognition of Environmental Rights for
Pennsylvania Citizens:
A Tribute to Chief Justice Castille

John C. Dernbach & Marc Prokopchak***

I.	INTRODUCTION	335
II.	LOSS OF ORIGINAL MEANING OF ARTICLE I, SECTION 27.....	339
A.	Commonwealth v. National Gettysburg Battlefield Tower, Inc.	339
B.	Payne v. Kassab	341
C.	<i>The Unhappy Legacy of Payne v. Kassab</i>	344
1.	<i>Reported Court Cases</i>	344
2.	<i>Administrative Agency Decisions</i>	348
III.	ROBINSON TOWNSHIP V. COMMONWEALTH: RECOVERY OF ARTICLE I, SECTION 27	351
IV.	CONCLUSION	359
	APPENDIX A	360
	APPENDIX B	364

*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. Eliot¹

I. INTRODUCTION

On April 21, 1969, at the dawn of the modern environmental era, a young lawyer and legislator from Sunbury named Franklin Kury

* John C. Dernbach is Distinguished Professor of Law at Widener University, Commonwealth Law School, in Harrisburg, Pennsylvania, and director of the Environmental Law and Sustainability Center. He is former policy director of the Pennsylvania Department of Environmental Protection. Ed Sonnenberg provided helpful research assistance. Professor Dernbach can be reached at jcdernbach@widener.edu.

** Marc Prokopchak is a member of the Class of 2016 at Widener University, Commonwealth Law School.

1. T. S. ELIOT, *Little Gidding*, in *FOUR QUARTETS* 39 (1943).

introduced what would become the Environmental Rights Amendment to the Pennsylvania Constitution (the “Amendment”). He said:

Mister Speaker, I rise to introduce a natural resource conservation amendment to Pennsylvania’s Bill Of Rights. I do so because I believe that the protection of the air we breathe, the water we drink, the esthetic qualities of our environment, has now become as vital to the good life—indeed to life itself—as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and privacy.²

Representative Kury was well aware of Pennsylvania’s history of environmental exploitation in the name of economic development, and the human and natural costs that accompanied it. He wanted the Amendment to foster a consistent statewide policy regarding the environment. “We need a state government policy that is clearly stated and beyond question, one that will firmly guide the legislature, the executive, and the courts alike.”³ He consistently explained the Amendment as needed to address existing and future environmental threats.⁴

Under the Pennsylvania Constitution, amendments must be approved by each house of the Pennsylvania General Assembly in two successive legislative sessions, and then approved by a majority of voters in a public referendum.⁵ Both houses of the Pennsylvania General Assembly approved the amendment in the 1969–70 and 1971–72 legislative sessions.⁶ Then, in a referendum vote on May 18, 1971, the public approved it by a margin of four to one.⁷

Article I, section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values

2. H. JOURNAL, 1969 Reg. Sess., at 485–86 (Pa. 1969), reprinted in John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, in WIDENER L. J., at 6–7 (Widener Law Sch., Legal Research Paper Ser. No. 14-18, 2014) (WIDENER L. J. forthcoming 2015), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=411559 [hereinafter Dernbach & Sonnenberg, *Legislative History*].

3. *Id.* at 7; see also *id.* at 15 (similar statement).

4. *E.g., id.* at 66 (stating the Amendment “would go a long way toward tempering any individual, company, or governmental body which may have an adverse impact on our natural or historic assets.”).

5. PA. CONST. art. XI, § 1.

6. Dernbach & Sonnenberg, *Legislative History*, *supra* note 2, at 1.

7. *Id.*

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.⁸

As adopted, the Amendment creates two sets of public rights. The first sentence contains a public right to "clean air, pure water," and the preservation of four environmental values—"natural, scenic, historic, and esthetic." The second and third sentences contain a public right to the conservation and maintenance of "public natural resources." The government, in turn, is assigned a trustee role on behalf of those resources, for the benefit of both present and future generations.

The text was of great concern to the drafters. Before adopting the Amendment, the General Assembly amended it three times because it understood that the text mattered and it wanted to get the text right. All three of these changes were made to the public trust part of the Amendment. As originally introduced, the Amendment would have required the state to protect public natural resources "in their natural state."⁹ It was rather quickly amended to delete "in their natural state."¹⁰ Another change involved the scope of what was to be protected. As originally drafted, the Amendment contained a list of protected resources, including "the air, waters, fish, wildlife, and the public lands and property of the Commonwealth."¹¹ Because of concern in the legislature that a list would be used to "limit, rather than expand" the range of protected resources, the term "public natural resources" was substituted for the list.¹² The third change involved the responsibility of the state for protected natural resources. As originally introduced, the proposal would have required the state to "preserve and maintain" public natural resources.¹³ The term "conserve" was substituted for "preserve" at the request of Dr. Maurice Goddard, who was then Secretary of the Department of Forests and Waters.¹⁴ He was concerned

8. PA. CONST. art. I, § 27.

9. H.R. 958, Printers No. 1105 (Apr. 21, 1969), in Dernbach & Sonnenberg, *Legislative History*, *supra* note 2, at 4–5.

10. H.R. 958, Printers No. 1307 (Apr. 29, 1969), in Dernbach & Sonnenberg, *Legislative History*, *supra* note 2, at 10–11.

11. H.B. 958 Printers No. 1105, *supra* note 9.

12. Dernbach & Sonnenberg, *Legislative History*, *supra* note 2, at 21–22.

13. *Id.* at 5.

14. ROBERT BROUGHTON, ANALYSIS OF HB 958, THE PROPOSED PENNSYLVANIA ENVIRONMENTAL DECLARATION OF RIGHTS, H. JOURNAL, 1970 Reg. Sess., at 2273 (Pa. 1970), reprinted in Dernbach & Sonnenberg, *Legislative History*, *supra* note 2, at 32–33.

that “preserve” might prohibit his department from authorizing “trees to be cut on Commonwealth land” or prohibit the game commission from licensing hunters to “harvest game.”¹⁵

This Article is about the loss and recovery of that original meaning. As Part I explains, two court decisions in the 1970s essentially ignored the history, purpose, and text of article I, section 27. As a result, courts tended to say that article I, section 27 applied only if the legislature said so. When it did apply, moreover, it was not the text of the Amendment that was employed; it was a three-part balancing test that the Commonwealth Court devised as a substitute for the text. Part I also exhaustively describes all of the reported judicial and administrative opinions on that balancing test. As Part I explains, the environmental plaintiff or petitioner has almost never succeeded. This three-part balancing test, in other words, is not only a remarkable example of a court substituting its own rule for that in the constitution; it has also had the effect of demonstrably and significantly limiting public rights.¹⁶

The recovery of the original meaning occurred in the Pennsylvania Supreme Court’s December 19, 2013 decision in *Robinson Township v. Commonwealth*.¹⁷ In that case, described in Part II, the court held unconstitutional several provisions of the State’s recently adopted Marcellus Shale gas legislation, known as Act 13.¹⁸ A plurality of the court, in a scholarly, thoughtful, and detailed opinion by Chief Justice Castille, based its decision on the text, purpose, and history of article I, section 27. Castille, who retired from the court at the end of 2014, has described *Robinson Township* as his legacy decision.¹⁹ Because this Article is part of a tribute to the retired chief justice, Part II also describes aspects of this opinion that are likely to give it staying power, even though it did not command a majority of the Pennsylvania Supreme Court. Whatever future courts decide about the meaning and scope of article I, section 27, they are likely to honor its text, purpose, and history.

We are now more than forty years into the journey that began with the dawn of modern environmental era. In the years since article I, section 27 was adopted, Pennsylvania has enacted a wide

15. *Id.*

16. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855–56 (1989) (explaining how judicial activism can be used to both enlarge and limit constitutional rights).

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

18. 58 PA. CONS. STAT. ANN. §§ 2301–3504 (West 2014).

19. Matt Fair, *Retiring Pa. Chief Justice Pegs Legacy on Fracking Decision*, LAW360 (Dec. 19, 2014), <http://www.law360.com/articles/606453/retiring-pa-chief-justice-pegs-legacy-on-fracking-decision>.

variety of environmental statutes and regulations.²⁰ The level of environmental sophistication and understanding—among regulators, industry, the public, and policy makers—has grown enormously. And yet now, thanks to Chief Justice Castille’s opinion, we are back at the beginning, getting to know article I, section 27 “as if for the first time.”²¹

II. LOSS OF ORIGINAL MEANING OF ARTICLE I, SECTION 27

The original understanding of article I, section 27 was lost in two cases that were decided in the 1970s, shortly after the Amendment was adopted. The first major case brought under article I, section 27, *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, framed the Amendment as a grant of power to the government to engage in environmental regulation, not as a limit on government authority. Because of that interpretive framework, many subsequent courts held that the Amendment is not self-executing; that is, it applies only if, and to the extent that, the General Assembly says so. In the second major case, *Payne v. Kassab*, the Commonwealth Court expressly substituted a three-part balancing test for the actual text of article I, section 27—a test that has demonstrably proven ineffective in protecting public rights. For four decades, those two cases effectively buried article I, section 27.

A. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*

The first significant case under the Environmental Rights Amendment was *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*²² In that case, the Attorney General sought an injunction to prevent the construction of a 307-foot observation tower on private land just outside the Gettysburg National Military Park.²³ No state or local governmental approval was required.²⁴ The state did not claim that it was attempting to conserve and maintain public natural resources.²⁵ Rather, the state focused on the Amendment’s first sentence, arguing that the tower’s visibility throughout

20. See generally PENNSYLVANIA ENVIRONMENTAL LAW AND PRACTICE (Terry R. Bossert & Joel R. Burcat, eds., 2012) (comprehensive compendium describing these statutes and regulations).

21. ELIOT, *supra* note 1.

22. 13 Adams County L.J. 45, 75, 135 (C.P. Adams Cnty. 1971), *aff’d*, 302 A.2d 886 (Pa. Commw. Ct. 1973), *aff’d*, 311 A.2d 588 (Pa. 1973).

23. *Id.*

24. *Id.*

25. *Id.*

the Gettysburg Battlefield would interfere with the experience of park visitors, and thus interfere with the public right to preservation of the natural, scenic, historic and esthetic values of that environment.²⁶ The public's right to the preservation of those values, the Attorney General claimed, imposed a substantive limitation on such private development.²⁷ Yet article I rights are rights against the government, not against private parties. The Attorney General's claim, by contrast, was that article I, section 27 worked as a grant of authority to seek an injunction against a private developer.

The court of common pleas decided that article I, section 27 is self-executing; that is, the people have a right to clean air, pure water, and the preservation of certain environmental values, regardless of whether the legislature has enacted supporting legislation.²⁸ The court reasoned that other provisions in the Pennsylvania Declaration of Rights have previously been held to be self-executing.²⁹ The common pleas court also denied the requested injunction, ruling that the state "has failed to show by clear and convincing evidence that the natural, scenic, historic, and esthetic values of the Gettysburg area will be irreparably harmed by the construction of the proposed tower on the proposed site."³⁰ For example, the tower was not likely to have an adverse effect on park visitors, and would enable many visitors to get a better sense of the overall battle than they could get from the ground.³¹

On appeal, the Commonwealth Court held that article I, section 27 is self-executing but affirmed the denial of the injunction.³² While the Pennsylvania Supreme Court affirmed the Commonwealth Court's decision, there was no majority opinion on whether article I, section 27 is self-executing.³³ In part, this was because of the unusual nature of the Attorney General's claim. Two Justices worried that article I, section 27, if self-executing, would allow the government to challenge private activities on private land.³⁴ Because the Pennsylvania Supreme Court was divided on the issue of whether the Amendment is self-executing, the Commonwealth Court's opinion is binding precedent on that issue; that is, article I,

26. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 588–89 (Pa. 1973).

27. *Id.* at 592.

28. See *Nat'l Gettysburg Battlefield Tower, Inc.*, 13 Adams County L.J. at 79–80.

29. *Id.* (citing *Erdman v. Mitchell*, 207 Pa. 79 (1903)).

30. *Id.* at 86.

31. *Id.*

32. *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886 (Pa. Commw. Ct. 1973).

33. *Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973).

34. *Id.* at 593 (opinion of the court by Justice O'Brien, joined by Justice Pomeroy).

section 27 is self-executing. Still, that point was often lost on subsequent courts, which held that article I, section 27 does not apply unless the General Assembly says so.³⁵ Because this was the first major case brought under the Amendment, moreover, it has led lawyers and judges to see article I, section 27 solely as a grant of governmental authority. There is little if any hint in the case that article I rights, including the environmental rights delineated in section 27, operate as a limit on governmental authority.

B. Payne v. Kassab

The second case, which tested the State's public trust responsibility under article I, section 27, is *Payne v. Kassab*.³⁶ In *Payne*, private citizens and college students brought an original action in the Commonwealth Court against the State, the city of Wilkes-Barre, and certain state and city officials to prevent the widening of a city street to a four-lane highway approximately two-thirds of a mile in length.³⁷ The proposed street widening project would slice .59 acres from the park along the project's length, slightly less than three percent of the park's total acreage.³⁸ Among other things, they argued that the park was a public natural resource, and that the public trust part of the Amendment prevented the use of even that small part of the park for a street-widening project.³⁹

In response to the plaintiffs' claims that the text of article I, section 27 imposed a limitation on the project, a defendant, the Pennsylvania Department of Transportation, filed briefs proposing that a three-part test be used in lieu of the constitutional text.⁴⁰ The test required nothing more of the agency than its existing statutes.⁴¹ The Commonwealth Court adopted that test as a "realistic and not merely legalistic" means of deciding whether the Amendment has been violated.⁴² The court stated:

35. See, e.g., *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 488–89 (Pa. Commw. Ct. 2012) (dismissing claim of violation of article I, section 27 because the General Assembly decided not to apply article I, section 27 to this type of case), *rev'd*, 83 A.3d 901 (Pa. 2013).

36. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

37. *Id.* at 88–89.

38. *Id.*

39. *Id.*

40. Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 127–28 (1990).

41. See *Payne*, 361 A.2d at 273 n.23.

42. *Payne*, 312 A.2d at 94.

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?⁴³

The court then applied that test to the street-widening project at issue.⁴⁴ The court first analyzed whether the state had complied with the applicable state transportation statute, which prohibited highway construction through public parks or historical sites unless there is no feasible and prudent alternative to the use of such land, and unless the facility is planned and constructed to minimize the harm to the park or historical site.⁴⁵ The court concluded that the state complied with this statute.⁴⁶ In addition, the court found that the planting of new trees, re-landscaping of the affected area, and preservation of historic features demonstrated a reasonable effort to minimize the project's adverse consequences.⁴⁷ The court then balanced the improvement in traffic movement that the project would bring against the loss of roughly three percent of the park's land area, and decided that the benefits of the project outweighed its costs.⁴⁸

In affirming the Commonwealth Court's decision, the Supreme Court recognized the plaintiffs' claim as being anchored primarily in the public trust part of the Amendment.⁴⁹ In fact, the Supreme Court expressly distinguished *Gettysburg Tower* by stating that the "property here is public property," not private property.⁵⁰ In this context, the Supreme Court said, the Amendment is self-executing: "There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations) and that the Common-

43. *Id.*

44. *See id.* at 94–96.

45. *See id.* at 94–95.

46. *Id.*

47. *See id.* at 95.

48. *See id.* at 96.

49. *See Payne v. Kassab*, 361 A.2d 263, 272–73 (Pa. 1976).

50. *Id.* at 272.

wealth is made the trustee of said resources, commanded to conserve and maintain them.”⁵¹ The court then explained that the safeguards provided by the state transportation statute “vouchsafe that a breach of the trust” established by the Amendment “will not occur” if state agencies comply with those safeguards.⁵² Because the statute “was complied with, we have no hesitation in deciding that the appellee Commonwealth of Pennsylvania has not failed in its duties as trustee” under article I, section 27.⁵³ The Supreme Court did not understand the three-part test to be an all-purpose substitute for the text of the Amendment; rather, it concluded that the test was an appropriate means in this case to ensure compliance with the constitutional text.⁵⁴ In a footnote, the Supreme Court observed that the Commonwealth Court had used the test to determine compliance with the Amendment.⁵⁵

The proper role of a court in deciding cases has, of course, been the subject of much debate. This debate centers on constitutional interpretation and application.⁵⁶ A variety of definitions of judicial activism also exist, along with a variety of views about whether judicial activism is good or bad.⁵⁷ For example, Robert Bork wrote: “Activist judges are those who decide cases in ways that have no plausible connection to the law they purport to be applying, or who stretch or even contradict the meaning of that law.”⁵⁸ Such judges, however, are not simply interpreting texts or applying law in some activist way; they are operating outside the realm of what judges are supposed to do.⁵⁹ Similarly, the Commonwealth Court’s substitution of a three-part balancing test for the text of article I, section 27 is not simply an activist reading of the text of the Environmental Rights Amendment; it steps outside the realm of what judges are supposed to do.⁶⁰

51. *Id.*

52. *Id.* at 273.

53. *Id.*

54. *Id.*

55. *See id.* at 273 n.23.

56. *See, e.g.,* Kermit Roosevelt III & Richard W. Garnett, *Judicial Activism and Its Critics*, 155 U. PA. L. REV. 112 (2006).

57. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 263–82 (2009).

58. ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 8 (2003), *cited in* BARAK, *supra* note 57, at 267.

59. *Id.*

60. *Id.*

C. *The Unhappy Legacy of Payne v. Kassab*

Unfortunately, and with little or no judicial analysis or explanation, the *Payne* test has come to be the “all-purpose test for applying [a]rticle I, [s]ection 27 when there is a claim that the Amendment itself has been violated.”⁶¹ In using the *Payne* test, courts rarely distinguish between public and private resources, between values and resources, or between the public trust and the right to a decent environment. Nor do cases distinguish between public-to-public transfers of public natural resources, such as occurred in *Payne v. Kassab*, with the conversion of part of a public park into a public street, and public-to-private transfers, when public natural resources are converted to private use. For four decades, the law of article I, section 27 has been the *Payne* test and the cases decided under it, and not the actual text of the Amendment.

In order to better understand the effect of *Payne*'s three-prong test on the judicial and administrative landscape of constitutionally-based environmental challenges, one of the authors (Mr. Prokopchak) undertook an exhaustive review of reported court cases and agency adjudications from 1973 to the present that have either applied the *Payne* test directly, reviewed its application (or lack thereof) by a lower court or agency, or both. The results are telling. In the overwhelming majority of reported court cases and administrative agency proceedings, individuals or organizations seeking vindication of their environmental rights lost.

1. *Reported Court Cases*

Of the twenty-four reported court cases where parties raised an article I, section 27 challenge to some type of governmentally-approved action—for example, a permit issuance or modification, condemnation, or construction project—only a single case held that the benefits of the government's action were clearly outweighed by its environmental harm, thus failing *Payne*'s requirements. In all other reported cases, the court found that the three-part *Payne* test was satisfied, thus complying with article I, section 27.⁶² The reported cases are summarized in Appendix A. Beginning in 1973 and continuing to the present day, parties challenging government action in Pennsylvania courts as violating article I, section 27 have

61. John C. Dernbach, *Natural Resources and the Public Estate*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES § 29.3[a] (Ken Gormley et al., eds., 2004) (quoted in Pa. Env'tl. Def. Found. v. Commonwealth, No. 228 M.D. 2012, 2013 WL 3942086, at *8 (Pa. Commw. Ct. Jan. 22, 2013)).

62. See *infra* Appendix A.

faced, and continue to face, an almost insurmountable hurdle in the *Payne v. Kassab* test.

Initially, as the law was developing and application of the *Payne* test was still in its fledgling stages, challengers faced the difficulty of courts and agencies applying the test in an unregimented and unpredictable fashion. For example, in an early Court of Common Pleas decision, the court held that the state had no affirmative duty under article I, section 27 to assess the environmental impact of its challenged condemnation of private property for a state road project.⁶³ In another case later that year, the Commonwealth Court held that when an article I, section 27 challenge is brought, the agency or reviewing court must analyze the state's action to make sure it satisfies the *Payne* requirements, but then upheld the utility commission's approval of a power line construction project after performing a *de novo Payne* analysis on the basis of the record.⁶⁴ In *Snelling v. Department of Transportation*,⁶⁵ the court recited the three-prong *Payne* standard, but after finding a particular statute did not apply to a disputed road modification project, the court affirmed approval of the project with no discussion or analysis of the second or third *Payne* prongs.⁶⁶

Even as the courts began to implement *Payne* in a more consistent fashion, the chances of succeeding on an article I, section 27-based challenge remained almost non-existent. A typical example of the difficulty created by *Payne*'s standard of review is found in *Concerned Citizens for Orderly Progress v. Commonwealth, Department of Environmental Resources*.⁶⁷ There, a citizens group, a township, and several private parties challenged the Department of Environmental Resources' (DER)⁶⁸ issuance of a water quality permit that would allow for the construction of a sewage system and treatment plant.⁶⁹ The permit also allowed the discharge of sewage effluent into a local tributary of the Allegheny Creek (and alternatively, when this tributary was running low due to dry weather, a local bog area).⁷⁰

63. *In re Condemnation of Right-of-Way*, 75 Pa. D. & C.2d 215, 225–26 (C.P. Chester Cnty. 1975).

64. *See Commonwealth, Dep't of Env'tl. Res. v. Commonwealth, Pa. Pub. Util. Comm'n*, 335 A.2d 860, 865 (Pa. Commw. Ct. 1975).

65. 366 A.2d 1298 (Pa. Commw. Ct. 1976).

66. *Id.* at 1305–06.

67. 387 A.2d 989 (Pa. Commw. Ct. 1978).

68. In 1995, the Department of Environmental Resources was renamed the Department of Environmental Protection. *See* 71 PA. STAT. § 1340.501.

69. *Concerned Citizens*, 387 A.2d at 991.

70. *Id.*

The challengers asserted, among other things, that the issuance of the permit violated article I, section 27 because neither DER nor the Environmental Hearing Board (EHB)⁷¹ made or required the appropriate evaluation of the environmental impacts of the proposed project before issuing the permit.⁷² While conceding that neither DER nor the EHB had followed *Payne's* mandate to balance the project's benefits against its environmental harm (as required by the third prong), the Commonwealth Court undertook its own *Payne* analysis based on the record.⁷³ The court found no statute violated, that the EHB did not abuse its discretion in determining that a reasonable effort had been made to keep environmental incursions to a minimum, and that "the environmental impact of the sewage plant and the resulting effluent will be negligible, while the social and economic benefits appear to be significant."⁷⁴

*Szarko v. Department of Environmental Resources*⁷⁵ provides another example of the typical result of an article I, section 27 challenge to governmental action after *Payne*. In *Szarko*, a private landowner challenged DER's issuance of permits in 1988 and 1990 for a solid waste landfill situated adjacent to his property.⁷⁶ Together, the two permits allowed for ninety-five acres of expansion, as well as fifty acres of overtopping—placement of waste over areas on which waste had already been placed.⁷⁷

The landowner raised numerous challenges to the issuance of the permits, including multiple alleged statutory violations, and the fact that there were nine other landfills in the county that could have been used in lieu of the disputed landfill he contended was contaminating groundwater and nearby streams.⁷⁸ The Commonwealth Court made short work of the landowner's article I, section 27 challenge. In several sentences at the conclusion of the opinion, the court noted that it found no statutory violations, and—without any analysis of the landowner's claims of potential environmental

71. The Environmental Hearing Board is as an administrative appellate body for decisions by the Department of Environmental Resources/Department of Environmental Protection. See Environmental Hearing Board Act, 35 PA. STAT. §§ 7511–16. Because the EHB conducts *de novo* review of DER/DEP decisions, it was appropriate for challengers to claim that the EHB as well as DER failed to conduct the required review. See *Young v. Dep't Env'tl. Res.* 600 A.2d 667, 668 (Pa. Commw. Ct. 1991).

72. *Concerned Citizens*, 387 A.2d at 992.

73. *Id.* at 994.

74. *Id.* at 994–95.

75. 668 A.2d 1232 (Pa. Commw. Ct. 1995).

76. *Id.* at 1232–33.

77. *Id.* at 1235.

78. *Id.* at 1236.

damage contained in his appeal—simply affirmed the EHB’s determination that “the benefits of the landfill outweigh the environmental harm.”⁷⁹

A Commonwealth Court case, *Pennsylvania Environmental Management Services v. Commonwealth, Department of Environmental Resources*,⁸⁰ provides an excellent example of how far removed the *Payne* test is from the constitutional text. In that case, the DER denied an application to operate a municipal waste landfill permit because, among other things, of the applicant’s failure to adequately protect against the risk of a leachate discharge into a high quality stream and of its failure to properly address truck traffic to the proposed facility.⁸¹ The EHB upheld the Department’s decision. The Commonwealth Court reversed based on the third prong of *Payne v. Kassab*. Where the Department denies a permit application, the court said, “it follows logically” from the third prong that the Department “abused its discretion if the benefits clearly outweigh the harm.”⁸² The Department erred, the Commonwealth Court held, by looking only at the site-specific benefits of the landfill, not “the regionwide benefits which would result from operation of the urgently needed landfill.”⁸³ A constitutional amendment intended to provide citizens with environmental rights was, in this case, used to overturn a decision protecting those rights. The benefits of the landfill, which are outside the scope of the Amendment and have no stated constitutional stature under any other provision of the Pennsylvania Constitution, provided the justification for doing so.

The solitary reported court case with an outcome favoring the challenger is *Marcon, Inc. v. Commonwealth, Department of Environmental Resources*.⁸⁴ There, DER issued several permits to a real estate developer, including a permit to allow for the discharge of treated sewage effluent into a local high-quality stream.⁸⁵ On appeal, after the challengers established the serious and deleterious effects the project would have on several high quality waterways, the EHB set aside the permits as a violation of article I, section 27, finding the issuance of the permits violated all three prongs of the

79. *Id.* at 1239–40.

80. 503 A.2d 477 (Pa. Commw. Ct. 1986).

81. *Id.* at 479.

82. *Id.* at 480.

83. *Id.*

84. 462 A.2d 969 (Pa. Commw. Ct. 1983).

85. *Id.* at 970.

Payne test.⁸⁶ The Commonwealth Court affirmed the EHB's determination, finding its decision supported by substantial evidence.⁸⁷ *Marcon* remains, however, the exception rather than the rule, and it bears noting that the court was simply affirming a decision reached by the EHB, rather than finding in favor of the challenger through its own analysis.

2. *Administrative Agency Decisions*

Challengers in administrative proceedings fared only marginally better than those in judicial proceedings. Of the fifty-five reported agency decisions performing a *Payne* analysis or review (or both),⁸⁸ only eight had "favorable"⁸⁹ outcomes for the challengers, with just two of those eight cases actually resulting in a final agency determination that the environmental harm of the challenged action clearly outweighed its benefits.⁹⁰ The cases are summarized in Appendix B.

Representative of typical agency decisions are EHB adjudications like *Souders & Souders v. Department of Environmental Resources*,⁹¹ and *Township of Indiana v. Department of Environmental Resources*.⁹² In *Souders*, local landowners appealed DER's issuance of a surface mining permit for the operation of a limestone quarry in an agricultural area adjacent to the challengers' residential properties.⁹³ Among the challenges raised by the landowners was that permitting the operation of a quarry and its concomitant blasting would damage the aesthetic value of the area.⁹⁴ The EHB performed a *Payne* analysis from the record and found all three prongs satisfied.⁹⁵ The Board found that no statutes were violated, that the permittee had planned to do as much as could be expected to keep the environmental incursions of a quarrying operation to a

86. *Id.* at 970–71, 970 n.1.

87. *Id.* at 971.

88. Agency decisions utilizing the *Payne* test (with both favorable or unfavorable outcomes) that were reviewed on appeal by the Pennsylvania Commonwealth Court are not included in this figure, as those decisions are incorporated into the analysis of the reported court cases.

89. A "favorable" decision includes—in addition to a final agency determination that the environmental harm of the challenged action clearly outweighed its benefits—remanding for a failure to apply the *Payne* test properly, remanding or reversing for failing one or more of the *Payne* prongs, reversing a permit modification for failure to apply the *Payne* test, and modifying a permit to better comport with the second prong of the *Payne* test.

90. *See infra* Appendix B.

91. 1975 E.H.B. 21 (Pa.).

92. 1984 E.H.B. 1 (Pa.).

93. *Souders*, 1975 E.H.B. at 21.

94. *Id.*

95. *Id.* at 25–26.

minimum, and that the “reasonably expected” benefits of the quarry—as no actual benefits were included in the record—were not clearly outweighed by the environmental harm.⁹⁶

In *Township of Indiana*, a citizens group and township challenged DER’s approval for the construction of a facility to process “fly ash, bottom ash, and pyritic material” (by-products of coal burning power plants) in a small community on the outskirts of Pittsburgh.⁹⁷ The challengers raised concerns about increased truck traffic, health risks, and the adverse environmental impact of the facility, claiming DER’s issuance of the permit violated article I, section 27.⁹⁸ The Board, after performing a full *Payne* analysis, affirmed DER’s approval and concluded that the challengers had failed to show that any of the *Payne* prongs had not been satisfied.⁹⁹

Conversely, *Township of Middle Paxton*¹⁰⁰ provides one of the few examples where a challenger received a favorable decision in which the agency determined that the environmental harm of a project clearly outweighed its benefits. There, a township and citizens group challenged DER’s issuance of a permit for the construction of a solid waste landfill.¹⁰¹ In reversing DER’s decision, the EHB, while noting the first two *Payne* prongs had been satisfied, found that the issuance of the permit failed under the final balancing prong.¹⁰² In explaining the reasoning behind its decision, the Board stated:

We have searched the record in [vain] for substantial evidence indicating the benefits which will flow from this landfill. On the other hand, the record is replete with fully detailed harmful effects which can reasonably be anticipated by the [citizenry] if we allow this permit to stand. . . . [The permittee] has suggested that there is a present need for this landfill in Dauphin County, but all of the evidence is to the contrary.¹⁰³

Middle Paxton remains one of only two reported agency decisions reaching such a conclusion on the third *Payne* prong.¹⁰⁴

96. *Id.*

97. *Twp. of Indiana*, 1984 E.H.B. at 1.

98. *Id.* at 2, 31.

99. *Id.* at 31–36.

100. 1981 E.H.B. 315 (Pa.).

101. *Id.* at 315.

102. *Id.* at 333–41.

103. *Id.* at 339–40.

104. The other reported decision is *Jefferson County Commissioners*, 2002 E.H.B. 132 (Pa.), where the EHB applied a Pennsylvania solid waste statute balancing test (analogous to *Payne*’s third prong) to the DER’s issuance of a solid waste permit, and found that the

Forty years ago, in a concurrence to one of the earliest Commonwealth Court decisions employing the *Payne* test, the late Judge Harry A. Kramer—highlighting what he perceived to be woeful inadequacies of the test—provided the following clairvoyant assessment:

The problem with a balancing test in this area of the law is that no one can translate environmental harm into a dollar and cents figure. In the absence of any prescribed standard to weigh or value environmental harm, it is really impossible to have a meaningful balancing test. I do not believe our balancing test is really anything more than a “shock the conscience of the court test.” In the absence of more precise standards or guidelines, we can really do no more than proceed on a case-by-case basis, and decide each case on the basis of whether or not the proposed development offends our own personal ideas concerning environmental values. Instead of applying any set law or standards to these cases, we will merely be applying our own personal standards (or biases) concerning environmental values.¹⁰⁵

While Judge Kramer appears to have been concerned with environmentalists utilizing article I, section 27 to “harass and perhaps even thwart what may be a perfectly legitimate development,”¹⁰⁶ it appears, from the subsequent forty years of *Payne*-inspired jurisprudence, that the opposite result has come to pass. Environmental challenges based on article I, section 27—where the *Payne* test has been utilized—have hardly ever been successful. Thus, in all but the most egregious cases where serious environmental degradation is coupled with little to no economic or social benefit, an aggrieved party has almost no chance of successfully invoking article I, section 27 to challenge potentially unconstitutional governmental action.

Of equal importance, there is little in these cases about the vindication of public rights under article I of the Pennsylvania Constitution, including the public right to have the government conserve and maintain public natural resources, or a right against government actions that interfere with clean air, pure water, or specified environmental values. From case to case, one can search in vain for

environmental harm of the proposed landfill clearly outweighed its benefits. *Jefferson Cnty. Comm'rs*, 2002 E.H.B. at 225–30.

105. Commonwealth, Dep't of Env'tl. Res. v. Commonwealth, Pa. Pub. Util. Comm'n, 335 A.2d 860, 867 (Pa. Commw. Ct. 1975) (Kramer, J., concurring).

106. *Id.* at 866.

constitutionally-based rules that are independent of the statutes and regulations on which they are based. None of these cases even resembles a constitutional law case. Instead, each case applies the *Payne* test and its progeny, and not the text of article I, section 27.

III. *ROBINSON TOWNSHIP V. COMMONWEALTH*: RECOVERY OF ARTICLE I, SECTION 27

The recovery of the Amendment's original meaning occurred on December 19, 2013, in the Pennsylvania Supreme Court's landmark decision in *Robinson Township v. Commonwealth*.¹⁰⁷ In this case, the court held unconstitutional several different provisions of Act 13 of 2012—Marcellus Shale legislation.¹⁰⁸ Chief Justice Castille authored a 162-page opinion on behalf of himself and two other justices, based on article I, section 27.¹⁰⁹ Justice Baer provided a fourth vote for the unconstitutionality of these provisions, based on substantive due process.¹¹⁰

As originally written, the Oil and Gas Act regulated conventional oil and gas production, which ordinarily involves drilling vertically to a concentration or pool of oil or gas located underground.¹¹¹ Although it has been long known that shale strata existing throughout Pennsylvania and other states contained gas, the gas did not exist in pools in that shale.¹¹² Rather, it was distributed throughout the shale strata.¹¹³ The most prominent of these in shale strata in Pennsylvania is known as Marcellus Shale.¹¹⁴ In late 2004, in western Pennsylvania, the commercial feasibility of extracting natural gas from Marcellus Shale was first demonstrated.¹¹⁵ Although unconventional gas development is often called “hydrofracturing,” “fracking,” or “fracing,” it actually involves a combination of techniques, including but not limited to hydrofracturing.¹¹⁶ These techniques involve drilling vertically to the shale layer but then horizontally through the shale to expose

107. 83 A.3d 901 (Pa. 2013).

108. 2012 Pa. Laws 87, No. 13, codified at 58 PA. CONS. STAT. §§ 2301–3504 (amendments to Oil and Gas Act).

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

110. *Id.* at 913.

111. Prior to Act 13, the last major revision of the state's oil and gas regulatory legislation was in 1969, when the Oil and Gas Act, 58 PA. CONS. STAT. §§ 601.101–601.607, was adopted.

112. Russell Bopp, *A Wolf in Sheep's Clothing: Pennsylvania's Oil and Gas Lease Act and the Constitutionality of Forced Pooling*, 52 DUQ. L. REV. 439, 442 (2014).

113. *Id.*

114. *Id.*

115. RUSSELL GOLD, *THE BOOM: HOW FRACKING IGNITED THE AMERICAN ENERGY REVOLUTION AND CHANGED THE WORLD* 227–28 (2014).

116. Bopp, *supra* note 112, at 442–44.

more of the shale to the well bore, injecting large amounts of water under pressure to shatter the shale and thus capture the gas contained in the rock, and drilling multiple wells from the same drilling pad.¹¹⁷ In less than a decade, unconventional gas development has transformed much of Pennsylvania's economy and landscape.

Act 13 is a comprehensive set of amendments to Pennsylvania's Oil and Gas Act that was intended to accommodate and foster unconventional gas production.¹¹⁸ Shortly after it was signed into law, Robinson Township and six other municipalities, two individuals, an environmental organization, and a physician filed an action against the state challenging Act 13 as inconsistent with article I, section 27, substantive due process, and other provisions of the Pennsylvania Constitution. In July 2013, the Commonwealth Court dismissed most of these claims but held two provisions of Act 13 to be unconstitutional.¹¹⁹ In December 2013, Pennsylvania's Supreme Court held three separate provisions of Act 13 to be unconstitutional.¹²⁰

The Supreme Court's decision in *Robinson Township* changed the legal landscape concerning article I, section 27 in many ways. It did so by going back to its origins—analyzing the text, purpose, and legislative history of the Environmental Rights Amendment. Chief Justice Castille wrote:

The actions brought under Section 27 since its ratification . . . have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision. Moreover, it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways. As a jurisprudential matter (and . . . as a matter of substantive law), these precedents do not preclude recognition and enforcement of the plain and original understanding of the Environmental Rights Amendment.¹²¹

Because of that review, Chief Justice Castille's opinion brought to light several key points that had been more or less lost for decades. To begin with, it recognized that article I, section 27 is located in the Declaration of Rights in Pennsylvania's

117. *Id.* at 443–44.

118. 58 PA. CONS. STAT. §§ 2301–3504 (amendments to Oil and Gas Act).

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

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

121. *Id.* at 950.

Constitution—the state’s equivalent of the U.S. Bill of Rights. The plurality opinion, in other words, recognized for the first time in decades what Franklin Kury had in mind when he first introduced article I, section 27 in the State House of Representatives, consciously placing the Amendment in article I, and stating that environmental rights are “as vital to the good life—indeed to life itself,” as the other rights in the State’s Declaration of Rights.¹²² The environmental rights in section 27, the plurality said, “are on par with, and enforceable to the same extent as, any other right reserved to the people in Article I.”¹²³

In addition, the plurality understood article I, section 27 as a limit on governmental authority, not simply as a grant of governmental authority. It thus changed the framework with which article I, section 27 has been treated since *Gettysburg Tower*. Rights in article I, the plurality noted, are understood as inherent rights that are reserved to the people; they operate as limits on government power.¹²⁴ The plurality explained that the court had not previously had an opportunity to address how article I, section 27 restrains the exercise of governmental regulatory power, and therefore “has had no opportunity to address the original understanding of the constitutional provision.”¹²⁵

Using the history and text of article I, Chief Justice Castille described article I rights, including those stated in section 27, as rights that are “inherent” in the people.¹²⁶ “Article I is the Commonwealth’s Declaration of Rights, which 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.’”¹²⁷ Chief Justice Castille then stated: “The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution—vis-`a-vis the government created by the people—are inherent in man’s nature and preserved rather than created by the Pennsylvania Constitution.”¹²⁸ The rights contained in section 27, then, are “[a]mong the inherent rights of the people of Pennsylvania.”¹²⁹

122. See *supra* note 2 and accompanying text.

123. *Robinson Twp.*, 83 A.3d at 953–54.

124. *Id.*

125. *Id.* at 964.

126. *Id.*

127. *Id.* at 947 (citing PA. CONST. art. I, pmb1, § 25).

128. *Id.* at 948 (citing Appeal of Lord, 81 A.2d 533, 537 (1951)).

129. *Robinson Twp.*, 83 A.3d at 948.

Because article I rights operate as limits on governmental authority, the plurality treated the Environmental Rights Amendment as self-executing, citing the Commonwealth Court decision in *Gettysburg Tower*.¹³⁰ “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.”¹³¹ As the plurality explained, constitutional provisions are self-executing when they impose restrictions on the state, as article I, section 27 does.¹³² Article I rights have traditionally been held by Pennsylvania courts to be self-executing.¹³³ That makes perfect sense, because rights would not be rights if the General Assembly’s authorization was needed to make them effective. No one could plausibly argue, for instance, that the right to free speech depends on legislative authorization. In that regard, Chief Justice Castille’s opinion treats section 27 the same as every other provision in article I.

Moreover, this case was decided based upon the text of article I, section 27 and traditional rules of constitutional interpretation. Remarkably, as Part I of this Article explains, the actual text of the Environmental Rights Amendment had not been taken seriously for decades. Constitutional interpretation, the plurality said, must begin with the plain language of article I, section 27 itself.¹³⁴ As a result, the plurality felt it necessary to explain what the text actually says: “The matter now before us offers appropriate circumstances to undertake the necessary explication of the Environmental Rights Amendment, including foundational matters.”¹³⁵

The first sentence establishes two rights in the people, Castille wrote. The first is a right to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”¹³⁶ The second is “a limitation on the state’s power to act contrary to this right.”¹³⁷ The state as well as local governments are bound by these rights, the plurality said. While the state does not have a duty to enact laws to protect the right in this first sentence, it does have a duty to “refrain from unduly infringing

130. *Id.* at 964–65, 964 n.52.

131. *Id.* at 974.

132. *Id.* at 974–75.

133. *See, e.g.*, *Erdman v. Mitchell*, 207 Pa. 79 (1903).

134. *Robinson Twp.*, 83 A.3d at 943 (citing *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006); *Ieropoli v. AC & S Corp.*, 842 A.2d 919, 925 (Pa. 2004)).

135. *Id.*

136. *Id.* at 951.

137. *Id.*

upon or violating the right, including by legislative enactment or executive action.”¹³⁸

The second and third sentences, the plurality wrote, involve a public trust. “Public natural resources are owned in common by the people, including future generations.”¹³⁹ The state’s constitutional public trust responsibility applies to all “public natural resources,” whether they are owned by the state or held in common law trust.¹⁴⁰ As noted in the introduction to this Article, the drafters of article I, section 27 left open the definition of “public natural resources.”¹⁴¹ The plurality nonetheless ventured a current list: “At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.”¹⁴²

Because the state is the trustee of these resources, it has a fiduciary duty to “conserve and maintain” them.¹⁴³ “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.”¹⁴⁴ The state has two separate obligations as trustee. First, “the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties.”¹⁴⁵ The second is a duty “to act affirmatively to protect the environment, via legislative action.”¹⁴⁶

138. *Id.* at 952; *see also id.* at 953 (“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.”).

139. *Id.*

140. *Id.*

141. *Id.* at 955.

142. *Id.*; *see also id.* at 975 (“The public natural resources implicated by the ‘optimal’ accommodation of industry here are resources essential to life, health, and liberty: surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest.”). The legislative history reinforces that understanding. *See, e.g.*, H. JOURNAL, 1970 Reg. Sess., at 2271–72 (Pa. 1970), in Dernbach & Sonnenberg, *Legislative History*, *supra* note 2, at 30–31 (“This trusteeship applies to resources owned by the Commonwealth and also to those resources not owned by the Commonwealth, which involve a public interest.”).

143. *Robinson Twp.*, 83 A.3d at 952.

144. *Id.* at 957.

145. *Id.* at 958.

146. *Id.*

In light of this explication of the text of article I, section 27, the plurality criticized the *Payne v. Kassab* test. As Chief Justice Castille explained, “the *Payne* test appears to have become, for the Commonwealth Court, the benchmark for section 27 decisions in lieu of the constitutional text.”¹⁴⁷ The Supreme Court in *Payne*, he explained, “did not adopt that test but noted that the standard was equivalent to appellate review” of the challenged decision under the applicable statute.¹⁴⁸ He then explained the flaws in the *Payne* test:

[W]hile the *Payne* test may have answered a call for guidance on substantive standards in this area of law and may be relatively easy to apply, the test poses difficulties both obvious and critical. First, the *Payne* test describes the Commonwealth’s obligations—both as trustee and under the first clause of Section 27—in much narrower terms than the constitutional provision. Second, the test assumes that the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action. And, finally, the Commonwealth Court’s *Payne* decision and its progeny have the effect of minimizing the constitutional duties of executive agencies and the judicial branch, and circumscribing the abilities of these entities to carry out their constitutional duties independent of legislative control.¹⁴⁹

Chief Justice Castille’s plurality opinion was also the first time that article I, section 27 had ever been used—even by a plurality—to hold a statute unconstitutional. In this case, three different provisions were held unconstitutional. Section 3303 declares that state environmental laws “occupy the entire field” of oil and gas regulation, “to the exclusion of all local ordinances.”¹⁵⁰ Section 3303 also “preempts and supersedes the local regulation of oil and gas operations” regulated under the state’s various environmental laws.¹⁵¹ The Commonwealth is the trustee under the Amendment, which means that local governments are among the trustees with constitutional responsibilities.¹⁵² Section 3303, the plurality stated, vio-

147. *Id.* at 966. “In its subsequent applications, the Commonwealth Court has indicated that the viability of constitutional claims premised upon the Environmental Rights Amendment was limited by whether the General Assembly had acted and by the General Assembly’s policy choices, rather than by the plain language of the amendment.” *Id.* (citations omitted).

148. *Id.* at 965.

149. *Id.* at 966–67.

150. 58 PA. CONS. STAT. § 3303.

151. *Id.*

152. *Robinson Twp.*, 83 A.3d at 977–78.

lates article I, section 27 “because the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.”¹⁵³

Section 3304 requires “all local ordinances regulating oil and gas operations” to “allow for the reasonable development of oil and gas resources.”¹⁵⁴ In so doing, it imposes uniform rules for unconventional gas development in the state, prohibits local governments from establishing more stringent rules, establishes limited time periods for local review of drilling proposals, and imposes uniform rules for oil and gas regulation. Section 3304, the plurality concluded, violates article I, section 27 for two reasons. “First, a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential] is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life.”¹⁵⁵ Second, under Act 13 “some properties and communities will carry much heavier environmental and habitability burdens than others.”¹⁵⁶ This result, the plurality stated, is inconsistent with the obligation that the trustee act for the benefit of “all the people.”¹⁵⁷

Finally, Section 3215(b) prohibits drilling or disturbing area within specific distances of streams, springs, wetlands, and other water bodies.¹⁵⁸ But Section 3215(b)(4) requires DEP to waive these distance restrictions if the permit applicant submits “additional measures, facilities or practices” that it will employ to protect these waters.¹⁵⁹ This provision, the plurality stated, violates article I, section 27 because the legislation “does not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver.”¹⁶⁰ In addition “[i]f an applicant appeals permit terms or conditions . . . Section 3215 remarkably places the burden on [DEP] to ‘prov[e] that the conditions were necessary to protect against a probable harmful impact of [sic] the public resources.’”¹⁶¹ Because Section 3215 prevents anyone other than the applicant from appealing a permit condition, it also “marginalizes participation by residents, business owners, and their

153. *Id.* at 977.

154. 58 PA. CONS. STAT. § 3304.

155. *Robinson Twp.*, 83 A.3d at 979.

156. *Id.* at 980.

157. *Id.*

158. 58 PA. CONS. STAT. § 3215.

159. 58 PA. CONS. STAT. § 3215(b)(4).

160. *Robinson Twp.*, 83 A.3d at 983.

161. *Id.* at 984.

elected representatives with environmental and habitability concerns, whose interests Section 3215 ostensibly protects.”¹⁶²

Justice Baer’s concurring opinion focused on the same disruptive aspects of Act 13 to citizens and their environment. Requiring all municipalities to adopt the same buffer zones for specific shale gas facilities, regardless of local circumstances, without any ability by the municipality to make the distances in these buffer zones more protective, “and without any available mechanism for objection or remedy by the citizenry consistent with the individualized concerns of each municipality, zoning district, or resident, is the epitome of arbitrary and discriminatory impact.”¹⁶³ He nonetheless anchored his view of the unconstitutionality of Act 13 on substantive due process, which he regarded as “better developed and a narrower avenue to resolve this appeal.”¹⁶⁴ The challenged provisions, he said, “force municipalities to enact zoning ordinances” that “violate the substantive due process rights of their citizenries.”¹⁶⁵ There were two dissenting opinions.¹⁶⁶

Nonetheless, as the Commonwealth Court explained in a later case, “it does not appear that any of the concurring and dissenting justices disputed the plurality’s construction of the Environmental Rights Amendment, including the rights declared therein and attendant duties imposed thereby on the Commonwealth.”¹⁶⁷ Indeed, Justice Baer described the plurality opinion as “thorough, well-considered, and able;” he also stated that it was “pioneering.”¹⁶⁸ Justice Eakin, in dissent, described it as “thoughtful.”¹⁶⁹

The *Robinson Township* case, and particularly Chief Justice Castille’s plurality opinion, is already being described as a landmark decision.¹⁷⁰ The case is spawning an already-significant number of

162. *Id.*

163. *Id.* at 1007.

164. *Id.* at 1001.

165. *Id.* at 1008.

166. Justice Saylor stated that Act 13 provides a detailed system for regulating unconventional gas development, that the legislature “occupies the primary fiduciary role” under article I, section 27, and that local governments have no “vested entitlement” to “dictate the manner in which the General Assembly administers the Commonwealth’s fiduciary obligation to the citizenry at large relative to the environment.” *Id.* at 1012. Justice Eakin’s dissent expressed concern that the decision empowers municipalities at the expense of state decision-making authority. *Id.* at 1015. “Municipalities certainly have the power to manage land use, but such power is given by the legislature, not the Constitution.” *Id.*

167. *Pa. Env’tl. Def. Found. v. Corbett*, 108 A.3d 140, 156 n.37 (Pa. Commw. Ct. 2015).

168. *Robinson Twp.*, 83 A.3d at 1000, 1001.

169. *Id.* at 1014.

170. *See, e.g., ION Geophysical Corp. v. Hempfield Twp.*, Civ. No. 14-410, 2014 WL 1405397, at *7 (W.D. Pa. Apr. 10, 2014).

articles and commentaries.¹⁷¹ Professor Mary Wood of the University of Oregon Law School, who has published a well-reviewed book about the public trust doctrine,¹⁷² has described Chief Justice Castille's opinion as "a transformative opinion," adding that it "amounts to the most detailed judicial iteration of the public trust obligation ever rendered."¹⁷³ The opinion is influencing lawyers and policy makers in Pennsylvania, in other states, and around the world.

IV. CONCLUSION

To be very sure, plurality opinions do not create binding precedent. A future decision by a majority of the Pennsylvania Supreme Court will be needed for that. Still, the plurality opinion is likely to have significant persuasive power, in no small part because it contains a lengthy, detailed, and thoughtful exposition of the original meaning and understanding of article I, section 27. The opinion reflects a deep understanding of Pennsylvania constitutional law and enormous respect for the purpose, text, legislative history, and meaning of article I, section 27. On the night the opinion was issued, one of the authors (Prof. Dernbach) spoke with Franklin Kury, who championed article I, section 27. "In terms of what we intended," Kury said, Chief Justice Castille "really got it right."¹⁷⁴ As a result of this opinion, Pennsylvanians will almost certainly be able to count on reinvigorated judicial protection of their environmental rights for generations to come. And for that, we can all thank Chief Justice Castille.

171. See, e.g., John C. Dernbach, James R. May, & Kenneth Kristl, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, RUTGERS U. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412657; John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, ENVTL. L. (forthcoming 2015); Erin Daly & James R. May, *Robinson Township: A Model for Environmental Constitutionalism*, WIDENER L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442367; 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. 819 (2014).

172. MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* (2014).

173. E-mail from Mary Wood, Philip H. Knight Professor of Law and Faculty Director, Environmental and Natural Resources Law Program, University of Oregon School of Law, to John Dernbach (Oct. 5, 2014, 11:28:20 AM EDT) (on file with Prof. Dernbach).

174. E-mail from Franklin Kury to John Dernbach (June 8, 2015, 5:50 PM EDT) (on file with Prof. Dernbach).

APPENDIX A

REPORTED JUDICIAL DECISIONS APPLYING THE *PAYNE V. KASSAB*
TEST

In the following twenty-three decisions, the court applied or considered the three-part *Payne v. Kassab* test as a substitute for the text of the constitution, and decided the case against the challenging party. *See* Energy Conservation Council of Pa. v. Pub. Util. Comm'n, 25 A.3d 440 (Pa. Commw. Ct. 2011) (affirming utility commission's approval of construction of high voltage power line and substation, and finding commission's approval process satisfied *Payne* obligations); Blue Mountain Pres. Ass'n v. Twp. of Eldred, 867 A.2d 692 (Pa. Commw. Ct. 2005) (denying conservation groups' constitutional challenge to race track construction on land adjacent to Appalachian Trail, and concluding that even though lower reviewing court "did not specifically articulate a *Payne* analysis," it was "satisfied" that the requirements of *Payne* were undertaken and met); Szarko v. Dep't of Env'tl. Res., 668 A.2d 1232 (Pa. Commw. Ct. 1995) (affirming Environmental Hearing Board's (EHB) determination that landfill operator's compliance with relevant statutes meant compliance with article I, section 27, and EHB's *Payne* test conclusion that benefits of landfill outweigh potential environmental harm); Concerned Residents of the Yough, Inc. v. Dep't of Env'tl. Res., 639 A.2d 1265 (Pa. Commw. Ct. 1994) (affirming Department of Environmental Resources' (DER) issuance of permit for construction of hazardous waste facility despite leakage from similarly situated and owned facility, and denying that DER failed to give meaningful consideration to quiet enjoyment and aesthetics by concluding that EHB properly found DER had considered quality of life and aesthetics in its permit review based on DER employee testimony that noise and aesthetics were considered as required by relevant regulation, despite that same employee testifying that no relevant regulation contained rules or standards for noise or aesthetics); O'Connor v. Pa. Pub. Util. Comm'n, 582 A.2d 427 (Pa. Commw. Ct. 1990) (upholding exemption from local zoning laws provided to private company by public utility commission for construction of electrical substation, finding Historical and Museum Commission's determinations were advisory and thus not binding on other agencies for first *Payne* prong, and omitting any balancing of project's benefit against environmental harm as required by third prong); Del-AWARE Unlimited, Inc. v. Pa. Pub. Util. Comm'n, 513 A.2d 593 (Pa. Commw. Ct. 1986)

(summarily dismissing citizens' group claim that public utility commission failed to adhere to *Payne* requirements in approval of construction of private pumping station in public park, and concluding in footnote that commission had "adequately considered the aesthetic effects" of project by relying on private company's statement that "attractiveness" was considered in its building construction and that company "would mulch"); *Butler Twp. Bd. of Supervisors v. Commonwealth, Dep't of Env'tl. Res.*, 513 A.2d 508 (Pa. Commw. Ct. 1986) (affirming DER's approval of construction of sewage treatment plant at a particular site, finding EHB's *Payne* analysis satisfactory, and concluding benefits of the project "unquestionably outweigh the environmental harm and adverse effects, if any"); *Commonwealth, Pa. Game Comm'n v. Commonwealth, Dep't of Env'tl. Res.*, 509 A.2d 877 (Pa. Commw. Ct. 1986) (upholding DER's issuance of permit for solid waste landfill, and, after review of record, affirming EHB's *Payne* analysis and permit approval); *Del-AWARE Unlimited, Inc. v. Commonwealth, Dep't of Env'tl. Res.*, 508 A.2d 348 (Pa. Commw. Ct. 1986) (denying citizens' group challenge to construction of pumping station in public park to supply water to nuclear facility, which challengers claimed DER approved without evaluating deleterious aesthetic effects on park and nearby historic district in violation of *Payne* mandate, and holding DER was free to rely on reviews from other agencies that found "pumping station would be compatible with the park and historic district"); *Pa. Env'tl. Mgmt. Servs., Inc. v. Commonwealth, Dep't of Env'tl. Res.*, 503 A.2d 477 (Pa. Commw. Ct. 1986) (remanding DER's denial of landfill permit for improper application of third *Payne* prong when DER limited benefit of landfill project analysis to proposed site instead of entire region, and considered the unsuitability of a proposed site in benefit rather than harm-to-environment portion of analysis); *In re Waltos' Condemnation*, 29 Pa. D. & C.3d 429 (C.P. Somerset Cnty. 1983) (dismissing landowners' preliminary objections to borough's condemnation of property to construct new sewage pipeline, which would drain into and pollute nearby waterway, due to landowners' failure to submit evidence of waterway pollution or the feasibility of an alternate plan, both of which court asserted were required for *Payne* test); *Montgomery Cnty. v. A.J.S. Enters., Inc.*, 18 Pa. D. & C.3d 507 (C.P. Montgomery Cnty. 1981) (finding *Payne* standards satisfied and dismissing landowner's objections to taking of private land for use as a solid waste dump, and holding environmental benefits derived from landowner's current use of property for recycling purposes irrelevant for determining environmental impact of challenged action in third *Payne* prong); *Swartwood v. Commonwealth*,

Dep't of Env'tl. Res., 424 A.2d 993 (Pa. Commw. Ct. 1981) (affirming EHB's approval of township's decision to supplement sewage facilities plan to allow for construction of new housing development, and finding all three *Payne* standards satisfied by record and EHB's analysis); Appeal of Spory, 419 A.2d 804 (Pa. Commw. Ct. 1980) (affirming lower court's approval of plan for roadway despite appellant's contention that township chose more environmentally harmful option, and finding township's decision satisfied *Payne* standards and was not arbitrary); Mignatti Constr. Co. v. Commonwealth, Env'tl. Hearing Bd., 411 A.2d 860 (Pa. Commw. Ct. 1980) (denying township's claim that DER's approval of quarry construction project violated article I, section 27, finding record established that DER satisfied *Payne* standards, and making its own third-prong determination—rather than deciding whether DER abused its discretion—that “benefits of quarry are substantial and outweigh the environmental harm which will result from [its] construction”); Concerned Citizens for Orderly Progress v. Commonwealth, Dep't of Env'tl. Res., 387 A.2d 989 (Pa. Commw. Ct. 1978) (per curiam) (denying appeal of approval of sewer and sewage plant construction project despite both DER and EHB admitting failure to balance environmental harms of project against social and economic benefits, and performing *de novo Payne* analysis from record in order to affirm project approval); *In re* Legislative Route 58018, 375 A.2d 1364 (Pa. Commw. Ct. 1977) (reversing the lower court's decision sustaining landowner's preliminary objections that condemnation for public road project had not satisfied *Payne* requirements, finding statute applied by lower court for first *Payne* prong did not pertain to the project and thus state was not subject to statute's numerous environmental considerations, and concluding—based on record—that state had satisfied second and third *Payne* prongs); Snelling v. Dep't of Transp., 366 A.2d 1298 (Pa. Commw. Ct. 1976) (after reciting the three-prong *Payne* standard, the court granted demurrer on an article I, section 27 challenge to road modification by finding particular statute does not apply to disputed project, concluding that the first *Payne* prong is satisfied because state is not required to consider factors beyond those mandated by relevant statutes, ignoring second and third *Payne* prongs, and affirming project approval); Commonwealth, Dep't of Env'tl. Res. v. Precision Tube Co., 358 A.2d 137 (Pa. Commw. Ct. 1976) (affirming DER's approval of proposed expressway cross-over project requiring construction of culverts and alteration of creek's natural channel, and finding that, while the project “will necessarily involve some harm to the natural and scenic area,” DER did not abuse its discretion by

concluding benefits outweighed harm); *Cnty. Coll. of Del. Cnty. v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975) (reversing decision of EHB, in which EHB had vacated approval of sewer line construction for failure to fully consider environmental impact, holding EHB could not apply additional criteria beyond that provided by relevant statute(s) indicated in first prong of *Payne* analysis, finding record thus satisfied first prong requirements, and concluding—in two sentences with little to no analysis—that the second and third *Payne* prongs were also met); *Commonwealth, Dep't of Env'tl. Res. v. Commonwealth, Pa. Pub. Util. Comm'n*, 335 A.2d 860 (Pa. Commw. Ct. 1975) (holding that when an article I, section 27 challenge is brought, state agency decision-making process or judicial review must meet *Payne* requirements, but still finding from record utility commission's approval of power line project—despite failing to analyze *Payne* standards—satisfied *Payne's* requirements); *In re Condemnation of Right-of-Way*, 75 Pa. D. & C.2d 215 (C.P. Chester Cnty. 1975) (holding that landowners challenging a state road project had burden to show adverse environmental impact, and finding state had no affirmative duty under article I, section 27 to assess environmental impact of its activity); *Bucks Cnty. Bd. of Comm'rs v. Commonwealth, Pa. Pub. Util. Comm'n*, 313 A.2d 185 (Pa. Commw. Ct. 1973) (denying an article I, section 27 challenge to oil pipeline construction, and—while noting commission did not have opportunity to use the recently enumerated *Payne* test due to date of commission's initial decision—concluding that the commission properly determined “the need for energy outweighed the indicated injury to the environment”);

For the lone reported case where government action failed the *Payne v. Kassab* test, see *Marcon, Inc. v. Commonwealth, Dep't of Env'tl. Res.*, 462 A.2d 969 (Pa. Commw. Ct. 1983) (affirming the EHB's decision to set aside permit issued by DER that would authorize discharge of sewage effluent into high quality waterway, noting EHB's decision was based on, *inter alia*, article I, section 27 and correctly-applied *Payne* analysis, of which the proposed project failed all three prongs).

APPENDIX B

REPORTED ADMINISTRATIVE TRIBUNAL DECISIONS APPLYING THE
PAYNE V. KASSAB TEST

There are forty-seven reported decisions by administrative tribunals applying or considering the *Payne v. Kassab* test as a substitute for the constitutional text, and deciding the case against the challenging party. These are: Brockway Borough Mun. Auth., No. 2013-080-L (Pa. E.H.B. Apr. 24, 2015) (dismissing water authority's appeal of DEP's issuance of permit for unconventional gas well to be drilled on existing well pad); PPL Elec. Util. Corp., Nos. A-2012-2340872 (Pa. P.U.C. Jan. 9, 2014) (approving siting and construction of high voltage transmission lines and two substation control buildings, as well as twenty-three eminent domain applications); PPL Elec. Util. Corp., Nos. A-2011-2267349 (Pa. P.U.C. July 16, 2013) (reversing two denials of PPL's eminent domain applications to construct high voltage transmission line after granting nearly all PPL's exceptions); Pa. Elec. Co., Nos. A-2011-2247862 (Pa. P.U.C. June 7, 2012) (approving siting and construction of a six-mile high voltage transmission line); PPL Elec. Util. Corp., Nos. A-2010-2152104 (Pa. P.U.C. Mar. 17, 2011) (approving construction of a high voltage transmission line and substation control building, as well as easement condemnation for transmission line corridor); Duquesne Light Co., No. A-2010-2159814 (Pa. P.U.C. Feb. 10, 2011) (approving siting and construction of an eight-mile high voltage transmission line); PPL Elec. Util. Corp., Nos. A-2009-2082652 (Pa. P.U.C. Jan. 14, 2010) (approving construction of a 101-mile high voltage transmission line and substation control building, as well as multiple condemnations for transmission line corridor); PPL Elec. Util. Corp., Nos. A-2008-2022941 (Pa. P.U.C. July 24, 2009) (approving construction of high voltage transmission line, construction of substation control building, and condemnation of five separate properties for transmission line corridor); Del. Riverkeeper, 2004 E.H.B. 599 (Pa.) (affirming DEP's approval of the construction of a central sewage treatment plant and effluent discharge into Delaware River); William A. Smedley, 2001 E.H.B. 131 (Pa.) (affirming approval by Department of Environmental Protection (DEP—formerly DER) of modification to air quality permits to allow for tire-derived fuel to be burned to generate electricity at paper mill); Green Thornbury Comm., 1995 E.H.B. 636 (Pa.) (dismissing appeals from DER's approval of revision to official sewage facilities

plan that allowed for single residence stream discharge systems); Montgomery Twp., 1995 E.H.B. 483 (Pa.) (affirming DER's order for municipality to revise its official sewage facilities plan to allow for spray irrigation sewage facility, and concluding that, even if DER did not perform third prong balancing, because challengers failed to provide specific evidence of environmental harm from project, the Board "must conclude there are no environmental costs from this project and any balancing of the interests would weigh in favor of allowing the project to proceed."); Jay Twp., 1994 E.H.B. 1724 (Pa.) (denying an article I, section 27 challenge to a permit issued to construct and operate residual waste landfill on site of an unreclaimed strip mine, holding that compliance with Solid Waste Management Act satisfies constitutional requirements for any actions taken pursuant to SWMA); Lower Windsor Twp., 1993 E.H.B. 1305 (Pa.) (affirming DER's issuance of permit modification for seventeen-acre expansion of solid waste landfill); Residents Opposed to Black Bridge Incinerator (ROBBI), 1993 E.H.B. 675 (Pa.) (dismissing appeal of DER's air quality plan approval for trash incinerator, and performing its own third prong balancing to find that environmental harm "does not clearly outweigh the benefits" of plan approval); Loraine Andrews, 1993 E.H.B. 548 (Pa.) (affirming DER's approval of the township's revision of official sewage plan to allow for construction of new housing development adjacent to historic and scenic area); Morton Kise, 1992 E.H.B. 1580 (Pa.) (affirming DER's approval of the township's revision of the official sewage plan to permit on-site sewage disposal, admitting DER did not analyze the third *Payne* prong, and performing *sua sponte* balancing that found environmental harm to be "de minimis or nonexistent" and thus outweighed by project's benefits); W. Pa. Water Co., 1991 E.H.B. 287 (Pa.) (affirming DER's issuance of permit for additional allocations from two waterways, and noting that agency was empowered to impose conditions on permit pursuant to DER's obligations under article I, section 27); Bobbi L. Fuller, 1990 E.H.B. 1726 (Pa.) (dismissing appeals of DER issuance of permits for sewage treatment plant construction, and omitting any discussion of third *Payne* prong from analysis); Easton Area Joint Sewer Auth., 1990 E.H.B. 1307 (Pa.) (upholding DER issuance of permit for sewage treatment facility and sewage effluent discharge into high-quality cold water fishery); T.R.A.S.H., LTD., 1989 E.H.B. 487 (Pa.) (affirming DER issuance of solid waste permit, air quality plan approval, and pollutant discharge permit, and stating "[a]s for the *Payne* analysis, we have determined that all relevant statutes have been complied with, that [applicant] has

reduced environmental incursion to a minimum, and that any environmental harm which will result will be outweighed by the benefits”); Gerald W. Wyant, 1988 E.H.B. 986 (Pa.) (affirming DER issuance of permit for sewage treatment facility and effluent discharge into cold water fishery, and concluding—without any analysis of second or third *Payne* prongs—that DER “properly carried out its duties under Article I, Section 27” because challenger failed to establish noncompliance with statutes or regulations); York Cnty. Solid Waste & Refuse Auth., 1988 E.H.B. 373 (Pa.) (denying reconsideration of DER approval for landfill expansion, and concluding DER’s evaluation satisfied *Payne*’s requirements); Floyd & Janet Keim, 1985 E.H.B. 63 (Pa.) (affirming approval of township’s revision of its official sewage facilities plan to permit inclusion of proposed 351-dwelling development into the municipal sewer system); Twp. of Concord, 1985 E.H.B. 32 (Pa.) (affirming DER’s order for township to revise its official sewage facilities plan to permit construction of individual package plant for sewage treatment on a private lot); Twp. of Indiana, 1984 E.H.B. 1 (Pa.) (affirming DER issuance of permit for facility to process byproducts of coal-burning power plant, and holding challengers have burden to show environmental harm outweighs the benefits); Coolspring Twp., 1983 E.H.B. 151 (Pa.) (affirming DER issuance of a permit for disposal of sewage sludge on farmland, and holding that challengers have burden to show environmental harm outweighs the benefits); Pa. Mines Corp., 1982 E.H.B. 407 (Pa.) (refusing to apply the *Payne* test to DER issuance of permit to drill a natural gas well on private property); E. Arthur Thompson, 1980 E.H.B. 224 (Pa.) (affirming DER’s approval of sewage treatment facility that would discharge into local waterway, and concluding that because it was technologically possible for sewage effluent to be treated, and because challengers did not prove project would cause environmental damage, “there is no need to minimize the environmental incursion or to balance the environmental damage against [the] social benefit.”); Eugene Scobel, 1980 E.H.B. 430 (Pa.) (denying supersedeas petition to stay DER’s issuance of mine drainage permit); Andorra Nurseries, Inc., 1980 E.H.B. 153 (Pa.) (affirming DER’s approval of sewage and water permits for construction of large conference facility, and concluding *Payne* analysis by stating “the impact of the sewer line and the resulting effluent will be negligible, while the social and economic benefits of a large well planned new conference and training facility will be of significant benefit to the entire area in both aesthetic and commercial terms”); Application of Phila. Suburban Water Co., No.

99126 (Pa. P.U.C. Apr. 11, 1980) (denying protests and issuing certificate of necessity for construction of 5-million-gallon steel water reservoir and pumping station in area zoned for farming and residential uses); Concerned Citizens of Breakneck Valley, 1979 E.H.B. 201 (Pa.) (finding DER's approval of construction of new chemical plant for military weapons proper under article I, section 27, but remanding to DER to consider effects of increased production on existing chemical plant and to require chemical company to install device to measure certain toxic chemical byproduct); Edward S. Swartz, 1979 E.H.B. 144 (Pa.) (affirming DER's approval of a surface mining permit—including blasting—on land adjacent to local historic cavern formation, and concluding that approval does not violate article I, section 27); Wrightstown Twp., 1977 E.H.B. 312 (Pa.) (upholding approval of surface mining permit after referencing three-prong *Payne* test but only analyzing first prong concerning statutory compliance); Pa. Power & Light Co., Nos. 97266–71 (Pa. P.U.C. Jan. 20, 1977) (affirming approval of electric transmission line construction and proposed exercise of eminent domain); Pa. Council of Trout Unlimited, 1976 E.H.B. 340 (Pa.) (affirming DER's issuance of a strip mining drainage permit for discharge into high quality streams adjacent to state park after performing full *Payne* analysis and concluding all prongs satisfied); Mrs. Merle Kohl, 1976 E.H.B. 242 (Pa.) (affirming DER's issuance of permits for expansion of solid waste landfill and industrial waste discharge, performing no *Payne* third prong balancing but concluding that “[article I, section 27] is satisfied by the issuance of these permits”); W. Pa. Conservancy, 1976 E.H.B. 190 (Pa.) (affirming DER's sewer permit approval for enlargement of vacation housing development, and finding DER had no responsibility to perform third *Payne* prong balancing, nor ability to consider the environmental effect of the project on adjacent public park land under DER control, because *locus in quo* was private property); Cnty. of Montgomery, 1975 E.H.B. 369 (Pa.) (denying appeal of multiple permit approvals for oil pipeline spanning five counties, and concluding, without any analysis, that DER's actions “adequately protected the interests expressed in Article I, Section 27”); Dolores M. Gondos, 1975 E.H.B. 223 (Pa.) (affirming DER approval of multiple permits for coal mine refuse dump after applying *Payne* test); Robert L. Anthony, 1975 E.H.B. 149 (Pa.) (affirming DER approval of erosion and sedimentation permit for shopping mall construction project, but remanding to DER to develop long-term waterway monitoring plan); Oaks Civic Ass'n, 1975 E.H.B. 123 (Pa.) (affirming DER approval of sewage

treatment plant expansion, and limiting the extent of *Payne* analysis to conclusion that “applying the principles enunciated in [*Payne v. Kassab*], DER’s decision appears to be eminently justified”); Summit Twp. Taxpayers Ass’n, 1975 E.H.B. 99 (Pa.) (addressing article I, section 27 implications *sua sponte*, performing *Payne* analysis but only cursory treatment of second and third prongs, and affirming DER approval of solid waste landfill permit); Souders & Souders, 1975 E.H.B. 21 (Pa.) (holding that challengers have burden of proof to show article I, section 27 violation, and affirming issuance of surface mining permit after full *Payne* analysis); Greene Twp. Supervisors, 1974 E.H.B. 468 (Pa.) (affirming DER permit approval for sewage plant construction and effluent discharge into local tributary despite established and potential regulatory violations by applicant, performing no *Payne* analysis of DER’s decision, and holding challenger had burden of proof to show breach of trust under article I, section 27); Chesterbrook Conservancy, 1974 E.H.B. 406 (Pa.) (upholding soil and erosion permit approval for the first stage of 800-acre development plan, and referencing *Payne* but applying none of its standards in reviewing approval).

For the eight administrative agency adjudications with outcomes that could be considered favorable for the challenging party, see the following: Jefferson Cnty. Comm’rs, 2002 E.H.B. 132 (Pa.) (revoking DEP’s issuance of solid waste landfill permit after finding, among multiple statutory and regulatory violations, need for landfill was outweighed by harm, in contravention of Pennsylvania waste regulation incorporating need-versus-harm analysis analogous to third *Payne* prong); Al Hamilton Contracting Co., 1992 E.H.B. 1458 (Pa.) (affirming DER’s denial of surface mining permit, concluding DER need not analyze second and third *Payne* prongs when clear violations of applicable regulations, in contravention of first prong, were present); Mr. & Mrs. John Korgeski, 1991 E.H.B. 935 (Pa.) (reversing DER’s permit modification—regarding approach and access routes to landfill—that was contingent upon completion of a study of route feasibility, holding *Payne* requires analysis of impact and balancing of harm versus benefit before such approval can be given); Edward Wayne Butz, 1981 E.H.B. 68 (Pa.) (modifying DER sewer extension permit by limiting it to only residences experiencing sewer problems, as required by second *Payne* prong to minimize environmental incursion); Twp. of Middle Paxton, 1981 E.H.B. 315 (Pa.) (reversing DER’s issuance of permit for solid waste landfill after finding substantial environmental harm of proposed landfill greatly outweighed putative benefits); Doris J. Baughman, 1979

E.H.B. 1 (Pa.) (remanding approval of new coal cleaning plant project to DER for failure of second *Payne* prong and failing to balance environmental harm with social and economic benefits as required by third prong, but concluding benefits of continued interim operation of old plant outweighed environmental harm); Penn's Woods W. Chapter of Trout Unlimited, 1977 E.H.B. 48 (Pa.) (finding DER failed second *Payne* prong in surface coal mine permit approval process, but nonetheless affirming issuance of permit with modification of reduction in mine discharge iron concentration); Paul K. Miller Mobile Home Park, 1974 E.H.B. 342 (Pa.) (remanding to DER to perform proper *Payne v. Kassab* analysis of the proposed sewer plant project and its feasible alternatives).