

PUBLIC UTILITY ZONING POST-ROBINSON TOWNSHIP: A CONSTITUTIONAL END-AROUND OR INFRASTRUCTURE IMPERATIVE?

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ABSTRACT

This Note examines infrastructure concerns pertaining to oil and natural gas operations in Pennsylvania. Beginning with the General Assembly's enactment of Act 13 in 2012, this Note details the subsequent development of regulatory oversight applicable to these operations. This Note examines how these regulations apply to oil and natural gas pipelines. It provides a holistic examination of Act 13 and the comprehensive exemptions from local zoning law the Act extended to oil and gas operations. It then explains the reasons the Act's broad zoning mandates were held unconstitutional under the Environmental Rights Amendment in the Pennsylvania Supreme Court's Robinson Township v. Commonwealth decision.

This Note argues that exempting these same operations under Pennsylvania's Public Utility Code is not unconstitutional. While Act 13's exemptions operate in a similar manner, the Note explains that exempting operations on a case-by-case basis is the approach most tailored to the Court's decision in Robinson Township.

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INTRODUCTION

Hydraulic fracturing, more commonly known as fracking, undoubtedly qualifies as one of the most polarizing environmental practices of the past decade.¹ Its surrounding discourse evinces a sharp dividing line. On one side, local governments, affected homeowners, and environmentalists decry the process as a local hazard

1. STEPHEN DEL PERCIO & J. CULLEN HOWE, THE LEGAL AND REGULATORY LANDSCAPE OF HYDRAULIC FRACTURING 1 (2014).

and environmental curse.² On the other side, industry participants, investors, and supporting politicians laud it as a profound economic boon.³ This dichotomy has fueled national, state, and local debate over the practice's utility.⁴ The question of whether fracking's economic benefits outweigh its environmental costs has always existed as a point of contention.

In Pennsylvania, Sunoco Logistics' Mariner East project exists at the center of this debate. Mariner East refers to a three hundred mile pipeline project proposed to utilize Sunoco's existing pipelines within Pennsylvania to provide desperately needed infrastructure to transport ethane, propane, and other petroleum products.⁵ The designated pipeline originally flowed east to west, carrying gasoline and distillates from a Philadelphia oil refinery.⁶ But, in an effort to bridge an abundance of shale gas with rampant consumer demand, Sunoco initiated the Mariner East project.⁷ Sunoco plans to reverse the pipeline's flow by retrofitting it and constructing multiple valve stations along its route.⁸ Upon completion, Mariner East would flow from west to east, transporting shale gas from the rural Marcellus region to the Marcus Hook industrial complex located near Philadelphia.⁹

Some commentators speculate that the repurposed pipeline would have a remarkably positive effect on Pennsylvania's economy, particularly in Philadelphia.¹⁰ Nonetheless, safety concerns at the local level have mired progress.¹¹ This narrative is quite familiar—local homeowners pitting themselves against an industry be-

2. See Mark Thompson, *U.S. to Become Biggest Oil Producer-IEA*, CNNMONEY (Nov. 12, 2012, 9:58 AM), <http://money.cnn.com/2012/11/12/news/economy/us-oil-production-energy/>.

3. *Id.*

4. *Id.*

5. Amended Petition of Sunoco Pipeline L.P. for A Finding that the Situation of Structures to Shelter a Pump State and Valve Control Station is Reasonably Necessary for the Convenience and Welfare of the Public, Exceptions of Sunoco Pipeline to Initial Decision at 14 (Pa. P.U.C. Aug. 19, 2014) (Docket No. P-201402411941), available at <http://www.puc.state.pa.us/pcdocs/1306079.pdf> [hereinafter *Amended Petition*].

6. *Id.*

7. *Id.* at 11 (“[E]ven as production has flourished, Pennsylvania has experienced severe consumer shortages of propane during periods of peak demand . . . due in large part to a lack of adequate pipeline capacity.”).

8. *Id.* at 12–14.

9. *Id.* at 13.

10. Patrick Kerkstra, *Pipe Dreams*, PHILADELPHIA MAGAZINE, (October 2014), available at <http://www.phillymag.com/articles/philadelphia-pipeline-americas-next-energy-hub/>.

11. *Id.* (“The Mariner East project . . . has been bedeviled by community opposition . . . and hostile politicians at the township level.”).

hemoth.¹² Sunoco has faced staunch opposition from property owners whose land is bisected by the Mariner East pipeline, or whose houses sit adjacent to the proposed valve stations.¹³ Homeowners argue that Mariner East, despite its economic upside, also might open the proverbial Pandora's box—a risk of environmental and health disaster, gas leaks, noise pollution, and more.¹⁴ In line with these concerns, local governments have instituted barriers to the project by creating legal hurdles through local zoning laws.¹⁵ Sunoco Logistics, in response, has sought zoning exemptions by asserting Mariner East's rights as a purported public utility.¹⁶

This Note evaluates the arguments surrounding Pennsylvania's oil and gas infrastructure development. In doing so, this Note demonstrates that the respective goals of both the industry and local homeowners are not mutually exclusive, and comes on the heels of the Pennsylvania Supreme Court's decision in *Robinson Township v. Commonwealth*, a case in which a plurality of justices utilized the state constitution's Environmental Rights Amendment to invalidate Act 13's comprehensive local zoning exemptions pertaining to oil and gas operations, pipeline installation included. Specifically, this Note argues that exempting pipeline public utilities from local zoning laws under the Public Utility Code does not operate in the same unconstitutional manner as Act 13's exhaustive oil and natural gas zoning exemptions. Instead, it exists as the most tailored and reasoned approach to sustainable infrastructure development.

The legal issues surrounding pipeline development necessitate a layered analysis that incorporates, but also extends beyond, local zoning law. Sunoco's pipeline project exists within an evolving regulatory landscape colored by constitutional commands, interpretive case law, state legislation, and administrative decisions. As an introduction, Part I of this Note discusses the hydraulic fracturing process, paying particular attention to the practical and economic aspects of pipeline infrastructure development. Part II provides an in-depth treatment of Pennsylvania's evolving regulatory landscape that industry participants must navigate when engaging in infrastructure development. Part II also provides an overview of Act 13, which granted the Commonwealth with paramount regulatory power over oil and gas operations within its borders, to the exclu-

12. *See id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See Amended Petition, supra* note 5, at 15.

sion of local governments. It then discusses how the Pennsylvania Supreme Court's decision in *Robinson Township* invalidated Act 13 on constitutional grounds, relying primarily on the Pennsylvania Constitution's Environmental Rights Amendment, and further explains how this decision intersects with local zoning law and public utility zoning exemptions. Part III argues that, unlike Act 13, public utility exemptions from local zoning ordinances do not violate the Environmental Rights Amendment. It concludes that such exemptions are in fact necessary to realize the full economic potential of the Marcellus Shale natural gas reserve. Part IV offers a brief conclusion.

I. BACKGROUND

Hydraulic fracturing, or fracking, is not a new practice.¹⁷ The requisite technology and market conditions needed to make it an economically viable pursuit, however, have only recently come to fruition.¹⁸ These developments have led to the arrival of horizontal well drilling,¹⁹ which, unlike more conventional vertical wells, has the capacity to stretch thousands of feet.²⁰ This relatively novel process increases minable surface area, and, by extension, the potential amount of extractable oil and natural gas.²¹ Its efficiency, in terms of cost and production, has facilitated fracking's nationwide proliferation.²² While this process gives rise to its own set of environmental²³

17. W. McDonald Plosser, *Into the Fracking Fray: A Balanced Approach to Regulating Hydraulic Fracturing in Tennessee*, 44 U. MEM. L. REV. 667, 670 (2014) (noting that fracking has existed since the mid-twentieth century); see also Heather Ash, *EPA Launches Hydraulic Fracturing Study to Investigate Health and Environmental Concern While North Dakota Resists Regulation: Should Citizens be Concerned?*, 87 N.D. L. REV. 717, 721 (2011).

18. See Plosser, *supra* note 17, at 670; see also PERCIO & HOWE, *supra* note 1; Ash, *supra* note 17, at 721 ("Fracking was first commercially used in 1949, but the fiscally onerous process did not become popular among drilling operators until the price of oil began increasing.").

19. Fracking, in a distilled sense, occurs in a three-step process. First, operators drill down vertically into sub-surface shale rock. See Plosser, *supra* note 17, at 671. Once contacting the shale formation, workers orient the drill horizontally and resume drilling. *Id.* Once drilled, a liquid admixture is introduced into the well at extremely high pressure. *Id.* at 672. The admixture's force creates rock fissures, and the liquid's "propping agents" fill the fissures to keep them open. *Id.* Third, the wellbore is drained, releasing hydraulic pressure and allowing the gas and petroleum to flow through the fractures in the direction of the wellbore and up to the surface. *Id.*

20. *Id.* at 672.

21. *Id.* at 671-72.

22. Clarissa Bierstedt, *What's the Fracking Problem?: Hydraulic Fracturing, Silica Sand, and Issues of Regulation*, 63 DRAKE L. REV. 639, 644-45 (2015).

23. Hydraulic fracturing's opponents routinely point to the practice's environmental risks as grounds for banning or delaying its implementation. See Kenneth J. Warren, *Resolving*

and economic²⁴ considerations by itself, fracking's rapid implementation as a standard industry practice has led to a host of corollary issues as well.

In Pennsylvania, one such issue concerns the viability and virtue of developing the Commonwealth's lagging pipeline infrastructure with respect to fracking.²⁵ This section explores that issue. Section A provides a general overview of the various types of pipelines required to move shale gas to market and how those pipelines are installed. Section B then turns specifically to Pennsylvania's fracking infrastructure and elaborates on the polarized discourse surrounding its development.

A. Pipeline Networks and Installation

Pipelines arguably exist as the ideal method for transporting shale oil and gas.²⁶ They not only enjoy a "substantial cost advantage" over rail and road transportation; they also "result in fewer spillage incidents and personal injuries" as well.²⁷ To move oil and natural gas from "the wellhead to the ultimate consumer[,]" various types of pipelines equipped for various types of tasks are required.²⁸

Fracking Wars Through Planning and Stakeholder Engagement, in BEYOND THE FRACKING WARS 265, 271 (Erica Powers & Beth E. Kinne eds., 2013). The practice indeed poses environmental risks. See *id.* Fracking consumes an *immense* amount of water, creating conservation concerns. Lisa Wozniak, Drew Young Dyke & Jacque Rose, *Fractured*, in BEYOND THE FRACKING WARS 175, 179–80 (Erica Powers & Beth E. Kinne eds., 2013). When it exits the well and resurfaces, flow-back water contains toxic chemicals, making storage and disposal an environmental challenge. *Id.* These chemicals present contamination issues for rural landowners and water supplies. *Id.* Fracking degrades air quality by introducing volatile organic compounds, ground level ozone, and smog into the atmosphere. *Id.* Such fears are especially profound at the local level, where homeowners and governments actually host the operations. *Id.* at 268. Affected residents have witnessed landscapes transformed by drill-site and road construction and have endured the operation's around-the-clock truck traffic, lights, and noise. See Warren, *supra* note 23, at 266.

24. Fracking is expected to result in lower national energy costs. See Kerkstra, *supra* note 10. It is touted as America's ticket to energy independence, with predictions that the United States will become a net energy exporter by 2020. See Thompson, *supra* note 2. Fracking leads to increased capital investment, tax revenue at all government levels, and *of course*—more jobs. *Id.*

25. See Susan Phillips, *Pipelines: The New Battleground Over Fracking*, STATE IMPACT (Apr. 2, 2015, 10:28 AM), <http://stateimpact.npr.org/pennsylvania/2015/04/02/pipelines-the-new-battleground-over-fracking/>.

26. See Diana Furchtgott-Roth, *Pipelines Are Safest For Transportation of Oil and Gas*, MANHATTAN INSTITUTE FOR POLICY RESEARCH (June 2013), available at http://www.manhattan-institute.org/html/ib_23.htm#VWt-3c9Viko.

27. *Id.* ("Americans are more likely to get struck by lightning than to be killed in a pipeline accident.")

28. See generally Suedeen Kelly & Vera Callahan Neinast, *Getting Gas to the People*, in BEYOND THE FRACKING WARS 81, 81 (Erica Levine Powers & Beth E. Kinne eds., 2013) ("[G]etting

Fracking's pipeline system originates at the wellhead where the oil and natural gas are produced.²⁹ From there, the pipeline delivers the product to larger gathering pipelines.³⁰ Depending on its purity, the gathering pipeline delivers the product to either the mainline transmission grid, or a processing plant³¹ where it is treated until ready for mainline transmission.³² Once it meets transmission standards, the product is funneled from either the processing plant or gathering line to transmission pipelines, which move the gas directly to customers.³³ Additionally, compressor stations are installed at selected intervals along the transmission pipeline to facilitate product flow.³⁴ These stations contain at least one compressor unit which receives the transmission flow at an intake point, and increases the pressure and rate of flow.³⁵ Ultimately, this process maintains the movement of product through the pipeline.³⁶

Of course, pipelines often must run across privately owned land. Thus, installing a pipeline usually entails a bargaining process between local landowners and industry representatives.³⁷ Depending on the type, installation requires landowners to grant a "property pipeline easement," or right-of-way, anywhere between fifty to one hundred feet.³⁸ In this scenario, a pipeline representative typically presents the landowner with a pre-printed easement agreement that

natural gas from the wellhead to the ultimate consumer requires a great deal of infrastructure."). See also U.S. ENERGY INFO. ADMIN., *About U.S. Natural Gas Pipelines*, http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/process.html (last visited Aug. 18, 2015) ("Transporting natural gas from the wellhead to the final customer involves several physical transfers of custody and multiple processing steps.").

29. See U.S. ENERGY INFO. ADMIN., *supra* note 28.

30. See Kelly & Neinast, *supra* note 28, at 82.

31. See U.S. ENERGY INFO. ADMIN., *supra* note 28. Natural gas that is not suitable for mainline transmission is usually referred to as "wet" product. *Id.* Thus, processing plants are necessary to "remove liquefiable hydrocarbons (ethane, butane, propane, [] and heavier hydrocarbons) from the natural gas, and [other] impurities[.]" *Id.*

32. "Natural gas entering the [mainline transmission] system [must be within specified] gravities, pressures, Btu content range, or water content level[.] *Id.* If the oil or natural gas does not meet these specifications, these infirmities may cause operational problems, pipeline deterioration, or even . . . pipeline rupture." See *id.*

33. Kelly & Neinast, *supra* note 28, at 82.

34. See U.S. ENERGY INFO. ADMIN., *supra* note 28.

35. *Id.*

36. *Id.*

37. Dave Messersmith, *Natural Gas Pipeline Right-of-Ways: Understanding Landowner Rights and Options*, PENN STATE EXTENSION (Apr. 25, 2010), <http://extension.psu.edu/natural-resources/natural-gas/news/2010/04/pipelineinfo> (last visited Sept. 7, 2015).

38. *Id.*; see also Kelly & Neinast, *supra* note 28, at 91 (This easement is a formal property document filed at the courthouse with other documents authorizing the pipeline to use a specified parcel of land, for a specified term.).

the landowner may accept or modify.³⁹ The agreement usually contemplates several important aspects of the landowner's property rights. It would delineate the easement's width and the timeline for construction.⁴⁰ Similarly, it might define the company's post-construction rights in terms of property access and enumerate specific methods of access.⁴¹ To mitigate landowner liability and facilitate the bargaining process, the document may also contain an indemnification agreement, which exonerates "the landowner from the acts and omissions of the [company's] independent and subcontractors."⁴² That said, not all landowners are willing to negotiate. Landowners might object in lieu of fracking's often-cited environmental and property concerns.⁴³ These objections have played a large role in impeding the installation of oil and natural gas pipelines across the Commonwealth.⁴⁴

B. Pennsylvania's Lagging Infrastructure

In Pennsylvania—perhaps more than any other state—the fracking dialogue is at a fever pitch. The discourse revolves around a novel problem: there is *too much* oil and natural gas.⁴⁵ This might not seem troublesome at first blush, but Pennsylvania's infrastructure lacks the capacity to bridge resource supply with rampant consumer demand.⁴⁶ In short, an infrastructure gap exists.⁴⁷ Industry participants plan to fill this gap by repurposing existing pipelines or installing entirely new ones.⁴⁸

Advocates argue that the existing pipeline need is the main impediment preventing the Commonwealth from becoming America's

39. Messersmith, *supra* note 37.

40. *Id.*

41. *Id.*

42. *Id.*

43. See *supra* note 23. The frequency of these objections has prompted legislators to propose a bill imposing "impact fees" on pipelines, with proceeds collected by effected counties and municipalities. S.B. 557, 199th Gen. Assemb., Reg. Sess. (Pa. 2015) (proposed Mar. 6, 2015).

44. See generally Phillips, *supra* note 25 (highlighting local debates concerning fracking and pipelines).

45. See Marie Cusick, *Mind 'the Gap': Why More Gas Means More Pipelines*, STATE IMPACT (Oct. 24, 2014, 12:37 PM), <http://stateimpact.npr.org/pennsylvania/2014/10/14/mind-the-gap-why-more-gas-means-more-pipelines/>; see also Phillips, *supra* note 25 ("Pipeline wars are now raging in Pennsylvania, where production is high and pipeline capacity is low.").

46. Cusick, *supra* note 45.

47. *Id.* Conceptually, this infrastructure gap can be analogized to a "dumbbell." *Id.* On one end, there is a glut of supply; on the other, a proportional demand. *Id.* Spanning the two, however, is a relatively small conduit that is not sufficient to bridge the two sides. *Id.*

48. See *Amended Petition*, *supra* note 5, at 5.

next great “energy hub.”⁴⁹ Indeed, “Marcellus Shale gas has the potential to alter the landscape of the global energy market.”⁵⁰ There are an estimated 1,744 trillion cubic feet of natural gas beneath U.S. soil.⁵¹ Much of it underlies Pennsylvania.⁵² Given the sheer volume of its subsurface resources, fracking proponents have begun referring to Pennsylvania as the “Saudi Arabia of natural gas.”⁵³ Moreover, the Marcellus “play,” colloquially, is especially attractive to the industry because of its close proximity to the country’s largest energy markets.⁵⁴

To a great extent, Pennsylvania’s government has embraced industry participants with open arms.⁵⁵ As the industry has increasingly relied on and developed the Commonwealth’s latent distribution infrastructure, in an effort to move product to market, the fracking debate has moved beyond the rural communities where the actual *drilling* occurs.⁵⁶ As such, suburban communities bisected by distribution and transmission pipelines suddenly find themselves being thrust into the fracking debate. In addition to the actual installation and repurposing of pipelines, convincing these landowners to place a pipeline under their property exists as a logistical hurdle in and of itself.⁵⁷ Despite their economic upside, pipelines present an array of legal issues and practical concerns at the local level.⁵⁸ Such concerns include the fear of reduced home values, insurance premium increases, environmental risks, and, of course, health and safety issues.⁵⁹

49. See Phillips, *supra* note 25.

50. *Id.*

51. See FRANK R. SPELLMAN, ENVIRONMENTAL IMPACTS OF HYDRAULIC FRACTURING 19 (2012).

52. See Bierstedt, *supra* note 22, at 645.

53. *Id.* at 643 (“Fracking proponents, commentators, and even President Barack Obama have begun calling Pennsylvania the ‘Saudi Arabia of natural gas,’ because the state’s shale resources have the potential to give America energy independence.”) (internal quotations omitted).

54. DEL PERICO & HOWE, *supra* note 1, at 31.

55. Cf. *Id.* at 30-31 (discussing the inconsistent regulatory “patchwork” amongst the states, comparing Pennsylvania’s penchant for drilling with New York’s fracking moratorium).

56. Phillips, *supra* note 25 (“[T]he pipeline construction boom has run up against opposition in small towns and rural areas where environmentalists and residents are pushing back. Some . . . don’t want their land disturbed . . . [O]ther activists see pipelines as part of a larger mission to end drilling altogether.”).

57. *Id.*

58. Jeremy Gerrard, *W. Goshen Residents Upset with Sunoco Natural Gas Pump Station Tied to Mariner East Project in Marcus Hook*, DELAWARE COUNTY DAILY TIMES (August 10, 2015, 2:20 PM) <http://www.delcotimes.com/general-news/20140331/w-goshen-residents-upset-with-sunoco-natural-gas-pump-station-tied-to-mariner-east-project-in-marcus-hook>.

59. *Id.*

Despite these concerns, advocates explain that simply addressing fracking's logistical infirmities could wholly transform the Commonwealth into the industrial "Workshop of the World."⁶⁰ Intuitively, such claims might feel hyperbolic and sensationalized, but Pennsylvania has a rich history as a state built on industry and manufacturing.⁶¹ While some point to those days as a bygone era, others claim it is in a "state of suspended animation."⁶² Pipelines, in a very conceivable way, could bring this status back to life.⁶³ The question is: at what cost?

II. THE SHIFTING REGULATORY LANDSCAPE

A. Local Government's Zoning Authority

The Pennsylvania Constitution recognizes its citizens' inherent right to acquire and possess property.⁶⁴ This "right to possess" encompasses and preserves the enjoyment of one's property, free from government interference.⁶⁵ However, state and local legislatures may impose reasonable land use restrictions via zoning laws to protect both neighboring property owners and the general public.⁶⁶ These regulations ensure land development occurs in an orderly and sustainable manner.⁶⁷ The government may impose such re-

60. See Kerkstra, *supra* note 10; see also E. Willard Miller, *Pennsylvania*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/place/Pennsylvania-state>, (last visited Aug. 29, 2015) ("From the 1830s to about 1920 Pennsylvania developed one of the world's great industrial economies . . .").

61. See Kerkstra, *supra* note 10.

62. *Id.*

63. Marcellus resources, coupled with "Philadelphia's manufacturing infrastructure, attracts investors who acknowledge that Philadelphia has perhaps the best freight rail connections in the East; [a strategic] port; unbeatable proximity to the nation's largest consumer markets; and heavy industrial sites along both rivers with the zoning and acreage for [investors] to build massive new plants." *Id.* While the potential is there, there is no way to utilize it absent pipelines. *Id.*

64. PA. CONST. art. I, § 1; see also *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 727 (Pa. 2003) (explaining that the right to possess property "is of ancient origin, recognized in the Magna Carta, and now memorialized in the [Commonwealth's] constitution).

65. See *In re Realen*, 838 A.2d at 727 (citation omitted).

66. *Id.*

67. The Supreme Court's decision in *Village of Euclid v. Amber Realty Co.* marks the advent of modern zoning law. 272 U.S. 365, 386-87 (1926). The *Euclid* Court explained that the influx of citizens to urban areas necessitated reasonable land-use restrictions to foster sustainable urban development; accordingly, it held that zoning laws are presumed valid unless proven arbitrary and unreasonable. *Id.* at 395; see also *In re Realen*, 838 A.2d at 729 ("[Z]oning regulations must . . . 'accommodate reasonable overall community growth, including population and employment growth and opportunities for development of a variety of residential dwelling types and nonresidential uses.'" (citation omitted).

strictions under the United States Constitution, pursuant to the state's inherent policing power.⁶⁸ Thus, to pass constitutional muster, zoning regulations must secure and relate to the community's public health, safety, morals, or general welfare.⁶⁹

Pennsylvania municipalities derive their zoning authority from the Municipalities' Planning Code (MPC).⁷⁰ This authority, however, is subordinate to the Commonwealth's, which may enact legislation that divests or preempts local zoning law.⁷¹ Local governments are viewed as agents or instrumentalities of the state.⁷² To illustrate this regulatory dynamic, the prevailing principle suggests that "what the state gives [to local government] the state may take away."⁷³ In enacting Act 13, that is exactly what the Commonwealth's General Assembly attempted to do.

B. Act 13: Preempting Local Zoning

Act 13 operated as an exhaustive renunciation of local zoning authority over oil and gas operations within Pennsylvania. On February 14, 2012, former Pennsylvania Governor Tom Corbett signed Act 13 into law.⁷⁴ The law modified Pennsylvania's existing Oil and Gas Act.⁷⁵ It repealed certain provisions and added six new chapters to Title 58 of the Pennsylvania Consolidated Statutes.⁷⁶ As a practical matter, Act 13 wrought profound effects on the ability of local gov-

68. *Euclid*, 272 U.S. at 387.

69. *Id.*

70. 53 PA CONS. STAT. ANN. § 10601 (West 1988).

71. See *Commonwealth v. Ogontz Area Neighbors Assoc.*, 483 A.2d 448, 451 (Pa. 1984) ("[Municipalities] are created, governed, and the extent of their powers determined by the [state] legislature and subject to change, repeal, or total abolition at its will.") (citations omitted). Thus, a local government's conditional zoning authority makes sense as a conceptual matter. *Id.* That said, whether this authority *should be* conditional has been the subject of much academic debate. See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1125 (2007) (defining the "home-rule" movement and its attendant theories, all of which advocate for more expansive, permanent law-making authority at the local level). But see Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 874 (1983) (noting that "the local regulatory process may be a device for one group to dominate another" as localities are small, insular forums where minority interests find little respite).

72. See *Ogontz Area Neighbors Assoc.*, 483 A.2d at 451.

73. Joseph Iole, *May Two Laws Occupy the Same Space at the Same Time? Understanding Pennsylvania Preemption Law in the Marcellus Shale Concept*, 6 APPALACHIAN NAT. RESOURCES L.J. 39, 43 (2011–2012) (explaining the parameters of local government authority in Pennsylvania).

74. See 58 PA. CONS. STAT. ANN. §§ 2301–3504 (West 2012).

75. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 915 (Pa. 2013) (providing a holistic overview of the Act's provisions).

76. See *id.*

ernment to regulate the shale mining and distribution process.⁷⁷ To a greater extent, it divested these entities of regulatory oversight with respect to fracking, and left this matter to the state.

Act 13 expressly regulated all “oil and gas operations” in the Commonwealth,⁷⁸ and endowed the term “oil and gas operations” with a comprehensive meaning. First, the definition naturally encompassed the actual fracking process.⁷⁹ But, in a broader sense, it also referred to the distribution and storage of shale gas once it had been extracted, extending its reach to:

[The] construction, installation, use, maintenance and repair of: (i) oil and gas pipelines; (ii) natural gas compressor stations; and (iii) natural gas processing plants or facilities performing equivalent functions. [As well as the] construction, installation, use, maintenance and repair of all equipment directly associated with [these] activities⁸⁰

The law, then, contemplated all facets of the fracking process, from well installation to product distribution.⁸¹

Act 13 left the regulation of “oil and gas operations” to the state. As such, the law preempted any local ordinances purporting to do the same, and actually directed local governments to enact uniform regulations.⁸² Three particular provisions directed the Act’s preemption and uniformity mandates. First, Section 3302 provided that:

[A]ll local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 . . . are hereby superseded. No local ordinance . . . shall contain provisions which impose conditions, requirements or limitations on . . . oil and gas operations The Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations as provided in this chapter.⁸³

77. See, e.g., 58 PA. CONS. STAT. ANN. § 3302 (“[A]ll local ordinances purporting to regulate oil and gas operations . . . are hereby superseded The Commonwealth . . . preempts and supersedes the regulation of oil and gas operations as provided in this chapter.”).

78. *Id.* § 3301.

79. *Id.* § 3301(1) (“The term [oil and gas operations] include . . . well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth.”).

80. *Id.* §§ 3301(3)-(4).

81. See *id.*

82. *Id.* §§ 3302-04.

83. *Id.* § 3302.

Second, Section 3303 extended state preemption to all local *environmental* ordinances concerning oil and gas operations.⁸⁴ Finally, Section 3304 further restricted local control by directing all local governments within the Commonwealth to enact certain uniform zoning requirements.⁸⁵ This “uniformity” requirement “allow[ed] for the reasonable development of oil and gas resources.”⁸⁶ Section 3304 required that nearly all oil and gas operations be allowed in *every* zoning district as a permitted use.⁸⁷

In sum, Act 13 vested the Commonwealth with exclusive regulatory power over fracking activity occurring within its borders. Its language contemplated an exhaustive swath of activity and preempted local ordinances purporting to regulate the same. In doing so, Act 13 immediately found itself in the cross-hairs of environmental groups and local governments.⁸⁸ These opponents criticized Act 13 as too industry friendly and environmentally corrosive.⁸⁹ Just a month after its enactment, Act 13 was before Pennsylvania’s Commonwealth Court⁹⁰ in a legal dispute which eventually made its way to the Supreme Court of Pennsylvania.

C. The Robinson Township Decision

1. Act 13 & Pennsylvania’s Commonwealth Court

In March 2012, Pennsylvania’s Commonwealth Court received a one-hundred plus page complaint⁹¹ attacking numerous provisions of Act 13 on constitutional grounds, dismissively referring to it as a “one-size-fits-all” zoning scheme for oil and gas development.⁹² The petitioners were seven municipalities, two municipal supervisors

84. *Id.* § 3303 (“Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances.”).

85. *Id.* § 3304.

86. *Id.*

87. *Id.* § 3304(b)(5).

88. JEREMY MERCER, ACT 13: A “FRACTURED” PENNSYLVANIA SUPREME COURT DECISION ON PENNSYLVANIA’S OIL AND GAS ACT 6 (2014), available at <http://www.nortonrosefulbright.com/files/20140205-act-13-decision-whitepaper-112734.pdf> (“[E]nvironmental groups, anti-drilling groups, and certain municipalities touted Act 13 as . . . Corbett’s [gift] to the oil and gas industry.”).

89. *Id.*

90. *Robinson Twp., Wash. Cnty. v. Pennsylvania*, 52 A.3d 463, 468 (Pa. Commw. Ct. 2012) (“On March 29, 2012, Petitioners filed a [complaint] . . . challenging the constitutionality of Act 13”) [hereinafter *Wash. Cnty.*].

91. *Id.*

92. *Id.*

suing in their individual and official capacities, an environmental group, and a doctor.⁹³ The named respondents were the Commonwealth of Pennsylvania, the Public Utility Commission (PUC), the Department of Environmental Protection, and the Office of the Attorney General.⁹⁴ The petitioners sought declaratory judgment and injunctive relief on twelve separate counts.⁹⁵

The complaint's first three counts challenged Act 13's zoning provisions under both Pennsylvania's constitution and the U.S. Constitution's Due Process Clause.⁹⁶ The petitioners noted that, to satisfy due process, zoning cannot be substantiated on the basis that it furthers the interests of a discrete few within a given community; rather, zoning must be directed toward the community as a whole.⁹⁷ In this vein, zoning must be concerned with the general public interest, and justified by a balancing of community costs and benefits.⁹⁸ Zoning ordinances typically satisfy these conditions when enacted in accordance with a local government's comprehensive plan for community growth and development.⁹⁹

The petitioners in *Robinson Township* argued that Section 3304 violated due process because it required that municipalities allow industrial land uses in every zoning district, a requirement that directly contravened the mandates of a municipality's comprehensive plan.¹⁰⁰ The court agreed, refuting the Commonwealth's argument that such zoning was a valid exercise of the state's police power.¹⁰¹ The court explained that the public's interest in zoning was development and land use in a manner consistent with local demographic and environmental concerns. Zoning is aligned with the public's interest when congruent with a local government's comprehensive plan.¹⁰² Because Section 3304 required local governments to violate their comprehensive plans in the interest of economic growth and development, it did not protect the interests of neighboring property

93. *Id.* at 471.

94. The petitioners also named as respondents the heads of each respective agency. *Id.* at 468.

95. *Id.* at 469-71.

96. *Id.* at 480.

97. *Id.* at 483 (citation omitted).

98. *Id.* (citation omitted).

99. *Id.*

100. *Id.* at 480-81.

101. The Court elaborated that under the Commonwealth's reasoning, it would naturally follow that the legislature could potentially mandate "fireworks plants" in residential zones for a variety of police power reasons. *Id.* at 484.

102. *Id.*

owners and also altered the character of affected neighborhoods.¹⁰³ In essence, Section 3304 violated due process because it required local governments to amend zoning ordinances in violation of the basic principle that “land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded.”¹⁰⁴

In a separate count, the petitioners also contended that Chapter 33, in its entirety, violated the Environmental Rights Amendment under Section 27 of the Pennsylvania Constitution.¹⁰⁵ Section 27 provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. *As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.*¹⁰⁶

The petitioners argued that Chapter 33 of the Act wholly circumscribed any ability to balance environmental concerns with oil and gas development.¹⁰⁷ The Commonwealth contended that the Amendment expressly imposed this balancing duty on the Commonwealth, rather than its municipalities.¹⁰⁸ Further, the Commonwealth asserted that to the extent the Environmental Rights Amendment *did* impose a duty at the municipal level, that duty was preempted under Section 3303.¹⁰⁹ The Court agreed,¹¹⁰ reasoning that Pennsylvania municipalities indeed had a duty to balance zoning concerns with oil and gas operations; however, that duty did not derive from the Pennsylvania Constitution.¹¹¹ Instead, the General Assembly delegated it to them through its adoption of the MPC.¹¹² As such, the duty’s “existence” at the local level was contingent upon whether federal or state authority preempted it.¹¹³ Because Act 13 occupied “the entire field [of environmental regulation] to the exclu-

103. *Id.*

104. *Id.* at 485 (citing *Edmonds v. Oxford House, Inc.*, 514 U.S. 724, 732–33 (1995)).

105. *Id.* at 488.

106. *Id.* (citing PA. CONST. art. 1, § 27) (emphasis in original).

107. *Id.* at 488.

108. *Id.*

109. *Id.*

110. *Id.* at 489

111. *Id.*

112. *Id.*

113. *Id.*

sion of all local ordinances,” the court summarily disposed of the this argument under Section 27.¹¹⁴

In sum, the court held Act 13 unconstitutional in part, and enjoined application of Section 3304, and any remaining provisions of Chapter 33 that enforced Section 3304, which would have included Sections 3305-09.¹¹⁵ The parties filed direct cross appeals to the Pennsylvania Supreme Court.¹¹⁶

2. Act 13 & Pennsylvania’s Supreme Court

On appeal, the parties again argued the constitutionality of Chapter 33’s zoning mandates.¹¹⁷ What followed from the court was an opinion over 160 pages long¹¹⁸ in which a plurality and concurring justice struck down Chapter 33’s zoning mandates as unconstitutional.¹¹⁹ The plurality, comprised of Justices Castille, Todd, and McCaffery invoked the Environmental Rights Amendment, a legal basis disposed of in the court below.¹²⁰ This section is limited to a discussion of the plurality’s opinion.¹²¹

a. The plurality’s decision

The parties again raised their respective arguments regarding the zoning mandates at issue in Act 13, namely Sections 3303 and 3304.¹²² On these issues, the plurality offered a synopsis of the parties’ due process arguments, which largely mirrored their arguments below.¹²³ The court then referenced the parties’ relatively meager arguments¹²⁴ under Section 27.¹²⁵ At this point, the court

114. *Id.*

115. *Id.* at 494.

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

117. *Id.* at 930.

118. *Id.*

119. *Id.*

120. *Id.* at 942.

121. Justice Baer issued a lone concurrence, agreeing that Act 13 was unconstitutional on due process grounds. *Id.* at 1000-01 (Baer, J., concurring) (“Act 13 . . . has unconstitutionally, as a matter of substantive due process, usurped local municipalities’ duty to impose and enforce community planning, and the concomitant reliance by property owners, citizens, and the like on that community planning.”).

122. *Id.* at 930-31.

123. *Id.* at 933-43.

124. *Id.* at 942 (“[T]he parties do not develop their Environmental Rights Amendment arguments to the same extent as . . . the due process arguments as to Section 3304 . . .”).

125. *Id.*

made patently clear the basis on which it would rule on Chapter 33 of Act 13:

To describe this case simply as a zoning . . . matter would not capture the essence of the parties' fundamental dispute regarding Act 13 The citizens' interests . . . implicate primarily rights and obligations under the Environmental Right Amendment We will address this basic issue, which we deem dispositive, first.¹²⁶

Diverging from the court below, the plurality first held that the duties established under the Environmental Rights Amendment applied to all levels of state government, including municipalities.¹²⁷ In this vein, the justices noted Section 27's third clause created a trust, recognizing the community's right of common ownership to Pennsylvania's public natural resources.¹²⁸ The court turned to basic trust law tenets to define the trust's scope and function.¹²⁹ Under the Environmental Rights Amendment, state citizens acted as both the trust's settlors and beneficiaries.¹³⁰ The Commonwealth, of course, acted as trustee¹³¹ and assumed two requisite duties: (1) to refrain from the unreasonable exercise of its duties by "permitting . . . [the] degradation . . . of public natural resources," and (2) to act affirmatively in protecting the environment via legislation.¹³²

126. *Id.* The Court explained that Section 27 of the Pennsylvania Constitution recognized, rather than created, a Pennsylvania citizen's environmental right.

[T]he Environmental Rights Amendment to the Pennsylvania Constitution delineates limitations on the Commonwealth's power to act as trustee of the public natural resources. . . . [I]nsofar as the Amendment's prohibitory trustee language is concerned, the constitutional provision speaks on behalf of the people, to the people directly, rather than through the filter of the people's elected representatives to the General Assembly.

Id. at 974.

127. *Id.* at 956–57.

128. *Id.* at 955–56.

129. *Id.* at 956.

130. *Id.*

131. *Id.* Of course, the term "Commonwealth" in this sense includes not only the state government, but its municipalities as well. *Id.* at 963. The plurality, divining original intent, found that that Section 27's duties were:

[D]elegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.

Id.

132. *Id.* at 957–58.

As the Environmental Rights Amendment only named the “Commonwealth” as trustee, it was unclear as to whether these duties extended beyond the state government and reached local governments.¹³³ The plurality, though, summarily answered that question by explaining, “[t]he Commonwealth is named trustee This includes local government.”¹³⁴ As such, *Robinson Township* requires state and local governments alike to shoulder the duties imposed by the Environmental Rights Amendment’s three clauses.¹³⁵ Clause One, as delineated by the plurality, creates individual rights to the environment and requires each level of government to consider—in advance—the environmental effects of a proposed law.¹³⁶ Clause Two creates a community ownership in Pennsylvania’s natural resources, and, as discussed, Clause Three vests the preservation of those rights to all levels of government.¹³⁷

After delineating the rights and duties arising under the Environmental Rights Amendment, the plurality turned to its analytical framework.¹³⁸ Until *Robinson Township*, a typical action under the Amendment involved either “challenges to specific . . . development projects, which implicated alleged violations of constitutional environmental rights, [or] challenges to local or statewide environmental quality laws, which implicated alleged violations of constitutional property rights.”¹³⁹ Accordingly, analyses in these contexts usually defined the Amendment’s broad constitutional rights in terms of statutory compliance.¹⁴⁰ Further, courts tended to conflate—or perhaps failed to discern between—challenges based on the Environmental Rights Amendment’s three separate clauses.¹⁴¹ Thus, existing environmental rights jurisprudence resulted in a uniform analytical method, regardless of the clause invoked in a given action, confusing members of the bar and stymieing jurisprudential development.¹⁴²

The *Robinson Township* court sought to remedy this problem. Parsing through developed case law, the court referenced *Payne v.*

133. PA. CONST. art. I, § 27.

134. *Robinson Twp.*, 83 A.3d at 956–57.

135. *Id.* at 957.

136. *Id.* at 952.

137. *Id.* at 954–58.

138. *Id.* at 963–64.

139. *Id.* at 964.

140. *Id.*

141. *Id.*

142. *Id.*

*Kassab*¹⁴³ as the existing benchmark for an environmental rights analysis.¹⁴⁴ In that case, the Commonwealth Court developed a three prong test to guide environmental rights actions.¹⁴⁵ The standard required courts to first consider whether a development project complied with all applicable environmental statutes and regulations; second, consider whether the record demonstrated a reasonable effort to optimally reduce the development's resultant environmental harm; and third, consider whether that harm resulting from the challenged decision so clearly outweighed the benefits that proceeding would constitute an abuse of discretion.¹⁴⁶ While easy to apply, the test had flaws considered by the plurality to be obvious and critical.¹⁴⁷ Elaborating, the justices reasoned that the *Payne* standard construed the Commonwealth's trustee duties in much narrower terms than required under Pennsylvania's constitution.¹⁴⁸ The court also reasoned that the test assumed that "the availability of judicial relief premised upon [the Environmental Rights Amendment was] contingent upon and constrained by legislative action."¹⁴⁹ Similarly, *Payne* minimized the constitutional duties of the executive and judiciary, and circumscribed their abilities to fulfill constitutional duties independent of legislative control.¹⁵⁰ For these reasons, the plurality deemed *Payne* inappropriate to determine matters outside the narrow category of cases where an environmental challenge is premised upon a developer's alleged "failure to comply with statutory standards enacted to advance Section 27 interests."¹⁵¹

In limiting *Payne* to such a narrow set of circumstances, the plurality seemed primed to articulate a more appropriate standard relating to the challenge of Act 13 at issue.¹⁵² However, no such articulation came. Instead, the court simply referenced its "obligation to vindicate the rights of its citizens where the circumstances require it and in accordance with the plain language of the constitution."¹⁵³

143. *Payne*, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd* 361 A.2d 263 (Pa. 1976). In *Payne*, city residents sought to enjoin the Pennsylvania Department of Transportation from widening a street to the detriment of a local park; the construction would have also required the elimination of several trees and a pedestrian sidewalk. *Payne*, 361 A.2d at 272-73.

144. *Robinson Twp.*, 83 A.3d at 966.

145. *See Payne*, 312 A.2d at 94.

146. *Robinson Twp.*, 83 A.3d at 967 (quoting *Payne*, 312 A.2d at 94).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 967.

151. *Id.*

152. *See id.*

153. *Id.* at 969 (quoting *Pap's A.M. v. Erie*, 812 A.2d 561, 605 (Pa. 2002)).

While not expressly articulating its adopted analytical approach, the plurality turned to address Act 13's zoning mandates.¹⁵⁴ The justices wasted no time voicing their displeasure with such proscriptions, characterizing Act 13 as a "remarkable revolution" of Pennsylvania's zoning regiment.¹⁵⁵ Turning to Section 3303's statewide zoning preemption, the court reiterated again that the Commonwealth's duties as trustee under Section 27 extended to municipalities.¹⁵⁶ With that, the court read Section 3303 as a directive requiring local governments to ignore their trustee obligations by proactively eliminating any existing local environmental regulations.¹⁵⁷ Despite the Commonwealth's broad police powers, zoning legislation cannot transgress constitutional commands.¹⁵⁸ Section 3303, the plurality held, did just that.¹⁵⁹

After striking down the preemption provision, the plurality addressed a similarly ill-fated Section 3304. This provision, which required statewide zoning uniformity, was deemed unconstitutional for two reasons.¹⁶⁰ First, requiring zoning uniformity with respect to industrial-use activity operated to degrade the corpus of the trust by "permitting industrial uses as a matter of right in every type of pre-existing zoning district . . ."¹⁶¹ Such a zoning scheme failed to contemplate the varying aspects of the Commonwealth's expansive, diverse terrain.¹⁶² Given Pennsylvania's geographic mass, and its municipalities' vastly divergent environmental features, fracking activity's "impact on the quality, quantity, and well-being of [the Commonwealth's] natural resources [could not] reasonably be assessed" outside of the locale in which it occurred.¹⁶³ In this respect, the plurality considered environmental protection a local issue that must be tailored to local conditions.¹⁶⁴

Second, uniform zoning imposed a disparate burden on Pennsylvania's citizens.¹⁶⁵ In a practical sense, fracking is limited to specific

154. *Id.* at 972.

155. *Id.* at 971 ("Reviewing the amended Act, few could seriously dispute how remarkable a revolution is worked by this legislation upon the existing zoning regiment in Pennsylvania, including residential zones.").

156. *Id.* at 977.

157. *Id.* at 978.

158. *Id.* at 978.

159. *Id.*

160. *Id.* at 979–80.

161. *Id.* at 979.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 980.

areas within the Commonwealth; where it does occur, it imposes habitability and environmental concerns not realized by citizens situated elsewhere.¹⁶⁶ Because of this disparity, the plurality characterized Act 13 as “irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of ‘all the people.’”¹⁶⁷ The court acknowledged that the Commonwealth may exercise its police powers to economically develop its land’s resources to foster *sustainable* development that considers the reserved rights of the trust’s beneficiaries.¹⁶⁸ Act 13 failed to account for this type of constitutional command.¹⁶⁹

D. Pipelines as Public Utilities

The *Robinson Township* decision invalidated Act 13’s most important provisions and restored local zoning authority to the status quo.¹⁷⁰ However, what the decision *did not* accomplish is nearly as important as what it did. In certain instances, Pennsylvania law still permits fracking operations to circumvent local zoning regulations. A private corporation engaged in fracking may apply for and obtain public utility status. This section first defines what constitutes a public utility and, second, lays out how the industry is taking advantage of this designation.

Generally, courts designate businesses as public utilities when they provide valuable, nondiscriminatory services to the public under government supervision.¹⁷¹ The Public Utility Code defines the term as:

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 981.

170. *See id.* at 771 (noting, in invalidating Act 13, how the legislation worked a “remarkable a revolution . . . upon the existing zoning regimen in Pennsylvania, including residential zones.”).

171. *See Crown Commc’ns v. Zoning Hearing Bd. of Glenfield*, 705 A.2d 427, 431-32 (Pa. 1997) (describing the relevant considerations when determining whether a business functions as a public utility); *see also* Public Utility Realty Tax Act, 72 PA. CONS. STAT. § 8101-A(2) (1971) (defining public utility as “any person, partnership, association, corporation or other entity furnishing public utility service under the jurisdiction of the Pennsylvania Public Utility Commission or the corresponding regulatory agency of any other state or of the United States”); *Pennsylvania v. WVCH Commc’ns*, 351 A.2d 328, 330 (Pa. Cmmw. Ct. 1976) (“[A public utility must] 1) serve all members of the public upon reasonable request; 2) charge just and reasonable rates subject to review by a regulatory body; 3) file tariffs specifying all of its charges; and 4) modify or discontinue its service only with the approval of the regulatory agency.”).

Any person or corporations . . . owning or operating in this Commonwealth[,] equipment or facilities for producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation . . . [and] transporting or conveying natural or artificial gas, crude oil, gasoline or petroleum products . . . by pipeline or conduit, to the public for compensation.¹⁷²

Thus, entities transporting natural gas via pipeline may fit the “public utility” definition.

The designation does not apply to all natural gas pipelines in the Commonwealth. First, PUC jurisdiction extends only to intrastate pipelines.¹⁷³ Second, this determination turns on what a pipeline contains and who the end user is.¹⁷⁴ However, once designated as a public utility, pipelines and related structures fall under the jurisdiction and regulatory powers of the PUC.¹⁷⁵ Accordingly, they must adhere to the agency’s prescriptive rules and regulations that are otherwise not applicable to private industries.¹⁷⁶

The PUC enjoys statewide jurisdiction over all public utilities.¹⁷⁷ Its jurisdiction is also exclusive; local governments cannot exercise regulatory authority over public utilities.¹⁷⁸ The MPC exempts pub-

172. 66 PA. CONS. STAT. ANN. § 102(a) (West 2004).

173. See Susan Phillips, *A Pennsylvania Pipeline Primer: Who, How, Where and What the Heck?*, STATE IMPACT (Dec. 13, 2012, 1:45 P.M.), <https://stateimpact.npr.org/pennsylvania/2012/12/13/a-pipeline-primer-who-how-where-and-what-the-heck/>. Determining an agency’s jurisdiction over pipelines, or specific pipeline segments, presents legal issues in and of itself. See e.g., Candy Woodall, *Regulating Pipelines, Whose Job Is It?* (Jan. 25, 2014, 8:15 AM), http://www.pennlive.com/midstate/index.ssf/2015/01/regulating_pipelines_whose_job.html. It is a difficult issue, given the manner in which pipelines are installed. See *id.* As a general matter, interstate pipelines are regulated by several federal agencies: the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, the Federal Energy Regulatory Commission, and the U.S. Environmental Protection Agency. *Id.* The Mariner East Pipeline is both intrastate and interstate—meaning the PUC shares jurisdiction with the PHMSA. *Id.* See also Pennsylvania Public Utility Commission, http://www.puc.state.pa.us/about_puc/search_results.aspx?advanced=true (last visited Sept. 28, 2015) for a list of intrastate pipelines subject to the PUC’s jurisdiction.

174. See PA. CONS. STAT. ANN. § 102(a) (West 2004); see also *Bethlehem Steel Corp. v. Pa. Public Utility Commission*, 713 A.2d 1110, 1112 (Pa. 1998) (holding a pipeline transporting natural gas to a single end user does not qualify as a public utility because its service was not for the “public at large”; but, instead, a single corporate entity).

175. 66 PA. CONS. STAT. ANN. § 501 (West 1978).

176. See *Crown Commc’ns*, 795 A.2d at 431.

177. See *Commonwealth v. Del. & Hudson Ry. Co.*, 339 A.2d 155, 157 (Pa. Commw. Ct. 1975) (quoting *Duquesne Light Co. v. Monroeville Borough*, 298 A.2d 252, 256 (Pa. 1972)).

178. *Duquesne Light Co. v. Upper St. Clair Twp.*, 105 A.2d 287, 292 (Pa. 1954).

lic utilities, pipelines included, from all local land use controls.¹⁷⁹ Reminiscent of Act 13's preemption and uniformity mandates, the PUC's exclusive jurisdiction ensures uniformity in public utility regulation.¹⁸⁰ Endowing the PUC with sole jurisdiction precludes regulation by a multitude of local jurisdictions, which in turn avoids what would otherwise result in "twisted and knotted" public utilities and harm to the public's general welfare.¹⁸¹

This zoning exemption might also extend to buildings and structures necessary to service public utilities.¹⁸² For instance, under the MPC, a pipeline's valve station might fall outside the purview of local zoning ordinances, provided the structures are "reasonably necessary for the convenience or welfare of the public."¹⁸³ While subject to state oversight, local governments have little, if any, control over public utility activity occurring in their own backyards.¹⁸⁴

III. PUBLIC UTILITY STATUS: PRESERVING STATE CONTROL OF NATURAL GAS DEVELOPMENT

A. *The Current Paradox: Mariner East and the Public Utility Zoning Exemption*

Even in the wake of *Robinson Township*, local governments may have little to no power when it comes to regulating certain forms of fracking activity. When an industry participant applies for and re-

179. See *Duquesne Light Co.*, 298 A.2d at 256 (noting that the PUC has exclusive regulatory jurisdiction over the implementation of public utility facilities); see also *Heintzel v. Zoning Hearing Bd. of Millcreek Twp.*, 533 A.2d 832, 833 (Pa. Commw. Ct. 1987) ("[T]here is *no power* possessed by municipalities to zone with respect to utility structures . . .") (citation omitted) (emphasis in original).

180. *Chester v. Phila. Elec. Co.*, 218 A.2d 331, 333 (Pa. 1966).

181. *Id.*

182. *Del-AWARE Unlimited, Inc. v. Pa. Pub. Util. Comm'n*, 513 A.2d 593, 595 (Pa. Commw. Ct. 1986).

183. 53 PA. CONS. STAT. ANN. § 10619 (West 1989). To elaborate, a municipality may zone a public utility building unless the PUC determines that the building is reasonably necessary for the public's convenience or welfare. See *Del-AWARE Unlimited*, 513 A.2d at 595. The burden in establishing the structure's necessity, of course, lies with the party seeking zoning exemptions. *Id.* It is a somewhat lax burden, the touchstone being reasonableness; Section 619 does not require proof that the site is absolutely necessary or that it is the best possible site. *O'Connor v. Pa. Pub. Util. Comm'n*, 582 A.2d 427, 433 (Pa. Commw. Ct. 1990).

184. Cf. *Crown Commc's v. Zoning Hearing Bd. of Glenfield*, 705 A.2d 427, 431 (1997) ("Because public utilities operate within this framework of regulation, provision must be made in zoning codes and elsewhere for utilities to provide their services without undue restriction. Government cannot simultaneously demand the provision of essential services, but then regulate the provider in such a way that it becomes impossible for the utilities to provide the services.").

ceives public utility status, it becomes exempt from local zoning laws and subject to the PUC's sole regulatory authority. Thus, the public utility designation deprives a local government's regulatory authority recognized in *Robinson Township*, and transfers that authority to the state.

Industry participants take advantage of the public utility designation. In 2012, Sunoco Logistics began constructing its Mariner East pipeline project.¹⁸⁵ The project for processing, storage, and distribution stretched three hundred miles, beginning in Washington County, Pennsylvania and ending in Marcus Hook, Philadelphia.¹⁸⁶ Sunoco initiated the project in response to the lack of infrastructure available to move Marcellus Shale natural gas and NGLs to market.¹⁸⁷ Logistically, it consisted of two components. First, a pipeline had to be installed at an origination point.¹⁸⁸ Mariner East would begin at a fracking well in Washington County, Pennsylvania and then tie into a pre-existing pipeline.¹⁸⁹ Second, Sunoco repurposed the pre-existing pipeline to move product from west to east.¹⁹⁰ This required installing eighteen new pump stations and seventeen new valve control stations located throughout thirty-one municipalities.¹⁹¹

Sunoco petitioned the PUC to designate Mariner East as a public utility.¹⁹² The rationale is seemingly obvious. Mariner East spanned dozens of municipalities, each with varied zoning laws.¹⁹³ Despite local pushback the PUC granted Sunoco's petition, reasoning that the pipeline served the public interest.¹⁹⁴ As such, local ordinances could not constrain Sunoco's ability to install its Mariner East pipelines.¹⁹⁵

185. See Amended Petition, *supra* note 5, at 3.

186. *Id.*

187. *Id.* at 6, 12.

188. *Id.* at 3.

189. *Id.* at 7.

190. *Id.*

191. *Id.* at 6.

192. *Id.* at 6-7.

193. See *id.*

194. The PUC provided two reasons in extending public utility status to Mariner East. First, the pipelines provided better natural gas and NGL transport options in the Commonwealth. Second, the pipelines would increase product volume, and assist in raising supply to meet an overwhelming market demand. Joint Motion of Vice Chairman John F. Coleman, Jr. and Comm'r Pamela A. Whitman, Pub. Meeting (October 2, 2014), http://www.puc.pa.gov/general/pdf/Comm-SM/Coleman_Witmer_JTstmt_OSA2411941.pdf.

195. *Id.*

This same exemption did not necessarily extend to the facilities required to service and maintain the pipelines.¹⁹⁶ Briefly, Sunoco sought to construct or refurbish pump control and valve stations. The question remained as to whether these structures constituted “buildings” under the Public Utility Code.¹⁹⁷ If so, the zoning exemption would apply only if the PUC determined the “buildings” existed for the public’s convenience or welfare.¹⁹⁸ As expected, effected municipalities hotly contested expanding Mariner East’s already broad zoning exemption to cover these structures.¹⁹⁹

B. The State & Local Zoning Dynamic Post-Robinson Township

Mariner East’s public utility status raises a broad constitutional question: does exempting oil and gas operations from local zoning law violate the Pennsylvania Constitution? The Pennsylvania Supreme Court’s *Robinson Township* opinion arguably answered this question in the affirmative. The ensuing inquiry becomes whether the same conclusion follows when these operations don the cloak of a public utility.

1. The contours of Robinson Township

The *Robinson Township* court was most concerned with Act 13’s exhaustive rejection of local zoning power over oil and gas operations. As a normative matter, the decision arguably recognized that local municipalities must retain some regulatory oversight specific to fracking operations, so as to comport with constitutional mandates.²⁰⁰

Framing the court’s decision in this manner seems congruent with the traditional regulatory dynamic between state and local governments.²⁰¹ Typically, state legislatures can divest or preempt a local

196. See 53 PA. CONS. STAT. ANN. § 10619 (West 1989).

197. *Id.*

198. *Id.*

199. See Amended Petition, *supra* note 5, at 9–10.

200. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 979 (Pa. 2013) (“[Act 13’s] entirely new [zoning] regimen alters existing expectations of communities and property owners and substantially diminishes natural and esthetic values of the local environment . . .”).

201. A local government’s regulatory abilities are derived from affirmative grants of power from the state. See, e.g., *Hunter v. Pittsburgh*, 207 U.S. 161, 178–79 (1907) (“In all . . . respects the state is supreme, and its legislative body, conforming its actions to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.”). State supremacy over municipalities is still the formal background norms for state-local rela-

government's regulatory abilities without constitutional implication.²⁰² However, the court in *Robinson Township* seemed to make an exception to this general rule due to the pervasive and corrosive effects that fracking operations pursuant to Act 13 might have fashioned on Pennsylvania's environment.²⁰³ The court's concerns implicitly suggested that retaining local oversight of oil and gas operations, given the Commonwealth's role as trustee, was the only available constitutional option.²⁰⁴ While a state typically has final say in defining the bounds of local zoning authority, the General Assembly went too far with Act 13.²⁰⁵ *Robinson Township* should not be read as a case that redefines the regulatory dynamic between the Commonwealth and its local governments.²⁰⁶ It is much more limited.

Robinson Township recognized that the right to a clean environment was not a product of legal positivism; instead, it was an organic right vested in each of Pennsylvania's citizens.²⁰⁷ Act 13 was not unconstitutional simply because it required local governments to abandon their regulatory authority as a *general* matter. Rather, the *Robinson Township* plurality held Act 13 unconstitutional because it required local governments to surrender that authority with respect

tionships. See Erik Lange, *Local Control of Emerging Energy Source: A Due Process Challenge to Disparate Treatment By State*, 64 CASE W. RES. L. REV. 619, 636 (2013).

202. In line with this state-local zoning dynamic, any powers granted to a municipality are preempted by state powers if the state chooses to enact a law in that field. See *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 862 (Pa. 2009) (citing *United Tavern Owners of Phila. v. Phila. School Dist.*, 272 A.2d 868, 870 (Pa. 1971); see also Lange, *supra* note 201).

203. In a moment of ominous nostalgia, the plurality expressly referenced its concerns with the breadth of fracking's environmental risks:

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 trees and erected eyesores along our roads. We uglified our land and we called it progress.

Robinson Twp., 83 A.3d at 961 (quoting 1970 Pa. Legislative Journal-House at 2270).

204. Michael Sklaroff, *The New Landscape of Land-Use Litigation: Robinson Township*, in *THE SUPREME COURT'S DECISION IN ROBINSON TOWNSHIP AND THE FUTURE OF ZONING IN THE COMMONWEALTH* 13 n.27 (2014) ("In theory, therefore, any new amendment to the MPC . . . must pass constitutional muster before it may restrict municipal zoning power as it stands today.").

205. *Robinson Twp.*, 83 A.3d at 968.

206. Cf. *Robinson Twp.*, 83 A.3d at 942 ("To describe this case . . . as a zoning . . . matter would not capture the essence of the parties' fundamental dispute regarding Act 13.").

207. *Id.* at 952 (noting that an individual's constitutional right to a clean environment exists "a priori" to any statute).

to *fracking*, an environmentally corrosive activity necessitating local regulation as a constitutional matter.²⁰⁸

To characterize *Robinson Township* as a complete vindication of local regulatory authority would read too much into the court's decision. Certainly, both local governments and residents effected by oil and gas operations might try to "squeeze" this interpretation from the opinion.²⁰⁹ As noted, however, *Robinson Township* did little to affect the Commonwealth's historical ability to preempt or supersede local regulation.²¹⁰ It is important to note that the opinion, in most instances, does not constitutionally require state decision-making concerning oil and gas operations to coincide with, much less yield to, local control.²¹¹ Instead, the decision requires the state and its

208. The court consistently indicates that its distaste for Act 13 is largely owed to the activity it purports to regulate. *See id.* at 976. For instance, the court states:

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.

Id. (emphasis added).

209. Indeed, attorneys attempt to fashion *Robinson Township* in this overly broad manner, construing the plurality's decision as one that invalidates the traditional state-local zoning dynamic. *See, e.g., Petition of Sunoco Pipeline L.P. for a Finding That the Situation of Structures to Shelter Pump Stations and Valve Control Stations is Reasonably Necessary for the Convenience and Welfare of the Public*, Preliminary Objections of Mountain Watershed Association Pursuant to Sunoco Pipeline L.P.'s Amended Petitions at 24–25 (Pa. P.U.C. June 5, 2014) (Docket No. P-2014-2411941), available at <http://www.puc.pa.gov/pdocs/1290764.pdf> [hereinafter *Preliminary Objections*]. The argument, simply put, is that oil and gas operations may never be exempted from local zoning laws without violating Pennsylvania's Constitution. *Id.* at 24 ("Even if the [PUC] finds that Sunoco is a public utility corporation . . . exempting it from local zoning ordinances contradicts the Pennsylvania Supreme Court's ruling in *Robinson Township* . . . and, more specifically, violates Article I Section 27 of the Pennsylvania Constitution."). Some scholars actually advocate for this regulatory dynamic, and regard local authority immune from state circumscription as an ideal regulatory approach. *See Lange, supra* note 201, at 636–37 ("The original form of home rule amendment treated the . . . municipality as an *imperium in imperio*, a state within a state, possessed of the full police power with respect to municipal affairs and also enjoying . . . immunity from state . . . interference.") (quoting Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990)).

210. Indeed, the Plurality's opinion should be narrowly construed as an interpretation of the Environmental Rights Amendment. To some extent, *Robinson Township* does alter the traditional state-local zoning dynamic; but, only in those instances where state legislation impacts the Commonwealth's environmental corpus. *Cf. Robinson Twp.*, 83 A.3d at 981 ("In our view, the framers and ratifiers of the Environmental Rights Amendment intended the constitutional provision as a bulwark against enactments, like Act 13, which permit development with such an immediate, disruptive effect upon how Pennsylvanians live their lives."); *see also Sklaroff, supra* note 204.

211. Sklaroff, *supra* note 204, at 11.

municipalities to exercise their authority in a manner consistent with their role as environmental trustees.²¹²

2. *The Problems with Local Regulation*

Act 13 aside, state action that effectively supplants local regulation will usually comport with the Commonwealth's duties as trustee.²¹³ Regulation at the state level is often regarded as superior to local regulation because it is more informed and comprehensive.²¹⁴ Moreover, it sidesteps one of the most prevalent shortcomings associated with local regulation, since it is not subject to the proclivities of an insular, biased community.²¹⁵ Local governments often bow to their constituency by "zoning out" proposed industrial or commercial development projects that might adversely affect nearby scenery and property values — such projects are zoned out, even though they would have produced a net benefit for the extended community and beyond.²¹⁶ Often, residential homeowners spur this result through political participation in Not In My Back Yard ("NIMBY") groups.²¹⁷ The downside of this outcome, of course, is that the concerns of a regimented minority may impede sustainable, worthwhile development.²¹⁸

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

213. *Berner v. Montour Twp.*, 2015 WL 4130473, *6 (Pa. Cmmw. Ct. 2015) ("If the [Commonwealth] has preempted a field, [it] has retained all regulatory and legislative power for itself and no local legislation in that area is permitted.") (citing *Hoffman Mining Co. v. Cambria Cty.*, 32 A.3d 587, 593–94 (Pa. 2011)).

214. See Clair E. Wischusen, *Who's Regulating the Regulators?*, 27 TEMP. J. OF SCI. TECH. & ENVTL. L. 315, 333 (2008) ("States are . . . better positioned to undertake natural resource regulation because state environmental agencies have greater access to reliable scientific information about the effects of land use on the environment."). But see David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 463 (2013) (noting that state regulation might initiate a "so-called 'race to the bottom' . . . [where] states may under regulate because they must compete with one another for jobs and economic development by reducing environmental or other regulatory requirements.").

215. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 872–73 ("The local forum is necessarily a much smaller unit in which a single issue can split the entire jurisdiction . . . [T]he [local] regulatory process may be a device for one group to dominate another and to bend decisions to its benefit.").

216. See, e.g., Spence, *supra* note 214, at 481 ("When fracking meets political resistance, elected local government leaders may respond with ordinances banning or restricting fracking.").

217. *Id.*

218. See, e.g., *Barnstable v. Cape Wind Assocs., LLC*, 27 Mass. L. Rptr. 111 (Mass. Dist. Ct. Apr. 27, 2010) (where a group of opposed locals substantially delayed a renewable energy company's proposed wind farm project on Nantucket Sound, despite reported local support of about 80%).

Even in the wake of *Robinson Township*, the argument exists that fracking activity should sometimes be exempt from local zoning law. This argument is especially true when it comes to regulating infrastructure development. As noted, the installation of pipelines and their attendant facilities could have a profoundly positive impact on the Commonwealth's economy.²¹⁹ Regardless, local NIMBY interests have stymied infrastructure development.²²⁰ Such localized opposition would have presented little more than a nuisance under Act 13's *carte blanche* zoning exemptions. However, this is no longer the case given the Commonwealth's environmental trustee duties as defined by the *Robinson Township* plurality. The question, then, is whether fracking operations may still be exempted from local zoning laws — in contravention of local interests — while still adhering to the Environmental Rights Act of the Pennsylvania Constitution.

C. Public Utility Zoning Exemptions

1. Act 13 or public utilities: a question of scale?

At first blush, Mariner East's zoning exemptions seem irreconcilable with the *Robinson Township* decision. On one hand, a plurality of justices held Act 13's zoning exemptions and uniformity requirements unconstitutional because they imposed disparate burdens on its citizenry, obstructed the corpus of Pennsylvania's environmental trust, and, by extension, obstructed the citizenry's interest in the corpus as trust beneficiaries.²²¹ On the other hand, the PUC exempts similar activity from local zoning for the convenience and welfare of the public.²²² The result is paradoxical: how can exemption from a local zoning ordinance be in the convenience and welfare of the public, while at the same time violate the citizenry's beneficiary interests? Absent resolution, an argument exists that zoning exemptions extended to oil and gas public utilities operate to bypass the *Robinson Township* decision, thus violating the Pennsylvania Constitution's Environmental Rights Amendment.²²³

219. See Kerkstra, *supra* note 10.

220. See *Preliminary Objections*, *supra* note 209.

221. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 974 (Pa. 2013).

222. 53 PA. CONS. STAT. ANN. § 10619 (West 1988).

223. Environmental advocates and residents raise this exact argument in contesting industry petitions for public utility status. See, e.g., *Preliminary Objections*, *supra* note 209, at ¶ 41 (“[Exempting Mariner East] from local zoning ordinances contradicts the Pennsylvania Supreme Court’s ruling in *Robinson Township* . . . and, more specifically, violates Article I Section 27 of the Pennsylvania Constitution.”).

As a threshold matter, one might argue that the environmental risks associated with public utility zoning exemptions, particularly as applied to pipelines and their attendant facilities, are not commensurate with those posed by Act 13. Administrative zoning exemptions, as a matter of scale, do not sweep as broadly as Act 13's statewide preemption and uniformity requirements.²²⁴ Instead, as with Mariner East, the PUC designates public utilities on a limited, case-by-case basis.²²⁵ Act 13, however, permitted fracking operations "as a use 'of right' in every zoning district throughout the Commonwealth"²²⁶ The PUC's limited, administrative grants of zoning exceptions arguably do not corrode the environmental corpus preserved under Pennsylvania's Constitution to the same extent as Act 13.²²⁷ This argument, however, fails to recognize the scope of the plurality's *Robinson Township* holding.

The Commonwealth's environmental trust has two primary beneficiaries: present and future Pennsylvanians.²²⁸ While limited zoning exemptions extended to public utilities may not significantly degrade the trust corpus for future beneficiaries, they do impose a burden on certain current beneficiaries.²²⁹ The *Robinson Township*

224. The PUC already has a paradigmatic model at its disposal in which to grant such limited zoning exemptions. See Alan M. Seltzer & John F. Povilaitis, *With Pipeline Taskforce – A Pa. Solution to a Pa. Problem*, PENNLIVE (June 24, 2015, 2:00 PM), http://www.pennlive.com/opinion/2015/06/with_pipeline_task_force_-_a_p.html#incart_river. For instance, the siting of intrastate transmission lines requires public utilities to "study a line route, evaluate alternatives and analyze the proposed transmission line route for . . . all land use, natural resource and environmental criteria before the PUC takes action on the siting application." *Id.* (emphasis in original).

225. Section 69.1401(c) of the Pennsylvania Public Utility Code necessitates this individualized, fact-based analysis. See 52 PA. CODE § 69.1401(c) (2007). The three specific factors that the PUC considers prior to designating a corporation as a public utility are enumerated therein. See *id.* First, whether the service provided is "merely incidental to nonutility business with the customers which creates a nexus between the provider and customer." *Id.* Second, whether the "facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project." *Id.* Third, whether the "service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service" *Id.*

226. See, e.g., *Robinson Twp.*, 83 A.3d at 979 (emphasis in original).

227. See *id.* at 951–52, 956–57, 977–78.

228. See *id.* at 963 ("[T]he Environmental Rights Amendment . . . permit[s] not only reactive but also anticipatory protection of the environment for . . . current and future generations.") (emphasis added).

229. *Id.* at 980 ("A . . . difficulty arising from Section 3304's requirement that local government permit industrial uses in all zoning districts is that some properties and communities will carry much heavier environmental and habitability burdens than others.").

plurality explicitly denounced this result as unconstitutional.²³⁰ The Environmental Rights Amendment requires the government to act as trustee for the benefit of *all* citizens.²³¹ State and local governments may run afoul of this duty by disproportionately allocating environmental risks to their citizens.²³² Indeed, such zoning exemptions impose disparate burdens on certain citizens, whether promulgated via legislation or administratively.²³³

The constitutional question posed by this disparate allocation is one of degree. It is a basic land use tenet that some individuals must endure the adverse externalities of a particular activity for the greater good.²³⁴ As *Robinson Township* recognized, however, there are constitutional limits to what these beneficiaries must bear. In the wake of that decision, the Commonwealth's environmental trustee duties might seem inapposite to its economic interests in promoting and facilitating oil and gas development.²³⁵ These interests, though, are by no means mutually exclusive. True, Act 13 promoted developmental interests in violation of the state's trustee duties.²³⁶ However, permitting limited and reasoned zoning exceptions in an effort to develop Pennsylvania's latent fracking infrastructure may strike the ever-elusive balance between fracking's competing environmental and economic interests.

2. *The Environmental Rights Amendment & Public Utility Zoning Exemptions: A Mutualistic Relationship*

The development of Pennsylvania's fracking infrastructure indeed poses environmental and safety risks. Its economic potential, however, is undeniable. Emerging anti-fracking discourse, including *Robinson Township*, hinders the infrastructure's cause.²³⁷ After dispel-

230. *Id.* at 1007-08.

231. PA. CONST. art. I, § 27.

232. *Robinson Twp.*, 83 A.3d at 980.

233. *Id.*

234. *Id.*, 83 A.3d at 980 (“[W]e do not quarrel with the fact that competing constitutional commands may exist, that sustainable development may require some degradation of the corpus of the trust, and the distribution of valuable resources may mean that reasonable distinctions are appropriate.”).

235. *See supra* Part II.A.

236. *Robinson Twp.*, 83 A.3d at 980.

237. *See* David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 357 (2014) (“[F]racking has generated intense opposition from local communities [T]he anti-fracking bandwagon seems to be gathering even more steam.”); *see also* PA. CONST. art. I, § 27 (“As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”).

ling the hyperbole and rhetoric, however, a regulatory middle ground exists where competing factions can meet. As it so happens, the Commonwealth might have accidentally stumbled right onto it.

a. Public utility zoning exemptions: constitutionally sound

Through the lens of *Robinson Township*, exempting designated public utilities from local zoning may be the ideal manner to utilize Marcellus resources and develop Pennsylvania's latent fracking infrastructure. True, the plurality lectured the Commonwealth on its duties as environmental trustee, and the consequent limitations such duties imposed on its legislative authority.²³⁸ In the same breath, though, the court acknowledged that the pursuit of reasoned, careful development is also subsumed within these duties:

[T]he trust's express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather . . . the duties to conserve and maintain are tempered by *legitimate development* tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development.²³⁹

Thus, this analysis begins by acknowledging the obvious: the development of Marcellus resources and infrastructure does not necessarily violate the Environmental Rights Amendment.²⁴⁰ Building upon this premise, it is also true that the state government may permit the development of fracking infrastructure in contravention of local zoning law under Pennsylvania's constitution.²⁴¹ The fact that localities maintain only derivative, rather than inherent, zoning authority may become lost in translation when reading the voluminous *Robinson Township* decision.²⁴² As previously discussed, how-

238. *Robinson Twp.*, 83 A.3d at 953 (“[W]hen government acts, the action must, on balance, reasonably account for the environmental features of the affected locale . . . if it is to pass constitutional muster.”).

239. *Id.* at 958 (emphasis added); see also Jordan B. Yeager & Lauren M. Williams, *Guidance for Municipalities Following the PA Supreme Court's Decision in Robinson Township*, in THE SUPREME COURT'S DECISION IN ROBINSON TOWNSHIP AND THE FUTURE OF ZONING IN THE COMMONWEALTH 25 (2014) (discussing how a “government entity must evaluate in advance of acting whether a proposed course of action would unreasonably cause actual or likely degradation of the environment . . .”).

240. See *Robinson Twp.*, 83 A.3d at 958.

241. See *id.* at 957 (discussing the Commonwealth's duty to prevent and remedy the degradation of public natural resources).

242. See *id.* at 1012 (Saylor, J., dissenting) (“ . . . the authority and responsibilities of municipalities are derivative.”).

ever, the plurality's decision in *Robinson Township* did not obliterate the state-local regulatory dynamic under the MPC.²⁴³ Indeed, local governments within Pennsylvania still very much exist as agents or instrumentalities of the state.²⁴⁴ This dynamic prompts two salient points: first, the Commonwealth may still compel infrastructure development irrespective of local opposition; second, this unilateral action is not, by itself, incongruent with the Commonwealth's duties as environmental trustee. Instead, such action will be deemed unconstitutional only when it operates to degrade the corpus of Pennsylvania's environmental trust, or if it disparately imposes adverse environmental burdens upon its citizens.²⁴⁵

Act 13's preemption and uniformity provisions did both. First, Section 3303's preemption mandates "fundamentally disrupted" the expectations of "citizens buying homes and raising families in areas zoned residential" with respect to their communities' current and prolonged environmental welfare.²⁴⁶ Second, Section 3304's uniformity provision both degraded the trust's environmental corpus while inequitably allocating these effects amongst Pennsylvanians.²⁴⁷

Local zoning exemptions, made pursuant to Pennsylvania's Public Utility Code, do not operate in the same unconstitutional manner. For instance, exempting public utility projects like pipelines from local zoning law does not "fundamentally disrupt" a homebuyer's expectations regarding the environmental well-being of his or her community. Act 13, however, created such a disruption given the latitude it afforded to the fracking industry in conducting operations, regardless of local zoning law.²⁴⁸ Under Act 13, the *Robinson Township* plurality seemed to envision a pervasion of no-holds-barred fracking activity throughout the Commonwealth, which in turn would corrode the environmental corpus, leaving local governments who had enacted zoning to avoid such an outcome without any avenues of recourse.²⁴⁹

243. See *supra* Part IV(B)(1).

244. See *Commonwealth v. Ogontz Area Neighbors Ass'n.*, 438 A.2d 448, 451 (Pa. 1984).

245. *Robinson Twp.*, 83 A.3d at 957.

246. *Id.* at 978.

247. *Id.* at 980.

248. *Id.* at 977-78.

249. For instance, the *Robinson Township* plurality analogized Pennsylvania's developing fracking industry with the early coal industry, which "operated 'virtually unrestricted'" at the state or federal level for some time. *Id.* at 961. This, of course, resulted in a myriad of long-lasting health and environmental problems. *Id.*

While public utility zoning exemptions might “disrupt” a homebuyer’s environmental expectations, the disruption cannot reasonably be viewed as “fundamental.”²⁵⁰ Pipeline installation no longer enjoys the universal zoning exemptions provided under Act 13.²⁵¹ Instead, a pipeline must first qualify as a public utility before it is entitled to zoning exemptions.²⁵² The PUC extends public utility status on a case-by-case basis, and only after conducting a fact-intensive inquiry.²⁵³ With such procedural mechanisms in place, exempting public utilities from local zoning does not lead to the same pervasive fracking activity that seemingly doomed Section 3303’s preemption mandates. Instead, it falls in line with the type of sustainable, tempered development acknowledged as constitutional by the *Robinson Township* plurality.²⁵⁴ Additionally, this sustainable development does not degrade the trust’s environmental corpus in the same manner as Act 13.

Lastly, the inordinate burdens that public utility zoning exemptions might impose on individual landowners is a nuisance they unfortunately must bear. The Environmental Rights Amendment does not mandate a synchronous distribution of adverse environmental burdens upon all of Pennsylvania’s citizens.²⁵⁵ Unlike Act 13’s “blunt approach,”²⁵⁶ which required landowners in heavily fracked communities to simply “deal with it” for the benefit of the whole, permitting exemptions on a case-by-case basis is a much more tempered, tailored, and reasoned approach.²⁵⁷ Landowners would be wrong to invoke their rights as beneficiaries of the environmental trust whenever a pipeline or other fracking operation were to bisect their property.²⁵⁸ The *Robinson Township* decision acknowledged that, to a certain extent, noting landowners bearing these externalities was sometimes necessary:

We do not quarrel with the fact that competing constitu-

250. *Cf. id.* at 978.

251. *See id.*

252. *Cf.* Robert J. Burnett & William Blakemore, *A Possible Blueprint for Landowners Challenging Pipeline Companies*, THE LEGAL INTELLIGENCER (June 16, 2015), <http://www.thelegalintelligencer.com/id=1202729163749/A-Possible-Blueprint-for-Landowners-Challenging-Pipeline-Companies?slreturn=20150729144145> (“The Classification of pipeline operators is of great significance . . . [P]ublic utility status may allow the operator to seek exemptions from local zoning ordinances.”).

253. *See* 52 PA. CODE § 69.1401(c) (2007).

254. *Robinson Twp.*, 83 A.3d at 980.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

tional commands may exist, that sustainable development may require some degradation of the corpus of the trust, and that the distributions of valuable resources may mean that reasonable distinctions are appropriate.²⁵⁹

Thus, the government may sometimes impose inordinate burdens in a manner consistent with its duties as environmental trustee.

b. Public utility zoning exemptions: economically necessary

The preceding section explained why public utility zoning exemptions are permissible under the Pennsylvania Constitution. This naturally transitions into a discussion about why such exemptions are necessary, or at the very least, desirable. The *Robinson Township* plurality expressly noted that development promoting the economic well-being of the citizenry constituted a legitimate state interest.²⁶⁰ In this vein, exempting public utilities from local zoning achieves this interest in a manner that is constitutionally sound.

As a preliminary matter, an adequate pipeline infrastructure would profoundly enrich Pennsylvania's economy.²⁶¹ For instance, the Mariner East Pipeline is readily poised to move the spoils of the Marcellus gas fields into the core of Philadelphia.²⁶² In turn, the increased volume of shale justifies the construction of processing facilities along the Schuylkill and Delaware Rivers.²⁶³ Lower energy costs resulting from increased gas supply will attract new factories, and new jobs.²⁶⁴ The potential is there, but is contingent upon the existence of an adequate infrastructure.²⁶⁵

Public utility zoning exemptions can achieve this end. First, a pipeline designated as a public utility does not have to navigate a maze of local regulations before commencing installation.²⁶⁶ This allows constitutionally sustainable development to occur in a timely manner. To a certain degree, this exemption is reminiscent of Act 13's objective in achieving zoning uniformity.²⁶⁷ Second, exempting

259. *Id.*

260. *Id.* at 954.

261. *See* Kerkstra, *supra* note 10.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *See* *Chester v. Phila. Elec. Co.*, 218 A.2d 331, 333 (Pa. 1966) (noting that public utility zoning exemptions ensures public utilities can operate pursuant to a uniform regulatory landscape).

267. *Cf.* 58 PA. CONS. STAT. § 3303 (2012).

public utilities from local zoning facilitates sustainable infrastructure development even in the face of local NIMBY opposition. This ensures that Pennsylvanians will be able to realize the economic benefits flowing from the Marcellus Shale, without infrastructure development being impeded by the proclivities of an insular, biased community.

CONCLUSION

Pennsylvania sits atop one of the largest oil and natural gas deposits in the United States. The Marcellus Shale formation, underlying much of the Commonwealth, is estimated to contain enough gas to meet domestic demand and enable the nation to become a net energy exporter by 2020. While the supply exists, Pennsylvania lacks the infrastructure necessary to bring the product to market.

The lack of infrastructure is partially attributable to Pennsylvania's continually changing regulatory landscape. In 2012, Pennsylvania's General Assembly enacted Act 13. The law, in large part, circumscribed local ability to regulate the activity of oil and natural gas operations within certain communities. In a practical sense, Act 13 allowed carte blanche oil and natural gas extraction in all zoning districts throughout the Commonwealth. Soon after its enactment, however, the Pennsylvania Supreme Court found Act 13 unconstitutional on a novel ground. In *Robinson Township*, the court recognized that Pennsylvania's Constitution endows all levels of government with the duty to act as trustee for the state's environmental corpus. Act 13's broad proscription of local zoning mandates violated this duty, and was therefore invalidated.

The industry responded by seeking and receiving zoning exemptions as public utilities. While the argument can be made that such designations simply operate as a work-around the court's decision in *Robinson Township*, a more careful analysis suggests that this default approach is the ideal outcome. An administrative approach to zoning exemptions, rather than the legislative "free ticket" provided by Act 13, appropriately balances the Commonwealth's duty as trustee with its interests in developing the Marcellus Shale.