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103 WVLR 387

(Cite as: 103 W. Va. L. Rev. 387)

West Virginia Law Review
Spring, 2001

Student Work

***387 SO YOU WANT TO BAN MOUNTAINTOP MINING? YOU MAY HAVE TO PUT YOUR
MONEY
WHERE YOUR MOUTH IS**

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I. INTRODUCTION

"[T]he right to coal consists in the right to mine it." [FN1]

The Fifth Amendment to the United States Constitution states, in part, that "private property [shall not] be taken for public use without just compensation." [FN2] This was originally interpreted to mean that only physical dispossession by the government triggered the duty to pay just compensation. [FN3] However, the United States Supreme Court has held that some government regulations restrict the use of *388 property to the extent that they have the same effect as physically appropriating the property. [FN4] This type of taking has become commonly known as a "regulatory taking." [FN5] Although regulatory takings were discussed in the Supreme Court before 1922, [FN6] *Pennsylvania Coal Co. v. Mahon* was the case that brought the issue into serious debate. [FN7]

In addition to *Mahon*, other cases involving mining regulations have provided substantial "takings" jurisprudence. [FN8] The more recent mining cases have centered around the Surface Mining Control and Reclamation Act of 1977 (SMCRA). [FN9] SMCRA was enacted largely to address potential harmful effects on the environment, health, and safety. [FN10] When Congress was drafting language for SMCRA, environmental groups pushed unsuccessfully for language that would essentially prohibit one type of mining commonly referred to as the "mountaintop removal" mining method of extracting coal. [FN11]

Recently, a decision by a federal court in the Southern District of West Virginia may well have effectively banned the mountaintop removal mining method. [FN12] This is because the court interpreted the Clean Water Act and SMCRA regulations to ban valley fills in intermittent and perennial streams. [FN13] The use of valley fills is essential to surface mining operations. Judge Charles Haden has stayed his opinion until the conclusion of an appeal to the Fourth Circuit Court of *389 Appeals. [FN14] It is precisely this type of interpretation of regulations which may, for individual property owners, effect a taking. It is important, in this case, and the court concedes, that for more than 20 years, state regulators have interpreted the regulations to allow these types of valley fills. [FN15] In fact, the appropriate administrative agencies signed a Memorandum of Understanding during the case to clarify the interpretation of the regulations they developed. [FN16] Clearly, an "expectation right" has validly been created by such an interpretation. [FN17] Even so, a takings case for the individual whose mineral rights on the property are at issue will not be ripe for adjudication until after the Fourth Circuit appeal. [FN18]

This article will examine whether banning the mountaintop removal mining method by citizen suits, judicially imposed injunctions, or government regulation such as permit denial may be considered a taking, requiring just compensation under the Takings Clause of the Fifth Amendment of the United States Constitution. [FN19] The examination will begin by applying various methods courts have used when considering takings cases. The first method focuses primarily on "diminution of value" in the property, a concept found in both *Mahon* and a more recent Supreme Court decision, *Lucas v. South Carolina Coastal Council*. [FN20] The second method utilizes the "Three Factor Penn Central Test" which incorporates diminution of value in one of the factors but is essentially a balancing test. [FN21] Finally, the article will consider whether substantive due process may be a viable option for analyzing such a case.

[FN22]

***390** II. BRIEF OVERVIEW OF THE MOUNTAINTOP REMOVAL MINING METHOD [FN23]

The term "mountaintop removal" mining has become popularized recently to describe the surface mining technique which reduces a mountain's original height by subsequently constructing a flat or gently rolling terrain. [FN24] One of the advantages of this method is that it can remove most, if not all of a coal seam. [FN25] Material covering the coal seam, termed "overburden," is first removed. The overburden "swells" when removed and then exceeds what is needed to reclaim the mining area. [FN26] The resulting excess material is often deposited into adjoining valleys and is known as a "valley fill." [FN27]

Typically, the mountaintop removal method is used in steep slope areas where prior coal mining has occurred and under such conditions, it represents the most economically viable means of recovering the resource. [FN28] Mountaintop removal operations obtain variances from the appropriate state and federal permitting authorities in order to change the contour of the land to maximize coal production at the site. [FN29] This mining method is controversial for two reasons. First, many people feel that the loss of a mountaintop damages the aesthetic quality of an area. [FN30] Second, this mining method may have a deleterious effect on the surrounding valleys and streams where the excess soil and rock is deposited. [FN31] However, this type of mining is an important source of the nation's energy supply. [FN32]

***391** As stated earlier, the mountaintop mining method, because it is a form of surface mining, is regulated by SMCRA. SMCRA sets forth, among other things, a permitting process requiring compliance with specific reclamation and environmental performance standards. [FN33] In lieu of the federal government enforcing SMCRA and its regulations in each state, a state may develop its own surface mining regulatory program. [FN34] If a state's program is as stringent as the federal program under SMCRA, that state can be granted primacy. [FN35] Subsequently, that state's own regulatory program will be enforced in place of SMCRA. [FN36] West Virginia's program was the first to be recognized for primacy on January 21, 1981. [FN37] Surface mining is important to the coal industry in West Virginia; this method represented 31 percent of the total coal mined in West Virginia in 1997. [FN38]

III. TAKINGS LAW AND MINING

A. The "Diminution in Value" Theory

1. Pennsylvania Coal Co. v. Mahon

The Mahon case considered whether private landowners must be compensated for a regulatory taking when actual physical invasion of their land does not occur yet the uses of their land are severely limited. [FN39] In Mahon, the constitutionality of a Pennsylvania statute called the Kohler Act was challenged. [FN40] This statute prohibited mining coal when subsidence would occur, with certain exceptions. [FN41] The Mahons possessed a deed which conveyed the surface rights but which reserved the right to remove underground coal. [FN42] Additionally, the deed contained a clause, whereby the Mahons waived "all claim for damages that may arise from mining out the coal." [FN43] After the Kohler Act was promulgated on May ***392** 27, 1927, the Mahons brought suit claiming that Pennsylvania Coal Company's right to mine under their property was "taken away." [FN44] Essentially, the plaintiffs asserted that even though the right to mine coal was reserved in the deed of conveyance where they built their house, the Kohler Act served to override the property and contract right to remove the coal. [FN45]

The Court was asked to consider whether forbidding the mining of coal was violative of Pennsylvania Coal Company's Fifth Amendment rights because it effected a taking without just compensation. [FN46]

The Supreme Court's majority opinion, written by Justice Oliver Wendell Holmes, stated that government "hardly could go on" if it had to pay every time a regulation diminished property value. [FN47] However, this statement is qualified by his famous declaration that "if regulation goes too far it will be recognized as a taking." [FN48] Holmes did not specifically define, in the opinion, what "too far" means. [FN49] He did state, however, that state police powers had to be limited in some way "or the contract and due process clauses are gone." [FN50] As a way of offering an example of how to consider the limitations, Holmes writes about "the extent of the diminution," thereby creating the diminution in value theory as applied to cases. [FN51] Some scholars have dismissed this as being a ridiculous proposition. [FN52] Nevertheless, Holmes created a test for takings cases which simply requires that one must consider the individual facts of the case when determining if a regulatory taking that triggers the just compensation requirement has occurred. [FN53] This essentially created a much-maligned case-by-case basis test. [FN54] Yet, it seems logical that a private property owner's constitutionally protected property rights be considered in the balance. These rights are no less important than the constitutionally provided state police powers.

***393** 2. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*

Importantly, in a later case, *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, the Court returned to its discussion about the diminution in value theory. [FN55] The plaintiffs argued and the lower court agreed, that the SMCRA provision establishing standards for mining operations on steep slopes [FN56] violated the takings clause because it could not be met. [FN57] The Supreme Court held that this was a facial challenge [FN58] and afforded the challenge a low level of scrutiny which the statute passed. [FN59]

Of significance, however, was the Court's dictum that it would apply a higher scrutiny when specific landowners could proffer adverse economic impacts and property devaluation to their individual lands. [FN60] Justice Powell, in his concurring opinion in *Hodel*, sheds light on the subject of when the Court may find that a taking has occurred. [FN61] Bearing in mind that Virginia and West Virginia have similar topography, Justice Powell's comments have great relevance to our state. Powell notes that coal is Virginia's most valuable natural resource. [FN62] Because the land is "marked by steep mountain slopes, sharp ridges, massive outcrops of rock, and narrow valleys," the alternative uses of land are "severely" limited. [FN63] The value of land, Powell states, "lies, in most instances, solely in its coal." [FN64] He further writes that "[a] number of the [Surface Mining Control and Reclamation] Act's provisions appear to have been written with little comprehension of its potential effect on this rugged area." [FN65] These statements, when considered with the aforementioned dictum in the majority opinion, seem to indicate that as applied, the steep slope requirements could effect a taking if an individual mining permit is denied. The *Hodel* opinion marked a definite return to Holmes' diminution in value ***394** theory and signaled a willingness in the Court to apply the Fifth Amendment's Taking Clause to regulations.

3. *Keystone Coal v. DeBenedictis*

In 1987, the Supreme Court decided *Keystone Coal v. DeBenedictis*. [FN66] Although the facts were stunningly similar to the facts in *Mahon*, the challenged Subsidence Act was found to not effect a takings and was, therefore, constitutional. [FN67] This was because in part, the Court stated, the company could still mine 50 percent of the coal on the property. [FN68] However, in this case and others, prohibiting surface mining outright may "extinguish the whole coal right," thereby effecting a taking, regardless of the fact that some coal will be accessible by other methods. [FN69]

In *Keystone*, the dissent argued that 27 million tons of coal must be left in place due to the Subsidence Act. [FN70] This coal is separate from the 50 percent allowed to be removed. [FN71] Since this coal

cannot be utilized in any way, the regulation should be considered a taking requiring just compensation. [FN72] "[T]he right to coal consists in the right to mine it." [FN73] If the right to mine the coal is taken away, all viable uses of the coal are taken away. [FN74] This leads into a discussion of a recently decided Supreme Court case, *Lucas v. South Carolina Coastal Council*. [FN75]

***395** 4. *Lucas v. South Carolina Coastal Council*

Lucas v. South Carolina Coastal Council was decided 70 years after the controversial Mahon opinion was published. [FN76] This case follows the same law set forth in Mahon, that when government regulation goes too far, it is a taking requiring just compensation. [FN77] Yet it has turned out to be just as controversial as Mahon. [FN78] The plaintiff, David Lucas, a real estate developer, bought property on the beachfront of an island in South Carolina with the intention of building homes on the lots. [FN79] Subsequently, South Carolina passed the Beachfront Management Act, preventing Lucas from building any occupiable dwellings. [FN80] The Supreme Court held that based on the trial court's findings, the plaintiff had lost all "economically viable" use of the property. [FN81] Based on this, South Carolina would be required to pay the plaintiff just compensation. [FN82] However, the Court limited its ruling by remanding the case for determining whether the plaintiff could have built the houses under state nuisance and property law. [FN83] This case is important because it stands for the proposition that a future use of property can be "taken." Therefore, it is significant to the coal industry because the most essential property right for that industry is the future right to remove the mineral.

B. The "Three Factor Penn Central Test"

1. *Penn Central Transp. Co. v. City of New York*

Although not a mining case, *Penn Central Transp. Co. v. City of New York* [FN84] is an important case in the establishment of takings doctrine. The plaintiff owned Grand Central terminal, which had been designated a "landmark" under New York City's Landmarks Preservation Law. [FN85] Penn Central wanted to construct a multi-story office building above the Grand Central terminal. [FN86] A Commission was created under the Landmarks Law and was charged with the responsibility of ***396** determining whether such changes could be made to landmarks. [FN87] In this case, the Commission rejected Penn Central's plan because it would be "destructive of the Terminal's historic and aesthetic features." [FN88] Penn Central promptly brought suit claiming that the decision violated the Fifth and Fourteenth Amendments of the United States Constitution by taking property without just compensation and without the due process of law. [FN89] The United States Supreme Court concluded that a takings had not occurred. [FN90] In its analysis, the Court noted and applied the three important factors which it had historically used in making previous decisions in takings cases. [FN91] The three factors include "an analysis of the economic impact, effect of reasonable investment-backed expectations, and character of the government action." [FN92] It is these three factors which future courts would deem the "Three Factor Penn Central Test." [FN93]

2. *Florida Rock Indus., Inc. v. U.S.*

The latest mining case on point is *Florida Rock Indus., Inc. v. U.S.* [FN94] which was filed in the United States Court of Claims. The United States Corps of Engineers had denied Florida Rock a permit that would have allowed it to mine limestone on its property. [FN95] The denial effected a taking under the Fifth Amendment requiring just compensation. [FN96] In its analysis, the court applied the "Three Factor Penn Central Test" to the facts of the case. [FN97]

In considering economic impact, the court looked at the property's value before and after permit denial,

effectively calculating a "diminution in value." [FN98] The court actually calculated that Florida Rock suffered a 73.1 percent diminution in value of its land. [FN99] "Recoupment of investment" was also explored in this ***397** factor's consideration. [FN100] The court considered whether Florida Rock could recover any of the money it had spent in preparation for mining the property. [FN101] It concluded that half of the investment could be recovered by making use of the property's only value left after prohibiting mining it - "resale as a speculative investment." [FN102] Based on the evidence proffered by both sides, the court found that denial of the permit caused Florida Rock a "severe economic impact." [FN103]

In considering the second factor of the Penn Central test, interference with reasonable investment-backed expectations, the court examined whether the disallowed use was the primary expectation for the property. [FN104] This consideration was obvious, Florida Rock had discovered the limestone in 1972 and bought the property specifically to mine the 100 million tons of rock underneath the surface. [FN105] Florida Rock had also prepared market studies at the time and determined that there was indeed a strong market for the stone and would be for several years. [FN106] Accordingly, using Penn Central language, the court found that the "primary expectation concerning the use of the parcel" was frustrated." [FN107]

Lastly, the court considered the "character of the government action." [FN108] The court found it significant that "[r]ock mining is widespread in this region of Florida." [FN109] Also, the mining of rock was "perfectly permissible" until permit denial by the Corps. [FN110] It was within the government's powers to create a policy that would benefit the general public by prohibiting some wetlands development. [FN111] However, it is for the judicial branch to determine whether such an action constitutes a taking "as if [the property] had been condemned." [FN112]

***398** C. Substantive Due Process

An alternative method for analyzing our hypothetical is substantive due process. [FN113] The due process clause may appear to merely guarantee certain procedures [FN114] but it has long been held to serve as a limitation on the substantive power of legislatures to regulate. [FN115] Traditionally, under substantive due process, a court would review a regulation to determine if it was a valid exercise of the state police power. [FN116] Substantive due process was later viewed as a rational basis test by which regulations are rarely, if ever, struck down. [FN117] Using this test, a regulation will be found constitutional if any rationale is offered to suggest that public interest is being promoted by the action. [FN118] This, in a sense, is no test at all. [FN119]

Recently, however, the Supreme Court defined substantive due process as a reasonableness test and rejected the rational basis test in *TXO Production Corp. v. Alliance Resources Co.* [FN120] This reasonableness test takes into account "the extent of the burden on the regulated party and requires that the public interest promoted be proportionate to the burden." [FN121] This reference to a reasonableness test is a return to ***399** the same language of a 1928 case that struck down a zoning ordinance. [FN122] In *Nectow v. Cambridge*, the property owner claimed that a zoning ordinance had deprived him of property without due process of law. [FN123] The Court held that "[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited." [FN124] Although the Court, in *Nectow*, stated that it would pay deference to the legislative judgment, it also mentioned a "balancing" of harm and benefit. [FN125]

The problem with substantive due process whether using the rational basis or reasonableness test is that it pays some deference to the regulation and merely pays lip service to the property owner's burden. It is thought that this reasonableness test "will catch an occasional case of regulatory carelessness." [FN126] However, it is a fact that since 1937, the Supreme Court has not struck down any economic regulations

for violating substantive due process. [FN127]

Even so, there is evidence that this trend may be changing. In the Supreme Court's latest regulatory takings case, *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, [FN128] it upheld jury instructions which allowed the jury to consider whether a city's decision to deny a permit for development was reasonably related to the city's justifications for the denial. [FN129] Although Justice Kennedy was careful to narrow the opinion, the decision can be interpreted to mean that the Court condones a much less deferential judicial review of land use decisions than does the rational basis test. [FN130] The resolution of *Del Monte Dunes* may, therefore, have wide implications because substantive due process, as historically practiced since 1937, has not given courts broad discretion when reviewing government action. [FN131] It now appears as if we are seeing the return of *Nectow*, and, although some deference will *400 be paid to legislative action, the Court seems willing to review such action with a higher level of scrutiny, and may perform a balancing test. [FN132]

IV. POTENTIAL EFFECT OF DENYING A COMPANY A MOUNTAINTOP REMOVAL MINING PERMIT

The following sections will consider the outcomes of a hypothetical case involving a property owner coal company holding the rights to mine coal on a tract of land either as property owner or lessee, that has been denied an individual mountaintop mining method permit in southern West Virginia. This denial can occur because of a decision by an administrative agency, judicial decision, or by the interpretation of a legislative rule.

A. Determination Using a Mahon/Lucas Analysis

It is evident that a court, in considering such a case, could use the rationales from *Mahon* and *Lucas* in making a takings determination. A company challenging such a permit denial has the potential to be successful by arguing its position from the perspective of both cases. *Mahon* and *Lucas*, read together, conclude that a regulation has gone "too far" when it deprives a property owner of all "economically viable" uses of the property; thus, a compensable taking will have occurred. [FN133]

A company will be more successful if certain things are true about the property. First, mountaintop removal mining will probably have to be the only possible mining method to recover the coal seam. [FN134] Even if substantially less coal can be extracted using other methods, a court probably will not find a compensable taking. This is because *Holmes*' "too far" language seems to have been interpreted in *Lucas* to mean that a loss in economic value very close to 100 percent is the only time a taking can occur. [FN135] Nevertheless, it is possible that in the future, the United States Supreme Court will take the position that a loss of less than 100 percent can still require just compensation. [FN136] Justice Scalia wrote the *Lucas* opinion and stated in a footnote that it is "unclear" whether a person will be found to have been deprived of all economically beneficial use of a burdened portion of the land, when, for example, 90 percent must be left undeveloped because of a regulation. [FN137] On the *401 other hand, Justice Scalia considers that this type of circumstance may be treated as a mere diminution in value for the entire tract, and thus, not qualify as a taking. [FN138] Justice Scalia has left open this question for another case.

By applying the above-mentioned dictum from *Lucas* to our hypothetical, the result might be something like the following. First, it is necessary to make some assumptions. The coal company/property owner is denied a permit to use the mountaintop removal mining method on its property. Additionally, the company has proof that 95 percent of the coal seam could have been extracted using this method. Underground mining is the second option and it is estimated that 30 percent of the seam will not be

extracted due to the limitations inherent in this method. The company can argue that, for 30 percent of the property, a takings has occurred because all economically viable uses of that portion of the property have been denied.

The analysis is easier if any other means of mining is impossible. This would preclude the company from any type of mining on the property. As the concurrence by Justice Powell noted in *Hodel*, the terrain on these types of properties is such that, no other economically viable use can be found. [FN139] The steep slopes and rocky soils usually preclude timbering, at least in a manner that is economically viable. [FN140] Additionally, farming and housing developments are generally out of the question. [FN141] Uses such as charging for hunting permits will probably not be found "viable," thus a court is more likely to find that a takings has occurred. [FN142]

B. Determination Using the Three Factor Penn Central Test

A company suffering a mountaintop removal mining permit denial is more likely to receive just compensation for a takings under this test. Each of the three factors is considered in turn.

First, considering economic impact, determining value before and after permit denial will be similar to the Florida Rock analysis and it should be easy to *402 calculate a diminution in value. [FN143] In this analysis, the fact that another mining method is permitted may not preclude a compensable taking as it would in the Mahon/Lucas determination. However, it will be a question of degree. For instance, if underground mining is possible on-site, there is no question that less coal can be extracted in this manner than via mountaintop removal mining where it is possible to mine the entire seam. [FN144] But if the diminution in the amount of coal that is unmineable by underground mining represents only 20 percent of the whole, this is certainly less significant than if 50 percent or more will remain in the ground. There is no magic number, the diminution in value is simply one of the considerations. Even so, severe economic impact will more likely be found when other mining methods are proven infeasible.

That the company has extensive investment-backed expectations to mine the property will probably be easily proved in our theoretical case. The company will have extensive documentation proving money spent in preparation to mine the coal including geology reports, and engineering and consulting services. It will be clear that the "primary expectation concerning use of the property is frustrated" by banning the planned mining method. Again, as with the first factor, the extent of this frustration depends on the feasibility of other mining methods on the property in question.

Lastly, in considering the character of the government action, the court will most likely find that it is within the government's police powers to create a policy prohibiting mountaintop removal mining in some cases. There is definitely some benefit conferred on the general public when any property is left undeveloped; particularly in the case of this hypothetical, where aesthetics play an important role. However, when the court considers the same issues it did in Florida Rock, it will be evident that one property owner via permit denial is shouldering the responsibility for the benefit. [FN145] This is precisely what the Fifth Amendment Takings Clause is meant to prohibit. [FN146] Similar to the facts in Florida Rock, the court will find other such mining operations in southern West Virginia which are permitted to occur. [FN147] Also, the permit denial will represent the government preventing what the property owner has a right to do under the common law. [FN148]

*403 C. Determination Using Substantive Due Process

By applying the traditional substantive due process, or rational basis test, to our hypothetical, it is obvious that any regulation banning the mountaintop removal mining method, even on an individual

basis, will not be found to be unconstitutional. This is because the rational basis test pays maximum deference to legislative decisions. [FN149]

However, there may be a different result if a court applies the newest form of substantive due process as it allowed in *Del Monte Dunes*. Under this analysis, court may apply a slightly higher level of scrutiny than the rational basis test. A judge or jury will consider whether the decision to deny the permit is "reasonably related" to a legitimate public purpose. Undoubtedly, the proffered justification for permit denial will include the benefits of leaving the land in its natural topographic state and environmental concerns. Although the reasons for permit denial will likely be found to be "legitimate public interests," the factfinder must consider whether this "particular decision" to deny the permit, in our hypothetical, is reasonably related to the public interests. [FN150] This inquiry does not promote "wholesale interference" [FN151] with land-use decisions, yet it allows for an examination of "the methods by which agencies negotiate with landowners and defer decisions." [FN152]

Additionally, unlike the rational basis test, a judge or jury may consider the surrounding circumstances pertaining to the permit denial in our hypothetical. [FN153] Therefore, the fact that the state agency has approved numerous permits similar to the one denied will be important. Also, the fact that the coal company/property owner has spent time and large sums of money in anticipation of mining the property via the mountaintop removal mining method, as previously allowed under other permits, is pertinent.

In summary, the "reasonableness" test allows for a balancing of interests similar to the "Three Factor Penn Central Test." Because a factfinder will be permitted to consider the burden on the property owner and surrounding circumstances, the plaintiff in our hypothetical is more likely to win a takings challenge than with the rational basis test.

*404 V. CONCLUSION

The courts have left open the question for the time being, about whether banning a specific type of mining method could effect a taking for an individual mine. After *Hodel* and *Lucas*, it is evident that in certain instances a court will find a taking requiring just compensation. This finding will be more probable in a state such as West Virginia where certain lands are likely to have no other economically viable use and where mountaintop removal mining may be the only mining method feasible.

Takings cases will continue to be decided on a case-by-case basis. However, the emergence of identifiable factors which a court will consider give a clearer guide to property owners in determining the viability of a takings claim in light of government regulation. The "Three Factor Penn Central Test" seems to be the best method of resolving these types of land use regulation cases because the judiciary is not required to pay deference to either side. Some scholars may argue that the Penn Central test is merely a guise for the substantive due process reasonableness test. Although the tests are similar, by using the three specific factors in the Penn Central test, it will be easier for a court or jury to balance the benefits and harm.

In summary, there is a strong possibility, with the right set of facts, that a taking requiring just compensation will be found when a specific mining method is banned. This is especially true given the dynamics of a changing United States Supreme Court. [FN154] This is a fair result. Individual property owners should not alone be forced to bear the cost of public policy, no matter how legitimate the interest. [FN155]

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College; B.S. Forestry, West Virginia University. I would like to thank my family for their continued support and dedicate this article in memory of my father, William F. Timmermeyer, I.

[FN1]. *Commonwealth v. Clearview Coal Co.*, 256 Pa. 328, 331 (1917) (emphasis added).

[FN2]. See U.S. Const. amend. V.

[FN3]. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 11.12 at 438 (5th ed. 1995) (citing F. BOSSELMAN ET. AL., *THE TAKING ISSUE* 51 (1973)).

[FN4]. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court held that government regulation must have its limits and one factor in determining if the government has overstepped the limits is the "extent of the diminution." *Id.* at 413. "When it [the extent of the diminution] reaches a certain magnitude, in most cases if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.*

[FN5]. See Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 *YALE L.J.* 613, 615 (1996).

[FN6]. See generally *Mugler v. Kansas*, 123 U.S. 623 (1887); *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

[FN7]. See 260 U.S. 393 (1922). See also Brauneis, *supra* note 5, at 615; James A. McLaughlin, *Majoritarian Theft in the Regulatory State: What's a Takings Clause For?*, 19 *WM. & MARY ENVTL. L. & POLICY REV.* 161, 164 (1995). See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

[FN8]. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.* 452 U.S. 264 (1981); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).

[FN9]. See generally *Hodel*, 452 U.S. 264 (1981) (plaintiffs argued that SMCRA provision violated the takings clause on its face).

[FN10]. See 30 U.S.C. §§ 201 - 1328 (1994).

[FN11]. See MARK SQUILLACE, *THE STRIP MINING HANDBOOK, A COALFIELD CITIZENS' GUIDE TO USING THE LAW TO FIGHT BACK AGAINST THE RAVAGES OF STRIP MINING AND UNDERGROUND MINING* 26 (1990).

[FN12]. See *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W.Va. 1999).

[FN13]. See *id.* at 663.

[FN14]. See *Bragg v. Robertson*, 190 F. R. D. 194 (S.D. W.Va. 1999).

[FN15]. See *Bragg*, 72 F. Supp. 2d 642, 658 (S.D. W.Va. 1999).

[FN16]. See *id.* at 653.

[FN17]. Courts have recognized property rights as including reasonable expectations. See *Kaiser Aetna v. U.S.*, 444 U.S. 164, 179 (1979) (property consists of recognized expectancies). The Kaiser Court also recognized that state law may create entitlements through express or implied agreements. See *id.* See also *Perry v. Sindermann*, 408 U.S. 593, 602 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577-8 (1972). Additionally, "property interests also may be created or reinforced through uniform custom and practice." *Nixon v. U.S.*, 978 F.2d 1269, 1276 (D.C. Cir. 1992) (citing *U.S. v. Arredondo*, 31 U.S. 691, 714 (1832)).

[FN18]. On April 24, 2001, the Fourth Circuit handed down its opinion in this case. The opinion reversed District Court Judge Haden's injunction which prohibited the WVDEP from issuing mining permits that allowed valley fills. See *Bragg v. Robertson*, No. 98-636-2, 2001 WL 410382, at *1 (4th Cir. Apr. 24, 2001). However, the reversal was based on sovereign immunity which barred the claim from being brought in a federal court. *Id.* It is unknown at this time whether the plaintiffs will reinstitute the action in a proper forum or appeal the Fourth Circuit's ruling.

[FN19]. See U.S. Const. amend. V.

[FN20]. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992).

[FN21]. See discussion *infra* Part III.B.

[FN22]. In the early 1900's substantive due process was a test which the Supreme Court used to evaluate economic legislation. In order for legislation to pass the substantive due process test, it had to bear some "reasonable relation to a legitimate end" and the judiciary did not pay deference to the government. *NOWALK & ROTUNDA*, *supra* note 3, at § 11.13, at 375. In the famous case of *Lochner v. New York*, 198 U.S. 45, 64 (1905), the Supreme Court struck down as unconstitutional, a law limiting the number of hours a baker could work in a week. Specifically, the Court held that government did not have a legitimate purpose in regulating labor practices unless it related to the category of health, safety, morals, or welfare. See *id.* at 53. However, after 1937, the Court avoided the use of substantive due process as a doctrine. See *NOWALK & ROTUNDA*, *supra* note 3, at § 11.4, at 385. Post-*Lochner*, economic legislation has been evaluated by the Supreme Court by paying deference to legislators. See *NOWALK & ROTUNDA*, *supra* note 3, § 11.4, at 385.

[FN23]. This is necessarily a brief description of the mountaintop removal mining method. For a more in-depth treatment of this mining method, see SAMUEL M. CASSIDY, *ELEMENTS OF PRACTICAL COAL MINING* 386 (1973).

[FN24]. See *A COMPLIANCE MANUAL: METHODS FOR MEETING OSM REQUIREMENTS 19-3* (SKELLY & LOY ed., 1979).

[FN25]. See *id.*

[FN26]. See *SQUILLACE*, *supra* note 11, at 140.

[FN27]. See *id.* at 24.

[FN28]. See Jonathan Belcher, *Exploring the Latitude of Lucas v. South Carolina Coastal Council: Local Control of Surface Mining*, 17 WM. & MARY J. ENVTL. L. 165, n. 13 (1993).

[FN29]. See A COMPLIANCE MANUAL: METHODS FOR MEETING OSM REQUIREMENTS, 19-3 (SKELLY & LOY ed., 1979).

[FN30]. See SQUILLACE, *supra* note 11, at 26.

[FN31]. See *id.* at 26.

[FN32]. See WEST VIRGINIA COAL ASSOCIATION, COAL FACTS 1998 30 (1998). Coal represented 57% of the electricity produced in the United in 1997. See *id.* Additionally, 61% of the total coal production 1997, was produced by surface mining. See *id.* at 3.

[FN33]. See 30 U.S.C. §§ 1251 to 1279 (1994).

[FN34]. See 30 U.S.C. § 1201(f)(1994).

[FN35]. See 30 U.S.C. § 1201(f)(1994).

[FN36]. See 30 U.S.C. § 1201(f)(1994).

[FN37]. See 30 C.F.R. § 948.10 (2000).

[FN38]. See WEST VIRGINIA COAL ASSOCIATION, *supra* note 31, at 3.

[FN39]. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

[FN40]. See *id.* at 412.

[FN41]. See Act of May 27, 1921 (Kohler Act), 1921 Pa. Laws 445. The prohibition applied when the miner did not own the surface rights and when certain supported structures were involved, such as houses, schools, and hospitals. See *id.*

[FN42]. See *Mahon*, 260 U.S. at 412.

[FN43]. *Id.*

[FN44]. See *id.*

[FN45]. See *id.* at 412-3.

[FN46]. See *id.* at 412.

[FN47]. *Mahon*, 260 U.S. at 413.

[FN48]. *Id.* at 413. Indeed, Holmes stated that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." See *id.* at 414.

[FN49]. See EPSTEIN, *supra* note 7, at 63. See also Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

[FN50]. Mahon, 260 U.S. at 413.

[FN51]. Id. See generally Rose, supra note 49, at 566-69 (exploring the diminution in value test).

[FN52]. See McLaughlin, supra note 7, at 164. See also Robert Brauneis, supra note 5, at 615 (author characterizes Holmes's opinion as "mysterious"); Rose, supra note 48, at 566 (identifying the diminution in value test as "troubling in its ambiguity").

[FN53]. See Mahon, 260 U.S. at 415. Perhaps this is consistent with the pragmatism that is implicit in Holmes' remark that "[the Constitution] is an experiment, as all life is an experiment." *Abrams v. U.S.*, 250 U.S. 616, 630 (1910) (possibly implying that we take each case, like we take each day, one at a time).

[FN54]. See sources cited supra note 51.

[FN55]. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

[FN56]. See 30 U.S.C. § 1265 (1994).

[FN57]. See *Hodel*, 452 U.S. at 293 (citing the district court case, *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 483 F. Supp. 425, 437 (W.D. Va. 1979), where the lower court held that in most cases, it would be "economically and physically" impossible to mine the lands in compliance with the stated provisions of SMCRA).

[FN58]. See *Hodel*, 452 U.S. at 295 ("[T]he only issue properly before ... this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking.>").

[FN59]. See id.

[FN60]. See id. at 296, n. 40. "[T]his holding does not preclude appellees or other coal mine operators from attempting to show that as applied to particular parcels of land, the Act and the Secretary's regulations effect a taking." Id. at 296. Additionally, the court held that if such a case is brought, there are several factors which much be considered. See id.

[FN61]. See *Hodel*, 452 U.S. at 306.

[FN62]. See id.

[FN63]. See id.

[FN64]. See id.

[FN65]. See id. at 307.

[FN66]. 480 U.S. 470 (1987). The vote was 5-4 with Justices Stevens, Brennan, White, Marshall, and Blackmun in the majority. Chief Justice Rehnquist wrote the dissent and was joined by Justices Powell, O'Connor, and Scalia.

[FN67]. See *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470, 506 (1987). The Pennsylvania Subsidence Act required that a certain amount of coal (generally 50%) be left in place in order to support certain dwellings on the surface such as houses, hospitals, and schools. See id. at 476. The plaintiffs in

this case were an association of coal mine operators and corporations which engaged in underground mining. See *id.* at 478. The complaint asserted that the section of the Act mandating that 50% of the coal be left in place constituted a taking of private property in violation of the Fifth Amendment. See *id.* at 479.

[FN68]. See *id.* at 485.

[FN69]. See Paul Upsons, *Valid Existing Rights Under the SMCRA and Takings Implications*, 22 *COLO. LAW.* 2405, 2406 (1993).

[FN70]. See *Keystone*, 480 U.S. at 515 (Rehnquist, C.J., dissenting).

[FN71]. See *id.* at 517.

[FN72]. See *id.* at 518.

[FN73]. See *Mahon*, 260 U.S. at 414 (quoting *Commonwealth v. Clearview Coal Co.*, 256 Pa. 328, 331 (1917)).

[FN74]. See *Keystone*, 480 U.S. at 518. The dissent, in discussing the property interest in the coal, asserts that "[f]rom the relevant perspective- that of the property owners-this interest has been destroyed every bit as much as if the government had proceeded to mine the coal for its own use." See *id.*

[FN75]. 505 U.S. 1003 (1992).

[FN76]. See *id.*

[FN77]. See *Lucas*, 505 U.S. at 1027.

[FN78]. See *McLaughlin*, *supra* note 7, at 165 (stating that the Supreme Court, through the *Lucas* opinion applied the diminution in value test for the first time).

[FN79]. See *Lucas*, 505 U.S. at 1008.

[FN80]. See *id.* at 1008-9.

[FN81]. See *id.* at 1020.

[FN82]. See *id.* at 1027.

[FN83]. See *id.* at 1031.

[FN84]. 438 U.S. 104 (1978).

[FN85]. See *id.* at 104.

[FN86]. See *id.*

[FN87]. See *id.*

[FN88]. Id.

[FN89]. See Penn Central, 438 U.S. at 104.

[FN90]. See id. at 138.

[FN91]. See id. at 124.

[FN92]. Id. (quoting Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

[FN93]. See Naegle Outdoor Adver. v. City of Durham, 803 F. Supp. 1068, 1073, n. 3 (M.D.N.C. 1992); and McNulty v. Town of Indialantic, 727 F. Supp. 504, 607 (M.D. Fla. 1989).

[FN94]. 45 Fed. Cl. 21 (1999).

[FN95]. See id. at 22.

[FN96]. See id. at 23.

[FN97]. See id. at 32.

[FN98]. See id. at 33.

[FN99]. See Florida Rock, 45 Fed. Cl. at 43.

[FN100]. Id. at 38.

[FN101]. See id.

[FN102]. In finding the property's value lying in the "speculative market," the court was recognizing the fact that someone may purchase the land with the expectation that the wetlands regulations may one day be "eased," thereby allowing mining on the property. Florida Rock, 45 Fed. Cl. at 34.

[FN103]. Id. at 38.

[FN104]. See id. (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978)). The Court in Penn Central stated that the New York law allowed the continued use of the terminal as it had been used for 65 years. See Penn Central, 438 U.S. at 136 (1978). "So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel." Id.

[FN105]. See Florida Rock, 45 Fed. Cl. at 39.

[FN106]. See id.

[FN107]. Id.

[FN108]. Id. at 40.

[FN109]. Id.

[FN110]. Florida Rock, 45 Fed. Cl. at 40.

[FN111]. See *id.* at 23.

[FN112]. *Id.*

[FN113]. See discussion *supra* note 22. Although *Lochner* has been treated as an anathema in the Supreme Court, some scholars claim that there has been an ongoing use of it even though the court has refused to use the words "substantive due process." See McLaughlin, *supra* note 7, at 204. Lately, however, the stigma attached to the use of substantive due process in cases involving economic regulation seems to be fading. Members of the court have been using the term and applying the test recently. For example, in *Moore v. East Cleveland*, Justice Powell stated the following: "Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection of certain substantive liberties without the guidance of the more specific provisions of The Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment" *Moore v. East Cleveland*, 431 U.S. 494, 495 (1977) (emphasis added). Even more recently, the court applied substantive due process in determining whether punitive damages were excessive and in violation of the Fourteenth Amendment." See *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 568 (1999). The court required that punitive "damages awarded must be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." See *id.* (emphasis added).

[FN114]. See U.S. Const. amend. XIV.

[FN115]. See *Lochner v. City of New York*, 198 U.S. 45, 53 (1905).

[FN116]. See *Lochner*, 198 U.S. at 53 (the police power exercise must fit into the category of health, safety, morals, or welfare and be reasonably related to the exercise of the police power).

[FN117]. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1948).

[FN118]. See *id.*

[FN119]. See Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. R. 977, 1024 (2000). Professor Eagle states that the rational basis test should be discarded, and in its place, a new test, "meaningful scrutiny," should be used. "Meaningful scrutiny" stands for the proposition used by the U.S. Supreme Court in a context other than takings that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 1025 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). See also McLaughlin, *supra* note 7, at 206 (describing the rational basis test as "utterly toothless").

[FN120]. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993).

[FN121]. See McLaughlin, *supra* note 7, at 164 (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993)).

[FN122]. See *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928).

[FN123]. See *id.* at 185.

[FN124]. *Id.* at 188.

[FN125]. See *id.*

[FN126]. McLaughlin, *supra* note 7, at 202.

[FN127]. See GERALD GUNTHER AND KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 483 (1997). See generally *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938) (upholding a federal prohibition of the interstate shipment of "filled milk"); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (sustaining "right to work" laws); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding an Oklahoma statute preventing opticians from fitting eyeglass lenses into frames without a prescription).

[FN128]. 526 U.S. 687 (1999).

[FN129]. See *id.* at 706 (1999).

[FN130]. See *id.* Justice Kennedy states that the jury instructions were limited to whether "in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proffered justifications." *Id.* Therefore, Justice Kennedy writes, a rule has not been adopted which allows a "wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions." *Id.*

[FN131]. See GUNTHER & SULLIVAN, *supra* note 127, at 483.

[FN132]. See *Del Monte Dunes*, 526 U.S. at 706.

[FN133]. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020 (1992); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

[FN134]. The word "possible" refers both to the supposition that mountaintop removal mining may physically be the only method available and that this may be the only method economically feasible due to market considerations.

[FN135]. See *Lucas*, 505 U.S. at 1016, n. 7.

[FN136]. See *id.*

[FN137]. See *id.* ("When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole."). See also *Florida Rock Indus., Inc. v. U.S.*, 45 Fed. Cl. 21, 32 (1999) (where the court seems to have taken Justice Scalia's dictum at face value by holding that "[t]he notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it").

[FN138]. See *id.*

[FN139]. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 306 (1981) (Powell, J., concurring).

[FN140]. *Id.*

[FN141]. *Id.*

[FN142]. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992) (Justice Blackmun, in his dissent, noted that Lucas could still use his property for swimming and camping, yet the Supreme Court upheld the trial court's finding that the property was valueless).

[FN143]. See *Florida Rock Indus., Inc. v. U.S.*, 45 Fed. Cl. 21, 33-7 (1999) (plaintiffs and the government both offered valuation experts).

[FN144]. See *A COMPLIANCE MANUAL: METHODS FOR MEETING OSM REQUIREMENTS 19-3* (SKELLY & LOY ed., 1979).

[FN145]. See *Florida Rock*, 45 Fed. Cl. at 23 (stating that "[c] ompensation is due when this test indicates that plaintiff was singled out to bear a burden which ought to be paid for by society as a whole").

[FN146]. See U.S. Const. amend. V.

[FN147]. See *Florida Rock*, 45 Fed. Cl. at 40. The Court found it notable that the disallowed use was widespread in the areas surrounding plaintiffs property. See *id.*

[FN148]. See *id.* at 24. See also *Lucas*, 505 U.S. at 1031 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack on any common-law prohibition So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.").

[FN149]. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1143 (2d ed. 1988). Professor Tribe states that for economic forms of regulation, the minimum rationality test should "continue to govern under the traditional deferential 'conceivable basis' test ... as a means of upholding all but the most brazenly and blatantly irrational governmental measures." *Id.* at 1445- 6 (emphasis added).

[FN150]. See *Del Monte Dunes*, 526 U.S. at 706.

[FN151]. See *id.*

[FN152]. *Eagle*, *supra* note 119, at 1039.

[FN153]. See *Del Monte Dunes*, 526 U.S. at 706 (the jury was "not asked to evaluate the city's decision in isolation but rather in context") (emphasis added).

[FN154]. See *Brauneis*, *supra* note 5, at 615 (noting that before 1986, on only four occasions in its two-hundred-year history did the Supreme Court find compensable regulatory takings, yet the Rehnquist Court found four in its first 10 years).

[FN155]. The Supreme Court supported this view in its statement that the "Fifth Amendment's guarantee that property shall not be taken without just compensation was designed to bar Government from forcing

some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).

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