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Lawrence Friedman

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Testing the Limits: Judicial Enforcement of Positive State Constitutional Rights

*Lawrence Friedman**

Negative rights—limitations on government action—preoccupy discourse about individual rights in American constitutional law. In no small part this is because the U.S. Constitution concerns itself only with these rights; the First Amendment, for example, protects us from certain kinds of government interference with speech or religious freedom. But once we expand our focus beyond the federal constitution, we see, as the political scientist Emily Zackin has explained, that the American state constitutional tradition contains within it a distinct commitment to numerous positive rights—to various means by which citizens may seek protection “from threats that are not solely from the state itself.”¹

Zackin’s book, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights*, explores the positive rights tradition in state constitutional law in three areas: public education, labor relations, and environmental protection.² The state constitutional provisions concerning environmental protection are illustrative. These provisions come in many flavors. The Illinois Constitution protects the right of each citizen “to a healthful environment,”³ while the New Mexico Constitution directs the state legislature to “provide for control of pollution and control of despoilment of the air, water and other natural resources.”⁴ As Zackin observes, their framers designed these provisions not to limit government or prevent tyranny, “but to mandate more active government involvement in order to protect people from life in a despoiled environment and from those who would despoil it.”⁵

* Professor of Law, New England Law | Boston. I prepared this essay at the invitation of the editors of the *Duquesne Law Review* for its issue dedicated to current topics in state constitutional law. Thanks to Jordy Singer and Bob Williams for comments and suggestions, and to my research assistant, Sara Conway, for all of her hard work.

1. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 40 (Princeton Univ. Press 2013).

2. *See id.* at 16–17.

3. ILL. CONST. art. XI, § 2.

4. N.M. CONST. art. XX, § 21.

5. ZACKIN, *supra* note 1, at 170.

In this essay I recount the story of one such protection: article I, section 27—the Pennsylvania Constitution’s Environmental Rights Amendment (the “ERA”)—which 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.⁶

Though the goals of environmental protection might have been clear to the framers of the ERA—“an amendment that would give the natural environment the same kind of constitutional protection as had been given to political rights”⁷—the courts of the Commonwealth over several decades did not define a clear path for judicial implementation of the provision.⁸ But the story does not end there: in a 2013 decision, *Robinson Township v. Commonwealth*, a plurality of the Pennsylvania Supreme Court, led by Chief Justice Ronald Castille, articulated a new approach to judicial enforcement of the ERA—an approach that, despite the questions it raises, may yet serve as a model for state courts seeking to make sense of similar positive rights provisions.

This essay proceeds as follows. First, I briefly summarize the prior stance of the Pennsylvania courts toward enforcement of the ERA, and discuss some of the reasons why state courts might back away from vigorous enforcement of positive rights provisions. Next, I review the plurality opinion in *Robinson Township* and the approach to the ERA that it articulates. Finally, I venture some preliminary thoughts on the plurality’s approach and the questions it raises about judicial implementation of state constitutional positive rights provisions.

I

The people of Pennsylvania ratified the ERA in 1971.⁹ The relatively few cases in which the ERA had been a subject of litigation

6. PA. CONST. art. I, § 27.

7. *Robinson Twp., Wash. Cnty. v. Commonwealth*, 83 A.3d 901, 962 n.50 (Pa. 2013).

8. See John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 724–25 (1999) (discussing diminished role of ERA).

9. *Robinson Twp.*, 83 A.3d at 962.

over the next four decades typically fell into one of two categories, either “challenges to specific private or governmental development projects, which implicated alleged violations of constitutional environmental rights,” or “challenges to local or state-wide environmental quality laws, which implicated alleged violations of constitutional property rights.”¹⁰ In the former category, the courts cohered around an analytical approach to the ERA that “tended to define the broad constitutional rights [it contains] in terms of compliance with various statutes and, as a result, to minimize [its] constitutional import.”¹¹ Indeed, the *Robinson Township* plurality observed that, for the lower courts, “the viability of constitutional claims premised upon the Environmental Rights Amendment was limited by whether the General Assembly had acted and by the General Assembly’s policy choices, rather than by the plain language of the amendment.”¹² Judicial enforcement of the ERA, on this understanding, was effectively “contingent upon and constrained by legislative action.”¹³

The *Robinson Township* plurality accordingly concluded that, contrary to the expectations of the ERA’s framers, “the provision has not yet led to the development of an environmental rights jurisprudence comparable to the tradition of political rights jurisprudence.”¹⁴ Zackin reaches a similar conclusion in *Looking for Rights in All the Wrong Places* regarding like provisions in other state constitutions, noting that state courts “have not used the environmental rights in state constitutions to support the aims of the environmental movement or fulfill the hopes of their advocates.”¹⁵

Lack of judicial enforcement of positive rights in state constitutions isn’t uncommon. Though the meaning of positive rights provisions might emerge with some clarity from litigation about the provision in question, judicial acknowledgement that, say, a provision concerning protection of the environment mandates action by the government, does not necessarily lead the court to order the legislature to take that action.¹⁶ Compelling the political branches to

10. *Id.* at 964.

11. *Id.*

12. *Id.* at 966.

13. *Id.* at 967.

14. *Id.* at 969.

15. ZACKIN, *supra* note 1, at 191.

16. Lawrence Friedman, *Rights in Front of Our Eyes: Positive Rights and the American Constitutional Tradition*, 44 RUTGERS L.J. 609, 615 (2014) (reviewing EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS*); see also Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 864 (2008) (noting that “positive rights enforcement requires a

act entails real risks for a court: the legislature or the governor could simply ignore the court's decision,¹⁷ or even seek to punish the court, either through the state's budget or by altering the process by which judges are selected.¹⁸ Any of these outcomes potentially could undermine either the legitimacy of the courts or their ability to administer justice. As a result, enforcement efforts may be tepid, or courts may, upon further reflection, pull back from enforcement efforts that were once more robust.¹⁹ Absent some enforcement mechanism, commitments to positive rights, such as environmental protection, will understandably appear hollow.²⁰

In light of the potential hazards associated with judicial enforcement of positive rights, litigants seeking to vindicate these rights need to chart a new way forward, one that envisions some kind of judicial enforcement of these obligations and that blunts the potential risks to the judiciary's legitimacy or its ability to function optimally. The approach endorsed by Chief Justice Castille's plurality opinion in *Robinson Township* suggests just such a path. Under this approach, the Pennsylvania courts may yet play a role in enforcing the Commonwealth's constitutional obligation to protect the environment. Let's turn now to the *Robinson Township* plurality.

II

In February 2012, Pennsylvania Governor Thomas W. Corbett signed Act 13 into law.²¹ The law declared statewide limitations on oil and gas development and set distance restrictions on well permitting.²² One section granted the Department of Environmental Protection authority to waive setback restrictions regarding the construction of wells near water, while another effectively eliminated any municipal right to appeal or seek any other review of

court to obligate the legislature to act, thus entering into the arena traditionally reserved for the political branches").

17. See Mark C. Miller, *Conflicts Between the Massachusetts Supreme Judicial Court and the Legislature: Campaign Finance Reform and Same-Sex Marriage*, 4 PIERCE L. REV. 279, 291 (2006) (discussing failure of Massachusetts legislature to honor its constitutional obligations to either fund or repeal clean elections law).

18. See Friedman, *supra* note, 16, at 616.

19. See, e.g., *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1155–56 (Mass. 2005) (Marshall, J., concurring) (retreating from earlier position regarding judicial enforcement of obligations created by positive right to public education).

20. See Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 36 (2006).

21. Act No. 13 of Feb. 14, 2012, P.L. 87, *eff.* immediately (in part) and Apr. 16, 2012 (in part), 58 Pa.C.S. §§ 2301–3504 (amending the Pennsylvania Oil and Gas Act); see also *Robinson Twp., Wash. Cnty. v. Commonwealth*, 83 A.3d 901, 915 (Pa. 2013).

22. See 58 PA. CONS. STAT. §§ 3201–3274 (2012).

the department's decision on a well permit.²³ The law required statewide uniformity in zoning ordinances regarding the development of oil and gas resources.²⁴ It prohibited local regulation of oil and gas operations, and announced that environmental acts regulating oil and gas operation occupy the entire field of regulation.²⁵ Finally, the law mandated uniform zoning ordinances, prohibited municipalities from imposing conditions on oil and gas operations, and allowed such operations in residential districts.²⁶

In March 2012, several Pennsylvania municipalities, two residents and elected officials, the Delaware Riverkeeper Network, and a Pennsylvania physician (collectively, the "plaintiffs") challenged Act 13 in the Commonwealth Court, arguing that the law violated article I, sections 1, 10, and 27 of the Pennsylvania Constitution, as well as article III, sections 3 and 32.²⁷ The plaintiffs also maintained that Act 13 was unconstitutionally vague and a violation of both the separation of powers and the Due Process Clause of the U.S. Constitution.²⁸ The Office of the Pennsylvania Attorney General, the Public Utility Commission, and the Department of Environmental Protection (together, the "defendants") objected and the parties filed cross-applications for summary relief.²⁹ In July 2012, an en banc panel of the Commonwealth Court held certain of Act 13's provisions unconstitutional and enjoined their enforcement.³⁰

The parties cross-appealed to the Supreme Court of Pennsylvania.³¹ A four-Justice majority declared several provisions of Act 13 unconstitutional, though the majority did not agree on a single rationale.³² Chief Justice Castille's plurality opinion concluded that

23. *See id.* §§ 3215(b)(4), (d).

24. *See id.* §§ 3301–3309.

25. *See id.* § 3303.

26. *See id.*

27. *Robinson Twp., Wash. Cnty. v. Commonwealth*, 83 A.3d 901, 915–16 (Pa. 2013); PA. CONST. art. I, § 1 (inherent rights of mankind); PA. CONST. art. I, § 10 (eminent domain); PA. CONST. art. I, § 27 (preservation of natural resources and the public estate); PA. CONST. art. III, § 3 (single subject bills); PA. CONST. art. III, § 32 (special laws).

28. *Robinson Twp.*, 83 A.3d at 916; U.S. CONST. amend. XIV, § 1.

29. *Robinson Twp.*, 83 A.3d at 916. The court sustained defendants' objections to eight counts of plaintiffs' petition and overruled objections to four counts, granting summary relief in favor of plaintiff on those four counts and denying defendants summary relief altogether. *Id.*

30. *Id.*

31. *Id.* at 913.

32. Chief Justice Castille, joined by Justice Todd, and Justice McCaffery concluded the law violated the ERA. *Id.* Justice Bear concurred, but would have resolved the case on substantive due process grounds. *Id.* at 1000–14. Justices Saylor and Eakin dissented. *Id.* at 1014–16. Former Justice Orié Melvin took no part in the decision. *Id.* at 1000.

several core provisions of Act 13 violated the Commonwealth's obligations under ERA.³³

On appeal, the defendants argued that the lower court had violated the separation of powers by "interfere[ing] with the exercise of the General Assembly's constitutional police powers" by second-guessing legislative choices and inserting its own "policy judgments and preferences," when it should have refrained from acting at all.³⁴ The defendants maintained that the General Assembly had the authority to retract local governments' ability to regulate oil and gas operations, and that merely by reaching the merits, the court had encroached upon an area reserved exclusively to legislative discretion.³⁵ Further, the defendants argued that, because the constitution failed to articulate any manageable standards that would allow a court "reasonably assess the merits of the General Assembly's policy choices," the court must refrain from deciding the case.³⁶

The plaintiffs, on the other hand, framed the case as simply an ordinary challenge to the constitutionality of a statute, a proper subject for judicial review.³⁷ According to the plaintiffs, the political question doctrine prevents a court from reaching the merits only when the matter in question is textually committed to a co-equal branch of government and doesn't involve a separation of powers claim.³⁸ The General Assembly could not "instruct" courts on the constitutionality of its actions, or draw a line beyond which the court couldn't reach.³⁹

33. PA. CONST. art. I, § 27. As an initial matter, the Chief Justice addressed standing. The court below had concluded that a majority of the plaintiffs had standing and presented a justiciable question. *Robinson Twp.*, 83 A.3d at 926. All four members of the majority in the Supreme Court agreed. Plaintiffs Brian Coppola and David Ball had standing in their individual capacities as landowners and residents whose property values were negatively affected, because they lived in a residential district that was, for the first time, subject to oil and gas operations under Act 13. *Id.* at 918. The municipalities had standing because each had a direct, immediate and substantial interest in protecting the environment and quality of life within its borders. *Id.* at 919–20. The Delaware Riverkeeper Network had standing as an association under Pennsylvania law because its individual members suffered threatened injury as residents and property owners in zoning districts that would likely host active natural gas operations under the Act 13 regime. *Id.* at 922. Finally, Dr. Mehernosh Khan, M.D., had standing because Act 13's restrictions on obtaining and sharing with other physicians information about the chemicals used in drilling put him in the untenable position of having to choose between following the mandatory provisions of the Act or his ethical obligations. *Id.* at 924.

34. *Robinson Twp.*, 83 A.3d at 925.

35. *Id.*

36. *Id.* at 926.

37. *Id.*

38. *See id.*; *see also id.* at 928 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

39. *Id.*

The plurality agreed that adopting the defendants' approach would mean the General Assembly could effectively prevent the review of any constitutional challenge to its actions by simply defending it as an exercise of its police power.⁴⁰ Chief Justice Castille explained that the passage of laws is expressly limited by the restrictions in article III of the Constitution, as well by the rights and powers reserved to the people.⁴¹ The court has the capacity and a duty to determine whether the Constitution requires or prohibits the performance of certain acts.⁴² Further, he reasoned that the need for the court to enforce constitutional limitations is greatest when individual liberties, interests, entitlements, or fundamental rights are at stake.⁴³ Here, the plaintiffs' claims "require[d] nothing more than the exercise of powers within the courts' province: the vindication of a constitutional right."⁴⁴

The Chief Justice, writing for the plurality, next turned to the merits. The lower court had held sections 3215(b)(4) and 3304 of Act 13 unconstitutional and enjoined the enforcement of both, as well as sections 3305–3309, which enforced section 3304.⁴⁵ The court had grounded its decision in separation of powers and due process theories regarding zoning regulations and agency decision-making.⁴⁶ On appeal, Chief Justice Castille remarked that, "[t]o describe this case simply as a zoning or agency discretion matter would not capture the essence of the parties' fundamental dispute regarding Act 13."⁴⁷ Rather, he explained, because the plaintiffs alleged the law threatened to degrade air, water and the natural, scenic, and aesthetic values of the environment, the fundamental dispute involved citizens' rights to quality of life on their properties and in their hometowns.⁴⁸ In other words, the plaintiffs' interests implicated the rights and obligations contained in the ERA.

The plurality next endeavored to explain the applicable constitutional paradigm under the ERA. Article III, sections 1 through 27

40. *Id.*

41. *Id.* at 927.

42. *Id.*

43. *Id.* at 928 (internal citations omitted).

44. *Id.* at 930.

45. *Id.* Section 3215(b)(4) allows the Department of Environmental Protection to grant oil and gas well permit waivers from mandatory minimum setbacks from certain types of waters. See 58 PA. CONS. STAT. § 3215(b)(4). Section 3304 created a uniform statewide scheme of regulation of the oil and gas industry. See *id.* § 3304.

46. *Robinson Twp.*, 83 A.3d at 931. The plaintiffs claimed Act 13 violated the following principles of provisions of the Pennsylvania Constitution: article I, section 27 (ERA); article III, section 32 (Special Laws); article I, sections 1 and 10 (Takings); as well as the non-delegation, separation of powers, and vagueness doctrines. See *id.* at 930.

47. *Id.* at 942.

48. *Id.*

of the Pennsylvania Constitution grant the General Assembly broad and flexible police power, and with it, plenary authority to “enact laws for the purposes of promoting public health, safety, morals, and the general welfare.”⁴⁹ Nonetheless, the plurality noted, the power granted the General Assembly is not absolute, but limited by the constitutional commitment to protect certain fundamental rights expressly reserved to the people of the Commonwealth of Pennsylvania.⁵⁰ Further, when the state regulates or restricts individual rights under its police power, it can only do so in a reasonable and non-discriminatory manner.⁵¹

Article I of the Pennsylvania Constitution—the Declaration of Rights—creates an inviolable social contract between the government and the people of Pennsylvania.⁵² The Constitution protects rights deemed to be inherent, such as the right to own and use one’s property in any manner that does not result in harm to one’s neighbor.⁵³ Article I, section 27 simply enumerates another inherent right: the right of the people “to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”⁵⁴ Further, the Constitution makes clear that Pennsylvania’s public natural resources are the common property of all, including generations yet to come, as the Commonwealth has an obligation to “conserve and maintain” these resources “for the benefit of all the people.”⁵⁵

The plurality understood the ERA to accomplish two goals. First, it “identifies protected rights, to prevent the state from acting in certain ways,” and, second, it “establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights.”⁵⁶ The ERA accomplishes these goals through three mandates, each contained in its own clause. First, the text declares the “right” of the people to clean air, pure water, and the preservation of natural, scenic, historic and esthetic values of the environment.⁵⁷ Next, the text states that the people,

49. *Id.* at 946.

50. *Id.* at 946–47; PA. CONST. art. I, § 25 (power reserved to the people).

51. *Robinson Twp.*, 83 A.3d at 946.

52. *Id.* at 947.

53. *See id.* at 948.

54. PA. CONST. art. I, § 27.

55. *Id.*

56. *Robinson Twp.*, 83 A.3d at 950. Given the twin purposes, a legal challenge can either allege the government has infringed upon citizens’ rights, or that it has failed in its trustee obligations, or both. *Id.*

57. *Id.* at 951.

including future generations, share common ownership of the Commonwealth's natural resources.⁵⁸ Finally, the ERA establishes the Commonwealth's duties in respect to these commonly-owned public natural resources,⁵⁹ including duties that are both negative—prohibiting certain governmental action—and positive—requiring “the enactment of legislation and regulations.”⁶⁰

Turning to the first clause, the plurality explained that the right of the people “to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” limits the Commonwealth's authority to act contrary to the right; in other words, the Commonwealth may regulate the air or water, for example, but such regulation must be “subordinate to the enjoyment of the right.”⁶¹ Put differently, “the corollary to the people's [] right to an environment of quality is an obligation on the government's behalf to refrain from unduly infringing upon or violating [it], including by legislative enactment.”⁶² The clause, the plurality concluded, requires the government to consider the environmental effect of any proposed action before that action is taken.⁶³ Moreover, the courts may enforce the substantive commitments to maintain “clean air” and “pure water,” by using as a benchmark of constitutional compliance the ERA's purpose: to guard against actual or likely degradation of protected public resources.⁶⁴

The plurality viewed the ERA's second clause—stating that Pennsylvania's public natural resources are the common property of all the people, including generations yet to come—as implicating relatively broad aspects of the environment.⁶⁵ The plurality suggested the lack of further definition indicated an intention by the ERA's framers to allow for its change over time.⁶⁶ At present, the concept might include such tangibles as state-owned lands and waterways, as well as resources affecting the public interest, like ambient air, surface and ground water, and wild flora and fauna.⁶⁷

Finally, the plurality interpreted the ERA's third clause as establishing the public trust doctrine in respect to the natural resources

58. *Id.* at 954.

59. *Id.* at 955.

60. *Id.* at 955–56.

61. *Id.* at 951.

62. *Id.* at 952.

63. *Id.* State and local governments are concurrently bound by this requirement, and, when faced with a meritorious challenge, the judiciary is obligated to vindicate these section 27 rights. *Id.*

64. *Id.* at 953.

65. *Id.* at 955.

66. *Id.*

67. *Id.*

named in the amendment: these resources form the corpus of the trust, with the Commonwealth as trustee and the people as beneficiaries.⁶⁸ Accordingly, the Commonwealth, including local government, has a fiduciary obligation to comply with the terms of the trust, which the ERA explicitly states requires the conservation and maintenance of the corpus through two distinct obligations.⁶⁹ First, the Commonwealth cannot perform its duties as trustee unreasonably by, for example, permitting or encouraging the degradation of the public natural resources.⁷⁰ Second, the Commonwealth must “act affirmatively to protect the environment.”⁷¹ As well, because the beneficiaries of the trust include future generations, the Commonwealth must treat all beneficiaries impartially, and it must “balance the interests of present and future beneficiaries.”⁷²

The plurality next applied its understanding to the controversy at hand. The defendants had argued the case involved an unobjectionable policy decision made pursuant to the General Assembly’s police powers as trustee, following which local government lacked the authority to articulate a different policy.⁷³ By contrast, the plaintiffs had challenged the extent to which the Commonwealth had complied with its constitutional obligations.⁷⁴ The plurality sided with the plaintiffs: though the General Assembly has the authority to alter or remove powers granted municipalities by statute,⁷⁵ it cannot abrogate constitutional commands regarding municipalities’ obligations and duties to its citizens.⁷⁶ Accordingly, the General Assembly could not command municipalities to ignore their section 27 obligations, or direct them to take affirmative actions that would undermine existing protections.

The plurality also concluded that the statutory authorization of a regulatory regime permitting industrial uses in every type of pre-existing zoning district was “incapable of conserving or maintaining the constitutionally-protected aspects of the public environment

68. *Id.* at 956.

69. *See id.* at 957.

70. *Id.*

71. *Id.* at 958.

72. *Id.* at 959. The Chief Justice then discussed other considerations of statutory construction, including its legislative history and the circumstances of its enactment and ratification, as well as the harm remedied and object attained by its existence. *See id.* at 959–63. Next, he discussed the limitations of existing jurisprudence regarding the ERA.

73. *Id.* at 974.

74. *Id.*

75. *Id.* at 977.

76. *Id.*

and of a certain quality of life.”⁷⁷ Such a regime, the plurality reasoned, would result in some properties carrying a heavier environmental burden than others.⁷⁸ As well, other provisions of Act 13 departed from the goal of sustainable development. For instance, section 3215 required the Department of Environmental Protection to waive setback requirements on certain bodies of water when a permit applicant submitted “a plan” to protect the water, and instructed the Department to articulate the terms and conditions it deemed “necessary” for such protection, but did not provide regulators any criteria by which “necessity” should be assessed.⁷⁹

Ultimately, the plurality determined the law failed to “ensure conservation of the quality and quantity of the Commonwealth’s waters and failed to treat beneficiaries equitably in light of the purposes of the trust” established by the ERA.⁸⁰ It followed that the Commonwealth had failed to discharge its constitutional duties under the ERA “as trustee of the public natural resources.”⁸¹

III

By nearly any measure, the *Robinson Township* plurality’s approach to the ERA warrants attention, not least for the confidence with which it contemplates a potentially profound judicial role in enforcing the ERA—this despite earlier jurisprudence that cast doubt on just this potential. In the earliest case concerning the ERA, *Commonwealth v. National Gettysburg Battlefield*,⁸² the Pennsylvania Supreme Court addressed an effort by the Commonwealth to block private parties from constructing an observation tower near the Gettysburg Battlefield.⁸³ No statute authorized such an effort, and the lead opinion concluded that a provision like the ERA, which sets out general principles mandating state action, ought not be deemed self-executing: unlike other provisions in the Declaration of Rights, the Justices reasoned, section 27 “does not merely contain a limitation on the powers of government,” but, rather, “expand[s] these powers” by granting the legislature the authority “to act in areas of purely aesthetic or historic concern.”⁸⁴

77. *Id.* at 980.

78. *Id.*

79. *Id.* at 982.

80. *Id.* at 984.

81. *Id.*

82. 311 A.2d 588 (Pa. 1973).

83. *See id.* at 591.

84. *Id.* at 591–92.

This view of the ERA—which governed much article 27 jurisprudence for decades, as discussed above⁸⁵—likely reflected judicial reluctance to assess the validity of challenges brought under the amendment absent the guidance of policy standards set by the General Assembly. It stands in contrast to the *Robinson Township* plurality’s approach, which embraces the idea that the judiciary has an independent constitutional obligation to implement the ERA’s provisions.⁸⁶ The distinctive feature of this approach is the way in which it treats a nominally positive obligation on the Commonwealth’s political branches—to conserve and maintain the state’s natural resources for the benefit of all the people—as a negative limitation. In other words, though the ERA fits the definition of a positive rights provision,⁸⁷ the plurality’s approach to its enforcement—at least on the facts of this case—casts the amendment’s substantive provisions as creating limits on the Commonwealth not unlike those imposed by political rights protections.

The ERA, in short, is like an electron. Recent research confirms that this elementary particle “appears to be a strange hybrid of a wave and a particle that’s neither here and there nor here or there.”⁸⁸ Whether the electron appears as a wave or as a particle seems to depend on the way in which we happen to be observing it at a particular moment—it depends, in other words, upon the *circumstances* in which it is observed.

So, too, the ERA: whether it serves to limit or to obligate state action depends upon the facts. The *Robinson Township* plurality held the disputed sections of Act 13 unconstitutional because the legislature acted without appropriate regard for the potential effects on environmental concerns.⁸⁹ For instance, as noted above,⁹⁰ the plurality concluded that the General Assembly could not command municipalities to ignore their obligations under the ERA, or direct them to take affirmative actions that would undermine existing protections—just as the legislature could not require that municipalities ignore or take actions that would undermine the state constitutional protection of, say, the freedom of expression. In this

85. See *supra* notes 10–13, 82–84 and accompanying text (discussing past jurisprudence under the ERA).

86. *Robinson Twp.*, 83 A.3d at 967 (explaining that “branches of government have independent constitutional duties pursuant to the Environmental Rights Amendment”).

87. See *supra* notes 1–5 and accompanying text (discussing positive rights provisions).

88. Edward Frenkel, *The Reality of Quantum Weirdness*, N.Y. TIMES, Feb. 20, 2015, at SR9.

89. See *Robinson Twp.*, 83 A.3d at 984 (noting “structural difficulties with a statutory scheme that fails both to ensure conservation of the quality and quantity of the Commonwealth’s waters and to treat all beneficiaries equitably in light of the purposes of the trust”).

90. See *supra* notes 75–76 and accompanying text.

sense, the ERA is functioning much like any other negative constitutional right, and its enforcement falls well within the legitimate reach of the judiciary's authority.

And yet, it can be argued that this kind of rights-enforcement really amounts to a judicial effort to *compel* state action—in this case, at a minimum, legislative consideration of the potential environmental effects of legislation.⁹¹ Of course, all components of state government have a continuing responsibility to respect the bounds imposed by the state's constitution, which means that there exists a tacit requirement that the legislature consider the effects of a particular law on the central concerns of any constitutionally-protected interest that it might implicate, whether that interest be free speech, religious freedom, or environmental protection. It just happens that the effect of legislation on the environment is more readily subject to some kind of empirical analysis.

As well, assuming the plurality's approach effectively requires the Commonwealth to consider in advance the environmental effects of particular action, that consideration can take many forms. Legislatures have many tools at their disposal with which to aid their deliberation of such matters—they may, for example, seek to “hear from any person or group that is interested in the outcome of [its] deliberations,”⁹² and from the evidence presented draw some conclusions about the likely consequences of certain legislative actions. The important question here is whether future courts facing challenges under the ERA will choose to closely supervise the legislature's fact-finding—and, if they do, whether the legislature ultimately will tolerate that kind of supervision.

This line of thought leads to a related question: assuming the legislative consideration of potential environmental impact under the ERA satisfies a reviewing court, what happens in a case in which the legislature's ultimate decision to move forward, or to allow private parties to move forward, is challenged as nonetheless violating the ERA? Here, the courts may elect to tread more softly than the *Robinson Township* plurality's approach suggests. The legitimacy of the judiciary may be threatened if it is seen as essen-

91. See *A First Take on Robinson Township v. Commonwealth*, MCGUIREWOODS LEGAL ALERT, Dec. 24, 2013, at 7 (noting that *Robinson Township* “arguably requires . . . that any executive, legislative or administrative action be *preceded* by an assessment of its likely environmental impact”) (emphasis in original).

92. Charles H. Baron, *Pleading for Physician-Assisted Suicide in the Courts*, 19 WESTERN N. ENG. L. REV. 371, 372 (1997) (discussing virtues of legislative law-making).

tially second-guessing these kinds of legislative determinations, especially after the legislature gave environmental concerns some kind of appropriate consideration.

The problem is that, notwithstanding the ERA's plain language, many observers will not see benchmarking the quality of water, air and other natural resources as a task naturally falling within the judiciary's institutional competence. Consider again the Gettysburg monument case. In a concurring opinion, Justice Roberts indicated that the problem with the Commonwealth's argument under the ERA was that it had not carried its burden to show the project in question would have harmed "the natural, historic, scenic, and aesthetic values of the Gettysburg area."⁹³ This may be the kind of review to which the *Robinson Township* plurality's approach will lead, and it's not at all clear that judges are in a position to make these assessments absent some external legislative or regulatory guidance. History is replete with instances in which a lack of institutional competence has led courts to abandon close scrutiny of the substance of lawmaking in areas involving technical, scientific, and economic considerations—in other words, those involving the kind of policy accommodations and compromises for which elected legislators rightly are accountable to their constituents.

In light of the questions it raises about the judiciary's capacity to enforce the ERA's provisions, the *Robinson Township* plurality opinion may prove an anomaly, both within and without Pennsylvania. But even if it turns out that all a court effectively can do under the ERA is determine whether the legislature appropriately considered the impact of particular public or private action on the environment, that determination in itself would represent an important step toward operationalizing the amendment. It would provide some hope, in the Commonwealth and elsewhere, that environmental and other positive rights may be seen as more than parchment promises.⁹⁴ Such determinations also may lead to greater transparency about legislation affecting the concerns of positive rights provisions—concerns like the environment, education, and labor relations—and thus spark public discourse about a legislature's policy choices. Given the breadth and potential consequences of competing policy alternatives in these and other areas touched by state constitutional positive rights provisions, renewed hope that

93. *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 596 (Pa. 1973) (Roberts, J., concurring).

94. See Dernbach, *supra* note 8 (observing that "[e]nvironmental amendments to state or national constitutions are attractive . . . only if they can be applied in a meaningful way").

legislatures will take these provisions seriously and enhanced discourse about public policy choices should not be regarded as small achievements.

