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I. INTRODUCTION

The rugged coal-laden hills and narrow valleys of Appalachia may be the context for resolution of an important and complex issue of constitutional law. The coal of that region has for more than one hundred years produced great wealth for a few individuals and a major portion of the energy for homes and factories across the United States. The region has also borne the burden of coal-related labor strife,[1] environmental degradation,[2] political corruption[3] and poverty.[4]

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[1] See e.g., P. LONG, WHERE THE SUN NEVER SHINES: A HISTORY OF AMERICA'S BLOODY COAL INDUSTRY (1989) and V.B. HARRIS, KANAWHA'S BLACK GOLD AND MINER'S REBELLIONS (1987).

[2] The legislative history of the "Surface Mining Control and Reclamation Act of 1974," a failed precursor of the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), identifies the impact of coal mining on many coalfield communities:

> The . . . environmental impacts of surface and underground coal mining have been enormous. The most serious effects are to be seen in the Appalachian region, where the entire socio-economic infrastructure of parts of Pennsylvania, West Virginia, Ohio, Kentucky, Virginia and Tennessee and Alabama has been profoundly affected by decades of extracting coal from the rich bituminous deposits. As a consequence of the hazardous environment associated with both underground and surface mining of coal, the health and safety of people living and working near the coal mines of the region are in more or less constant peril. . . .

H.R. REP. No. 1072, 93d Cong. 2d Sess. 56 (1974).

[3] Even as I write, the insidious corrupting influence of coal money has surfaced in Appalachia, bringing disgrace and dishonor to public officials who allegedly took part in extortion and kick-back schemes. Former three-term West Virginia Governor Arch A. Moore Jr. and members of his administration stand accused of conspiring with coal company executives to commit such repulsive crimes as bilking the West Virginia Black Lung Benefits Fund of more than two million dollars at the expense of disabled coal miners and widows. The former Governor has pled guilty to using the illegal proceeds in his election efforts. *See e.g.*, The Charleston Gazette, April 13, 1990, at 1.

[4] *See, e.g.*, H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS, A BIOGRAPHY OF A DEPRESSED AREA (1963).

Government intervention to protect coal miner's health and safety[5] and the homes and the environment of coalfield residents is common. It is as common as the ubiquitous coal tipple which dots the Appalachian landscape;[6] as common as the mountains and fields ripped apart and abandoned by irresponsible coal operators; and as common as the overloaded tri-axle coal trucks that wind their way down the narrow broken roads of remote hollows.[7] Government intervention came too late, however, to prevent pollution of thousands of miles of streams and rivers now stained orange and rendered biologically dead by sulfuric

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[5] *See Reide, Historical Development of Federal Coal Mine Safety and Health Regulation*, 1 COAL LAW AND REGULATION 1-1 - 1-60 (McGinley and Vish eds., 1983 & Supp. 1989).

[6] Coal tipples are structures used to load coal onto trucks, railcars, or barges for transportation to coal purchasers. Coal tipples are to the coal fields what silos are to the farming regions of the mid-west. *See* U.S. BUREAU OF MINES, A DICTIONARY OF MINING, MINERAL AND RELATED TERMS (1968), p. 1145.

[7] *See e.g.*, West v. National Mines Co., 285 S.E.2d 670 (W.Va. 1981). One who has not experienced the impact of the heavy over-loaded coal truck rumbling past her home can not comprehend the intrusive nature of the activity. In West, the impact of this experience is recited in stark terms:

> Coal produced from National's leasehold is removed by contract haulers who transport the coal by truck down route 8/1 past the appellants' house to a preparation facility owned by National located approximately three miles west of Pineville, West Virginia. The coal is hauled in large trucks carrying 30 to 50 tons per load. The trucks run six days per week and occasionally all night long. Route 8/1, the only access road between the mine and National's preparation facility, is a dirt and gravel based road. Consequently, much dust is created by the truck traffic in dry weather conditions. The dust problem is exacerbated by the truck operators' practice of travelling in packs of four or five trucks at a speed of approximately 30 miles per hour. The appellants' house sits close to the road and the dust created by the trucks settles on the house and the surrounding property. Although the appellants have lived in their present house since 1972, Mr. West has lived at the same address for over 45 years. Mining operations have been ongoing above the appellants' property for decades, but more coal is being hauled out now than ever before.
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> . . .
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> The dust is ubiquitous. It permeates the house even with the doors and windows closed. The evidence shows that the dust is oily and greasy, black looking and hard to clean. It interferes with breathing. It spoils the food raised by the appellants in their garden. It fouls the water, and prevents the appellants from sleeping soundly. The oppressive conditions caused by the dust were summarized by Mr. West: "It is hard to breathe. I tell you, I've often thought about it like this: A man would be better off over there in jail in solitary confinement than to have to put up with this kind of conditions for the rest of his life. It is just that bad."

Id., 285 S.E.2d at 673-74.

acid mine drainage[8] which pours from hillsides scarred by the strip miner's giant shovels and pierced by the shafts of the underground mine operator. For a century, the region has in the Dickensian sense, suffered the "worst of times and the best of times."[9]

The existence of great mineral wealth in the midst of Appalachian poverty provides the backdrop for the following discussion of difficult constitutional issues. At the bottom lies the basic conflict between private property ownership and the right of a society to organize to further common community goals.[10] In the present context, the focus is the implied right of government to "take" private property for a public use and the implied right of government[11] to regulate private activities to protect the public health, safety, morals and advance the general welfare.[12] Specific constitutional protections of individual rights are also implicated here: the Fifth Amendment's mandate that private property can be appropriated by government only if "just compensation" is paid, and the Fifth Amendment's corollary mandate that "[n]o person shall be . . . deprived of . . . property, without due process of law . . . ."[13]

Narrowly viewed, at stake is the power of government to pass laws that regulate the use of property so as to reduce or eliminate its economic value. But such laws, be they to protect the public health and safety from nuisance-like activities or to

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[8] *See e.g.* McGinley & Sweet, *Acid Coal Mine Drainage: Past Pollution and Current Regulation*, 17 DUQ. L. REV. 67 (1978); Begley and Williams, *Coal Mine Water Pollution: An Acid Problem with Murky Solutions*, 64 KY. L. J. 507 (1976).

[9] DICKENS, TALE OF TWO CITIES, 1 (1859). While the introductory comments above suggest the region has suffered only the "worst of times," coal has often proved a significant economic stimulus to coal-state economies and in more recent years has provided rural coal workers with well-paying jobs. Coal state economies have, however, experienced significant adverse consequences resulting from a recurring boom/bust cycle; when coal is less marketable, tax dollars and jobs are correspondingly reduced.

[10] The latter right, of course, includes the power to restrict private property rights.

[11] This government prerogative is commonly referred to as the police power. It comprises the inherent powers of the sovereign that were not surrendered to the federal government in the Constitution, but were reserved by the states under the Tenth Amendment. *See e.g.*, 16 AM.JUR. 2D, *Constitutional Law*, § 360. The Congress acts similarly under its enumerated powers, e.g., the Commerce Power upon which enactment of SMCRA is based. For purposes of this article, I refer to "police power" as embodying the powers of the states and Congress to enact health and safety legislation subject to constitutional limitations.

[12] This is commonly called the power of "eminent domain".

[13] U.S. CONST., amend. V. The Fourteenth Amendment also includes a due process guarantee applicable to state government.

regulate the use of land to further a comprehensive community plan, may be reduced to one fundamental issue: who bears the burden of the financial loss—-the private property owner or the broader community upon whose authority and pursuant to whose consent the government has regulated?

Venting their frustrations, commentators and judges have expounded on the difficulties one faces when exploring the relationship between the police power and the constitutional impediments to the "taking" of private property for a public use.[14] As one commentator put it, "[i]n truth, the collected decisions of the Supreme Court, and all other courts, leave the subject as disheveled as a ragpicker's coat."[15] The Supreme Court has recognized the complexity of the issue, describing the search for a bright-line analysis in the takings area as follows: "[t]he attempt to determine when regulation goes too far that it becomes, literally or figuratively, a 'taking' has been called 'the lawyer's equivalent of the physicist's hunt for the quark.'"[16]

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[14] Twenty years ago, Professor Joseph Sax succinctly characterized this conflict:

> Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation. Despite the intensive efforts of commentators and judges, our ability to distinguish between "takings" in the constitutional sense, and exercises of the police power, for which compensation is not compelled, has advanced only slightly since the Supreme Court began to struggle with the problem some eighty years ago.

Sax, *Takings, Private property and Public Rights*, 81 YALE L. J.149 (1971)(notes omitted). In a more recent restatement of the same problem, Professor Richard Epstein observed:

> The two sides of the general debate are well marked. On the one hand, private property has often been praised as the bulwark of individual liberty, to be held sacred and inviolate against any and all intrusions. On this view, its protection becomes, as it was for Locke, the *raison d'etre* for the state. On the other hand, private property has been attacked as the mark of social privilege—-indeed theft—-that allows the lucky few to dominate the unfortunate many. It becomes the social institution that marks mankind's fall from grace. Neither of these extreme positions can be maintained. But quickly having ruled out the extremes, there remains open the difficult and vexing task of marking the intermediate path.

Epstein, *Takings: Decent and Resurrection*, 1987 SUPREME COURT REVIEW 1. For a more lengthy presentation of Prof. Epstein's controversial views, *see* EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[15] Stoebuck, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059 n. 11 (1980).

[16] Williamson Co. Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 199, n.17 (1985), *citing* C. HAAR, LAND USE PLANNING 766 (3d ed. 1976). In a familiar incantation in Supreme Court takings opinions, Justice Brennan has

Notwithstanding the long held perception of the police power/taking conflict as a morass of conceptual confusion which can only be resolved on an ad hoc, case by case basis, recent caselaw developments have brought some order to the debate. This article will examine taking jurisprudence in light of these developments and apply it in the context of what has, heretofore, been considered a most difficult environmental regulatory issue. That issue centers on the "valid existing rights" caveat to a provision of the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA).[17]

Section 522(e) of the SMCRA prohibits by statutory fiat, the mining of coal within certain distances from buildings, roads, cemeteries and other surface land features and also declares specific federal lands to be off-limits to coal mining.[18] These

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stated that:

> [T]his court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) (citations omitted).

[17] Pub. L. No. 95-87, § 522(e), 91 Stat. 507 (codified as 30 U.S.C. § 1272(e) (1988)).

[18] Section 522(e) of the SMCRA provides in relevant part:

> (e) After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
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> (1) on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 1276(a) of Title 16 and National Recreation Areas designated by Act of Congress;
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> (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—
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> (A) surface operations and impacts are incident to an underground coal mine; or
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> (B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those National Forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained- Yield Act of 1960 [16 U.S.C. §§ 528-531], the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this chapter: *And provided further,* That no surface coal mining operations may be permitted within the boundaries of the

restrictions apply "subject to valid existing rights." Attempts to interpret this phrase has spawned a dozen years of Department of the Interior rulemaking[19] and attendant litigation, while homes, cemeteries, schools, highways and the integrity of some of the nation's natural treasures including some National Parks and Forests hang in the balance.

As I write, almost thirteen years after enactment of the SMCRA, the extent to which a coal operator possesses "valid existing rights," and thus may blast, strip, auger, and construct haul roads and sediment ponds in areas where such activity is otherwise proscribed by the SMCRA remains unresolved. Throughout this extended rulemaking the Department of Interior's Office of Surface Mining has consistently identified congressional concerns that section 522(e) not effect a taking, as the central issue guiding agency efforts to craft an acceptable regulation implementing that section's prescriptive mandate.[20]

It was to OSM that Congress gave the responsibility to see that SMCRA is effectively implemented. SMCRA envisioned that ultimate front-line authority for stripmine enforcement would rest with states who would implement OSM promulgated regulations with federal oversight of state actions. The agency's first decade of existence was marked with controversy and criticism.

> Custer National Forest;
> (3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;
> (4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or
> (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

SMCRA § 522(e), 30 U.S.C. § 1272(e). (emphasis in original).

[19] *See* 53 Fed. Reg. 52,374 (1988) which outlines the history of this extended rulemaking.

[20] SMCRA § 511, 30 U.S.C. § 1211 (1988) created a new Office of Surface Mining Reclamation and Enforcement ("OSM") to implement, administer and enforce the Act and to oversee the efforts of state regulatory agencies which receive primary jurisdiction to enforce the statute.

The agency and, in turn, its implementing regulatory program were created by Carter Administration officials. The original Carter OSM staff were characterized by coal industry spokesmen as environmental activists, imperious, hostile and dictatorial.[21]

The coal industry was delighted, however, when President Reagan replaced Carter and OSM's attempts to promulgate regulations to implement SMCRA fell into the hands of James Watt and his aides.[22] Secretary Watt proposed regulatory amendments that seriously challenged the underlying policies of SMCRA.[23]

Congressman Morris Udall, a leading proponent of the enactment of SMCRA viewed OSM's new direction with alarm, fearing "a devastating impact on the goals we set . . . in this law."[24] Another commentator observed that Secretary Watt was

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[21] In an article setting forth their coal industry clients' view of OSM rulemaking under the Carter Administration, two Washington lawyers stated:

> The activist, pace-setting role OSM has played as regulation promulgator in determining the alpha and omega of state programs has been mirrored and reinforced by OSM's role in reviewing and approving state programs.
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> . . .
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> OSM's imperious manner and general lack of grace in performing the state program review and approval function generated considerable hostility on the part of the states . . . . Such was the hue and cry that legislation was proposed to free the states entirely from OSM's dictatorial regulations.

Macleod and Means, *The Federal Threat to State Primacy and Effective Reclamation Under the Surface Mining Act*, 2 E. MIN. L. INST. 5-1, 5-24 - 5-25 (1981).

[22] The coal industry applauded Watt's plan to reorganize OSM's Regulatory program. *See Reorganization of the Office of Surface Mining: Oversight Hearing before the Subcommittee on Energy and Environment of the House Comm. on Interior and Insular Affairs*, 97th Cong., 1st Sess. 143-150 (1981) ("Reorganization Hearing") (Joint statement of the National Coal Association and American Mining Congress Committee on Surface Mining Regulations). The Watt-OSM rulemaking overhaul included several hundred proposed rule changes involving sixty percent of the agency's regulations. *See* 47 Fed. Reg. 1709 (1982); *See also*, Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TULANE L. REV. 299, at 335 (1983).

[23] Comment, *Regulatory Revisions to the Surface Mining Control and Reclamation Act: An Exercise in Administrative Legislation?*, 31 KAN. L. REV. 279, 280 (1983). (This commentary explores environmentalists' charges that "the OSM has abdicated its congressionally mandated duties by loosening regulatory requirements in vital areas.") *Id.* at 280, n. 10.

[24] *Reorganization Hearing* at 7. One commentator observed at the time that:

> The implications of the new administration's philosophies . . . were not well received by [those] interested in effective surface mining regulation. Many viewed the deregulation and "new federalism" rhetoric as thinly-veiled proposals to return the industry to the dark ages of state competitors for mining business . . . .

Comment, *Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TULANE L. REV. at 334.

on a "mission . . . to accomplish a . . . vivisection of OSM "by creating turmoil and uncertainty in the agency.[25] Secretary Watt's resignation, conservationist court victories and the end of the Reagan administration prevented the implementation of the Watt OSM reorganization plan.

The following discussion analyzes the impact of Section 522(e) of the SMCRA on private property rights and applies recently clarified "taking" precedent in reaching the conclusion that the law's mandate may be enforced without "taking" private property and triggering the Fifth Amendment's compensation requirement.[26] To reach this view I explore the nuances of SMCRA and Section 522(e) in light of more than one hundred years of Supreme Court taking jurisprudence. Hopefully this discussion will also provide some assistance in resolving the confusion surrounding constitutional taking jurisprudence.

II. THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 AND VALID EXISTING RIGHTS

One cannot address the police power/taking issue raised in the context of SMCRA's section 522(e) without at least a threshold appreciation of the history and purpose of the legislation. SMCRA was enacted after years of acrimonious debate in the public arena and in Congress.[27] The often bitter struggle pitted coalfield residents, responsible coal operators, some state gov-

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[25] Seiberling, *How Effective is the Federal Stripmining Law?*, 88 W. VA. L. REV. 509, 511-512 (1986). Congressman Seiberling believed that "[l]awlessness and non-compliance with SMCRA are widespread in the Appalachian coal fields." *Id.* at 512. *See also*, Dunlap and Lyon, *Effectiveness of the Surface Mining Control and Reclamation Act: Reclamation or Regulatory Subversion*, 88 W. VA. L. REV. 547 (1986).

[26] There may be some cases where a "taking" will occur but such instances will, in my view, be rare.

[27] The legislative process included 183 days of hearings and legislative consideration, eighteen days of actions in the House of Representatives, three House-Senate conferences and reports, eleven committee reports, two presidential vetoes and more than fifty recorded votes in the House and Senate. Udall, *The Enactment of the Surface Mining Central and Reclamation Act of 1977 in Retrospect*, 81 W. VA. L. REV. 553, 554 (1979). *See, A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775 (1979) (hereafter referred to as "Summary of the Legislative History"); Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TULANE L. REV. 299, 311-312; Comment, *Regulatory Revisions to the Surface Mining Control and Reclamation Act: An Exercise In Administrative Legislation?*, 31 KAN. L. REV. 279, 280-282 (1983); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 277-280 (1981).

ernments, conservationists and their allies in Congress against other coal operators, coal trade associations and industry friends in state government and Congress.

The legislative history of SMCRA contains extensive evidence of coal industry resistance to federal regulation. The post-World War II development of modern stripping technology and giant mining equipment greatly magnified the adverse impacts of unregulated and under-regulated coal mining. Congress emphatically rejected the claims of irresponsible operators[28] and their supporters that federal intervention was not necessary to stem the tide of strip mine ravages that swept across the coalfields in the post-war period:

> [D]espite claims from some quarters that State reclamation laws have improved so significantly that federal mining standards are no longer needed, the hearing record abounds with evidence that this is simply not the case. For a variety of reasons, including the reluctance of State to impose stringent controls on its own industry, serious abuses continue.[29]

The legislative history of the SMCRA is replete with evidence of the devastating impact of strip and underground coal mining on coalfield communities:

> Tragically, coal mining in America has left its crippling mark upon the very communities which labored most to produce the energy which once impelled the Nation's industrial plants and now generates much of its electrical power . . .
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> . . .
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> Acid mine drainage which has ruined an estimated 11,000 miles of streams; loss of prime hardwood forest and the destruction of wildlife habitat by strip mining; the degradation of productive farmland; recurrent landslides; siltation and sedimentation of the river systems; . . . and perpetually burning waste dumps—these constitute a pervasive and far reaching ambience.[30]

SMCRA was intended to put an end to the adverse impacts of coal mining. Notwithstanding Congress' intentions, coal min-

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[28] The terms "responsible" and "irresponsible operators" are words of art in the coal industry. Responsible operators are often characterized as those coal companies who seek to comply with environmental laws; irresponsible operators are those that flaunt the law while creating environmental and safety hazards which remain after mining has ceased because the mining company has failed to properly reclaim the minesite.

[29] H.R. REP. No. 218, 95th Cong., 1st Sess. 58 *reprinted at* 1977 U.S. CODE, CONG. & ADMIN NEWS 593, 596.

[30] *Id.*

ing's detrimental effects did not cease with the enactment of the SMCRA. After more than a decade of regulation under the Act, ineffective state regulation and weak federal oversight have allowed irresponsible coal operators to continue many of the practices which provided the impetus for the enactment of SMCRA.[31]

In view of continued systemic obstacles to the effectuation of sound mining and reclamation practices throughout the coal fields, Congress' decision to place certain areas, identified in Section 522(e), off-limits to mining, seems wise indeed.[32] Although Congress created a process in Section 522(c) of SMCRA which gives OSM and state regulatory agencies discretionary authority to ban all or some types of mining in certain areas including federal lands, it observed that the Section 522(e) "decision to bar surface mining in certain circumstances is better made by Congress itself."[33]

A. *Valid Existing Rights in Legislation Enacted Prior to SMCRA*

Prior to the enactment of the SMCRA, the term "valid existing rights"[34] was a term of art in federal law, developed in the context of and applicable only in situations involving the acquisition of private interests in federal public lands. For example, the Mineral Leasing Act of 1920 contained VER lan-

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[31] For example, in Pennsylvania, more than 20,000 acres of mined land has been abandoned by coal operators without reclamation since the enactment of the SMCRA. Because of continued inadequate reclamation bonding requirements imposed by that state's regulatory authority (with the approval of OSM), Pennsylvania taxpayers are being forced to provide more than $100,000,000 to offset the shortfall between the amount collected from forfeit bonds and the actual cost of reclamation. Cited in an unpublished report of the Pennsylvania Department of Environmental Resources dated January, 1984. *See e.g.*, U.S. GENERAL ACCOUNTING OFFICE, SURFACE MINING: INTERIOR DEPARTMENT AND STATES COULD IMPROVE INSPECTION PROGRAMS (Dec. 1986) (GAO Doc. No. RCED-87-40).

Signs that federal enforcement of the SMCRA will be significantly strengthened by the appointment of a new Director of the Office of Surface Mining by President George Bush have been observed by coalfield observers, *See*, The Charleston Gazette, January 13, 1990.

[32] H.R. REP. No. 218, 95th Cong., 1st Sess. 95 *reprinted at* 1977 U.S. CODE CONG. & ADMIN. NEWS, at 631. Such lands include national parks and forests, and homes, cemetaries and other surface features situate on private land. For text of SMCRA § 522(e), *see supra* note 18.

[33] *Id.*

[34] Hereinafter referred to as "VER."

guage.[35] There, VER was intended to preserve the mining claims of those who accepted Congress' offer in the 1872 Mining Law and had literally staked their claim and conducted prospecting and other mineral development activities on federal lands. If a claimant did not possess VER, the 1920 Act would operate so as to extinguish the claim. More than one hundred other federal statutes relating to federal public lands enacted over the past century have contained VER language.[36]

One commentary on the respective rights and obligations of those holding private interests in public resources has observed that the parameters of "valid existing rights" created by federal legislative or executive action depends upon the specific governmental motives underlying each.[37] The authors of that work make clear that there is no talismanic thread discoverable in the crazy-quilt of federal statutes and executive orders which have utilized "valid existing rights" language as part of a federal lands regulatory scheme:

> Typically, Congress never lists what interests it means to include within the "valid existing rights" phrase. The task of interpretation thus falls on the executive branch (i.e., the Department of the Interior) or the courts.[38]

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[35] Act of Feb. 25, 1920, c. 85, § 36, 41 Stat 451 (codified as amended, 30 U.S.C. § 192 (1988)).

[36] *See e.g.*, Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, § 4, 90 Stat. 1083 (amending, subject to valid existing rights, the Mineral Lands Leasing Act § 2(b), codified as 30 U.S.C. § 201(b)(1988)); Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, § 14(g), 85 Stat. 702 (codified as 43 U.S.C. § 1601, 1613 (g) (1982)); The Wilderness Act of 1964, Pub. L. No. 88-577, § 4(d)(3), 78 Stat. 890 (codified as 16 U.S.C. 1131, 1133 (1988)); and the Missions Indian Relief Act, Act of Jan. 12, 1891, c. 65, § 2, 26 Stat. 712 (uncodified). VER has also been invoked in Executive Orders whose purpose, generally stated, was similarly to preserve pre-existing private interests in federal minerals or land from executive or statutory withdrawal. *See e.g.*, Exec. Order No. 1538, May 28, 1912 (withdrawing public lands for establishment of the Papago Indian Reservation, Pinal Co., Az.); Exec. Order No. 4109, Dec. 8, 1924 (withdrawing from entry certain islands located off of the Florida coast); and Exec. Order No. 6909, Nov. 21, 1934 (designating grazing areas).

[37] Laitos and Westfall, *Government Interference with Private Interest in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 19 (1987).

[38] Laitos and Westfall identify six "classes" of property interests used by courts and agencies when they label the range of such interests that private parties may acquire from the federal government. According to the authors, these include vested rights, non-vested protectible property rights, protected possessory interests, non-discretionary entitlements, rights of possession, and applications. These six categories are discussed in the context of an examination of the impact on each resulting from federal government attempts to extinguish, or prevent acquisition of, one of these interests, or when it seeks to place additional regulatory burdens upon such existing interests. *Id.* at 9-19.

> . . .
> It is not possible to identify in the abstract every interest that is a valid existing right. One must in each case consider the nature and terms of the interest alleged to be a valid existing right, the case law and administrative decisions that have previously considered whether that interest is a valid existing right, and the precise language and history of the statute or executive order acknowledging the valid existing right.[39]

Thus, one may safely conclude that an examination of the term VER as used in other statutes will shed little light on how it should be interpreted in the federal Surface Mining Act. While far from determinative of the appropriate scope and meaning of VER in Section 522(e), the legislative history of the SMCRA provides some clues.

B. *Valid Existing Rights and SMCRA: Legislative History*

Reflective of the intensity of the struggle leading to the enactment of the SMCRA[40] is the fact that opponents of federal regulation of coal stripping successfully induced President Gerald Ford to twice veto bills passed by substantial margins.[41] It was only in the wake of the election of a new President in the fall of 1976 that the legislative effort finally bore fruit.

From the time Congress first entertained the notion of federal regulation of the environmental effects of coal mining until enactment of the SMCRA, almost ten years had passed.[42] Not surprisingly, the legislative history of SMCRA which accumu-

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[39] *Id.* at 20 (citations omitted). For other commentary on valid existing rights, *see generally*, Toffenitti, *Valid Mining Rights and Wilderness Areas*, 20 LAND AND WATER L. REV. 31 (1985); Note, *Regulation and Land Withdrawals; Defining 'Valid Existing Rights'*, 3 J. MIN. L. & POL'Y 517 (1988); Barkeley and Albert, *A Survey of Case Law Interpreting "Valid Existing Rights" —Implications for Unpatented Mining Claims*, 34 ROCKY MTN. MIN. L. INST. 9-1 (1988); McFerrin and Whitman, *Valid Existing Rights and the Constitution; 1983 Regulatory Changes*, 87 W. VA. L. REV. 947 (1985); McGinley, *The Surface Mining Control and Reclamation Act of 1977: Ten Years of Promise and Problems for the National Parks*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS (J. Simon ed., 1988).

[40] *See supra* note 27 and accompanying text.

[41] *See Summary of Legislative History*, *supra* note 27, at 777-778. *See also*, *Surface Mining Veto Justification: Briefing Hearings Before the Subcomm. on Energy and the Environment and the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975).

[42] The legislative history of SMCRA, which began with hearings in 1968, is capsulized in Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264, 278, n. 19 (1981).

lated during the balance of a decade of legislative consideration, totals thousands of pages. Buried in these volumes are scant and conflicting references to VER. In those places where VER is discussed, precious little guidance is discernible which can inform as to the meaning of and manner in which Congress intended the term to be applied.[43]

The legislative history does explicitly reveal a congressional intent to follow state law guidance regarding the interpretation of coal severance deeds.[44] In almost every jurisdiction which has confronted the question, state courts have held that the right to conduct strip mining operations is not granted by a coal severance deed unless the document of conveyance clearly and explicitly grants such a right.[45]

Given such sparce legislative history,[46] it is necessary to glean legislative intent from other sources. Indeed, utilizing commonly

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[43] The House Report on the Ninety-Fifth Congress version of SMCRA does contain the following perspective on the valid existing rights proviso of § 552(e) only as it relates to National Forest lands:

> As subsection 522(e) prohibits surface coal mining in lands within the boundaries of national forest subject to valid existing rights it is not the intent, nor is it the effect of this provision to preclude surface coal mining on private inholding within the national forests.

H.R. REP. No. 218, 95th Cong. 1st Sess. 95 *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 631.

This statement suggests section 522(e)'s *per se* prohibitions are made "subject to" certain rights of those owning private "inholdings" (i.e., land held in fee simple absolute), located within the boundaries of a national forest. It is not uncommon for such inholdings to occur as islands of private property within the boundaries of many federal land units. There are a variety of reasons for the existence of such isolated parcels; an example would be the straightforward situation where federal land managers purchased or were granted a large parcel of private land which surrounded property owned by a third party.

The House Report does not suggest an automatic exemption from the prohibitions (or anything else) with regard to private inholdings within the boundaries of other types of important federal lands which are protected by the *per se* prohibitions of SMCRA § 552(e)(1).

[44] The House Committee Report indicates that the VER language of SMCRA § 552(e) "is intended . . . to make clear that the prohibition of strip mining on the national forests is subject to previous court interpretations of valid existing rights." H.R. Rep. No. 218, 95th Cong. 1st Sess. 95, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS, 593, 631-632. The House report gives United States v. Polino, [133] F. Supp. 722 (N.D. W.Va. 1955), as an example of the Congress' intent to follow this well established rule of mineral law. Said the Committee: "The phrase 'subject to valid existing rights' is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping. "H.R. REP. No. 218.

[45] *See generally*, 4 COAL LAW AND REGULATION, § 81.01[3] (McGinley and Vish, ed. 1983).

[46] Only one other portion of the Act's legislative history provides the basis for an

recognized rules of statutory construction, the language of the statute itself should be the first source to examine.

The words of Section 522 itself strongly suggest that the term "subject to valid existing rights" was intended to require more than the bare ownership of coal or the right to mine it.[47] This becomes apparent when one examines the entire language of the Section, not just the *per se* prohibitory language.

Thus, an interpretation of Subsection (e) must include consideration of Subsection 522(a) which allows regulatory authorities the discretionary power to designate certain land as off-limits for all or some types of mining.[48] Such designations are made subject to a caveat different than VER; they are subject to, in the words of the statute, "substantial legal and financial commitments."[49] The legislative history of SMCRA reveals that Congress intended Section 522(a)'s "substantial legal and financial commitments" to require more than "mere ownership or acquisition cost of the coal itself or the right to mine it.[50] It is

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educated guess as to Congress' specific intent regarding how application of VER relates to mining on private lands. On the Senate side of the Ninety-Fifth Congress, its Committee Report emphasized that the Section 522(e)(4) and (5) prohibitions of mining on private land near certain surface features like schools and cemeteries were included "for reasons of public health and safety . . . " S. REP. No. 128, 95th Cong., 1st Sess. 55 (1977). This remark supports the argument that the "buffer zone" *per se* restrictions on mining found in Sections 522(e)(3)-(5), are intended to protect the public from the nuisance effects of coal mining. *See infra* text accompanying note 120 for a discussion of the significance of governmental exercises of the police power to abate nuisances.

[47] Laitos and Westfall observe that

> [I]f a vested right means fee title previously acquired from the government, or legal or equitable rights to a fee title, then the inclusion of "valid existing rights" language in the statute or executive action is redundant; the vested right is presumably already protected from subsequent changes in the law by the Fifth Amendment [eminent domain/taking clause].

Laitos and Westfall, *supra* note 37, at 19.

[48] SMCRA § 522(a); 30 U.S.C. § 1272(a)(1988).

[49] OSM has defined "substantial legal and financial commitments" to mean:

> [s]ignificant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities and other capital-intensive activities. An example would be an existing mine, not actually producing coal, but in a substantial stage of development prior to production. Costs of acquiring the coal in place or of the right to mine it without an existing mine, as described in the above example, alone are not sufficient to constitute substantial legal and financial commitments.

30 C.F.R. § 762.5 (1979), 44 Fed. Reg. 14,902, 15,344 (1979).

[50] H.R. REP. No. 218, 95th Cong., 1st Sess. 95, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 631.

logical to conclude that the term "valid existing rights" in Section 522(e) was intended to be construed at least as strictly, and probably more strictly than "substantial legal and financial commitments;" the intention being to provide assurance that public lands of the greatest importance would receive optimum protection—consistent with the Constitution.

It seems beyond cavil that Congress' intention to protect such precious natural gems as National Parks, Wildlife Refuges, and National Monuments must have been much greater than its concern, albeit significant, for the wide range of places not near or at least dear to the collective national heart.[51] In essence, it could be said that Congress has equated these areas of special concern with nuisance law's apocryphal parlor which any reasonable person would agree is off-limits to pigs.[52] Blasting, the dragline, coal trucks and the coal tipple are as out of place in National Parks as the pig is in the parlor. Other locales could be protected from coal mining nuisances by the Section 522(a) discretionary designation process.

C. *Nexus Between the Constitution and Valid Existing Rights in SMCRA*

In its preamble to the first round of rulemaking relative to Section 522(e), the Office of Surface Mining[53] identified the major congressional concern which the agency felt constrained to address in deciding on the form and content of a regulation needed to implement that section's limitation of mining:

> [T]he legislative history of the Act indicates that Congress wanted to avoid any "taking in the implementation of section

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[51] While the *per se* prohibitions of mining on private lands would not, at first blush, seem to fit this argument, logic suggests that members of Congress believed that coal mining with attendant blasting, coal truck traffic, noise, dust, and subsidence would almost universally be viewed by reasonable people to create a public nuisance intolerable within a short distance from such surface features as homes, cemeteries, schools, public highways, and the like. Common sense compels the conclusion that Congress similarly saw no reason to make prohibition of mining in those buffer zones subject to a discretionary bureaucratic designation process.

[52] Village of Euclid v. Amber Realty Co., 272 U.S. 365, at 388 (1926). Justice Sutherland's characterization of a nuisance as the equivalent of a pig in the parlor instead of the barnyard has been used by judges and scholars for more than half of a century to succinctly describe the essence of a common law nuisance. *See infra*, discussion at note 142.

[53] The Office of Surface Mining Reclamation and Enforcement (hereafter "OSM") was created by SMCRA to implement and oversee the administration of the Act. SMCRA § 201, 30 U.S.C. § 1211 (1988).

> 522(e) (Congressional Record, April [29, 1977, H-12,878). There Congressman Udall opposed an amendment to delete the VER clause from the Act. He stated that if VER were deleted, the Act would not preserve valid legal rights which could not be done without "paying compensation under the Fifth Amendment to the Constitution." Thus, OSM has endeavored to determine the point at which payment would be required because a taking had occurred, then to define "valid existing rights" in those terms, i.e., those rights which cannot be affected without paying compensation.[54]

This view of the rationale underlying the VER caveat is entirely consistent with common sense, the legislative history of SMCRA, and prior congressional usage of the term in other statutes.[55] Consistently, the goal of avoiding a compensable taking has been a central purpose guiding agency drafters of VER regulatory language.[56]

Thus, the controversy over the extent to which the *per se* ban effected by Section 522(e) can actually serve to protect the specified lands from harmful coal mining activities devolves down to the question: to what extent can such lands be shielded from mining activities without triggering a judicial finding that such a ban constitutes a compensable taking? If a confident answer can be given to such an inquiry, the answer would greatly assist identification of the parameters of a sound OSM regulation to implement Section 522(e).

In my view, such an answer can be given with a significant degree of confidence; the answer as explained below, is that "valid existing rights" can and should be construed narrowly to protect the vast majority of lands, as identified in Section 522(e),

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[54] 44 Fed. Reg. 14902, 14992 (1979). Rep. Morris Udall was a principal sponsor of SMCRA.

[55] Indeed, while OSM subsequently has tried on several other occasions to redraft its original VER definition, each of its attempts has focused on the taking issue as a crucial concern propelling the rulemaking. *See* regulatory history of VER rulemaking, *supra* note 19.

[56] As Laitos and Westfall have explained:

> Ascertaining the precise scope of a "valid existing rights" phrase is often quite difficult prior to litigation. Nevertheless, it is possible to articulate some general rules of interpretation. First, one of the principal purposes of a "valid existing rights" provision is to assure that the operation of the subsequent law will not create a taking which must be compensated under the Fifth Amendment."

Laitos and Westfall, *supra*. note 37, at 59 (notes omitted).

without the ban being construed to be a compensable taking.[57]

III. TAKING BY EMINENT DOMAIN AND BY DEPRIVATION OF DUE PROCESS

A. A Century of Supreme Court Jurisprudence

A partial answer to the takings riddle does exist. The key lies in a sound appreciation for the purposes of and the relationship between three separate constitutional considerations: the Fifth Amendment's "due process" and "just compensation" (eminent domain) clauses, and the implied "police power" inherent in the governance of a sovereign state.[58]

The police power, as observed below,[59] is the basic authority of government to legislate in the public interest—-a power which emanates, not from a specific provision of the Constitution, but from the fundamental purpose motivating societies to eschew unstructured individual freedom for the collective security offered by organized government. Of course, it is the police power (that underlies regulatory acts) which are claimed to be unconstitutional takings.

When "takings" are discussed, the most obvious reference is to the Fifth Amendment's literal use of the words: "nor shall private property be taken for public use, without just compensation."[60] This clause of the Fifth Amendment evokes recognition of the implied power of eminent domain—the inherent sovereign power to physically take or occupy private property for public uses such as a road or a government building. The framers accepted such usurpation of private property rights as a legitimate exercise of governmental power if the property owner received fair payment for the property taken.[61]

A second clause of the Fifth Amendment is also implicated in takings analysis. The due process clause provides that "[n]o

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[57] Moreover, should any such prohibition be considered a taking, the parameters of the "just compensation" principle imbedded in the Fifth Amendment should compel only modest payments to cure such an otherwise unconstitutional act. *See*, generally Costonis, *Fair Compensation and the Accommodation Power, Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUMBIA L. REV. 1021. (1975).

[58] *See infra*, note 11, and accompanying text.

[59] *See infra*, note 67, and accompanying text.

[60] U.S. CONST. amend. V..

[61] *See* United States v. Carmack, 329 U.S. 230, 241-42 (1946); R. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973); Kartovil & Harrison, *Eminent Domain—Policy and Concept*, 42 U. CAL. L. REV. 596 (1954).

person shall be . . . deprived of life, liberty, or property, without due process of law . . .''[62] While the fact has been largely ignored for decades, it is clear that there can be "takings" in the context of the just compensation/eminent domain clause, as well as when private property is "taken" in violation of the due process clause.[63] The latter point has been obscured by commentators and judges in modern discussions of constitutional takings jurisprudence. They have failed to recognize the clear due process basis underlying the Court's seminal modern taking case, *Pennsylvania Coal v. Mahon*.[64]

For one to comprehend and evaluate contemporary takings analysis, some understanding of the historical development of legal concepts of the police and eminent domain powers, and due process, is a necessary prerequisite.

B. *Early Interpretation of the Just Compensation/Eminent Domain Clause*

In the first century and a half of governance under the Constitution, the Fifth Amendment's just compensation mandate was considered to be properly invoked only when land was actually seized by the government. It was not until the turn of the twentieth century, in the throes of the industrial revolution, that courts began to expand the meaning of the just compensation/eminent domain clause beyond its original meaning.[65] Until that time, it was generally agreed that "[T]o entitle the owner to protection under this clause the property must actually be taken in the physical sense of the word . . . .''[66]

The protective reach of the Fifth Amendment eminent domain/just compensation clause, then, was originally limited by its literal meaning. When government physically took private

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[62] U.S. CONST. amend. V..

[63] *See* Williamson Country Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 197, n. 15, (1985) (citing commentators who espouse this view). *See also* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385 N.Y. S.2d 5 (1976).

[64] 260 U.S. 393, 413 (1922).

[65] F. BOSSELMAN, D. CALLIES & J. BANTA, *supra*, note 60, at 51. The authors quite accurately refer to the era as "a period of conflict between freewheeling growth and expansion and an emerging concern that government regulation was needed . . . ." Id.

[66] T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 456-57 (2d ed. 1874), *reprinted* 1980. *See also* Commonwealth v. Alger, 66 Mass. (7 Cush.) 53 (1853).

property for some purpose which entailed actual use by the public, the owner of private property would receive just compensation or the government act allowing such confiscation would be judicially nullified.

C. *Early Interpretation of the Police Power*

Early cases delineated the breadth of the police power:

> The police power includes all measures for the protection of the life, the health, the property, and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling houses and lottery tickets. The power, being essential to the maintenance of the authority of local and to the safety and welfare of the people, is inalienable . . . . The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself. . . .[67]

This expansive view of the police power, having been narrowed during the first three decades of this century,[68] was resuscitated in post-Depression years; today courts accord similar deference to its exercise as they did in the late nineteenth century. Only in the area of taking law and infringement of fundamental rights[69] has such deference been displaced.

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[67] Leisy v. Hardin, 135 U.S. 100, 128 (Gray, J., dissenting) (1890). *See also*, Noble State Bank v. Haskel, 219 U.S. 104 (1911). At the turn of the century, Ernst Freund effectively described the reach of the police power:

> The state . . . exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common-law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this . . . kind of state control that constitutes the essence of the police power.

E. FREUND, THE POLICE POWER (1904).

[68] *See infra*, discussion of Lochner v. New York 198 U.S. 45 (1905) and substantive due process at note 79 and accompanying text.

[69] The deferential standard of judicial review afforded police power enactments does not extend to cases where such laws are alleged to have infringed fundamental rights. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), Moore v. City of East Cleveland 431 U.S. 494 (1977). The remaining sections of this article explain how the standard of judicial review in "due process taking" cases has become more instrusive.

D. *Early Views of Substantive Due Process*

The suggestion that the Due Process Clauses of the Fifth and Fourteenth Amendments extended constitutional protection beyond the procedural realm to substantive concerns relating to a citizen's life, liberty and property interests came as a surprise to members of the Supreme Court when the concept was first articulated in the latter part of the nineteenth century. Calling the argument a "strange misconception," the court rejected the argument that the Due Process Clause could be used to challenge the substantive merits of state laws.[70]

In another case, *Munn v. Illinois*,[71] the Court considered a substantive due process argument directed at state-imposed maximum rates that warehouse owners could charge for grain storage. The owners contended that the Due Process Clause of the Fourteenth Amendment prohibited states from setting rates which denied them the greater profit otherwise available in an unregulated free market.

The Supreme Court made short shrift of these arguments, emphasizing the breadth of the police power, and the limits of the due process guarantee.[72]

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[70] Davidson v. New Orleans, 96 U.S. 97, 104 (1878). The Court observed that:

> [W]e are asked to hold that State Courts and State Legislatures have deprived their citizens of . . . property without due process of law. There is abundant evidence that there exists some strange misconception of the scope of this provision . . . . In fact, it would seem . . . that the clause under consideration is looked upon as a means of bringing to . . . this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and the merits of the legislation on which such a decision may be founded.

Id. at 104. *See also*, Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 519-520 (1885).

[71] 94 U.S. 113 (1877). The importance of Munn v. Illinois in placing the rights of property and the scope of the police power in perspective for the development of twentieth century governance in the United States cannot be over-stated. Munn v. Illinois was described by Professor (later Justice) Felix Frankfurter as "among the dozen most important decisions in our constitutional law." F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE, 83 (1937).

[72] *Munn v. Illinois*, 94 U.S. at 125. Said Chief Justice Waite:

> Under these [police] powers the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the common good . . . . [W]e think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.

Flatly rejecting the grain warehouse owners' substantive due process argument, the Court found no judicial remedy for their concerns: "We know that this a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."[73]

Thus, at this point in the historical evolution of constitutional taking doctrine the parameters of the police power, the due process clause and the just compensation/eminent domain clause were clearly defined: just compensation was required to be paid when property was physically taken or impacted by the government; the due process clause had no substantive thrust; and the police power was a broadly conceived tool to be used by government to suppress undesirable activities and further important public interests. The only governmental "taking" of property which required compensation involved physical occupation and/or use by the state.

E. *Tangling of the Doctrinal Web: Distinctions Between Police Power and Fifth Amendment Limits are Blurred*

The doctrinal repose existing at the time of *Munn* was not to last for long. Indeed, the dissent in that case[74] set the tone for a "torrent of criticism"[75] and the eventual erosion of *Munn's* clearly articulated principles of judicial non-intervention into the sphere of legislative judgment regarding the proper exercise of the police power.

Justice Field's dissent evinced the serious concern of many that, by insulating police power initiatives from meaningful judicial review, the Fifth and Fourteenth Amendment's protection of liberty, property, and contract would be rendered meaningless:

> The principle upon which the opinion of the Majority proceeds is . . . subversive of the rights of private property, heretofore

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[73] *Id* at 134.

[74] *Id.* at 136.

[75] C. Marshall, *A New Constitutional Amendment*, 24 AM. L. REV. 908 at 909 (1891), *also cited in* C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, v. 2, 594 (1922).

> believed to be protected by constitutional guaranties against legislative interference . . . .[76]
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> . . .
>
> The legislation in question is nothing less than a bold assertion of absolute power by the State to control at its discretion the property and business of the citizen . . . .[77]

Critics of the time paraded horrors before the public, asserting that *Munn* was a significant departure from established notions of individual rights of liberty and property vis-a-vis the role of the state under the constitution.

Thus, the argument was that the life, liberty and property (of individuals and corporations) were shielded from state intrusion by the due process clauses of the fifth and the fourteenth amendments. An in-depth analysis of this substantive due process theory, which was nurtured and grew in an environment of social and economic discord and dislocation[78] wrought by the Industrial Revolution, is beyond the scope of this work. It is appropriate, however, to observe the result evident in the Court's best known substantive due process decision, *Lochner v. New York*.[79]

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[76] *Munn v. Illinois*, 94 U.S. at 136. Dissenting in a similar case involving state regulation decided several years later, Justice Field observed that Munn v. Illinois:

> in its wide sweep, practically destroys all the guaranties of the Constitution and of the common law . . . for the protection of the rights of the railroad companies. Of what avail is the constitutional provision that no State shall deprive any person of his property except by due process of law, if the State can, by fixing the compensation . . . take from him all that is valuable in the property?
>
> . . .
>
> It sanctions intermeddling with all business and pursuits and property in the community, leaving the use and enjoyment of property . . . to the discretion of the legislature.

Stone v. Wisconsin, 94 U.S. 181, 186-87 (1883).

[77] *Munn v. Illinois*, 94 U.S. at 148. *See also*, C. Marshall, *A New Constitutional Amendment*, 24 AM. L. REV. 908, 912 (1891).

[78] Why substantive due process became a tool of judicial review at the time has been a subject of debate; many have examined its origins, *See e.g.* B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT (1942); Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125 (1956); A. MASON AND W. BEANY, THE SUPREME COURT IN A FREE SOCIETY 227-35 (1968); A. PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW (1969); L. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917 138-66 (1971); Nelson, *The Impact of the Antislavery Movement upon the styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 521-532 (1974).

[79] 198 U.S. 45 (1905). Lochner by now is synonymous with the economic substantive due process analysis characterizing the Court's review of state exercise of police

In discussing the limits of the police power, the *Lochner* Court relied on principles rooted in the philosophy of Justice Field and the critics of *Munn v. Illinois*.[80]

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powers during the first three decades of this century. It has properly been observed, however, that the so-called Lochner era was ushered in by the Court's decision in Allgeyer v. Louisiana 165 U.S. 578 (1897). That case invalidated a state law which barred the performance of any act within Louisiana related to contracting for a certain type of insurance on property held within the state—unless the insurer was a Louisiana company. The Court held that the law violated the Fourteenth Amendment's due process clause by interfering with the liberty to contract for insurance. *Id.* at 592. Professor Tribe suggests that it was Allgeyer rather than Lochner that opened "the floodgates of substantive due process review." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 434-435 (1st ed. 1977).

Nevertheless, Lochner provides the best illustration of the Court's strict scrutiny of legislative ends and means. In that case the Court reviewed a New York statute limiting the working hours of bakers to sixty hours per week. The stated end sought to be achieved by the legislation was protection of workers health and welfare; the Court viewed this rationale skeptically. Finding that other state legislative approaches would not similarly infringe upon the right to contract while still effectively reaching the same end, the Court held that the legislative means was not a valid exercise of the police power.

The source of the Court's substantive due process analysis can be traced to cases otherwise upholding exercises of the police power. In Mugler v. Kansas, 123 U.S. 623 (1887), a case emphatically rejecting the contention that a liquor prohibition law was violative of due process, the Court used language that eventually would evolve into the intrusive standard of judicial review it used during the Lochner period; the substantive reasonableness of a state law would be examined to determine if it "had no real or substantial relation" to the protection of public health, safety and welfare and whether it effected "a palpable invasion of rights secured" by the Constitution. 123 U.S. 27, 31 (1885). *See also*, Hurtado v. California, 110 U.S. 516, 532 (1884).

Professor Tribe cautions that the "period is ordinarily described as 'the Lochner Era,' but it should be so characterized only with great caution—and with the recognition that 'Lochnerizing' has become so much an epithet that the very use of the label may obscure attempts at understanding." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (2d ed. 1988). Be that as it may, one cannot dispute that the period from the turn of the century until the mid-nineteen thirties was a time when the Court used an intrusive substantive due process analysis to assess the validity of state police power initiatives.

[80] *See Lochner*, 198 U.S. at 56:

> It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. . . . Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.

Ultimately the Court found that the purpose underlying the New York statute was not to protect the public, nor the health of bakers; rather

> The real object and purpose were simply to regulate the hours of labor

It should be remembered that the standard of judicial review applied to substantive due process claims during the Lochner era was strict and intrusive.[81] Nearly two hundred state statutes were declared invalid on substantive due process grounds during the three decades in which the *Lochner* standard of judicial review was extant.[82]

Ultimately, however, this approach to judicial review fell victim to its own excesses and changing national economic circumstances. Both internal inconsistency in the analytical structure supporting the Lochnerian due process perspective and mounting external pressures during the Great Depression[83] pushed the doctrine to the brink of collapse.[84]

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between the master and his employees . . . in a private business . . . ."
Id. at 64.

[81] Refusing to defer to the legislative judgment about the end and means of the statute, the Court in Lochner observed that:

> The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

Id. at 57-58.

Giving little weight to the legislative purpose for regulating the working hours of bakers, the Court suggested that:

> [i]t is unfortunately true that labor . . . may carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? . . . No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.

Id. at 59.

[82] *See e.g*, L. TRIBE, *supra*, note 78, at 567, n. 2 (2d ed. 1988), and authorities cited therein. Tribe notes, however, that the majority of cases decided on substantive due process grounds resulted in affirmance of the challenged enactment.

[83] *See*, Id. at 574-581. *See also*, P. MURPHY, THE CONSTITUTION IN CRISIS TIMES 70-82, 99-110 (1972).

[84] A major premise of this article is that while substantive due process was observed to have been interred by the Court's decisions of the mid and late 1930's such as Nebbia v. New York, 291 U.S. 502 (1934), and West Coast Hotel v. Parrish, 300 U.S. 379 (1937), it has been resurrected in disguised form in the Court's modern "takings" doctrine. *See* note 87 and accompanying text. *See also*, McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. RPTR. (Envtl. L. Inst.) 10369 (1987); and Lawrence, *Means, Motives and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231 (1988).

By 1937, the use of substantive due process analysis as a vehicle for voiding police power legislation fell into disfavor.[85] In a short time, the *Lochner* line of cases was explicitly rejected[86] and by the 1950's the *Lochner* substantive due process analysis was history, the Court having returned to the deferential judicial review of police power laws articulated with clarity in *Munn v. Illinois* more than seventy-five years earlier.[87]

F. *Pennsylvania Coal v. Mahon and the Linkage of Substantive Due Process and Taking Analysis in the Post-Lochner Era*

By the early 1940's, the days of strict and intrusive judicial scrutiny were gone. Police power enactments directed at the protection of public interests were once again given deference and the second guessing of legislative motives by judges bent on protecting the economic freedom and property rights of individuals and corporations was over—-or so it seemed.

Disguised in the rhetoric of Fifth Amendment eminent domain/just compensation doctrine, the substantive due process approach slipped unnoticed into the Court's taking jurisprudence in the post-*Lochner* period.

The vital link between *Lochner* style substantive due process analysis and post-Lochner taking analysis was forged in 1922 in Justice Holmes' opinion for the Court in *Pennsylvania Coal v.*

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[85] As Professor Tribe has noted, "Lochner's decline proceeded even more rapidly than had its late-nineteenth century ascent." L. TRIBE, *supra* note 78 at 581 (2d ed. 1988). Thus, in West Coast Hotel v. Parrish, 300 U.S. 379 (1937) the Court turned its back on the substantive due process analysis that it had used only a year before to strike down a minimum wage statute. In West Coast Hotel, the Court upheld another state minimum wage enactment that was virtually indistinguishable from the one it had rejected in Morehead v. New York ex rel. Tipaldo, 298 U.S. 581 (1936).

[86] *See e.g.*, Phelps Dodge v. National Labor Relations Board, 313 U.S. 177 (1941); Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 535 (1949).

[87] Thus, in upholding a state statute whose rationality rested on a slim reed, the Court bowed low to the alter of legislative power:

> The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the Courts, to balance the advantages and disadvantages of the new requirement. . . . The day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they are unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in Munn v. Illinois, . . . "For the protection against abuses by legislatures the people must resort to the polls, not to the courts."

Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955) (citations omitted).

Mahon Chief Justice Rhenquist recently stated that *Pennsylvania Coal* " . . . for 55 years been the foundation of our regulatory takings' jurisprudence."[88]

Fertilized by Lochnerian substantive due process analysis theory, the birth of so-called "regulatory taking" theory can be traced to Holmes' statement in *Pennsylvania Coal* that " . . . [t]he general rule at least is, that while property may be regulated to a certain extent, if it goes too far it will be recognized as a taking."[89]

Ignorant of *Pennsylvania Coal's* substantive due process heritage, regulatory taking cases during the last half-century have struggled to identify the point at which a particular exercise of the police power goes "too far" and thus must be "recognized as a taking." As explained below, courts have unwittingly intertwined substantive due process analysis of *Pennsylvania Coal* with eminent domain/just compensation doctrine. The result has been judges' and scholars' inability to draw a bright line that would assist in identifying an exercise of the police power which has gone "too far". This floundering on the shoals of takings analysis has led Justice Brennan to admit that:[90]

> [T]his court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.[91]

Numerous theories have been developed by judges and scholars in an attempt to resolve the dilemma identified but not

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[88] Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting). By the term "regulatory taking" the Chief Justice referred to the concept that government actions which do not involve a physical occupation of real property, but which through the exercise of police power based regulation diminish or destroy the value of private property, are considered to be compensable takings entitled to Fifth Amendment "just compensation". See also, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127 (1978); D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 319 (2d ed. 1986). The flawed perspective that has led to the wide use of the term "regulatory taking" is discussed below.

[89] *Pennsylvania Coal*, 260 U.S. at 415. It is a regulatory taking that Congress sought to avoid when it conditioned SMCRA prohibitions of mining on valid existing rights.

[90] Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

[91] *Id.* at 124.

resolved by Holmes—"how far is too far?"[92] None of these theories has provided a reliable answer. Not surprisingly, none of these theories recognize the distinction between Substantive Due Process Takings of the *Pennsylvania Coal* genre and Eminent Domain Takings. Recognition of this distinction is crucial to an understanding of the development of taking jurisprudence.

G. *Pennsylvania Coal v. Mahon - A Case of Due Process "Taking"*

Pennsylvania Coal Co. v. Mahon involved a challenge to a Pennsylvania statute, known as the "Kohler Act", that prohibited the removal of coal by underground mine operators beneath homes and other surface structures. Removal of such coal had the effect of causing subsidence[93] of the surface with attendant serious damage to surface features.

The Supreme Court of Pennsylvania upheld the Kohler Act against a substantive due process challenge, finding that the statute was a valid exercise of the police power directed at regulating a business activity which harmed important public interests.[94] A dissenting Pennsylvania Justice waved the rhetori-

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[92] Commentary on these issues is legion. *See, e.g.*, B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); N. BOWIE, TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE (1971); R. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982); Sax, *Takings, Private Property and Public Rights*, 81 YALE L. REV. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L. REV. 30 (1964); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

[93] Coal mine subsidence—-the fracturing and caving of overlying rock strata and the surface caused by the removal of underground coal—-often results in substantial structural damage to foundations, walls and supporting beams. It can cause sinkholes, troughs and sloughing of surface land making it difficult or impossible to develop. Farming activities can be impeded because areas that are subsided are difficult to plant and plow; subsidence can cause the loss of ground water flowing to springs and wells and dewater surface streams and lakes. As the Court observed in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 475 (1987): "[i]n short, it presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades." For further discussion of the impacts of coal mine subsidence, *see generally*, Blazey and Strain, *Deep Mine Subsidence—State Law and the Federal Response*, 1 E. MIN. L. INST. 1-5 (1980). *See also*, F. Lee & J. Abel, *Subsidence from Underground Mining: Environmental Analysis and Planning Considerations*, U.S. Geol. Sur. Circ. 876 (1983), 2-12.

[94] Mahon v. Pennsylvania Coal Co., 274 Pa. 489, 118 At. 491 (1922), *rev'd* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

cal flag of private property rights[95] in language reminiscent of Field's dissent in *Munn v. Illinois*[96] and the arguments of the proponents of substantive due process which had accumulated over the almost two decades that had passed since the *Lochner* decision.

The court, in an opinion written by Justice Holmes, held that the Kohler Act abrogated valid contract rights and could not be justified as a legislative attempt to protect public welfare and safety:

> This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens in the commonwealth. Some existing rights may be modified even in such a case. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—-a very valuable estate—and what is declared by the court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiff's position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.[97]

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[95] *Mahon*, 274 Pa. at 507, 118 At. at 497 (Kephart, J. dissenting).

[96] *Compare Munn v. Illinois*, 94 U.S. at 136-154 (Field, J. dissenting) and *Mahon*, 274 Pa. at 507, 118 At. at 497-501 (Kephart, J. dissenting).

[97] Pennsylvania Coal, 260 U.S. at 413-414 (citations omitted).

Apparently in response to the plea of the Pennsylvania coal industry that, if enforced, the Kohler Act would result in mass economic dislocation in that state's coal fields, the Supreme Court quickly accepted the appeal, heard oral arguments and rendered an opinion nullifying the enactment as an invalid exercise of the police power.

Only five months passed from the entry of the Pennsylvania Court's order upholding the law until the issuance of the Supreme Court's opinion invalidating it. It is remarkable that an opinion that has had such a dramatic and far-reaching impact on the development of an important issue of constitutional law was rendered less than one month after oral argument.

In *Pennsylvania Coal*, the Court held that (1) the statute was not a valid exercise of the police power; and (2) impermissibly interfered with private contractual relationships.[98] The Court recognized that both the constitution's contract clause[99] and the due process clause of the Fifth Amendment provide protection from inappropriate exercises of the police power:

> [S]ome 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 contracts and due process clauses are gone.[100]

Importantly, Justice Holmes, the author of *Pennsylvania Coal*, vigorously dissented from the substantive due process analysis of the Court in *Lochner v. New York* and subsequent cases.[101] Thus, his reference to substantive due process as the basis for invalidating the police power regulation in *Pennsylvania Coal* must be explained.[102]

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[98] *Id.* at 414. The court held that the Pennsylvania legislature had, in effect, transferred ownership of the coal from its legitimate owners to surface owners like the Mahons: "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Id.* at 416.

[99] The contracts clause is part of U.S. CONST. art I, § 10. ("No State shall . . . pass any . . . law impairing the obligation of contracts . . . ").

[100] 260 U.S. at 413. The concept that a taking could be affected by violation of the due process clause as well as by an exercise of eminent domain did not surface first in Pennsylvania Coal. As observed below, such arguments had been made on a number of occasions in the last quarter of the nineteenth century and during the Lochner era. In a case decided only a year before Pennsylvania Coal, Holmes clearly stated the view that a deprivation of substantive due process could be a "taking":

> All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.

Block v. Hirsh, 256 U.S. 135, 156 (1921).

[101] In *Lochner*, Holmes wrote:

> The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some . . . , is interfered with by school laws, by the post office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.

Lochner, 195 U.S. at 75 (Holmes, J. dissenting).

[102] *See supra*, McGinley, note 83 at 10374-75.

Given Holmes' strong disagreement with the *Lochner* intrusive judicial review model, *Pennsylvania Coal* is appropriately viewed as an attempt to validate some residual protection of property rights lodged in the due process clause; Holmes standard of judicial review, however, fell short of the substitution of judicial opinion for legislative judgment which is recognized as the hallmark of Lochnerian due process analysis. While Holmes deemed the substantive due process analysis of *Lochner* far too broad, when as in *Pennsylvania Coal*, (1) the justification for exercise of the police power is invalid, and (2) the extent of the impact on property rights is extreme (total diminution of value), the due process clause required that "there must be an exercise of eminent domain to sustain the act."[103] Otherwise, the regulatory taking would be struck down as a violation of the substantive due process guarantee.[104]

It is the substantive due process foundation of *Pennsylvania Coal* that has escaped notice as the confusing post-*Lochner* taking jurisprudence evolved.[105] The blurring of the fundamental distinction between eminent domain and due process takings spawned intrusive Lochnerian style judicial review.

IV. UNTANGLING THE WEB: THE COURT'S *KEYSTONE* DECISION CLARIFIES TAKINGS LAW AND *PENNSYLVANIA COAL*

Sixty-five years after *Pennsylvania Coal* was decided, the Court grappled with another taking case from the Pennsylvania coal fields—*Keystone Bituminous Coal Assn. v. DeBenedictis*.[106] The Court's opinion in the later case clarifies the Court's taking

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[103] *Pennsylvania Coal*, 260 U.S. at 413.

[104] For a detailed discussion of this point, *see* McGinley, *supra*, note 83.

[105] For commentary on this point, *see* Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Costal Commission*, 12 HARV. ENVTL. L. REV. 231 (1988); McGinley, *Regulatory 'Takings': The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENV. L. RPTR. (Envtl. L. Inst.) 10369 (1987); Stoebuck, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV.1057, 1097-99 (1980); Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105 (1985); Comment, *Testing the Constitutional Validity Of Land Use Regulations: Substantive Due Process As A Superior Alternative To Takings Analysis*, 57 U. WASH L. REV. 715 (1982). For cases which discuss this point, *see* Agins v. City of Tiburon, 24 Cal. 3d 266, (1979), *aff'd*, 447 U.S. 255 (1980); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 85 N.Y.S. 205, 350 N.E.2d 381 (1976). *See also*, Williamson Planning Commn. v. Hamilton Bank, 473 U.S. 172, 197-200 (1985).

[106] 480 U.S. 470 (1987).

jurisprudence, at least in so far as it distinguishes exercises of the police power to abate public nuisances and noxious uses from other non-nuisance land use regulation emanating from the same power. *Keystone* also informs as to whether the prohibitions of mining in Section 522(e) of the SMCRA can be sustained against a taking challenge. *Keystone* emphasizes what has been obscured by the court's subsequent failure to analyze carefully Holmes' opinion in *Pennsylvania Coal.* In that seminal case, Holmes did not mean to trigger strict judicial scrutiny of valid police power enactments intended to abate nuisances and noxious uses.

A. *Keystone Bituminous Coal Ass'n v. DeBenedictis*

Recognizing the potentially "devastating effects" of subsidence,[107] in 1966 the Pennsylvania legislature concluded that the Commonwealth's existing laws relating to coal mine subsidence did not provide adequate protection for the public interest in safety, land conservation, stability of tax base of municipalities affected, and land development. On the basis of specific detailed findings the General Assembly enacted the Bituminous Mine Subsidence and Land Conservation Act.[108]

The Subsidence Act empowers the Pennsylvania Department of Environmental Resources to administer and enforce a comprehensive program to minimize or prevent subsidence and to regulate its consequences.[109] Section 4 of the Act prohibits mining which would cause damage to certain structures, including homes, public buildings, non-commercial buildings used by the public and cemeteries.[110] Section 4 of the Act requires a coal company to repair or pay for the repair of any structure damaged by subsidence from its mining operation.

A cursory review of the Subsidence Act and the ends it seeks to achieve leaves one with the impression that it is very much like the Kohler Act which the Court invalidated in *Pennsylvania*

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[107] *Id.* at 474.

[108] PA. STAT. ANN., tit. 52, § 1406.1 (Purdon Supp. 1990) ("the Subsidence Act.")

[109] *Keystone*, 480 U.S. at 476.

[110] In 1980 the legislature amended the Subsidence Act in response to the enactment of SMCRA and in an attempt to gain primary jurisdiction under Section 503 of SMCRA, 30 U.S.C. § 1253 (1988). The amendment provided protection for additional classes of structures and surface features including schools, hospitals, courthouses, perennial streams certain large water impoundments and subsurface aquifers. *See* 25 PA. CODE §§ 89.145 (a) and 89.146 (b) (1983).

Coal v. Mahon. Seizing on the facial similarity of the statutes, the coal industry petitioners argued that the case was not materially different, on the facts and the law, from what Holmes and his brethren had faced.

Indeed, both cases involved a Pennsylvania statute which the state argued, had been enacted to protect important public interests; both statutes barred coal companies from removing coal under homes and other surface structures to prevent subsidence damage; in each situation the coal companies relied on exculpatory clauses in broad-form coal severance deeds[111] to support their claim of a right to mine coal without any liability for subsidence damage; and in both cases coal companies claimed that the statute would have a destructive effect on coal companies' ability to mine their reserves, thus effectively "taking" their property without just compensation.[112]

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[111] Such exculpatory clauses were common in deeds granting or reserving ownership of coal severed from the fee simple estate. A typical example of such a clause includes:

> The right to mine and remove all of said coal, and with the free and uninterrupted right of way into, upon, over, and under the said lands, at such points and in such manner, for such ways, tracks, and roads as may be necessary and proper for the purpose of ventilating, draining, digging, mining, operating, and carrying away said coal, or other coal or coke, without any liability for damages that may arise from the removal of any or all of said coal, or the manufacture of coke, without being required to provide or leave support for the overlying strata or surface, and without being liable for any injury to the same, or anything therein or thereon, or to the streams or water courses thereof.

Continental Coal v. Connelsville By-Product Coal Co., 104 W. Va. 44, 138 S.E. 737, 738 (1927).

Similar exculpatory clause waivers of liability for subsidence damage in *Keystone* were obtained at the turn of the century. The court explained that "[n]o question of enforcement of such a waiver against the original covenantor is presented; rather petitioners claim a right to enforce the waivers against subsequent owners of the surface." *Id. Keystone*, 480 U.S. at 505, n. 32. Observing that Pennsylvania courts had held that these waivers run with the land, the Court hinted that "Pennsylvania courts might have had, or may have in the future have, a valid basis for refusing to enforce these perpetual covenants against subsequent owners of the surface rights . . . ." justification for legislative impairment of contracts. *Id.*

[112] As noted above, the gravamen of the coal companies' complaint in the earlier case centered on constitutional due process and right to contract theories—calling on the court to apply its then extant Lochnerian substantive due process standard of judicial review; in *Keystone* the coal industry parties argued that the newer Pennsylvania law abridged the eminent domain/just compensation clause of the Fifth and the Fourteenth Amendments and the contract clause. The contract clause argument was reduced to its essence by Justice Stevens: "[I]t 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

To the coal company petitioners, *Pennsylvania Coal* was clearly controlling: *Keystone* should have been little more than a *deja vu* experience for the Court,[113] calling for a summary reversal of the lower court decisions. The Supreme Court, however, chose to look farther than the superficial similarities between the two Pennsylvania coalfield takings cases. In an opinion authored by Justice Stevens, the Court found that *Pennsylvania Coal* "differs . . . in critical and dispositive respects . . . ." from *Keystone*.[114]

The Court found that "Justice Holmes . . . characteristically decided the specific case at hand in a single, terse paragraph"[115] and then "uncharacteristically provided the parties with an advisory opinion discussing the general validity of the Act."[116]

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shambles of . . . buildings and cemeteries." *Keystone*, 480 U.S. at 505. Because the focus of this discussion is the Court's taking jurisprudence, the *Keystone* court's rejection of the companies' contract clause argument is beyond the scope of this work. Suffice it to say that the Court applied a non-Lochnerian standard of judicial review ("courts should 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure'") *Id.* Using this standard, the Court concluded that "the impairment of petitioners' right to enforce the damages waivers is amply justified by the public purposes served by the Subsidence Act." *Id.* at 506. The coal companies had relied upon waivers contained in coal severence deeds for their argument that the Subsidence Act impaired pre-existing rights to subside lands without liability for damages.

[113] Justice Stevens characterized this argument: "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." *Keystone*, 480 U.S. at 481.

[114] "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." *Id.* at 481. Chief Justice Rehnquist, writing in dissent, strongly disagreed. *See Id.* at 507-510.

[115] Id. at 483. *See supra* paragraph from Holmes' *Pennsylvania Coal* opinion quoted in text occompanying note 96.

[116] *Keystone*, 480 U.S. at 484. While Chief Justice Rehnquist could not accept this view, *see id.* at 508-509, the explicit language of Holmes' opinion leaves no room to doubt the majority's observation:

> But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought vain.

Pennsylvania Coal, 260 U.S. at 414.

Of course the necessity for "going farther in the statement of our opinion" was necessitated by the fact that the plaintiff was the owner of a single home who, relying on the Kohler Act, had sought to enjoin the coal company's undermining of his dwelling. There were no other parties plaintiff.

The *Keystone* Court emphasized that in *Pennsylvania Coal*, the statute " . . . merely involve[d] a balancing of the private economic interests of coal companies against the private economic interests of surface owners."[117] The Subsidence Act, in contrast, was found by the District Court, the Court of Appeals and the Supreme Court to set forth legislative purposes to advance important public interests which were "genuine, substantial, and legitimate."[118] "None of the indicia of a statute enacted solely for the benefit of private parties identified in Holmes' opinion are present here."[119]

B. *Keystone: The "Special Status" of Police Power Initiatives Which Abate Public Nuisances and Noxious Uses and Its Application to Section 522(e) of the SMCRA*

The portion of the *Keystone* opinion which bears directly, and in my view, dispositively, on the issue of the validity of Section 522(e) of the SMCRA addresses the relationship between

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[117] *Keystone*, 480 U.S. at 485. *See Pennsylvania Coal*, 260 U.S. at 413-415.

[118] *Keystone*, 480 U.S. at 486. Section 2 of the Subsidence Act provides in relevant part:

> 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 the "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 . . .

PA. STAT. ANN. tit. 52, § 1406.2 (Purdon Supp. 1990).

[119] *Keystone*, 480 U.S. at 486. Justice Stevens observed that Holmes found that the Kohler Act "was a 'private benefit' statute since it 'ordinarily does not apply to land when the surface is owned by the owner of the coal.'" The safety justification for the Kohler Act likewise was insupportable because safety of overlying landowners could easily have been accomplished through a notice requirement; the Subsidence Act, in contrast, was designed to advance a wide variety of public interests rather than focusing on safety as the legislative drafters of the Kohler Act had done. *Id.* Finally, Stevens noted that Section 6 of the Subsidence Act (which requires coal operators to pay for subsidence damage notwithstanding waivers of liability contained in operator's coal severance deeds) was not rendered unnecessary because the state administers an insurance program to reimburse surface owners for the cost of repair of their properties. This argument, said Justice Stevens, mistakenly assumes that the law was "motivated by a desire to protect private parties." Section 6's requirement that operators repair "deters the operator from causing the damage at all—the Commonwealth's main goal—whereas an insurance program would merely reimburse . . . after the damage occurs." *Id* at 487.

police power laws whose purpose is to suppress public nuisance-type activity and non-nuisance regulation. In its discussion of this relationship the Court emphasized that, to Holmes, "a critical factor" in determining if there had been a taking in *Pennsylvania Coal* was the nature of the state interest involved.[120]

Thus, as mentioned above, the fact that the Kohler Act benefited private parties rather than advancing important public interests invalidated the attempted exercise of the police power.[121] Emphasizing the nuisance character of the mining activity that the newer Subsidence Act prohibits, the *Keystone* Court discussed the broad power of legislative bodies to protect the public from similar nuisance activities.[122]

In an extremely important clarification of *Pennsylvania Coal*, the *Keystone* court observed that Justice Holmes did not dispute Justice Brandeis' argument in dissent—-that "the state has an absolute right to prohibit land use that amounts to a public nuisance."[123] Reaching back more than a century to the opinion in *Mugler v. Kansas*, Justice Stevens explained that exercises of the police power to repress public nuisances have been "repeatedly upheld", even "regulations that destroy or adversely affect real property interests."[124]

Rejecting the coal industry's implicit assertion that *Mugler* and its progeny were tacitly overruled by *Pennsylvania Coal*, the *Keystone* majority quoted extensively from *Mugler's* clear and unequivocal distinction between valid exercises of the police power to prevent or abate public nuisances and police power regulatory initiatives that seek to accomplish other objectives:[125]

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[120] *Keystone*, 480 U.S. at 488.

[121] *Id.* Obviously, if the police power is that implied power of sovereignty whose exercise seeks to advance public health, morals, safety and the general welfare, a law which protects only private interests would be *ultra vires*.

[122] *Id.*

[123] *Id.* at n. 17. Justice Stevens observed that the point of disagreement between the two Justices was whether the Kohler Act was a legislative attempt to abate public nuisance-like activities; Holmes concluded that it was not. *Id. See also* Pennsylvania Coal, 260 U.S.
at 417.

[124] *Keystone*, 480 U.S. at 488, n.18. (citations omitted). The court discusses Mugler v. Kansas, 123 U.S. 623 (1887), a case that upheld as a valid police power exercise Kansas' prohibition of the manufacture and sale of intoxicating liquors, even though the prohibition diminished the value of a pre-existing brewery. *See also* Keystone, 480 U.S. at 489.

[125] An example of the latter would be zoning which, while grounded firmly in the police power, does not need the excuse of nuisance abatement to legitimize regulations of land use. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

> [P]rohibition 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 or appropriation of property . . . . The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health morals, or the safety of the public, is not—-and consistently with the existence 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.[126]

Mindful of Justice Holmes' observations concerning the connection between diminution of value occasioned by police power regulation and an unconstitutional taking, *Keystone* also admonished that the extent of the diminution is " . . . by no means conclusive."[127] Moreover, relying on *Mugler's* extremely broad view of the scope of the police power to regulate nuisances, Justice Stevens reminded that all private property "is held under the implied obligation that the owners' use of it shall not be injurious to the community . . . ."[128] Juxtaposing this sweeping view of the police power with the restricting force of the just compensation/eminent domain clause, the Court opined that "[T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it."[129]

The *Keystone* Court separated police power regulation of nuisance activity and noxious uses from other exercises of legislative power such as zoning which are also intended to further the public interest. Indeed, the court signaled that such regulatory efforts are afforded "special status" in takings analysis:

> The special status of this type of state action can be understood on the simple theory that since no individual has the right to

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[126] *Keystone*, 480 U.S. at 489, quoting *Mugler*, 123 U.S. at 668-669, and citing Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); and Powell v. Pennsylvania, 127 U.S. 678 (1888).

[127] *Keystone*, 480 U.S. at 490, citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

[128] *Keystone*, 480 U.S. at 492 quoting *Mugler*, 123 U.S. at 665, and citing Beer Co. v. Massachusetts, 97 U.S. 25 (1877).

[129] *Keystone*, 480 U.S. at 492, again relying on *Mugler*, 123 U.S. at 664.

> use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.[130]

To the extent that Section 522(e) of SMCRA seeks to abate coal mining nuisances and noxious mining uses of land, it is entitled to the deference afforded the special status of such legislative action.

C. *Keystone's Alternative Rationale for Sustaining the Subsidence Act*

The *Keystone* Court did not rely exclusively on the nuisance abatement goal to sustain the Pennslyvania subsidence law. *Keystone's* other justifications for upholding the Act deserve attention.[131]

Keystone recognized that two considerations of Holmes' opinion in the *Pennsylvania Coal* case have become, "integral parts" of the Court's general takings analysis.[132] Those two factors—-whether (1) a land use regulation "substantially ad-

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[130] *Keystone*, 480 U.S. at 491, n. 20, citing Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149, 155-161 (1971); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1235-37 (1967).

While Chief Justice Rehnquist, writing for himself and three other dissenters, believed that the Subsidence Act focused "on essentially economic concerns" (Keystone, 480 U.S. at 513) rather than nuisance abatement and thus did not deserve to be "excepted" from constitutional takings proscriptions, he did admit that if the law was a valid "nuisance statute" it would be entitled to substantial deference during judicial review. *Id.* at 511, n. 3. The Chief Justice's view of what he calls "the nuisance exception" is virtually identical with that espoused by the *Keystone* majority:

> [W]e have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use.

Id. at 511 (Rehnquist, C.J. dissenting). Interestingly, the dissent cited Mugler, among others, as authority for this proposition. The dissent also observed that "our cases have never applied the nuisance exception to allow a complete extinction of the value of a parcel of property." *Id.* at 511, n. 3. This observation, as discussed *infra* at note 167, is not supported either by logic or the cases upon which the Chief Justice purports to rely.

[131] The *Keystone* majority did not have to go any further in sustaining the Subsidence Act than to rely on the *Mugler* nuisance abatement rationale. However, because of the confusion emanating from a half-century of mis-reading *Pennsylvania Coal* and the close split of the court in *Keystone*, it made sense to further bolster the opinion by showing that application of taking analysis to non-nuisance legislative measures would similarly result in the validation of the Subsidence Act.

[132] *Keystone*, 480 U.S. at 485.

vances legitimate state interests or (2) denies an owner economically viable use of his land," —-are tests used to determine whether a compensable taking has occurred.[133]

In *Keystone*, unlike *Pennsylvania Coal*, the coal industry parties failed to satisfy their burden with regard to both tests.[134] First, as noted above, the Subsidence Act furthers substantial public interests.[135] Second, the later statute did not "make the mining of coal commercially impracticable;" in making a facial challenge, the "petitioners have never claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed."[136]

The application of these "tests" has relevance to "regulatory taking" determinations regarding Section 522(e) of the SMCRA, and will be addressed below in the context of a specific discussion of the significance of *Keystone* to SMCRA's "prohibitions by Act of Congress."[137] In addition, the other cumulative lessons of a century of Supreme Court due process and eminent domain/ just compensation taking cases will be applied as well.

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[133] *See e.g.* Agins v. Tiburon, 447 U.S. 255, 260 (1980); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

[134] *Keystone*, 480 U.S. at 485.

[135] *Id.* at 492.

[136] *Id.* at 495-96. In order to circumvent the serious problem of lack of proof of the extent of diminution of value of their coal, the petitioners attempted to narrow the scope of the property interest to which the taking analysis would apply—-as the Court put it "[t]hey advance two alternative ways of carving their property" in order to reach the conclusion that they had been deprived of all the economic use of their property. *Id.*

They first argued that the tons of coal that would be left in the ground if the Subsidence Act were enforced was effectively appropriated or "taken", because the coal left in place had no other useful purpose. The other contention was that the state had effectively taken an interest in real property recognized only by Pennsylvania law—-the "support estate". *Id.*, 496-97. The support estate is a legal term of art used only in Pennsylvania. It refers to the common law right of subjacent support which Pennsylvania courts have deemed to be a third discrete interest in real property separate from the surface and mineral estates recognized by all other jurisdictions. For a discussion of the parameters of the "support estate" *see* Penman v. Jones, 256 Pa. 416, 100 A. 1043 (1917), and *see generally*, Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania*, 25 TEMPLE L. Q. 1 (1951). With regard to both arguments, the Court found that the facial attack was unsupported by probative evidence in the record as to the effect of the statute on their ability to conduct business profitably. Said the Court with not a small touch of irony: "Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process." *Keystone*, 480 U.S. at 501.

[137] *See infra*, discussion in text accompanying note 151.

VII. SECTION 522(E) PROHIBITIONS OF MINING: TAKING OR VALID NON-COMPENSABLE EXERCISE OF THE POLICE POWER?

The legislative history of the SMCRA indicates that "[T]he decision to bar surface mining in certain circumstances is better made by Congress itself."[138] Thus, in Section 522(e) of that Act, certain areas were identified and placed off-limits to mining activities.[139] Those areas include both public and private lands.[140] As explained below, these prohibitions are readily sustainable with regard to the protected private lands and may withstand a taking challenge regarding most, if not all, of the identified federal lands as well.

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[138] H.R. REP. No. 218, 95th Cong., 1st Sess. 95, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 631.

[139] SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988), contains certain narrow exceptions to the congressional ban (in addition to the limitations imposed by the words "subject to valid existing rights"). Subsection (e)(2) allows coal mining in a national forest "if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations" and that "surface operations and impacts are incident to an underground coal mine." Mining is also permitted within National Forests lands west of the 100th meridian which do not have significant forest cover; such surface mining must comply with the Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified as 16 U.S.C. § 528 (1988)), the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (codified as 30 U.S.C. § 181 note and scattered sections of 30 U.S.C.), the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. § 472a and scattered sections of 16 U.S.C.), and SMCRA. Subsection (e)(3) of 522 allows mining even though it will adversely affect a public park or places included in the National Register of Historic Sites if approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or historic site.

Subsection (e)(4) allows mining within one hundred feet of any public road, where mine access roads or haulage roads join such road. Also the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if, after public notice and opportunity for public hearing in the locality, a written finding is made that the interests of the public and the landowners affected thereby will be protected.

Subsection (e)(5) allows mining within three hundred feet of any occupied dwelling, if the homeowner waives the prohibition.

[140] SMCRA §§ 522(e)(1) and (2), 30 U.S.C. §§ 1272 (e)(1) and (2) (1988), protects federal lands included in the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System (including study rivers), National Recreation Areas, and National Forests.

Sections 522(e)(3)-(5) protects non-federal public and private lands including publicly owned parks, places included in the National Register of Historic Sites, within one hundred feet of the outside right-of-way line of any public road, within three hundred feet from any occupied dwelling, public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

A. *Section 522(e) is Sustainable As A Legislative Prohibition of Noxious Use/Nuisance Activity*

As suggested above, the potential adverse impacts of mining on these important and/or sensitive areas was so apparent that Congress concluded that there was no reason to leave the designation of such areas to the discretion of a regulatory agency.[141]

In the case of each area to which Section 522(e) is applicable, common sense dictates that coal mining activities would be as much of a nuisance as Justice Sutherland's graphic reference to the unsuitability of a pig in the parlor instead of a barnyard:[142]

> Thus the question whether the power exists to forbid . . . a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or the thing considered apart, but by considering it in connection with the circumstances and locality. A nuisance may merely be a right thing in the wrong place,—-like a pig in a parlor instead of a barnyard.[143]

Therefore, while coal mining may be perfectly appropriate high on an unpopulated eastern Kentucky ridge, most reasonable and objective people would deem it a noxious or nuisance activity when conducted within 100 feet of a cemetery, or 300 feet of a school, hospital, public park or road; so too would they find mining activities with attendant blasting, operation of heavy equipment and coal haulage trucks, subsidence, noise, dust and similar characteristic effects of coal mining to be repugnant nuisances within the boundaries of such federal lands as National Wildlife Refuges, National Parks, Wild and Scenic Rivers that

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[141] SMCRA § 522(a)(3), 30 U.S.C. § 1272(a)(3) (1988), gives OSM and state regulatory agencies the power to designate land as unsuitable for mining in response to a citizens petition or on their own motion.

[142] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

[143] *Id.* (citations omitted). In Euclid, the Court rejected a taking challenge and upheld as a valid exercise of the police power, the type of zoning ordinance which typically prohibits certain non-nuisance activities on private land. Euclid's discussion of nuisance law informed the court's decision as to the permissible scope of the police power; it also helps to explain the statements in *Keystone* that the "nuisance exception" is not "coterminous with the police power." *Keystone*, 480 U.S. at 512 (Rehnquist, C.J. *dissenting*). That is, the police power encompasses not only the suppression of nuisance activity, but the regulation of non-nuisance activities that interfere with a comprehensive legislative plan of land use in a community. Other types of regulation of business and property to protect public health, safety, morals and the general welfare fall within the purview of the police power as well.

are protected by Section 522(e)—-"merely a right thing in a wrong place" as Justice Sutherland would say.[144]

As indicated above, even the dissenters in *Keystone* recognized the general applicability of what they called "the nuisance exception."[145]

> [W]e have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use.[146]

The dissent found that the Subsidence Act was not the type of police power regulation that the Court had previously held to fall within the nuisance exception to takings analysis.[147] This criticism of the statute was grounded in substantial measure on the view that it was "much more than a nuisance statute."[148] Thus, the purposes of the Subsidence Act, though including public safety, reflects a concern for preservation of buildings, economic development, and the maintenance of property values

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[144] *Euclid*, 272 U.S. at 388. One will recall the great deference accorded legislative determinations to use the police power to suppress noxious and nuisance activities in cases from *Mugler v. Kansas* to *Keystone*. The words of Justice Stevens in the latter case are indicative and bear repeating:

> since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

Keystone, 480 U.S. at 491, n. 20.

[145] *Keystone*, 480 U.S. at 512. With all respect, the police power is not an exception to the protection afforded by the just compensation/eminent domain and due process clauses; rather the latter are exceptions to, or more appropriately limitations upon, the application of the police power.

[146] *Id.* at 511 (Rehnquist, C.J. dissenting).

[147] *Id.* The dissent characterized this so-called exception to the "taking guarantee" as a "narrow exception allowing the government to prevent 'a misuse or illegal use'." *Id* at 512. Such a characterization, however, affirms by negative implication that a legislative exercise of the police power which recognizes certain activity (like coal mining) to be an illegal nuisance when carried on in a certain place (such as within 300 feet of a school or within the boundaries of a National Park) is a valid exercise of the power which cannot be considered a taking.

[148] *Id.* at 513 (Rehnquist, C.J. dissenting). This interesting observation cuts substantially against the grain of the dissents' argument, for it suggests that if a statute like the Subsidence Act really can be said to be "more than a nuisance statute," this defect could be simply remedied by eliminating from its ameliorative goals all but the suppression of subsidence-caused damage—-clearly as much a nuisance as damage caused by blasting in the course of mining activities. Of course, the dissent fails to explain why a statute which not only seeks to abate noxious uses, but also to accomplish other ends well within the scope of the police power, could be any less viable than a law limited exclusively to nuisance regulation.

to support the State's tax base.[149] Without explanation, the dissent attempted to draw a distinction between the statute before the Court and those entitled to be recognized as "nuisance exceptions to the taking guarantee":[150]

> We should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it a nuisance regulation.[151]

Notwithstanding the Keystone dissent's objections to characterization of the Pennsylvania Subsidence Act as a nuisance statute, it seems clear that Section 522(e) does not suffer from similar disabilities. That section clearly looks, in the words of Chief Justice Rehnquist, "to prevent a property owner from using his property to injure others."[152] As Justice Sutherland observed in Euclid, "the question of whether a particular thing is a nuisance," depends upon "the circumstances and the locality."[153]

With regard to each area protected by Section 522(e)'s prohibitions, coal mining clearly is inappropriate. Few industrial enterprises exhibit such a combination of nuisance activities that threaten to annoy, injure, and damage than those attendant coal mining.

B. *Prohibition of Mining on Private Lands*

Congress decided that certain private lands deserved the absolute protection from the noxious effects of coal mining oper-

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[149] *Id.* The dissenters take the odd position that nuisance law reaches only to the protection of public safety, thus ignoring centuries of statutory and case law that recognizes the power of courts and legislatures to abate activities that do not threaten public safety, but which nevertheless substantially and unreasonably interfere with rights common to the public. To appreciate how far the dissenters' observation departs from long accepted nuisance doctrine, one need only recall the statute upheld by the Court in Lawton v. Steele, 152 U.S. 133 (1894) which declared the possession of a certain kind of fishing net to be a public nuisance—hardly an attempt to protect public safety.

[150] *Keystone*, 480 U.S. at 512.

[151] *Id.* at 513.

[152] *Id.* at 511. Of course some might quibble with this observation, arguing that coal mining in areas designated by SMCRA § 522(e) will not injure anyone. Such arguments would improperly limit the scope of injuries caused by nuisance, contrary to well-established statutory and common law principles and ignore the very real potential for physical injury and property damage occasioned by coal trucks, blasting, fugitive dust, mine drainage, subsidence and other mining related harms.

[153] *Euclid*, 272 U.S. at 388.

ations afforded by an out-right ban. The private lands protected include publicly owned parks and places included in the National Register of Historic Sites; mining is also prohibited within one hundred feet of any public road or cemetery and, within three hundred feet from any occupied dwelling, public building, school, church, community, or institutional building, public park.[154]

Suffice it to say that Section 522(e)(3) through (5) exhibits none of the indicia of a taking that have been identified in the Supreme Court regulatory takings cases. That Section 522(e) seeks to prevent nuisances and noxious uses cannot be doubted; indeed mining activities within a few hundred feet of any buildings or places regularly used or inhabited by people would appear a classic example of a nuisance.

The buffer zone-type regulation of coal mining activities occasioned by Section 522(e)'s private land restrictions is fully sustainable as a valid exercise of the police power.[155] It cannot rationally be viewed as "loading on one individual more than his share of the burdens of government"—the core constitutional concern distilled by Chief Justice Rehnquist as the essence of the Fifth Amendment's taking protection.[156]

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[154] SMCRA §§ 522(e)(3)-(5), 30 U.S.C. §§ 1272 (e)(3)-(5) (1988). The coal industry has resisted the enforcement of this buffer zone concept. In all candor, one must speculate as to the collective judgment of an industry that so seeks to maximize its profits that it resists government attempts merely to provide a marginal buffer zone to insulate the public from the obvious harms accompanying mining. One wonders whether the economics of the coal mining business are so problematic that mining companies will be cast into the throes of bankruptcy if they cannot mine to the foundation of a school or church. Would those in the industry who have argued strenuously for a decade that such buffer zones represent an invalid exercise of the police power, be willing to accept a less restrictive limitation—say the ban of mining within 50 or 25 or perhaps 5 feet from a cemetery or the door of a hospital?

[155] The court emphasized Justice Brandeis' observation (which was not contested by Holmes) that the state has an absolute right to prohibit land use that amounts to a public nuisance. *Keystone*, 480 U.S. at 488, n. 17, citing *Pennsylvania Coal*, 260 U.S. 413-414.

[156] *Keystone*, 480 U.S. at 512. Takings challenges to SMCRA §§ 522(e)(3)-(5) prohibitions will, in my view, be summarily rejected on noxious use/nuisance suppression grounds alone. It is worth observing, however, that if one applies taking analysis appropriate for non-nuisance land use regulation—that is diminution of value and interference with distinct investment backed expectations—a similar result would obtain. One need only look to *Keystone* for a concise articulation of why this is so:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under

C. *Prohibition of Mining on Federal Lands*

Section 522(e)(1) is a *per se* prohibition[157] of mining on various important and environmentally sensitive federal lands, including National Parks, National Wildlife Refuges and the like.[158] Section 522(e)(2) bars strip mining in National Forests, but allows underground mining in certain circumstances.[159]

Somewhat different issues arise when coal mining is barred on federal as opposed to private lands. The Section 522(e) ban is most easily upheld when a coal operator/owner holds a fee simple interest. In this context, the accepted rule is that—when land is not physically occupied and used by the government, and, where the right of possession, use, and some economic or other benefit remains in the owner—-there has been no taking.[160]

Thus, for the owner of a fee simple located within the boundaries of a protected federal area, the prohibition of coal

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> petitioners' theory one could always argue that a set-back ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. Cf. Gorieb v. Fox, 274 U.S. 603 (1927) (upholding validity of set-back ordinance) (Sutherland, J.).

Keystone, 480 U.S. at 498.

Justice Stevens rejected the coal petitioners' assertion that such regulation in the Subsidence Act (requiring the coal operator to leave a pillar of coal beneath homes) effected a taking. Said Stevens:

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

Id. at 499.

Similarly, coal operators who pose a takings challenge to the buffer zone restrictions of SMCRA §§ 522(e)(3)-(5) will, no doubt, be doomed to the same fate as the Keystone petitioners.

[157] As the discussion above demonstrates, each and every prohibition of mining contained in SMCRA § 522(e) is made "subject to valid existing rights." *See supra*, discussion at note 138.

[158] For a listing of all federal lands included within this *per se* ban, *see supra*, note 139.

[159] *See supra*, note 139.

[160] *See e.g. Keystone*, 480 U.S. at 495-499, Andrus v. Allard, 444 U.S. 51, 65-68; Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130-131 (1978); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962); United States v. Twin City Power Co., 350 U.S. 222 (1956); Hadacheck v. Sebastian, 239 U.S. 394 (1915). Compare Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1926), and United States v. Virginia Electric & Power Co., 365 U.S. 264 (1961). *See also*, Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1230-1233 (1967).

mining on and under such lands would affect only one "strand in the total bundle" of property rights incident to fee ownership. The court in *Andrus v. Allard*[161] explained this rule:

> Suffice it to say that government regulation—-by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. . . . [T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.[162]

The Court has time and again rejected taking arguments where only one use of property is prohibited, and/or the value of the whole is diminished but not extinguished.[163] Given this fact, one can predict with a high level of confidence that a Section 522(e) (1) or (2) ban on mining will withstand constitutional taking scrutiny where the coal owner owns the fee, can still exclude others[164] and use the land for any other lawful purpose.

1. *The Single Use Anomaly*

A problem arises when mining is barred under Section 522(e) and the mine operator owns only the mineral interest that has been severed from the fee estate.[165] Such segmented ownership of coal rights is common, although in the eastern coal fields it is the product of contractual agreements between private parties, while with regard to western federal lands the mineral estate

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[161] 444 U.S. 51, 65-66.

[162] *Id.* at 65-66. In the context of a Section 522(e) ban, the right deprived is to mine coal for profit. *See also Penn Central*, 438 U.S. 104, 130-131; and *Keystone*, 480 U.S. at 496-97. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 592-599 (2d ed. 1988).

[163] *See Penn Central*, 438 U.S. at 125-127, and cases cited therein.

[164] This right to exclude others is a very important "strand" in the bundle of real property rights; Justice Brandeis found that: "[a]n essential element of individual property is the legal right to exclude others from enjoying it." International News Service v. Associated Press, 248 U.S. 215, 250 (1918) (dissenting opinion). *See* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979).

[165] Such severance may occur either by grant or reservation.

may be owned or leased as a result of a transaction in which the government itself is a party.[166]

Where a coal owner possesses only the coal and the right to mine it, the situation smacks of the often quoted concern expressed by Holmes in *Pennsylvania Coal*:

> '[f]or practical purposes the right to coal consists of the right to mine it.' What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.[167]

While many have done so in the past, one should not, upon reading this portion of Holmes opinion in *Pennsylvania Coal*, jump immediately to the conclusion that the total diminution of value of a property interest necessarily begets a taking.[168] On the contrary, such a conclusion, while superficially appealing, flies

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[166] When the government is a party to the transaction, different concerns must be addressed. Perhaps the best argument the coal owner has to invalidate a SMCRA § 522(e) ban on federal lands would be based on contract clause principles rather than taking doctrine. *See Keystone*, 480 U.S. at 505, where the court emphasized that while a state may interfere with contracts between private parties to protect important public interests, courts should not necessarily defer to legislative judgment where "the State itself is a contracting party." *See also* Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 413 (1983); United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977).

[167] *Pennsylvania Coal*, 260 U.S. at 414-15 (citations omitted).

[168] Chief Justice Rehnquist observed that "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." *Keystone*, 480 U.S. at 513. Thus, the Chief Justice suggests that in *Mugler* the prohibition on manufacture and sale of liquor made a brewery "of little value" but "did not completely extinguish the value of the building." Id. He drew a similar distinction regarding Miller v. Schoene, 276 U.S. 272 (1928) (cedar trees caused to be cut to preserve neighboring apple orchards from blight could still be used). *Id.* The two other cases the Chief Justice relied on involve non-nuisance regulation: (Penn Central, 438 U.S. 104 (1978)(restrictions on use of historic building) and, Goldblatt v. Hempstead, 369 U.S. 590 (1962)(safety ordinance without effect on tract value). In contrast to his views, the *Keystone* majority stated that "the Court has repeatedly upheld regulations that destroy or adversely affect real property interests." *Keystone*, 480 U.S. at 488, n. 18 (citing cases). While the *Keystone* dissent's point might be technically correct regarding cases like *Mugler* and *Miller*, the conclusion implicitly drawn—that the total extinction of all value in certain property is a taking—misses the mark by a wide margin. Indeed, the fact that the suppression of noxious uses and nuisances may leave some de minimus value in affected property is clearly irrelevant to the Court's holdings in such cases. It seems an extreme view to suggest that the Court would have found a taking in *Mugler* if the value of the building had been reduced to zero, or in *Miller* if the state had ordered the cedar trees burned, instead of allowing the owner to salvage them.

in the face of the teaching of the Court's noxious use/nuisance cases from *Mugler* to *Keystone*. The lesson of those cases is that the diminution of property value occasioned by governmental attempts to suppress a nuisance or noxious use is irrelevant;[169] only where government regulation destroys property values attendant an otherwise "innocent use" of land should diminution be considered.[170] Professor Tribe argues that even total diminution of value does not signal a taking, where nuisances and noxious uses are involved:

> in accord with ordinary intuition, government need not pay even for complete takeover or destruction if the latter is justified by the owner's insistence on using his property to injure other people or their property. In such cases of noxious use, or nuisance, the offending user may be required to stop, and if he refuses his property may be seized as a means of enforcing civility.[171]

Other reasons also militate in favor of upholding a Section 522(e) ban even where the totality of the property owned is the coal seam and the right to mine it. For example, if mining a coal seam will produce sulfuric acid mine drainage and the operators' cost of treatment of the discharge before it enters a stream would be economically prohibitive, mining operations can be prohibited. A regulation prohibiting the discharge of untreated acid mine drainage would not effect a taking—-even though the coal operator owned only the coal and the regulation, to paraphrase Holmes, made it commercially impracticable to mine it.[172]

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[169] Diminution of value is a relevant factor in the substantive due process standard of judicial review appropriate to "due process takings". *Cf.* Hodel v. Indiana, 452 U.S. 314, 331-333 (1981).

[170] Professor Tribe has succinctly stated the distinction between noxious/nuisance uses and "innocent uses" that suffer a diminution of value as a result of zoning or other land use regulation. That is, there is nothing innately noxious or offensive about an apartment house, but it may be totally prohibited from an area reserved by a zoning ordinance for single family dwellings. Thus, Tribe concluded that:

> It is this "non-noxious" or innocent use qualification that came to cause the greatest difficulty as the law of takings and of just compensation developed.

L.TRIBE, AMERICAN CONSTITUTIONAL LAW, 593-594 (2d ed. 1988).

[171] *Id.* at 593.

[172] *See Pennsylvania Coal*, 260 U.S. at 414.

Simply put, the reason such a regulation would not be considered a taking lies in recognition of the "special status"[173] of police power initiatives directed at suppressing nuisance/noxious uses. That is precisely why Holmes' statements about "diminution of value" regulations which make it "commercially impractical" to mine coal are relevant only in cases like *Pennsylvania Coal*. There, Holmes found "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of . . . constitutionally protected rights."[174] The legislation was not an attempt to abate a public nuisance but rather redistributed economic benefits between private parties.

Moreover, one is struck by the anomaly if a taking is found to occur where the total value of a severed property interest is extinguished by a regulation of noxious/nuisance characteristics of mining activities. In such cases the strange, and in my view unacceptable, result is that one who owns less property, is entitled to more constitutional protection.[175]

As noted above, when land is held in fee, the prohibition of "the most beneficial use of the property" does not constitute a taking, where the owner maintains the right to use the property for other uses.[176] Where, by contrast, only the coal is owned, the argument is that all the value has been extinguished by the regulatory prohibition of a single use—coal mining. Thus, so the theory goes, the owner of the single-use severed mineral interest receives "just compensation" for a regulatory taking; however, she would receive nothing if she owned the fee estate.

Utilizing the single-use taking argument one can easily envision the following scenario in the context of a Section 522(e) prohibition of mining on federal lands. A fee owner could sell the surface and retain the minerals. This simple maneuver would assure compensation because mining would be prohibited and the coal owner would possess mineral rights devoid of economic value.

There are, moreover, no legal impediments to a coal owner's sale of that portion of her coal property lying outside a protected

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[173] *See* note 130, *supra* and accompanying text where the *Keystone* majority recognizes this "special status."

[174] *Pennsylvania Coal*, 260 U.S. at 414.

[175] *See* McGinley and Barrett, *Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?*, 16 U. TULSA L. REV. 418, 438-439 (1981).

[176] *Penn Central*, 438 U.S. at 125.

federal area. This would insure that the value of her property lying within the boundary of the federal land unit would be reduced to zero. The single-use taking theory would require compensation, although if she had not sold her adjoining holding she could have mined the tract profitably notwithstanding the fact that the area within the federal unit could not be disturbed.

A third possibility involves speculative purchase of Section 522(e)(1) or (2) lands. One could purchase the severed coal estate with the design of collecting "just compensation" for a single-use regulatory taking.[177]

These examples of the application of the single-use taking theory reveal a fundamental defect. Individuals and corporations would be allowed unrestrained freedom to align real property interests by private contract in ways that defeat legitimate legislative efforts to suppress noxious uses and nuisances. In the process, by private contract, these parties create greater constitutional protection[178] for themselves.

2. *The Single Use Theory In Perspective*

A similar concern was expressed by the Court in *Penn Central* even though the regulation in question was of a non-noxious "innocent use."[179] The owners of Grand Central Station, a building designated a landmark, objected to a New York City ordinance's prohibition of their right to alter the historic station by constructing a high rise office building on top of it. Claiming that a segmented property interest protected by state law—air rights—had been totally extinguished by the regulation, they

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[177] Such a scenario suggests the wisdom of OSM's current valid existing rights test which cuts off the right to mine in Section 522(e) areas if the coal owner did not apply for all applicable permits relating to the mining by the date of enactment of the SMCRA, August 3, 1977. *See* 30 C.F.R. § 761.5(a)(1)-(2) (1979); 44 Fed. Reg. 15,342 (1979), as modified by *In Re* Permanent Surface Mining Litig. 14 Env't Rep. Cas. (BNA) 1083, 1091 (D. D.C. 1980) (mem). The "all permits" test removes the incentive to speculate on the availability of compensation for a taking of land within areas protected by Section 522(e).

[178] That is, the property owner is compensated in the form of a payment for the devalued segmented property interest.

[179] *Penn Central*, 438 U.S. at 138-139 (1978) (Rehnquist, J., dissenting). Said the dissent: "Only in the most superficial sense . . . can this case be said to involve 'zoning.'" *Id.* And explaining Curtin v Benson, 222 U.S. 78 (1911), a case in which the court found a taking, the dissent offered: "The prohibition in question, however, was not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of ownership." *Penn Central*, 438 U.S. at 145.

argued that it had effected a taking without just compensation. Said the Court in response:

> [T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . . 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.[180]

Of course, one might attempt to distinguish *Penn Central* on the ground that there was not a severance of air rights from the fee; rather the property owner argued that the diminution of value of the air rights should be isolated for takings analysis purposes. This would be a distinction without a difference, for it was urged that the value of the other segments of the land in *Penn Central* should be disregarded when the extent of the diminution of value of the air rights was calculated. At bottom, the issue in *Penn Central* and cases where a fee has been divided into segmented interests is no different. Had the air rights of *Penn Central* been sold to another corporation by some graceful exercise of the art of conveyancing, would the Court have found the city ordinance to have been a taking because it totally extinguished the value of those severed rights?[181] One suspects that it would not. Nor should the court find a taking where a private contract has severed mineral interests from a fee.

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[180] *Id.* at 130. (citations omitted). *See also*, *Pennsylvania Coal*, where Justice Brandeis opined in dissent:

> It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution of value, and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but of the whole property. The rights of an owner as against the public are not increased by dividing the interests of his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole.

260 U.S. at 419 (Brandeis, J. dissenting).

[181] *Keystone* addressed a subterranean version of this question. Unlike *Pennsylvania Coal*, in *Keystone* the law was a valid exercise of the power directed at the regulation of a nuisance. Said Justice Stevens: "Petitioners . . . argue that . . . the Subsidence Act . . . 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." *Keystone*, 480 U.S. at 500

Justice Brandeis' dissenting observations in *Pennsylvania Coal* were brilliantly prescient on this point:

> The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum. But I suppose no one would contend that by selling his interest above one hundred feet from the surface he could prevent the State from limiting, by the police power, the height of structures in the city.[182]

With equal cogency, Justice Brandeis then asked rhetorically: "And why should a sale of underground coal rights bar the State's power?"[183]

This is precisely the question to be asked with regard to a Section 522(e) limitation; why, indeed, should the provisions of a private sale of underground rights, reflecting a legal fiction that the property was somehow severed into segments, defeat the public's valid interest in suppressing noxious uses and nuisances?

One answer is that, in the parlance of the Court's modern takings analysis, the regulation may defeat "distinct investment backed expectations."[184] While in *Penn Central*, a case involving a non-nuisance "innocent use," such concerns make good sense,

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[182] *Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J., dissenting). Lest one be inclined to cavalierly dismiss the weight of a dissenting opinion, it should be recalled that *Keystone* tells us that Holmes and Brandeis substantially agreed on the breadth of the police power in *Pennsylvania Coal*. They disagreed only on whether the Kohler Act actually was a legislative effort to suppress nuisance activity, as Brandeis strongly contended, or as Holmes found, a measure to bestow an economic benefit on private parties—which was not a valid exercise of the power. *Keystone* 480 U.S. at 488, n. 17.

[183] *Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J., dissenting). Justice Brandeis also came to grips with the "reciprocity of advantage" theory relied on by Holmes' in *Pennsylvania Coal*. This theory suggests that a taking occurs unless a property owner acquires some reciprocity of advantage, i.e. while zoning limits use of ones property, it bestows the benefit of living in a planned, safe community. Said Brandeis:

> [W]here the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in [Pierce Oil Corp. v. City of Hope,] 248 U.S. 498 (1919); his brickyard, in [Hadacheck v. Sebastian,] 239 U.S. 394. (1915); his billiard hall, in [Murphy v. California,] 225 U.S. 623 (1912); his oleomargarine factory, in [Powell v. Pennsylvania,] 127 U.S. 678 (1888); his brewery, in [Mugler v. Kansas,] 123 U.S. 623 (1887); unless it was be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

Id. at 422.

[184] *See e.g.*, *Penn Central*, 438 U.S. at 127.

in a case where an activity that has the potentially to substantially harm people and a fragile environment, this inquiry is irrelevant.

Keystone reflected on more than a century of caselaw extending back to *Mugler*,[185] observing that "[l]ong ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'"[186] Surely, citizens have no constitutionally cognizable expectation (investment backed or otherwise) to conduct noxious or nuisance-like activities on their property.[187]

A rejoinder, however, might be that the government has changed the rules of the game, so to speak—-by making illegal an activity that was previously perfectly legitimate. By so doing, the property owner, who gave valuable consideration for a severed mineral interest, is unfairly deprived of the total value of his or her property; a deprivation which serves to increase the value of adjoining and super-incumbent tracts which are no longer burdened by exposure to the theretofore legal use.

Changing times, mores, and new information, however, have long been observed to mold the objective and subjective fairness of legislative initiatives under the police power. As Justice Holmes pointedly remarked, the police power is grounded upon shifting sand:

> Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the 18th Amendment, notwithstanding the 14th, to enable a state to say that the business should end. What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way.[188]

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[185] *Mugler*, 123 U.S. 623 (1887).

[186] *Keystone*, 480 U.S. at 491-492, quoting, *Mugler*, 123 U.S. at 665.

[187] This observation is obviously as applicable to segmented property interests as to a fee interest.

[188] Tyson & Brother v. Banton, 273 U.S. 418, 446 (1926) (Holmes, J. dissenting). Tyson involved an abortive attempt by the State of New York to regulate theatre ticket scalping. The State attempted to justify the law as against a substantive due process taking attack by arguing that the theatre business was clothed with a public interest, like the arguments made to defend rate-making for railroads and public utilities. The majority rejected the argument. Thus, Holmes' reference in the textual quote above, to "theatres . . . devoted to a public interest."

Holmes' statement reflects well established case law and rather artfully describes the fragility of "investment-backed expectations" when exposed to the often harsh winds that frequently sweep across the modern "regulatory state."[189] Viewed in this light, it seems obvious that when a legislature finds an activity inimical to public health, safety, or welfare, the constitutionality of a law prohibiting the activity should not depend on the extent of economic loss occasioned by its enforcement.

In essence, Section 522(e) declares that coal mining activities within the boundaries of environmentally sensitive and publicly revered federal lands are akin to Justice Sutherland's offensive pig in the parlor. Whether the coal owner has "distinct investment-backed expectations" or will be deprived of the entire value of his/her contractually severed mineral estate should have no bearing on takings analysis. As long as the legislative means utilized[190] is rationally and substantially related to the end sought to be achieved, no taking occurs.

VI. CONCLUSION

Even the most strident proponent of rights of coal operators should pause at the visions of huge coal mining "draglines"[191] with scoop buckets the size of a house thrusting deep into the fragile soil of National Park land, of gigantic earth moving machines hauling and dumping rocks ripped from the subsoil of a Wildlife Refuge, or of rumbling tri-axle coal trucks loaded with coal traversing a tree and soil-stripped ridge overlooking a

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[189] To add a modern twist to this perspective, one may focus on a literal exercise of the police power. Cocaine, which had once been advertised in the Sears catalogue (as an all-purpose elixir) became illegal overnight with the enactment of a law criminalizing its use and possession. Who among us would argue for the cocaine dealer, that because the entire value of his stash had been extinguished—indeed appropriated—that he is entitled to "just compensation"? One might dismiss the analogy, suggesting that cocaine use is a serious evil unlike coal mining. Of course the observations of Holmes quoted in the text accompanying note 188, and the eighteenth century suppression of the evil of lotteries and liquor suggest the aptness of the analogy. Unless, of course, one wishes judges to sit as Lochnerian super-legislators.

[190] The protection of important fragile public lands from noxious uses is the goal of SMCRA § 522(e)(1) and (2).

[191] A dragline is "[a] type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket toward itself on the ground with a second rope, elevates the bucket, and dumps the material . . ." U.S. BUREAU OF MINES, A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS (1968), 346. Some draglines are enormous; if feasible for a particular coal mine site, draglines can provide significant economies of scale.

wild and scenic river. Likewise with regard to private land, the specter of blasting, subsidence, and dumping of coal refuse within a stone's throw of a home or a school should present an equally troubling picture, even for the hardened corporate advocate.

Basic values relating to how human beings treat each other and simple common sense should lead an industry to eschew such activities in close proximity to places where people live, work and worship or in the midst of natural places that we, as a nation, treasure—-places which most of us pray are passed on unblemished to future generations. When human beings are motivated by the balance sheets' bottom line, basic human values and common sense often fall victim to greed. Mining in National Parks and under homes and cemeteries are not scenes conjured from the distorted imagination of environmental extremists; in a decade of VER litigation, lawyers and coal operators have argued that mining in such areas is a constitutionally protected property right.

Congress clearly foresaw that such rights would be claimed by coal interests. Given the penchant of certain elements in the coal industry to ignore the environmental impacts of their work and the rights of their neighbors, Congress sought to provide broad protection for extremely sensitive areas where reasonable people would deem mining a nuisance or noxious use.

The drafters of SMCRA sought to avoid unconstitutional taking of private property in the administration of the statute, out of an abundance of caution and with a measure of respect for rights of property. Thus, prohibition of mining in certain areas was tempered with an eye toward the concerns implicit in the just compensation and due process clauses of the Fifth Amendment.

Legislative history and common sense suggest that Congress intended to restrain the regulatory impact of the Act generally, and Section 522(e) in particular by avoiding unconstitutional "takings" of private property—-but only to the extent that such regulation could be found violative of fifth amendment proscriptions. Thus, by limiting Section 522(e) mining bans by the vague limitation "subject to valid existing rights" Congress gave OSM flexibility in crafting implementing regulations which go so far as to avoid takings—-but no farther.[192] In the final anal-

[192] Given the discussion above, I conclude that the current "modified all permits

ysis, the SMCRA's statement of purpose emphasizes precisely this point; OSM must assure that mining is conducted in a manner that will be environmentally sound and wherever necessary, the agency should implement the Act by exercising "the full reach of Federal constitutional powers to protect the public interest.[193]

With a new Administration in Washington, and competent and fair-minded people at the helm of an agency previously wracked with contention and partisanship, the OSM will, hopefully, develop a fair and reasonable regulatory approach to the implementation of Section 522(e) of the SMCRA. In approaching this daunting task the agency should be mindful of the thought expressed by the first Justice Harlan more than a century ago:

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In one case a nuisance . . . is abated; in the other, unoffending property is taken from an innocent owner.[194]

Neither the law nor the demands of justice and fairness are, nor should they be, different today.

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test" is broader than necessary to escape a taking; it is however a test that is fair and administratively workable. The test falls within the scope of the discretion afforded the agency by the SMCRA.

[193] SMCRA § 102 provides:

> It is the purpose of this chapter to . . . (d) assure that . . . mining operations are so conducted as to protect the environment;
>
> . . .
>
> (m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

30 U.S.C. §§ 1202(d) and (m) (1988).

[194] *Mugler*, 123 U.S. at 669.