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Challenging Payday Lenders by Opening up the Market for Small-Dollar Loans

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Foreword

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It is appropriate that this groundbreaking issue of the *BYU Journal of Public Law* should deal with a subject that is both doctrinally profound and also of great practical importance. Recent decades have seen significant increases in land use planning efforts by governments at all levels. Necessarily, these efforts have resulted in the diminution—and in many cases the virtual elimination—of property values. Does the Constitution provide any protection against such exercises of governmental power? Under what circumstances may land use regulation amount to a "taking," for which the fifth and fourteenth amendments to the Constitution require just compensation to be paid?

The cornerstone of our modern regulatory takings jurisprudence is the Supreme Court's 1922 decision in *Pennsylvania Coal v. Mahon*,[1] authored by Justice Holmes. To many people of that day, Holmes' authorship of the *Pennsylvania Coal* opinion must have come as something of a surprise. It was the same Justice Holmes who, having witnessed the "grasping and predatory industrialism"[2] of his day, frequently advocated construing the fourteenth amendment narrowly and the state police power broadly. In fact, some thought that his judicial opinions gave legislatures a virtual free rein to regulate economic growth and development.[3]

Pennsylvania Coal involved a Pennsylvania law, the Kohler Act, which prevented coal companies from mining coal in certain areas. The law was designed to prevent surface subsidence and its accompanying problems and appeared to be the kind of reasonable exercise of the police power that in Justice Holmes' view would fall safely within the legislative power. Nonetheless, seven other Justices joined with Justice

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1. 260 U.S. 393 (1922).

2. M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES xxvii (1943). In speeches to law students during the later years of his life Justice Holmes revealed that he was "saddened at the sordid commercialism he saw, both among industrialists and among lawyers." *Id.*

3. *Id.* at 185.

Holmes in holding that the statute, by failing to provide compensation to coal companies for the coal they were forced to leave under the ground, violated the fifth amendment of the Constitution. "We are in danger of forgetting", Justice Holmes wrote, "that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[4]

Times have changed greatly since 1922. Many more people populate the United States, making our nation's land an even more precious commodity. During the past 65 years great quantities of natural resources have been consumed or manufactured into other products. The extraction and use of these resources have been the source of significant air, water and land degradation, some of it possibly irreversible.

Thus, the issue the Supreme Court faced when it decided *Pennsylvania Coal* in 1922 is more sharply defined today, largely because of increasing societal concern about the way we use and abuse our natural resources. To what extent may government impose limits on the use of privately owned land before it can be said that private property has been "taken" for public use, requiring "just compensation"?[5] This issue has surfaced repeatedly in the Court in recent years, though we have not yet progressed much beyond the ambiguous *Pennsylvania Coal* rule that if governmental regulation "goes too far" a taking may occur.[6]

Most recently, in what many observers thought would be a replay of *Pennsylvania Coal*, a Supreme Court majority of five held that Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (the "Subsidence Act"), which requires 50% of the coal beneath certain protected structures to be kept in place, was not a *per se* taking of private property.[7] *Keystone Bituminous Coal Assn.* v. *DeBenedictis*,[8]

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4. Pennsylvania Coal v. Mahon, 260 U.S. at 416.

5. This debate has existed since the early days of our nation. It was no secret that the Federalists wanted to secure the right of private property ownership from democratic incursions. R. SCHLATTER, PRIVATE PROPERTY 190 (1951). Opponents of the Federalist view, on the other hand, held that "the prerogatives of property were as fit to be abridged as those of princes." *Id.* at 192. Out of this conflict emerged the fifth amendment "which became the chief legal barrier to popular demands for the limitation of private ownership." *Id.* at 194. Interestingly enough, it was the anti-federalists who insisted on the amendment. They saw the amendment as "an explicit guarantee of the rights of nature", i.e., an assurance that property ownership was not reserved for a favored few. *Id.* at 193.

6. Justice Holmes wrote: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 189.

7. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987) (No. 85-1092). The majority consisted of Justice Stevens, who wrote the opinion, and Justices Brennan, Marshall, White and Blackmun.

the modern day counterpart of *Pennsylvania Coal*, distinguished,[9] but did not overrule, Justice Holmes' 65 year old opinion. *Keystone*'s major thrust may well be that times really *have* changed.[10] Justice Stevens, writing for the majority, compared *Keystone* with *Pennsylvania Coal*, focusing on what he regarded as differences between the legislative purposes underlying the two Pennsylvania subsidence statutes involved in the respective cases. The Kohler Act, he noted, was enacted to prevent damage to "some private landowners' homes."[11] The Subsidence Act, on the other hand, was enacted "to protect the public interest in health, the environment, and the fiscal integrity of the area."[12] Thus, the majority implied that the effects of subsidence in Pennsylvania today are more acute than they were in 1922, justifying an extension of the police power. Such an implication is strengthened by the fact that the stated purposes of the Kohler Act and the Subsidence Act are virtually the same.[13]

After recognizing the public interests at stake, the majority later explicitly held that the subsidence in Pennsylvania was akin to a public nuisance and that police power restrictions were therefore justified.[14] This was a bold step, which, as the dissent noted "suggests an exception far wider than recognized in . . . previous cases."[15] While the central purposes of the Subsidence Act included public safety concerns (the traditional concerns of the police power), the Act reflected economic concerns as well. Chief Justice Rehnquist voiced disagreement with allowing "a regulation based on essentially economic concerns to be insu-

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8. *Id.*

9. *Id.* at 4329. The majority divided Justice Holmes' opinion into two parts: 1) the decision of the case at hand, i.e., the injury to the Mahons' specific property; and 2) the portion of the opinion discussing the general validity of the Kohler Act. The *Keystone* majority called the second portion of Justice Holmes opinion "uncharacteristically. . .advisory. . . ." *Id.* at 4330. This characterization might appear odd to Justice Holmes who wrote to his close friend, Frederick Pollock, in November of 1922 that he believed the *Pennsylvania Coal* decision "to be a compact statement of the real facts of the law and as such sure to rouse opposition for want of the customary soft phrases." Letter from Justice Holmes to Frederick Pollock (November 26, 1922) *quoted in* LERNER, *supra* note 2, at 185.

10. The majority specifically stated that the Subsidence Act was "a prime example that 'circumstances may so change in time. . .as to clothe with such a [public] interest what at other times. . .would be a matter of purely private concern.' " *Keystone*, 55 U.S.L.W. at 4331 (citing with approval Block v. Hirsh, 256 U.S. 135, 155 (1921)).

11. *Keystone*, 55 U.S.L.W. at 4331.

12. *Id.*

13. For a comparison of the two statutes see this issue, Berger, *The Year of the Taking Issue*, 1 BYU J. PUB. L., 261, 287 (1987).

14. *Keystone*, 55 U.S.L.W. at 4331.

15. *Id.* at 4337 (Rehnquist, C.J., dissenting).

lated from the dictates of the Fifth Amendment by labeling it nuisance regulation."[16]

By its terms, the fifth and fourteenth amendments' takings guarantee could be construed as applying only to exercises of the eminent domain power. Under this view, the constitutional guarantee would come into play only in those circumstances where governmental action has not only diminished the individual's net worth, but has also enriched the government or someone designated by the government. However, it has been clear since at least as early as 1922 when *Pennsylvania Coal v. Mahon* was decided that the takings clause is not so limited; there are some circumstances under which governmental exercise of its regulatory authority may amount to a taking for which the Constitution requires that compensation be paid.[17] *Keystone* does not disturb that basic ruling. Neither, however, does it do much to clarify the law. Controversy will continue over the kinds of governmental regulation that go "too far" and which therefore amount to effective takings.[18] Accordingly, the importance of the issue with which this volume deals seems assured for at least the immediate future.

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16. *Id.* at 4338.

17. The Supreme Court recently affirmed that so-called "temporary regulatory takings" fit within this category. First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles, California, 85-1199 Slip Op. (U.S. Supreme Court June 9, 1987). For a detailed discussion of the *Lutheran Church* see this issue Berger, *The Year of the Taking Issue*, BYU J. Pub. L. 261-303 (1987).

18. Following the recent Supreme Court decision in Nollan v. California Coastal Comm'n., 86-133 (U.S. June 26, 1987), controversy is likely to increase regarding the proper standard of review of the ends-means relationship between the purposes of land-use regulations and the means applied in holding that a condition placed upon a development permit was an improper use of the police power, the court stated that "the evident constitutional property (of conditions placed upon building permits) disappears, . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification as the prohibition." Id. For a discussion of the *Nollan* case see this issue, Berger, *The Year of the Taking Issue*, 1 BYU J. Pub. L. 261, 315 (1987).