

In *Mahon*, Justice Holmes, for the Court, over Justice Brandeis' vigorous dissent, held unconstitutional a state statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. The homeowners had purchased by deeds that reserved to the coal companies ownership of subsurface mining rights and that held the companies harmless for damage caused by subsurface mining operations. The statute thus gave the homeowners more than they had been able to obtain through contracting, and at the same time deprived the coal companies of the entire value of their subsurface estates. The Court observed that "[f]or practical purposes, the right to coal consists in the right to mine," and that the statute, by making it "commercially impracticable to mine certain coal," had essentially "the same effect for constitutional purposes as appropriating or destroying it."<sup>686</sup> The regulation, therefore, in precluding the companies from exercising any mining rights whatever, went "too far."<sup>687</sup> However, when presented 65 years later with a very similar restriction on coal mining, the Court upheld it, pointing out that, unlike its predecessor, the newer law identified important public interests.<sup>688</sup>

The Court had been early concerned with the imposition upon one or a few individuals of the costs of furthering the public interest.<sup>689</sup> But it was with respect to zoning, in the context of substantive due process, that the Court first experienced some difficulty in this regard. The Court's first zoning case involved a real estate company's challenge to a comprehensive municipal zoning ordinance, alleging that the ordinance prevented development of its land for industrial purposes and thereby reduced its value from \$10,000 an acre to \$2,500 an acre.<sup>690</sup> Acknowledging that zoning was of recent origin, the Court observed that it must find its justification in the police power and be evaluated by the constitutional standards applied to exercises of the police power. After considering traditional nuisance law, the Court determined that the public interest was served by segregation of incompatible land uses and the ordinance was thus

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<sup>686</sup> 260 U.S. at 414–15.

<sup>687</sup> 260 U.S. at 415. In dissent, Justice Brandeis argued that a restriction imposed to abridge the owner's exercise of his rights in order to prohibit a noxious use or to protect the public health and safety simply could not be a taking, because the owner retained his interest and his possession. *Id.* at 416.

<sup>688</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

<sup>689</sup> *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935) (government may not require railroad at its own expense to separate the grade of a railroad track from that of an interstate highway). *See also* *Panhandle Co. v. Highway Comm'n*, 294 U.S. 613 (1935); *Atchison, T. & S.F. Ry. v. Public Util. Comm'n*, 346 U.S. 346 (1953), and compare the Court's two decisions in *Georgia Ry. & Electric Co. v. City of Decatur*, 295 U.S. 165 (1935), and 297 U.S. 620 (1936).

<sup>690</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).