KEYSTONE BITUMINOUS COAL ASS'N v. DE BENEDICTIS
480 U.S. 470 (1987)

JUSTICE STEVENS delivered the opinion of the Court:

In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), the Court reviewed the constitutionality of a Pennsylvania statute that admittedly destroyed "previously existing rights of property and contract."... In that case the "particular facts" led the Court to hold that the Pennsylvania Legislature had gone beyond its constitutional powers when it enacted a statute prohibiting the mining of anthracite coal in a manner that would cause the subsidence of land on which certain structures were located.

Now, 65 years later, we address a different set of "particular facts," involving the Pennsylvania Legislature's 1966 conclusion that the Commonwealth's existing mine subsidence legislation had failed to protect the public interest in safety, land conservation, preservation of affected municipalities' tax bases, and land development in the Commonwealth. Based on detailed findings, the legislature enacted the Bituminous Mine Subsidence and Land Conservation Act (the "Subsidence Act" or the "Act"), Pa. Stat. Ann., Tit. 52, §_1406.1 et seq. (Purdon Supp. 1986). Petitioners contend, relying heavily on our decision in *Pennsylvania Coal,* that §_4 and §_6 of the Subsidence Act and certain implementing regulations violate the Takings Clause, and that §_6 of the Act violates the Contracts Clause of the Federal Constitution. The District Court and the Court of Appeals concluded that *Pennsylvania Coal* does not control for several reasons and that our subsequent cases make it clear that neither §_4 nor §_6 is unconstitutional on its face. We agree.

I

Coal mine subsidence is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal. This lowering of the strata can have devastating effects. It often causes substantial damage to foundations, walls, other structural members, and the integrity of houses and buildings. Subsidence frequently causes sinkholes or troughs in land which make the land difficult or impossible to develop. Its effect on farming has been well documented — many subsided areas cannot be plowed or properly prepared. Subsidence can also cause the loss of groundwater and surface ponds. In short, it presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades.[1]

Despite what their name may suggest, neither of the "full extraction" mining methods currently used in western Pennsylvania[2] enables miners to extract all subsurface coal; considerable amounts need to be left in the ground to provide access, support, and ventilation to

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[1] Indeed, in 1977, Congress passed the Federal Surface Mining Control and Reclamation Act, 91 Stat. 445, 30 U.S.C. §_1201, et seq., which includes regulation of subsidence caused by underground coal mining. See 30 U.S.C. §_1266.

[2]The two "full extraction" coal mining methods in use in western Pennsylvania are the room and pillar method, and the longwall method.

the mines. Additionally, mining companies have long been required by various Pennsylvania laws and regulations, the legitimacy of which is not challenged here, to leave coal in certain areas for public safety reasons.[3] Since 1966, Pennsylvania has placed an additional set of restrictions on the amount of coal that may be extracted; these restrictions are designed to diminish subsidence and subsidence damage in the vicinity of certain structures and areas.

Pennsylvania's Subsidence Act authorizes the Pennsylvania Department of Environmental Resources (DER) to implement and enforce a comprehensive program to prevent or minimize subsidence and to regulate its consequences. Section 4 of the Subsidence Act, Pa. Stat. Ann., Tit. 52, §_1406.4, prohibits mining that causes subsidence damage to three categories of structures that were in place on April 17, 1966: public buildings and noncommercial buildings generally used by the public; dwellings used for human habitation; and cemeteries. Since 1966 the DER has applied a formula that generally requires 50% of the coal beneath structures protected by §_4 to be kept in place as a means of providing surface support.[4] Section 6 of the Subsidence Act, 52 Pa. Stat. Ann., Tit. 52, §_1406.6, authorizes the DER to revoke a mining permit if the removal of coal causes damage to a structure or area protected by §_4 and the operator has not within six months either repaired the damage, satisfied any claim arising therefrom, or deposited a sum equal to the reasonable cost of repair with the DER as security.[5]

II

In 1982, petitioners filed a civil rights action in the United States District Court for the Western District of Pennsylvania seeking to enjoin officials of the DER from enforcing the Subsidence Act and its implementing regulations. The petitioners are an association of coal mine operators, and four corporations that are engaged, either directly or through affiliates, in underground mining of bituminous coal in western Pennsylvania. The members of the association and the corporate petitioners own, lease, or otherwise control substantial coal reserves beneath the surface of property affected by the Subsidence Act. The defendants in the action, respondents here, are the Secretary of the Commonwealth of Pennsylvania, the Chief of DER's Division of Mine Subsidence, and the Chief of DER's Section on Mine Subsidence

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[3] For example, Pennsylvania law requires that coal beneath and adjacent to certain large surface bodies of water be left in place. Pa. Stat. Ann., Tit. 52, §_3101 et seq. (Purdon).

[4] ...[T]his 50% requirement is neither an absolute floor nor ceiling. It may be waived by the Department upon a showing that alternative measures will prevent subsidence damage. §_89.146(b) (5). Alternatively, more stringent measures may be imposed, or mining may be prohibited, if it appears that leaving 50% of the coal in place will not provide adequate support. §_89.146(b) (4).

[5] Although some subsidence eventually occurs over every underground mine, the extent and timing of the subsidence depends upon a number of factors, including the depth of the mining, the geology of the overlying strata, the topography of the surface, and the method of coal removal. The DER believes that the support provided by its 50% rule will last in almost all cases for the life of the structure being protected. Since 1966, petitioners have mined under approximately 14,000 structures or areas protected by §_4; there have been subsidence damage claims with respect to only 300.

Regulation.

The complaint alleges that Pennsylvania recognizes three separate estates in land: The mineral estate; the surface estate; and the "support estate." Beginning well over 100 years ago, land owners began severing title to underground coal and the right of surface support while retaining or conveying away ownership of the surface estate. It is stipulated that approximately 90% of the coal that is or will be mined by petitioners in western Pennsylvania was severed from the surface in the period between 1890 and 1920. When acquiring or retaining the mineral estate, petitioners or their predecessors typically acquired or retained certain additional rights that would enable them to extract and remove the coal. Thus, they acquired the right to deposit wastes, to provide for drainage and ventilation, and to erect facilities such as tipples, roads, or railroads, on the surface. Additionally, they typically acquired a waiver of any claims for damages that might result from the removal of the coal.

In the portions of the complaint that are relevant to us, petitioners alleged that both §_4 of the Subsidence Act, as implemented by the 50% rule, and §_6 of the Subsidence Act, constitute a taking of their private property without compensation in violation of the Fifth and Fourteenth Amendments. They also alleged that §_6 impairs their contractual agreements in violation of Article I, §_10 of the Constitution. The parties entered into a stipulation of facts pertaining to petitioners' facial challenge, and filed cross motions for summary judgment on the facial challenge. The District Court granted respondent's motion.... [The district court rejected the taking claim and the Court of Appeals affirmed.]

We granted certiorari, and now affirm.

III

Petitioners assert that disposition of their takings claim calls for no more than a straightforward application of the Court's decision in *Pennsylvania Coal Co. v. Mahon.* Although there are some obvious similarities between the cases, we agree with the Court of Appeals and the District Court that the similarities are far less significant than the differences, and that *Pennsylvania Coal* does not control this case.... [The Court discussed *Pennsylvania Coal,* noting Justice Holmes had decided the "specific facts" of the case and then, "uncharacteristically," had provided an advisory opinion on the general validity of the act.]

The holdings and assumptions of the Court in *Pennsylvania Coal* provide obvious and necessary reasons for distinguishing *Pennsylvania Coal* from the case before us today. The two factors that the Court considered relevant, have become integral parts of our taking analysis. We have held that land use regulation can effect a taking if it "does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land." *Agins v. Tiburon,* 447 U.S. 255, 260 (1980) (citations omitted); see also *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). Application of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the Subsidence Act constitutes a taking. First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in *Pennsylvania Coal,* that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.

The Public Purpose

Unlike the Kohler Act, which was passed upon in *Pennsylvania Coal*, the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas. Section 2 of the Subsidence Act provides:

> "This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than 'open pit' or 'strip' mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania." Pa. Ann. Stat., Tit. 52, §_1406.2.

The District Court and the Court of Appeals were both convinced that the legislative purposes set forth in the statute were genuine, substantial, and legitimate, and we have no reason to conclude otherwise.

None of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes' opinion are present here. First, Justice Holmes explained that the Kohler Act was a "private benefit" statute since it "ordinarily does not apply to land when the surface is owned by the owner of the coal." 260 U.S., at 414. The Subsidence Act, by contrast, has no such exception. The current surface owner may only waive the protection of the Act if the DER consents. See 25 Pa. Code §_89.145(b) (1983). Moreover, the Court was forced to reject the Commonwealth's safety justification for the Kohler Act because it found that the Commonwealth's interest in safety could as easily have been accomplished through a notice requirement to landowners. The Subsidence Act, by contrast, is designed to accomplish a number of widely varying interests, with reference to which petitioners have not suggested alternative methods through which the Commonwealth could proceed.

Petitioners argue that at least §_6, which requires coal companies to repair subsidence damage or pay damages to those who suffer subsidence damage, is unnecessary because the Commonwealth administers an insurance program that adequately reimburses surface owners for the cost of repairing their property. But this argument rests on the mistaken premise that the statute was motivated by a desire to protect private parties. In fact, however, the public purpose that motivated the enactment of the legislation is served by preventing the damage from occurring in the first place — in the words of the statute — "by providing for the conservation of surface land areas." Pa. Stat. Ann., Tit. 52, §_1406.2. The requirement that the mine operator assume the financial responsibility for the repair of damaged structures deters the operator from causing the damage at all — the Commonwealth's main goal — whereas an insurance program would merely reimburse the surface owner after the damage occurs.[6]

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[6] We do not suggest that courts have "a license to judge the effectiveness of legislation," n. 3, or that courts are to undertake "least restrictive alternative" analysis in deciding whether a state

Thus, the Subsidence Act differs from the Kohler Act in critical and dispositive respects. With regard to the Kohler Act, the Court believed that the Commonwealth had acted only to ensure against damage to some private landowners' homes. Justice Holmes stated that if the private individuals needed support for their structures, they should not have "take[n] the risk of acquiring only surface rights." 260 U.S., at 416. Here, by contrast, the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals erred in taking a risk cannot estop the State from exercising its police power to abate activity akin to a public nuisance. The Subsidence Act is a prime example that "circumstances may so change in time ... as to clothe with such a [public] interest what at other times ... would be a matter of purely private concern." *Block v. Hirsh,* 256 U.S. 135, 155 (1921).

In *Pennsylvania Coal* the Court recognized that the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required.[7] The Court distinguished the case before it from a case it had decided eight years earlier, *Plymouth Coal Co. v. Pennsylvania,* 232 U.S. 531 (1914). There, "it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property." *Pennsylvania Coal,* 260 U.S., at 415. Justice Holmes explained that unlike the Kohler Act, the statute challenged in *Plymouth Coal* dealt with "a requirement for the safety of the employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws." *Ibid.*...

The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal.*[8] Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses

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regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it. See *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388-389 (1926). But, on the other hand, *Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature. In *Pennsylvania Coal,* that inquiry led the Court to reject the Pennsylvania Legislature's stated purpose for the statute, because the "extent of the public interest is shown by the statute to be limited." 260 U.S., at 413-414. In this case, we, the Court of Appeals, and the District Court, have conducted the same type of inquiry the Court in *Pennsylvania Coal* conducted, and have determined that the details of the statute do not call the stated public purposes into question.

[7] In his dissent, Justice Brandeis argued that the state has an absolute right to prohibit land use that amounts to a public nuisance. *Id.,* at 417. Justice Holmes' opinion for the Court did not contest that proposition, but instead took issue with Justice Brandeis' conclusion that the Kohler Act represented [su]ch a prohibition. *Id.,* at 413-414.

[8] The special status of this type of state action can be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

However, as the current Chief Justice has explained: "The nuisance exception to the taking guarantee is not coterminous with the police power itself." Penn Central Transport Co., 438 U.S., at 145 (Rehnquist, J., dissenting)....

individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.[9] See *Penn Central Transportation Co. v. New York City,* 438 U.S., at 144-150 (Rehnquist, J., dissenting). These restrictions are "properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States,* 338 U.S. 1, 5 (1949). Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," *Mugler v. Kansas,* 123 U.S., at 665, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.

In *Agins v. Tiburon,* we explained that the "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," and we recognized that this question "necessarily requires a weighing of private and public interests." 447 U.S., at 260-261. As the cases discussed above demonstrate, the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation. The Subsidence Act, unlike the Kohler Act, plainly seeks to further such an interest. Nonetheless, we need not rest our decision on this factor alone, because petitioners have also failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases.

Diminution of Value and Investment-Backed Expectations

The second factor that distinguishes this case from *Pennsylvania Coal* is the finding in that case that the Kohler Act made mining of "certain coal" commercially impracticable. In this case, by contrast, petitioners have not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking. For this reason, their takings claim must fail.... [The court noted the district court granted summary judgment on the facial challenge to the Subsidence Act. The parties then filed a joint motion asking the court to certify the facial challenge for appeal. The Court noted that "[t]he posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation."]

Petitioners thus face an uphill battle in making a facial attack on the Act as a taking.

The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania. Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit. The only evidence available on the effect that the Subsidence Act has had on petitioners' mining operations comes from petitioners' answers to respondents' interrogatories. Petitioners described the effect that the Subsidence Act had from 1966-1982 on 13 mines that the various companies operate, and claimed that they have been required to leave a

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[9] The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

bit less than 27 million tons of coal in place to support §_4 areas. The total coal in those 13 mines amounts to over 1.46 billion tons. Thus §_4 requires them to leave less than 2% of their coal in place.[10] But, as we have indicated, nowhere near all of the underground coal is extractable even aside from the Subsidence Act. The categories of coal that must be left for §_4 purposes and other purposes are not necessarily distinct sets, and there is no information in the record as to how much coal is actually left in the ground solely because of §_4. We do know, however, that petitioners have never claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed. Nor is there evidence that mining in any specific location affected by the 50% rule has been unprofitable.

Instead, petitioners have sought to narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use. They advance two alternative ways of carving their property in order to reach this conclusion. First, they focus on the specific tons of coal that they must leave in the ground under the Subsidence Act, and argue that the Commonwealth has effectively appropriated this coal since it has no other useful purpose if not mined. Second, they contend that the Commonwealth has taken their separate legal interest in property — the "support estate."

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." ... [The Court then quoted the "whole parcel" rule from *Penn Central.*]

The Coal in Place

The parties have stipulated that enforcement of the DER's 50% rule will require petitioners to leave approximately 27 million tons of coal in place. Because they own that coal but cannot mine it, they contend that Pennsylvania has appropriated it for the public purposes described in the Subsidence Act.

This argument fails for the reason explained in *Penn Central* and *Andrus.* The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a set-back ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. Cf. *Gorieb v. Fox,* 274 U.S. 603 (1927) (upholding validity of set-back ordinance) (per Holmes, J.). There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

We do not consider Justice Holmes' statement that the Kohler Act made mining of "certain coal" commercially impracticable as requiring us to focus on the individual pillars of coal that must be left in place. That statement is best understood as referring to the Pennsylvania

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[10] The percentage of the total that must be left in place under §_4 is not the same for every mine because of the wide variation in the extent of surface development in different areas. For 7 of the 13 mines identified in the record, 1% or less of the coal must remain in place; for three others, less than 3% must be left in place; for the other three, the percentages are 4%, 7.8%, and 9.4%.

Coal Company's assertion that it could not undertake profitable anthracite coal mining in light of the Kohler Act....

When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property. The record indicates that only about 75% of petitioners' underground coal can be profitably mined in any event, and there is no showing that petitioners' reasonable "investment-backed expectations" have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by §_4.[11]

The Support Estate

Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate. Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights. For example, in *Penn Central*, the Court rejected the argument that the "air rights" above the terminal constituted a separate segment of property for Takings Clause purposes. 438 U.S., at 130. Likewise, in *Andrus v. Allard*, we viewed the right to sell property as just one element of the owner's property interest. 444 U.S., at 65-66. In neither case did the result turn on whether state law allowed the separate sale of the segment of property....

[The court also rejected the Contract Impairment claim. Justice Stevens emphasized that the state was not a party to the old no-damages contracts and held that the public purposes which justified a conclusion that there was no taking also justified abrogating these contracts. The dissent did not address the issue. — eds.]

The judgment of the Court of Appeals is
Affirmed.

[CHIEF JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE O'CONNOR, and JUSTICE SCALIA joined, dissented.]

NOTES AND QUESTIONS

1. *The Public Purpose Issue.* After rereading *Pennsylvania Coal*, *supra*, do you agree with the *Keystone* majority that *Pennsylvania Coal* was decided on the ground that that case involved only a "single private house" and that there was therefore no "public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights"? Do

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[11] We do not suggest that the State may physically appropriate relatively small amounts of private property for its own use without paying just compensation. The question here is whether there has been any taking at all when no coal has been physically appropriated, and the regulatory program places a burden on the use of only a small fraction of the property that is subjected to regulation.

you agree with the *Keystone* majority that the *Pennsylvania Coal* majority *accepted* the Coal Company's argument that the Kohler Act in reality was nothing more than "robbery under the form of law" because its purpose was "not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few"? Do you agree that Justice Holmes' long discussion of "the general validity" of the Kohler Act was nothing more than an "advisory opinion," despite his statement that the Court assumed "that the statute was passed upon the conviction that an exigency exists that would warrant it." The last statement presumably referred to evidence in the record on the extensive damage to dwellings, public buildings, schools, hospitals, theaters, hotels, railroads, public streets and bridges, and public utility structures (all of which were expressly protected by the Act) if mining should cause widespread surface subsidence.

It should be noted that the *Keystone* majority's conclusion that *Pennsylvania Coal* involved only "a single private house" was based almost entirely upon the opinion of the *Pennsylvania Coal* trial court. That trial court opinion was rendered while the case involved only the validity of the Kohler Act as applied to a private landowner's house, because only Mr. and Mrs. Mahon were plaintiffs. But the entire complexion of *Pennsylvania Coal* changed drastically when the case came before the Pennsylvania Supreme Court, at which time the court heard arguments in support of the Kohler Act from both the Pennsylvania Attorney General and the Solicitor of the City of Scranton. The Pennsylvania Supreme Court said that "the case had taken on a much wider range" as a result of the intervention of the Attorney General and Scranton's City Solicitor. The court's opinion made it clear that the issue for decision was whether the Kohler Act was unconstitutional on its face, not simply as applied to the Mahons' house.

The Pennsylvania Supreme Court's opinion also made it clear that the court thought that the Act was a constitutionally valid response to "conditions portrayed in the legislative declaration" in the preamble to the Kohler Act, which the court held to be "such as to create an emergency, properly warranting the exercise of the police power," using language echoed in Justice Holmes' opinion. See 118 A. 491, at 493 (1922). The legislative declaration relied on in the Pennsylvania Supreme Court, and apparently by Justice Holmes as well, was as follows:

> [T]he anthracite coal industry in this Commonwealth has been and is being carried on in populous communities in such a manner as to remove the entire support of the surface of the soil to such an extent as to result in wrecked and dangerous streets and highways, collapsed public buildings, broken gas, water and sewer systems, the loss of human life, and in general so as to threaten the lives and safety of large numbers of the people of this Commonwealth. [118 A. 491, at 493.]

With respect to the "public purpose" issue, does the *Keystone* majority really do more than restate the views of Justice Brandeis in his *Pennsylvania Coal* dissent? He argued there that the Kohler Act was "merely the prohibition of a noxious use" — "a use which interferes with paramount rights of the public" — similar to the uses prohibited in *Mugler v. Kansas,* and *Hadacheck v. Sebastian.* If not, was it necessary for the *Keystone* majority opinion to discuss the economic impact of the Subsidence Act with respect to "diminution of value" and impairment of "investment-backed expectation"?

2. *Economic Impact — The Coal in Place.* What do you think of the *Keystone* majority's

argument that — in contrast to the situation in *Pennsylvania Coal* — the petitioners "have not come close to satisfying their burden of proving that they have been denied the economically viable use of the property"? The majority made this claim because "the record indicates that only about 75% of the petitioners' underground coal can be profitably mined in any event, and there is no showing that petitioners' reasonable 'investment-backed expectations' have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by §_4 of the Subsidence Act."

Does this accept without acknowledgment Justice Brandeis' argument, in his *Pennsylvania Coal* dissent, that "if we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land" owned by Coal Company? Justice Holmes apparently rejected this argument, at least by implication, in *Pennsylvania Coal,* but a majority of the Court endorsed this "whole parcel" rule in *Penn Central.*

Keystone distinguished *Pennsylvania Coal* by accepting the court of appeals' argument that Justice Holmes' statement in *Pennsylvania Coal* that the Kohler Act made the mining of "certain Coal" commercially impossible was a result of his "understanding that the Kohler Act rendered the business of mining coal unprofitable." It seems reasonably clear, however, that Justice Holmes' use of the term "certain coal" referred to the "individual pillars of coal that must be left in place." This was required, according to John W. Davis, who argued the case for the Pennsylvania Coal Company, to prevent "the subsidence that will inevitably result unless the Coal Company provides artificial support at a cost exceeding the value of the coal." (Argument of John W. Davis, 260 U.S. at 395). Davis did not, in his argument for the Coal Company, assert that the Coal Company "could not undertake profitable anthracite mining in light of the Kohler Act." He surely would have done so if, in fact, the record had contained any evidence to support such an assertion. That the record did not contain such evidence is further indicated by Justice Brandeis' statement, in his dissent, that "[f]or aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the [Coal Company's] whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute." 260 U.S. at 419.

3. On the definition of the property interest "taken" as a result of regulatory legislation or action, compare the principal case with *Whitney Benefits, Inc. v. United States,* 18 Cl. Ct. 394 (1989), *aff'd,* 926 F.2d 1169 (Fed. Cir. 1991). In *Whitney Benefits,* the Court of Appeals affirmed a Claims Court judgment awarding compensation of $60,296,000 plus prejudgment interest for the "taking" of coal in place located in Wyoming — which, the Court noted, "recognizes separate mineral and surface estates" — as a result of enactment of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. §_1201 et seq.). In reaching this result, the Court rejected the argument that no "taking" occurred because plaintiff had not sought a surface mining permit, stating that "the government does not suggest ... any basis whatever on which a permit could be legally granted to surface mine Whitney coal" and that the statute expressly provided that "no permit shall be approved" under conditions precisely descriptive of the Whitney coal estate.

4. *New "Taking" Law?* In *Penn Central* Justice Brennan indicated there was no "set formula" for taking jurisprudence but that the Court had applied a set of taking "factors" in its taking decisions. Is the balancing test adopted by Justice Stevens in *Keystone* a set formula? Note

that Justice Stevens also refers to the Brennan taking factors and applies the investment-backed expectations taking factor in his decision. Is this consistent with the balancing test?

Justice Stevens also resurrected the "average reciprocity of advantage" rule from Justice Holmes' decision in *Pennsylvania Coal.* Is his application of the rule consistent with the Holmes opinion? What do you think of Justice Stevens' holding, that "[w]hile each of us is burdened somewhat by such [land use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." These burdens are "part of the burden of common citizenship." See also footnote 21. This holding is a repetition of a similar rule in *Penn Central.*

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