Wolf in Sheep's Clothing: Pennsylvania's Oil and Gas Lease Act and the Constitutionality of Forced Pooling, A

Russell Bopp

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A Wolf in Sheep’s Clothing: Pennsylvania’s Oil and Gas Lease Act and the Constitutionality of Forced Pooling

Russell Bopp*

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I. INTRODUCTION

The Omnibus Amendments to Pennsylvania’s Oil and Gas Lease Act¹ enjoyed an expedited path through the legislative process. The bill was passed by the Pennsylvania General Assembly on June 30, 2013,² signed by Governor Corbett on July 9, 2013,³ and

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* Mr. Bopp holds a B.A. from Grove City College and is a 2015 J.D. Candidate at Duquesne University School of Law. The author would like to thank Robert S. Barker, Distinguished Professor of Law, for his instrumental guidance.

Duquesne Law Review went into effect on September 7, 2013. Generally speaking, the bill contains two pertinent provisions: royalty payments and forced pooling. The royalty payment provision guarantees landowners a one-eighth royalty payment, and the forced pooling provision adds a default provision that permits horizontal drilling in existing landowner-operator leases. In response to the newly-passed Oil and Gas Lease Act—and a mere thirteen days after Governor Corbett signed it—EQT filed suit in the Court of Common Pleas of Allegheny County on July 22, 2013, asserting its right to engage in horizontal drilling where not expressly prohibited under existing leases.

Part II of this article explains the historical background of oil and gas development in Pennsylvania and the General Assembly's attempt to regulate the industry through the Oil and Gas Lease Act. Part III evaluates the potential constitutional challenges to the forced pooling provision of the Oil and Gas Lease Act under the Pennsylvania and United States Constitutions. Briefly stated, the forced pooling provision implicates three constitutional provisions: (1) the Contracts Clause, (2) the Due Process Clause, and (3) the Takings Clause. Although each of these challenges requires an independent inquiry, the primary basis for a finding of unconstitutionality hinges upon whether the statute applies retroactively. The principal conclusion of this article is that the retroactive application of Pennsylvania's Oil and Gas Lease Act, which adds default provisions allowing horizontal drilling to existing leases, violates the Contracts Clauses, but not the Due Process Clauses or Takings Clauses, of the Pennsylvania and United States Constitutions. Part IV explores a recent case litigating these issues in the Allegheny County Court of Common Pleas.

5. 58 PA. CONS. STAT. ANN. §§ 33.3, 34.1 (West 2013).
Pennsylvania has a decorated heritage in the oil and gas industry stretching back to the "Drake Well" drilled in Titusville in 1859.\(^8\) As the first liquid oil well in the United States, the Drake Well sparked an energy revolution in Pennsylvania and throughout the country.\(^9\) Within forty years of the Drake Well, Pennsylvania produced one-half of the world’s oil resources.\(^10\) This level of production proved unsustainable, however, and Pennsylvania’s energy industry turned its focus toward the state’s other abundant natural resources: coal and natural gas.\(^11\) Although coal established itself as the bedrock of energy production in Pennsylvania,\(^12\) the natural gas industry began to develop in 1878 with the drilling of the “Haymaker Well,” the first natural gas well in Pennsylvania.\(^13\) Over the past 135 years, the natural gas industry has grown consistently and provided significant infrastructure for economic growth in Pennsylvania.\(^14\) Despite this growth, however, Pennsylvania was unable to regain its former status as the center of energy development in the United States.\(^15\) The Marcellus Shale Formation’s unconventional natural gas resource provided the impetus for Pennsylvania to rediscover its oil and gas heritage and reestablish its status as an energy leader in the United States.

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8. John M. Smith, The Prodigal Son Returns: Oil and Gas Drillers Return to Pennsylvania with A Vengeance Are Municipalities Prepared?, 49 DUQ. L. REV. 1, 3 (2011) (The well, named after Edwin Drake, was originally referred to as “Drake’s Folly” based on the popular notion that it would fail).


10. Smith, supra note 8.


12. Id. (“Pennsylvania relies on coal to produce nearly one-half of its net electricity, making it one of the largest coal-consuming states in the country.”).


15. Smith, supra note 8, at 3-4.
Marcellus Shale is a layer of sedimentary rock containing pores of natural gas, primarily methane and propane. Similar to other fossil fuels, Marcellus Shale was formed from the concentration of organic materials under extreme heat and pressure over an extended period of time. The Marcellus Shale Formation is located in the Appalachian Basin, a stretch of land west of the Appalachian Mountains running from New York to West Virginia. The Marcellus Shale Formation is the largest repository of unconventional gas in the United States. Marcellus Shale is considered an unconventional natural gas resource because the natural gas is tightly packed within the shale. Conventional natural gas, on the other hand, is typically found in porous sandstone formations, which allows the gas to flow freely after drilling. Although geologists have known about the Marcellus Shale Formation for over 150 years, it was thought that the shale was an economically unviable source of energy due to the tightly packed nature of the shale.

Two recent technological advances resulting from experimental developments in drilling technology in the Barnett Shale Formation in Fort Worth, Texas removed this barrier: horizontal drilling and hydraulic fracturing. In 2005, Range Resources utilized horizontal drilling and hydraulic fracturing to complete Pennsylvania's first Marcellus Shale unconventional natural gas well, the "Renz #1 Well," in Washington County. The Renz #1 Well demonstrated that Marcellus Shale development was now

20. Id.
21. Id.
22. Smrecak, supra note 16.
23. Morris, supra note 18.
25. Smrecak, supra note 16.
26. Id.
technologically and economically viable. Since 2005, thousands of Marcellus Shale unconventional natural gas wells have been drilled in Pennsylvania.

A. Benefits and Dangers of Horizontal Drilling and Hydraulic Fracturing

The Marcellus Shale energy revival in Pennsylvania has drawn local, national, and international interest. The obvious reason for this interest is that Marcellus Shale natural gas development has a myriad of direct and collateral consequences: from international environmental issues to local watershed concerns, from the socioeconomic impact on rural communities to the increase in the United States GDP, and from municipal regulations to the restrictions imposed by the United States Constitution. In order to fully appreciate these issues, it is necessary to better understand horizontal drilling and hydraulic fracturing—the two unique procedures used to extract natural gas from Marcellus Shale.

Horizontal drilling is a simple concept: an operator begins by drilling a vertical well and then gradually angles the drill—over the course of several hundred feet—until it is drilling horizontally.
through the layers of Marcellus Shale.\textsuperscript{35} This greatly increases the range and productivity of an individual well.\textsuperscript{36} When compared to vertical drilling, which only supports one well on each drilling pad, horizontal drilling is particularly effective because it enables an operator to drill multiple wells from a single well pad.\textsuperscript{37} Horizontal drilling is not particularly controversial. In fact, it is generally accepted as both economically beneficial and environmentally friendly.\textsuperscript{38} Horizontal drilling preserves the environment by reducing the surface footprint of Marcellus Shale operations.\textsuperscript{39} The economic benefit derives from the operator's ability to drill multiple wells from a single well pad, which are multi-million dollar investments.\textsuperscript{40}

Hydraulic fracturing, however, is one of the most controversial aspects of Marcellus Shale natural gas operations.\textsuperscript{41} Hydraulic fracturing is the process of forcing highly pressurized water, chemicals, and proppants\textsuperscript{42} into the Marcellus Shale layer in order to create micro-fractions in the shale, which allow the natural gas to escape and ultimately collect in the well bore.\textsuperscript{43} A single horizontal well requires over 4.5 million gallons of water to complete the fracturing process.\textsuperscript{44} Aside from the sheer amount of fresh water utilized, the primary controversies surrounding hydraulic fracturing concern the addition of chemicals and the wastewater


\textsuperscript{36} Id.

\textsuperscript{37} Smith, supra note 8, at 5.

\textsuperscript{38} Joseph F. Speelman et al., Environmental and Legal Issues Surrounding Development of the Marcellus Shale, in ASPATORE SPECIAL REPORT, NAVIGATING LEGAL ISSUES AROUND THE MARCELLUS SHALE 5, 7 (Thompson Reuters, 2011) (“Horizontal drilling allows multiple wellbores to be drilled into shale regions form one site, well below water tables or underground water sources.”).


\textsuperscript{40} Smith, supra note 8, at 6.

\textsuperscript{41} John W. Carroll, Environmental Issues Arising From Development of the Marcellus Shale, in ASPATORE SPECIAL REPORT, NAVIGATING LEGAL ISSUES AROUND THE MARCELLUS SHALE 51, 54 (Thompson Reuters, 2011).

\textsuperscript{42} Proppants are extremely small sand grains that hold open the fractures created by the pressurized water in order to allow the natural gas to flow into the well bore. Smrecak, supra note 92, at 4.

\textsuperscript{43} Id.

\textsuperscript{44} Smith, supra note 8, at 5.
The solution used in the hydraulic fracturing process is generally composed of one percent chemicals, nine percent proppants, and ninety percent fresh water. Despite the fact that the chemicals are heavily diluted, they still have the potential to negatively affect the watershed. Wastewater, by contrast, is the fluid that comes back out of a well after the hydraulic fracturing is complete. Wastewater is comprised of the original solution and minerals, metals, salts, and even some radioactive materials. As a highly concentrated solution, wastewater can be extremely harmful to the environment and, in order to address this concern, operators generally build multi-million gallon storage ponds to allow for recycling and reuse of the wastewater in the hydraulic fracturing process. Even after the process of recycling, however, some wastewater remains and requires permanent disposal. Many of the pertinent legal issues facing Marcellus Shale development in Pennsylvania emerged as the general public and Pennsylvania General Assembly became aware of these legitimate environmental concerns.

B. Forced Pooling

The most recent legal controversy regarding Marcellus Shale development has revolved around forced pooling statutes in Pennsylvania. “Pooling” is the consolidation of rights to natural gas in a specific geographic area in order to facilitate the production of natural gas from a single well. Typically, pooling occurs through voluntary agreements between landowners and gas companies seeking to develop natural gas operations; this is known as “voluntary pooling.” In fact, before the recent amendments to the Oil and Gas Lease Act, oil and gas companies were required to bar-
gain with landowners in order to achieve pooling.\textsuperscript{55} The issue of forced pooling, however, arises when "holdout" landowners refuse to lease their land—refuse to voluntarily pool—for natural gas development.\textsuperscript{56} Forced pooling involves the compulsory consolidation of natural gas interests in order to facilitate the production of natural gas.\textsuperscript{57} Practically speaking, forced pooling disregards landowners' property rights and requires unwilling landowners to allow natural gas development on their properties.\textsuperscript{58} Per standard industry procedure, however, landowners are compensated for any operations on their land and any subsequent natural gas production.\textsuperscript{59}

In addition to disregarding individual property rights, forced pooling is controversial because it involves hydraulic fracturing. In fact, in order to be implemented effectively, forced pooling relies heavily on horizontal drilling and hydraulic fracturing technology.\textsuperscript{60} From the oil and gas producers' perspective, forced pooling is both environmentally sound and economically efficient.\textsuperscript{61} From the landowners' perspective, however, forced pooling in order to enable Marcellus Shale development exposes their properties to the myriad of risks and concerns that accompany hydraulic fracturing.

Interestingly, there is an existing forced pooling statute in Pennsylvania, the 1961 Oil and Gas Conservation Law,\textsuperscript{62} which does not apply to wells drilled within the Marcellus Shale Formation.\textsuperscript{63} This statute applies to wells that are drilled within the Utica Formation, which is deeper than the Marcellus Shale Formation.\textsuperscript{64} The forced pooling clause in the Oil and Gas Conserva-

\begin{itemize}
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Michael L. Krancer & Margaret Anne Hill, \textit{Shale Gas Leasing: Achieving Clarity, Transparency and Conservation: Recent Actions of the Pennsylvania Supreme Court and Legislature}, 84 PA. B.A. Q. 93, 100 (2013).
\item \textsuperscript{57} Lindsey Trachtenberg, \textit{Reconsidering the Use of Forced Pooling for Shale Gas Development}, 19 BUFF. ENVTL. L.J. 179, 197 (2012).
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Colosimo, supra note 9, at 59-60.
\item \textsuperscript{61} Trachtenberg, supra note 57, at 211 ("Forced pooling benefits the environment by preventing excessive drilling. Therefore, there are fewer well pads, which leads to less forest fragmentation and fewer sites disturbed at the surface by drilling activity.").
\item \textsuperscript{62} 58 PA. CONS. STAT. ANN. § 408 (West 2013).
\item \textsuperscript{63} Trachtenberg, supra note 57, at 183.
\item \textsuperscript{64} Krancer, supra note 56 ("The Oil and Gas Conservation Law applies only to drilling in formations that penetrate the Onondaga formation or 3,800 feet below land surface where the Onondaga formation is shallower than 3,800 feet."). The Utica Formation lies below the Onondaga formation. \textit{Id}.
\end{itemize}
tion Law permits an operator to compel landowners to participate in Utica Shale operations in the absence of a lease. The distinguishing characteristic of this forced pooling statute is that it was passed in 1961, well before the combined use of horizontal drilling and hydraulic fracturing were contemplated as viable extraction methods in the oil and gas industry. This existing forced pooling statute is still valid law in Pennsylvania and has not been challenged on constitutional grounds.

C. Oil and Gas Lease Act—Omnibus Amendments

In response to a multitude of concerns regarding the transparency of natural gas production, payment receipts, and minimum guarantees of royalty payments, Senator Gene Yaw, who represents the 23rd Senate District, introduced Senate Bill No. 259 in the Pennsylvania Senate on January 18, 2012. According to Senator Yaw, the explicit purpose of this bill was to “provide openness and transparency for mineral rights owners.” The bill was referred to the Environmental Resources and Energy Committee, where it was considered, amended, and reintroduced over the course of five months. During this period of time, the bill’s primary goal was to establish new standards of transparency for royalty payments. On June 25, 2013, the emphasis changed when a version of SB 259 was introduced that included a forced pooling clause. In a mere two weeks, the Senate passed the bill, which had become the proverbial “wolf in sheep’s clothing”: the

65. Id.
66. 58 PA. CONS. STAT. ANN. § 408 (West 2013).
67. Id. It is likely that this statute has not been challenged on Constitutional grounds because it did not implicate the inherent dangers of hydraulic fracturing.
71. Yaw, Bill History, supra note 69.
72. Yaw, Senate Memoranda, supra note 70.
royalty payment provisions provided the "wool" that hid the forced pooling clause.\textsuperscript{74}

On June 30, 2013, the Pennsylvania General Assembly passed Senate Bill No. 259, titled "An act regulating the terms and conditions of certain leases regarding natural gas and oil."\textsuperscript{75} On July 9, 2013, Governor Corbett signed the bill into law.\textsuperscript{76} In his signing statement, Governor Corbett addressed growing concerns surrounding the forced pooling clause: "By signing this legislation, it is my intention, and I believe that of the General Assembly . . . [not] to alter or affect the agreed-to terms of any existing lease."\textsuperscript{77} The law took effect on September 7, 2013.\textsuperscript{78}

As previously mentioned, the Amended Oil and Gas Lease Act contains two significant modifications: royalty payments and forced pooling.\textsuperscript{79} The royalty payment provisions guarantee landowners a one-eighth royalty payment for any oil or gas produced on their land.\textsuperscript{80} Additionally, there are enumerated requirements relating to production cost and profit transparency on the part of the operators.\textsuperscript{81} The Oil and Gas Lease Act states in relevant part:

A lease or other such agreement conveying the right to remove or recover oil, natural gas or gas of any other designation from the lessor to the lessee shall not be valid if the lease does not guarantee the lessor at least one-eighth royalty of all oil, natural gas or gas of other designations removed or recovered from the subject real property.\textsuperscript{82}

These royalty and transparency provisions form the political façade of the Oil and Gas Lease Act, which acted as a shield for the forced pooling clause to hide behind.

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\textsuperscript{74} The origin of this phrase is the New Testament of the Bible, from a passage in the Gospel of Matthew in which Jesus says, "Beware of false prophets, which come to you in sheep's clothing, but inwardly they are ravening wolves." \textit{Matthew} 7:15 (New International Version).

\textsuperscript{75} Yaw, \textit{Bill History}, supra note 69.

\textsuperscript{76} Signing Statement, OFFICE OF THE GOVERNOR: TOM CORBETT (July 9, 2013).

\textsuperscript{77} \textit{Id}.


\textsuperscript{79} \textit{Id}.

\textsuperscript{80} 58 PA. CONS. STAT. ANN. § 33.3 (West 2013).

\textsuperscript{81} \textit{Id.} § 35.2 (requiring the following information on a check stub: identification, date, and volume of gas produced; price received for gas produced; taxes charged; value of sales from gas; landowner's interest, landowner's share of the sales; contact information).

\textsuperscript{82} \textit{Id.} § 33.3.
The relevant language establishing forced pooling in the Oil and Gas Lease Act states, "[w]here an operator has the right to develop multiple contiguous leases separately, the operator may develop those leases jointly by horizontal drilling unless expressly prohibited by a lease." This clause acts as a default provision for oil and gas leases within Pennsylvania; where landowners have not expressly prohibited horizontal drilling in their leases, the operators are free to engage in horizontal drilling. Although the statute only addresses horizontal drilling, it also implicitly authorizes hydraulic fracturing as the technological means of harvesting natural gas.

This provision differs from the forced pooling clause in the 1961 Oil and Gas Conservation Law in two ways: first, when that act was passed, horizontal drilling and hydraulic fracturing were not contemplated as viable extraction methods; and second, the forced pooling clause applies to the Utica Shale Formation, which is much deeper underground than the Marcellus Shale Formation. The difference in depth between the shale formations might seem insignificant, but the shallower depth of the Marcellus Shale Formation raises significant watershed concerns that many landowners want to avoid because of the environmental hazards inherently involved in horizontal drilling and hydraulic fracturing.

D. The Problem: Constitutional Implications of Forced Pooling

In a relatively short period of time, the recent technological developments in Marcellus Shale extraction, and the legislature's attempts to manage them, have intersected with the United States and Pennsylvania Constitutions in significant ways. In fact, horizontal drilling and hydraulic fracturing have only been used in Pennsylvania since 2005. Therefore, due to the recent developments in the oil and gas industry, the majority of landowners could not have contemplated horizontal drilling when they entered into their leases. If applied retroactively to existing leases, the Amended Oil and Gas Lease Act would deprive those

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83. Id. § 34.1. It should be noted that this is not a traditional forced pooling clause because it applies to existing landowner-operator leases. Krancer, supra note 56.
84. See supra text accompanying note 66.
85. Smrecak, supra note 16, at Figure 4.
86. Carroll, supra note 41.
87. Pifer, supra note 13, at 620. See supra p. 4.
88. Krancer, supra note 56 at 99.
landowners of a substantial property right and impair the exercise of existing rights and obligations under their leases.

From the legal perspective, forced pooling statutes set the stage for a confrontation between individual property rights and the police power of the state. This confrontation calls into question the validity of these statutes under the Due Process, Takings, and Contracts Clauses of the Pennsylvania Constitution. Forced pooling also implicates the corresponding clauses of the United States Constitution. These types of confrontations between individual property rights and the powers of government are not new to the field of law and are generally resolved to the detriment of individual rights.89

III. CONSTITUTIONAL CHALLENGES TO THE OIL AND GAS LEASE ACT

Although originally presented as a benefit to landowners by guaranteeing them royalties, the Pennsylvania Oil and Gas Lease Act actually injures landowners by adding a default provision to existing leases that alters the conditions of the contract and ultimately transfers a substantial property right to the operators.90 The most plausible constitutional challenges to the Oil and Gas Lease Act are based on the Contract Clauses, Due Process Clauses, and Takings Clauses of the United States and Pennsylvania Constitutions. In order to fully explore the likelihood of success of these constitutional challenges, it is necessary to address the practical implications of the Oil and Gas Lease Act as it applies to landowners. Specifically, this requires discussion of how the Oil and Gas Lease Act will affect current landowners and existing leases.

A. Retroactive Application

A threshold consideration arising from the implementation of the Oil and Gas Lease Act, as applied to current landowners with existing leases, is whether the Act will be applied retroactively. This inquiry is significant because it determines whether existing leases will be affected by the changes in the law that add default provisions regarding Marcellus Shale pooling. Black's Law Dic-

tionary defines a retroactive law as "a legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect."91 The United States Supreme Court acknowledged, however, that a statute is not retroactive solely because it is applied to events or transactions completed before the statute was enacted.92 Instead, the ultimate consideration is whether the statute "attaches new legal consequences to events completed before its enactment."93 In much the same way, Pennsylvania courts have held that a statute is classified as retroactive where it affects a pre-existing legal right or relationship.94

Established limitations govern when a statute can be applied retroactively. In Pennsylvania there is a statutory limitation on interpreting a statute to apply retroactively: "No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly."95 This statutory limitation is a codification of established case law within Pennsylvania.96 Simply stated, a statute is retroactive when it affects pre-existing legal relationships, but a statute cannot be applied retroactively unless unequivocally intended by the General Assembly. Therefore, any determination of whether the Oil and Gas Lease Act will be applied retroactively requires a court to delve into the morass of statutory construction and legislative intent.

Legislative intent can be found in any number of sources including committee notes, signing statements, and the text of the statute itself. Beginning with the text of the statute, the relevant language states that forced pooling is authorized "where an operator has the right to develop multiple contiguous leases separately."997 The necessary implication of this statutory language is that the operator has already entered into an existing lease with a landowner. Furthermore, the effect of the statute is to alter that existing lease by adding in the default forced pooling requirement. Thus, when evaluating the plain language of the statute and the inferences it yields, it is apparent that the statute was designed to apply retroactively.

91. BLACK'S LAW DICTIONARY 1343 (9th ed. 2009).
92. Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994).
93. Id.
95. 1 PA. CONS. STAT. ANN. § 1926 (West 2008).
96. Kepple v. Fairman Drilling Co., 615 A.2d 1298, 1304 (Pa. 1992) ("[I]t is well established in Pennsylvania that no statute shall be construed to be retroactive unless clearly and manifestly intended by the General Assembly.").
97. 58 PA. CONS. STAT. ANN. § 33.3 (West 2013).
Although the text of the statute will ultimately be determinative of legislative intent, the signing statement of Pennsylvania Governor Tom Corbett had the potential to create some ambiguity. As mentioned before, the signing statement explicitly stated Corbett’s intention and his belief as to the intention of the Pennsylvania General Assembly: “By signing this legislation, it is my intention, and I believe that of the General Assembly . . . [not] to alter or affect the agreed-to terms of any existing lease.” The only way in which the statute would not affect the agreed-to terms of an existing lease is by applying prospectively to future leases. Governor Corbett’s signing statement—that the Act was not intended to apply to existing leases—created a contradiction with the express language of the Act. Regardless of Governor Corbett’s opinion as to the Act’s retroactivity, however, a court’s starting point for determining the intent of the General Assembly is the text of the statute. Therefore, because the text seems to assume that the statute applies to existing leases, it is extremely likely that a court would construe the statute to be retroactively applicable.

From a constitutional analysis standpoint, the retroactive application of the Oil and Gas Lease Act is significant because constitutional challenges under the Contracts Clause and the Due Process Clause are only viable if the Act is applied retroactively. Absent retroactive application, there is no impairment of contractual obligations because the law will only affect newly formed contracts. By contrast, the Due Process and Takings Clause challenges are not determined by the retroactive nature of the Oil and Gas Lease Act because Pennsylvania courts are unlikely to recognize that the means of extraction—horizontal drilling—is an independent property right under existing landowner-operator leases. Even if Pennsylvania courts were to construe the Oil and Gas Lease Act to apply retroactively, however, it is important to note that the “retroactive application of statutes is not per se prohibited” or unconstitutional. Retroactive application of a statute is only prohibited, however, when it would violate the Due Process Clause or Contracts Clause of either the United States or the Pennsylvania Constitutions. Therefore, the strongest basis for a constitutional

99. 1 PA. CONS. STAT. ANN. § 1921 (West 2000).
challenge to the Pennsylvania Oil and Gas Lease Act is when the Act is applied retroactively to add a default forced pooling provision to existing landowner-operator leases.

B. Contracts Clause Challenge

Contracts Clauses are found in both the United States Constitution and the Pennsylvania Constitution. Article I, Section 10 of the United States Constitution states: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”102 Similarly, Article I, Section 17 of the Pennsylvania Constitution states, “No . . . law impairing the obligation of contracts . . . shall be passed.”103 By explicitly prohibiting laws that would restrict private citizens’ ability to contract, the Framers were guarding against potential abuses of governmental authority.104 In fact, in Federalist Paper 44, James Madison wrote, “[L]aws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation.”105 Thus, the constitutional prohibition on laws impairing the obligations of contracts is a fundamental constitutional protection of personal liberty and property.

Despite the express language protecting individual contractual rights in the United States Constitution and Pennsylvania Constitution, this protection has gradually eroded in the name of federalism and states’ rights. Generally, this rationale is rooted in the police powers of the states, which were reserved to the states by the Tenth Amendment of the United States Constitution.106 Specifically, the Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”107 The police powers of the states traditionally include the power to provide for the general welfare of the people through the “promotion of public health, safety and morals.”108 For example,

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103. PA. CONST. art. I, § 17.
105. THE FEDERALIST NO. 44 (James Madison).
106. U.S. CONST. amend. X.
107. Id.
police powers include state regulation of crime, healthcare, education, and licensing.109

Ultimately, the United States Supreme Court recognized that each state has the authority to exercise its police powers to promote the general welfare of the people, a power which supersedes individual contractual rights.110 In the same breath, however, the United States Supreme Court also acknowledged that "if the Contract Clause is to retain any meaning at all...it must be understood to impose some limits on the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."111 In order to identify and enumerate the limits that the Contracts Clause imposes on the police powers of the states, the United States Supreme Court originally developed a factor-based test.112

The United States Supreme Court's factor-based test incorporates the following considerations: (1) substantial impairment of contract; (2) existence of emergency; (3) interest group protected; (4) tailored relief; (5) reasonable conditions; and (6) temporal limitation.113 The Court further developed and refined this test to a three-part analysis.114 The threshold inquiry is whether the state statute has substantially impaired a contractual relationship.115 This factor is the most significant because the "severity of the impairment measures the height of the hurdle the state legislation must clear."116 In order to overcome a substantial contractual impairment, the second inquiry evaluates whether the state has a "significant and legitimate public purpose."117 It is important to note, however, that the mere finding of a legitimate public purpose does not validate an impairment of private contracts.118 Thus, the third inquiry is whether the legislation at issue imposes reasona-

109. Id. at 792-93.
111. Id. at 242 (emphasis added).
112. See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (holding that a state's exercise of its police powers violated the Contracts Clause of the United States Constitution where the statute retroactively altered a mortgagee's contractual right to compensation and possession); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (holding that a state's exercise of its police powers violated the Contracts Clause of the United States Constitution where the statute retroactively altered the compensation owed to an employee).
113. Blaisdell, 290 U.S. at 444-49; Spannaus, 438 U.S at 244-45.
116. Id. at 244.
117. DeBenedictis, 480 U.S. at 505.
118. Id.
ble conditions and is appropriate to justify the legitimate public purpose.\textsuperscript{119} Although not expressly acknowledged by the United States Supreme Court, it appears that the Court is engaging in a form of heightened scrutiny for contract clause challenges.

The original factor-based test has since been adopted and applied by the Pennsylvania Supreme Court.\textsuperscript{120} Specifically, in \textit{Parsonese v. Midland National Insurance Co.}, the Pennsylvania Supreme Court applied the same test in the context of a retroactive statute.\textsuperscript{121} Pennsylvania courts have also applied the adapted three-part analysis when evaluating challenges under the Contracts Clause of the United States and Pennsylvania Constitutions.\textsuperscript{122} Therefore, in order to survive the Contracts Clause challenge, the forced pooling clause of the Oil and Gas Lease Act must pass through the three-part analysis, which incorporates the original factors.

When evaluating whether the Oil and Gas Lease Act violates the Contracts Clause, the first and most significant factor is whether the Act substantially impairs a contractual relationship.\textsuperscript{123} Although the Oil and Gas Lease Act allows a landowner to expressly prohibit hydraulic fracturing through an explicit provision in his or her lease, many of these leases were entered into before hydraulic fracturing and horizontal drilling were contemplated by the landowner.\textsuperscript{124} If applied retroactively, the Oil and Gas Lease Act would add a default pooling provision into existing leases between landowners and operators that would permit hydraulic fracturing and horizontal drilling.\textsuperscript{125} Therefore, allowing the Oil and Gas Lease Act to add a default pooling provision would alter the conditions of that contract. In fact, the main purpose of a lease is to allow the landowner to transfer property rights to a third party. Inherent in this statement is the presupposition that any property right \textit{not} transferred to a third party is reserved to the landowner.\textsuperscript{126}

\begin{itemize}
\item \textsuperscript{119} \textit{Id.; E.g.,} U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 22 (1977).
\item \textsuperscript{120} \textit{Parsonese v. Midland Nat'l Ins. Co.}, 706 A.2d 814, 817-18 (Pa. 1998).
\item \textsuperscript{121} \textit{Id.} (finding that the retroactive nature of the statute violated the contracts clause where the statute eliminated an insured's selection of a beneficiary).
\item \textsuperscript{123} \textit{Spannaus}, 438 U.S at 242.
\item \textsuperscript{124} Krancer, \textit{supra} note 56.
\item \textsuperscript{125} 58 PA. CONS. STAT. ANN. § 34.1 (West 2013).
\item \textsuperscript{126} Jeanne L. Schroeder, \textit{Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property}, 93 MICH. L. REV. 239, 239 n. 2 (1994) ("In contemporary legal discourse the most common conception of property is the bundle of legally protected interests, held
This principle is illustrated by the effect of the Oil and Gas Lease Act’s forced pooling clause. Pennsylvania’s Statutory Construction Act of 1972 states that a statute shall be construed to give effect to each of its provisions.\textsuperscript{127} The forced pooling clause expressly grants an operator the right to engage in horizontal drilling when certain conditions are met.\textsuperscript{128} It follows that, without this new provision, an operator does not have the ability to engage in horizontal drilling. Otherwise, the forced pooling provision of the Oil and Gas Lease Act would be rendered superfluous. Therefore, it is evident that, before the forced pooling clause, landowners inherently reserved the right to prevent an operator from engaging in horizontal drilling. When applied retroactively, the Oil and Gas Lease Act would operate to deprive landowners’ substantial property rights that were reserved under the lease.

Unlike many standardized contracts, gas lease contracts are customized and specifically bargained for by the landowner and operator because of the wide variety of unique characteristics involved.\textsuperscript{129} Due to the recent rise in concern regarding the environmental impacts of horizontal drilling and fracturing, many landowners have specifically removed or avoided provisions allowing such drilling techniques.\textsuperscript{130} In effect, the retroactive application of the Oil and Gas Lease Act would add default provisions in leases requiring forced pooling, horizontal drilling, and, by implication, hydraulic fracturing. Simply stated, many landowners would not have allowed such provisions in their lease if they had contemplated these aspects at the time of signing the lease. Based on these considerations, it is evident that the Oil and Gas Lease Act substantially impairs the contractual relationship between landowners and operators.

A substantial contractual impairment, however, is only the beginning of the Contracts Clause analysis. The second inquiry, which incorporates the remaining original factors, is whether the state has a legitimate public purpose for the statute which impairs

\textsuperscript{127} 1 PA. CONS. STAT. ANN. § 1921 (West 2000).
\textsuperscript{128} 58 PA. CONS. STAT. ANN. § 34.1 (West 2013).
\textsuperscript{129} George A. Bibikos, Interpreting Oil and Gas Leases in Pa.’s Shale Gas Era, THE LEGAL INTELLIGENCER, July 31, 2012, at 1.
\textsuperscript{130} Examples of these leases can be found in the complaint filed in EQT v. Opatkiewicz. Complaint, supra note 4 at 19-103.
private contractual obligations. The only identifiable public purpose of the forced pooling clause of the Oil and Gas Lease Act is to economically benefit natural gas companies and the Commonwealth by implication. It is undisputable that the Oil and Gas Lease Act was not passed in response to the existence of an emergency or in response to environmental concerns. Thus, the only potential legitimate public purpose is the ephemeral economic public benefit from the development of natural resources.

Even if a court were to accept economic public benefit as a legitimate public purpose, the final inquiry for a Contracts Clause analysis is whether the legislation at issue imposes reasonable conditions and is appropriate to justify the legitimate public purpose. Essentially, this is an evaluation of how well the legislation is tailored to achieve its purpose. Here, the forced pooling provision of the Oil and Gas Lease Act was not limited in scope or time. In fact, the main constitutional problem is that the Act will be applied retroactively to existing leases. Furthermore, the forced pooling provision doesn't impose reasonable conditions to achieve its purpose because landowners have relied on the existing obligations and rights under their leases. Ultimately, analogous to Blaisdell, Allied Structural Steel Co., and Parsonese, the fact that the Oil and Gas Lease Act will be applied retroactively to existing leases will be determinative. Therefore, the forced pooling clause of the Oil and Gas Lease Act would not survive a constitutional challenge under the Contracts Clause of either the United States or Pennsylvania Constitutions.

C. Due Process Clause Challenge

The Due Process Clause is found in the Fourteenth Amendment to the United States Constitution: "No state shall . . . deprive any person of life, liberty, or property without due process of law." The Fourteenth Amendment has been subject to much discussion regarding substantive due process, procedural due process, and the incorporation doctrine regarding the Bill of Rights. It is im-

131. DeBenedictis, 480 U.S. at 505.
132. Id.
133. Parsonese, 706 A.2d at 819 ("It is critical to our analysis that application of the statute in this case would be retroactive application.").
important to note, however, that the Fourteenth Amendment's due process requirement expressly applies to the legislative actions of a state.\textsuperscript{136} Although economic substantive due process has been effectively abandoned by the Court,\textsuperscript{137} it is well established that the Due Process Clause restricts a state's ability to alter or extinguish individual rights.\textsuperscript{138} The Pennsylvania Supreme Court held that Article I, Section 1 of the Pennsylvania Constitution contains an equivalent "Due Process Clause,"\textsuperscript{139} which is not distinguishable from the Due Process Clause of the 14th Amendment of the United States Constitution.\textsuperscript{140} Therefore, the Oil and Gas Lease Act can be challenged under the Due Process Clauses of the United States and Pennsylvania Constitutions on the basis of the deprivation of a "vested right."

The Pennsylvania Supreme Court has acknowledged that the retroactive application of newly enacted statutes violates the Due Process Clause only when the application would be unreasonable.\textsuperscript{141} In a rather perplexing manner, the Pennsylvania Supreme Court elucidates the unreasonable standard by describing what constitutes a reasonable application. Specifically, the retroactive application of a statute is considered to be reasonable when it will "impair no contract and disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, and . . . not vary existing obligations contrary to their situation when entered into and when prosecuted."\textsuperscript{142} Thus, the touchstone of a due process challenge in this situation is whether a vested right has been disturbed. Pennsylvania courts have defined vested rights in a myriad of ways, but each contains similar elements.\textsuperscript{143} The com-

\begin{footnotesize}
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\item 136. U.S. CONST. amend. XIV, § 1.
\item 137. Robert Ashbrook, \textit{Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process}, 150 U. PA. L. REV. 1255, 1285 (2002) ("[The] economic substantive due process doctrine was and continues to be wrong.").
\item 138. Hosp. & Healthsystem Ass'n of Pa. v. Com., 77 A.3d 587, 603 (Pa. 2013) ("The retrospective character of [the statute] implicates this Court's recognition that due process norms limit the government's ability to extinguish vested rights . . . through retroactive legislation.").
\item 139. PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.").
\item 140. Pennsylvania Game Comm'n v. Marich, 666 A.2d 253, 255 n.6 (Pa. 1995).
\item 142. Id.
\item 143. \textit{E.g.}, In re R.T., 778 A.2d 670, 679 (Pa. Super. Ct. 2001) ("[A vested right is a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent."); Croll v. Harrisburg Sch. Dist., 2012 WL 8668130 (Pa.
\end{enumerate}
\end{footnotesize}
mon vein running through these definitions leads to one conclusion: ultimately, a vested right is a right that is considered to be legally enforceable. Therefore, in order to survive the constitutional challenge under the Due Process Clause of the Fourteenth Amendment as it applies to Pennsylvania, the Oil and Gas Lease Act must not disturb the vested rights of landowners.

In the case of the Oil and Gas Lease Act, it is unclear whether the retroactive application would disturb a vested right. The analysis to determine whether a vested right is disturbed is similar to the threshold analysis under the Contracts Clause challenge. However, instead of identifying a contractual right or obligation, the focus is to identify an existing and independent property right. The property right at issue here is the right of an operator to jointly develop properties by engaging in horizontal drilling. Property rights are traditionally referred to as a bundle of sticks, all of which are vested rights that are legally enforceable when given away or retained in a contract. The absence of the forced pooling provision in a lease could be construed as reserving that "stick" with the landowner. Under the Oil and Gas Lease Act, however, an operator must first own the right to the minerals before engaging in forced pooling. Therefore, this analogy likely draws too thin of a distinction between the right to the minerals themselves and the means of extracting the minerals—horizontal drilling. Therefore, in order for the Oil and Gas Lease Act to violate the Due Process Clause of the United States Constitution, the means of extraction must be construed to be an independent right of the property owner. Because this is likely too far of a stretch for Pennsylvania courts, it is probable that the Oil and Gas Lease Act would survive the challenge under the Due Process Clause of the United States and Pennsylvania Constitutions.

Commw. Ct. Dec. 13, 2012) ("[A vested right] must be something more than a mere expectation, based upon an anticipated continuance of existing law. It must have become title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another.").
144. See supra pp. 18-20.
146. Kraner, supra note 56.
147. Id.
D. **Takings Clause Challenge**

The final plausible constitutional challenge to the Oil and Gas Lease Act is a violation of the Takings Clauses of both the United States and Pennsylvania Constitutions.\(^\text{148}\) The federal constitution's Takings Clause is found in the Fifth Amendment: "[N]or shall private property be taken for public use, without just compensation."\(^\text{149}\) Beginning in the late nineteenth century, the United States Supreme Court applied the Takings Clause of the Fifth Amendment to the states through the Fourteenth Amendment.\(^\text{150}\) The Pennsylvania Constitution also has a Takings Clause: "Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken."\(^\text{151}\) Inherent in the Takings Clauses of both the United States and Pennsylvania Constitutions is the requirement that the property be taken only for public use.\(^\text{152}\) Thus, the touchstone for the takings clause analysis is whether the effect of the state statute falls within the label of "public use." Historically, public use has been interpreted broadly, giving great deference to state legislatures as long as there is some public purpose present.\(^\text{153}\)

In response to the broad interpretation of public use under the Takings Clause, however, the Pennsylvania General Assembly passed the Property Rights Protection Act.\(^\text{154}\) The statute states, in relevant part, that "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited."\(^\text{155}\) Thus, there are two barriers to the practical implementation of the Oil and Gas Lease Act: first, the Takings Clauses of the United States and Pennsylvania Constitutions require the property to be taken for public use,\(^\text{156}\) and second, the Property Rights Protection Act, passed in response to the U.S. Supreme Court's broad interpretation of what

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\(^\text{149}\) U.S. CONST. amend. V.
\(^\text{150}\) See Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897).
\(^\text{151}\) PA. CONST. art. X, § 4.
\(^\text{153}\) Kelo v. City of New London, Conn., 545 U.S. 469, 483 (2005) ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").
\(^\text{154}\) 26 PA. CONS. STAT. ANN. § 204 (West 2006).
\(^\text{155}\) Id.
\(^\text{156}\) U.S. CONST. amend. V.
constitutes a public purpose, expressly prohibits any government takings for private use. Ultimately, both barriers require that property is only taken by the government for a public use.

A traditional forced pooling statute would clearly violate Pennsylvania’s Property Rights Protection Act and could potentially violate the Takings Clause of the United States and Pennsylvania Constitutions because traditional forced pooling statues require “holdout” landowners to lease their mineral rights to an operator. In effect, a traditional forced pooling statute allows an operator to take a landowner’s mineral rights. Here, however, it is undisputed that the Oil and Gas Lease Act is not a conventional forced pooling statute because the Act applies to existing landowner-operator leases. Despite this significant distinction, a plausible argument can be made, similar to the due process analysis, that the means of extraction—horizontal drilling—comprise an independent property right that is reserved to the property owner, even after the rights to the minerals have been leased. For the same reasons that the due process challenge might prove to be problematic, however, it is unlikely that the Pennsylvania courts would construe the means of extraction as an independent right of the property owner.

E. Constitutional Challenge Summary

Despite the strict limitations on the retroactive application of statutes, based on inferences drawn from the statutory language, the Pennsylvania Oil and Gas Lease Act will likely be construed to apply retroactively as adding default provisions to existing leases between landowners and operators. Although the retroactive application of a statute is not per se unconstitutional or prohibited, it does create three plausible constitutional challenges to the Act based on the Contracts, Due Process, and Takings Clauses of the United States and Pennsylvania Constitutions. The strongest challenge is likely to be found under the Contracts Clauses because the statute effectively adds default provisions to leases that have been specifically bargained for, and those default provisions incorporate recent developments in the oil and gas industry that could not have been contemplated by the property owner when they entered into their lease. The Due Process and Takings

158. Krancer, supra note 56.
159. 58 PA. CONS. STAT. ANN. § 34.1 (West 2013).
Clause challenges, however, are weaker arguments because they ultimately turn on the courts’ determination that the means of extraction, horizontal drilling and hydraulic fracturing, is a vested and independent property right—a step that the courts are unlikely to be willing to take.

IV. CONCLUSION

Although this article was academic in evaluating the constitutional challenges to Pennsylvania’s Oil and Gas Lease Act, the real battle is already being waged in the Pennsylvania judicial system. As mentioned throughout this article, a recent case litigating these constitutional issues is EQT v. Opatkiewicz before the Court of Common Pleas of Allegheny County, Pennsylvania. On April 8, 2014, the Court entered an order granting EQT’s Motion for Partial Judgment on the Pleadings, holding that the forced pooling clause is constitutional. The accompanying Memoranda explained the Court’s rationale: (1) EQT always had the right, under existing leases, to jointly develop through horizontal drilling; (2) the forced pooling clause is a mere clarification of existing rights; and (3) because the landowners reserved no rights under existing leases, there is no basis for a constitutional challenge. As such, the Court cleverly dodges fully addressing the substantial constitutional challenges. Although, there is no indication of whether this order will be appealed by the landowners, an appeal likely due to the important interests involved.

The basis of the Court’s decision, that under existing leases EQT always the right to jointly develop properties through horizontal drilling, is misguided for three reasons. First, as mentioned in this article, it is a fundamental concept that property rights not expressly given away are retained by the landowner. Second, the forced pooling clause of the Oil and Gas Lease Act is not a clarification of existing rights because it expressly grants an operator the right to engage in horizontal drilling in limited circumstances. Third, and perhaps most significantly, prior to this

161. Id.
164. See supra text accompanying note 126.
165. 58 PA. CONS. STAT. ANN. § 34.1 (West 2013).
decision it was a well-established practice in the oil and gas industry to bargain for and compensate landowners for these joint development provisions.\textsuperscript{166} Obviously, if EQT always had the right to jointly develop properties, they would not specifically bargain for and compensate landowners for an express joint development provision in the lease.

If the contracts clauses of the Pennsylvania and United States Constitutions are to retain any practical meaning or effect in modern constitutional law jurisprudence, then the retroactive application of this statute is a clear violation. To hold otherwise would render meaningless an important constitutional protection of individual rights. Therefore, based on the analysis in this article, the forced pooling clause in the Oil and Gas Lease Act is unconstitutional as a violation of the Contracts Clause of the United States and Pennsylvania Constitutions.

\textsuperscript{166} E.g., Complaint at 81, EQT v. Opatkiewicz, No. GD-13-13489 (C.P. Allegheny Cnty. July 22, 2013). The pooling provision in paragraph two of the Smith lease, which EQT attempted to bargain for, is explicitly crossed out.