Tulsa Law Review

Volume 16
Number 3 *Energy Symposium*

Volume 16 | Number 3

Spring 1981

Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking

Patrick Charles McGinley

Joshua Barrett

PENNSYLVANIA COAL COMPANY v. MAHON REVISITED: IS THE FEDERAL SURFACE MINING ACT A VALID EXERCISE OF THE POLICE POWER OR AN UNCONSTITUTIONAL TAKING?

Patrick Charles McGinley*
and
Joshua Barrett**

I. INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977[1] is the product of a hard-fought and lengthy battle which sought to end environmental damage resulting from unregulated or underregulated surface and deep coal mining activities.[2] In the relatively short time since its enactment, the SMCRA has been besieged by coal industry challenges. Several cases have raised the issue whether certain provisions of the Act violate the fifth amendment prohibition against the taking of private property without just compensation.[3] In each of the challenges

* A.B., Dickinson College; J.D., Duke University; Associate Professor of Law, West Virginia University.

** B.A., Wesleyan University; J.D., West Virginia University; Member of the West Virginia Bar.

1. Surface Mining Control and Reclamation Act of 1977, §§ 101-908, 30 U.S.C. §§ 1201-1328 (Supp. II 1978) [hereinafter cited as the SMCRA or as the Act].

2. Serious efforts to enact national surface mining legislation date back to 1972. For a review of the legislative history of the Act, see H.R. REP. NO. 218, 95th Cong., 1st Sess. 140-41, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 672-73. For a review of the conditions attending the Act's enactment, see Gage, *The Failure of the Interim Regulatory Program Under the Surface Mining Control and Reclamation Act of 1977: The Need for Flexible Controls*, 81 W. VA. L. REV. 595-96 (1979). *See also* Dunlap, *An Analysis of the Legislative History of the Surface Mining Control and Reclamation Act of 1975*, 21 ROCKY MT. MIN. L. INST. 11 (1975).

3. *See* Va. Surface Min. & Reclamation Ass'n v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980), *prob. juris. noted*, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596); In re Permanent Surface Mining Regulation Litigation, 13 ERC 1586, 9 ELR 20720 (D.D.C. 1979); Indiana v. Andrus, 10 ELR 20613 (S.D. Ind. 1980), *prob. juris. noted*, 101 S. Ct. 67 (1980); Star Coal Co. v. Andrus, 10 ELR 20328 (S.D. Iowa 1980).

alleging an unconstitutional "taking," coal industry plaintiffs have relied primarily on the 1922 landmark case, *Pennsylvania Coal Co. v. Mahon*.[4]

In *Pennsylvania Coal*, Mr. Justice Holmes, speaking for the Supreme Court, established a foundation for the present SMCRA taking challenges:

> What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it. We are in danger of forgetting 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.[5]

In *Virginia Surface Mining and Reclamation Association v. Andrus*,[6] the District Court for the Western District of Virginia held that section 515 of the SMCRA violated the fifth amendment taking prohibition.[7] Section 515 requires surface coal mine operators to restore land mined on steep slopes to the approximate original, pre-mining, contour. The court found that "it is economically and physically impossible to restore these steep slopes to approximate original contour, and therefore, that it is physically and economically impossible to mine the coal."[8] The court indicated that even if it were possible to recreate steep slopes, the restoration requirement reduced the value of the land to "practically nothing,"[9] whereas if the land "were left stabilized with benches, with roads already constructed, it would be worth several thousand dollars per acre."[10]

In *Indiana v. Andrus*,[11] the State of Indiana and several coal companies obtained an injunction against the enforcement of sections 508(a)(2),[12] 510(d)(i),[13] and 519(c)(2) of the SMCRA on the grounds that their enforcement constituted a taking violative of the fifth amend-

4. 260 U.S. 393 (1922).
5. *Id.* at 414, 416.
6. 483 F. Supp. 425 (W.D. Va. 1980), *prob. juris. noted*, 101 S. Ct. 67 (1980).
7. *Id.* at 441. Office of Surface Mining Reclamation and Enforcement [OSM] regulations implementing § 515 are found in 30 C.F.R. § 715.11-716.7 (1980).
8. 483 F. Supp. at 437.
9. *Id.*
10. *Id.*
11. 10 ELR (E.L.I.) 20613 (S.D. Ind. June 10, 1980).
12. 30 U.S.C. § 1258(a)(2)(c) (Supp. II 1978).
13. *Id.* § 1260(d)(1).

ment.[14] These sections of the SMCRA relate to the mining and reclamation of prime farmlands.[15] The district court found as a fact that it was technologically impossible to reclaim prime farmlands in the manner required by the Act. Because such farmland is unrestorable the court held that the Act prohibited coal mining, thereby completely destroying the value of the mineral interest in violation of the taking prohibition of the fifth amendment.

One other section of the SMCRA was challenged on taking grounds in *Virginia Surface Mining* and in *Indiana v. Andrus*. In each case, section 522 of the SMCRA was challenged by the coal companies and held by the respective courts to be unconstitutional on its face. Section 522 prohibits surface mining on certain federal lands and also allows the Office of Surface Mining, or an approved state regulatory authority, to designate other lands as unsuitable for some or all types of coal mining.

Both the *Virginia* and the *Indiana* district courts relied principally on *Pennsylvania Coal Co. v. Mahon* as the basis for invalidating the challenged SMCRA provisions.[16] The United States Supreme Court, however, has issued a stay of the district courts' orders pending disposition of the government appeals.[17]

The stage is thus ripe for review of *Pennsylvania Coal Co. v. Mahon*, which is perhaps the leading case in the Supreme Court's taking jurisprudence. At stake is the viability of a congressional attempt to curtail the extensive strip mining damage by federalizing enforcement and reclamation of such mining activities in the coal regions of the United States.

While the slope restoration and farmland reclamation taking issues are important, the invalidation of section 522 of the SMCRA in the *Virginia* and *Indiana* cases provides the best analytical basis for

14. 10 ELR at 20621.

15. Prime agricultural lands are those available for growing crops which have the soil quality, growing season, and moisture supply needed to produce sustained high yields when treated and managed in accordance with modern farming methods. Such lands can be farmed intensively with minimum adverse environmental impacts, lower energy and economic inputs, and higher yields than nonprime lands. *See* H.R. REP. No. 218, 95th Cong., 2d Sess. 105, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 593, 638. *See also* 30 U.S.C. § 1291 (20) (Supp. II 1978).

16. In Virginia Surface Mining and Reclamation Ass'n v. Andrus, the court held that the case before it was "on all fours with Pennsylvania Coal Co. v. Mahon." 483 F. Supp. at 44. In Indiana v. Andrus, the court relied exclusively on *Pennsylvania Coal.* 10 ELR at 20621.

17. Andrus v. Virginia Surface Mining & Reclamation Ass'n, Inc., *prob. juris. noted*, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596); Andrus v. Indiana, *prob. juris. noted*, 101 S. Ct. 67 (1980) (No. 80-231).

review of the taking issue in light of *Pennsylvania Coal Co. v. Mahon*.[18] The following discussion will focus, therefore, on section 522 of the SMCRA.

II. DESIGNATION OF AREAS AS UNSUITABLE FOR COAL MINING: AN ANALYSIS OF SECTION 522 OF THE SMCRA

The SMCRA imposes uniform environmental standards[19] and gives citizens a voice in the implementation and enforcement of these standards.[20] In addition, the Act creates an Abandoned Mine Reclamation Fund for the restoration of orphaned lands,[21] provides funds to universities for research into problems and technology relating to surface mining,[22] regulates the surface effects of underground mining,[23] and allows for the limitation of noncoal surface mining.[24] One of the unique aspects of the Act is that it promotes reasoned land use planning. A key provision in this respect is section 522, entitled "Designating Areas Unsuitable for Surface Coal Mining."[25]

A. *Basic Designations*

There are three basic designations of unsuitability available under section 522. The first, set forth in section 522(a)(2), is a mandatory

18. The prime farmland reclamation and return to approximate original contour questions seem relatively easy to resolve. In each situation, Congress found that the reclamation of such areas was practically and economically feasible. 30 U.S.C. § 1201(c)(Supp. II 1978). Moreover, Congress found that the failure to properly reclaim such areas resulted in significant harm to the public. *Id.* § 1201(c). On lands where reclamation under the Act is impossible, Congress intended that those lands not be mined because of the possibility of harm to the public if proper reclamation could not be accomplished. *Id.* § 1202(c),(d). Arguably, the district courts erred when they rejected congressional findings and substituted their own views on the feasibility of SMCRA mandated reclamation. *See* Star Coal Co. v. Andrus, 10 ELR 20328, 20329-30 (S.D. Iowa 1980).

19. SMCRA §§ 515-516, 30 U.S.C. §§ 1265-1266 (Supp. II 1978). The Act created the Office of Surface Mining in the Department of the Interior. The Secretary of the Interior is charged with administering the Act through this Office. *Id.* § 201(b), (c), 30 U.S.C. § 1211(b), (c) (Supp. II 1978). Regulations promulgated under this section are codified in 30 C.F.R. § 70.1-845.20 (1980), and are accompanied by a lengthy preamble in 44 Fed. Reg. 14,902 (1979).

20. *See* Note, *Citizen Participation in the Regulation of Surface Mining*, 81 W. VA. L. REV. (1979).

21. SMCRA §§ 401-413, 30 U.S.C. §§ 1231-1243 (Supp. II 1978).

22. *Id.* §§ 301-309, 30 U.S.C. §§ 1221-1229.

23. *Id.* § 516, 30 U.S.C. § 1266.

24. *Id.* § 601, 30 U.S.C. § 1281.

25. *Id.* § 522, 30 U.S.C. § 1272 (Supp. II 1978). This planning concept is not entirely new and has been codified in many states. *See generally* KY. REV. STAT. § 350.085 (Supp. 1980); MD. NAT. RES. CODE ANN. §§ 7-505 to -505.1 (Supp. 1980); MONT. REV. CODES ANN. § 50-1042 (Supp. 1977); N.D. CENT. CODE § 38-14.1-05 (Supp. 1979); OKLA. STAT. tit. 45, §§ 781-783 (Supp. 1980); S.D. COMP. LAWS ANN. § 45-6A9.1 (Supp. 1980). *See also* McGinley, *Prohibition of Surface Mining in West Virginia*, 78 W. VA. L. REV. 445 (1976).

standard that must be triggered by a citizen petition calling for the designation of an area as "unsuitable for all or certain types of surface coal mining operations" if the Secretary or state regulatory authority "determines that reclamation pursuant to the requirements of this Act is not technically and economically feasible."[26]

The second category, section 522(a)(3), is discretionary.[27] Under this provision, following receipt of a citizen petition, mining operation may be designated as unsuitable for certain types of surface coal mining operations if such operations will:

> (1) be incompatible with existing state or local land use programs; or
>
> (2) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems; or
>
> (3) affect renewable resource lands in which such operations could result in substantial loss or reduction of long range productivity of water supply or of food and fiber products, such lands to include aquifers and aquifer recharge areas; or
>
> (4) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.[28]

The third category of designation, section 522(e) of the Act, may be termed "designation by Act of Congress."[29] Section 522(e) designations do *not* require initiation by citizen petition, but instead prohibit surface mining by force of law in certain protected areas. These areas include national parks and certain federal forest lands.[30] Mining operations that will adversely affect any public park or place listed in the National Register of Historic Sites are also proscribed under section 522(e) unless special permission is obtained.[31] Finally, the Act prohibits surface mining within specified distances of any occupied dwelling, public road, public building, public park, or cemetery.[32]

---

26. SMCRA § 522(a)(2), 30 U.S.C. § 1272(a)(2) (Supp. II 1978).
27. *Id.* § 522(a)(3), 30 U.S.C. § 1272(a)(3).
28. *Id.* § 522(a)(3)(A)-(D), 30 U.S.C. § 1272(a)(3)(A)-(D).
29. *Id.* § 522(e), 30 U.S.C. § 1272(e).
30. *Id.* § 522(e)(1)-(2), 30 U.S.C. § 1272(e)(1)-(2).
31. *Id.* § 522(e)(3), 30 U.S.C. § 1272(e)(3).
32. *Id.* § 522(e)(4)-(5), 30 U.S.C. § 1272(e)(4)-(5).

B. *The "Grandfather Clause" and "Valid Existing Rights"*

Designations under the first two categories, section 522(a)(2) and (3), are subject to the limitations of a "grandfather clause":

> The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on the date of enactment of this Act or under a permit issued under this Act, or where substantial legal and financial commitments in such operations were in existence prior to January 4, 1977.[33]

Although the phrase "substantial legal and financial commitments" seems to be extremely broad, the legislative history narrows the scope of the exemption considerably.

> The phrase "substantial legal and financial commitments" . . . is intended to apply to situations where, on the basis of a long term coal contract, investments have been made in powerplants, railroads, coal handling and storage facilities and other capital-intensive activities. The committee does not intend that mere ownership or acquisition costs of the coal itself or the right to mine it should constitute "substantial legal and financial commitments."[34]

Similarly, "Designations by Act of Congress" under section 522(e) do not allow prohibition of mining operations in existence on August 3, 1977,[35] the date of enactment of the SMCRA. Section 522(e) provides that its prohibitions are "subject to valid existing rights."[36] Valid existing rights are defined by Department of Interior regulations. In order for such rights to be recognized at least two factors must be present.

The regulations first require that a "legally binding conveyance, lease, deed, contract or other document" exist, which authorizes surface mining.[37] In accordance with the legislative history,[38] such a document must be interpreted according to custom and usage at the time and place of conveyance. Moreover, there must be "a showing . . . that the

33. *Id.* § 522(a)(6), 30 U.S.C. § 1272(a)(6).

34. H.R. REP. No. 218, 95th Cong., 1st Sess. 95 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 631. While this explanation clarifies an otherwise confusing clause, it does not completely eliminate the possibility that the exception will swallow the rule. One unresolved issue involves the area of land exempted where a capital intensive investment occupies a small space or is not site specific.

35. SMCRA § 522(e), 30 U.S.C. § 1272(e) (Supp. II 1978).

36. *Id.*

37. 30 C.F.R. § 761.2 (1980).

38. H.R. REP. No. 218, 95th Cong., 1st Sess. 95, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 631-32; S.H. REP. No. 128, 95th Cong., 1st Sess. 94-95 (1977) (citing United States v. Polino, 133 F. Supp. 722 (S.D. W.VA. 1955)).

parties . . . actually contemplated a right to conduct the same . . . mining activities for which the applicant claims a valid existing right."[39]

Second, the regulations require that those seeking to mine an area obtain all necessary state and federal permits before August 3, 1977, or "demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all permits were obtained prior to August 3, 1977."[40] This second requirement demonstrates that the "valid existing rights" provision was designed to avoid the taking of property without just compensation and that it should be construed accordingly.[41] A recent federal court ruling has broadened the regulatory definition to include situations where a good faith attempt was made to obtain all permits before August 3, 1977.[42]

C. *Procedures*

1. Petitions

The primary mechanism for initiation of the designation procedures under section 522(a)(2) and (3)[43] is the petition process. The Act provides that "any person having an interest which is or may be adversely affected" may file a petition to have an area designated as unsuitable for all or certain types of mining.[44] The legislative history of the Act[45] indicates that "the phrase, 'any person having an interest which is or may be adversely affected' shall be construed to be coterminous with the broadest standing requirements enunciated by the U.S. Supreme Court."[46] Thus, the OSM regulations governing the petition

39. 30 C.F.R. § 761.5(b)(2) (1980).

40. *Id.* § 761.5(a)(ii). The regulation further provides that

> "Valid existing rights" does not mean mere expectation of a right to conduct surface coal mining. . . . Examples of rights which alone do not constitute valid existing rights include, but are not limited to, coal exploration permits or licenses, applications or bids for leases, or where a person has only applied for a State or Federal permit.

Id. § 761.5(d).

41. 44 Fed. Reg. 14,902, 14,992 (1979). This interpretation is not unreasonable but is nevertheless subject to dispute. *See* United States v. Polino, 133 F. Supp. 772 (S.D.W.VA. 1955); 123 CONG. REC. H 3827 (daily ed. April 29, 1977).

42. In re Permanent Surface Mining Regulations, 9 ELR 20720 (D.D.C. Aug. 21, 1979).

43. *See* text accompanying notes 22-24 *supra*.

44. SMCRA § 722(c), 30 U.S.C. § 1272(c) (Supp. II 1978).

45. H.R. REP. No. 218, 95th Cong., 1st Sess. 90, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 626. *See also* Sierra Club v. Morton, 405 U.S. 727 (1972).

46. H.R. REP. No. 218, 95th Cong., 1st Sess. 90, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 626.

process not only require the allegation of injury in fact,[47] but they are sufficiently broad to encompass injury to environmental, recreational, and aesthetic interests as well as property and economic interests.[48]

The petition must contain "allegations of facts with supporting evidence which would tend to establish the allegations."[49] Exactly what the petitioner must show is unclear. The OSM regulations cast further confusion on the matter by allowing the regulatory authority to reject petitions that are deemed "frivolous."[50] It may be reasonably argued that the use of language such as "frivolous" in a statutory scheme seeking broad citizen participation is ill-advised, although it is not without support in the legislative history.[51] There is no doubt, however, that Congress intended to encourage citizen participation in the petition process. This view is supported by SMCRA provisions that mandate against comprehensive technical pleadings, which would discourage citizen participation.[52]

Once a petition has been accepted a permit may not be issued for the pertinent land until final action has been taken by the regulatory agency. An exception to the rule applies, however, if the petitioner demonstrates that he has made "substantial legal and financial commitments" relating to the proposed mining operations, and that such commitments were made prior to January 1, 1977.[53]

---

47. 30 C.F.R. § 764.13(b)(5) (1980).

48. *Person having an interest which is or may be adversely affected* or *person with a valid legal interest shall include* any *person*—

(a) Who uses any resource of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority; or

(b) Whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority.

Id. § 700.5 (1980) (emphasis added).

49. SMCRA § 522(c), 30 U.S.C. § 1272(c) (Supp. II 1978).

50. 30 C.F.R. § 764.15(a)(3) (1980).

51. *See* H.R. REP. No. 128, 95th Cong. 1st Sess. 94 (1977).

52. SMCRA §§ 102(i), 522(e)(4), 30 U.S.C. §§ 1202(i), 1272(e)(4) (Supp. II 1978) (requiring public notice and opportunity for public participation). One court has passed on the power of a state to require that a § 522 petition contain more information than that required by 30 C.F.R. § 764(b) (1980). The Court stated:

> This regulation protects the regulatory authority against frivolous petitions. It also protects the petitioner against overly burdensome informational requirements. Moreover, the regulation does not prohibit a state regulatory authority from requiring additional information that could affect the outcome of the petition.

In re Permanent Surface Mining Regulation Litigation, 14 ERC 1083, 1094 (D.D.C. 1980).

53. SMCRA § 522(a)(6), 30 U.S.C. § 1272(a)(6) (Supp. II 1978) (codified in 30 C.F.R. § 762.13(c) (1980); see notes 33 & 34 *supra* and accompanying text. Petitions must be received before the end of the public comment period in order to stay permit issuance. Petitions received

2. Public Hearing Requirement

The Act requires that a public hearing on the petition's proposed designation be held within ten months after receipt of the petition.[54] The hearing must be held in the locality of the affected area unless all petitioners "stipulate agreement prior to the requested hearing, and withdraw their request."[55] "Appropriate notice . . . of the date, time, and location of such hearing" must be given, and "any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations."[56] The regulations indicate that notice must be forwarded to all local, state, and federal agencies having an interest in the decision, the petitioner and intervenors, and all persons known by the regulatory authority to have real property interests in any part of the area covered by the petition.[57] Two weekly newspaper notices must be published four to five weeks before the hearing to advise the general public of the pendency of proceedings.[58]

The Act is silent with regard to the type of hearing required. The regulations, however, provide for nonadjudicatory public hearings, "legislative and fact-finding in nature, without cross-examination of witnesses."[59] The OSM's decision to follow the legislative hearing model was likely intended to avoid adjudicatory procedures which would be inappropriate to local public participation where, for example, cross-examination might "intimidate witnesses whose own experience might provide valuable information for the record."[60]

The entire fact-gathering mechanism set forth in section 522(a)(4) of the Act[61] supports the conclusion that such hearings should be informal rather than adjudicatory. The mechanism anticipates that the agency will draw on internal and external resources to make independant judgments on designation, and that it will not merely act as an impartial arbitrator between conservationists and mineral owners.[62] In cases that have challenged the nonadjudicatory nature of the proce-

after this date may still preclude the issuance of permits for other lands within the area described in the petition. 30 C.F.R. § 764.15(a)(7) (1980).

54. *Id.* § 522(c), 30 U.S.C. § 1272(c).

55. *Id.*

56. *Id.*

57. 30 C.F.R. § 764.17(b) (1980).

58. *Id.*

59. *Id.* § 764.17(a).

60. 44 Fed. Reg. 14,902, 15,004 (1979).

61. 30 U.S.C. § 1272(a) (Supp. II 1980); see text accompanying notes 52-54 *supra*.

62. It must be recognized, however, that there are legitimate reasons for requiring adjudicative procedures. The most persuasive of these is that the designation inquiry focuses on specific

dures the agency's position has thus far been upheld.[63]

D. *The Role of the State in the Designation Process*

Perhaps the most confusing procedural aspect of section 522 is the role of the state in the designation process. The Act indicates that land designations must be made upon petition where reclamation is not feasible[64] or where the state chooses to apply the discretionary criteria. In contrast, the Secretary of the Interior is required to "conduct a review of Federal lands" to determine if there are areas unsuitable for surface coal mining.[65] It is unclear from the literal language of the Act whether the state must conduct a similar review.

The state is also required to "establish a planning process enabling objective decisions [to be made] based upon competent and scientifically sound . . . data as to which, if any, land areas of a state are unsuitable for all or certain types of surface mining."[66] In such a planning process, the state must provide:

> (A) a State agency responsible for surface coal mining lands review;
> (B) a data base and inventory system which will permit proper evaluation of the capacity of different land areas of the state to support and permit reclamation of surface coal mining operations;
> (C) a method or methods for implementing land use planning decisions concerning surface coal mining operations; and
> (D) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation. . . .[67]

These statutory requirements indicate that the state should not play a passive role in hearings. Rather, the "planning process" requirement implies that the state should actively direct attention to the future impact of mining on the state as a whole, and not merely to the limited issue of the effect of mining on petitioned acreage.

The preamble to the OSM regulations directs that information be

---

characteristics of specific lands, rather than on general policy considerations. Thus, it can be argued that the decision requires the scrutiny of an adversarial proceeding.

63. In re Permanent Surface Mining Litigation, 9 ELR 20720 (D.D.C. Aug. 21, 1979).

64. SMCRA 522(a)(2), 30 U.S.C. § 1272(a)(2) (Supp. II 1978).

65. *Id.* § 522(b) 30 U.S.C. § 1272(b) (Secretary may permit surface coal mining on federal lands prior to completion of review).

66. *Id.* § 522(a)(1), 30 U.S.C. § 1272(a)(1).

67. *Id.* § 522(a)(4), 30 U.S.C. § 1272(a)(4).

gathered "not only in response to petitions, but also in anticipation of petitions."[68] This requirement of present and anticipatory data collection and compilation thus provides the agency with an effective tool to evaluate petitions, and also provides it with a comprehensive view of the particular state's coal lands and resources. Additionally, this data base and inventory system will ensure the availability of a vast body of information on coal lands within the state[69] for a comprehensive state land use plan and for state use in initiating its own petitions under section 522(c) of the SMCRA.[70]

E. *The Role of the Secretary of the Interior in the Designation Process*

The Secretary's role in the designation process is more specific with regard to federal lands. The Secretary has a duty to "conduct a review of the federal lands to determine . . . whether there are areas on Federal lands which are unsuitable for all or certain types of surface coal mining operations."[71] Pursuant to this review, the Secretary is required to "withdraw" those lands which he determines to be unsuitable for all or certain types of surface coal mining operations or condition any lease or entry on those lands in a manner that will limit surface coal mining on such lands.[72] The Secretary's decision is subject to the same petition process that applies to a state's determination on the use of land for surface coal mining operations.[73]

III. SECTION 522 AND *PENNSYLVANIA COAL CO. V. MAHON*

United States Representative Morris Udall, the principal author of the SMCRA, has admitted "some discomfort [in] undertaking to write

68. A "coal impact statement" must also be made prior to any designation. The statement must describe "(i) the potential coal resources of the area, (ii) the demand for coal resources, and (iii) the impact of such designation on the environment, the economy, and the supply of coal." SMCRA § 522(d), 30 U.S.C. § 1272(d) (Supp. II 1978).

69. 44 Fed. Reg. 14,902, 15,005 (1979). *See also id.* at 14,998.

70. 30 U.S.C. § 1272(c) (Supp. II 1978). OSM regulations include federal, state, and local governmental agencies in the definition of "person," thereby enabling the state to initiate a petition under the Act. 30 C.F.R. § 700.5 (1980). The state must also demonstrate, however, that is a "person having an interest which is or may be adversely affected" by a determination of the regulatory authority. The data base and inventory system established by the OSM preamble will aid the state in proving an adverse affect. *Id.*

71. SMCRA § 522(b), 30 U.S.C. § 1272(b) (Supp. II 1978) (Secretary required to make determination pursuant to applicable standards established in § 522(a)(2)-(3), 30 U.S.C. § 1272(a)(2)-(3) (Supp. II 1978).

72. SMCRA § 522(b), 30 U.S.C. § 1272(b) (Supp. II 1978).

73. *Id.* § 522(c), 30 U.S.C. § 1272(c).

[the SMCRA] with the admonitions of *Pennsylvania Coal Co. v. Mahon*[74] echoing in my ears."[75] Nowhere in the Act do Justice Holmes' words, "to make it commercially impractical to mine certain coal has very nearly the same effect for consititutional purposes as appropriating it,"[76] echo more clearly than in section 522. The Supreme Court, almost sixty years after *Pennsylvania Coal*, must now decide whether a section 522 prohibition of all or certain types surface mining in a given area amounts to a taking of private property without just compensation. A further consequence of the Supreme Court's action will likely be a long awaited clarification of *Pennsylvania Coal*'s meaning in constitutional jurisprudence. Hanging in the balance will be the ability of federal and state governments to regulate surface mining under the SMCRA.

As noted above, in the two cases now being appealed to the Supreme Court,[77] both trial courts held that section 522 violated the fifth amendment taking prohibition. Moreover, both courts found that *Pennsylvania Coal* was determinative on the taking issue.[78] For this reason, the facts and holding of *Pennsylvania Coal* will be examined and compared with similar cases involving the application of section 522 of the SMCRA.

A. *The Facts and Holding of* Pennsylvania Coal

In 1921, the Pennsylvania legislature enacted what was commonly known as the Kohler Act.[79] That statute forbid the mining of anthracite coal in such a way that would cause the subsidence of any public building, street, road, bridge, or railroad tracks, factory, store, or any private dwelling used for human habitation.[80]

The Mahons, the plaintiffs in *Pennsylvania Coal*, owned the surface of certain land on which their dwelling house was located, and the Pennsylvania Coal Company, the defendant, owned the coal underly-

74. 260 U.S. 393 (1922).

75. Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. VA. L. REV. 553, 557 (1979) (original footnote omitted) (new footnote added).

76. 260 U.S. at 414.

77. Andrus v. Indiana, No. 80-231 (S.D. IND., filed August 15, 1980), *reprinted in* 10 ELR 20613, *prob. juris. noted*, — U.S.), 101 S. Ct. 67 (1980); Virginia Surface Mining and Reclamation Ass'n., Inc., 483 F. Supp. 425 (W.D. Va. 1980), *prob. juris. noted*, — U.S. —, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596) (both parties appealed and cases were consolidated by the Court).

78. Andrus v. Indiana, 10 ENVIR. L. REPTR. at 20621; Virginia Surface Mining and Reclamation Ass'n, Inc., 483 F. Supp. at 436-42.

79. 52 PA. CONS. STAT. § 661 (19—).

80. *Id.*

ing the Mahons' land. The Mahons' title derived from an 1878 conveyance by the Pennsylvania Coal Company to the Mahons' predecessor in interest. Pennsylvania Coal Company reserved the right to remove all coal under the tract, and the grantee took the premises subject to an express waiver of all damage claims including any subsidence that might be caused by the grantor's coal mining.[81]

Relying on the Kohler Act, the Mahons subsequently sought to enjoin the company's coal mining operations to the extent that such mining would cause subsidence of their home. The Pennsylvania Supreme Court upheld the constitutionality of the Act against the company's arguments that to limit mining would interfere with their contractual rights, benefit private parties rather than the public, and constitute a taking.[82]

A review of the argument later made by the Pennsylvania Coal Company before the United States Supreme Court indicates that the heart of the company's complaint was that the Kohler Act attempted to protect the rights of a small group of private parties and was not legislation intended to promote a broad public interest pursuant to the police power.[83] The coal company therefore contended that the Act "shows on its face that its purpose is not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few."[84]

The company argued that the Kohler Act altered the bargained-for contractual relationship between the coal and surface owners and that the right to mine the underlying coal was, in effect, transferred by the Act to the surface owner without compensation being paid to the coal company.[85] This allowed the purchaser of a severed surface estate, who had been able to purchase land at a reduced price because the coal rights had not been included, to obtain much more than he or she had bargained and paid for. In contrast, the Mahons argued that "[t]he protection of the life, health and safety of the public in the anthracite mining communities [was] the primary purpose of the [A]ct. Its interference with property rights [was] merely incidental."[86]

The Supreme Court rejected the Mahons' contention that the

81. 260 U.S. at 412.
82. *Id.* at 394-404, 412.
83. 260 U.S. at 394-404.
84. *Id.* at 394-95.
85. *Id.* at 403.
86. *Id.* at 405 (citations omitted).

Kohler Act was a legitimate exercise of the police power and held in favor of the Pennsylvania Coal Company. Justice Holmes, speaking for the Court, concluded:

> This is the case of a single private house. . . . 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.
>
> . . . .
>
> . . . 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 of greater rights than they bought.[87]

Despite Justice Brandeis' eloquent and oft cited dissent that the Kohler Act was intended to protect the public health and welfare incident to a valid exercise of the police power,[88] it is clear that the Court viewed *Pennsylvania Coal* as a case in which legislative power was used to benefit private parties rather than to enhance public interests.

B. *Constitutional Taking Law in General*

Pennsylvania Coal did little to clarify the present-day law of takings.[89] In a recent Supreme Court opinion, *Penn Central Transportation Co. v. New York City*,[90] Justice Brennan confessed that "this 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] *Penn Central* does, however, cite *Pennsylvania Coal* with approval.

A taking analysis involves the application of a number of considerations, each judicially developed under varying factual situations and governmental activity.[92] While the purpose of this article is not to catalogue the various taking theories or to derive from them the essence of

87. *Id.* 413-14, 416 (citations omitted).
88. *Id.* at 416-22.
89. See note 79 *infra*.
90. 438 U.S. 104 (1978).
91. *Id.* at 124 (citation omitted).
92. *See generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1979).

the taking problem,[93] an application of several of these theories to the problem at hand is helpful. The foremost theories are:

1) the "diminution of value" theory,[94] which had its genesis in *Pennsylvania Coal Co. v. Mahon*;[95]

2) the "noxious use" theory,[96] which was based on the holdings of such cases as *Hadacheck v. Sebastian*[97] and *Mugler v. Kansas*;[98]

3) the "distinct investment-backed expectations" theory, which evolved from the "diminution of value" and "noxious use" theories and which was first articulated in *Penn Central Transportation Co. v. New York City*.[99]

Specifically, the interaction between the "diminution of value" theory and the "noxious use" theory presents the crux of the issue. The third theory, however, described in *Penn Central* as the frustration of "distinct investment-backed expectations"[100] must also be examined.

C. *Diminution of Value and Noxious Use Theories*

1. Noxious Use

Justice Holmes relied on a diminution of value theory in *Pennsylvania Coal Co. v. Mahon*[101] when he stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[102] It must be remembered, however, that the *Pennsylvania Coal* Court did not regard the statute in question as an attempt to protect public interests through the exercise of the police power, but rather as an unintentional legislative aid to private parties.[103] In indicating that in some circumstances

93. Many scholars have wrestled with the taking problem. *See generally* Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1 (1972). Dunham, *A Legal and Economic Basis for City Planning (Making Room for Robert Moses, William Zeckendorf, and a City Planner in the Same Community)*, 58 COLUM. L. REV. 650, 663-69 (1958); Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking?*, 57 MINN. L. REV. 1 (1972); Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039; McGinley, *Prohibition of Surface Mining in West Virginia*, 78 W. VA. L. REV. 445, 463-74 (1976); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

94. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 48 (1964).

95. 260 U.S. at 412-16.

96. Sax, *Takings and the Police Power*, 74 YALE L. J. 30, 50 (1964).

97. 239 U.S. 394, 404-14 (1915).

98. 123 U.S. 623, 664-73 (1887).

99. 438 U.S. 104, 124 (1978).

100. *Id.*

101. 260 U.S. 393 (1922).

102. *Id.* at 415.

103. *Id.* at 412-16.

the private property rights of individuals must yield to the police power of the state, Justice Holmes stated: "[I]f the regulation goes too far it will be recognized as a taking."[104]

In some circumstances the Supreme Court has appeared to be relatively unconcerned with diminution of value, especially where the Government has sought to eliminate "noxious" or "harmful" uses of property. For example, in *Goldblatt v. Hempstead*[105] the Court upheld a municipal ordinance which prohibited excavation below the water table and which imposed, on those persons responsible for such operations, an affirmative duty to fill excavations already below the water table.[106] The ordinance enjoined the appellants' sand and gravel mining operations which had been active for many years. Faced with a claim by appellants that the termination of ongoing operations constituted a taking, the *Goldblatt* Court reiterated the "noxious use" test set forth in *Mugler v. Kansas*, and further indicated that even a "lawful use" could be prohibited through a reasonable exercise of the police power.[107] Accordingly, the ordinance was upheld. The *Goldblatt* Court's treatment of the diminution of value problem should also be noted. While indicating that a simple comparison of value before and after governmental action is inconclusive, *Goldblatt* continued to rely on *Pennsylvania Coal* when it stated the that "governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally required compensation."[108]

---

104. *Id.* at 415.

105. 369 U.S. 590 (1961). *Accord*, Mugler v. Kansas, 123 U.S. 673 (1887).

106. 369 U.S. at 592.

107. *Id.* at 593. *But see* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1977), where the Court dispelled the notion that a use must be truly "noxious" to be eliminated without compensation. In a footnote, Justice Brennan commented:

> Appellants attempt to distinguish [*Hadacheck, Miller and Goldblatt*] on the ground that, in each, the government was prohibiting a "noxious" use of land and that in the present case, in contrast, appellants' proposed construction above the [t]erminal would be beneficial. We observe that the use in issue in *Hadacheck, Miller* and *Goldblatt* were perfectly lawful in themselves. They involved no "blameworthiness, . . . moral wrongdoing or conscious act of risk taking which induce[d society] to shift the cost to a pa[rt]icular individual.

Id. at 133-34 n.30 (citing Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 50 (1964)). The Court continued: "These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." *Id.*

108. 369 U.S. at 594. The Court did not examine diminution of value in *Goldblatt* because of the absence of evidence in the record in support of a claim that the value of the appellants' property had been reduced in value. The Court also noted that it was affording to the legislative judgment "the usual presumption of constitutionality." *Id.*

In cases in which the record established the presence of a nuisance as well as a significant diminution of value, the Supreme Court has upheld severe restrictions on the use of private property. In *Hadacheck v. Sebastian*,[109] the Court upheld a municipal ordinance which made it unlawful to operate a brickyard in a residential area, despite the fact that the ordinance effectively reduced the value of the plaintiff's property from $800,000 to $60,000.[110] The Court indicated that the reasonableness of the city's concern for the health and comfort of its residents justified the prohibition, the plaintiff's uncompensated loss notwithstanding.[111] Similar concerns have justified the upholding of other governmental activities which resulted in substantial and uncompensated losses of private property.[112]

A number of state courts have declined to consider the diminution of value issue after they found that the legislature had sought to eliminate harmful or socially undesirable activities through the exercise of the police power. In *Consolidated Rock Products v. City of Los Angeles*,[113] the California Supreme Court directly confronted and rejected the diminution of value theory and upheld a zoning restriction which prohibited rock and gravel excavations on the plaintiff's property. The California court emphasized the distinction between the police power and the power of eminent domain.[114] In holding that the ordinance was an exercise of the police power rather than an exercise of eminent domain, the court accorded the regulation the same presumption of constitutionality generally afforded legislative decisions.[115] Other state courts have shown a similar reluctance to subject the public to harm in order to protect private financial interests from diminution of value.[116]

The cases and commentators suggest that a valid exercise of the

109. 239 U.S. 394 (1915).

110. *Id.* at 405.

111. *Id.* at 414.

112. *See* Miller v. Schoene, 276 U.S. 272, 279 (1928); Euclid v. Ambler Realty Co., 272 U.S. 365, 388-89 (1926).

113. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

114. *Id.* at 530-32, 370 P.2d at 351-52, 20 Cal. Rptr. at 647-48. The court noted, however, that the property might sustain a number of other uses, such as "stabling horses, cattle feeding and grazing, chicken raising, [and] dog kennels". *Id.* at 530, 370 P.2d at 351, 20 Cal. Rptr. at 647.

115. *Id.* at 346-47.

116. *See, e.g.*, Turnpike Realty Co. v. Town of Dedham, 72 Mass. 1303, 284 N.E.2d 891, 900 (1972). A more recent case demonstrating a state court's unwillingness to sacrifice the police power in order to yield to substantial private financial interests is Commonwealth v. Barnes and Tucker Co., 472 Pa. 115, 371 A.2d 461, *appeal dismissed*, 434 U.S. 807 (1977). The court upheld, against a taking challenge, an order which required Barnes and Tucker Co. to treat acid mine drainage emanating from its inactive coal mine. The company failed to convince the court that the remedy imposed was unduly oppressive. *Id.*

police power, whether it takes the form of eliminating noxious or harmful uses, limiting harmful "spillover" effects, or better determining the appropriate uses for competing or interlocking property,[117] should not require compensability when greater public interests are at stake. From this it also follows that a congressional prohibition of surface mining in particular areas under section 522 of the SMCRA should be deferentially upheld by courts.

2. Diminution of Value

The above conclusion sidesteps the issue of how the noxious use theory compares with *Pennsylvania Coal*'s emphasis on the diminution of land value caused by SMCRA enforcement. Despite the logic and weight of authority of the noxious use approach, the judicial response has instead been to focus on the diminution of value theory. Moreover, recent Supreme Court discussions on the just compensation issue dispell any argument that *Pennsylvania Coal* is old or bad law.[118]

Even in situations in which the Government acts to protect the public from harmful land uses, courts often attempt to challenge such legitimate exercises of police power by subjecting them to the diminution of value scale. The object, of course, is to determine whether the Government's acts constitute a taking which constitutionally requires compensation. One case in particular illustrates this point.

In *Benenson v. United States*,[119] the owner of the historic Willard Hotel in Washington, D.C., brought an inverse condemnation suit alleging that the designation of the hotel as part of a Pennsylvania Avenue historic site rendered the property completely valueless. The Government had previously announced that the hotel would be condemned as part of the project but had for many years delayed condemnation proceedings, resulting in the unmarketability of the subsequently vacated building under the threat of imminent condemnation. After several years elapsed without condemnation, the plaintiffs sought to demolish nonstructural parts of the building to determine

117. *See generally* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). Professor Sax asserts that uses of property have effects that generally extend beyond legal property lines and which result in intertwining property. Uses which "spill over" the borders of the user's land may be prohibited without compensation. *Id.* at 161. The spillover theory is broader and more sophisticated than the noxious use theory, but clearly encompasses the latter. Professor Sax's classic example of a spillover use is strip mining. *Id.* at 152-55, 161, 170, 173.

118. *See* Andrus v. Allard, 444 U.S. 51, 65-67 (1979); Kaiser Aetna v. United States, 444 U.S. 164, 174, 178 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127, 136-37. (1978).

119. 548 F.2d 939 (Ct. Cl. 1977).

whether it could be converted into an office building. The federal agency directing the Pennsylvania Avenue Project responded by refusing to allow the removal of the exterior features of the historic building.[120]

The United States Court of Claims held that the plaintiff's property had been taken in contravention of the fifth amendment. After quoting *Pennsylvania Coal Co. v. Mahon*, the court concluded that the "net effect of the acts of the Government is that the plaintiffs cannot use their property for any income producing purpose; they cannot sell it and thus far, the lack of congressional appropriations denies them compensation for it."[121]

In the many cases in which restrictions on wetland filling and dredging or gravel mining have been upheld under the police power, courts have noted that there were other purposes for which the property could be used. The existence of such uses after regulations have been implemented leads courts to conclude that the plaintiff has not been deprived of the total use of the property.[122] Unfortunately, both state and federal courts often misapply this approach and mistakenly hold that the Government cannot act in a manner that would render private property unuseable for *any* lawful purpose.

The fifth amendment was never intended to place such restrictions upon society's right to protect itself.[123] Such convoluted interpretations of the just compensation clause are premised upon a misconception of

120. *Id.* at 941-46.

121. *Id.* at 947.

122. *See generally* South Terminal Corp. v. EPA, 504 F.2d 646, 678 (1st Cir. 1974); Brecciarole v. Conn. Comm'r of Envt'l Prot., 362 A.2d 948, 951 (Conn. 1975); Turnpike Realty v. Town of Dedham, 72 Mass. 1303, —, 284 N.E.2d 891, 899 (1972); State v. A. Capuano Bros., Inc., 384 A.2d 610, 614-15 (R.I. 1978); State Dept. of Ecology v. Pacesetter Const. Co., 571 P.2d 196, 199 (Wash. 1977). *See also* Bureau of Mines of Md. v. George's Creek Coal & L. Co., 272 Md. 143, —, 321 A.2d 748, 765 (Md. 1974), where a holding company was the owner of mineral rights underlying state owned land. A Maryland statute was enacted prohibiting surface mining on any land owned by the State of Maryland unless the prohibition would amount to a taking and public funds were unavailable to provide compensation. The Lessee of George's Creek was prohibited from mining pursuant to the statute.

In reviewing the circuit court's finding that the prohibition resulted in a taking of property without just compensation, the Maryland court found that the prohibition was clearly within the police power because it was "calculated to protect the environment and to preserve State-owned land for public use for present and future generations of citizens." *Id.* at 765. Nevertheless, in attempting to comply with the holdings of *Pennsylvania Coal* and *Goldblatt*, the court remanded the case for a determination on whether the owner had been deprived of all reasonable use of his property. *Id.* at 766.

123. *Cf.* Andrus v. Allard, 444 U.S. at 66 n.6 (1979); Eastlake v. Forest City Enterprises, 426 U.S. 668, 674 n.8 (1977); Penn Central Transp. Co. v. New York City, 438 U.S. at 127-30.

Pennsylvania Coal. That case simply did not involve noxious uses or other public nuisance type activities.

D. *Taking Law Applied to the Severed Mineral Estate*

Where a tract of land is owned in fee, a prohibition of coal mining under section 522 would still allow the land to be put to other lawful uses, thus negating a possible taking challenge. In some instances, however, a governmental prohibition against surface coal mining may render the mineral interest valueless. In this context, the most difficult taking question thus involves the effect of use prohibitions on such a single use property interest.

Assume, for example, the existence of a situation in which the interest holder owns *only* the coal and that because of a shallow overburden the coal can only be mined by surface mining methods. To prohibit mining of such coal under section 522 of the SMCRA would appear to deprive the coal estate owner of *any lawful use* of that property interest.[124] Nevertheless, this conclusion is subject to qualification. As long as the coal is owned by the plaintiff, there is a possibility that technological advancements will make extraction of the coal profitable through other extractive methods that will not violate SMCRA provisions.[125] Moreover, for certain SMCRA prohibitions, the designation is subject to termination upon the introduction of new evidence.[126]

Finally, as Congress has indicated, "the designation of unsuitability will not necessarily result in a prohibition of mining. The designation can merely limit specific types of mining and thus the coal resource may still be extracted by a mining technology which would protect the values upon which the designation is premised."[127] Because the plaintiff bears the burden of proving the absence of other possible uses,[128]

124. This was the rationale in Midland Electric Coal v. Knox County, 1 Ill. 2d 200, 115 N.E.2d 275 (1953), where the court struck down a zoning ordiance prohibiting the use of land for the recovery of coal by strip mining. *Id.* at —, 115 N.E.2d at 287. The court reasoned: "Zoning that prevents mining has the effect of prohibiting any use at all of mineral property. Authorization to use the surface for farming purposes provides no use for the mineral property beneath it." *Id.* at —, 115 N.E.2d at 283.

125. Certain coal seams once thought unmineable, for example, can be tapped by a process of igniting the coal seam in place and tapping the combustible gas produced. This process is known as *in situ* gasification.

126. SMCRA § 522(a)(2)-(3), 30 U.S.C. § 1272(a)(2)-(3) (Supp. II 1978). Section 522(e) designations by Act of Congress are not subject to later re-evaluation. 30 C.F.R. § 764.13(c) (1980).

127. *See* H.R. REP. No. 218, 95th Cong., 1st Sess. 94, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 631.

128. Bureau of Mines of Md. v. George's Creek Coal and Land Co., 272 Md. 143, —, 321 A.2d 748, 766 (1974); State v. A. Capuano Bros. Inc., 384 A.3d 610, 615 (R.I. 1978).

the prospect that the prohibition will be reevaluated and subsequently terminated or that section 522 prohibitions will not preclude all mining methods may alone provide a sufficient basis for courts to reject a taking challenge. Assuming for the moment, however, that the coal in question is rendered unmineable because of the section 522 designation, several cogent arguments may still support the uncompensated prohibition of coal mining.

The Supreme Court's recent pronouncement in *Penn Central*[129] provides support for such a view. *Penn Central*, it should be recounted, involved a controversy over the proposed construction of a high rise office building anchored upon and rising above the Grand Central Terminal. Pursuant to New York's Landmarks Preservation Law,[130] the Landmarks Preservation Commission had designated the terminal a "landmark" and the city tax block it occupied a "landmark site." Because the station had been designated a landmark, the commission denied Penn Central permission to construct the office building.[131]

The facts in *Penn Central* are quite different from those relating to the prohibition of surface mining. The greatest difference is that the SMCRA attempts to protect the public from noxious uses or nuisances created by surface mining, while the New York law attempted to regulate land use in the *absence* of a nuisance or noxious use. An analysis of the Court's opinion is helpful, however, because the thrust of Penn Central's argument focused upon the diminution of value theory.

1. The Severed Mineral Estate and the Single Use Anomaly

Penn Central reiterated the principle that governmental action promoting the health, safety, welfare, and morals of the public is permissible "even when prohibiting the most beneficial use of the property."[132] Therefore, as indicated above, the owner of a valuable mineral estate may be prohibited from mining that mineral without compensation simply because the property can still be used for other purposes. Thus, the owner is not deprived of all profitable land use.

On the other hand, if one were to carry the diminution of value

129. 438 U.S. 104, 130 (1978).

130. NEW YORK, N.Y. ADMIN. CODE ch. 8A, § 207-20(a)(1976).

131. The New York ordinance provided that owners of such landmarks could be compensated by the transfer of development rights. Penn Central was granted such rights by the Landmarks Preservation Commission. The Supreme Court, however, declined to decide whether such a mechanism constituted just compensation. 438 U.S. at 122.

132. *Id.* at 125.

argument to its logical conclusion, the owner of a coal seam who owns only the mineral rights could not be prohibited from mining, for there would be no other use to which he could put the coal. Consequently, by purchasing the coal and not the surface, the severed mineral estate owner acquires a guaranteed right to mine the coal, even though such mining may cause harm to the public.

In short, the diminution of value focus upon the available uses of divided property interests leads to an anomaly: one who purchases *less*, in effect, will receive *more* constitutional protection. Even if mining a tract would cause landslides, downstream flooding, or water pollution, this argument would preclude governmental prohibition of such harmful mining activity unless compensation were paid.[133] The result is absurd—but one logically flowing from the diminution of value theory applied to a severed mineral estate.

2. *Penn Central* and the Problem of Segmented Real Property

Penn Central deals to some degree with the problem of segmented real property interests. Penn Central had argued that the landmarks law deprived it of any gainful use of the air rights above the terminal. The Court responded:

> Apart from our own disagreement with Appellant's characterization of the effect of the New York City Law. . . , the 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. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, . . . but also in approving those prohibiting both the subadjacent, . . . and the lateral . . . development of particular parcels. *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.*[134]

This statement, reminiscent of Justice Brandeis' dissent in *Pennsylvania Coal Co. v. Mahon*,[135] suggests that one cannot establish a compensa-

133. The SMCRA was enacted to protect the public from such hazards. *See* SMCRA § 101(c)-(d), (e), (h), 30 U.S.C. § 1201(c)-(d), (e), (h) (Supp. II 1978).

134. 438 U.S. at 130 (citations omitted) (emphasis added).

135. 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 with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and

ble taking by showing that the ability to exploit a *subsurface* property interest has been completely abrogated.[136]

3. *Pennsylvania Coal* and *Penn Central*: The Destruction of Distinct Investment-Backed Expectations

It can also be argued that the anomaly created by applying a destruction of value test to a "single-use" segment of property suggests a result inconsistent with actual expectations. *Penn Central*'s focus on the parties' expectations suggests a second line of analysis. Besides providing a rather comprehensive review of the law of taking,[137] *Penn Central* is particularly significant in its treatment of *Pennsylvania Coal*:

> *Pennsylvania Coal Co. v. Mahon* . . . is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate *distinct investment-backed expectations* as to amount to a "taking". There the claimant had sold the surface rights to the particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, . . . and thus *had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land*, . . . the Court held that the statute was invalid as effecting a "taking" without just compensation.[138]

---

subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. 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 a city. And why should a sale of underground rights bar the State's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. 260 U.S. at 419 (Brandeis, J., dissenting). In Bureau of Mines of Md. v. George's Creek Coal & L. Co., 272 Md. 143, 321 A.2d 748 (1974), the court considered the effect of prohibiting surface mining on land use as a whole rather than upon the limited mineral estate. *Id.* at —, 321 A.3d at 766. *See also* American Dredging Co. v. Dept. of Envt'l Prot., 161 N.J. Super. 504, 391 A.2d 1265 (1978).

136. In *Penn Central* there had been no legal severance of air rights from the fee interest. This distinction seems irrelevant, however, since the existence of segmented interests within a fee is judicially recognized. Air rights, like subsurface rights, can be severed and sold for substantial value. *See* N.Y. Times, June 10, 1979, § 1, at 1, col. 1.

137. 438 U.S. at 123-28.

138. *Id.* at 127-28 (citations omitted) (emphasis added). In its discussion of "distinct invest-

The particular unfairness which the Court refused to permit in *Pennsylvania Coal* clearly appears in this description. It was not the fact that the coal owner could not profit from the coal that frustrated his distinct investment-backed expectations. Rather, the frustration stemmed from Government action which, pursuant to statute, attempted to readjust property rights *between the private parties to the transaction*.

The question arises whether a coal seam purchase creates investment-backed expectations. Reflecting on *Pennsylvania Coal*, it appears that the mere purchase of the coal was not the "investment" which the Court sought to protect. Instead, it was the concreteness of the expectations that rendered it unfair to prohibit mining. The coal owner in *Pennsylvania Coal* crystallized its expectations in a deed under which those who could have been protected by purchasing the right to subadjacent support knowingly waived that protection. Moreover, the Kohler Act was not a legitimate exercise of the police power because it sought to protect private rather than public interests.

The expectations issue takes on an entirely different hue when it arises from a bilateral transaction which ignores valid rights held by others. *Pennsylvania Coal* clearly does not stand for the proposition that a coal owner can solidify rights between himself and the public at large by using a bilateral coal deed granting only the right to mine coal and to remove the surface in the process. Coal mining activities may intrude upon the property interests of adjacent property owners, holders of riparian water rights, and the rights of the public. Such rights were clearly not paid for in acquiring the mining rights.[139] In such cases the police power may be legislatively invoked without regard to the impact on private contractual rights.

An expectation of the right to exploit property at the expense of others, not parties to the transaction, is not entitled to constitutional protection when the public may be harmed by the exercise of such rights. It has long been established that rights subject to state restriction cannot be removed from the State's jurisdiction merely by incorporating those rights into a contract.

---

ment-backed expectations", the Court in *Penn Central* referred to Professor Michelman's seminal article on takings in which he discussed "distinctly perceived, sharply crystallized, investment, backed expectations." *Id.* at 128 (citing Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1229-34 (1967)).

139. *See* Reitze, *Old King Coal and the Merry Rapists of Appalachia*, 22 CASE W. RES. L. REV. 650, 661-62 (1971); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152-55 (1971).

E. *Section 522 and the* Virginia *and* Indiana *Challenges*

In both *Virginia Surface Mining and Reclamation Association v. Andrus* and *Indiana v. Andrus*, United States district courts deemed section 522 an unconstitutional taking. The *Indiana* case, citing *Pennsylvania Coal*, did so somewhat casually, stating merely that the prohibition of coal mining "destroys the mineral interest and the owner's rights."[140] In the *Virginia* case the Court held simply that section 522 "is clearly a physical restriction against the removal of coal and furthermore, requires a total loss of profit opportunity. . ."[141]

Both cases relied exclusively on *Pennsylvania Coal* as precedent for their holdings. Neither case examined the congressional purposes underlying section 522, nor did they undertake a review of just compensation principles.

F. *Section 522 is a Valid Exercise of the Police Power*

Pennsylvania Coal Co. v. Mahon has been interpreted by courts in various ways. It has been incorrectly discussed in contexts in which a government regulation has been enacted to protect the public from nuisances, noxious uses, and other types of harmful or hazardous activities. Section 522 of the SMCRA, enacted to prevent or ameliorate harm to public interests flowing from surface mining, is typical of regulations which are undesirably burdened by *Pennsylvania Coal*. It is hoped that the Supreme Court, when reviewing the SMCRA in the *Indiana* and *Virginia* cases, will correct these previous judicial misapplications of *Pennsylvania Coal* to legislative enactments that are correctly intended to protect the public from harmful land use activities. When Congress or a state legislature enacts a statute to protect the public health or welfare from harmful land use activities, private economic interests should be subsumed to the larger good. To the extent that courts have relied on *Pennsylvania Coal* to find takings in cases in which statutes or ordinances were enacted to protect the public welfare from harm created by private activities, those courts were wrong. *Pennsylvania Coal* was not a case in which a statute was found to advance a significant public interest. Rather, it was one in which legislation purportedly enacted under the guise of the police power was actually directed toward promoting private interests. Thus, the diminution of value theory is relevant only in cases like *Pennsylvania Coal* where the

140. 10 ELR at 20614.
141. *Id.*

public interest advanced by legislation is not significant and the concomitant impact on private rights is great.

The fifth amendment was never intended to be an obstacle to governmental regulation, especially in situations where private activity creates the possibility of harm to important public interests. Activities which a legislature finds may harm the public can be completely prohibited even though those regulated may suffer great financial loss. A lower court recently upheld the SMCRA against a fifth amendment attack, and quite correctly emphasized that:

> [T]he Surface Mining Act is directed at the public purpose of eliminating the spillover effects of surface mining which burden interstate commerce. Although the owner of the surface rights or his successor in interest may benefit from the Act, he is neither the sole nor the principal beneficiary. The principal beneficiary is the public. The Supreme Court has said, "where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[142]

There can be no doubt that section 522 of the SMCRA was enacted pursuant to the commerce clause as a police power measure. Therefore, section 522 should not be subject to the theoretical limitations imposed by the diminution of value analysis. Instead, this section should be afforded the same presumption of constitutionality that other police power measures are given. It should be struck down only if its challengers can meet the heavy burden of proving that Congress had *no rational basis* for enacting such a provision or that there was no rational nexus between the means utilized by the statute and the end sought to be achieved.

---

142. Star Coal Co. v. Andrus, 14 ERC 1325, 1332 (D. Iowa (1980)) (citing Miller v. Schoene, 276 U.S. 272, 279-80 (1928)). In *Star Coal*, the court distinguished the SMCRA from the statute challenged in *Pennsylvania Coal*. The Court stated:

> The legislation served no public purpose and instead was directed at a private purpose of benefiting principally those living in the dwelling, that the legislation deprived the coal mining company, which had originally owned the land in fee, of its reserved subsurface mineral rights, and that the legislation abrogated the right to contract by giving the house dweller more than he bargained for while depriving the coal miner of his bargain.

In *Pennsylvania Coal*, the surface owner benefited if mining was prohibited. In contrast, this is not necessarily the case with prohibitions under Section 522. It is not at all unusual, for example, for a surface owner to lease coal mining rights in return for a per ton royalty. In these instances, the obvious and only beneficiary of a prohibition would be the public—who would be protected from the harms and hazards found by Congress to arise from mining in certain areas.

G. *Takings Problems in the Application of Section 522*

One may conclude that the designation of certain areas as unsuitable for surface mining does not run afoul of the fifth amendment prohibition against the taking of property without just compensation. Section 522 as applied, however, provides for a mining prohibition in a multiplicity of situations and for varying reasons. Further constitutional questions can thus arise.[143]

The types of designation most likely to be unsuccessfully challenged arise under section 522(a)(2), which requires the designation of an area to be "unsuitable for all or certain types of surface mining operations if the State Regulatory authority determines that reclamation pursuant to the requirements of the Act is not technologically and economically feasible."[144] This type of prohibition depends on a legislative determination that unreclaimed surface mines are in essence nuisances.[145] As discussed above, the prohibition of a noxious use is clearly within the police power, notwithstanding the diminution in value of private interests and even though compensation is not dis-

143. The Court, for example, in In re Permanent Surface Mining Regulation Litigation, 14 ERC 1083 (D.D.C. 1980), found persuasive the argument of the Secretary of Interior that the SMCRA "purports to advance a public interest. . . the Court in *Mahon* recognized the Pennsylvania statute reflected a limited public interest." *Id.* at —. Nevertheless, the court declined to decide the taking issue because it was premature. The district court stated:

> The Court noted in *Penn Central* that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case. Herein the plaintiffs' claim is hypothetical; they have presented the court with no specific circumstances enabling the Court to adjudicate this issue. Since no party can complain of an unconstitutional taking, we decline to address the constitutionality. . . .

Id. at —.

144. SMCRA § 522(a)(2), 30 U.S.C. § 1272(a)(2) (Supp. II 1978).

145. Section 101. The Congress finds and declares that—.

. . . .

> (c) Many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;
>
> . . . .
>
> (h) there are a substantial number of acreas of land throughout major regions of the United States disturbed by surface and underground coal on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality

. . . .

Id. § 101(c), (h), 30 U.S.C. § 1201(c), (h) (Supp. II 1978).

pensed.[146]

It follows that designations of certain areas as unsuitable for specified mining operations, especially natural hazard lands where the operations would "subsequently endanger life and property,"[147] should likewise encounter no constitutional difficulties. Mining on natural hazard lands, such as "areas subject to frequent flooding and areas of unstable geology," also fall clearly within the holdings of the noxious use and nuisance cases.[148] Applications of the other discretionary criteria of section 522(a)(3)[149] may be more problematic. Lands may be designated and protected as "fragile lands" pursuant to this section.[150]

One need look no further than the spate of litigation surrounding the prohibition of various dredge and fill operations in wetland and coastal estuary areas to appreciate the controversy attending a mining prohibition in such areas.[151] This litigation has yielded conflicting results and the question is by no means closed. More recent decisions, however, tend to uphold legislative efforts designed to protect such fragile areas.[152] The significant public interest in protecting such areas

146. *See* text accompanying note 143 *supra*. *But see* Midland Electric Coal Corp. v. Knox County, 1 Ill. 2d 200, 115 N.E.2d 275 (1953). The *Midland Electric* court noted:

> The record further fails to disclose any substantial relationship between the prohibition of strip mining and the preservation of the community's public health, either as to water resources, drainage, lateral support of roads, noxious fumes or odors, weeds, drownings, predatory animals or other elements involved in public health and safety.

Id. at 210, 115 N.E.2d at 281. *See also* Smith v. Juillerate, 161 Ohio St. 424, 119 N.E.2d 611 (1954) (zoning prohibiting strip mining in residential area upheld).

147. *See, e.g.*, SMCRA § 522(a)(3)(D), 30 U.S.C. § 1272(a)(3)(D) (Supp. II 1978).

148. *See, e.g.*, Turnpike Realty v. Town of Dedham, 72 Mass. 1303, 284 N.E.2d 891, *cert. denied*, 409 U.S. 1108 (1972); Maple Leaf Investors v. State Dep't of Ecology, 88 Wash. 2d 726, 565 P.2d 1162 (1977) (flood control zoning upheld as a valid exercise of the police power).

149. SMCRA § 522(a)(3)(B)-(C), 30 U.S.C. § 1272(a)(3)(B)-(C) (Supp. II 1978).

150. *Id.* § 522(a)(3)(B), 30 U.S.C. § 1272(a)(3)(B).

151. *See generally* Dooley v. Town Planning & Zoning Comm. of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964); McGibbon v. Bd. of Appeals of Duxbury, 356 Mass. 635, 255 N.E.2d 349 (1970); Comm'r of Natural Resources v. S. Volpe & Co., 344 Mass. 104, 206 N.E.2d 666 (1965); State v. Johnson, 265 A.2d 711 (Md. 1970); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); Spears v. Berle, 63 A.D.2d 372, 407 N.Y.S.2d 590 (1978).

152. Severe land use restrictions for the preservation of wetlands were upheld in Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972); Candlestick Properties Inc. v. San Francisco Bay Consv'n & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Brecciaroli v. Conn. Comm'r of Envir. Protection, 168 Conn. 349, 362 A.2d 948 (1975); Pope v. City of Atlanta, 242 Ga. 331, 249 S.E.2d 16 (1978); Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (Ct. App. 1972), *cert. denied*, 409 U.S. 1040 (1972); Turnpike Realty v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975); American Dredging Co. v. State Dep't of Environmental Protection, 161 N.J. Super. 504, 391 A.2d 1265 (1978); Sands Point Harbor v. Sullivan, 136 N.J. Super. 436, 346

from the harms accompanying surface mining is clearly sufficient to uphold the constitutionality of section 522(a)(3).

The mining prohibition in historic areas may also give rise to controversy, particularly in light of the prior case law surrounding historic preservation.[153] In *Penn Central*, the Court goes a considerable distance in resolving not only the issue of historic preservation, but also the broader issue regarding the extent of the police power to regulate primarily for the preservation of aesthetic values.[154]

Finally, it must be remembered that while a taking issue does exist under section 522(a), extreme unfairness to individuals is avoided by the operation of the grandfather clause,[155] which prevents the termination of operations in existence or for which "substantial legal and financial commitments" had been made prior to January 4, 1977.[156]

Section 522(e), which designates certain lands as unsuitable "by Act of Congress," also raises constitutional issues in its various applications. These issues cannot be avoided merely because the section contains a savings clause exempting from designation any areas where the operator is found to possess "valid existing rights".[157] An example of the problems attending the application of section 522(e) is the prohibition of surface mining "which will adversely affect any publicly owned

---

A.2d 612 (1975); State v. A. Capuano Bros., 384 A.2d 610 (R.I. 1978); Maple Leaf Investors v. State Department of Ecology, 88 Wash. 2d 726, 565 P.2d 1162 (1977).

The most noteworthy wetlands case is Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). In *Just*, the Court emphasized the value of property in its natural state, rather than the potential value of the property if used to suit the owner's wishes. Most courts upholding the constitutionality of wetland restrictions focused on the loss of value resulting from the owner's inability to *use* the property, but the court in *Just* rejected this approach:

> The Justs argue their property has been severly depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.

Id. at —, 201 N.W.2d at 771. For a discussion of wetlands valuation, see Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 18-20 (1972).

153. *See* 438 U.S. at 104; Berenson v. United States, 548 F.2d 939 (Ct. Cl. 1977); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. 1977).

154. 438 U.S. at 129 (land-use restrictions or controls to enhance the quality of life) (citing New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Bell Terre v. Boraas, 416 U.S. 1 (1974); Bermon v. Parker, 348 U.S. 26 (1954); Welch v. Swasey, 214 U.S. 91 (1909)). In *Berman*, the Supreme Court noted that [t]he concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary." 348 U.S. at 33 (citation omitted).

155. See text accompanying notes 29-30 *supra*.

156. SMCRA § 522(a)(6), 30 U.S.C. § 1272(a)(6) (Supp. II 1978).

157. *Id.* § 522(e), 30 U.S.C. § 1272(e); see text accompanying notes 32-38 *supra*.

park or certain historic sites."[158]

Preventing property from being surface mined because it will spoil a park view is arguably nothing more than governmental acquisition of additional parkland. Conceptually, the problem under these circumstances is best explained by a theory espoused in 1964 by Professor Joseph Sax.[159] Sax contends that when the Government acts as a mediator between conflicting property interests, choosing one over the other, it need not compensate.[160] But, when the Government acts in its enterprise capacity, "in which the government acquires resources for its own account," it must compensate.[161]

Creating parks is certainly an enterprise function of government and under the Sax theory must be paid for.[162] Following this line of thought, several state cases have held that restrictions on property are compensable when they effectively turned private property into parkland.[163] In analyzing a section 522(e) prohibition of this nature, the type of "adverse effect" on a park or historic site may be determinative. If the alleged "adverse effect" is water or air pollution, noise pollution, or other similar nuisance infringements on the right of park or historic site users, then a prohibition should clearly be upheld. If, however, the alleged adverse effect is purely aesthetic, then a more difficult problem is presented.

Legislative protection of the public from aesthetic harms may be ripe for a due process attack on the grounds that substantive standards

158. *Id.* § 522(e)(3), 30 U.S.C. § 1272(e)(3) (Supp. II 1978).

159. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

160. *Id.* at 61-76.

161. *Id.* at 62.

162. *Id.* at 63.

163. In Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), private parks within an apartment development were rezoned as areas open to the public "in which only passive recreational uses [were] permitted." *Id.* at —, 350 N.E.2d at 384, 385 N.Y.S. at 7. The owners were able to challenge successfully the city's action by claiming that the zoning ordinance was an unreasonalbe exercise of the police power. *Id.* at —, 350 N.E.2d at 386, 385 N.Y.S. at 11. A similar dispute arose in Morris County Land Improvement Co. v. Township of Parasippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963). In that case, the plaintiff's property was classified as a "meadows development zone." *Id.* at —, 193 A.2d at 236. Land uses on that land were required to be in harmony with the natural state or use of the land. The plaintiff's landfill operations were therefore prohibited under the statute. The court, in applying the diminution of value approach, held for the plaintiff on the theory that the designation amounted to a taking.

> [I]t will be noted that any of the previously listed permitted uses in the zone are public or *quasi*-public in nature, . . . i.e., outdoor recreational uses to be operated only by some governmental unit, conservation uses and activities, township sewage treatment plants and water facilities and public utility transmission lines, substations and radio and television transmitting stations and towers.

Id. at —, 193 A.2d at 240.

for determining exactly what constitutes aesthetic harm must be established.[164] It cannot be doubted that, in many situations, what is beautiful to some is offensive to others. This attack may be rebutted, however, by the argument that a congressional determination of when strip mining adversely affects parks or historic sites compels that violations be remedied by an exercise of the police power despite the diminution of value of the mineral owner's interest.

The aesthetic value problem can be narrowed to a question of proof. If the Government can show that mining may cause an "adverse effect," as that term is used in section 522(e)(3), then it properly may be prohibited. It is obvious, moreover, that there is a substantial distinction between the effects of enforcing section 522(e)(3) and the effects of other types of mining regulations. In most instances, the prohibition of surface mining limits only one use of a fee simple estate. Section 522 does not turn a potential minesite into parkland if the property may still be used for farming or other purposes.[165] If surface mining could be prohibited for the protection of adjacent properties and the public under the police power, it should also be legitimate to prohibit surface mining for the purpose of protecting a park.[166]

---

164. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); Missouri v. Illinois, 180 U.S. 208, 241 (1901).

165. SMCRA § 522(a)(e)(c); 30 U.S.C. § 1272 (a)(3)(c)(Supp. II 1978). The single-use property issue may nevertheless present a problem. See text accompanying notes 95-104 *supra.*

166. It is significant that Professor Sax himself may have retreated from the distinction he earlier drew between entrepreneurs and mediators. In a later article, Sax concludes that uses of property which "spill over" beyond the borders of the user's land may be prohibited without compensation. Sax, *Takings Private Property and Public Rights*, 81 Yale L.J. 149, 152-55, 161, 172-74. As seen in this light, land owners should not be compensated for legislation protecting public parks from surface mining operations.

Where federal parkland is concerned, the property clause of the United States Constitution provides protection where traditional police power is unavailable. This applies when jurisdiction over private inholdings has not been ceded by the state to the federal government under U.S. CONST art. I, § 8, cl. 17, or where the land sought to be regulated lies outside the boundaries of the national parkland in question. Under the property clause, the federal government has authority analogous to the police power to regulate private lands for the limited purpose of protecting federally owned lands. *See* United States v. Alford, 274 U.S. 264, 267 (1927); Camfield v. United States, 167 U.S. 518, 525 (1897). *See also* Kleppe, Secretary of the Interior v. New Mexico, 426 U.S. 529 (1976). For a discussion of the problem of protecting national parks from intrusive uses on private lands that are near or within park boundaries, see Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1977).

Generally, Section 522(e) of the SMCRA prohibits surface mining that would disrupt federal parks. That section prohibits surface mining:

(1) on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National 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;

(2) on any Federal lands within the boundaries of any national forest; Provided, how-

The protection of pristine areas from the harmful environmental effects of surface mining surely falls within the purview of the police power. Yet, under the presumption of constitutionality accorded to legislative determinations, it is difficult to argue that Congress acted arbitrarily or irrationally in prohibiting strip mining in national parks. This is particularly true in light of the great potential for environmental harm which Congress found might result from such mining activities. When outstanding national resources such as national wilderness areas and parks are at stake, Congress should be afforded considerable leeway in protecting them from potential harm.

With few exceptions, section 522(e)(2) prohibits surface mining within the boundaries of any national forest.[167] Although the Kohler Act's prohibition of coal mining related subsidence of public buildings, highways, and the like was an absolute prohibition, the mining prohibition within any national forest is not absolute.

Section 522(e)(2) permits surface mining in national forests if the Secretary of the Interior finds:

> that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—

---

ever, 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 maybe incompatible with such surface mining operations and—

(A) surface operations and impacts are incident to an underground coal mine; or

(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, 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 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 of 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)(1)-(5), 30 U.S.C. § 1272(e)(1)-(5) (Supp. II 1978).

167. *Id.* § 522(e)(2), 30 U.S.C. § 1272(e)(2).

(A) surface operations and impacts are incident to an underground mine; or

(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, the Federal Coal Leasing Amendment Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act. . . .[168]

There is an inherent element of unfairness in such broad prohibitions of surface mining on private holdings, national forests, and other federal lands, and courts should take notice of this unfairness.

The most difficult taking problem likely to arise under a section 522(e) prohibition of mining in a national forest may occur when the Government has acquired a surface estate through donation or purchase while the right to mine coal has remained in the grantor. Such a situation is most like *Pennsylvania Coal Co. v. Mahon*, for when mining is prohibited, the grantor has lost the right to exploit that which was expressly reserved in the grant.[169] In *Pennsylvania Coal* the Court noted: "[S]o 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 of greater rights than they bought."[170]

There are distinguishing features, however, which may require a different result in a section 522(e)(2) case. If the grantee had been a private party rather than the United States, it would have been a valid exercise of the police power to prohibit mining. Even though such regulation would render the mineral estate valueless, it would have been valid in order to protect the public from water pollution, air pollution, or damage to the economic community. The point is simply that no matter who contracts with whom to sell or lease real property interests, such contracts can never be used to insulate the parties from regulation

168. *Id.*

169. 260 U.S. at 416. It should be observed, however, that while Justice Holmes purported to pass on the constitutionality of the Kohler Act as it applied to surface rights purchased by a government body, such statements are dictum because the case pertained only to subsidence of the Mahons' private residence.

170. *Id.* The similarity between *Pennsylvania Coal* and a National Forest prohibition under section 522(e)(2) is evident in instances where the Government has purchased or sold mineral rights. Different considerations may be present if surface rights have been donated to the United States.

if the property is thereafter used to adversely affect others who are not parties to the contract.

One exception to the general constitutional validity of section 522 is apparent, however, where the Government has literally enticed persons to bid for and purchase the right to mine coal, especially in the vast federal land holdings of the western and Rocky Mountain regions of the United States. Where the right to mine coal has been purchased under such circumstances, it seems patently unfair for the Government to later deprive the purchaser of the contractual benefit which the Government itself solicited.

These examples are not intended to suggest that section 522 is unconstitutional. On the contrary, the section would be unconstitutional only if just compensation were not paid. It is evident, however, that Congress has made provision, under the Tucker Act, for a mechanism to compensate persons whose mining rights have been "taken". As a practical matter, therefore, if courts find that an SMCRA related "taking" is compensable under the Tucker Act, there would be no constitutional violation.

IV. CONCLUSION

For almost sixty years the precise holding of *Pennsylvania Coal* has been misconstrued by state and federal courts. Indeed, the Supreme Court has been a primary source of *Pennsylvania Coal*'s misinterpretation. With all due respect, the Supreme Court has greatly complicated constitutional taking jurisprudence by cavalierly citing *Pennsylvania Coal* for a proposition that is not supported by a close examination of the facts and holding of that case.

Pennsylvania Coal was not a case in which legislation was enacted to serve an important public interest. Rather, the statute struck down by the Court was directed at protecting private interests. Judicial misinterpretation of *Pennsylvania Coal* has resulted in the imposition of undue weight on the diminution of private property values in the context of valid police power legislation. Diminution of value is certainly one factor to be considered in determining whether there has been an exercise of the power of eminent domain. It is not, however, a relevant factor in determining the validity of police power legislation enacted to protect important public interests from harmful private activities. Such legislation is distinctly different from the type of government activity appropriately characterized as an exercise of the power of eminent do-

main. It defies logic to suggest that the Government's ability to afford public protection from harmful private actions should be dependent upon the regulation's financial impact on private sectors. The fifth amendment was never intended to recognize or to secure vested property rights in those whose private activities harm important public interests.

It is hoped that the Supreme Court will take advantage of the opportunity presented in the cases now before it to eliminate more than a half century of erroneous fifth amendment analysis. It can do this simply by analyzing *Pennsylvania Coal Co. v. Mahon* on the basis of its holding and not upon excerpted statements taken out of context from that opinion. Such a reappraisal of *Pennsylvania Coal* will bring to the law of takings the specific logic expressed in Justice Holmes' opinion and it will greatly clarify an area of the law that has been confused as a result of erroneous constitutional analysis.