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COMMONWEALTH V. BARNES & TUCKER CO.—THE BURDEN OF TREATING ACID MINE DRAINAGE

On February 28, 1977, the Supreme Court of Pennsylvania decided the case of Commonwealth v. Barnes & Tucker Co. That decision resolved a lengthy controversy over the issue of responsibility for the abatement of acid mine drainage emanating from an inactive deep coal mine which was owned and once operated by Barnes and Tucker Co. The Supreme Court's decision, requiring the company to bear the responsibility for the treatment of the discharge, is significant. It illustrates not only the strength of Pennsylvania's commitment to a clean environment, but also the ability of the state to act in furtherance of that commitment under the broad authority of its police powers. This comment will examine the development of the Barnes & Tucker Co. controversy, and the rationale employed by the court to resolve it.

HISTORY OF THE CASE

Lancashire Mine No. 15 is a bituminous, deep coal mine located in the B seam of coal in the Barnesboro Basin area of Cambria and Indiana Counties, Pennsylvania. Operation of Mine No. 15 had begun in 1915. When Barnes and Tucker Co. took over its operation in 1939, the Pennsylvania Clean Streams Law of 1937 was the controlling state legislation dealing with water pollution. Under that Act, acid mine drainage was not included within the definition of "industrial waste" and was expressly exempted from regulation imposed by article three of the Act.

The Clean Streams Law was amended in 1945. While section 310 was amended to regulate the discharge of acid mine drainage into the "clean waters" of the Commonwealth, discharge of acid mine drainage into unclean waters and into clean waters not devoted to public use was permitted without regulation.

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3 Id. § 1 (current version at PA. STAT. ANN. tit. 35, § 691.1 (Purdon 1977)).
4 Id. § 310 (repealed 1985).
The 1945 amendments also added a new section which required a drainage plan to be submitted and approved by the Sanitary Water Board before a coal mine could be opened, reopened or continued in operation.\(^7\) Between 1945 and 1964, Barnes and Tucker Co. operated under two permits, neither of which provided for treatment of acid mine drainage nor included any provision for the post-mine discharge of acid mine drainage.\(^8\) In 1964 Barnes and Tucker Co. applied for a permit to open a new mine in the Barnesboro Basin. The application proposed a new drainage plan covering all mining operations of Barnes and Tucker Co. On December 21, 1964, a permit was issued approving the drainage plan as submitted. There was no requirement of treatment of acid mine drainage, nor any provision for post-mining drainage under the permit since the discharge was into unclean streams.\(^9\)

The Clean Streams Law was amended again in 1965.\(^10\) In section four of these amendments the General Assembly condemned the special treatment afforded acid mine drainage under prior law, recognizing the deleterious effect of acid mine drainage on the waters of the Commonwealth and the necessity of clean streams for attracting manufacturing industries, developing the tourist industry and developing outdoor recreation. It declared that the objectives of the Clean Streams Law included not only the prevention of pollution of clean public waters, but also the reclamation and restoration of already polluted waters.\(^11\) Accordingly, it redefined "industrial waste" to include acid mine drainage,\(^12\) thereby subjecting to regulation discharges of acid mine drainage into any waters, clean or unclean.\(^13\)

In addition, the 1965 amendments added to the original Act section 315 which required that before any coal mine could be opened, reopened or continued in operation, application for a permit approving the proposed drainage and disposal of industrial

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\(^7\) Id. § 7 (amending 1937 Pa. Laws 1987) (repealed 1965).
\(^9\) Id. at 10, 303 A.2d at 548.
\(^11\) Id. § 2 (amending 1937 Pa. Laws 1987) (current version at PA. STAT. ANN. tit. 35, § 691.4 (Purdon 1977)).
\(^12\) Id. § 1 (amending 1937 Pa. Laws 1987, § 1) (current version at PA. STAT. ANN. tit. 35, § 691.1 (Purdon 1977)).
wastes had to be submitted to the Sanitary Water Board. All permits issued prior to the 1965 amendments were deemed to have been issued pursuant to the 1965 amendments, and were valid for one year after the effective date of the 1965 amendments or for such additional periods as permitted by the board. On May 25, 1966, Barnes and Tucker Co. applied to the Sanitary Water Board for an extension of time to operate Mines Nos. 15 and 24 under its pre-1965 permit. The application set forth two alternative plans for the treatment of acid mine drainage and a time schedule for completion of the treatment facilities. The Board granted an extension of the pre-1965 permit until November 1, 1968.

In October of 1967, Barnes and Tucker Co. applied for a mine drainage permit for Mines Nos. 15 and 24 on a post-1965 permit form. In this application it was disclosed for the first time that the closing of Mine No. 15 was contemplated. Also included in the application was a report which contemplated the construction of a treatment facility for acid mine drainage sufficient to meet minimum water quality standards. On March 22, 1968, the permit was issued, subject to certain conditions.

Subsequent to the issuance of the post-1965 permit, Barnes and Tucker Co. applied for and was granted two further extensions of its pre-1965 permit. Operation of Mine No. 15 ceased on May 10, 1969; all equipment was removed from the mine, pumping of acid mine drainage from the Duman Dam pumping station ceased, and inundation of the mine began in July 1969.

In June of 1970, a substantial discharge of acid mine drainage was discovered emanating from the Buckwheat borehole of inactive Mine No. 15. In response, the Sanitary Water Board suspended Barnes and Tucker Co.'s post-1965 permit. After the Buckwheat borehole was plugged, and the permit reinstated, the acid mine water in Mine No. 15 began to rise. Barnes and Tucker Co. constructed another borehole, but this additional action was not sufficient to prevent another substantial discharge through the

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15 Id. at 1-12, 303 A.2d at 544, 549 (1973).
16 Id. at 13-14, 303 A.2d at 550.
17 Id. at 14-16, 303 A.2d at 550-51.
18 Id. at 17, 303 A.2d at 551.
19 Id. at 19-20, 303 A.2d at 552-53.
earth's surface on July 23, 1970. Discovery of this new discharge led to another suspension of the post-1965 permit and an order from the Sanitary Water Board requiring Barnes and Tucker Co. to take immediate steps to abate the acid mine drainage emanating from Mine No. 15. Barnes and Tucker Co. appealed the Board's administrative order to the commonwealth court, and the Commonwealth filed an original complaint in equity seeking to enjoin the operations of Mines Nos. 15 and 24 and to compel compliance with the order.21

The Commonwealth and Barnes and Tucker Co. then entered into a stipulation designed to provide a temporary solution to the problem, pending determination of the litigation. The stipulation provided that Barnes and Tucker Co. would construct and operate a pumping and treatment facility at Duman Dam for a period of at least thirty days. Pursuant to the stipulation, Barnes and Tucker Co. constructed the facility and operated it for a period of over three months, thereby causing the emanations of acid mine water from the Buckwheat borehole, Maberry borehole and the breakout area to cease. After Barnes and Tucker Co. ceased operating the facility, the Commonwealth assumed its operation and renewed its application for injunctive relief. The commonwealth court issued a preliminary injunction ordering Barnes and Tucker Co. to resume operation of the Duman Dam facility. Costs of the operation were to be shared by the parties, but ultimately were to be absorbed by the losing party after a final determination of the case.22

Upon full consideration of the merits of the case, the commonwealth court held that although the board was empowered to require Barnes and Tucker Co. to treat the post-mining discharges emanating from Mine No. 15, it had failed to impose such a requirement on the company, either by its permit terms or by regulation.23 The commonwealth court further held that the statute as

21 Id. at 20-21, 303 A.2d at 553-54.
22 Id. at 21-24, 303 A.2d at 554-55.
MINE DRAINAGE

amended in 1965 did not impose such an obligation on Barnes and Tucker Co. The court emphasized the legislature's chary movement into the regulation of acid mine drainage in the 1945, 1965 and 1970 amendments to the Clean Streams Law, and held that acid mine drainage from Mine No. 15 did not constitute a public nuisance as defined by the Clean Streams Law then in effect. Finally, the commonwealth court relied on Pennsylvania Coal Co. v. Sanderson, an 1886 private nuisance case, and on the legislative history which surrounded the regulation of acid mine drainage to conclude that the acid mine drainage emanating from Mine No. 15 did not constitute a common law public nuisance. The commonwealth court left its preliminary injunction in effect, however, pending the filing of an appeal by the Commonwealth within thirty days.

On appeal, the Supreme Court of Pennsylvania reversed the decree of the commonwealth court and remanded the case for further proceedings. It concluded that the post-mining discharges from Mine No. 15 did constitute a statutory public nuisance under section three of the 1970 amendments which provided in part that "industrial waste . . . which causes . . . or contributes to pollution . . . or creates a danger of such pollution is hereby declared . . . to be against public policy and to be a public nuisance." Since the relief requested was prospective in nature, the 1970 amendments were held to be clearly applicable.

The post-mining discharges emanating from Mine No. 15 were also held by the supreme court to constitute a common law public nuisance. Rejecting the rationale of Pennsylvania Coal Co. v. Sanderson, upon which the commonwealth court had relied, the

were inapplicable to this case since all of the operative facts took place prior to the effective date of the amendments. Section 316 of the 1965 amendments merely authorized the board to order the landowner or occupier to allow access to government officials, mine operators or other persons to the land in order to abate pollution resulting from a condition on the land. 1965 Pa. Laws 372, § 5 (amending 1937 Pa. Laws 1987) (current version at PA. STAT. ANN. tit. 35, § 691.316 (Purdon 1977)).

22 Id. at 44-47, 303 A.2d at 565-66.
23 113 Pa. 126, 6 A. 453 (1886).
25 Id. at 60, 303 A.2d at 572-73.
27 455 Pa. at 408-09, 319 A.2d at 880.
28 Id. at 411-12, 319 A.2d at 881-82.
supreme court found that the relevant inquiry in determining the existence of a public nuisance was set forth in *Pennsylvania R.R. v. Sagamore Coal Co.* In *Sagamore*, the court had declared "the controversy . . . is controlled by one fact and a single equitable principle—the fact that the stream has been polluted, and the principle that this creates an enjoinable nuisance if the public uses the water." The supreme court overcame the "public use" hurdle of this test by citing article I, section 27 of the Pennsylvania Constitution, which creates a public right to clean water and imposes an obligation on the Commonwealth to preserve and protect that right, and by citing a recent Pennsylvania Supreme Court case which recognized "that an overriding public interest in acid mine drainage pollution control does exist."

The supreme court also rejected the commonwealth court's holding that injunctive relief could not be granted under either statutory or common law public nuisance. Having determined that the Commonwealth could be granted the requested injunctive relief, the supreme court addressed the more difficult problem of whether it would be a "taking of property" to require Barnes and Tucker Co. to treat or abate the post-mining discharge from Mine No. 15, noting that "[t]here is often a thin line separating that which constitutes a valid exercise of the police power and that which constitutes a taking." As a guideline for determining the constitutional validity of the injunctive relief, the court adopted the rule set forth by the United States Supreme Court in *Lawton v. Steele:* "To justify the state . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." The Pennsylvania Supreme Court noted that the "public interest" aspect of the test was satisfied by the same factors satisfying the "public use" re-

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31 281 Pa. 233, 126 A. 386 (1924).
35 *Id.* at 238, 126 A. at 387, quoted in *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. at 412, 319 A.2d at 882.
34 455 Pa. at 412-13, 319 A.2d at 882 (quoting PA. CONST. art. 1, § 27).
36 455 Pa. at 408, 319 A.2d at 880.
39 *Id.* at 418, 319 A.2d at 885.
40 152 U.S. 133 (1894).
41 455 Pa. at 418, 319 A.2d at 885 (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).
quirement necessary to establish a common law public nuisance. Although the supreme court recognized that abatement of water pollution is a reasonable exercise of the police power in the abstract, the court could not ascertain from the record before it whether or not the Commonwealth’s use of such power would be unduly oppressive upon Barnes and Tucker Co., and thus beyond the parameters of reason. It therefore remanded the case to the commonwealth court to take additional testimony and to make the additional findings of fact necessary to fashion appropriate relief.

On remand from the supreme court, the commonwealth court examined the various sources from which the water flowing into Mine No. 15 derived. It found that of the 7.2 million gallons of water which had to be pumped daily from Mine No. 15 in order to maintain a constant level, 6 million gallons were attributable to “fugitive” mine water which had originated in other active mines in the mining complex. Only 1.2 million gallons were “generated” water, directly attributable to Mine No. 15. The evidence was inconclusive as to whether pumping of acid mine water would have been necessary if fugitive mine water had been prevented from entering Mine No. 15. The evidence was also inconclusive as to the comparative quality of generated mine water and fugitive mine water flowing into Mine No. 15. The court did find, however, that the volume of water flowing into Mine No. 15 precluded any effort to seal the mine, and that the only method of abatement available was treatment of the discharging mine water. It also found that the cost of pumping and treating the acid mine water being pumped from Mine No. 15 varied between $30,000 and $50,000 per month.

42 455 Pa. at 418, 319 A.2d at 885. See text accompanying notes 37 and 38, supra.
43 455 Pa. at 418-20, 319 A.2d at 885-86.
44 Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. Ct. 496, 508, 353 A.2d 471, 478 (1976). An understanding of the court’s findings on this issue requires a brief explanation of the terminology used. Generated water is water flowing or percolating into a mine from the land surface as a result of the forces of gravity. Fugitive mine water is water entering a mine from adjoining subsurface mines as a result of the forces of gravity or other pressure. Thus, the volume of water contained in a mine at any one time will be the sum of generated and fugitive mine water. In order to maintain a constant level of water in Mine No. 15, 7.2 million gallons of water per day were required to be pumped out of Mine No. 15. Id. at 503, 353 A.2d at 475. Fugitive mine water entering Mine No. 15 was contributed by the Moss Creek Mine, Colver Mine, the Sterling complex of mines and Lancashire Mine No. 14 (owned by Barnes and Tucker Co.). Id. at 504, 353 A.2d at 476.
45 Id. at 502, 353 A.2d at 474-75.
46 Id. at 508, 353 A.2d at 478.
In light of the significant contribution of fugitive mine water to the total amount of mine water which flowed from Mine No. 15, Barnes and Tucker Co. argued that its conduct did not proximately cause the creation of the public nuisance. The commonwealth court rejected this argument by adopting a kind of "but for" test:

Out of this activity was created a condition which has in turn resulted in a public nuisance. Whether the impelling force which produced the public nuisance is solely or partially that of fugitive mine water flowing into and adding to the generated water of that mine, the conduct of Barnes & Tucker in its mining activity remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did.17

Barnes and Tucker Co. next argued that granting the requested relief would amount to a taking of its property or would be beyond the parameters of reason. The company did not introduce any new evidence pertaining to its financial condition, but relied instead on the high cost of operating the Duman Dam facility. The court rejected this argument, emphasizing the deleterious impact of the acid mine drainage on the public health, safety and welfare and upon the environment in general. The court ordered Barnes and Tucker Co. to pump sufficient quantities of mine water out of Mine No. 15 to avoid future breakouts, and to maintain a treatment program sufficient to achieve minimum water quality standards as required by law.18

On appeal to the Pennsylvania Supreme Court for the second time, Barnes and Tucker Co. argued that compelling it to treat the acid mine drainage emanating from its abandoned mine would be an unreasonable exercise of the state's police power and an unconstitutional taking of property. Rejecting this argument, the court pointed out that "one who challenges the constitutionality of the exercise of the state's police power, affecting a property interest, must overcome a heavy burden of proof to sustain that challenge."19 While Barnes and Tucker Co. emphasized that much of the acid mine water emanating from its closed mine was attributable to fugitive mine water, the court noted that the objective of the Clean Streams Law was the prevention of further pollution of the public waters and that the law was concerned with the source of

17 Id. at 510, 353 A.2d at 479. See text accompanying notes 55-61, supra.
the discharge of acid mine drainage rather than the source of the polluted water itself. The supreme court upheld the lower court's order as a valid exercise of the police power, and concluded that there can be no unconstitutional taking of property when a statute reasonably restricts the use of property in order to protect the public health, safety or morals. The court pointed out that Barnes and Tucker Co. failed to demonstrate that a less restrictive means of abating the nuisance was available, or that the remedy was unduly oppressive due to its economic impact. The final decree of the commonwealth court was affirmed.

ANALYSIS OF THE CASE

An important feature of the Barnes & Tucker Co. decision is the Pennsylvania Supreme Court's treatment of the problem of causation. Its conclusion that Barnes and Tucker Co. was responsible for the nuisance created by discharges from its abandoned mine raises serious questions as to where the line separating responsibility from no responsibility will be drawn in the future. Of the total amount of acid mine water required to be pumped and treated from Mine No. 15, only seventeen percent was attributable to Barnes and Tucker Co. as a result of generated water. The remaining eighty-three percent of acid mine water was attributable to fugitive mine water flowing from adjacent mines. But the commonwealth court, employing a "but for" rationale, focused on the fact that the breakout would never have occurred nor would the pumping have been required had Mine No. 15 never been constructed. This rationale would seem to apply equally as well even if all of the acid mine water from Mine No. 15 had been fugitive mine water flowing from adjacent mines. Such an extension of the "but for" test would seem unfair, however, since the real cause of the discharge would appear to be the adjacent mines. Whether the supreme court will extend this test to include such a situation may be predicted by first examining how the court has expanded the "but for" test to date.

The commonwealth court was not breaking new ground when it applied the "but for" test in Barnes & Tucker Co. In

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20 Id. at 465-66.
21 Id. at 467-68.
22 Id. at 468.
23 See text accompanying notes 44-46, supra.
24 See text accompanying note 47, supra.
Commonwealth v. Harmar Coal Co. the Pennsylvania Supreme Court had espoused the "but for" test under facts similar to, but clearly distinguishable from, Barnes & Tucker Co. Harmar Coal Co. involved a consolidation of two cases: one involving Harmar Coal Co. and the other involving Pittsburgh Coal Co. In order to make its active mine safe for continued operation, Harmar Coal Co. was required to pump acid mine water from an adjacent abandoned mine because the pressure created by the water against a barrier separating the Harmar mine from the adjacent mine endangered the lives of the men working in the Harmar mine. Pittsburgh Coal Co. was required to pump acid mine water flowing into its mine from adjacent abandoned mines in order to continue operations in its active mine. The supreme court upheld an order of the Sanitary Water Board denying the companies' applications for permits which would allow the discharge of untreated acid mine drainage. The court dealt with the causation problem by emphasizing that "it is the discharge of the polluted waters into the stream that is critical and not the source of the polluted waters." Thus, although Harmar Coal Co. and Pittsburgh Coal Co. were not the sole causes of the acid mine drainage being discharged into the public waters, "but for" their activities the discharges would not have occurred.

Unlike the active mines in Harmar Coal Co., Mine No. 15 in Barnes & Tucker Co. was inactive; the supreme court merely extended the "but for" test it had applied to active mines in Harmar Coal Co. to a situation where the acid mine water was emanating from an abandoned mine. It is important to note the focus of the supreme court in Harmar Coal Co. on the place of discharge of the acid mine water into the public waters, and the de-emphasis on the original source of the acid mine water. The court continued to focus on the place of discharge of the acid mine water in Barnes & Tucker Co. by noting that it was the activity of Barnes and Tucker Co. that was the dominant factor causing the nuisance, regardless of whether the source of the acid mine water was partially or solely from adjacent mines. In light of the supreme court's emphasis on the source of the discharge of acid mine water and its strict application of the "but for" test, it appears that the owner of an aban-

54 Id. at 95, 306 A.2d at 318.
doned mine will be held responsible for the nuisance created by
discharges from that mine, even where all of the acid mine water
originated in adjacent active mines.

It might seem unfair for Barnes and Tucker Co. to bear the
total economic burden of pumping and treating the acid mine
water from Mine No. 15, since it is apparent that the adjacent
active mines from which fugitive mine water flowed into Mine No.
15 were free to continue operations. Such operations contributed
significantly to the total amount of discharge from Mine No. 15
without sharing in the costs of pumping and treating the acid mine
water. Placing the entire burden of treatment on the point of dis-
charge into public waters, however, provides the Commonwealth
with an easy method of effecting its statutory policy of preventing
further pollution, and of reclaiming and restoring already polluted
waters.\textsuperscript{58} Moreover, the harshness of the result in *Barnes & Tucker
Co.* may be alleviated without depriving the Commonwealth of
this efficient method provided by the Clean Streams Law of ensur-
ing clean streams. The Uniform Contribution Among Tortfeasors
Act\textsuperscript{60} adopted by Pennsylvania in 1951 provides that the right of
contribution exists among joint
tortfeasors.\textsuperscript{60} Although Barnes and
Tucker Co. may have evidentiary problems in proving that certain
adjacent mines are joint tortfeasors\textsuperscript{61} with respect to the creation
of a public nuisance caused by the emanation of acid mine water
from Mine No. 15, the availability of a means of allocating the
costs of pumping and treating the acid mine water among the
respective causes of the nuisance is available.

The Pennsylvania Supreme Court's decision in *Barnes &
Tucker Co.* is also noteworthy for its expansive view of the state's
police powers. The police powers traditionally encompass the in-
herent right of state and local governments to protect the health,
safety, morals and welfare of the people within their jurisdiction.\textsuperscript{62}

\textsuperscript{60} Id. § 2083.
\textsuperscript{61} See Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. Ct. 496, 503-
04, 353 A.2d 471, 475-76 (1976). For a definition of "joint tortfeasors" under the
Uniform Contribution of Tortfeasors Act, see Pa. Stat. Ann. tit. 12, § 2082 (Purdon
1977).
\textsuperscript{62} J. Nowak, R. Rotunda & J. Young, *Handbook on Constitutional Law* 389
(1978); see Berman v. Parker, 348 U.S. 26, 32 (1954); Barbier v. Connolly, 113 U.S.
27, 31 (1885).

States' police powers derive from an inherent attribute of sovereignty reserved
to the states by the Tenth Amendment which provides: "The powers not delegated
According to one commentator, the modern approach to the police power concept is to ignore it and to "recognize that the state has power to act on behalf of the public welfare, limited only by the Constitution and [the judicial concept of reasonableness]."

The Commonwealth's exercise of its police powers in this case consisted of the enactment and enforcement of a statute prohibiting the pollution of public streams by discharge of acid mine drainage into such streams, and of action on the part of the state attorney general to abate the pollution under a theory of common law public nuisance. Recognizing that the contours of the police powers have limits, the Pennsylvania Supreme Court addressed the question of whether the Commonwealth's exercise of its police powers was proper by applying the test set forth in *Lawton v. Steele*.

That test requires that the purpose of the statute be directed towards a public interest and that the means be reasonably necessary to accomplish such purpose and not unduly oppressive. After examining findings of fact made by the commonwealth court on remand, the supreme court concluded that the Commonwealth's exercise of its police powers was valid. It then concluded that since there was a valid exercise of the police powers, there could not have been an unconstitutional taking of property requiring compensation.

Although the end result reached by the supreme court appears to be justified, the analysis adopted by the court to reach its result seems questionable. By satisfying the *Lawton* test, the supreme court determined that there was neither an invalid exercise of the police power nor an unconstitutional taking of property without just compensation. A more appropriate method of analysis would have involved three separate inquiries: (1) Was the Commonwealth's exercise of its police power in the form of regulation of the discharges of industrial waste reasonable? (2) Even if the exercise of the police powers was reasonable, did such exercise constitute a
taking of property requiring just compensation? (3) If injunctive relief was required, what was the appropriate type of injunctive relief?

It is important to note that the Lawton test is analogous to the test used to review the constitutionality of a statute under a due process analysis (although the phrases "rational relation to a legitimate end" or "rational basis" may be substituted for the term "reasonable"). The United States Supreme Court has applied the "rational relation to a legitimate end" or "reasonableness" test with virtually complete judicial deference to the legislature, and has adamantly refused "to sit as a 'superlegislature to weigh the wisdom of legislation.'" Thus, there is a presumption that legislation will have a rational relation to a legitimate end.

Support for the proposition that the Lawton test and the contemporary due process presumption of legislative validity are indistinguishable is found in Goldblatt v. Hempstead. In Goldblatt, Justice Clark repeated the Lawton test while evaluating the validity of a municipal ordinance. After quoting the Lawton test, Justice Clark proceeded to explain it: "Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature . . . .'" Justice Clark continued by citing three cases, each of which analyzed legislation in terms of due process, as support for the presumption of reasonableness under the Lawton test. Thus, it is clear that when the Pennsylvania Supreme Court in Barnes & Tucker Co. applied a reasonableness standard to the statutory public nuisance provision of the Clean Streams Law, judicial deference to the legislature in the absence of clearly arbitrary legislation was required.

Under the court's analysis in Barnes & Tucker Co., a presumption of reasonableness, resulting in a determination of legisla-

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47 Id. at 595 (quoting Sproles v. Binford, 286 U.S. 374, 388 (1932)).
48 369 U.S. at 596.
tive validity, would have foreclosed any inquiry into whether or not the Clean Streams Law resulted in an unconstitutional taking of property requiring just compensation since the court had concluded that there could be no unconstitutional taking upon the valid exercise of the police power. Instead of deferring to the legislature under the Lawton test, however, the court incorporated a traditional taking analysis into its reasonableness inquiry. A more proper method of analysis would have been to apply the due process presumption of legislative validity first, and then to deal with the taking issue separately. Even though the end result would have been the same, under such an analysis the confusion inherent in the court's reasoning would have been avoided.

The fifth amendment to the United States Constitution provides in part: "nor shall private property be taken for public use, without just compensation." Although the Supreme Court has failed to establish any definitive formula for determining where regulation ends and taking begins, it has produced three different formulas upon which it has relied on different occasions: (1) the invasion theory; (2) the noxious use theory; and (3) the diminution of value theory. Under the invasion theory, the government is

11 U.S. Const. amend. V.
13 Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964). "A survey of the recent cases . . . leaves the impression that the Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem." Id. at 46.

Unsatisfied with the Supreme Court's treatment of the taking problem, commentators have offered a variety of approaches for drawing the line between government regulation which requires compensation and government regulation which does not require compensation. See F. Bosselman, D. Callies & J. Banta, The Taking Issue (Council on Environmental Quality 1973); Costonis, Development Rights Transfer: An Exploratory Essay, 83 Yale L.J. 75 (1973); Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650 (1958); Heyman & Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions, 73 Yale L.J. 1119 (1964); Kusler, Open Space Zoning: Valid Regulation or Invalid Taking, 57 Minn. L. Rev. 1 (1972); Large, This Land is Whose Land? Changing Concepts of Land as Property, 1973 Wis. L. Rev. 1039; Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Netherton, Implementation of Land Use Policy: Police Power vs. Eminent Domain, 3 Land & Water L. Rev. 33 (1968); Plater, The Taking Issue in a Natural Setting: Floodlines and the Police Power, 52 Texas L. Rev. 201 (1974); Ryckman, Eminent Domain—Conservation, 6 Nat. Resources J. 8 (1966); Sax, Takings and
required to compensate a property owner when the government occupies or in some manner takes physical possession of his or her property. Under the final decree issued by the commonwealth court and affirmed by the supreme court, the Commonwealth took no possession of the Duman Dam treatment facility or any of Barnes and Tucker Co.'s property. Thus, the invasion theory was inapplicable.

Under the noxious use theory, the government does not have to compensate a property owner when the use of his or her property is adversely affected by government regulation or activity aimed at terminating or controlling a noxious or harmful use of such property. Thus, a regulation which results solely in public benefit requires compensation, while a regulation aimed at terminating a harmful activity or condition which created the need for the regulation does not. The facts of Barnes & Tucker Co. fit well into the noxious use theory, and the Pennsylvania Supreme Court relied primarily upon this theory in overcoming the taking problem. After quoting Mugler v. Kansas, the court stated: "[W]e find


See United States v. Central Eureka Mining Co., 357 U.S. 155, 165-66 (1958) (An order issued by the War Production Board requiring gold mines to close down in an effort to coerce experienced miners, who were in short supply, to switch to more essential war work was not a taking of property because the government did not occupy, use, or in any manner take physical possession of the gold mines); United States v. Pewee Coal Co., 341 U.S. 114, 115-17 (1951) (An executive order, directing the Secretary of Interior to take possession of and operate all mines producing coal in which a labor strike had occurred, constituted a taking of property when exercised against Pewee Coal Co.).

Hadacheck v. Sebastian, 239 U.S. 394 (1915) (An ordinance prohibiting the manufacturing of bricks within the city limits did not constitute a taking of property since the ordinance was directed at termination of a nuisance, despite the fact that the brickyard was not subject to the ordinance prior to expansion of the city limits); Mugler v. Kansas, 123 U.S. 623 (1887) (A statute prohibiting the manufacture and sale of intoxicating liquors and rendering plaintiff's brewery virtually worthless did not constitute a taking of property because the State cannot be burdened with compensating property owners for pecuniary losses suffered as a result of a prohibition against the noxious use of their property).


A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking
that restrictions or obligations imposed on the use or ownership of property to protect the public health, safety or morals from dangers threatened, if reasonably necessary to dispel the particular danger, do not constitute a taking." In light of the court's adoption of the noxious use theory, it appears that Barnes and Tucker Co.'s claim of an unconstitutional taking was doomed when the court found that the emanation of acid mine drainage from Mine No. 15 created a statutory and common law public nuisance.

Under the diminution of value theory, property may be regulated to a certain degree without a requirement of compensation; however, once the value of the economic interest in the property is completely or substantially destroyed as a result of government regulation, compensation is required. The line separating a regulation requiring compensation from a regulation not requiring compensation has not yet been established. Although the supreme

or an appropriation of property for the public benefit . . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.


371 A.2d at 467-68.

70 Justice Holmes first explicated this theory in Pennsylvania Coal Co. v. Mahon, where he states:

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. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

260 U.S. 393, 413 (1922). The Court summarized the rule, stating: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. at 415; see Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

court in *Barnes & Tucker Co.* never expressly addressed the diminution of value theory, the court was willing to consider the financial impact of the regulation and resultant injunctive order on Barnes and Tucker Co. in determining whether or not the remedy was unduly oppressive.\(^{31}\) Such an inquiry seems analogous to an application of the diminution of value theory. The court avoided a direct confrontation with this issue, however, by pointing out that Barnes and Tucker Co. failed to introduce sufficient evidence to prove that the remedy was unduly oppressive due to its economic impact.\(^{32}\)

After concluding that the regulation was reasonable and that there was not an unconstitutional taking of property requiring just compensation, the court's analysis should have been directed towards the fashioning of an appropriate remedy. Although the "power of a court of equity, in a proper case, to enjoin a nuisance is of long standing, and apparently never has been questioned since the earlier part of the eighteenth century,"\(^{33}\) such power is not without its limitations. The propriety of injunctive relief in a public nuisance action depends upon a balancing of comparative hardships.\(^{34}\) The Pennsylvania Supreme Court in *Barnes & Tucker Co.*, however, stated that "when the Commonwealth brings an equity action to abate a public nuisance its right to relief is not restricted by any balancing of equities . . . ."\(^{35}\) It is unclear what the court meant by the phrase "balancing of equities." The phrase could be narrowly read simply to preclude equitable defenses such as estoppel, laches and clean hands,\(^{36}\) thus permitting a balancing

\(^{31}\) 371 A.2d at 468. The court created unnecessary confusion by failing to articulate under which analysis it was willing to consider the economic impact of the regulation and injunctive order on Barnes and Tucker Co. At one point the court asserted:

> [G]iven our determination that the Commonwealth is validly employing its police power in a reasonable manner to abate the immediate public nuisance, there can be no finding of an unconstitutional ‘taking’ by the imposition of the present abatement order, *despite the impact this exercise of the police power may have on the appellant.*

*Id.* at 467 (emphasis added). The court noted, however, that Barnes and Tucker Co. failed to prove that "the remedy imposed was unduly oppressive due to its economic impact." *Id.* at 468.

\(^{32}\) *Id.* at 468.


\(^{36}\) The defenses of laches, prescriptive rights and the statute of limitations will
of comparative hardships. A broader interpretation, however, could preclude not only equitable defenses but a balancing of the comparative hardships as well. Moreover, since phrases like "balancing the equities," "balancing the comparative hardships," "balancing the conveniences" and others are often used inconsistently by different courts and writers, it is not surprising that confusion frequently arises as to the intended meaning of a particular phrase. While the Pennsylvania Supreme Court's use of the phrase "balancing of equities" is unclear, it is evident that the court considered the harm which would have resulted from a denial of injunctive relief and was willing to consider the economic hardships which Barnes and Tucker Co. would suffer if injunctive relief were granted. The harm which the public would have suffered as a result of a denial of injunctive relief was recognized as being substantial by the Pennsylvania Legislature in the Clean Streams Law, and the importance of protecting against such harm was recognized in the Pennsylvania Constitution. In contrast, Barnes

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78 See text accompanying notes 10-11, supra. The declaration of policy of the Clean Streams Law reads:

1. Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry;

2. Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead;

3. It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted;

4. The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth; and

5. The achievement of the objective herein set forth requires a comprehensive program of watershed management and control.


79 The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property...
MINE DRAINAGE

and Tucker Co. showed only that it would suffer the cost of operating the Duman Dam pumping and treatment facility if injunctive relief were granted. Although Barnes and Tucker Co. was given the opportunity to present a complete picture of its financial position and to show how the imposition of this cost would affect the company, it failed to produce additional evidence. Since Mine No. 15 had already been closed, there was no need to weigh the costs resulting from a dislocation of workers or the costs of a general economic decline in the local community caused by the closing of a productive enterprise. Thus, a comparison of the substantial harm resulting from denial of injunctive relief with the harm resulting from issuance of injunctive relief would have produced a reasoned conclusion that injunctive relief was required. In light of the emphasis placed on eliminating pollution from the waters of the Commonwealth, it further appears that only the most severe hardships resulting from the issuance of injunctive relief will outweigh the hardships resulting from denial of such relief.

The inquiry into the appropriateness of injunctive relief is not complete upon a determination that injunctive relief is required, however, because injunctive relief is not a single remedy but rather an arsenal of remedies which is flexible in nature. The commonwealth court found that there was "no alternative method of relief available to that of the treatment of the discharging mine water," and the supreme court noted that Barnes and Tucker Co. had failed to show the existence of a more reasonable alternative means of abating the nuisance. In the absence of a more reasonable alternative to abate the nuisance, and in light of the balancing of hardships in favor of injunctive relief, the requirement that Barnes and Tucker Co. treat the acid mine water being pumped from

of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. 1, § 27.


Mine No. 15 cannot be held to be an improper exercise of the powers of equity.

CONCLUSION

The Commonwealth of Pennsylvania has expressly espoused a policy of preventing pollution of its clean streams and further pollution of its unclean streams. In an effort to accomplish this policy, the Commonwealth has placed the responsibility of ensuring that mine drainage does not pollute public waters on the operators who reap the benefits of their mining operations which cause such mine water drainage. Further assurance of clean streams is made by imposing the entire economic burden of treating discharges into the public waters on the operator of the mine from which the discharge emanates. Rather than delaying the treatment of mine water discharges, this approach delays only the allocation of the costs of treatment among the various contributors of the polluting discharge.

The manner in which Pennsylvania has sought to prevent the pollution of public waters is not unfair or unreasonable. For too long the mining industry has avoided a cost of production—clean water. Now the mine operators must internalize this additional cost of production instead of passing it along in the form of polluted streams. If problems of proof of the cause of the pollution arise, the burden of ferreting out the contributors should fall on the industry and not the public.

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