

**[J-127A-D-2012] [OAJC:Castille, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

ROBINSON TOWNSHIP, WASHINGTON : No. 63 MAP 2012
COUNTY, PENNSYLVANIA, BRIAN :
COPPOLA, INDIVIDUALLY AND IN HIS : Appeal from the order of Commonwealth
OFFICIAL CAPACITY AS SUPERVISOR : Court at No. 284 MD 2012 dated July 26,
OF ROBINSON TOWNSHIP, TOWNSHIP : 2012.
OF NOCKAMIXON, BUCKS COUNTY, :
PENNSYLVANIA, TOWNSHIP OF : ARGUED: October 17, 2012
SOUTH FAYETTE, ALLEGHENY :
COUNTY, PENNSYLVANIA, PETERS :
TOWNSHIP, WASHINGTON COUNTY, :
PENNSYLVANIA, DAVID M. BALL, :
INDIVIDUALLY AND IN HIS OFFICIAL :
CAPACITY AS COUNCILMAN OF :
PETERS TOWNSHIP, TOWNSHIP OF :
CECIL, WASHINGTON COUNTY, :
PENNSYLVANIA, MOUNT PLEASANT :
TOWNSHIP, WASHINGTON COUNTY, :
PENNSYLVANIA, BOROUGH OF :
YARDLEY, BUCKS COUNTY, :
PENNSYLVANIA, DELAWARE :
RIVERKEEPER NETWORK, MAYA VAN :
ROSSUM, THE DELAWARE :
RIVERKEEPER, MEHERNOSH KHAN, :
M.D. :

v.

COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA PUBLIC UTILITY :
COMMISSION, ROBERT F. POWELSON, :
IN HIS OFFICIAL CAPACITY AS :
CHAIRMAN OF THE PUBLIC UTILITY :
COMMISSION, OFFICE OF THE :
ATTORNEY GENERAL OF :
PENNSYLVANIA, KATHLEEN KANE, IN :
HER OFFICIAL CAPACITY AS :
ATTORNEY GENERAL OF THE :
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA DEPARTMENT OF :

ENVIRONMENTAL PROTECTION AND :
E. CHRISTOPHER ABRUZZO, IN HIS :
OFFICIAL CAPACITY AS SECRETARY :
OF THE DEPARTMENT OF :
ENVIRONMENTAL PROTECTION :

APPEAL OF: PENNSYLVANIA PUBLIC :
UTILITY COMMISSION, ROBERT F. :
POWELSON, IN HIS OFFICIAL :
CAPACITY AS CHAIRMAN OF THE :
PUBLIC UTILITY COMMISSION & :
PENNSYLVANIA DEPARTMENT OF :
ENVIRONMENTAL PROTECTION AND :
E. CHRISTOPHER ABRUZZO, IN HIS :
OFFICIAL CAPACITY AS SECRETARY :
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SOUTH FAYETTE, ALLEGHENY :
COUNTY, PENNSYLVANIA, PETERS :
TOWNSHIP, WASHINGTON COUNTY, :
PENNSYLVANIA, DAVID M. BALL, :
INDIVIDUALLY AND IN HIS OFFICIAL :
CAPACITY AS COUNCILMAN OF :
PETERS TOWNSHIP, TOWNSHIP OF :
CECIL, WASHINGTON COUNTY, :
PENNSYLVANIA, MOUNT PLEASANT :
TOWNSHIP, WASHINGTON COUNTY, :
PENNSYLVANIA, BOROUGH OF :
YARDLEY, BUCKS COUNTY, :
PENNSYLVANIA, DELAWARE :
RIVERKEEPER NETWORK, MAYA VAN :
ROSSUM, THE DELAWARE :
RIVERKEEPER, MEHERNOSH KHAN, :
M.D. :

v.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA PUBLIC UTILITY
COMMISSION, ROBERT F. POWELSON,
IN HIS OFFICIAL CAPACITY AS
CHAIRMAN OF THE PUBLIC UTILITY
COMMISSION, OFFICE OF THE
ATTORNEY GENERAL OF
PENNSYLVANIA, KATHLEEN KANE, IN
HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND
E. CHRISTOPHER ABRUZZO, IN HIS
OFFICIAL CAPACITY AS SECRETARY
OF THE DEPARTMENT OF
ENVIRONMENTAL PROTECTION

APPEAL OF: OFFICE OF THE
ATTORNEY GENERAL OF
PENNSYLVANIA, KATHLEEN KANE, IN
HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA

ROBINSON TOWNSHIP, WASHINGTON : No. 72 MAP 2012
COUNTY, PENNSYLVANIA, BRIAN :
COPPOLA, INDIVIDUALLY AND IN HIS : Appeal from the order of Commonwealth
OFFICIAL CAPACITY AS SUPERVISOR : Court at No. 284 MD 2012 dated July 26,
OF ROBINSON TOWNSHIP, TOWNSHIP : 2012.
OF NOCKAMIXON, BUCKS COUNTY, :
PENNSYLVANIA, TOWNSHIP OF : ARGUED: October 17, 2012
SOUTH FAYETTE, ALLEGHENY :
COUNTY, PENNSYLVANIA, PETERS :
TOWNSHIP, WASHINGTON COUNTY, :
PENNSYLVANIA, DAVID M. BALL, :
INDIVIDUALLY AND IN HIS OFFICIAL :
CAPACITY AS COUNCILMAN OF :
PETERS TOWNSHIP, TOWNSHIP OF :
CECIL, WASHINGTON COUNTY, :

PENNSYLVANIA, MOUNT PLEASANT TOWNSHIP, WASHINGTON COUNTY, PENNSYLVANIA, BOROUGH OF YARDLEY, BUCKS COUNTY, PENNSYLVANIA, DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER, MEHERNOSH KHAN, M.D., CROSS

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, KATHLEEN KANE, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND E. CHRISTOPHER ABRUZZO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellees

ROBINSON TOWNSHIP, WASHINGTON COUNTY, PENNSYLVANIA, BRIAN COPPOLA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR OF ROBINSON TOWNSHIP, TOWNSHIP OF NOCKAMIXON, BUCKS COUNTY, PENNSYLVANIA, TOWNSHIP OF SOUTH FAYETTE, ALLEGHENY COUNTY, PENNSYLVANIA, PETERS

No. 73 MAP 2012
Appeal from the order of Commonwealth Court at No. 284 MD 2012 dated July 26, 2012.
ARGUED: October 17, 2012

TOWNSHIP, WASHINGTON COUNTY,
PENNSYLVANIA, DAVID M. BALL,
INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS COUNCILMAN OF
PETERS TOWNSHIP, TOWNSHIP OF
CECIL, WASHINGTON COUNTY,
PENNSYLVANIA, MOUNT PLEASANT
TOWNSHIP, WASHINGTON COUNTY,
PENNSYLVANIA, BOROUGH OF
YARDLEY, BUCKS COUNTY,
PENNSYLVANIA, DELAWARE
RIVERKEEPER NETWORK, MAYA VAN
ROSSUM, THE DELAWARE
RIVERKEEPER, MEHERNOSH KHAN,
M.D., CROSS

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA PUBLIC UTILITY
COMMISSION, ROBERT F. POWELSON,
IN HIS OFFICIAL CAPACITY AS
CHAIRMAN OF THE PUBLIC UTILITY
COMMISSION, OFFICE OF THE
ATTORNEY GENERAL OF
PENNSYLVANIA, KATHLEEN KANE, IN
HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND
E. CHRISTOPHER ABRUZZO, IN HIS
OFFICIAL CAPACITY AS SECRETARY
OF THE DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellees

DISSENTING OPINION

MR. JUSTICE EAKIN

Decided: December 19, 2013

I join the analysis expressed by Justice Saylor, in its entirety.

I find the lead opinion's protracted expression, while thoughtful, to be ultimately inconsistent with the basic relationship between sovereign and subject, and insufficiently considerate of discrete judicial and legislative roles. Its premise conflates individual rights and governmental standing, and the sweeping, general, and necessarily aspirational terms on which the holding is based are too broad and insufficiently defined to provide meaningful guidance in the future. Further, the decision reverses the Commonwealth Court on a theory not presented to us by the parties. While we often affirm decisions using different reasoning than the court below, we should be chary of reversing on theories not raised or argued.

Of significant concern is the alchemy that recognizes in municipalities the ability to enforce individual constitutional rights. It is a very fundamental precept of constitutional law that the Constitution assures the rights of individuals, not governments. Giving standing to some 2,500 sets of local officials to sue the sovereign based on alleged violations of individual constitutional rights is misguided, and will have precedential repercussions — I fear we will soon face a tide of mischief that will flow from such an ill-advised notion.

Municipalities certainly have the power to manage land use, but such power is given by the legislature, not the Constitution. The allocation of this power is not irrevocable, and it may be removed or modified by the same body that granted it in the first place. And no municipality has any entitlement to manage land use that is superior

to that granted by the Constitution to the sovereign alone. Our municipalities are part of our political structure, and certainly have great interest in the use of land within their borders, but their professed power must bow to the Constitution.

The legislature has determined that our unique shale resource can benefit all citizens; indeed the resource has already resurrected many local economies, though not without cost. The challenge is one of balancing the competing interests of local and individual economic prosperity, national need for energy and a desire for independence from foreign energy, and the unavoidable environmental impact of taking and using any resource from the ground. It is for the legislature to balance these competing interests and rights of the citizenry as a whole, for it is not merely a question of local consequence — indeed, the constitutional provision on which this action relies speaks to resources as “the common property of all the people,” not as property of the people currently living in each municipality. Pa. Const. art. I, § 27.

The balancing is far, far from a simple task by any measure, and it cannot be accomplished by giving 2,500 vetoes to local governments. See Eagle Environmental II, L.P. v. Commonwealth, Department of Environmental Protection, 884 A.2d 867, 879 (Pa. 2005).¹ This is not to demean the thoughtfulness or concern of municipal governments for the rights of their citizens to clean air and water, interests that are compellingly

¹ In Eagle Environmental II, this Court stated:

While we have not held that Article 1, Section 27 requires any specific balancing test, we have determined that it is manifest that a balancing must take place between the Commonwealth’s duty under Article 1, Section 27 to protect the environment of the Commonwealth and its other duties to provide other needed services to the public.

Id. (citation and internal quotation marks omitted).

expressed by the lead opinion and the cross-appellants. The point is that there is one body with the authority to address the broad statewide issues that necessarily are involved here — it simply cannot be done town by town or township by township. It demands a comprehensive plan respectful of every citizen’s right to the resource.

And like it or not, the bottom line is this — the gas in question will be extracted. It is going to be removed from the earth, and it is going to be transported to refineries. The question for our legislature is not “if” this will happen, but “how.”²

² This Act does not force a derrick into every neighborhood; Justice Saylor’s opinion recounts the protections in the Act that have precisely the opposite effect. This Act is about a pipeline — it is aimed at the method of transporting the gas more than the extraction itself. After hearing all voices, the legislature decided transport can best be accomplished by pipeline, and a pipeline cannot be built with 2,500 sets of rules.

Pennsylvania is crosshatched with pipelines. It is not an obtrusive means of transporting energy; a person would be hard pressed to locate a current pipeline were it not for the occasional roadside marker. In fact, the PUC currently inspects the existing pipeline infrastructure that serves consumers — that portion alone consists of over 46,000 miles. Despite the fear mongering about pipelines, practical experience shows the contrary, and there is no evidence suggesting these interfere with our environment in any significant way.

Absent a pipeline, alternate means of transport will be needed — the tractor-trailer. The number of trucks needed to transport the gas that could flow through a pipeline may be fewer than the number of angels that can dance on the head of a pin, but not by much. Will the environment, which underlies the constitutional argument, be better or worse when fleets of trucks expel their exhausts into our air and spill fuel and oil that leaks into our water? Beyond the environmental consequences, the physical toll of such an armada on the repair of our state roads and local highways can hardly be overstated.

We can speculate about which transport will be better or worse, but we have held no hearings, taken no evidence. My speculations are just that, but they are the same type of speculation that girds the lead opinion’s broad language and cross-appellants’ parade of horrors. Likewise, it is but speculation that leads to the unfortunate characterization of the legislature’s motives. Whether pro or con, the various opinions of the members of this Court and the divergent opinions of thousands of local officials about the best means of accomplishing the balance between resources and environment are simply not a proper part of our constitutional analysis.

The means necessary for making these decisions properly lies in the processes of a different branch of government — our role is to assure those decisions do not violate the Constitution. Our role is not inclusive of balancing all the factors on which a political decision must be made. We have a constitutional duty to afford great deference to the body of government given the power by the Constitution to make decisions about such matters. We should not complain of incursions on judicial independence and of refusals to respect our role when we in turn act legislatively.³

If we limit our role to the evaluation of the constitutionality of this Act, we serve the Commonwealth as we should. And if we do so, this Act withstands our scrutiny. Hence, I must dissent.

³ As an example of its tendency to broaden our function, the lead opinion states the “Commonwealth is named trustee and, notably, duties and powers attendant to the trust are not vested exclusively in any single branch of Pennsylvania’s government. The plain intent of the provision is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people” for accomplishing the trust purposes. Opinion Announcing the Judgment of the Court, at 83. It is not notable that no branch is given exclusive administrative power, in this or any similar concern — the judicial role is not administrative at all. We are a check or balance to be sure, but we have no authority to “administer” things “for the benefit of the people.” We benefit the people by assuring constitutional compliance, not by second-guessing the administrative decisions made by the branch of government manifestly charged with that responsibility.