Keystone Bituminous Coal Ass'n v. DeBenedictis: When Regulation Becomes a Taking

With the increase in population and the resulting scarcity of land in America came the inevitable competition among individuals for land use.[1] A piece of property, valuable for mining, might also be productive as farmland. Common sense dictates, however, that only one interest can prevail. When these interests address public safety and private property rights,[2] fifth amendment takings issues often arise. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[3] the United States Supreme Court gave great weight to the public interest by refusing to hold that a restriction upon coal mining constituted a taking. When *Keystone* was decided in March of 1987, it appeared to reflect a trend toward environmental protection and less concern for individual interests.[4] Subsequent holdings, however, throw skepticism on that initial assumption.

I.
FACTS

More than fifty years before the land use regulation, petitioner sold the surface estate of its property but retained the mineral estate and the rights to the surface in order to facilitate mineral extraction. In addition, petitioner retained a waiver of any claims for damages which might result from the removal of coal.[5] During the fourteen years between 1966 and 1982, petitioner, Keystone Bituminous Coal Association, owned thirteen mines.[6] The Pennsylvania Bituminous Mine Subsidence and Land Conservation Act ("Act")[7] re-

1. Callies, *Regulating Paradise: Is Land Use a Right or a Privilege?*, 7 U. HAW. L. REV. 13, 14 (1985).

2. "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 (1987) (construing Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897)).

3. 480 U.S. at 502.

4. Cronin & Fieldsteel, *When Does Environmental Regulation of Private Property Become a Taking and Require Compensation?*, 70 MASS. L. REV. 72, 76 (1985).

5. 480 U.S. at 478-480.

6. *Id.* at 496.

7. Section 4 of the Act provides:

quired that twenty-seven million tons, or two percent, of the total 1.46 billion tons of coal in these mines remain in place to support the surface estate.[8] Petitioner complained that this two percent loss effectuated a constitutional taking and demanded compensation.

In 1984, the coal company filed a complaint in the United States District Court for the Western District of Pennsylvania,[9] alleging that the section of the Act which authorized the Department of Environmental Regulation ("DER") to revoke its mining permit violated the fifth amendment.[10] The District Court granted summary judgment, holding that the public's interest in health, safety, and general welfare justified the restriction on land use as a valid exercise of police power.[11] Pursuant to the coal company's appeal, the Third Circuit affirmed, arguing the Act was a legitimate means of "protect[ing] the environment of the Commonwealth, its economic future, and its well-being."[12] The Supreme Court, per Justice Stevens, also affirmed, finding: (1) there was public purpose for the Act; (2) there was no showing of the diminution of value in land resulting from the Act; (3) the Act did not work unconstitutional taking on its face; (4) there was no showing of unconstitutional taking of the separate support estate recognized by Pennsylvania law; and (5) public interests in the legislation were adequate to justify impact of the Act on coal companies' contractual agreements with surface owners.[13] Justice Stevens' holding logically followed a gradual, but undisputed, progression in fifth amendment case law.

Protection of surface structures against damage from cave-in, collapse, or subsidence.

In order to guard the health, safety and general welfare of the public, no owner . . . shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures . . . ;

(1) Any public building or any noncommercial structure customarily used by the public, including but not being limited to churches, schools, hospitals, and municipal utilities or municipal public service operation.

(2) Any dwelling used for human habitation . . . .

Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406.4 (Purdon Supp. 1988).

8. 480 U.S. at 496.

9. Keystone Bituminous Coal Ass'n v. DeBenedictis, 581 F. Supp. 511, 513 (W.D. Pa. 1984).

10. 480 U.S. at 478.

11. *Id.* at 479-480.

12. Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707, 715 (3d Cir. 1985), *aff'd sub nom.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). Judge Adams also explained that there could be no taking because petitioners' entire bundle of property rights was not destroyed. *Id.* at 716.

13 480 U.S. 470.

II.
BACKGROUND LAW

The fifth amendment to the United States Constitution provides for compensation to a private citizen whose property has been taken by a governmental body.[14] The answer to the question of what exactly constitutes a taking constantly changes as property law itself evolves.[15] The initial construction of the fifth amendment was a strict one: a taking would be found only with an actual physical invasion. The notion gradually expanded, however, to include such invasions as regulations on use.[16]

As the country became more concerned about environmental conservation and urban beautification,[17] the question arose: how far can a regulation go in limiting a private citizen's use of his own land before it will be considered a taking?[18] Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*,[19] held that the Kohler Act,[20] a statute similar to the Subsidence Act, was unconstitutional. Holmes failed, however, to set forth guidelines defining when a regulation had gone too far and had become a taking.[21] Because all of the cases since *Pennsylvania Coal* have been decided on a case-by-case basis,[22] the line drawn between a taking and justifiable police

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14. U.S. CONST. amend. V.

15. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 35 (1986).

16. Friedman, *A Search for Seizure: Pennsylvania Coal Co. v. Mahon In Context*, 4 LAW & HIST. REV. 1, 5 (1986).

17. Cribbet, *supra* note 15, at 27.

18. Holmes in *Pennsylvania Coal* stated: "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." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The question was not whether the regulation had gone too far in diminishing the value of the landowner's property but rather, whether it had gone too far in its efforts to protect private over public interests. Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property*, 34 U. KAN. L. REV. 539, 558 (1986).

19. 260 U.S. 393 (1922).

20. The Kohler Act, PA. STAT. ANN. tit. 52, § 661 (Purdon, 1930), provides that it shall be unlawful "so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of any public building or any structure customarily used by the public . . . ."

21. Friedman, *supra* note 16, at 5.

22. Several factors can be considered in the factual determination: 1) economic impact of the regulation, 2) its interference with reasonable, investment-backed expectation, and 3) the character of the government action. These factors are used to determine factually whether a regulation has gone too far. These factual bases will, naturally, vary in each case. 480 U.S. at 495 (construing Kaiser Aetna v. United States, 444 U.S. 164 (1979)); *see also* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986), *quoted in* Florida Rock Industries, Inc. v. United States, 791 F.2d 890 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987).

power remains undefined. The fifth amendment continues to be the subject of varying interpretations.

Though *Pennsylvania Coal* remained the leading takings case when *Penn Central* was decided in 1978, the Court refused to compensate for the loss of air rights because the regulation did not abrogate all of the petitioner's interest.[23] Again, a year later in *Andrus v. Allard*, the Court denied compensation because the fifth amendment was not intended to restrict the government from protecting itself.[24] In essence, the Court argued that the government could not continue if required to pay every individual any time a use was regulated. Where the line would be drawn, however, remained unclear.

Finally, in the 1980 decision of *Agins v. Tiburon*, the Court set forth the test for regulation of land use: a regulation constitutes a taking *only* if it fails to substantially advance legitimate state interests or if it denies an owner economically viable use of his land.[25] The wording of that test seems to reflect an intent to restrict compensation. *Keystone* followed this reasoning in its attempt to limit the situations in which individuals would be compensated for public regulation of their land.[26] As the cases decided after *Keystone* show, however, this trend towards restricting compensation may have come to a screeching halt. Perhaps a weakness in the Court's analysis of public purpose left a gap in reasoning that courts in the future might use to reverse the trend.

III.
THE COURT'S ANALYSIS

The Supreme Court, in *Keystone*, held that a regulation limiting a property owner's right to mine coal complied with the fifth amend-

23. New York City adopted the Landmarks Preservation Law, placing restrictions on the development of individual historic landmarks and restricting an owner's control over his parcel, in an attempt to preserve historic landmarks. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

24. This case involves the Eagle Protection Act and Migratory Bird Treaty Act that prohibits commercial transactions in bird parts. Petitioner claimed he was deprived of potential profits from the sale of artifacts utilizing the feathers of these birds. Andrus v. Allard, 444 U.S. 51 (1979). "To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*." *Id.* at 65 (emphasis in original).

25. Agins v. Tiburon, 447 U.S. 255 (1980).

26. McGinley and Barrett, *Pennsylvania Coal Co. v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?*, 16 TULSA L.J. 418, 434 (1981).

ment.[27] The Court concluded that the Commonwealth's interest in public health and safety made the Subsidence Act constitutional.[28]

The Court began its analysis by distinguishing *Pennsylvania Coal* and the Kohler Act. First, the Act had a public purpose whereas the regulation in *Pennsylvania Coal* served only private interests.[29] Second, the regulation did not make mining coal commercially impracticable;[30] the Kohler Act did. The following brief discussion deals only with the first distinction.

The legislative purpose of the Subsidence Act was to protect the public interest in health, the environment, and the area's fiscal integrity.[31] The Kohler Act, on the other hand, protected only individuals.[32] Stevens defined the Kohler Act as a "private benefit" statute.[33] This Act would not apply to a surface owner if he owned both the surface and the coal, and if the regulation would not benefit him.[34] The Subsidence Act, conversely, applied in every situation.[35] After pointing out various other distinguishing features, the Court argued that a private interest may, under changed circumstances, take on characteristics of a public purpose.[36] In *Block v. Hirsh*,[37] for example, Justice Holmes noted that housing, which at one time was a completely private matter, had become by 1920 a matter of public concern. With the added weight of public purpose, government could legitimately regulate housing.

The Court added that the nature of the state action is important in any takings analysis.[38] A physical invasion will more likely be found a taking, for example, than will a regulation.[39] That is be-

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27. 480 U.S. at 471-472.

28. *Id.* at 487 n.16.

29. *Id.* at 485. Commercial impracticability is the second part of the *Agins v. Tiburon* test. A regulation that makes it commercially impracticable to mine coal has the same constitutional effect as appropriating or destroying it. *Id.* at 484 n.13 (construing 260 U.S. at 414).

30. *Id.* at 484.

31. *Id.* at 488.

32. 260 U.S. at 398.

33. 480 U.S. at 486.

34. *Id.*

35. The Department of Environmental Regulation could give permission to mine coal beyond the constraints set forth in the Act. *Id.* The guidelines they considered, however, pertained to safety of the public, not to the economic status of the landowner.

36. *Id.* at 488 (quoting Block v. Hirsch, 256 U.S. 135, 155 (1921)).

37. 256 U.S. 135 (1921).

38. 480 U.S. at 488.

39. *Id.* at n.18; *Penn Central*, 438 U.S. at 124; Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962); *see also* Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635, 652 (1986).

The Court seems to be arguing that since diminution in value must occur to prove a

cause, although a regulation may destroy or adversely affect real property interests, restraining certain uses benefits the public.[40] The Court found the public's interest in preventing activities similar to public nuisances to be a substantial one, satisfying the public purpose requirement and sufficiently outweighing any private interest.[41]

IV.
BALANCING THE INTERESTS

The Court distinguished *Pennsylvania Coal* in two respects: diminution in value and public purpose.[42] In reference to the second, Justice Stevens stated that the Kohler Act of *Pennsylvania Coal* served only private interests and, thus, could not be sustained as an exercise of the police power.[43] The Subsidence Act, on the other hand, was upheld as a police power because it served a legitimate public purpose.[44]

A. Police Power and Public Purpose

The Court overstated the legislature's motivating force behind the Kohler Act. Stevens labeled the Act a "private benefit" statute, enacted *solely* for the benefit of private parties.[45] The dissent, however, quoted the stated purpose, correctly noting the emphasis on public interest.[46] But the fact that the legislature stated that the

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taking, the prohibition of mining cannot constitute a taking without evidence of a decrease in fair market value. Ordinarily, compensation is awarded according to the fair market value of that which is taken. In condemning land containing minerals, however, the minerals are included in the land valued because their value cannot be shown separately. 29A C.J.S. *Eminent Domain* § 174 (1965).

These types of regulations are rarely held to be takings because the amount of compensation is so often based on a speculative value, loss of future profits; the Court is not competent to perform such a task. Note, *Student Symposium on Oil & Gas, Consideration of Mineral Rights in Eminent Domain Proceedings*, 46 LA. L. REV. 827, 841 (1986); Andrus v. Allard, 444 U.S. 51, 66 (1979). *But see* Florida Rock Industries, Inc. v. U.S., 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987) (court should have considered fair market value based on potential sales to those who would be willing to speculate).

40. Holmes originated his concept of "reciprocity of advantage" in *Pennsylvania Coal*, 260 U.S. at 415-16. He proposes weighing the landowner's right to use his property against the public's need to impose reasonable restraints on harmful uses. *See* Cronin & Fieldsteel, *supra* note 4, at 76.

41. 480 U.S. at 492. *See infra* note 57 and accompanying text.

42. *Id.* at 470.

43. 260 U.S. at 414.

44. 480 U.S. at 479.

45. *Id.* at 486.

46. The Kohler Act regulated mining under "[1] any *public* building or any struc-

Act served a public purpose is not determinative if it, in fact, appropriates property for a private use.[47] Such was the case in *Pennsylvania Coal*.[48] *Actual* intent thus distinguishes the two acts, not *stated* intent. Justice Stevens should have concentrated on actual intent.[49]

A finding that the legislature's actual intent was to benefit the public does not alone dictate compensation under the fifth amendment, nor does it justify the appropriation of property. The public purpose for a regulation must outweigh the private interest of the landowner in order to warrant compensation.[50] The Court correctly used that balancing test in *Keystone*.[51]

In weighing the interests, the public use side of the scale is coterminous with the scope of the police power.[52] Thus, when the police power has "gone too far,"[53] the public purpose has exceeded its limits and no longer justifies enforcing the regulation. The appropriation becomes a taking. A practical problem surfaces in determining when the public purpose goes too far and intrudes on the individual's interests. Because the public purpose and private interest will be different in each fact pattern, the determination inevitably will be made on a case-by-case basis.[54] This type of post hoc rationalization affords little guidance in determining what will be a taking.

To explain how he applied the particular facts in weighing the state's public interest in health, Stevens pointed out the Act's intent to prevent damage before it is done.[55] Merely compensating for the

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ture customarily used by the *public* . . . ." Protected areas included "any other *public* passageway dedicated to *public* use or habitually used by the *public* . . . ." *Id.* at 509 n.2 (emphasis added) (construing Kohler Act, PA. STAT. ANN. tit. 52, § 661 (Purdon, 1930)). For the comparable purpose of the Subsidence Act, *see supra* note 7.

47. The Court in *Pennsylvania Coal* argued that the Kohler Act was actually a "confiscatory measure masquerading as police regulation . . . ." 260 U.S. at 397. The legislators consciously emphasized the public purpose to hide their true intent to serve a select minority's interests. *Id.*

48. *Id.*

49. With regard to the relevant factors presented by the majority, Justice Rehnquist finds "that the differences between them and those in *Pennsylvania Coal* verge on the trivial." 480 U.S. at 508-509 (Rehnquist, J., dissenting). But there are undoubtedly underlying differences not immediately apparent. In assessing the true purpose, the Court must examine operative provisions as well as the stated purpose. 480 U.S. at 487 n.16 (construing 260 U.S. at 413).

50. 260 U.S. at 415.

51. 480 U.S. at 491-492.

52. *Id.* at 491 n.20 (construing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984))).

53. 260 U.S. at 415.

54. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

55. 480 U.S. at 487.

damage through an insurance program would not suffice because the intent was to preserve the land for the enjoyment of future generations.[56] The scope of the duty to protect one's neighbor against a nuisance has thereby been expanded to include protection for a future public.[57] With this increased scope in public interest comes an identical increase in the police power, as the two are coterminous.[58]

As the scope of public purpose and police power expands, the weight given to private interest simultaneously decreases.[59] The added duty to protect future generations, for example, limits an individual's present right to do what he pleases with his property.[60] The ownership right gradually dwindles, eventually becoming a mere privilege of ownership which is limited to specific lawful uses.[61] The Court correctly took this recent expansion of public purpose into consideration when it weighed the individual's interest against that of the public.

In one sentence, the Court recognized that a regulation which, in 1920, was for private interest had become, by 1987, one of public purpose.[62] Though it eventually reached the correct result in its

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56. *Id.*; section two of the Act provides:

> This Act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal . . . and generally to improve the use and enjoyment of such lands . . . .

PA. STAT. ANN. tit. 52, § 1406.2 (Purdon Supp. 1986). *See also* Bureau of Mines of Maryland v. George's Creek Coal & L. Co., 272 Md. 143, 321 A.2d 748, 765 (1974) (holding a land use regulation to be within the police power because it was meant to protect the environment and preserve land for present and future generations of citizens) *quoted in* McGinley & Barrett, *supra* note 26, at 436 n.122.

57. This common law duty to protect against a nuisance applies specifically to a miner's duty to provide support to the surface estate. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 563 (1984); Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287 (1986).

58. The line between police power and eminent domain is a grey one. But we know that as the scope of police power increases, courts are less likely to find a regulation has exceeded that scope. It follows that courts will be more hesitant in finding a taking.

59. Brandeis justifies this decrease as a burden borne to secure "the advantage of living and doing business in a civilized community." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).

60. *See* State v. Shack, 58 N.J. 297, 303, 277 A.2d 369, 372 (1971) (the balance between individualism and social dominance depends as much upon circumstances of time and place as upon political and social ideologies) *quoted in* Cribbet, *supra* note 15, at 42; Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 710 (1938).

61. Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759 (1974); Callies, *supra* note 1.

62. "The Subsidence Act is a prime example that 'circumstances may so change in

balancing process, the Court stressed insignificant details in distinguishing *Pennsylvania Coal*. A more expansive and detailed explanation of how public purpose outweighed private interest would have been more convincing and would have offered stronger precedent for future courts.

B. Impacts of the Decision

Denying compensation for regulations such as the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act inevitably causes an increased economic burden on the individual. It must be stressed, however, that this burden is merely another factor to consider in the balancing.[63] The individual will be implicitly compensated through the benefits to the public, so his burden will often be outweighed.[64] The holding in *Keystone* reflects a society in which the individual is being forced into an awareness of environmental issues.[65]

Keystone, like *Pennsylvania Coal*, fails to set forth a test for determining the line between regulations and takings. Findings will, therefore, continue to be made case-by-case, and judges in different jurisdictions will easily distinguish different fact situations. The Court's more recent decisions in *Nollan v. California Coastal Commission*[66] and *First English Evangelical Lutheran Church of Glendale v. The County of Los Angeles*[67] illustrate that the Court might follow this method of judicial decision-making. Both of these cases, on very different facts, held that the regulations in question constituted takings. After these decisions, the question now arises

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time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern.' " 480 U.S. at 488 (construing Block v. Hirsh, 256 U.S. 135, 155 (1921)).

63. Any restriction on use inherently involves a loss in economic value to the landowner. That loss, however, does not always require compensation. Cribbet, *supra* note 15, at 35; *see also* 260 U.S. at 417 (Brandeis, J., dissenting).

64. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 219 (1985). The idea of implicit, in-kind compensation is actually a concept invented to appease the individual. The underlying rationale is that government could not go on if it had to pay for every diminution in property value. 260 U.S. at 413, *quoted in* 438 U.S. at 124.

65. Cribbet, *supra* note 15, at 31.

66. 107 S. Ct. 3141 (1987). The California Coastal Commission granted the Nollans a permit to demolish a bungalow and rebuild between two public beaches. Granting of the permit was conditioned, however, on the Nollan's granting the public a lateral access easement over their property. The Supreme Court found that the Commission's exaction of the easement constituted a regulatory taking.

67 107 S. Ct. 2378 (1987). The Supreme Court found a temporary flood protection zoning ordinance constituted a taking of the private owner's property.

whether the trend has reversed since *Keystone* or whether the absence of clear guidelines defies a definite trend in either direction.

V.
CONCLUSION

Despite several flaws in his reasoning, Justice Stevens correctly found in *Keystone* that public concern for environmental protection had grown sufficiently in the previous seventy years to outweigh the private property interest. He understood that in order to safeguard our environment, private concerns must be subordinated to public needs.[68] The three holdings in *Keystone*, *Nollan*, and *First English* exemplify the uncertainty as to how far the private interest has become subordinated to the public interest. The Court's refusal to administer specific guidelines undoubtedly causes this uncertainty. Unfortunately, the American judiciary may have to continue operating without guidelines and remain flexible in order to accommodate the rapid changes in property law.

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68. TARLOCK, *A Correlative Rights Approach to the Taking Issue*, in PLANNING WITHOUT PRICES 159 (B. Siegan ed. 1977) *noted in* Cribbet, *supra* note 15, at 38.

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