

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1092

TITLE KEYSTONE BITUMINOUS COAL ASSOCIATION, ET AL.,
Petitioners V. NICHOLAS DeBENEDICTIS, PHILIP ZULLO
AND THOMAS B. ALEXANDER

PLACE Washington, D. C.

DATE November 10, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEYSTONE BITUMINOUS COAL :

4 ASSOCIATION, ET AL., :

5 Petitioners :

6 v. : No. 85-1092

7 NICHOLAS DeBENEDICTIS, PHILIP :

8 ZULLO AND THOMAS B. ALEXANDER :
9 -----X

10 Washington, D.C.

11 Monday, November 10, 1986

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:47 a.m.

15 APPEARANCES:

16 REX E. LEE, ESQ., Washington, D.C.; on
17 behalf of the Petitioners.

18 ANDREW S. GORDON, ESQ., Chief Deputy Attorney General of
19 Pennsylvania, Harrisburg, Pennsylvania; on behalf
20 of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Keystone Bituminous Coal Association against Nicholar DeBenedictis.

Mr. Lee, you may proceed whenever you're ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEE: Thank you, Mr. Chief Justice, and
may it please the Court:

This case involves two Constitutional provisions, the takings clause and the contract clause.

The principle that controls the takings issue is simple and well established. Sixty-four years ago this Court held in *Pennsylvania Coal v. Mahon* that regulation which goes too far amounts to an unconstitutional taking.

And specifically, it held that the State of Pennsylvania went too far when it required anthracite coal owners to leave certain coal in the ground in order to serve a public purpose.

There is, very simply, no meaningful distinction between Section 4, which is one of the two sections of the statute at issue today, and the Kohler Act, which held -- which Pennsylvania Coal held unconstitutional.

1 Indeed, the parallels between the two statutes
2 are remarkable. The operative language in the Kohler
3 Act was as follows: It shall be unlawful for any owner
4 so to mine anthracite coal as to cause subsidence.

5 Whereas its modern day counterpart, Section 4,
6 states that no owner shall mine bituminous coal so as to
7 cause damage from subsidence.

8 The one deals with anthracite, and the other,
9 bituminous. But that's the only real difference.

10 If Pennsylvania Coal is still good law, as
11 this Court has stated on many occasions that it is, the
12 then Third Circuit's judgment in this case must be
13 reversed.

14 The controversy arises out of the following
15 circumstances.

16 Pennsylvania law recognizes three separate
17 property interests, or estates in land: the mineral
18 estate; the surface estate; and the support estate.

19 My clients' Constitutional rights are based on
20 the right that as to most of their properties, they have
21 acquired two of these three estates. And it's important
22 to understand why it is that they acquired the support
23 estate in addition to the coal.

24 Most of Pennsylvania's bituminous coal, which
25 is located in the western part of the State, lies

1 hundreds of feet below the ground and is extracted by
2 underground mining.

3 When that happens, the surface will subside.
4 In some cases, the subsidence will cause damage, and in
5 other cases, it doesn't. And it is impossible to
6 predict in advance which parcels will be damaged by
7 subsidence, and which will not.

8 Two facts, then, bring the interests of the
9 coal owners on the one hand and the surface owners on
10 the other into an obvious conflict. On the one hand,
11 coal in the ground has no value unless it can be mined.
12 It's worthless unless it can be mined. Yet on the other
13 hand, the underground mining of any coal in any quantity
14 creates some risk of subsidence.

15 So that if it isn't mined, it's valueless.
16 And if it is mined, there will be subsidence, and there
17 may be some damage.

18 In the case of about 90 percent of the
19 bituminous parcels in Pennsylvania, these competing
20 interests have been accommodated, and the relevant
21 burdens and risks have been shifted by contract.

22 Between about --

23 QUESTION: Mr. Lee, are you -- are your
24 clients complaining only about parcels as to which they
25 have acquired the support estate?

1 MR. LEE: Yes.

2 QUESTION: Nothing else is at issue here?

3 MR. LEE: That is correct.

4 The coal owners --

5 QUESTION: As to such parcels, do you think
6 that under the regulatory power of government, that
7 there's any leeway for the State of Pennsylvania to
8 prevent and prohibit the taking of any portion of the
9 coal to prevent contamination of water, underground
10 water, or to prevent destruction of utility lines?

11 Is that beyond the regulatory power of the
12 State?

13 MR. LEE: Those are -- I think it is not
14 totally beyond the regulatory power of the State,
15 Justice O'Connor. I want to stress at the outset that
16 that's outside what we're talking about in this
17 instance. But --

18 QUESTION: I thought it was part of it. I
19 thought this act dealt in part with underground water
20 aquifers and utility lines.

21 MR. LEE: Yes. Insofar as -- and let me draw
22 the distinction. In the Pennsylvania Coal case, there
23 was a case that the majority -- that the Court
24 distinguished. It was called the Plymouth Coal case,
25 which dealt with the requirements for mine safety.

1 I think that when the coal miners engage in a
2 certain kind of activity, then the State has the right
3 to regulate that activity in such a way as to make it
4 safe.

5 But when they go beyond that, and attempt to
6 take property in such a way as to -- as to protect other
7 property, then that's the point at which it goes too
8 far.

9 And that, we submit, is the necessary holding
10 of Pennsylvania coal.

11 QUESTION: Well, but applying that to
12 protection of aquifers and utility lines: What is your
13 view? I'm not clear.

14 MR. LEE: Our view is -- now, of course,
15 aquifers and utility lines is different factually from
16 what happened in Pennsylvania Coal. But we don't think
17 that it's a different -- there's a difference in
18 concept, and we don't think that the legal rule is
19 different insofar as aquifers and utility are
20 concerned.

21 It's not private property; public property in
22 a sense. But it involves the same principle, that if
23 Pennsylvania wants to accomplish its purposes -- and
24 certainly those are proper purposes -- that there comes
25 a point at which regulation goes too far, if it takes

1 too much, if it regulates too much, then it goes too
2 far.

3 And the necessary holding of Pennsylvania Coal
4 is that when coal has only one value, unlike the
5 situation in Penn Central, where there were other
6 values, and unlike all of the other cases, when it only
7 has one value, then if Pennsylvania eliminates that
8 value, it has gone too far.

9 QUESTION: Well, as I understand it, the State
10 requires only a small percentage of the coal to be left
11 in place, from one to nine percent?

12 MR. LEE: No, that is not correct. Let me
13 clarify the answer to that. And let me compare it in
14 that respect, to the Kohler Act.

15 Note the parallels in the language. Both
16 simply said you can't -- you can't mine anthracite or
17 bituminous in such a way as to cause subsidence.

18 Neither statute said you have to leave so much
19 in the ground. It was assumed however in the
20 Pennsylvania Coal case that the amount that would be
21 required to be left in the ground was about a third.
22 And that's in the opinion, mostly in the argument
23 portion of the opinion, in Pennsylvania Coal.

24 In the case of the modern day counterpart to
25 the Kohler Act, in the case of Section 4, the State of

1 Pennsylvania in 1982 adopted regulations which require
2 that 50 percent of the coal underlying certain
3 designated surface structures be left in the ground.

4 Now, the one percent to nine percent that
5 they're talking about is the percentage of the coal that
6 has to be left in the ground, that is, the 50 percent
7 under surface structure; the percentage that that is to
8 the total coal holdings of the company.

9 But they're the same. The only difference in
10 that respect is that where it was assumed in
11 Pennsylvania -- and apparently correctly, because that's
12 what the lower court said as well -- was that you had to
13 leave 30 percent of the anthracite. We are required to
14 leave 50 percent of the bituminous.

15 So that these contractual arrangements that
16 were made mostly between the years 1890 and 1920,
17 carefully shifting the burdens between the parties,
18 among the parties that are affected, have been
19 rearranged by the State of Pennsylvania.

20 QUESTION: Does the record really tell us how
21 much has to be left in place?

22 MR. LEE: Oh, yes.

23 QUESTION: And therefore, is this right for
24 our decision?

25 MR. LEE: Oh, it is indeed right.

1 The State of Pennsylvania's own exhibit, which
2 appears, Justice O'Connor, at page 284 of the joint
3 appendix, shows in excess of 26 million tons that have
4 been left.

5 Part of the record, though it hasn't been sent
6 here to the clerk's office, are maps that show exactly
7 where those parcels are; where they are in the mining
8 plans; and which parts are going to have to be -- and
9 which parts are going to have to be left.

10 This cases contrasts, in that respect, with
11 other cases in which in recent years the Court has not
12 reached the takings issue in land use cases because of
13 ripeness problems. And I'd like to contrast in that
14 respect with Yolo County.

15 In Yolo County the Court had to --

16 QUESTION: Mr. Lee, let me get back just a
17 minute to the question Justice O'Connor asked you. You
18 don't really dispute the 9.4 percent in this table on
19 page 284, but you just say, that's applied to the total
20 amount of coal holdings.

21 MR. LEE: That is correct.

22 QUESTION: That as much as 50 percent can be
23 required to support a particular building.

24 MR. LEE: That is correct.

25 QUESTION: But now, 50 percent of what?

1 MR. LEE: Of the coal underlying the
2 particular structures that are protected by Section 4.

3 What the statute, as implemented by the
4 regulations, requires is this: You have a designated
5 structure. You move out 15 feet from each side of that
6 structure. And then you go down at an angle of 15
7 degrees from a perpendicular to the point where the coal
8 seam lies.

9 And then within that circumscribed area, you
10 have to leave 50 percent of the coal that is within that
11 area.

12 It's exactly the same as you had in
13 Pennsylvania Coal. And the amount that was left under
14 the man's home in Pennsylvania Coal was an even smaller
15 percentage of the total Pennsylvania Coal holdings.

16 Now, let me just complete --

17 QUESTION: Let me just follow up on that for a
18 second. Supposing you have a house on a big farm.

19 MR. LEE: Yes.

20 QUESTION: What you're saying is, 50 percent
21 of the coal under the house has to be retained.

22 MR. LEE: That is correct.

23 QUESTION: But the rest of it on the farm
24 wouldn't. And you're mainly concerned about mining
25 under urban areas, is that what the problem is?

1 MR. LEE: No, it really isn't.

2 QUESTION: It's just the structures out in the

3 --

4 MR. LEE: The coal reserves in this area just
5 aren't in urban areas.

6 QUESTION: I see. Well, but if you're just
7 concerned about 50 percent of, say, a 40-foot square
8 parcel in a 20-acre farm, it doesn't sound -- 50 percent
9 is a little bit misleading, isn't it?

10 MR. LEE: Would that that were the case,
11 Justice Stevens. By the time --

12 QUESTION: Does the record tell us what
13 proportion of the given coal fields have structures on
14 them?

15 MR. LEE: The record tells us --

16 QUESTION: What does the 50 percent reduce to
17 in terms of the total field, in other words?

18 MR. LEE: What the record tells us -- it
19 doesn't tell us what it reduces to in terms of the total
20 field. But it does tell us this --

21 QUESTION: Except insofar as the exhibit on
22 page 284 indicates it's about nine percent.

23 MR. LEE: That is correct. That is correct.
24 It's about nine -- that's right, it's about nine percent
25 of the total coal fields.

1 But a couple of things need to be said. Would
2 that it were only 40 feet by the time it gets down to
3 the seam. By the time you extent that down at a 15
4 degree angle for 800 feet, it amounts to acres by the
5 time you actually reach the point where the coal is.

6 But the important thing is that there is no
7 question that it amounts somewhere between their figure
8 of 26 million tons, and 30 million tons.

9 And that is the amount that is have to be left
10 -- that has had to be left in the ground underneath
11 these structures solely because of this statute.

12 And it is indistinguishable, for those
13 purposes, from Pennsylvania Coal.

14 QUESTION: Mr. Lee, how much of that do you
15 think you have a Constitutional right to remove?

16 MR. LEE: Oh, all of it.

17 QUESTION: You have a right to remove all of
18 it?

19 MR. LEE: Yes, that is the thrust of
20 Pennsylvania Coal, that -- because from 1890 to 1920 we
21 acquired those rights.

22 The question is who --

23 QUESTION: You acquired the support rights.

24 MR. LEE: Support estate.

25 QUESTION: A support estate in every piece of

1 the land affected by this that you're bringing before us?

2 MR. LEE: That is correct. Those parcels as
3 to which we acquired the support estate.

4 I refer you back to my earlier comment that
5 they're in irreconcilable conflict with each other. The
6 coal is worthless unless you can mine it. On the other
7 hand, if you do mine it, there is going to be
8 subsidence, and in some instances, there will be
9 damages.

10 Now the way that that is accommodated is, that
11 someone has the support right. Which can only be used
12 valuably in connection with either one of the other two
13 estates.

14 If it belongs to the surface owner, then you
15 can't mine. If it belongs to the coal owner, then you
16 can mine.

17 And what Pennsylvania has done is to
18 redistribute these property rights and contract rights
19 that the parties have acquired as between themselves.
20 And that is Pennsylvania Coal.

21 Now coming to ripeness, and let me just finish
22 it up. There is identifiable, recognizable coal in
23 identifiable amounts that has been left under the ground
24 in order to accomplish a public purpose.

25 In Yolo County, the Court properly observed

1 that it had -- well, let me say, the Court had two
2 tasks. It had to determine, first, how much of a land
3 -- how much land use regulation amounted to a taking;
4 that had never been determined. And then it had to
5 determine whether the particular -- particular case did
6 or did not meet that measure.

7 But as the Court said, a court cannot
8 determine whether a regulation has gone too far unless
9 it first knows how far the regulation goes.

10 There, there was no indication whether some
11 less dense development was possible, and therefore, how
12 badly the surface owners had been hurt. And until you
13 could know that, you could not know whether the
14 regulation went too far.

15 Here it has been established how far is too
16 far. And here we know that 30 million tons of
17 identifiable coal have been left.

18 QUESTION: Mr. Lee, suppose you hadn't taken
19 what you think you've taken in the transaction, namely,
20 the support estate; that you bought the mineral right --
21 mineral rights, but you didn't take the support estate.

22 What would your argument be now?

23 MR. LEE: I wouldn't have any. We wouldn't be
24 here.

25 QUESTION: Because?

1 MR. LEE: Because the State of Pennsylvania
2 then wouldn't be taking anything, because then they
3 would just be adjusting something that the parties
4 themselves unadjusted.

5 I supposed there might be an argument.

6 QUESTION: Well, what if in the contract the
7 surface owners just waived any right to any damage?

8 MR. LEE: It's the same thing. Then we would
9 be here, because that's --

10 QUESTION: Then it would just be a contract?

11 MR. LEE: Then it would be the contract
12 clause. Then I would be talking to you about my Section
13 6 rather than Section 4.

14 QUESTION: All right, where did the support
15 estate -- is that Pennsylvania law?

16 MR. LEE: It is Pennsylvania law. There's the
17 Captline case that you might want to look at, Justice
18 White, cited in our brief.

19 QUESTION: Well, have you -- you're really
20 saying, then, that what they've taken here is not 25
21 million tons of coal directly. They're just taken the
22 support estate.

23 MR. LEE: That is correct. But it is measured
24 by the value of the 25 million tons.

25 QUESTION: You think that's what was taken in

1 the Pennsylvania Coal case?

2 MR. LEE: Yes, it is, because the support --
3 Pennsylvania is unique in this respect. You could
4 accomplish the same thing in West Virginia by getting
5 the waiver. But it is conceptually cleaner --

6 QUESTION: But then you would just be a
7 contract claimant. It wouldn't be a takings case.

8 MR. LEE: That is arguably correct, though I
9 think --

10 QUESTION: Arguably? Or I thought you said it
11 was --

12 MR. LEE: No, arguably. Arguably. I think
13 you could still make a takings argument under those
14 circumstance. But I will save that for the case if it
15 ever comes up.

16 QUESTION: It is correct, is it not, that your
17 -- that Pennsylvania law differs from, say, West
18 Virginia, Indiana, and Illinois with regard to this
19 underground support estate?

20 MR. LEE: It's unique in that respect.

21 QUESTION: And so that your -- there at least
22 would be a different takings argument in the rest of the
23 country, basically?

24 MR. LEE: That is correct. That is correct.

25 QUESTION: But the same contract argument that

1 you're making here?

2 MR. LEE: Identical.

3 QUESTION: And if it wouldn't be any good in
4 those other cases, it wouldn't be any good here. I'm
5 not saying it isn't any good, but --

6 MR. LEE: The statement is a correct one.

7 QUESTION: Does any other State have a law
8 like Pennsylvania?

9 MR. LEE: It really doesn't, Justice Powell.

10 QUESTION: You say it's unique?

11 MR. LEE: It's unique. Pennsylvania -- oh,
12 excuse me -- Pennsylvania is unique both in recognizing
13 the support estate. It is also unique in that it is the
14 only State that has ever found it necessary to go as far
15 as Pennsylvania has gone both in 1921 and then almost
16 half a century later in this particular statute.

17 QUESTION: Well, what's the citation of the
18 case?

19 MR. LEE: The Captline? It's cited in our
20 brief, and I'm sure in the State's as well. And it is
21 459 A.2d 1298.

22 On the merit --

23 QUESTION: May I just one other question about
24 the three estates?

25 Does the record give us any indication of the

1 relative costs of the three -- just of the two estates?
2 How much extra for underground coal do they have to pay
3 to get the support as well?

4 MR. LEE: It really doesn't. There are a
5 number of deeds, and I'm told that you can reconstruct
6 from the information on the deeds. But they bought the
7 whole package, as a single package.

8 QUESTION: Mr. Lee, what if the State here had
9 simply passed a law allowing owners of the surface
10 estate to compel your clients to convey to them for a
11 fair price the support structure estate.

12 MR. LEE: I get your question. The state in
13 fact did that, at Section 15 of the same statute, and
14 we're not challenging it.

15 On the merits, the respondents make two
16 arguments. The first is an attempt to distinguish
17 Pennsylvania Coal, and the second, we contend, amounts
18 to an attempt to overrule it.

19 We are told --

20 QUESTION: (Inaudible) has Pennsylvania ever
21 recognize a support estate?

22 MR. LEE: No, of course not. Of course not.
23 But it's about -- it's a good discussion of the general
24 rule, is all I'm saying, Justice White.

25 QUESTION: Is that a common law rule in

1 Pennsylvania or is that statutory?

2 MR. LEE: I think it has both common law and
3 ancient statutory roots.

4 QUESTION: Ancient statutory roots in
5 Pennsylvania?

6 MR. LEE: Ancient -- ancient for -- I don't --
7 yes, ancient for Pennsylvania. Let me revise that
8 statement. It has both common law and longstanding
9 statutory roots.

10 QUESTION: And is there any notion of why such
11 an estate came to pass?

12 MR. LEE: Oh, I think there's little question
13 why it came to pass. It's because Pennsylvania is an
14 importing coal mining State, and there was a need to
15 accommodate these obviously competing interests.

16 QUESTION: Some reason other than just an
17 action for damages or a duty to support or --

18 MR. LEE: I'm really not sure, but I've always
19 assumed that it was because of something more than an
20 action for damages. That it was, whether there was or
21 was not a duty to support.

22 The State suggests that this is not like the
23 Kohler Act, and they suggest only one difference. And
24 that difference is that, whereas the Kohler Act was
25 designed to protect personal safety, that the purpose of

1 the Subsidence Act is to promote land development and
2 preserve the tax basis.

3 That argument is insufficient for two
4 reasons. The first is that the Constitution guarantees
5 against takings without compensation. It does not
6 permit takings without compensation for some purposes
7 but not others.

8 Once it's determined that the State has gone
9 too far, then the State has only two options: They
10 either stop the restriction or pay for the property
11 taking.

12 It makes no difference in a particular case
13 that a State may or may not have a very good reason for
14 taking. If the reason is good enough, then it can
15 take. But if it takes it has to pay. And if it doesn't
16 pay, then it must stop the taking.

17 Here it is beyond dispute that the State has
18 gone too far, because Pennsylvania Coal holds that
19 requiring coal to be left in the ground is a taking.

20 QUESTION: Mr. Lee, what precautions are taken
21 in Pennsylvania, or required in Pennsylvania, under
22 Federal law, when you mine coal for the safety of miners
23 to keep the mine from collapsing?

24 MR. LEE: Those are extensive. Those are
25 extensive.

1 QUESTION: Do you leave pillars of coal?

2 MR. LEE: Yes, indeed we do.

3 QUESTION: Or do you put in steel supports, or
4 what?

5 MR. LEE: Mostly -- there can be artificial
6 supports; it's a combination of both.

7 QUESTION: Would you suppose that -- why
8 aren't those precautions -- why wouldn't those be
9 sufficient to satisfy any requirement for support and to
10 prevent damage to the surface areas?

11 MR. LEE: The reason that they don't -- let me
12 give you a twofold answer. The first is just a
13 precedent answer, that that really is the Plymouth Coal
14 case, which a few years prior to Pennsylvania Coal, had
15 involved the requirement that coal be left in the ground
16 for support purposes -- excuse me, for safety purposes.

17 QUESTION: Safety.

18 MR. LEE: For safety purposes. And this
19 Court, in its decision in Pennsylvania Coal,
20 distinguished that case on two grounds, as I read the
21 opinion.

22 One is that it was related to a purpose that
23 is attributable to what the mining companies themselves
24 were doing, that if they're going to mine, that the
25 State does have an interest in controlling that activity.

1 QUESTION: Sure.

2 MR. LEE: And the second is, that it was only
3 temporary; that whereas -- it was only temporary during
4 the period of time that the coal is in the ground.

5 You see, for the miners own purposes -- that
6 is, for the company's own purposes, they can never get
7 it all out.

8 QUESTION: Well, what I really want to know,
9 as you well know, is why do you -- why is it so
10 impossible that you couldn't satisfy the act, this act's
11 requirements, by saying, well, if we're going to mine,
12 we can easily supply the support in another way?

13 MR. LEE: Yes, yes. Let me answer that
14 question, and the answer to that one is --

15 QUESTION: Suppose that were true, that you
16 could prove that, would you have any kind of a claim?
17 It might cost you a lot of money, but would you have
18 some claim against somebody?

19 MR. LEE: Yes, we would have a claim. And
20 here is the answer. And the factual support for this
21 is, incidentally, is in the record. It's contained in
22 the Joint Appendix.

23 There are certain parts of a coal mine that
24 the companies, from time immemorial, would leave only --
25 actually more than 50 percent of the coal in the ground

1 for their own purposes: for safety for their own miners;
2 for access; and for ventilation.

3 And those are sometimes referred to as the
4 mains, the submains, the development entries, and so
5 forth. Those are the parts of the mine that for the
6 miners' own purposes, you have to leave substantial
7 amounts of coal in the ground.

8 In between those areas are what are called the
9 mining panels, or the development panels. And within
10 that area you try -- the effort is to get just as much
11 of the coal out as you possible can.

12 Now, it is possible in many instances, and the
13 record bears this out, that in setting out the mining
14 plan, it is possible to locate these areas where the
15 mining companies would in any event leave underneath the
16 protected structures. But you can't do it in all
17 instances.

18 And what happens is, that there are 3,000
19 structures that belong to my clients, and this is also
20 in the record --

21 QUESTION: Well, the act does say that --
22 provide a mechanism whereby you can at least try to get
23 --

24 MR. LEE: That's right, and we do. And we do.

25 QUESTION: And have you?

1 MR. LEE: Of course.

2 QUESTION: In all of these areas?

3 MR. LEE: Oh, no, no, no. Well, we have made
4 the effort. Because it's to our advantage to do so.
5 Some of the mines, of course, were already set up and
6 operating prior to the time -- prior to the time -- that
7 the act came into effect.

8 QUESTION: So any statutory remedies you've
9 had you've exhausted?

10 MR. LEE: Yes. Yes, we think we have.

11 QUESTION: And you've never been able to prove
12 up, or to demonstrate, that there's some other way of
13 doing this?

14 MR. LEE: We not only have not been able to
15 demonstrate it, Justice White -- the answer to that
16 question is no, we've never been able to demonstrate
17 it. And we alleged in the complaint that we could not.
18 And the answer to the complaint was -- or the answer to
19 that allegation was, that we were right.

20 Let me say just one word about the contract
21 clause, then I do want to save just a little bit for
22 rebuttal.

23 Simple -- our contract clause argument is this
24 simple. The contract clause is there. It is one of the
25 most specific provisions in the Constitution. It is the

1 only -- it is one of the few in the original 1787
2 document that particularly applies to the states.

3 It has to mean something. It has to protect
4 some contracts. And this Court said in Spannaus that
5 the height of the impairment -- that the nature of the
6 impairment measures the height of the hurdle that the
7 State must clear.

8 If the contract clause does not apply to
9 protect this particular contract in this case, then it
10 is hard to see that the contract clause has any value at
11 all.

12 Because unlike Spannaus, where, as this Court
13 said, there was one provision that was modified, this
14 case does not involve just a modification of a
15 provision; it involves a complete rewriting of the
16 entire contract.

17 QUESTION: You really -- I take it you're
18 really submitting that even though you lose on the
19 takings clause, you should win on the contracts clause?

20 MR. LEE: No, I'm really not saying that.
21 Well, yes, I'm saying that, but I'm saying one other
22 thing. I'm saying also that there is a separate ground
23 that is particularly applicable to Section 6. But we do
24 think we can win on both grounds.

25 I'd like to reserve the rest of my time, Mr.

1 Chief Justice, unless the Court has questions.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

3 We'll hear now from you, Mr. Gordon.

4 ORAL ARGUMENT OF ANDREW S. GORDON, ESQ.,

5 ON BEHALF OF THE RESPONDENTS.

6 MR. GORDON: Mr. Chief Justice, and may it
7 please the Court:

8 As Mr. Lee mentioned, this appeal raises
9 questions under the takings clause and the contract
10 clause.

11 I'd like to address my remarks this morning
12 primarily to the taking clause issue. If my time
13 permits, or if the Court has questions, I'll address the
14 contract clause issue as well.

15 The coal companies, it seems to me, have
16 conceded a great deal in this case. First of all, they
17 do not contest the fact that Pennsylvania's subsidence
18 program is a land conservation measure; that it is
19 designed to promote land development, to protect the
20 municipal tax base, and generally, to preserve the
21 health, safety and welfare of the Commonwealth citizens.

22 QUESTION: Do you think that makes it
23 difference from the Kohler Act in Mahon?

24 MR. GORDON: Well, it certainly has a far
25 broader focus. It is intended to accomplish a great

1 deal. I'm not sure that that difference in itself, and
2 we don't argue that that difference in itself, makes the
3 case distinguishable from Pennsylvania Coal. There are
4 other factors which I will elaborate on in a few
5 moments.

6 The coal companies do not contest the fact, as
7 well, that this program accomplishes these broad
8 purposes. The coal companies admit that the government
9 may regulate the use and enjoyment of property, even
10 though the regulation in particular cases may affect
11 property values adversely, and sometimes substantially.

12 They admit as well that the effect of these
13 regulations on their coal mining operations is
14 relatively small. As the Court noted in the chart we
15 that we have prepared as part of the Joint Appendix, as
16 little as four-hundreths of one percent of a coal mine
17 is involved in this particular case. And the percentage
18 varies.

19 QUESTION: But as much as nine percent?

20 MR. GORDON: It goes up to nine percent,
21 that's correct.

22 And of course, focussing more broadly --

23 QUESTION: And as much as 50 percent under a
24 particular structure?

25 MR. GORDON: That's right, that's correct.

1 Focussing even more broadly than that, the
2 contracts and the arrangements that are involved that
3 make up these coal mines, that these coal companies
4 purchase, involve more than the purchase of coal.

5 They purchase many other rights along with
6 it. They're outlined in the deeds that are in the
7 record. But many rights: the right to sink shafts, to
8 erect buildings on the surface; a whole variety of other
9 rights were purchased along with the coal.

10 So we're talking about a small aspect, really,
11 as far as this record shows, of what they have and what
12 they control.

13 And finally, the companies do not contest the
14 fact that since this program was initiated back in 1966,
15 that they have operated their mines, they have operated
16 them at a profit. And in fact, as recently as 1980 and
17 '81, in the face of these regulatory requirements, and
18 Federal regulatory requirements, which are to some
19 extent similar, Consolidation Coal Company, one of the
20 petitioners here, purchased vast new mining properties;
21 began to plan a new complex of mines --

22 QUESTION: But I don't suppose you would
23 contend that if during these years instead of doing what
24 the State did, the State said, by the way, we would like
25 to have 50 percent of your coal under these structures

1 and we're going to mine it, and they just went and mined
2 it; they would have to pay for it, I suppose?

3 MR. GORDON: If they went -- if the mined the
4 coal --

5 QUESTION: If the State just mined the coal
6 and said, you can make plenty of profit without this
7 coal; we just want it.

8 MR. GORDON: Well, obviously, as I will
9 elaborate on more in the rest of my argument, the
10 character of the government action makes a difference.
11 And certainly that would make a --

12 QUESTION: Well, you're arguing that the
13 quantity of it makes a difference. And I think the
14 import of Justice White's question is: Does it? If
15 there's a taking, if there is a taking of property, does
16 it make any difference that you're only taking a little
17 bit of the property?

18 QUESTION: Or if you leave the other fellow
19 with a lot of his property.

20 QUESTION: If I have \$200 million, is it okay
21 for you to come and take \$1 million just because it's
22 not -- it's not very much of the total?

23 MR. GORDON: Well, but the question here, of
24 course, is: Is there a taking. And what that -- and
25 what --

1 QUESTION: But does that have anything to do
2 with what proportion you're taking?

3 MR. GORDON: It does in the -- when you're
4 talking about a regulatory taking that affects the use
5 and enjoyment of property, it makes a big difference
6 what the economic impact and the relative impact is.

7 QUESTION: (Inaudible) it does if you haven't
8 established that there's a taking. But if Pennsylvania
9 Coal says that there's a taking, then what difference
10 does it make that there's less of a taking here?

11 MR. GORDON: Well, if Pennsylvania Coal
12 establishes that there is a taking here, then obviously,
13 we don't prevail. But what our argument is that you
14 can't read it that simply; that you have to look at the
15 question of regulatory takings in its proper
16 perspective.

17 Through the years in the Court's -- sometimes
18 its struggle to come up with guidelines to judge takings
19 clause claims --

20 QUESTION: General, before you move on, do you
21 agree with Mr. Lee that perhaps up to, what, 30 million
22 tons of coal will have to be left in the ground with no
23 economic value under this act?

24 MR. GORDON: We might have a slight difference
25 on the amount. But as I read the charts in the

1 Appendix, it's upwards of --

2 QUESTION: It could be 27 to 30?

3 MR. GORDON: Yes, somewhere in that amount.

4 QUESTION: Is it possible that that could be
5 -- I don't know too much about the particular
6 petitioners here -- but is it possible that there could
7 be a very small owner of coal that substantially all of
8 which could be taken under this act?

9 MR. GORDON: My understanding is, like most
10 industries which are capital intensive like the coal
11 industry is, it's becoming more and more large
12 companies. It's possible; I don't know.

13 QUESTION: Yes, I would agree with that.

14 MR. GORDON: I don't know.

15 QUESTION: But let's assume, for example, you
16 own a hundred or a thousand acres, and you leased it to
17 a coal company. And it so happened that because of the
18 effect of this act, you had a lease depending upon the
19 percentage of the coal drawn from the ground. If you
20 just happened to have it where the act was applied,
21 you'd lose 90 percent of your rent.

22 Would that be a taking?

23 MR. GORDON: It could be.

24 QUESTION: It would be, wouldn't it?

25 MR. GORDON: Well, I'm not sure --

1 QUESTION: You wouldn't have it, and there
2 would be no compensation?

3 MR. GORDON: The rule is, if it denies an
4 owner all of the economically viable use, or almost all
5 of the economically viable use of his land, that is a
6 taking.

7 I'm not sure that I am able to say that 90
8 percent, 95 percent, 98 percent, where that line is; and
9 I don't think the Court has ever said where that line
10 is.

11 There are cases, though, that certainly have
12 found no taking where there was a diminution of upwards
13 of 90 percent. So I'm not sure where that line is.

14 But it's possible, as applied to a particular
15 coal mine and a particular miner, that there could be a
16 taking. We don't dispute that.

17 QUESTION: You'd be in much better shape if
18 Pennsylvania had never recognized the support estate,
19 wouldn't you?

20 MR. GORDON: Well, I'm not sure that we
21 ascribe the features to it that the petitioners do.

22 QUESTION: Well, you might address that.
23 Because as I understand it, Mr. Lee said that he would
24 be in tough trouble if they hadn't acquired the support
25 estate.

1 MR. GORDON: My understanding of the effect of
2 the support estate, or a waiver of liability, whether
3 it's in Pennsylvania or in most coal mining States is,
4 it's pretty much the same.

5 What it is, is a waiver of liability for
6 damages caused by coal mining to the surface. Or if
7 it's owned by the surface owner, it's a protection
8 against damage, and a right to be compensated
9 irrespective of fault.

10 What happened in Pennsylvania was --

11 QUESTION: But that would eliminate the
12 takings argument. It wouldn't eliminate the contracts
13 argument. If it were just a waiver.

14 MR. GORDON: Well, I don't know that it would
15 eliminate the takings argument entirely, really, for two
16 reasons. One is, they are claiming not so much that we
17 are taking their support right, but we're taking their
18 coal.

19 They can't take the coal out, so we've taken
20 it. That's point one.

21 Point two is, of course a contract right can
22 be the subject of a takings claim as well.

23 QUESTION: I don't think, unless I mistake
24 their argument, I think they're saying you're taking
25 the support estate, whose value is measured by the coal.

1 MR. GORDON: They're really saying both. As I
2 read their main brief, what they say is: We have to
3 leave our coal in the ground. We can't use it. You're
4 taking it. We bought the support right. We can't get
5 the benefit of it. So you're taking it.

6 I read their reply brief, and I don't really
7 the support estate talked about very much at all;
8 they're concentrating on the coal. So I think it's a
9 little bit of both.

10 But our argument really doesn't change based
11 upon the focus. Because the focus is, in a case like
12 this, on the overall economic impact.

13 This is not a case that falls into one of the
14 areas where the Court has seen fit to adopt a per se
15 rule. This is not a case like a physical appropriation
16 case, or a physical invasion case, where in almost every
17 instance, regulation will be found to be a taking.

18 In the absence of invasion or appropriation,
19 the Court's approach has been less structured and,
20 frankly, more lenient towards regulation. And there are
21 good reasons for this.

22 The police power on which regulatory actions
23 like this one is based -- are based -- is an essential
24 component of an organized society. And this power, as
25 this Court has recognized time and again, can't be

1 overly restrained without doing damage to the State's
2 and the government's ability to protect the citizens.

3 In theory, of course, compensation could be
4 paid every time regulation diminished property values at
5 all. But the Court has recognized in many cases that
6 this is an unworkable solution.

7 And frankly, property and all property values
8 are not entirely sacrosanct. To a degree, they may be
9 limited. They may be regulated. Sometimes in return
10 for -- really, for nothing more than the owner's right
11 to live and do business in an organized society.

12 Police power regulation of this sort is
13 especially important in the area of land use, which is
14 what we are dealing with here.

15 The zoning cases have recognized through the
16 years that land use is interdependent; that my use of my
17 land has spillover effects beyond the borders of my
18 property, in fact, beyond the borders of my neighbor's
19 property as well.

20 In order to deal with this competition
21 between, on the one hand, the right of property owners
22 to use and enjoy their property, and on the other hand,
23 the government's need to regulate the use and enjoyment
24 of property in the spillover effects, to deal with this
25 competition the Court has adopted the practice of

1 looking broadly at what an owner has, and assessing
2 against that baseline the overall effect of regulation
3 on the owner's economic interest.

4 And this has been an evolutionary process.
5 Pennsylvania Coal was the first step. In that case, the
6 Court made the general statement that regulation, if it
7 goes too far, can amount to a taking.

8 This was carried forward in the later cases,
9 particularly Goldblatt, Penn Central, and Hodel. And
10 what these later cases make abundantly clear is that the
11 effect of regulation must be judged against the entire
12 package of rights which the owner controls; not by
13 isolating a particular segment which may be most clearly
14 affected by the regulation, and just looking at the
15 effect on that segment.

16 To do otherwise, quite simply, is
17 unrealistic. Property is not purchased, it is not
18 valued or viewed in legally discrete components. It is
19 purchased and acquired and viewed in legally recognized
20 bundles.

21 So in this case we have coal companies who
22 operate coal mines. They operate them as economic units.

23 QUESTION: It sounds to me like your argument
24 there would take you to saying that they -- by
25 regulation you could reduce the value of a piece of

1 property to zero, and deny the owner any economic value
2 of it, without effecting a taking.

3 MR. GORDON: No, we certainly don't say that.

4 QUESTION: Well, that's where your argument
5 goes.

6 MR. GORDON: Our argument goes that you take a
7 look at what the owner has. You take a --

8 QUESTION: Well, what value is left to the
9 owner of this 25 million tons of coal?

10 MR. GORDON: The value is the coal mine, an
11 operating, a profitable coal mine. That is --

12 QUESTION: Go ahead.

13 MR. GORDON: That is the economic unit under
14 which coal miners operate. It is the way we all -- we,
15 being the regulators as well as the industry -- views
16 what is at issue here.

17 QUESTION: Well, could you take 5 percent per
18 year, and over 20 years you would take the entire thing;
19 but so long as you do it in 5 percent increments, is
20 that permissible?

21 MR. GORDON: I think in each case you have to
22 take a look at the overall regulatory scheme, at the
23 complete package of property rights which the owner
24 controls, and assess the economic impact of that
25 regulation.

1 And if, for example -- in your example, the
2 result would be, ultimately, that there would be a
3 taking, then the State, I suppose, would be put to the
4 choice of deciding whether it wanted to go that far.
5 And if it did, it would have to pay compensation.

6 If it wanted to go to the point where it
7 denied the owner economically valuable use of his
8 property, then it would have to pay compensation.

9 QUESTION: It's only economically viable use
10 of the property. You could take -- to take away a good
11 many uses, I take it, and still not have a taking under
12 your view?

13 MR. GORDON: Absolutely. And under the case
14 law, for example, the regulation -- I believe they could
15 be categorized as zoning cases -- but the regulation of
16 the brickyard, or the regulation of the sand and gravel
17 quarry, took away a substantial use; no doubt the best
18 use, the most profitable use, of that property, and was
19 nevertheless not found by the Court to be a taking
20 because --

21 QUESTION: But Pennsylvania has a mineral
22 right, doesn't it?

23 MR. GORDON: Yes.

24 QUESTION: I mean, it recognizes the rights to
25 minerals as a separate piece of property.

1 MR. GORDON: Yes. All states do, as far as I
2 know.

3 QUESTION: And it also says that there is a
4 support estate.

5 MR. GORDON: Well, it does.

6 QUESTION: At least, this takes a piece -- or
7 this reduces the economic value to zero of a piece of
8 the mineral estate.

9 MR. GORDON: Well, let me say this --

10 QUESTION: That's a Pennsylvania law; it's a
11 piece of property.

12 MR. GORDON: What Pennsylvania law says is,
13 that there is a support right. You have it if you own
14 the surface, and you can waive it.

15 QUESTION: No, but just think of the mineral
16 estate.

17 MR. GORDON: Okay.

18 QUESTION: You say there's 25 million tons of
19 that mineral estate whose value is reduced to zero.

20 MR. GORDON: That is correct. Out of many
21 millions, I think billions of tons, as the record
22 reflects, which lie in these coal mines.

23 It is really no different than if you say,
24 well, we have a building setback ordinance. And you
25 can't really use certain portions of your parcel. Now,

1 maybe you can't use the full air rights that you have.
2 You can't build as high as you want.

3 If you're still permitted economically viable
4 use of that property, it's not a taking. And the same
5 rationale applies here.

6 QUESTION: Don't we -- the crucial word in all
7 of this discussion is property. And you want us to look
8 upon the property in question as being the coal, or the
9 right to get the coal.

10 But isn't what is property or what is not
11 property dependent on what the State chooses to define
12 as property? Some States will give you property rights
13 in water, and if you take that away, you're taking
14 properties, *ferae naturae*. I suppose different States
15 have different rules on that.

16 Here Pennsylvania has chosen to define as
17 property, as a separate estate, the support estate.
18 Now, aren't we bound to recognize that as a property
19 right. And hasn't the totality -- the totality -- of
20 that piece of property been taken by this regulation?

21 MR. GORDON: Yes, you are bound to respect
22 State law with respect to the definition of property.
23 No, the totality of that right has not been taken here,
24 and let me tell you why.

25 Both courts below recognized, in taking a look

1 at Pennsylvania law, and a look at the facts of this
2 case, a couple of very important points.

3 First of all, the support right, the support
4 estate, it may have been given the label of an estate in
5 land; and we don't dispute that. But it has no value,
6 it has no economic value, separate and apart from other
7 property interests. That's the first part.

8 It has to be combined with the surface right,
9 it has to be combined with the mineral rights, to have
10 any value.

11 Second point, what we have here --

12 QUESTION: Well, excuse me, you could say
13 about any estate in land. You could say that about the
14 surface right, too. It has no economic value apart from
15 the ability to cultivate it, or to build a structure
16 upon it.

17 MR. GORDON: I think that's precisely our
18 point.

19 QUESTION: So you can take the surface right,
20 too, without any consequences.

21 MR. GORDON: Let's take your example, the
22 right to cultivate. What if we say, here is land, we'll
23 assume it's a good public purpose, you can't have a farm
24 there, because of erosion problems or whatever. You can
25 do whatever else you want with it. You can build an

1 apartment building.

2 The judgment is, well, that's certainly an
3 economically viable use of that land. And the result
4 is, no taking. That's exactly right. It's consistent
5 with our position.

6 QUESTION: No, but you've reversed what
7 happened. The State, in your hypothetical, has said you
8 still have -- you still have -- the surface right.
9 Whereas in this case the State is saying, you do not
10 have the support estate any more.

11 It isn't just saying, you can't take the coal
12 out. It's saying, you do not have the support estate.

13 MR. GORDON: That gets me to point two, which
14 is, if you look at the record in this case, we haven't
15 completely destroyed the support right. Even if you
16 isolate it away from the coal, all the other interests
17 that were purchased as a part of this single contract of
18 which the support estate is a part.

19 Because what we've said is, here you have a
20 limited class of structures, and certain environmental
21 features. And under those particular features and
22 structures, we don't want you to mine coal because of
23 subsidence.

24 The rest of your mines, the other thousands
25 and thousands of acres, covered by this same

1 transaction, the same support right that you purchased
2 from the surface owner, you can use that.

3 QUESTION: Well, that's just like saying, if
4 you take only one of my hundred acres of surface estate,
5 it's not a taking.

6 MR. GORDON: Well, again, the question is, if
7 we are restricting your use -- the use of your land,
8 that'll get back to my example with the setback
9 regulations or the height restrictions.

10 We certainly restricted the property owner's
11 use of a portion of his parcel, or maybe a separate
12 property right, like air rights.

13 And nevertheless --

14 QUESTION: You haven't restricted. You've
15 taken away entirely so many acres of surface estate.
16 Now, you know, it wouldn't occur to me to create an
17 estate like that. But if Pennsylvania has chosen to
18 create a property interest in what is called a surface
19 estate, you've taken so many acres of it.

20 MR. GORDON: Well, Justice White was asking
21 Mr. Lee a little bit about the support estate and how it
22 came about and what does it all mean, and maybe this
23 will help a little bit.

24 There's a law review article which is cited in
25 the Court of Appeals' opinion at page 15A of the

1 appendix to the petition. And that article is a fairly
2 comprehensive review of the case law having to do with
3 the support estate and how this concept came about.

4 And it didn't come about because coal mining
5 is such an important industry to Pennsylvania, although
6 obviously, it is. It came about because of some rather
7 strange conveyancing problems that arose in a couple of
8 isolated transactions where you had, in one situation,
9 the surface conveyed without the right to support, and
10 then the coal conveyed without a waiver as well --
11 without a conveyance of the support estate.

12 And you had a situation where subsidence
13 occurred. And here comes the case. And the owner of
14 the surface says, you didn't have a waiver, you have to
15 repair it. And the court said, well, no, you didn't own
16 the surface either.

17 The coal miner didn't own it. But you didn't
18 own it either. So you can't enforce that.

19 It didn't come about because of some
20 overwhelming need to have this concept for the purpose
21 of advancing coal mining or the interests of coal
22 mining. It arose in a rather strange set of
23 circumstances. And that's really where it's remained.

24 There hasn't been anything since those cases
25 at the turn of the century that have really amplified

1 it. And as both courts below found, after examining
2 State law, and the facts of this case, it really does
3 not make sense, realistically, without -- without in any
4 way tampering with Pennsylvania law and the definition
5 of this property interest, to view it in isolation.

6 QUESTION: Mr. Gordon, let me ask you
7 something about one of your responses to Justice
8 Scalia's question. Is it your position that a takings
9 inquiry would be different if the State comes and takes
10 one acre out of one thousand acres as opposed to taking
11 one acre out of ten acres?

12 Does it depend on how much you own and what
13 percentage is taken as to whether there's a takings
14 clause problem?

15 MR. GORDON: I take it in your hypothetical
16 you mean to restrict the use of it as opposed to
17 physically occupying it.

18 QUESTION: No, let's say, simply, the State
19 wants one of your ten thousand acres.

20 MR. GORDON: It is our view, based on the
21 State law, that if the State takes and occupies any of
22 your land, however small, that that is a taking under
23 Loretto.

24 QUESTION: But regulatory -- but so-called
25 regulatory takings, which you say involve something less

1 than a complete taking, are to be judged by the
2 percentage of the estate that is disabled or impaired?

3 MR. GORDON: That's an important factor; it is.

4 Now, in the face of these developments which I
5 mentioned a few minutes ago, namely, the principle that
6 you look at the entire package --

7 QUESTION: Don't you think that you're making
8 the very arguments that Justice Brandeis made in dissent
9 in the Mahon case, and that were rejected by the
10 majority?

11 MR. GORDON: We're making one of the arguments
12 that he made in dissent.

13 QUESTION: And that was rejected by the
14 majority?

15 MR. GORDON: I will assume it was rejected
16 since it wasn't accepted and he mentioned it in his
17 dissent. The Court didn't say anything about it.

18 QUESTION: Fair inference.

19 MR. GORDON: I think that's a fair inference.

20 But let me say this --

21 QUESTION: Mr. Gordon, over here. Excuse me
22 for interrupting you when you were just going to start
23 on another subject.

24 But I'd like to follow up on the Chief
25 Justice's question. Let's assume that you owned a

1 profitable farm. And it was necessary in the interests
2 of public safety for a highway that adjoined your farm
3 to be substantially widened, to take a substantial --
4 well, to take a fraction of your property.

5 You draw the distinction between regulation
6 and taking. There you would have the interests of the
7 State in public safety. Would the State not have to pay
8 for whatever part of your property it took, even though
9 the property remained economically viable, and even
10 though the State had a legitimate public interest?

11 Would the State have to pay or not?

12 MR. GORDON: The State would have to pay for
13 the same reason that payment was required in Loretto,
14 because no matter how small the area that's involved,
15 when there is an authorization for a physical invasion,
16 that is a different case. That is a special case that
17 involves essentially -- at least in most cases, with the
18 exception of a case like Prune Yard, for example -- of a
19 per se rule.

20 But that's not this case.

21 QUESTION: But here there's no taking because
22 the coal remains in the ground, even though it has no
23 value?

24 MR. GORDON: That's right. A more
25 sophisticated inquiry is required.

1 QUESTION: Mr. Gordon --

2 QUESTION: Do you concede that the coal has no
3 value when it's in the ground? Doesn't it perform the
4 function of supporting the surface, and isn't that value?

5 MR. GORDON: Well, it is value. Although I
6 would say that in the record, there were allegations in
7 affidavits in support of the summary judgment motion
8 that the coal in the ground was valueless, and we didn't
9 directly dispute that.

10 So we are assuming for at least the purposes --

11 QUESTION: You're assuming that the support
12 estate, even when owned by the owner, is totally
13 valueless?

14 MR. GORDON: No, I'm not. It's certainly
15 valuable to the owner. And it's valuable to the
16 community generally, as is reflected in the statute.

17 I was just pointing out that the specific
18 allegation was that it was valueless as coal.

19 You're right; it's value in support.

20 QUESTION: It's valueless as part of the
21 mineral estate. But the mineral estate is something
22 else.

23 MR. GORDON: That's right.

24 QUESTION: Mr. Gordon, the Pennsylvania
25 statute deals in part with taking support estate rights

1 under publicly owned buildings, does it not?

2 MR. GORDON: Yes, public buildings are one of
3 the categories.

4 QUESTION: And doesn't that fall just squarely
5 within one of the concerns of Pennsylvania Coal, where
6 the State takes land or an interest in land for its own
7 use?

8 MR. GORDON: It was one of the concerns
9 expressed in the Pennsylvania Coal opinion. What you
10 have to do here, I think, is to not abstract one small
11 feature of this regulatory program, and look at it in --

12 QUESTION: To that extent, it's awfully hard
13 for me, anyway, to distinguish it.

14 MR. GORDON: Well, let me say this about the
15 comment earlier about Justice Brandeis' dissent.
16 Interestingly enough, this idea that you look at the
17 whole package seemingly had its source in Justice
18 Brandeis' dissent. It wasn't cited in the later cases,
19 but it seems remarkably close.

20 And really it is this principle, and this
21 principle alone, it seems to me, that explains the more
22 recent results in cases such as Goldblatt and Penn
23 Central.

24 There -- Pennsylvania Coal, quite frankly, if
25 it ever -- if it ever did, no longer stands for the

1 proposition that an owner has a Constitutionally
2 protected right in the full use of every segment of his
3 property.

4 That is the development since Pennsylvania
5 Coal, and that's what commands the result that we urge
6 here.

7 I think we lose sight of the fact that what we
8 are talking about -- or we risk losing sight of the fact
9 that what we are talking about in a case like this is
10 the regulation of business and the use of this property
11 in the operation of a business.

12 And of course the primary -- the primary
13 concern of businessmen are profits. And yet all that
14 they've shown here, all that the coal companies have
15 shown here, is that they have lost the opportunity to
16 sell at a profit some small portion of their coal.

17 Yet the curtailment of maximum profit
18 opportunities never has been viewed by the Court, nor
19 should it, as standing alone, a basis on which to rest a
20 takings claim.

21 The Court has endeavored through the years to
22 apply what it has termed rules of judgment, common
23 sense, and fairness. The hypertechnical distinctions,
24 it seems to me, which the coal companies ask the Court
25 to draw here, namely that, well, in a case like Penn

1 Central, for example, or Goldblatt, you can't draw lines
2 between the air rights, the surface rights, the
3 subsurface rights, and just look at the effect on one of
4 those segments.

5 But in a case such as this, what they would
6 like the Court to do is draw the lines at the boundaries
7 of this protected building; take a look at the coal
8 under there; and just assess the effect on that segment
9 of their property.

10 QUESTION: Well, Mr. Gordon, wouldn't it be
11 more fair in your view for Pennsylvania to tell the coal
12 companies that they would have to sell back the support
13 estate to a surface owner if there were a structure on
14 it that required protection?

15 Isn't that a fair way to approach the problem?

16 MR. GORDON: Well, of course, the way this
17 program is set up, we've done that to a certain extent.
18 With respect to some structures, that really is the only
19 right that's available.

20 But frankly the concern here, although there
21 was concern with the people who lived above these mines,
22 it's a far broader concern. It's a community-wide
23 concern as in -- for the interests of land development,
24 for the preservation of the tax base.

25 And that's what makes it fair, in our view.

1 That, combined with really the minimal effect. Not only
2 is there --

3 QUESTION: Can't the owners waive it? Doesn't
4 that take away some of the very appealing public
5 interest argument that you're making? The owner of the
6 surface land can waive the application of the statute,
7 can't he?

8 MR. GORDON: Yes, in 1980 the statute was
9 amended to provide for a waiver under limited
10 circumstances.

11 QUESTION: So it's for the benefit of the
12 surface owner, and not for the polity at large. If the
13 surface wants to give all of this good stuff away, he
14 can.

15 MR. GORDON: Well, except there are two
16 reasons why it doesn't go quite that far. First of all,
17 let me say that in experience the waiver provision is
18 not something that's widely used. And in fact the
19 protections of the Act have been widespread.

20 But second of all, if you a look --

21 QUESTION: Well, maybe that's because nobody's
22 willing to buy the waiver, since that might be taken
23 away by some later statute. I mean, they already bought
24 it once.

25 MR. GORDON: I think you need to also note,

1 with respect to the waiver provision, that it only
2 applies if the miner has the consent of the present
3 owner.

4 And what that means is, if the miner gets
5 consent, and for some reason the land is sold, the
6 consent isn't binding on the successor.

7 The point is this --

8 CHIEF JUSTICE REHNQUIST: I think your time
9 has expired, Mr. Gordon.

10 Mr. Lee, do you have anything more? You have
11 three minutes left.

12 REBUTTAL ARGUMENT OF REX E. LEE, ESQ.,

13 ON BEHALF OF THE PETITIONERS

14 MR. LEE: Mister --

15 QUESTION: (Inaudible) 25 million tons, that's
16 just what's involved in the 50 percent of --

17 MR. LEE: That is correct. And only -- the
18 only --

19 QUESTION: Now, I take it, then -- I take it,
20 then, that you do not contend that it would be
21 uneconomical to mine the other 50 percent?

22 MR. LEE: I'm not sure I understand the
23 question. That it would be uneconomical --

24 QUESTION: This statute says you can't mine
25 any more than 50 percent.

1 MR. LEE: Well -- I understand the question.

2 QUESTION: Would it be economical to mine the
3 other 50?

4 MR. LEE: It is economical to mine the other
5 50 percent.

6 QUESTION: So under every underground acre of
7 mineral estate, you can take out half the coal, and do
8 it economically?

9 MR. LEE: That is correct. That is correct.
10 But it's the 30 million tons that have to be left.

11 QUESTION: Yes.

12 MR. LEE: And that is what this case really
13 comes down to.

14 QUESTION: Mr. Lee, could you settle the
15 theoretical quandry that was raised? Are you arguing
16 that there is a taking of the support estate --

17 MR. LEE: Yes.

18 QUESTION: -- or that there is a taking of the
19 coal?

20 MR. LEE: We're arguing both. We would have
21 the same argument for the support estate. But it is
22 made theoretically much cleaner, much easier.

23 And also, the case on which we rely, and the
24 case which has not been distinguished through briefs or
25 oral argument, also happened to involve Pennsylvania law

1 with the same support estate.

2 And in that respect, Justice Scalia, under
3 Pennsylvania law, in 1970.17, Pennsylvania Supreme Court
4 case, that support estate can be owned by a third person
5 other than the owner of the surface or the coal.

6 The case is found at 256 Pennsylvania 416.
7 It's cited on the first page in the first footnote of
8 our petition for certiorari.

9 QUESTION: Mr. Lee, doesn't that cut against
10 you, then?

11 MR. LEE: Excuse me?

12 QUESTION: Doesn't that demonstrate -- cut
13 against you? Because doesn't that demonstrate that the
14 coal in place has economic value apart from being mined
15 and taken out of there?

16 MR. LEE: No. What it shows is that the
17 support estate --

18 QUESTION: The support estate, as I
19 understand, to be a bunch of pillars of coal or solid
20 coal underground. There is some value in not having the
21 surface collapse.

22 MR. LEE: It does have some value if you can
23 use it in connection with supporting your mining
24 operations. And by hypothesis, as I mentioned earlier --

25 QUESTION: Well, I suppose if you didn't have

1 a waiver of surface subsidence, it would also protect
2 you against liability.

3 MR. LEE: That is correct. That is correct.
4 But these 30 million tons that we're talking about are
5 what we can't use for any other purpose.

6 QUESTION: I understand. Let me ask you one
7 other question.

8 Suppose that instead of going about it the way
9 they did, Pennsylvania had passed a statute saying:
10 When you remove all of the pillars underground, they
11 must be replaced with steel structures. Would that be
12 Constitutional? It'd be a lot more expensive, I know.

13 MR. LEE: It clearly would not be
14 Constitutional. Indeed, go back and look at John W.
15 Davis' argument in Pennsylvania Coal. And that is the
16 premise from which he started, from which I think
17 everyone in the courtroom that day started, that it
18 would be unconstitutional to require concrete pillars.

19 QUESTION: Why would that be? It wouldn't be
20 a taking, would it?

21 MR. LEE: It would not be a taking. It would
22 be a different -- well, I think it would be -- I think
23 it would be a taking in the same sense that Pennsylvania
24 Coal is a taking, but it's regulation that goes too
25 far. But it's a different kind of "too far" concept --

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QUESTION: But not a taking?

MR. LEE: -- from the one that's here, which
under Pennsylvania Coal, clearly does go too far.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

The case is submitted.

(Whereupon, at 11:48 a.m., the case in the
above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1092 - KEYSTONE BITUMINOUS COAL ASSOCIATION, ET AL., Petitioners V.
NICHOLAS DeBENEDICTIS, PHILIP ZULLO AND THOMAS B. ALEXANDER

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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