Keystone Bituminous Coal Association v. Debenedictis: A Regulatory Taking

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KEYSTONE BITUMINOUS COAL ASSOCIATION v. DEBENEDITCIS: A "REGULATORY TAKING"?

I. INTRODUCTION

The concept of eminent domain,¹ which is addressed in the "takings" clause of the fifth amendment to the United States Constitution, focuses on the rights of property owners to compensation when the government takes their property for the public good. The contract clause,² in article I of the Constitution, prohibits laws which impair an individual's right to contract. Often, governmental regulations limit these individual rights to achieve goals that promote the public interest. Such governmental regulations emanate from the state's "police power," that is the "exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare within constitutional limits. ..."³ While these laws benefit the public, they often adversely affect individuals whose property is regulated. Takings issues are, therefore, difficult for the courts to resolve.

The actual physical invasion cases are uniformly viewed as unconstitutional takings,⁴ but courts review taking challenges to zoning ordinances⁵ and nuisance regulations⁶ on an ad hoc basis. The courts have developed a variety of tests including a "diminution of value test" set forth initially by Justice Holmes in his majority opinion in Pennsylvania Coal Co. v. Mahon,⁷ and a "noxious use" test advocated by Justice Brandeis in his Pennsylvania Coal dissent.⁸ Historically, both tests have been used to determine whether a compensable taking has occurred. Neither test is dispositive, therefore, prediction as to the outcome of zoning and nuisance cases is problematic.

Keystone Bituminous Coal Association v. DeBenedictis,⁹ involved a constitutional taking challenge to the Pennsylvania Bituminous Mine Subsidence and

¹ The fifth amendment of the United States Constitution states that: "No person shall be . . . deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V (emphasis added).
⁷ Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) [hereinafter cited as Pennsylvania Coal].
⁸ Id. at 416 (Brandeis, J. dissenting).
Land Conservation Act, and its implementing regulations. Basically, the Act requires that mine operators take measures to prevent subsidence and maintain the surface's natural integrity during and after mining operations. The greatest impact of subsidence damage is upon the environment, insofar as the surface becomes unusable and water pollution may result. Additionally, structures over the mining operations become unsafe. In sum, these environmental and physical factors reduce the surface's value which, in turn, affects the tax base of the property.

In *Keystone Bituminous Coal Association v. Duncan,* the Third Circuit Court of Appeals focused on the expressed legislative purpose of the Subsidence Act to protect the environment and the property tax base. The court determined that these legislative concerns were paramount to an individual's contract right to waive subjacent support. In a unanimous decision, the circuit court agreed with the district court's analysis upholding the constitutionality of the Subsidence Act. Both courts viewed private property rights and the state's regulatory powers for the public good as well-defined "opposites" and "nearly perfectly equal in magnitude," but found the state's interest in environmental protection as the primary consideration.

In order to understand the *DeBenedictis II* holding, this Comment will first focus upon the historical development of the takings clause and the contract clause. Next, this Comment will consider the "diminution of value test" and "the noxious use test," along with variations recently developed by the courts for analyzing takings cases. Finally, this Comment will discuss how the Third Circuit employed these tests in *Keystone,* and how the Supreme Court affirmed the holding of the Third Circuit in *DeBenedictis II.*

II. STATEMENT OF THE CASE

Initially, five coal companies and a coal association, which engaged in underground mining in Pennsylvania, filed suit in the District Court for the Western

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13 *Keystone Bituminous Coal Association,* a Pennsylvania unincorporated association of bituminous coal producers, brought suit individually and as represented by certain of its member companies; Helvetia Coal Company, a Pennsylvania corporation; Rochester & Pittsburgh Coal Company, a Pennsylvania corporation; U.S. Steel Mining Co., Inc., a Delaware corporation, individually and as a trustee *ad litem* for *Keystone Bituminous Coal Association; United States Coal Company,* a Delaware corporation [hereinafter referred to as "coal companies"].
District of Pennsylvania asserting that certain state statutes and regulations governing subsidence damage to surface property were unconstitutional on their face. The defendants were state officials responsible for Pennsylvania’s coal mine subsidence regulation program.

The coal companies, which operated bituminous coal mines in western Pennsylvania, purchased the right to mine coal from the surface owners in the early 1900s. Along with the right to mine the coal, the operators also obtained waivers from the surface owners for any damage caused to the surface. In the district court, the coal companies argued that, because of these legal contracts with the surface owners, the Subsidence Act amounted not only to uncompensated taking of private property for public use but also an unconstitutional impairment of the contract clause.

Since the late 1800s, Pennsylvania courts have recognized that the person who owned the surface of the land did not own it to the center of the earth. The surface could be separated from the different strata beneath it. There could be as many owners as strata if the surface owner did not protect his rights in the severance deed. In Chartiers Block Coal Co. v. Mellon, the Pennsylvania Supreme Court recognized the right to enjoy each strata even if that right was not stated in the deed.

Then, in 1921, the Kohler Act drastically expanded the regulation of mine operators, making it unlawful to conduct anthracite mining so as to cause the

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14 At issue are three statutory provisions, Pa. Stat. Ann. tit. 52, § 1404.4, 1404.6(a), and 1406.15 in Pennsylvania's Bituminous Mine Subsidence and Land Conversation Act.
15 Also, at issue are the Department of Environmental Resources regulations, 25 Pa. Code §§ 89.145, 89.146, and 89.147(b) (Shepard's 1985), which implement the provisions and the requirements of the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1982 & Supp. I 1983) hereinafter referred to as SMCR.
16 “Subsidence” is defined as “the process of falling, lowering, or flattening out . . . so as to form a depression. . . .” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2279 (14th ed. 1961).
17 Peter S. Duncan was sued individually and in his capacity as Secretary of the Commonwealth of Pennsylvania Department of Environmental Resources. Philip Zullo was sued individually and in his capacity as Chief, Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources. Thomas B. Alexander was sued individually and in his capacity as Chief, Section of Mine Subsidence Regulation of the Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources [hereinafter referred to collectively as DER].
18 Pennsylvania state courts recognize the “third estate” in land, that being the surface, the mineral rights, and the right of subjacent support. The concept developed in three cases: Graff Furnace Co. v. Scranton Coal Co., 244 Pa. 592, 91 A. 508 (1914); Penman v. Jones, 256 Pa. 416, 100 A. 1043 (1917); and Charnetski v. Miners Mills Coal Co., 270 Pa. 459, 113 A. 683 (1921) and is still recognized today.
collapse of public structures. In Pennsylvania Coal, the Supreme Court held the Kohler Act unconstitutional because the statute did not "disclose a public interest sufficient to warrant so extensive of a destruction of the ... constitutionally protected rights" without compensation.22

In 1966, the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act was enacted. In 1980, amendments and implementing regulations were passed pursuant to the requirements of federal law, creating Pennsylvania's current bituminous coal mining regulatory program. The coal companies felt that this new legislation, like the Kohler Act which preceded it, created an unconstitutional demand upon the property rights for which they had contracted, and should be overturned. The coal companies challenged three basic aspects of the legislation in the district court.

First, the plaintiffs attacked the requirement that a certain amount of coal be left in the ground for support under "[a]ny public building or any non-commercial structure customarily used by the public including ... churches, schools, hospitals ..." and "[a]ny dwelling used for human habitation ... unless the current owner of the structure consents and the resulting damage is fully repaired or compensated."24 These provisions apply even if the mineral owner is also the surface owner.25 The coal companies alleged that these provisions constituted a taking violation under the fifth amendment of the Constitution because they were not compensated. This argument rested almost entirely on the reasoning in Pennsylvania Coal.26

Second, the plaintiffs challenged section 6 of the Subsidence Act which requires mine operators to compensate the surface owner for subsidence damage. The implementing regulation requires mine operators to repair any damage to the surface caused by subsidence, to the extent technically feasible.27 These provisions are enforceable notwithstanding a damage waiver signed by the surface owners and held by the coal company.28 The coal companies asserted that this violated the contract clause of article I, section 10 of the United States Constitution and the takings clause, again because they were not compensated.

Finally, section 15 of the Subsidence Act gives surface owners, not otherwise protected by other sections of the Act, the right to protect the surface integrity

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22 Pennsylvania Coal, 260 U.S. at 414.
23 SMCRA provides that a state may assume primary control over reclamation activities within its borders by adopting a regulatory scheme at least as stringent as the minimum guidelines set forth in the federal act. See 30 C.F.R. §§ 938.1 to .21 (1983).
24 Keystone Coal, 771 F.2d at 711 (emphasis added).
25 Brief for Appellee at 7, Keystone Coal, 771 F.2d 707.
26 Pennsylvania Coal, 260 U.S. 393.
27 Keystone Coal, 771 F.2d at 711.
28 Id.
by purchasing the underlying coal even though this right may have been waived. The coal companies asserted that this section was an invalid exercise of eminent domain under the fourteenth amendment.\textsuperscript{29} The plaintiff coal companies rationalized that, if they had originally purchased the mining rights and could not exhaust the mineable coal, then they should be compensated for the coal they were not allowed to mine.

The DER maintained that the legislative purpose of the Subsidence Act was to prevent damage from mine subsidence. Such subsidence damage resulted in a reduction in property values, thus decreasing the tax base. The Act was intended to preserve this tax base for certain municipalities in order to enhance the state's economic welfare. The statute was passed, therefore, pursuant to the state's "police power" to promote the health, safety, and welfare of the people of the Commonwealth.\textsuperscript{30} The district court found the legislative purpose legitimate because the "damage from mine subsidence caused a very clear and present damage to the health, safety and welfare of the people of Pennsylvania."\textsuperscript{31} Both the legislature and the district court recognized that the prevention of subsidence damage was "related to the economic future and well-being of Pennsylvania."\textsuperscript{32} The district court held that the state law and regulations were not facially unconstitutional\textsuperscript{33} because the legislation did not exceed the inherent police power of the state. Since the coal companies did not allege any particular injury suffered from the enforcement of the Subsidence Act, the only question remaining was whether the Act and regulations constituted a taking.\textsuperscript{34}

The district court identified four general guidelines for identifying a taking. These guidelines included a determination of: (1) Whether there has been a permanent physical occupation of private land by the government; (2) whether the Subsidence Act was reasonably necessary to protect health, safety, and welfare; (3) whether the statute created a general easement for the public; and (4) whether the coal companies were still able to receive some profit,\textsuperscript{35} thus, only partially affecting their rights.

The United States Court of Appeals for the Third Circuit affirmed the lower court decision. Judge Adams, writing for the court, held that the statute and regulations protecting surface owners from subsidence damage were not violative of the takings or contract clauses, nor did they constitute an invalid exercise of

\textsuperscript{29} "No State shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law...." U.S. Const amend. XIV, § 1.
\textsuperscript{31} Id.
\textsuperscript{33} The district court opinion as to the constitutionality "as applied" is pending.
\textsuperscript{34} Keystone Coal, 771 F.2d at 718.
\textsuperscript{35} DeBenedictis I, 581 F. Supp. at 517.
eminent domain.\textsuperscript{36} The United States Supreme Court affirmed the Third Circuit decision in a five to four decision.

III. PRIOR HISTORY

The appeals court’s analysis which was approved by the Supreme Court in \textit{DeBenedictis II} embraces three areas of subsidence law: First, the court reviewed both the statutory development of the Subsidence Act and a prior similar law\textsuperscript{37} which was held unconstitutional as an unauthorized use of the state’s “police power”; second, the court discussed the prior history of the takings clause in the fifth amendment; and finally, the court analyzed the contract clause in article I, section 10 of the United States Constitution. All three areas must be historically developed in greater detail to fully understand the \textit{DeBenedictis II} decision.

A. The Pennsylvania Bituminous Mine Subsidence and Land Conservation Act

Until the passage of the Subsidence Act, coal mine operators had been able to extract the maximum amount of mineable coal, regardless of the possible damage to the surface, simply by obtaining a waiver of support from the surface owner. Because of the Subsidence Act and its corresponding regulations, the surface owners now have an absolute right of subjacent support, whether or not a contract of waiver exists.

In Pennsylvania, three estates in land are recognized: the surface, the minerals, and subjacent support.\textsuperscript{38} Pennsylvania is one of the few states which recognizes the right of support as a distinct estate in land.\textsuperscript{39} In fact, this third estate in land may be vested in someone other than the mineral or surface owner.\textsuperscript{40} Although no cases demonstrate this occurrence, and no one other than the surface or mineral owners would appear to have an interest, the state has shown an interest in this third estate through its police power.

Pennsylvania adopted the English view that the surface owner is entitled to support of the land in its natural state. This right to support was held absolute in \textit{Jones v. Wagner}.\textsuperscript{41} Since \textit{Jones}, Pennsylvania courts have rejected defenses that mining operations were conducted according to the custom of the industry\textsuperscript{42}

\textsuperscript{36} \textit{Keystone Coal}, 771 F.2d at 708.
\textsuperscript{37} \textit{See supra} note 21.
\textsuperscript{38} \textit{Coleman v. Chadwick}, 80 Pa. 81 (1875).
\textsuperscript{39} \textit{Charnetski}, 270 Pa. 459, 113 A. 683.
\textsuperscript{41} \textit{Jones v. Wagner}, 66 Pa. 429 (1870).
\textsuperscript{42} \textit{Id.} at 435.
or that support was ordinarily sufficient but failed for a particular structure.

Obviously, there was no right to surface support if the same person owned both the mineral and surface estate. The natural right of support incident to surface ownership was created by a severance deed. A Pennsylvania court held that once there had been a horizontal severance, the surface owner was limited in the use and enjoyment of his estate to the extent that he must provide the mineral owner with access.49 The mineral estate's only allowable use, the removal of coal, was heavily burdened by Jones' subjacent support requirement.44 The mineral estate is determinable because, once the coal is exhausted, the mineral owner's interest terminates and this space previously occupied by the coal reverts to the surface owner;45 therefore, no further enjoyment or use of the coal exists.

At common law, the proprietary right of subjacent support attached to the surface based upon the assumption that such support was necessary to enjoy and use the land.46 In Jones, the defendant coal company was held liable for subsidence damage caused to a building. Even though the building had been erected after the horizontal partition of the estate, the court found "the owner of the mineral estate...owes a servitude to the superincumbent estate, of sufficient supports; consequently the failure to do so is negligent..."47 Jones recognized the surface owner's right to waive subjacent support by stating that the "[c]ontract may devote the whole of the minerals to the enjoyment of the purchaser, without supports, if the parties choose,"48 but "[i]f not [waived], the loss by maintaining pillars or putting in props will necessarily come out of the value of the mineral estate."49

In 1880, the right to waive support was recognized only by an express agreement.50 The mineral owner who received from the surface owner a release from liability for loss of subjacent support not only had a contractual release from future contingent liability, but also a covenant running with the land.51 This bound successors of the surface estate to the original contract,52 leaving them at the mercy of the mineral owners. These early cases scrutinized the absolute right to contract and, with the development of case law, as well as the increase of mining operations in Pennsylvania, the legislature became sensitive to the need for subsidence legislation.53

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44 Id.
46 Jones, 66 Pa. 429.
47 Id. at 435.
48 Id.
49 Id.
53 Noonan, 200 Pa. at 478, 50 A. at 258.
In 1913, the Pennsylvania General Assembly made it unlawful to remove necessary support beneath streets and public ways without utilizing permanent and adequate artificial supports.\(^4\) In 1921, the Kohler Act expanded the regulation of anthracite mine operators. But in 1922, the United States Supreme Court, in \textit{Pennsylvania Coal},\(^5\) held the Kohler Act to be an unconstitutional use of police power. The Pennsylvania Legislature reacted to \textit{Pennsylvania Coal} by enacting a statute in 1937 which replaced absolute liability for subsidence with a "fault concept" under which a mineral owner would be liable only when his act caused an "unreasonable risk of harm to the surface."\(^6\)

Although the creation of a subsidence committee by the Pennsylvania Legislature in 1956 provided no remedy for those actually damaged by subsidence, it did allow for notice to be given in surface deeds that coal or support rights were not transferred.\(^7\) In 1961, the committee reenacted many provisions of the Kohler Act and added a declaration of legislative purpose as well as a guide for mining operators.\(^8\)

Finally, the original Bituminous Mine Subsidence and Land Conservation Act was enacted in 1966.\(^9\) The legislature included a lengthy statement of purpose and a declaration of public policy concerns. The basic premise of the Subsidence Act was that, regardless of the right to waive subjacent support by the surface owner, the state has the right through its police power to require subjacent support for the benefit and protection of the community.

Pennsylvania was the forerunner of subsidence regulations. Not until 1977, in response to a national ecological threat, did Congress enact the Surface Mining Control and Reclamation Act (SMCRA).\(^10\) Pennsylvania's Subsidence Act is more demanding upon operators than the Federal Act.

B. \textit{The Takings Clause}

Since the fourteenth amendment's adoption:

compensation for private property taken for public uses constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, no matter under what form of


\(^{5}\) \textit{Pennsylvania Coal}, 260 U.S. 393.

\(^{6}\) Comment, supra note 54, at 842-43.

\(^{7}\) Id. at 844.

\(^{8}\) The purpose of SMCRA is to establish a nationwide program to protect society and the environment from the adverse effects of surface mining operations and to assure that the rights of surface landowners are fully protected from such operations.
procedure it is taken, would violate the provisions of the federal constitution.\textsuperscript{61}

Pursuant to its police powers, the state may take or regulate the use of property to promote the public good.\textsuperscript{62} This concept of eminent domain recognizes that a taking requires compensation, but does not include the notion that a regulation, which only infringes upon an individual’s property rights, requires compensation.\textsuperscript{63} A government regulation involves the adjustment of rights for the general welfare. Often this adjustment curtails some potential use of private property. To require compensation in all circumstances would effectively compel the government to regulate by purchase.\textsuperscript{64} “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”\textsuperscript{65} The facts of each case will determine whether a taking occurs. Balancing of the factors involved in each case has not provided a definitive guide. Takings have been decided using various elements and tests, none of which alone are determinative.

The Supreme Court has candidly acknowledged that it is unable to develop a single test or formula for determining whether a particular government regulation of private property constitutes a taking.\textsuperscript{66} Commentators have characterized the Court’s ad hoc approach as a “crazy quilt pattern”\textsuperscript{67} and a “mosaic,”\textsuperscript{68} but important distinctions have surfaced. A “‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by [the] government. . . .”\textsuperscript{69} When permanent physical invasions are held as takings, just compensation is required, as demonstrated in a number of recent Supreme Court cases.

In \textit{Kaiser Aetna v. United States},\textsuperscript{70} the Court held that the application of the federal navigational servitude to a lagoon on the island of Oahu in Hawaii constituted a taking, requiring compensation. A land developer had converted a private pond into a marina which he connected by canal to the ocean. The gov-

\begin{itemize}
\item\textsuperscript{61} \textit{Scott v. City of Toledo}, 36 F. 385, 396 (C.C.N.D. Ohio 1888).
\item\textsuperscript{62} \textit{Keystone Coal}, 771 F.2d at 712.
\item\textsuperscript{63} \textit{Pennsylvania Coal}, 260 U.S. at 415.
\item\textsuperscript{64} \textit{Andrus v. Allard}, 444 U.S. 51, 65 (1979).
\item\textsuperscript{65} \textit{Pennsylvania Coal}, 260 U.S. at 413.
\item\textsuperscript{66} \textit{Kaiser Aetna}, 444 U.S. at 175.
\item\textsuperscript{67} \textit{Dunham, Griggs v. Allegheny County in Perspective: 30 Years of Supreme Court Expropriation Law}, 1962 \textit{Sup. Ct. Rev.} 63.
\item\textsuperscript{70} \textit{Kaiser Aetna}, 444 U.S. 164.
\item\textsuperscript{71} Navigational servitude is defined as the “public right of navigation for the use of the people at large.” \textit{BLACK’s LAW DICTIONARY} 927 (5th ed. 1979).
\end{itemize}
ernment claimed the connection made the canal a “navigable water” of the United States, subject to regulation by the federal government. However, the government could not require public use of the private marina without invoking eminent domain. The Court held the government’s action went “beyond ordinary regulation” and that converting private property to public use required just compensation.

The Supreme Court again held in Loretto v. Teleprompter Manhattan CATV Corp. that actual physical invasion required just compensation. Loretto dealt with the constitutionality of a New York statute which required owners of rental properties to allow installation of cable television transmission facilities. In holding that a “permanent physical occupation of property is a taking,” Loretto confirmed the distinction between regulation and public use, employing a rationale the Court developed nearly 100 years previously:

[the restriction imposed by the constitution [is] to the effect that statutes passed in the exercise of the police power of the Commonwealth must not be repugnant or contrary to the constitution, one of the provisions of which is, that the owner of private property, appropriated to public uses, shall receive a reasonable compensation therefor. . . .

Undoubtedly, the State, without taking the title to itself, may, in some appropriate mode and without compensation to the owner, forbid the use of specified private property, where such use would be injurious to the public health. . . .

The difference [is] between an act passed with exclusive reference to the police power of the State, without any purpose to take and apply property to public uses, and a statute... for the general good, [which] ordains and establishes regulations declaring the existence of a nuisance. . . .

The Court has extended the physical invasion category of the takings clause to include some cases in which a government activity physically invades an easement in property. In 1922, resort hotel owners claimed that the government’s placement of a gun battery near the hotel impaired the land’s recreational value so as to constitute a taking. Two prior decisions by the Supreme Court had rejected the same claim because the government displayed no intent of depriving the owner of the hotel’s profitable use. Recognizing the potential for a taking,

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72 Kaiser Aetna, 444 U.S. at 178.
73 Loretto, 458 U.S. 419.
74 Id. at 441 (emphasis in original).
76 See, e.g., United States v. Causby, 328 U.S. 256 (1946).
79 Peabody, 231 U.S. at 538.
Justice Holmes reversed the trial court’s dismissal of the 1922 decision. The Supreme Court ordered the Court of Claims to hear evidence to determine whether the cumulative effect of the overt firings from the gun battery were sufficient to prove an intent to create a servitude over the hotel’s property. In United States v. Causby, the Supreme Court held that regular and frequent flights of military planes over the plaintiff’s land created an easement for the government’s benefit which required payment of compensation. The plaintiffs in Causby owned a small chicken farm near a military airport whose glidepath was only eighty-three feet above their property. The use of the runway disturbed the farm to the extent that the plaintiffs had to discontinue their chicken business. The Court held that the landowners were entitled to as much air space over the land as necessary to allow their farm to exist and ordered compensation.

Aside from the actual physical invasion cases, courts have taken an ad hoc approach, balancing various factors to determine when a taking has occurred. The courts must look to the facts of each case involving such a decision.

Justice Holmes’ majority opinion and Justice Brandeis’ dissent in Pennsylvania Coal illustrate the diverse methodology of the Court’s takings analysis. In Pennsylvania Coal, Mahon’s land and house had subsided. A predecessor in title had contracted away the right to subjacent support. Nonetheless, Mahon contended that the Kohler Act required the coal company, which had the mining rights, to maintain subjacent support. The plaintiff coal company challenged the validity of the statute because it protected the rights of only a small group of private citizens, not the public. The coal company argued that because the statute mandated subjacent support, the amount of mineable coal was reduced, which the coal company charged amounted to a taking without just compensation.

Justice Holmes’ majority opinion held that the Kohler Act could not be sustained as a valid exercise of police power because the “statute [did] not disclose a public interest sufficient to warrant so extensive a destruction of the defendant’s constitutionally protected rights.” Holmes’ decision focused on the “magnitude of the burden imposed,” or what has been called the “diminution of value theory.” Holmes found that a statute making it commercially impractical to mine certain coal has nearly the same effect, in the constitutional sense, as an appropriation.

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80 Portsmouth Harbor, 260 U.S. at 330.
81 Causby, 328 U.S. 256.
82 Id. at 265.
83 Pennsylvania Coal, 260 U.S. at 414.
84 Id.
85 Id.
Justice Brandeis' dissent in Pennsylvania Coal relied on different factors than considered under the diminution of value theory. Brandeis reasoned that the restriction in the Kohler Act was merely a prohibition of a "noxious use," a test often used to distinguish a valid regulation from a taking. Furthermore, the paramount rights of the public88 outweighed the individual's property rights. Brandeis concluded that the Kohler Act was a valid exercise of the police power,89 and not a taking.

The theory underlying Brandeis' dissent emanated from Mugler v. Kansas,90 a case which interpreted a Kansas statute prohibiting the manufacture of liquor. In Mugler, the plaintiff manufactured beer for several years prior to the passage of the statute. He argued that the mere passage of the statute was a taking of his plant and equipment without compensation. The Court recognized that the property's value would diminish significantly,91 but held that the statute did not impair any constitutional liberty or property interest of alcohol manufacturers.92 The regulation was not an exercise of eminent domain because a mere prohibition on the use of property for purposes which are declared by valid legislation to be injurious to the "health, morals, or safety of the community, cannot in any sense, be deemed a taking or an appropriation of property for the public benefit."93 In essence, this "noxious use" test used in Brandeis' dissent in Pennsylvania Coal and Harlan's opinion in Mugler, requires a finding by a legislative body that a particular use of property is offensive and should be prohibited as a matter of public policy. Once the legislative body identifies an offensive use, the Court will scrutinize whether the act prohibiting it was an "unreasonable and arbitrary exercise"94 of authority. If the Court finds the act not arbitrary or unreasonable, the prohibition stands, and no compensation is due.95 If arbitrary or unreasonable, compensation is required.

The taking question often arises in land use cases. Land use regulations require ad hoc analysis to determine if a taking has occurred, and courts often rely upon the public benefit aspect. In 1926, the Supreme Court first addressed the constitutionality of a comprehensive land use law in Village of Euclid v. Ambler Realty Co.,96 restrictively regulating the location of trades, industries, and apartments, as well as the size and height of buildings.97 The zoning ordinance

88 Pennsylvania Coal, 260 U.S. at 418 (Brandeis, J., dissenting).
89 Id. at 417.
91 Id. at 656-57.
92 Id. at 688-69.
93 Id.
95 See, e.g., Mugler, 123 U.S. 623 and Pennsylvania Coal, 260 U.S. at 416 (Brandeis, J., dissenting).
96 Village of Euclid, 272 U.S. 365.
97 Id. at 379-80.
was attacked on the ground that it deprived the owner of the value of his property if zoned adversely; and was also challenged on due process and equal protection grounds. The Court found that the statute's enactment was a proper exercise of police power because of sufficient public interest in the segregation of incompatible land uses to justify the diminution of certain property values. Courts interpreting zoning ordinances continue to stress that the restriction "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare." 99

In 1962, the Supreme Court, in Goldblatt v. Town of Hempstead, 100 determined the constitutionality of a zoning ordinance. The town, in attempting to restrict a quarry, established a regulation which prohibited excavation below the water line, which effectively eliminated the use to which the property had previously been devoted. 101 The Court upheld the statute's validity reasoning that the "interest of the public...require[d] such interference; and [secondly] that the means [were] reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." 102

The Court often balances the public interest against private interests when no actual physical intrusion exists. 103 Penn Central Transportation Co. v. New York City was one such case in which the Court applied the "distinct investment-backed expectations" test. 104 In Penn Central, the Court interpreted the constitutionality of a landmark preservation act which allowed owners of historical buildings to transfer development rights to mitigate the loss of investment expectations. 105 Because the Court found that the legitimate public concern regarding historic preservation was paramount to the developers' investment-backed expectations, the restriction was a valid exercise of the state's police power and did not amount to a taking. 106

Emergency legislation rarely has been deemed a taking. For example, in United States v. Central Eureka Mining Co., 107 a government regulation requiring nonessential gold mines to cease operation was not considered a taking. War demanded strict control of resources and the regulation was the only reasonable means to achieve the desired result.

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100 Goldblatt, 369 U.S. 590.
101 Id. at 591.
102 Id. at 595 (quoting Lawton v. Steel, 152 U.S. 133, 137 (1894)).
105 Id. at 109-12.
106 Id. at 138.
Determining the line between permissible police power regulations and impermissible uncompensable takings for public use has not always been an easy task for the Supreme Court. Each case is closely scrutinized as to its particular facts and, as previously discussed, various tests have been used to determine the legitimacy of the state's action.

C. Contract Clause

The importance of the contract clause is evident from its inclusion in the original articles of the Constitution. The contract clause's purpose was to address post-Revolutionary War state legislation which allowed repudiation of British creditors. Although the contract clause prohibited state legislation repudiating contracts between private parties, the Supreme Court extended its coverage to prohibit a state's repudiation of its own contract. However, when a state was a party to a contract, the scrutiny was more relaxed. In contrast, laws alleged to impair the obligations of contracts between private parties were more closely scrutinized.

In 1934, the Supreme Court reversed this position, holding that the contract clause should not be read as a serious impediment to social and economic legislation affecting private contracts. In Home Building and Loan Association v. Blaisdell, the Court examined a state law enacted as an emergency measure during the depression extending redemption periods on mortgages. The Court held that the extension of the redemption period did not violate the contract clause because "[t]he economic interests of the state may justify the exercise of its...protective powers notwithstanding interference with contracts." The Court employed a means-ends analysis in Blaisdell, reasoning that "[t]he question is not whether legislation affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to the end."

The language of the contract clause appears to contain an absolute prohibition on the impairment to contract. Nonetheless, the Court found in Blaisdell, that

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113 Id. at 437.
114 Id. at 438.
the prohibition must accommodate the inherent police power of a state "to safeguard the vital interest of its people." Again, the state's police power to protect the community overrides a constitutionally protected right.

In 1977, the Court reaffirmed its position in *Blaisdell*. In *United States Trust Co. v. New Jersey*, the Supreme Court struck down New Jersey legislation which allowed the repudiation of a covenant between the state and bondholders. The Court justified its higher standard of scrutiny, reasoning that, when a state is a party to a contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake."117

The most recent Supreme Court decision considering impairment of private contracts was *Energy Reserves Group Inc. v. Kansas Power and Light Co.*118 In *Energy Reserves*, a Kansas statute had imposed a price ceiling on newly discovered gas which was lower than the amount charged on gas previously purchased through a long-term contract. Justice Blackmun analyzed the impairment of contract challenge using a three-step approach. The threshold inquiry was whether the state law operated "as a substantial impairment of a contractual relationship." If so, the second question was whether "the state, in justification, [had] a significant and legitimate public purpose behind the regulation . . . such as remedying a broad and general social or economic problem." The final inquiry was "whether the adjustment of the rights and responsibilities of contracting parties [was based] upon reasonable conditions and [was] of a character appropriate to public purpose justifying [the legislation's] adoption."119

If the state is not a party, legislative intent should control.120 If the state is a party, the court must inquire whether a less drastic modification is sufficient and whether the legislation is reasonable in light of the circumstances.121

Remedying broad social or economic problems is a sufficient public purpose for the state to override the contract clause. The requirement of a legitimate public purpose guarantees that the state is exercising its police power in an appropriate manner, rather than providing a benefit to special interests. In certain contexts, the prohibitions of the contract clause must occasionally give way to the state's legitimate goals.

115 Id. at 434.
117 Id. at 26.
119 Id. at 411 (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, reh'g denied, 439 U.S. 886 (1978)) (emphasis added).
120 Id. at 411-12.
121 Id. (quoting United States Trust Co., 431 U.S. at 22).
122 United States Trust Co., 431 U.S. at 22-23.
123 Id. at 30-32; see also, Troy Ltd., 727 F.2d at 296.
IV. The Third Circuit's Analysis in Keystone Coal

The Third Circuit's analysis in *Keystone* focused on the takings and the contract clauses. The takings clause analysis reviewed *Pennsylvania Coal*, the state's police power, and eminent domain. The contract clause challenge to the legislation was evaluated in light of the legitimate public purpose,\(^{124}\) balanced against the individual's right to contract.

A. Takings Clause

1. Appellant's Argument Relying upon *Pennsylvania Coal*

   The appellants in *Keystone* suggested that *Pennsylvania Coal* should have been particularly relevant to the Third Circuit's analysis.\(^{125}\) The court recognized the similarities between the Kohler Act as it was applied in *Pennsylvania Coal*, and the Subsidence Act as applied in *Keystone*, but distinguished the cases on their facts. *Pennsylvania Coal* was not controlling because it involved a single private house, while *Keystone* dealt with the public interest. Furthermore, in *Pennsylvania Coal*, Justice Holmes narrowed the holding only to apply to the government's power to enact regulations regarding individual citizens. Holmes stated that "'[a] source of damage to such a [private] house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public.'"\(^{126}\) The Supreme Court in *DeBenedictis II* found no "... indicia of a statute enacted solely for the benefit of the private parties..."\(^{127}\)

   Justice Holmes viewed the Kohler Act as a taking without just compensation based on a diminution of value test. He also recognized, however, the merit of an ad hoc approach, stating that the "question depends upon the particular facts."\(^{128}\) In that regard, Holmes criticized the Kohler Act as an unjustified protection of public safety not directed to preventing common or public damage and not applying to all surface owners in that subjacent support was not required if the coal company owned the surface.\(^{129}\)

   In *Keystone*, the Third Circuit found the Subsidence Act overcame Holmes' criticisms of the Kohler Act. The *Keystone* court felt that the Subsidence Act was a justified safety measure, which supported the tax base and served the public interest in preserving the land.\(^{130}\) Additionally, no surface owner was excluded in

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\(^{124}\) *Keystone Coal*, 771 F.2d at 717.

\(^{125}\) Id. at 711.

\(^{126}\) *Pennsylvania Coal*, 260 U.S. at 413.

\(^{127}\) *DeBenedictis II*, 55 U.S.L.W. at 4330.

\(^{128}\) *Pennsylvania Coal*, 260 U.S. at 413.

\(^{129}\) Id.

\(^{130}\) *Keystone Coal*, 771 F.2d at 714-15.
the Subsidence Act.131 Because the legislative purpose of the Kohler Act was the preservation of the surface owner's safety, notice to the surface owner that the land was to be mined was sufficient to accomplish that purpose.132 In the Subsidence Act, notice was insufficient, however, because its legislative purpose was to "protect the environment of the Commonwealth, its economic future, and its well-being."133 Therefore, other measures were necessary to accomplish that purpose.134

The constitutional question in Pennsylvania Coal, turned primarily upon the degree of economic injury imposed by the governmental regulation. In Keystone, the court also may have been considering the degree of economic injury, but this alone clearly was not dispositive. The plaintiffs in Pennsylvania Coal stressed that the Kohler Act had rendered the business of mining coal commercially impracticable; the Subsidence Act was not challenged on this basis.135

The rationale of Pennsylvania Coal reflected the mentality of the early 1900s when a fear of a domestic fuel shortage was prevalent,136 and before an awareness of ecology and the effect of subsidence on the public welfare was recognized. A more enlightened viewpoint was demonstrated in Keystone.137

2. The Police Power Takings Analysis

The Third Circuit distinguished Pennsylvania Coal, focusing on three areas of inquiry in its takings analysis: (1) Whether the government's action entailed a physical invasion, (2) whether, because of the regulation, there was a diminution in the value of the coal companies' property, and (3) the degree of interference with the coal companies' reasonable, distinct, investment-backed expectations.138

The Subsidence Act does not authorize physical invasion. Furthermore, the court noted that no physical invasion had occurred. The support requirements are part of a public program which promotes public good by preventing a serious and identifiable harm.139 The court cited Penn Central to demonstrate that a government regulation is less likely to be considered a taking when the legislative purpose is the protection of the environment, public safety, and economic welfare of the state.140

131 Id. at 715.
132 Pennsylvania Coal, 260 U.S. at 414.
133 Keystone Coal, 771 F.2d at 715.
134 See supra note 15.
135 Keystone Coal, 771 F.2d at 716, n.6.
138 Keystone Coal, 771 F.2d at 715.
139 Id.
140 Id. (citing Penn Central Transp. Co., 438 U.S. at 124).
In *Keystone*, the appellants, relied on *Pennsylvania Coal* to support their argument that there was a significant diminution of the value of their property. This point was complicated by Pennsylvania's recognition of three estates in land.\(^{141}\) The support estate, a separate property interest, cannot be profitably used by one who also does not possess either the mineral or surface estate.\(^{142}\) The court viewed this support estate as being one "strand in the [appellant's] bundle of property rights."\(^{143}\) "[T]he destruction of one strand of the bundle [is] not a taking, because the aggregate must be viewed in its entirety."\(^{144}\) The court held, therefore, that because the coal companies still possessed valuable mineral rights, subject only to the prevention of subsidence, their entire bundle of property rights had not been destroyed,\(^{145}\) and no taking had resulted.

The court confronted the appellants' argument of interference with reasonable investment-backed expectations stating that the mine operator cannot expect to profit at the public's expense.\(^{146}\) The court, relying upon *Penn Central*, held that even though a regulation may significantly impair investment-backed expectations, it was not necessarily a taking if it was reasonably related to the promotion of the general welfare.\(^{147}\)

A property owner's reasonable expectations as to the possible uses of his property are always subject to interference by the state in the exercise of its police power.\(^{148}\) The court relied on *Goldblatt* and *Mugler*, finding that the Act was enacted for the public benefit and therefore, "cannot in any just sense, be deemed a taking. . . ."\(^{149}\)

3. Eminent Domain

Section 1406.15 of the regulations implementing the Subsidence Act requires coal owners to sell coal support to surface owners who are not protected by other provisions of the Subsidence Act, in order to guarantee support of the surface estate. In *Keystone*, the coal companies alleged that this was an invalid exercise of the power of eminent domain because it served no public use.\(^{150}\) The Third Circuit refuted this allegation citing *Hawaii Housing Authority v. Midkiff*.\(^{151}\) *Hawaii Housing* involved a challenge to a state law that created a land condemnation

\(^{141}\) Id.
\(^{142}\) Id.
\(^{143}\) Id. at 716.
\(^{144}\) Id. (quoting *Andrus*, 444 U.S. at 66).
\(^{145}\) *Keystone Coal*, 771 F.2d at 716.
\(^{146}\) Id.
\(^{147}\) *Penn Central Transp. Co.*, 438 U.S. at 127.
\(^{148}\) *Keystone Coal*, 771 F.2d at 717.
\(^{149}\) *Goldblatt*, 369 U.S. at 593 (quoting *Mugler*, 123 U.S. at 668-69).
\(^{150}\) *Keystone Coal*, 771 F.2d at 719.
arrangement in which titles were transferred from lessors to lessees. The legislative purpose of the Hawaii act was to benefit the public by the decentralization of Hawaiian oligarchic property. The landowners claimed a fifth amendment violation of due process, but the Supreme Court found that the public use requirement was met, therefore, the action was within the state's police power. The Court reviewed the legislative interpretation of a public use, finding its scope was "an extremely narrow one." Courts must defer to legislative judgment for the determination of a public use "unless the use be palpably without reasonable foundation." Based on Hawaii Housing's reasoning, the Third Circuit held in Keystone that the public use had a reasonable foundation.

The coal companies also attacked section 1406.15 because it did not require the surface owner to demonstrate that the coal purchased was necessary to avoid subsidence. The court again relied upon the reasoning of Hawaii Housing. The court determined that the question was not whether the state plan was perfect or even likely to achieve the intended goal; the constitutional requirement was met if the legislature could have believed the Subsidence Act would promote its stated objective.

B. Contract Clause Analysis

While the contract clause is absolute on its face, it must nonetheless accommodate the inherent police power of the state "to safeguard the vital interest of its people." In Keystone, the Third Circuit acknowledged that two levels of scrutiny are employed to evaluate challenges under the contract clause: heightened scrutiny when the state itself is a party to the contract, and a lesser degree of scrutiny when economic and social legislation affects a wholly private contract. The court found the higher level of scrutiny inapplicable in Keystone, and focused instead on an analysis of the wholly private contract.

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152 Id. at 240 (citing Berman v. Parker, 348 U.S. 26 (1954)).
154 Keystone Coal, 771 F.2d at 719.
155 Hawaii Housing Auth., 104 S. Ct. at 242.
156 Energy Reserves Group, Inc., 459 U.S. at 410 (quoting Blaisdell, 290 U.S. at 434). In Manigault v. Springs, 199 U.S. 473, 480 (1903), the Supreme Court states that:

[It] is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Id. at 480.
The Third Circuit upheld the district court’s use of Justice Blackmun’s three-step test from *Energy Reserves*. The threshold inquiry was whether the state law substantially impaired a contractual relationship. All the parties in *Keystone* stipulated that section 1406.6 did operate as a substantial impairment of contract. Surface owners had relinquished their right to subjacent support in ninety percent of the cases in which mineral rights were conveyed. The legislation and regulation sought to guarantee subjacent support, despite the contractual relinquishment of these rights. The coal companies, therefore, met the first prong of the test.

Under the second step, the state must justify its law based on a “significant and legitimate public purpose behind the regulation.” The Third Circuit believed that the “[l]egislature expressly found subsidence damage devastated many surface structures, and thus endangered the health, safety, and economic welfare of the Commonwealth and its people.” Thus, a legitimate public purpose was established.

In the third part of the test, once the legitimate public purpose was identified, the court determined whether the adjustment of the parties’ rights and responsibilities was based upon reasonable conditions of a character appropriate to the legislature’s public purpose. The coal companies argued that the district court did not exercise sufficient scrutiny at this third step but the Third Circuit disagreed. The court reasoned that, because the state was not a contracting party, the court need not inquire whether there was a less restrictive alternative or whether the legislation was reasonable in the light of the circumstances; the court only need defer to legislative judgment.

The Third Circuit held that the trial court properly deferred to the legislature’s identification of important state interests in preserving the integrity of the surface. The court cited its recent opinion in *Troy Ltd. v. Renna*, which also applied Justice Blackmun’s test. *Troy* deferred to legislative judgment:

> assessing the reasonableness of these purposes we [the court] are admonished not to substitute our views for those of the legislature. Because the state is not itself a contracting party, in this sphere of economic and social regulation we “properly

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158 This concept was first employed in *Allied Structural Steel Co.*, 438 U.S. at 244.
159 *Keystone Coal* at 717-18.
160 Id.
161 Id.
162 *Energy Reserves Group Inc.*, 459 U.S. at 411.
163 *Keystone Coal*, 711 F.2d at 718.
164 *United States Trust Co.*, 431 U.S. at 22.
165 *Keystone Coal*, 711 F.2d at 718.
166 *United States Trust Co.*, 431 U.S. at 30-32.
167 Id. at 22.
168 *Troy Ltd.*, 727 F.2d 287.
defer to legislative judgment as to the necessity and reasonableness of" the Act.169

V. CONCLUSION

The Third Circuit’s analysis in Keystone of the takings and contract clauses explicitly identifies important considerations necessary to determine if a regulation is a taking. The Third Circuit has consistently applied the same analysis to the takings and contract clauses since its decision in Troy. There was much anticipation that the Supreme Court would clarify the issue when the case was brought before it on appeal as DeBenedictis II.

The Supreme Court only distinguished Pennsylvania Coal from Keystone, however. The Court distinguished the facts in that the regulations in Keystone affected a greater number of individuals in Pennsylvania via the environment and the tax base, while in Pennsylvania Coal only a few individuals were affected. The Court found the Subsidence Act an allowable police power regulation because the legislature stated a legitimate purpose which the Court found difficult to override. If the Court had overturned the Third Circuit’s decision, it would have been devastating to the state of Pennsylvania. In order to comply with the statute, the state would have had to compensate the coal companies for the coal which has been left in place. The actual calculations themselves would prove almost impossible. Furthermore, the Court did not limit its affirrnance of the Third Circuit’s decision to Pennsylvania because of its unique three estates in land.

The Court’s inability to draw a bright-line is understandable considering the variety of regulations which states have enacted to achieve purportedly legitimate public goals. Furthermore, the need for an ad hoc approach is necessary given the changing attitudes about protection of a community’s health, safety, and welfare. Justice Holmes’ decision in Pennsylvania Coal was the product of a different age. The amicus brief in support of the petitioners in Keystone seemed to ignore these changing attitudes, relying instead on “free enterprise system” arguments of the Holmes era.170

Perhaps the most interesting facet of DeBenedictis II is the dissent which could well be significant to the future of environmental and eminent domain cases. Chief Justice Rehnquist, writing for the dissent, joined by Justices Powell, O’Connor, and Scalia did not wish to “readily dismiss the precedential value of Pennsylvania Coal.171 Unlike the majority, the dissent saw little difference between the Kohler Act and the present Subsidence Act. Regardless of whether similarities exist or not, the fact remains that the environment would be disproportionately affected if coal companies could mine all the underlying coal, when refraining

169 Id. at 298 (quoting Energy Reserves Group Inc., 459 U.S. at 413).
170 Brief of Amici Curiae, Mid-Atlantic Legal Foundation, at 4, Keystone Coal, 771 F.2d 707.
171 DeBenedictis II, 55 U.S.L.W. at 4336.

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from doing so still allows them to mine coal profitably. Noting that Justices, Scalia and O’Conner joined the dissent, it is not improbable that the dissent will become the majority opinion of the future.

*Pennsylvania Coal* may not be overruled in the near future. Other factors have become increasingly important, however, in justifying regulations which may adversely impact on individual rights. The Supreme Court, even with a conservative bench presiding, has become increasingly respectful of social and economic legislation which protects society’s needs. Senator Morris Udall’s comment in response to SMCRA, demonstrates his discomfort with this law because of the admonitions in *Pennsylvania Coal* warning against undue interference with individual rights. While writing SMCRA, Udall stated that “[t]he balancing of private economic interests and the public good in this exercise is tricky and constitutional questions abound. I believe, however, that the courts will be mindful as the Congress of the obligation of a civilized people to themselves, the environment and the future.”172

The Court must still respect the individual right to contract. The regulation must still be viewed as beneficial to the public good before the contract clause can be disregarded.

Even though the demarcation between what is a taking and what is a mere regulation remains unclear, the Supreme Court was mindful of the Third Circuit’s attempt to identify the critical public policy concerns which are superior to the individual’s rights. Unfortunately, *DeBenedictis II* does not increase the degree of predictability in the area of governmental regulation as to whether the regulation is tantamount to a taking and just compensation is due, or whether the regulation is a legitimate exercise of the state’s police power to further the public good. The ad hoc approach will continue to rule in the area of governmental regulation.

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