Supplementary Material

Chapter 10: The Reagan Era—Individual Rights/Property/Takings

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Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)

The Keystone Bituminous Coal Association was an organization of coal mine operators that operated underground mines in western Pennsylvania. Members objected to a series of Pennsylvania laws adopted in the 1970s and early 1980s that required coal companies to refrain from mining half the coal under "any public building . . . dwelling" or "cemetery." In 1982, the Association filed a lawsuit against Nicholas DeBenedictis, the Secretary of the Pennsylvania Department of Environmental Resources. The suit claimed that Pennsylvania law took property without compensation in violation of the takings clause of the Fifth Amendment as incorporated by the due process clause of the Fourteenth Amendment. A lower federal court and the Court of Appeals for the Third Circuit sustained the Pennsylvania law. The Keystone Bituminous Coal Association appealed to the Supreme Court.

The Supreme Court by a 5–4 vote declared the law constitutional. Justice Stevens' opinion for the Court asserted that the state law had a public purpose and did not destroy the value of the property that coal mining companies owned. Stevens acknowledged that the Pennsylvania law in this case was very similar to the Kohler Act that the Supreme Court declared unconstitutional in Pennsylvania Coal Co. v. Mahon *(1922). On what basis did Stevens distinguish the two cases? Do you find his distinction persuasive or do you agree with the dissent that the two cases are indistinguishable? Might the only difference between the two cases be that DeBenedictis had a better lawyer than Mahon? Can you think of other Supreme Court cases where lawyering might have made a difference in the outcome?*

JUSTICE STEVENS delivered the opinion of the Court.

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Petitioners assert that disposition of their takings claim calls for no more than a straightforward application of the Court's decision in *Pennsylvania Coal Co. v. Mahon* (1922). Although there are some obvious similarities between the cases . . ., the similarities are far less significant than the differences, and *Pennsylvania Coal* does not control this case.

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

Unlike the Kohler Act, which was passed upon in Pennsylvania Coal, the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private

interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas. Section 2 of the Subsidence Act provides:

> This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than 'open pit' or 'strip' mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania.
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. . . With regard to the Kohler Act, the Court believed that the Commonwealth had acted only to ensure against damage to some private landowners' homes. Justice Holmes stated that if the private individuals needed support for their structures, they should not have "take[n] the risk of acquiring only surface rights." Here, by contrast, the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance.

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The second factor that distinguishes this case from *Pennsylvania Coal* is the finding in that case that the Kohler Act made mining of "certain coal" commercially impracticable. In this case, by contrast, petitioners have not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking. For this reason, their takings claim must fail.

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

The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania. Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit. . . .

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

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The parties have stipulated that enforcement of the DER's 50% rule will require petitioners to leave approximately 27 million tons of coal in place. Because they own that coal but cannot mine it, they contend that Pennsylvania has appropriated it for the public purposes described in the Subsidence Act. This argument fails. . . . The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. . . .

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When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property. The record indicates that only about 75% of petitioners' underground coal can

be profitably mined in any event, and there is no showing that petitioners' reasonable "investment-backed expectations" have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by § 4.

Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate. Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights. For example, in *Penn Central*, the Court rejected the argument that the "air rights" above the terminal constituted a separate segment of property for Takings Clause purposes.

. . . [I]n practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.

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In assessing the validity of petitioners' Contracts Clause claim in this case, we begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment. Petitioners claim that they obtained damages waivers for a large percentage of the land surface protected by the Subsidence Act, but that the Act removes the surface owners' contractual obligations to waive damages. We agree that the statute operates as "a substantial impairment of a contractual relationship" and therefore proceed to the asserted justifications for the impairment.

The record indicates that since 1966 petitioners have conducted mining operations under approximately 14,000 structures protected by the Subsidence Act. It is not clear whether that number includes the cemeteries and water courses under which mining has been conducted. In any event, it is petitioners' position that, because they contracted with some previous owners of property generations ago, they have a constitutionally protected legal right to conduct their mining operations in a way that would make a shambles of all those buildings and cemeteries. As we have discussed, the Commonwealth has a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties.

. . . [T]he Subsidence Act plainly survives scrutiny under our standards for evaluating impairments of private contracts. The Commonwealth has determined that in order to deter mining practices that could have severe effects on the surface, it is not enough to set out guidelines and impose restrictions, but that imposition of liability is necessary. By requiring the coal companies either to repair the damage or to give the surface owner funds to repair the damage, the Commonwealth accomplishes both deterrence and restoration of the environment to its previous condition. We refuse to second-guess the Commonwealth's determinations that these are the most appropriate ways of dealing with the problem. We conclude, therefore, that the impairment of petitioners' right to enforce the damages waivers is amply justified by the public purposes served by the Subsidence Act.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

. . . Examination of the relevant factors presented here convinces me that the differences between them and those in *Mahon v. Pennsylvania Coal Co.* (1922) verge on the trivial.

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The Court opines that the decision in Pennsylvania Coal rested on the fact that the Kohler Act was "enacted solely for the benefit of private parties" and "served only private interests." A review of the Kohler Act shows that these statements are incorrect. The Pennsylvania Legislature passed the statute "as remedial legislation, designed to cure existing evils and abuses." These were public "evils and abuses,"

identified in the preamble as "wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life. . . ."

[T]his Court did not ignore the public interests served by the Act. When considering the protection of the "single private house" owned by the Mahons, the Court noted that "[n]o doubt there is a public interest even in this." It recognized that the Act "affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved." The strong public interest in the stability of streets and cities, however, was insufficient "to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." . . .

The Subsidence Act rests on similar public purposes. These purposes were clearly stated by the legislature: "[T]o aid in the protection of the safety of the public, to enhance the value of [surface area] lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands. . . ." The Act's declaration of policy states that mine subsidence "has seriously impeded land development . . . has caused a very clear and present danger to the health, safety and welfare of the people of Pennsylvania [and] erodes the tax base of the affected municipalities." . . . Thus, it is clear that the Court has severely understated the similarity of purpose between the Subsidence Act and the Kohler Act. The public purposes in this case are not sufficient to distinguish it from *Pennsylvania Coal*.

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[O]ur cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.

Here, petitioners' interests in particular coal deposits have been completely destroyed. By requiring that defined seams of coal remain in the ground, § 4 of the Subsidence Act has extinguished any interest one might want to acquire in this property, for "'the right to coal consists in the right to mine it.'" Application of the nuisance exception in these circumstances would allow the State not merely to forbid one "particular use" of property with many uses but to extinguish all beneficial use of petitioners' property.

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. . . Physical appropriation by the government leaves no doubt that it has in fact deprived the owner of all uses of the land. Similarly, there is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property, for the effect of this action on the holder of the property is indistinguishable from the effect of a physical taking. . . .

In this case, enforcement of the Subsidence Act and its regulations will require petitioners to leave approximately 27 million tons of coal in place. There is no question that this coal is an identifiable and separable property interest. Unlike many property interests, the "bundle" of rights in this coal is sparse. "'For practical purposes, the right to coal consists in the right to mine it.'" From the relevant perspective—that of the property owners—this interest has been destroyed every bit as much as if the government had proceeded to mine the coal for its own use. The regulation, then, does not merely inhibit one strand in the bundle, but instead destroys completely any interest in a segment of property. In these circumstances, I think it unnecessary to consider whether petitioners may operate individual mines or their overall mining operations profitably, for they have been denied all use of 27 million tons of coal. I would hold that § 4 of the Subsidence Act works a taking of these property interests.

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When held by owners of the mineral estate, the support estate "consists of the right to remove the strata of coal and earth that undergird the surface . . . ." Purchase of this right, therefore, shifts the risk of subsidence to the surface owner. Section 6 of the Subsidence Act, by making the coal mine operator strictly liable for any damage to surface structures caused by subsidence, purports to place this risk on the holder of the mineral estate regardless of whether the holder also owns the support estate. Operation of this provision extinguishes petitioners' interests in their support estates, making worthless what they purchased as a separate right under Pennsylvania law. Like the restriction on mining particular coal, this

complete interference with a property right extinguishes its value, and must be accompanied by just compensation.