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ONE J

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PENNSYLVANIA GAS: TRUSTS, TAKINGS, AND JUDICIAL TEMPERAMENTS

JOSHUA ULAN GALPERIN*

When I arrived at the house in Pittsburgh, John Fleenor was on the roof. I had left Hartford, Connecticut by plane around 6:00 a.m. that morning, touched down in Pittsburgh on schedule, rented a car in record time, and made it to the house well before 9:00 a.m., which is when the home inspection was scheduled to begin. Nevertheless, at least a quarter hour early, John was on the roof and having a look around.

John was a younger man than I had expected. In my limited experience, I had come to believe that home inspectors were contractors who had decided knocking on walls and looking at electrical panels was a better job for an aging handyman than the haul and grind of building and renovating. But John scrambled down the ladder in no time, shook my hand, and told me that the roof was in good shape.

My wife and I had both been offered new jobs at the University of Pittsburgh, so we had travelled out over our winter break, looked at 18 homes, found the one we liked, made an offer, gotten an acceptance, and here I was, less than a month later, for the home inspection.

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After the roof, John looked at the main levels and then we made our way down to the basement. “Hmm,” John hummed. “It looks like something is happening down here.”

Indeed, the basement floor was bowing, peaking in the center of the room, tapering down towards the utility closet in one direction and the closet doors in the other direction. It didn’t look good. It was obvious that we were not going to be setting up the room with a pool table, but was the bulge a problem?

“I don’t think this is any problem,” John said with some confidence after poking around a bit. “The house obviously had some movement after the foundation was poured, but if it was still moving you’d see other problems. The walls might be cracked, the windows might not open, and the stairs would definitely be uneven.”

We had just been over all those things, windows, walls, stairs, and all looked great.

John warned me though, “look, I’m not a structural engineer so I can’t say for sure if you have a larger problem. Why don’t you call an engineer and have them confirm this so you can rest assured.”

The very next day I was on the phone with Russell Kowalich. Russell is a home inspector and a certified structural engineer. As it turned out, Russell had been to my house before to look at the very same issue in the basement. After a little negotiation, Russell disclosed his previous findings. He assured me the bowing in the basement was a remnant and would not cause any structural problems.

“A remnant of what?”

“Off-gassing from the shale beneath the house, which was probably disturbed when they dug the foundation.”

Shale is a type of below-ground sedimentary rock that tends to have fissures throughout its formation. In some shale, natural gas collects within these breaks in such quantities that with modern drilling technologies, businesses can economically extract that gas and make it available as a source of energy. This is the geological basis of the so-called hydraulic fracturing boom. In hydraulic fracturing, gas drillers will pump liquid into a shale formation to break apart the shale and force the stored gas to the surface. Apparently, when building a home it is possible to slightly disturb shale that is close to the surface, which can release much smaller quantities of gas. This, it turns out, is the sort of shale off-gassing that transformed the basement of my new home.

Off-gassing from the shale beneath the foundation of my new home has practically nothing to do with hydraulic fracturing, but possibly you could

forgive an environmental law professor for immediately thinking about the hydraulic fracturing boom, particularly around Pittsburgh, Pennsylvania.

* * *

Our realtor pointed me to the State of Pennsylvania's website because the state wants to make sure that residents are aware of the risk of coal mine subsidence. There is a website dedicated to this very issue, which warns: "BE INFORMED Underground coal has been mined in Pennsylvania for more than 200 years. It extends throughout 43 of our 67 counties.... CHECK FOR RISK Over one million homes in Pennsylvania sit on top of abandoned mines."¹

The mine subsidence check is not so much a way to decide whether or not to buy a home. It is a way to decide whether to buy subsidence insurance. I cannot say what I would have done if our home were above an abandoned mine, as many homes in Pittsburgh are, but I was awfully relieved to learn that there had not been mining in our neighborhood. No risk of subsidence for us. No need for insurance. And so we went through with the sale of the house, where I sit as I type this sentence.

Hydraulic fracturing and coal mining, a century earlier, had much greater effects on Pennsylvania's development, and on the law, than they had on my home-buying experience. But that both shale off-gassing and coal mine subsidence popped up in important ways even before I had actually moved to Pennsylvania prodded me to think more about both forms of energy extraction.

As many lawyers, I was aware of the historic case of *Mahon v. Pennsylvania Coal Company*, which is about coal mine subsidence.² The case changed the way regulators and courts think about land restrictions.³ I am also well aware that hydraulic fracturing is having an obvious impact in Pennsylvania,⁴ and I recalled a conversation I had with a colleague in the

1. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, <http://www.dep.pa.gov/Citizens/MSI/Pages/default.aspx>, (last visited Sept. 1 2018).

2. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

3. E.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984).

4. E.g., Eliza Griswold, *The Fracturing of Pennsylvania*, N.Y. TIMES (Nov. 7, 2011), <https://www.nytimes.com/2011/11/20/magazine/fracking-amwell-township.html>; Jennifer Szalai, *A Community Cracked Open by Fracking*, N.Y. TIMES (June 13, 2018) <https://www.nytimes.com/2018/06/13/books/review-amity-prosperity-fracking-eliza-griswold.html>.

summer of 2017 about a recent Pennsylvania Supreme Court case related to hydraulic fracturing.⁵

Eschewing grand ideas about some comprehensive theory of energy and environmental law, or Pennsylvania's special role in this area, I thought I would explore something more modest. What, I pondered, could I learn from a close reading of both cases, a look at the historical context of each, and the way advocates and activists had received them? Perhaps nothing, but who knows? In moving to Pennsylvania, in preparing to teach law students here, it would not hurt to get to know two important cases a little better. In doing that, in closely re-reading the cases and their contexts, and in comparing them, I realized that they have very little in common. But they can teach us something about judicial temperament and the important distinction in law between analytical reasoning and policy outcomes.

* * *

Some 300 miles to the east of Pittsburgh, Scranton, Pennsylvania was the one-time epicenter of anthracite coal mining.⁶ The high energy density of anthracite, paired with its relatively clean burn made it a very valuable commodity.⁷ Valuable enough, in fact, that coal companies thought it worth the risk of extracting coal from beneath urban areas despite the fact that hollowing out the land below buildings posed a risk to property and lives.⁸

Over two decades ago economics professor William Fischel investigated the subsidence problem.⁹ He travelled to Scranton and surrounding areas and discovered, to his own surprise, that while, thanks to subsidence "whole houses [had been] swallowed up, and reports indicated that lives were sometimes lost,"¹⁰ damage from subsidence he explained was, on the whole, "episodic and limited; cities were not literally falling into the earth."¹¹ The past, however, is not so different from the present. Then, as now, high-profile problems could convert, in the public's mind, a real but limited threat into an intense and ever-present risk. What Fischel discovered was that just before the start of the 1909 school year, an underground mine

5. Pa. Env'tl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).

6. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 16 (1995).

7. *Id.*

8. *Id.* at 26–27.

9. *See generally id.*

10. *Id.* at 26.

11. *Id.*

collapse had felled a Scranton schoolhouse.¹² The event roused public fears that eventually led to the famous case of *Mahon v. Pennsylvania Coal Company*.¹³

To help assuage the public concern over mine subsidence, the Pennsylvania General Assembly passed the Kohler Act in 1921.¹⁴ The Act required coal companies to leave a pillar of coal in place to support a variety of different land uses including homes, schools, roads, commerce, and industry.¹⁵ The Kohler Act only applied, however, when the owner of the minerals, that is, the mining company, did not also own the surface property.¹⁶

In the town of Pittston, just outside Scranton, H.J. Mahon owned a home and the land on which that home sat.¹⁷ Below that land was coal owned by the Pennsylvania Coal Company.¹⁸ In fact, Mahon had bought his land from his father-in-law, an executive with the Company.¹⁹ In order to challenge the validity of the Kohler Act, Mahon and the Company had strategized to manufacture a conflict for the court.²⁰ Mahon objected to Pennsylvania Coal mining beneath his property because removal of the coal would, he argued, cause his home to collapse.²¹

To the Pennsylvania Coal Company, the spring and summer of 1922 would have seemed a good time to have the Pennsylvania Supreme Court deciding their case. Anthracite coal miners had gone on strike that spring, making national news and straining the supply of coal.²² One might have expected a court to consider the limited availability of coal and therefore invalidate the Kohler Act, which may have further limited supply. But the Pennsylvania Supreme Court upheld the Act, reasoning that it validly protects public safety.²³

Just as the mining strikes were ending in September of 1922, the litigants were heading to Washington, D.C. to argue their cause before the United

12. *Id.* at 27.

13. *Id.*

14. An act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties, P.L. 1198 (May 27, 1921).

15. *Id.*

16. *Id.*

17. *Mahon v. Pa. Coal Co.*, 118 A. 491, 494 (Pa. 1922).

18. *Id.*

19. FISCHER, *supra* note 6, at 18.

20. *Id.*

21. *Mahon*, 118 A. at 494.

22. FISCHER, *supra* note 6, at 25.

23. *Mahon*, 118 A. at 496.

States Supreme Court.²⁴ In December the Court issued its now famous opinion in the case, holding that the Kohler Act went “too far.”²⁵

Surprisingly, despite reaching the arguably conservative outcome that a state regulation was invalid, the liberal Justice Holmes authored the Supreme Court’s opinion in *Mahon*.²⁶ Though his reasoning in the case is famously unclear,²⁷ what Holmes seemed to do in this case was apply a substantive due process analysis. In his opinion, Holmes looked closely at the Kohler Act and asked whether it advances the interests it purported to protect: to wit, public safety.²⁸ He determined that it did not.²⁹ He likewise balanced whatever public purpose did exist against the burden the Kohler Act placed on Pennsylvania Coal’s mineral rights. Holmes determined that the burden on the Company outweighed any public safety benefits because, in this case, there was only a single home at risk.³⁰

Mahon has become a foundation of what we today call regulatory takings;³¹ the idea that if a regulation burdens property to a certain point, it is not merely a regulation but is tantamount to an appropriation of private property.³² This was a legal innovation, one that even Justice Scalia—who could not have been more ideologically different from Justice Holmes—was fond of quoting. And in many of those quotes, Scalia made a point of mentioning Holmes by name.

“Justice Holmes recognized in *Mahon*...that if the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained....”

24. FISCHER, *supra* note 6, at 25.

25. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (a Westlaw search on July 5, 2018 shows that the opinion has been cited over 8,500 times).

26. *Pa. Coal*, 260 U.S. at 412.

27. *E.g.*, William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 816, 830–31 (1998) (“Despite disagreement about precisely how to read Justice Holmes’s opinion in *Mahon*...”); Joseph F. DiMento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. LEGAL HIST. 349, 397 (1990) (citing BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 156 (1977) (“The Opinion is ‘both the most important and most mysterious writing in takings law.’”)).

28. *Pa. Coal*, 260 U.S. at 413.

29. *Id.*

30. *Id.* at 413–14.

31. Treanor, *supra* note 27, at 814–15, *citing* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting).

32. Treanor, *supra* note 27, at 814 n.6.

wrote Justice Scalia.³³ “Prior to Justice Holmes’s exposition in [*Mahon*], it was generally thought that the Takings Clause reached only a direct appropriation of property....” Scalia also reminded his readers.³⁴ Property rights advocates have been equally sanguine about the continuing impacts of *Mahon*, citing it, as the conservative Pacific Legal Foundation has, to argue against land use regulations.³⁵

Of course, at the very same time, *Mahon* has been a trouble spot for regulators, environmentalists, and liberal scholars seeking to make a case for more government flexibility or respect for values-based environmental protection. Professor Joseph Sax, arguably the godfather of modern environmental legal thought, wrote in 1971 that *Mahon* and the thinking that underlies it was “naïve” for thinking that property can be easily defined by only its economic values as Justice Holmes had supposed.³⁶

Although I was reminded of the *Mahon v. Pennsylvania Coal* case because buying a home in Pittsburgh forced me to consider whether the legacy of coal mining might swallow me whole, it’s hard to forget about a case that has had such national significance. The hydraulic fracturing boom over the past decade has likewise had national significance, but that stems from the way hydraulic fracturing has transformed the American energy landscape. Because almost all aspects of hydraulic fracturing are governed at the state and local level,³⁷ there is no nationwide legal revolution on the horizon but there has been a revolution of sorts here in Pennsylvania.

* * *

In the summer of 1968, Franklin Kury read an article in the *New York Times* about a proposed amendment to that state’s constitution.³⁸ The amendment dealt with what seemed like minutia of New York’s environment and natural resources, but it gave Kury an idea.³⁹ Then a

33. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992).

34. *Id.* (internal citations and quotation marks omitted).

35. Brief Amicus Curiae of Pacific Legal Foundation and California Farm Bureau Federation In Support of Appellant County of Siskiyou at 24, *Envtl. Law Found. v. State Water Resource Bd.*, (Aug. 10, 2017) (No. C083239) (available for download at <https://pacificlegal.org/documents/ac-brief-environmental-law-fdn/>).

36. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 151–52 (1971).

37. Grace Heusner, Allison Sloto & Joshua Ulan Galperin, *Defining and Closing the Hydraulic Fracturing Governance Gap*, 95 *DENV. L. REV.* 191, 196 (2017).

38. FRANKLIN L. KURY, *CLEAN POLITICS, CLEAN STREAMS: A LEGISLATIVE AUTOBIOGRAPHY AND REFLECTIONS* 74 (2011).

39. *Id.*

member of the Pennsylvania House of Representatives, Kury thought he could try something similar here in Pennsylvania. Rather than struggle over a detailed, geography-specific inventory, however, he would craft, in simple prose, an amendment to Pennsylvania's Constitution putting forward two powerful concepts.⁴⁰ What he wanted to forever enshrine in Pennsylvania law was "an articulation of the public's interest in the environment" wrote Kury in 2011 "and the placement of the responsibility on state government to serve as a trustee of the state's natural resources."⁴¹

Amendments to the Pennsylvania Constitution require approval by a majority of the House and Senate in two consecutive meetings of the General Assembly and then approval of the people of Pennsylvania.⁴² This is a series of five significant hurdles and in today's politics its simply impossible to imagine that Representative Kury's proposed amendment could succeed. But things are different today. On June 1, 1969, the proposed amendment passed the state house unanimously, 190-0, and the rest was easy.⁴³ The proposal also passed the state Senate unanimously, and in the following session of the General Assembly, the proposal again passed both chambers without a single dissenter.⁴⁴

The proposed constitutional amendment was put to the people on May 18, 1971.⁴⁵ What is now known as the Pennsylvania Environmental Rights Amendment (ERA), Article 27 of the Pennsylvania Constitution, was approved by a 4-1 margin, with over 1 million Pennsylvanians voting to enshrine environmental protection in the state's constitution.⁴⁶

In its entirety, the ERA reads:

The people have the 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.⁴⁷

40. *Id.*

41. *Id.*

42. PA. CONST. art. XI, § 1.

43. KURY, *supra* note 38.

44. *Id.* at 75.

45. *Id.*

46. *Id.*

47. PA. CONST. art. I, § 27.

Shortly after the new ERA took effect, a group of students from Wilkes College and several other citizens of the city of Wilkes-Barre tried to use the Amendment as a shield against a new road that was going to invade a neighborhood park.⁴⁸

The students brought their argument to the courts, claiming that because the park was a historic area the state's constitution now prohibited the Department of Transportation from destroying any part of it with a road.⁴⁹ The court thought this was too absolutist an argument. The ERA "was intended to allow the normal development of property in the Commonwealth," the court ruled in 1973, favoring "controlled development of resources rather than no development."⁵⁰

Undergirding the ruling in this case, *Payne v. Kassab*, was that a literal reading of the ERA was, to the court's mind, unrealistic. The court felt that application of the ERA to real-world cases must be "realistic and not merely formalistic."⁵¹ To guide future courts in making "realistic" environmental decisions under the ERA, the court built a three-part test. First courts should ask if the state complied with the laws. Second, did the state make a reasonable effort to minimize environmental damage? And third, courts would need to balance the environmental harm of a state action against the benefits of that action.⁵² None of this analysis seemed imbedded in the text of the ERA, but the court sought to adapt a flexible standard that would allow for "normal development of property."⁵³

The ERA, it seemed after the *Payne* ruling, had a very short life and a very minor impact. That state of affairs remained until hydraulic fracturing took hold in Pennsylvania over a decade ago. According to John Dernbach, a Professor at Weidner University Commonwealth Law School in Harrisburg, a leading expert on the ERA, it was when "the Marcellus Shale boom and economic recession happened—at the same time" that the ERA had its revival.⁵⁴

The first sign that things were about to change emerged in the now-famous case of *Robinson Township v. Pennsylvania*.⁵⁵ In 2012, the

48. *Payne v. Kassab*, 312 A.2d 86, 88 (Pa. Commw. Ct. 1973).

49. *Id.* at 93–94.

50. *Id.* at 94.

51. *Id.*

52. *Id.*

53. *Id.*

54. John C. Dernbach, *The Abandonment and Restoration of Pennsylvania's Constitutional Public Trust*, 49 No. 2 ABA TRENDS 10, 11 (2017).

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

Pennsylvania General Assembly passed Act 13 which, among other things, prohibited local town governments from regulating hydraulic fracturing operations within their borders. The Pennsylvania Supreme Court found that Act 13 was unconstitutional but was divided over the exact reasoning.⁵⁶ One group of justices argued that the Act was unconstitutional because it violated the ERA.⁵⁷ This plurality of justices argued that the ERA requires Pennsylvania to act as a trustee for the environment.⁵⁸ By removing authority over hydraulic fracturing from towns, and replacing that authority with very thin environmental protections, the state, said this plurality, had violated its duty.⁵⁹

Because the *Robinson Township* decision did not represent the reasoning of the majority of the Pennsylvania Supreme Court, it was more guidance than law. But that would soon change.

In 1945, Pennsylvania began a program of leasing a small amount of state land for oil and gas exploration.⁶⁰ As part of that endeavor, the state created the oil and gas Lease Fund to house income from the program.⁶¹ Money in the Lease Fund could only be used for conservation and other natural resource purposes.⁶²

This is where the recession and the shale boom come in. Pennsylvania found itself in a difficult financial situation just as hydraulic fracturing was promising to make major inroads in the state. This was an opportunity that was too good to pass up. “The state expanded drilling on state lands, bringing in hundreds of millions of dollars” Dernbach explained. According to the 1947 Lease Fund law, that money should have been used for conservation or natural resource management but, says Dernbach, instead the state “transferred much of that money to the General Fund to help balance the budget.”⁶³

The General Assembly had created the Lease Fund and the spending restriction was really meant to restrain bureaucrats. On first blush, there was no reason the General Assembly could not later decide to redirect

56. *Id.* at 913.

57. *Id.*

58. *Id.* at 985.

59. *Id.*

60. Dernbach, *supra* note 54.

61. *Pa. Envtl. Def. Found.*, 161 A.3d at 911, 919.

62. *Id.*

63. Dernbach, *supra* note 54, at 11.

money out of the Fund for purposes other than conservation.⁶⁴ Or that was the thinking until the Pennsylvania Environmental Defense Foundation got involved.

The Pennsylvania Environmental Defense Foundation is a tiny non-profit organization. Its website scrolls downward endlessly, a mishmash of fonts, typefaces, and colors looks like it may have been designed in the 1990s.⁶⁵ According to Pennsylvania's Department of State, the Foundation's net assets amount to less than \$27,000.⁶⁶ But the Foundation punches above its weight, which turned out to be a problem for those who wanted the fracking money for the state's general fund and wanted to keep the ERA off the radar. The Foundation challenged the General Assembly's redirection of the Lease Fund money, claiming that the ERA did not allow the diversion.

On June 20, 2017, the Pennsylvania Supreme Court handed down its decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF)*, agreeing with the Foundation and dramatically reviving the ERA.⁶⁷

The legislative process of managing state finances can be a slog and a significant portion of the Pennsylvania Supreme Court's opinion in *PEDF* relates legislative details taking place over several years.⁶⁸ What stands out about the court's decision here are not these details, but two critical decisions they arrived at only after they waded through the legislative machinations. First, the Supreme Court explicitly decided to throw out the 1973 rule from *Payne v. Kassab* that had for decades suffocated the ERA.⁶⁹ Second, in place of the *Payne* rule, the court insisted that the text of the ERA should control and that Pennsylvania trust law is the best tool for understanding the ERA.⁷⁰

The Pennsylvania Supreme Court said that the ERA created a trust. The body of that trust is the public natural resources of the state. The state of

64. *See Pa. Envtl. Def. Found.*, 161 A.3d at 911, 927 (“It further highlighted that the Lease Fund is not a constitutional creation but rather is a special fund created by legislative enactment, which could be altered by subsequent legislative action.”).

65. PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION, <http://www.pedf.org/>, (last visited Sept. 6, 2018).

66. PENNSYLVANIA DEPARTMENT OF STATE CHARITIES ONLINE DATABASE, <http://www.charities.pa.gov/CharityDetail.aspx?315id2e%3d122a1>, (last visited Sept. 6, 2018).

67. *Pa. Envtl. Def. Found.*, 161 A.3d at 911.

68. *Id.* at 919–25.

69. *Id.* at 930.

70. *Id.*

Pennsylvania is the trustee. The beneficiaries of the trust are the people of the state, including future generations.⁷¹

Pennsylvania trust law imposes three specific duties. The duty of prudence means the trustee must exercise care in managing the trust.⁷² The duty of loyalty means the trustee must manage the trust only for the benefit of the trustees.⁷³ The duty of impartiality means the trustee must consider the needs of all the various beneficiaries,⁷⁴ which includes those now alive and future generations.⁷⁵

Using these principles of trust law, the court here decided that the state had indeed violated the ERA. Natural resources such as oil and gas, the court explained, are part of the trust. When the state decides to sell these resources, it gets, for instance, monthly royalty payments based on how much oil or gas is produced. These proceeds, according to Christine Donahue, the justice who wrote the opinion in *PEDF*, “are unequivocally proceeds from the sale of oil and gas resources.”⁷⁶ Therefore, “[t]hey are part of the corpus of the trust and the Commonwealth must manage them pursuant to its duties as trustee.”⁷⁷

PEDF has not had almost a century of time to make waves, as *Mahon* has, but it is nevertheless, not without its champions and critics. Some, like Jim Willis, the editor and publisher of *Marcellus Drilling News*, declared that “radical environmentalists are causing chaos and confusion” in their use of the “Pennsylvania Supreme Court as a weapon” against drilling here in Pennsylvania.⁷⁸ Others are taking a more nuanced tact. Attorneys Jordan Yeager, Laurel Williams, and Joseph Minott, representing a group of environmental clients, have argued that *PEDF* changes the way the Pennsylvania Department of Environmental Protection should conduct itself when making decisions on whether to permit new natural gas wells.⁷⁹

71. *Id.* at 931–32.

72. *Id.* at 932.

73. *Id.*

74. *Id.*

75. Dernbach, *supra* note 54, at 12.

76. *Pa. Envtl. Def. Found.*, 161 A.3d at 935.

77. *Id.*

78. Jim Willis, *Fractivists Use Pennsylvania Supreme Court As Weapon*, NATURAL GAS NOW (June 25, 2017), <http://naturalgasnow.org/fractivists-use-pennsylvania-supreme-court-weapon/>.

79. Appellants’ Supplemental Post-Hearing Brief Regarding Article I, Section 27 of the Pennsylvania Constitution at 1, 19, *Del. Riverkeeper v. Commonwealth*, (Aug. 21, 2017) (EHB Docket No. 2014-142-B) (available at <http://ehb.courtapps.com/efile/documentViewer.php?documentID=38769>).

In order to fulfill their duties as trustees, argue the lawyers, the permit writers need to be convinced that the potentially damaging activity will not degrade the local environment.⁸⁰

This is a major change from the status quo. It's about precaution, Yeager explained when we spoke last winter. In the past, there was a presumption in favor of permitting but now, he thought, there may be a presumption against permits, placing the burden on the applicant to justify that their application is the result of science-based decisionmaking. And, Yeager hoped, over time this can shift agency culture.⁸¹

* * *

Mahon has become an icon of conservative and legal advocacy and *PEDF* may, within Pennsylvania and as a model elsewhere, become an equally important icon for environmentalists and progressive advocates. But as I read these cases, and read about them, and talk to people who have a stake in the law they present, I am struck by how their outcomes are so ideologically different from the judicial philosophies that they display. *Mahon*, as it turns out, is an expression of progressive judging sometimes called realism or pragmatism, while *PEDF* is an embodiment of conservative formalism.

Justice Holmes, the author of *Mahon*, is famous for his embrace of realist judging, advancing flexible judicial analysis that empowers judges to inject subjective values into decisionmaking.⁸² Justice Donahue of the Pennsylvania Supreme Court, the author of *PEDF*, is lucky enough to not (yet, at least,) be a pawn in any high-profile ideological tug-of-war. Thus, to demonstrate the ideological underpinnings in *PEDF* I will instead portrait the late Justice Scalia as the embodiment of formalism. Justice Scalia was a lion of judicial conservatism, a champion of what he saw as judicial restraint, which he advanced through formalistic, categorical rules that might be more objectively applied.⁸³

80. *Id.*

81. Interview with Jordan Yeager, Partner, Curtin & Heefner, in New Haven, Ct., Feb 26, 2018.

82. *E.g.*, Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788, 793 (1988).

83. *E.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

In *United States v. Mead Corporation*,⁸⁴ an administrative law case about when to grant deference to agency interpretations of law, Justice Breyer made a brief statement that nicely summarizes these competing ideas.

Justice Scalia had dissented in that case, arguing for a categorical rule rather than the more *ad hoc* approach the majority took. In response to Scalia's dissent, Breyer wrote "Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety."⁸⁵

This hits it right on the nose. Scalia believed that the role of the judiciary is a classical one: to make the law simple and consistent, and then to place a given factual situation into one simple bucket or another. This does not leave as much space for case-by-case considerations of justice and equity, but it does have the benefit of greater certainty and it makes it harder for judges to apply their own preferences in decisionmaking.⁸⁶

In *Mead*, the Court was taking an *ad hoc* approach. This is an approach more indicative of progressive judging, the type of jurisprudence that Justice Holmes preferred, in which judges can look carefully at the facts of any given case and eschew categorical rule instead employing balancing tests and perceptions of reasonableness. That approach may result in a higher rate of decisions that seem fair, but it also permits judges to decide what is and is not fair based on their own belief system, which is not easily replicable.

Of course, while conservative formalism promises consistency and progressive pragmatism promises fairness, these promises do not always come to fruition in practice. Nevertheless.

This expectation of progressive jurisprudence embracing *ad hoc* balancing and fact-based justice or classically conservative jurisprudence holding tenaciously to categorical and formal approaches maps perfectly onto *Mahon* and *PEDF*, respectively.

In *Mahon* the United States Supreme Court delivered an outcome that pleased (and continues to please) conservatives and yet, the analysis promotes Justice Holmes' subjective balancing and flexible assessments of rationality and effectiveness. *Mahon* employed a vague standard of "too

84. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

85. *Id.* at 236.

86. Stephanos Bibas, *Justice Scalia's Originalism and Formalism: The Rule of Criminal Law as a Law of Rules 5* (2016), in *The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan's Impact on the Law*, Heritage Foundation, special report No. 186 (Aug. 30, 2016) (available for download at <https://www.heritage.org/courts/report/the-legacy-justice-antonin-scalia-remembering-conservative-legal-titans-impact-the>).

far” and then compared the benefit of the regulation to the burden on an individual property owner to determine that the Kohler Act did indeed go too far.⁸⁷ This balancing against an equivocal standard allows a judge to inject his own conception of what is best, what is needed, what is appropriate and it is exactly what we should expect from Holmes. As William Treanor, a leading *Mahon* scholar and Dean of the law school at Georgetown says, “Holmes rejected the categorical approach” and, Treanor continues, he “favored balancing.”⁸⁸

PEDF, as I discovered after a second and third reading of the case, is really a very formal opinion despite its progressive outcome. In *PEDF*, the Pennsylvania Supreme Court did two important things. First, it overruled the law of *Payne*, the case the students brought to stop a road from encroaching on a local park.⁸⁹ *Payne* was explicitly a flexible, pragmatic, decision that meant to give judges flexibility through its three-part balancing test.⁹⁰ In overruling *Payne*, the *PEDF* court was clearing away judicial subjectivity, and they replaced it with the restraint of formalism because the second important thing that *PEDF* did was to create a very clearly defined, replicable, and categorical rule by using trust principles.⁹¹

In applying the trust doctrine, the Court did not invent any new law, or even look closely at the nuance and justification for the General Assembly’s diversion of hydraulic fracturing-based income. Instead, the Court took a well-established body of law and applied it simply to the facts at hand.⁹² This is the classically conservative judicial model of Justice Scalia. As applied, the trust rules ask first if the property at issue falls into the trust category and then if the government activity violates any of the trust duties long enshrined in Pennsylvania law. This is not about judicial policymaking; it is about judicial restraint.

* * *

Moving to Pennsylvania has brought some changes. There are old coal mines roughly a half mile from my home and shale off-gassing immediately below it. But there is also an Environmental Rights Amendment in the state’s constitution. These sorts of contradictions seem to be popping up everywhere here, and not least in state politics. You may have heard that

87. *Mahon*, 260 U.S. at 413.

88. Treanor, *supra* note 27, at 840.

89. *Pa. Env’tl. Def. Found.*, 161 A.3d at 930.

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

91. *Pa. Env’tl. Def. Found.*, 161 A.3d at 930.

92. *Id.* at 932–40.

Pennsylvania is a political swing state. Pittsburgh is a blue island of “I’m With Her stickers,” in a bright red sea of MAGA hats.⁹³ Who would have thought that a United States Supreme Court case from 1922 about coal mining and a Pennsylvania Supreme Court Case nominally about state finances but practically about hydraulic fracturing would have turned up another set of contradictions?

There may not be any great revelation here, just an example of another Northeasterner moving from one bubble to another. But as I settle into my new home, I am also settling into teaching a new crop of students that probably reflect the same political contradictions everywhere around me. If nothing else, I hope that what I’ve learned from *Mahon* and *PEDF* can help them consider their own commitments both political and in the law.

93. Pennsylvania Election Results, N.Y. TIMES (Sept. 13, 2017, 3:24 PM), <https://www.nytimes.com/elections/results/pennsylvania>.