Local Land-Use Control, Constitutional Environmentalism, and Hydrofracking: New York and Beyond

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I. INTRODUCTION

Where does our energy come from? How will we transition to sources that reduce the amount of greenhouse gas pollution in our atmosphere? Who gets to decide? The boom in oil and gas drilling in North America, due to the proliferation of high-volume hydraulic fracturing (HVHF or fracking) technology, has brought these issues, literally, to the doorstep of families across America.

Fracking to recover oil and gas reserves in tight shale formations has spread across the country, even into areas that have little history and experience with large-scale resource extraction, such as New York. Every region with a potentially profitable shale resource has faced a "land rush" to secure leases.[1] Yet the impacts of heavy industry and drilling operations on rural and residential neighborhoods do not arrive quietly or without question. Even as some landowners sign lease agreements hoping to receive significant financial benefits, others feel their communities, homes, and lives have more to lose than gain with an influx of industrial operations and are impassioned to preserve the character of their community. I first saw this principle directly while

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1. *See, e.g.*, *Marcellus Shale Lease Guide: Principles for the Conservation-Minded Landowner*, PA. ENVTL. COUNCIL 1 (June 2011), http://www.pagreenlease.org/wp-content/uploads/2011/06/PEC-Marcellus-Shale-Lease-Guide.pdf.

advising a citizen's group from Chalmette, Louisiana, for the Tulane Environmental Law Clinic, after Hurricane Katrina destroyed the adjacent Murphy Oil USA, Inc., refinery, dumping several feet of oil through the citizens' homes in one of the worst urban oil spills in U.S. history.[2] These residents, once they learned to question the status quo post-Katrina, sought to exert as much local control over their fate as possible. Similar passions to preserve towns and neighborhoods from the perceived downsides of hydraulic fracturing have galvanized municipal boards across the United States to use local zoning authority to restrict or exclude fracking on lands in their jurisdiction.[3]

But any local land-use ordinance passed in response to citizens' environmental and community character concerns faces potential conflict with state regulatory programs governing the oil and gas industry. To determine the validity of such ordinances, courts must undertake a preemption analysis based on the state oil and gas law statutes at issue. This Article explores two preemption cases, one in New York and one in Pennsylvania, informing the evolution of home-rule and environmental rights with respect to oil and gas drilling. The New York Court of Appeals' ruling in *Wallach v. Town of Dryden* serves as a watershed moment in municipal self-determination and was a critical decision in New York's recent ban on HVHF.[4] The Pennsylvania Supreme Court's ruling in *Robinson Township v. Commonwealth* enshrined and reempowered the Environmental Rights Amendment (ERA) of the state constitution, leading to a new era of American environmental constitutionalism.[5] Both cases herald impacts that extend far beyond their state borders.

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2. *$330 Million Settlement Deal in Katrina Oil Spill*, NBCNEWS.COM, http://www.nbcnews.com/id/15004868/ns/us_news-environment/t/million-settlement-deal-katrina-oil-spill/#.VKF77F5-DA (last updated Sept. 25, 2006) (describing the Murphy Oil USA, Inc.'s oil spill as the worst environmental disaster during Hurricanes Katrina and Rita); *see also Response to 2005 Hurricanes: Murphy Oil Spill*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/katrina/testresults/murphy/ (last updated Oct. 9, 2014) (detailing the impacts and subsequent response by the U.S. federal government to the oil spill Murphy Oil USA, Inc.'s refinery in Chalmette and Meraux, Louisiana).

3. *See* Andrew Ba Tran, *Where Communities Have Banned Fracking*, BOS. GLOBE (Dec. 18, 2014), http://www.bostonglobe.com/news/nation/2014/12/18/where-communities-have-banned-fracking/05bzzqiCxBY2L5bE6Ph5iK/story.html (listing over 400 towns, cities, counties, and states across the country that have banned fracking and/or the transport of drilling waste material within their jurisdiction).

4. *See infra* Part II.

5. *See infra* Part III.

II. NEW YORK STATE AND MUNICIPAL HOME-RULE AUTHORITY

One of the highest profile oil and gas preemption cases in the nation centered on the community of Dryden, New York, located just outside of Ithaca, New York, my hometown. In 2011, the Dryden Town Board (Board) voted to amend its zoning ordinance to provide a "clarification" of the principles of their comprehensive plan, which aimed to "[p]reserve the rural and small town character of the Town of Dryden, and the quality of life its residents enjoy, as the town continues to grow in the coming decades."[6] Dryden lies above the Marcellus Shale, which has been the target formation for fracking activities in Pennsylvania, West Virginia, and Ohio.[7] Accordingly, Norse Energy Corporation USA (Norse Energy), through its predecessor in interest, acquired land leases in the community in 2006.[8] The Board believed that the existing comprehensive plan and the boilerplate ordinance prohibiting any land use not expressly authorized were sufficient to prevent oil and gas development in Dryden; however, new concerns over the impacts of hydraulic fracturing provided the impetus for it to update the zoning law to specify that oil and gas exploration, extraction, and storage were not authorized.[9] The Board's rationale for banning industrial uses in Dryden's "rural environment" was that they "would endanger the health, safety and general welfare of the community through the deposit of toxins into the air, soil, water, environment, and in the bodies of residents."[10]

Norse Energy's predecessor in interest filed an action asserting that Dryden lacked authority to ban natural gas extraction and exploration because the oil and gas industry was regulated by state statute and therefore local regulations were preempted.[11] In response, Dryden sought a "declaration that the zoning amendment was a valid exercise of its home rule powers."[12] Judge Rumsey of the Tompkins County Supreme Court ruled in favor of the Town of Dryden in February 2012,[13] and the

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6. Town of Dryden Planning Bd., *Town of Dryden Comprehensive Plan*, TOWN OF DRYDEN 32 (Dec. 8, 2005), http://dryden.ny.us/Downloads/CompPlanFull.pdf.

7. Wallach v. Town of Dryden, 16 N.E.3d 1188, 1192 (N.Y. 2014).

8. *Id.*

9. *Town of Dryden Special Board Meeting*, TOWN OF DRYDEN 2, 6 (Aug. 2, 2011), http://dryden.ny.us/Board_Meeting_Minutes/TB/2011/TB2011-08-02.pdf (meeting about Resolution No. 126 in 2011).

10. *Id.* at 10.

11. *Wallach*, 16 N.E.3d at 1193 (mentioning N.Y. ENVTL. CONSERV. LAW § 23-0303(2)).

12. *Id.*

13. Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 474 (Sup. Ct. Tompkins Cnty. 2012) (invalidating, however, the Town of Dryden's Zoning Amendment provision declaring state and federal permits invalid (citing TOWN OF DRYDEN, ZONING

New York State Supreme Court, Appellate Division Third Department, ruled for Dryden in May 2013.[14] The New York Court of Appeals decided the case on June 30, 2014.[15] I prepared and filed amicus curiae briefs at each court level[16] on behalf of the state legislator representing Dryden.[17]

In New York, local governments have been granted a broad range of powers "to adopt and amend local laws not inconsistent with the provisions of th[e] constitution or any general law relating to its property, affairs or government" under article IX of the state constitution.[18] These powers enshrined in the constitution have been affirmatively granted to municipalities by the New York legislature, including the express authority to regulate land use through zoning laws.[19] In fact, in *Wallach*,[20] the New York Court of Appeals found that "[a]s a fundamental precept, the legislature has recognized that the local regulation of land use is '[a]mong the most important powers and duties granted . . . to a town government.'"[21] Also, court precedent states, "Without question, municipalities may 'enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community].'"[22] Yet, clearly, such exercise of land-use authority by a town is only valid if it does not conflict with the state's constitution or any other law of general applicability.[23]

ORDINANCE § 2104(5))), *aff'd*, Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.2d 714 (App. Div. 3d Dep't 2013).

14. *See Norse Energy*, 964 N.Y.S.2d at 714, *aff'd*, *Wallach*, 16 N.E.3d 1188.

15. *Wallach*, 16 N.E.3d at 1188.

16. *See* Brief for Assemblywoman Barbara Lifton as Amicus Curiae, *Anschutz Exploration*, 940 N.Y.S.2d 458 (RJI No. 2011-0499-M), *available at* http://assembly.state.ny.us/member_files/125/20111026/index.pdf; Brief of Assemblywoman Barbara Lifton as Amicus Curiae, *Norse Energy*, 964 N.Y.S.2d 714 (No. 515227), *available at* http://assembly.state.ny.us/member_files/125/20121210/index.pdf; Brief of Assemblywoman Barbara Lifton as Amicus Curiae, *Wallach*, 16 N.E.3d 1188 (APL-2013-00245), *available at* http://www.scribd.com/doc/229237746/Court-of-Appeals-Norse-v-Dryden-Amicus-Brief.

17. *Lifton Files Amicus Brief in Fracking Case*, N.Y. ST. ASSEMBLY (Apr. 24, 2014), http://assembly.state.ny.us/mem/Barbara-Lifton/story/58606/. The 125th New York Assembly District covers all of Tompkins County (including the Town of Dryden) and parts of Cortland County. *Assemblywoman Barbara Lifton Assembly District 125 Map*, N.Y. ST. ASSEMBLY, http://assembly.state.ny.us/mem/Barbara-Lifton/map/ (last visited Jan. 28, 2015).

18. N.Y. CONST. art. IX, § 2(c)(i).

19. *Id.* § 2(c).

20. Mark S. Wallach, the bankruptcy trustee for Norse Energy, was substituted as the petitioner in the case. *Wallach*, 16 N.E.3d at 1192 n.2.

21. *Id.* at 1194 (alteration in original) (quoting N.Y. TOWN LAW § 272-a(1)(b)).

22. *Id.* (alteration in original) (quoting Trs. of Union Coll. v. Members of Schenectady City Council, 690 N.E.2d 862, 864 (N.Y. 1997)).

23. *Id.* at 1195 (citing N.Y. MUN. HOME RULE LAW § 10(1)(i)-(ii)).

The New York Court of Appeals cautioned, however, that it construes ambiguous state statutes in favor of upholding municipal zoning powers because it "do[es] not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake," only striking down a zoning law when finding a "'clear expression of legislative intent to preempt local control over land use.'"[24] The gravamen of the preemption claim relies on interpretation of the supersession clause of New York's Oil, Gas and Solution Mining Law (OGSML), the Environmental Conservation Law (ECL) section 23-0303(2), which "'shall supersede *all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries;* but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.'"[25]

The court declared that it must adhere to the existing framework for a preemption determination,[26] as delineated in New York Court of Appeals precedent, *Frew Run Gravel Products, Inc. v. Town of Carroll*.[27] Three factors are required for an analysis of legislative intent regarding preemption: "(1) [a] plain language [examination] of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history."[28] In relevant part, ECL section 23-0303(2) prohibits municipalities from passing local laws "'*relating to the regulation of the oil, gas and solution mining industries*.'"[29] But what limits does this supersession clause place on municipal zoning authority?

The court found it necessary to discuss *Frew Run* in detail concerning a nearly identical provision in the Mined Land Reclamation Law (MLRL) because that precedent both informed and bound subsequent analysis.[30] Here, the New York Court of Appeals faced a similar supersession provision in the MLRL, which stated, at that time, "'[T]his title shall supersede all other state and *local laws relating to the extractive mining industry*.'"[31] The court looked to the plain-language

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24. *Id.* (quoting Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1234 (N.Y. 1996)).

25. *Id.* (quoting N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (emphasis added)).

26. *Id.* (discussing Frew Run Gravel Prods., Inc. v. Carroll, 518 N.E.2d 920, 922 (N.Y. 1987)). For discussion on different approaches to state zoning law preemption in the context of fracking, especially in other states, see also Jamal Knight & Bethany Gullman, *The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities*, 28 TUL. ENVTL. L.J. 297 (2015).

27. 518 N.E.2d at 920.

28. *Wallach*, 16 N.E.3d at 1195 (discussing *Frew Run*, 518 N.E.2d at 922).

29. *Id.* (quoting N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (emphasis added)).

30. *Id.* (discussing *Frew Run*, 518 N.E.2d at 920).

31. *Id.* at 1195-96 (quoting N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (emphasis added)).

meaning of the phrase, "'*relating to the extractive mining industry*,'" and construed that the MLRL did not preempt zoning law, rejecting the mining company's contention because zoning ordinances do not relate to the regulation of the mining industry.[32] They relate to an entirely different subject matter and purpose for the regulation of land use generally. Only local regulations that conflict with the actual operation and process of extractive mining violate the purpose of the MLRL to streamline mining operations through standardized state-wide regulation. While zoning ordinances may affect the mining industry in an incidental manner, local laws related to land use do not frustrate the legislative intent of the MLRL.[33] With this clear and binding case law, the court applied its three-part test to the OGSML provision at issue in *Wallach*.

Proper analysis required a careful look at the legislative intent of the statute, beginning with a plain language textual examination of the supersession clause.[34] Adhering to precedent, the court declined to ascribe a broader meaning to the provision at issue, holding that "*Frew Run* applies with equal force here, such that ECL [section] 23-0303(2) is most naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries."[35] Citing this precedent concerning analogous zoning authority over gravel mining, the court held that incidental control from use of a town's authority to regulate land use was not the type of regulation that the legislature contemplated as prohibited when promulgating the OGSML statute.[36] The court noted that state regulatory programs that are intended to preempt local zoning authority expressly say so and typically include additional statutory safeguards to account for local concerns.[37] The OGSML statute, if it was held to preempt all local ordinances, would preclude protections from local laws of general applicability, such as light, noise, dust, and odor pollution; storm water-management regulations; wetland provisions; land-use provisions concerning industrial uses; erosion-control regulations; identification of critical

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32. *Id.* at 1196 (quoting N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (emphasis added)).
33. *Id.* (quoting *Frew Run*, 518 N.E.2d at 923).
34. *Id.*
35. *Id.* at 1197 (discussing *Frew Run*, 518 N.E.2d at 924; N.Y. ENVTL. CONSERV. LAW § 23-0303(2)).
36. *Id.* (quoting *Frew Run*, 518 N.E.2d at 922).
37. *Id.* at 1198 (citing N.Y. ENVTL. CONSERV. LAW § 27-1103(2)(g); N.Y. MENTAL HYG. LAW § 41.34(c); N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1320(2)).

environmental areas; and tree-cutting regulations,[38] which typically encompass all commercial and industrial uses where enacted. With no statutory remedy to account for local impacts in the OGSML statute, the court concluded that preemption was not supported.[39]

The court also dismissed an implied preemption argument, seeking to invalidate municipal zoning over oil, gas, and solution mining based on conflict with specific OGSML spacing provisions, in its analysis of the statutory scheme as a whole.[40] Implied preemption will overturn any local law found to be inconsistent with constitutional or general law, yet here the court found that the town's zoning ordinance did not conflict with either the language[41] or the policy of the OGSML.[42] Well-spacing provisions are technical and operational aspects of drilling and do not address traditional zoning considerations such as land-use compatibility and permissible uses.[43] The court noted that within the long list of authorizations to the New York State Department of Environmental Conservation (DEC) in the OGSML, "it is readily apparent that the OGSML is concerned with the D[EC]'s regulation and authority regarding the safety, technical and operational aspects of oil and gas activities across the State."[44] Accordingly, local zoning authority can be harmonized with the OGSML regulatory program, and the New York Court of Appeals held, "[W]e perceive nothing in the various provisions of the OGSML indicating that the supersession clause was meant to be broader than required to preempt conflicting local laws directed at the technical operations of the industry."[45]

Completing its analysis using a comprehensive assessment of the legislative history of ECL section 23-0303(2) and the OGSML in general, the court found, "Nothing in the legislative history undermines our view that the supersession clause does not interfere with local zoning laws regulating the permissible and prohibited uses of municipal land."[46]

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38. Kimberlea Shaw Rea, *A Legal and Practical Guide To Protecting Your Citizens and the Environment in the Face of Marcellus Shale Natural Gas Drilling*, TOMPKINS COUNTY LEG. 8-9 (Mar. 30, 2009), http://tompkinscountyny.gov/files/tccog/Gas_Drilling/Resources/Community%20Impacts/reapresentation.pdf (presentation to the Tompkins County legislature).

39. *Wallach*, 16 N.E.3d at 1198 (discussing N.Y. ENVTL. CONSERV. LAW § 23-0303(2)).

40. *Id.* at 1199 (discussing *Frew Run*, 518 N.E.2d at 923; N.Y. ENVTL. CONSERV. LAW § 23-0303(2)).

41. *Id.* (citing N.Y. ENVTL. CONSERV. LAW § 23-0501, -0503).

42. *Id.* (quoting N.Y. ENVTL. CONSERV. LAW § 23-0301).

43. *Id.* at 1200 (quoting Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714, 723 (App. Div. 3d Dep't 2013), *aff'd*, *Wallach*, 16 N.E.3d 1188).

44. *Id.* at 1199.

45. *Id.*

46. *Id.* at 1201.

Tellingly, "the pertinent passages make no mention of zoning at all, much less evince an intent to take away local land use powers."[47] With their three-part assessment complete, the New York Court of Appeals "cannot say that the supersession clause—added long before the current debate over high-volume hydrofracking and horizontal drilling ignited—evinces a clear expression of preemptive intent."[48] The decision was joined by five justices, with two in dissent, to uphold local zoning authority over oil and gas drilling in New York.[49]

III. CONSTITUTIONAL ENVIRONMENTALISM: PENNSYLVANIA'S ENVIRONMENTAL RIGHTS AMENDMENT AND THE COMMONWEALTH AS TRUSTEE

While courts in New York have validated a municipality's zoning authority over oil and gas development, other states such as West Virginia, Colorado, Ohio, and Pennsylvania have ongoing legal battles seeking to overturn local restrictions on hydraulic fracturing or have already ruled against a town's ban.[50] Each analysis depends on the exact wording of an individual local ordinance and the language of the state regulatory scheme and home-rule authorizations.

Under Governor Paterson in 2008, New York began drafting new laws to prepare for HVHF.[51] By December 17, 2014, Governor Andrew M. Cuomo's DEC announced its intention to ban hydraulic fracturing statewide.[52] This was based on a recommendation from the Acting Commissioner of Health who, following a review of health impact data, said he "'cannot support high-volume hydraulic fracturing in the great state of New York.'"[53] The *Wallach* case further informed the decision,

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47. *Id.*

48. *Id.* at 1203.

49. *Id.* at 1204. For those readers who have been closely following New York oil and gas preemption challenges, they may recall another case seeking invalidation of a town zoning ordinance based on ECL section 23-0303(2) and the OGSML. The New York Court of Appeals combined both cases into the same proceeding, addressing *Cooperstown Holstein Corp. v. Town of Middlefield* in its June 30, 2014, ruling. *Id.* at 1193.

50. For discussion of West Virginia, Colorado, Ohio, and Pennsylvania, see Knight & Gullman, *supra* note 26.

51. *Testimony of Alexander B. Grannis, Commissioner New York State Department of Environmental Conservation*, N.Y. ST. DEP'T ENVTL. CONSERVATION 2 (Oct. 15, 2008), http://www.dec.ny.gov/docs/materials_minerals_pdf/assemblytestimony.pdf.

52. Thomas Kaplan, *Citing Health Risks, Cuomo Bans Fracking in New York State*, N.Y. TIMES (Dec. 17, 2014), http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html.

53. Jerry Zremski, *State Bans Fracking, Citing Health and Environmental Concerns*, BUFFALO NEWS (Dec. 17, 2014, 10:40 AM), http://www.buffalonews.com/city-region/albany-politics/state-bans-fracking-citing-health-and-environmental-concerns-20141217 (quoting Howard

because the practical implications of its ruling meant that towns would need to update their zoning plans to allow for HVHF, leading to significant complications.[54] With the current patchwork of proposed restrictions, setbacks, and town bans, at most 37% of the Marcellus Shale formation in New York would be available for drilling.[55] The DEC Commissioner, Joseph Martens, called the prospect of fracking in New York "uncertain at best."[56] To gather information about HVHF, the state, in part, looked to how the Marcellus Shale formation was being exploited in neighboring jurisdictions.[57] This provides a valuable look into the laws, regulations, and potential pitfalls of the practice in a geologically-similar region.

Without a doubt, the most relevant example lies just across the border in Pennsylvania, where shale gas development was welcomed whole-heartedly at the onset of the American hydrofracking boom.[58] No new regulations were enacted prior to the start of shale drilling in Pennsylvania, and thus the state was, arguably, unprepared for the large-scale industrialization of unconventional drilling.[59] In response, the

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A. Zucker, M.D., J.D., Acting Comm'r of Health, N.Y. State Dep't of Health, Remarks at the Meeting of Governor Andrew M. Cuomo's Cabinet (Dec. 17, 2014)).

54. Andrew Casler, *Dryden Lawsuit Weighed On New York Fracking Ban*, ITHACA J. (Dec. 18, 2014, 9:36 AM), http://www.ithacajournal.com/story/news/local/2014/12/17/dryden-lawsuit-new-york-fracking-ban/20554997/ (discussing *Wallach*, 16 N.E.3d at 1188); *see also* Tom Wilbur, *Fracking in N.Y. Would Face Local Zoning Hurdles*, ITHACA J. (Dec. 6, 2014, 1:17 PM), http://www.ithacajournal.com/story/news/local/fracking/2014/12/05/zoning-changes-required-fracking/19966927/.

55. Jon Campbell & Rick Jervis, *New York Plans To Prohibit Fracking*, USA TODAY (Dec. 17, 2014, 5:07 PM), http://www.usatoday.com/story/money/business/2014/12/17/new-york-fracking/20538891/.

56. *Id.*

57. *See Revised Draft Supplemental Generic Environmental Impact Statement*, N.Y. DEP'T ENVTL. CONSERVATION § 8.4 (Sept. 2011), http://www.dec.ny.gov/energy/75370.html. While undoubtedly greatly outdated by 2014, it indicates that New York was engaged in a review of impacts and responses occurring in other regions of the country. *See id.*; *see also A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development*, N.Y. DEP'T HEALTH 4-8 (Dec. 2014), https://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf (citing extensive research and information gathering on the effects of hydraulic fracturing in other states).

58. *See Pennsylvania State Review*, ST. REV. OIL & NAT. GAS ENVTL. REGS. (STRONGER) 10 (Aug. 2004), http://www.strongerinc.org/sites/all/themes/stronger02/downloads/Pennsylvania%20Follow-up%20Review%208-2004.pdf (discussing 58 PA. CONS. STAT. § 601.101 (1984)). This Pennsylvania state review was conducted by the quasi-federal, nonprofit-oversight agency STRONGER and showed that the 1984 Pennsylvania Oil and Gas Act was the governing regulatory program when the state began the first phase of shale drilling. *Id.*

59. See *Special Performance Audit: Department of Environmental Protection*, PA. DEP'T AUDITOR GEN. (July 21, 2014), http://www.auditorgen.state.pa.us/Media/Default/Reports/speDEP072114.pdf, for a report detailing numerous regulatory failures with the Pennsylvania Department of Environmental Protection's performance in monitoring potential impacts to water quality from shale gas development from 2009 to 2012.

legislature passed what is known as "Act 13," and the former Governor of Pennsylvania, Thomas W. Corbett, signed the legislation in February 2012.[60] This law repealed portions of the existing Pennsylvania Oil and Gas Act and consolidated the provisions under a comprehensive state regulatory program. Specifically, Act 13, inter alia, sought to encourage optimal development of shale resources through preemption of "'local regulation of oil and gas operations regulated by the [statewide] environmental acts, as provided in this chapter,'" including directing that all political subdivisions "[s]hall authorize oil and gas operations . . . as a permitted use in all zoning districts."[61] The Act further compelled municipalities to allow compressor stations and natural gas processing plants, without the ability to enact stricter standards for any purpose or increase setback distances, regardless of the existing land use and incompatibility with a long-established comprehensive plan.[62]

Faced with this major limitation on local governments, "introduc[ing] heavy-duty industrial uses—natural gas development and processing, including permission to store wastewater (a drilling by-product)—into all existing zoning districts as of right, including residential, agricultural, and commercial,"[63] many Pennsylvania townships, residents, environmental groups, and even a medical doctor brought suit to challenge the constitutionality of Act 13 by March 2012.[64] This challenge was expedited by the lower court because "Act 13 comprises sweeping legislation affecting Pennsylvania's environment and, in particular, the exploitation and recovery of natural gas in a geological formation known as the Marcellus Shale."[65] Accordingly, the dispute centered on a core exercise of the court's responsibility: to "construe and apply constitutional provisions and determine whether aspects of Act 13 violate our charter."[66] And out of this issue of critical importance for the protection of environmental and aesthetic interests of the people was born environmental case law of sweeping and unprecedented magnitude.

Allowing the court to address fundamental environmental rights, the litigation invoked, inter alia, a provision of the Pennsylvania Constitution,

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60. Robinson Township v. Commonwealth, 83 A.3d 901, 915 (Pa. 2013) (discussing 58 PA. CONS. STAT. §§ 2301-3504).
61. *Id.* at 970 (quoting 58 PA. CONS. STAT. §§ 3303, 3304(b)(5)).
62. *Id.* at 971 (discussing 58 PA. CONS. STAT. §§ 2301-3504).
63. *Id.* at 937 (discussing 58 PA. CONS. STAT. §§ 2301-3504).
64. *Id.* at 913-14.
65. *Id.* at 913.
66. *Id.* at 929.

specifically section 27 of the Declaration of Rights.[67] Generally referred to as the ERA, it states:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people.[68]

On appeal in the Pennsylvania Supreme Court, the court ruled that "a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders," conferring standing upon the aggrieved municipalities and opening up a substantive review of the constitutional duties required of the Commonwealth under the ERA.[69]

In its fascinating analysis, the court highlighted the historical and cultural elements behind the adoption of the ERA, providing a window into environmental thought and the effects of resource extraction upon communities and quality of life. This effort was designed to illuminate the fundamental crux of state constitutional interpretation, which requires a plain-language reading and endeavors to "'determine the intent of voters who ratified the constitution.'"[70] The court concluded that these rights were enshrined via the ERA in 1971 as a result of a centuries old pattern of resource exploitation, making it "not a historical accident that the Pennsylvania Constitution now places citizens' environmental rights on par with their political rights."[71] By taking this broad look at systemic booms and busts of a range of industries, the court managed to synthesize the values inherent in the enactment of environmental rights, while juxtaposing it with the outdated yet still prevalent sense of limitless resources that has persisted from the time of European exploration and perception of a provident New World.[72] Lamenting a lumber harvesting

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67. *Id.* at 913.

68. PA. CONST. art. 1, § 27.

69. *Robinson Township*, 83 A.3d at 919-20 (citing Susquehanna County v. Commonwealth Dep't of Envtl. Res., 458 A.2d 929, 931 (Pa. 1983)).

70. *Id.* at 944 (quoting Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283, 290 (2003)).

71. *Id.* at 960-62.

72. *Id.* For a groundbreaking discussion of the transplant of English laws (particularly property ownership) and natural resource valuation to the New World, see generally WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 19-127 (1983). Cronon notes the heavy New England forest cover, which was novel to settlers from England because they had long ago burned their forests as a source of fuel. *Id.* at 50. Also,

boom that by 1920 left much of Pennsylvania barren, and in turn led to the abandonment of many towns with log mills shuttered, the court cautioned against over exuberance in harvesting a limited resource.[73] During the same era, an abundance of wild game declined so precipitously that the Pennsylvania Game Commission was founded in 1895, and with more than a century of wildlife management and protection laws, it was able to restore the health of deer, elk, waterfowl, and other game birds.[74] Painting the closest parallel to HVHF, the court also noted a third tale of overreach of Pennsylvania's natural resources: widespread coal mining.[75] At the time when coal dominated the state's economy, it remained virtually unrestricted by government oversight and "was devastating to the natural environment of the coal-rich regions of the Commonwealth, with long-lasting effects on human health and safety, and on the esthetic beauty of nature."[76] The long-term costs of a full reclamation of abandoned Pennsylvania coal mines, just one of many continuing impacts, are estimated at $15 billion by the Pennsylvania Department of Environmental Protection (DEP).[77]

The court did not present these environmental incidents as a tangential backdrop to the policy enactments of the Pennsylvania legislature but made clear that the ERA was drafted as a direct response to "the shocks to our environment and quality of life."[78] The record of the Pennsylvania House of Representatives reflects:

> We seared and scarred our once green and pleasant land with mining operations. We polluted our rivers and our streams with acid mine drainage, with industrial waste, with sewage. We poisoned our "delicate, pleasant and wholesome" air with the smoke of steel mills and coke ovens and with the fumes of millions of automobiles. We smashed our highways through fertile fields and thriving city neighborhoods. We cut down our

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seasonal fluctuations in the lifestyle of native populations, often enduring hardship and hunger in the winter months, were unfathomable because "[m]any European visitors were struck by what seemed to them the poverty of Indians who lived in the midst of a landscape endowed so astonishingly with abundance." *Id.* at 33.

73. *See Robinson Township*, 83 A.3d at 960 (citing *Pennsylvania Lumber History*, PA. LUMBER MUSEUM, http://lumbermuseum.org/pennsylvania-lumber-history/ (last visited Jan. 28, 2015)).

74. *Id.* (citing *Pennsylvania's Wildlife Conservation History*, PA. GAME COMM'N, http://www.portal.state.pa.us/portal/server.pt/document/1212592/historybook_pdfversion_pdf (last visited Jan. 28, 2015)).

75. *Id.*

76. *Id.* at 961.

77. *Id.* (citing *Pennsylvania's Comprehensive Plan for Abandoned Mine Reclamation*, PA. DEP'T ENVTL. PROTECTION 2 (June 1997), http://amlcampaign.wpcamr.org/Resources/PAComprehensivePlanForAMRNarrativeAndAppendices.pdf).

78. *Id.*

> trees and erected eyesores along our roads. We uglified our land and we called it "progress."[79]

With a public and a legislature facing this new consciousness toward environmental and esthetic degradation, the ERA was passed unanimously in both the 154th and 155th Pennsylvania General Assembly, receiving the consecutive passage required to amend the state constitution.[80] The court argued that due to Pennsylvania's "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," the state affirmed the environmental rights of its citizens—a rare action in American constitutional law.[81]

The ERA, thus, codified several principles that are critical to interpretation of the constitutionality of Act 13. Restrictions on legislative power stem solely from the constitution, in the form chosen by the people of the state. Under the Pennsylvania Constitution, specific rights of the people of the Commonwealth "to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" are identified and protected.[82] Although the state is not ascribed any express duty in furtherance of this provision, "the right articulated is neither meaningless nor merely aspirational."[83] Certainly the state can legislate on the subject of the right, but any regulation is "'subordinate to the enjoyment of the right . . . . It must be regulation purely, not destruction.'"[84]

Paramount in an assessment of constitutionality is whether the government (either at the state level or a political subdivision thereof) has unduly infringed upon these environmental rights through either legislation or executive action.[85] With a trend towards "new federalism," dating to the 1970s, the court in *Robinson Township* elected to interpret the ERA without looking to analogous federal constitutional provisions, nor to the existing, narrow, case law interpreting the ERA with respect to compliance with specific statutes.[86] Out of this broad authority to "fashion an appropriate remedy to vindicate the environmental rights at

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79. *Id.* (quoting *Earth Day—Pennsylvania*, 1 COMMONWEALTH PA. LEGIS. J., Apr. 14, 1970, at 2269, 2270).

80. *Id.* (citing H.R.J. Res. 3, 155th Gen. Assemb., Reg. Sess., 1971 Pa. Laws 769).

81. *Id.* at 963.

82. PA. CONST. art. 1, § 27.

83. *Robinson Township*, 83 A.3d at 952.

84. *Id.* at 975 (quoting Page v. Allen, 58 Pa. 338, 347 (1868)).

85. *Id.* (citing Goodheart v. Casey, 565 A.2d 757, 760 (Pa. 1989); *Page*, 58 Pa. at 347).

86. *Id.* at 944 (citing Commonwealth v. Edmunds, 586 A.2d. 887, 894-95 (Pa. 1991)).

issue," the court recognized "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."[87] The court held that the inviolate environmental rights enumerated in the ERA required that "economic development cannot take place at the expense of unreasonable degradation of the environment."[88]

Second, the ERA placed all public natural resources into ownership by the people of the Commonwealth, including future generations.[89] In lieu of a narrow definition of "natural resources," the court inferred that the drafters intended the term to remain flexible over time.[90] Any express enumeration of these resources would inherently narrow the constitutional rights, especially with respect to the unknown impacts that may affect "generations yet to come."[91]

The third clause of the ERA established the public trust doctrine with respect to public natural resources, placing the Commonwealth (and its political subdivisions) as trustee and the people as beneficiary.[92] Through its role as a fiduciary, the trust must then be managed for the benefit of the public, fostering a "duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality."[93] The court clarified that a trustee's role contains both negative and affirmative duties for furtherance of the trust. This means that the Commonwealth must "refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether . . . through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties" and must act to protect environmental values through legislative action.[94] Inherent in maintenance of the trust is the desire to preserve the environment for public benefit, yet these duties are not absolute and may be muted by "legitimate development tending to improve upon the lot of Pennsylvania's citizenry."[95] Through this lens, how the court determines

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87. *Id.* at 952-53 (citing Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1249 (Mont. 1999); *Edmunds*, 586 A.2d at 905-06).

88. *Id.* at 954.

89. *Id.*

90. *Id.* at 955 (citing *Earth Day—Pennsylvania*, *supra* note 79, at 2271-75).

91. *Id.* at 948 (quoting PA. CONST. art. I, § 27).

92. PA. CONST. art. I, § 27.

93. *Robinson Township*, 83 A.3d at 957 (citing Lang v. Commonwealth Dep't of Pub. Welfare, 528 A.2d 1335, 1342 (Pa. 1987); *In re* Estate of Hamill, 410 A.2d 770, 773 (Pa. 1980); *In re* Mendenhall, 398 A.2d 951, 953 (Pa. 1979)).

94. *Id.* at 957-58 (citing Geer v. Connecticut, 161 U.S. 519, 534 (1996)).

95. *Id.* at 958 (citing *Earth Day—Pennsylvania*, *supra* note 79, at 2273; Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 727-29 (Cal. 1983)).

the constitutionality of Act 13 and whether it fosters legitimate development, or is violative of environmental rights, depends not on short-term economic windfalls but rather on short- and long-term environmental impacts upon the state and people, including detrimental effects upon future generations, as protected under the ERA.[96]

By laying this foundation of historical and cultural context for the adoption of the ERA, the court prepared to address the original understanding of the provision and its full constitutional import for the first time.[97] Finding that precedent on the ERA had failed to address the nature of the broad Act 13 claims at issue and that previous jurisprudence had also failed to develop a cohesive, intractable environmental rights paradigm befitting this constitutional directive, the court returned to a textual, organic interpretation of the ERA as applied to Act 13.[98]

In its review of Act 13, the court concluded that "few could seriously dispute how remarkable a revolution is worked by this legislation upon the existing zoning regimen in Pennsylvania, including residential zones."[99] The Act completely disregarded existing land uses, prior planning, and any reasonable expectations regarding zoning, including enjoyment of property. Gas drilling had become the de facto "highest" and "best" use of the land by compelling municipalities to allow HVHF and all of its infrastructure and myriad appurtenances wherever required by the state DEP.[100] Limiting local governments' zoning authority to merely a pro forma accommodation of oil and gas drilling is unprecedented. Additionally, with regard to modest setbacks from water sources in Act 13, the DEP "shall" waive the setback protections "'upon submission of a plan identifying the additional measures, facilities or practices as prescribed by the [DEP] to be employed during well site construction, drilling and operations.'"[101] Thus, sensitive waters are denied protections because industry is entitled (not even subject to agency discretion) to receive a setback waiver. Astonishingly, should a drilling permit with a setback waiver be appealed, the burden of proof lies with the agency, not with the industry applicant, to show that the additional conditions are necessary to prevent probable harm to public water resources.[102] During permit approval, "[i]n a further blanket accommodation of industry and development," a local

96. *Id.* at 959 (citing *In re Estate of Hamill*, 410 A.2d at 773).
97. *Id.* at 964 (citing District of Columbia v. Heller, 554 U.S. 570, 625-26 (2008)).
98. *Id.* at 969 (citing Pap's A.M. v. City of Erie, 812 A.2d 591, 605 (Pa. 2002)).
99. *Id.* at 971.
100. *See id.* at 972.
101. *Id.* at 973 (quoting 58 PA. CONS. STAT. § 3215(b)(4)).
102. *Id.* (quoting 58 PA. CONS. STAT. § 3215(e)(2)).

government has no right to appeal but can only submit comments about local concerns to the DEP; the DEP may act on these comments at its discretion, and formal administrative appeal lies only with the industry.[103] The court clarified that the ERA established a public trust and placed the Commonwealth as its trustee, establishing a right in the people to seek relief when the Pennsylvania General Assembly has performed a legislative function "in a manner inconsistent with the constitutional mandate."[104]

Finally ruling on the merits of Act 13, the court hearkened back to the environmental legacy of Pennsylvania, which "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," leading to overwhelming support for, and the ratification of, the ERA.[105] A connection between historical extraction industries and the current hydrofracking boom was cemented in stating that "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."[106] The court unequivocally viewed hydrofracking as the newest threat to life, health, liberty, surface and ground water, air quality, and the many quality-of-life values that Pennsylvanians depend upon and which the ERA was enacted to protect. Environmental degradation of past generations, and the constitutional provision in response, was deemed "a product of our unique history" by the Pennsylvania court, which cautioned, "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."[107]

History would not be forgotten by this court. To allow Act 13 to stand "requires a blindness to the reality here and to Pennsylvania history, including Pennsylvania constitutional history," and the court held that "constitutional commands regarding municipalities' obligations and

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103. *Id.* (discussing 58 PA. CONS. STAT. § 3215(d)). Indeed, this lack of due process was the focus of Justice Baer's concurring opinion, which gave the court its plurality ruling. *Id.* at 1001 (Baer, J., concurring).

104. *Id.* at 975 (majority opinion) (citing Goodheart v. Casey, 565 A.2d 757, 760 (Pa. 1989)).

105. *Id.* at 976.

106. *Id.* at 975.

107. *Id.* at 976.

duties to their citizens cannot be abrogated by statute."[108] By forcing the acceptance of natural gas drilling into any zoning district, regardless of the impacts on environmental and habitability considerations for homes, schools, and businesses, and eliminating any possible local regulation or remedy for failure to provide adequate protections to the public, Pennsylvania violated its constitutional trustee duty under the ERA.[109]

IV. THE ENVIRONMENTAL AND LEGAL LEGACY

In *Robinson Township*, the court reinvigorated environmental constitutionalism in the United States and beyond. By rejecting narrower precedent on the ERA, the court recast the provision as the nexus between constitutional law, human rights, and environmental law, which can inform courts across the world. At its core, as with the *Wallach* case in New York, the ability to seek environmental redress lies with the people at the local level.[110] While environmental rights provisions are a rarity in the United States, often, the ethos underlying legislative enactments can be traced to the cultural milieu of each state. West Virginia, Pennsylvania, and Ohio have a long history of resource extraction,[111] largely from coal in the Appalachian Mountains. For the Pennsylvania Supreme Court, this legacy of coal extraction was largely determinative in its ruling that Act 13 violated the constitutional environmental public trust duty of the Commonwealth.[112] Colorado and much of the west harbor vast tracts of federal land which have historically been subject to laws that encourage natural resource extraction, such as the General Mining Act of 1872 (which is still in effect today).[113] Indeed, many of the early mining laws were intended to

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108. *Id.* at 976-77 (citing Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cnty. Bd. of Assessment Appeals, 44 A.3d 3, 9 (Pa. 2012); Alliance Home of Carlisle v. Bd. of Assessment Appeals, 919 A.2d 206, 223 (Pa. 2007); Stilp v. Commonwealth, 905 A.2d 918, 943 (Pa. 2006)).

109. *Id.* at 984.

110. *See supra* Parts II-III.

111. Frank Mauro et al., *Exaggerating the Employment Impacts of Shale Drilling: How and Why*, MULTI-ST. SHALE RES. COLLABORATIVE 7 (Nov. 2013), https://pennbpc.org/sites/pennbpc.org/files/MSSRC-Employment-Impact-11-21-2013.pdf.

112. *Robinson Township*, 83 A.3d at 960-61 (citing *Pennsylvania Comprehensive Plan for Abandoned Mine Reclamation*, *supra* note 77, at 1; PA. DEP'T OF MINES & MINERAL INDUS., OPERATION SCARLIFT: THE AFTER EFFECTS OF OVER 1000 YEARS OF COAL MINING IN PENNSYLVANIA AND CURRENT PROGRAMS TO COMBAT THEM 1 (1967)).

113. *See, e.g.*, JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, NATURAL RESOURCES LAW AND POLICY 1033 (Robert C. Clark ed., 2004). Chapter 9, section III ("Mining on the Public Lands") describes the General Mining Law of 1872, 30 U.S.C. §§ 21-42, which allows for a citizen or corporation to enter lands in the public domain with the purpose of discovering and prospecting for minerals. Should a viable deposit be located, the statute allows for purchase of the land at a rate set between $2.50 and $5.00 per acre, dating to the 1872 law.

spur exploration and settlement of the arid lands west of the Mississippi River, becoming the foundation of livelihood and society in many regions.[114] New York's legacy, however, differs significantly. With the creation of the Adirondack Forest Preserve in 1894 under article 7, section 7 of the New York Constitution, the worldwide conservation movement arguably began in New York.[115] The Hudson River School paintings cultivated a defining iconography of America and celebration of wilderness, and its place amidst human civilization is prominent in the state's legal history, as is a highly participatory form of local decision making.[116]

As we enter a new era of increased global connectivity and face environmental challenges of unprecedented scope, particularly with respect to climate change, local decision-making has a worldwide impact. Recent international attention upon shale gas, and broader energy concerns in general, places the *Wallach* and *Robinson Township* cases at the forefront of American environmental jurisprudence. With the impacts of fracking at their doorstep, citizens and communities in New York and Pennsylvania exercised their rights to preserve quality of life and peaceful enjoyment of property.[117] And the courts agreed, reflecting a shifting attitude toward resource extraction, community impacts, and environmental stewardship. The question is whether this authority can hold its own, or if a new legacy has already begun.

The text notes that "[t]he Mining Law was passed at a time when the federal government was promoting Western migration, and it accomplished this goal, at least in part, by providing legal protection to those who followed its fairly simple requirements." *Id.*

114. *Id.* at 1034 ("As the country expanded, so did the belief that land was an unlimited asset and if public it should be disposed of as rapidly as possible in the interest of development and exploitation 'in order that all might prosper.' Increasingly, mineralized lands on the public domain were sold to private interests, often at extremely low prices." (quoting DAVID SHERIDAN, COUNCIL ON ENVTL. QUALITY, HARDROCK MINING ON THE PUBLIC LAND 3 (1977))).

115. PHILLIP G. TERRIE, CONTESTED TERRAIN: A NEW HISTORY OF NATURE AND PEOPLE IN THE ADIRONDACKS 100-02 (Alice Wolf Gilborn ed., 2d ed. 2008).

116. *See id.* at 9.

117. *See supra* Parts II-III.