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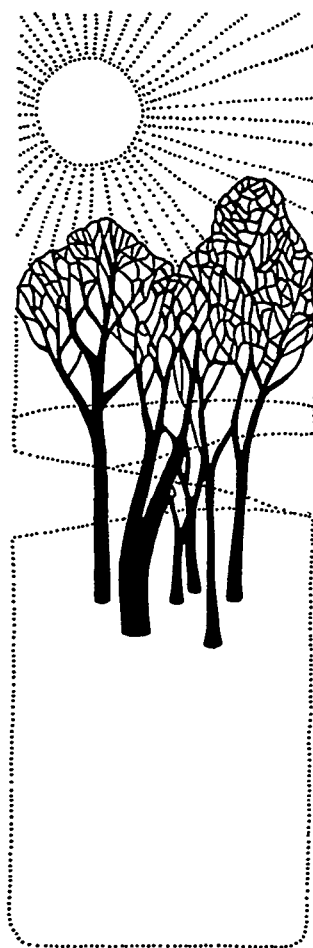
From Pennsylvania Coal to Keystone: The Supreme Court's Evolving View of "Regulatory Takings"

by Richard M. Frank

Over the past decade, no issue of environmental law has so captured the attention of the United States Supreme Court as has "regulatory takings." The Court has issued over a dozen opinions during that period which seek to clarify the slippery concept of when a regulation becomes so excessive as to result in an uncompensated taking of private property in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The results of that judicial effort have been decidedly mixed. But with the Court's recent decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, ___ U.S. ___, 55 U.S.L.W. 4326 (March 9, 1987), some much-needed clarification may be at hand. At a minimum, *Keystone* provides government with welcome legal support in its efforts to contain some of the more dramatic threats to our environment.

The Origins of "Regulatory Takings"

It was 65 years ago that the U.S. Supreme Court first articulated the notion that excessive government restrictions



could run afoul of the Takings Clause of the Fifth Amendment. Justice Holmes wrote in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) that "If regulation goes too far it will be recognized as a taking." In *Pennsylvania Coal*, the Court struck down as such a taking a Pennsylvania statute which had prohibited coal mining in a manner which caused subsidence of land on which certain structures were located. Three generations later, *Pennsylvania Coal* was still characterized as the "cornerstone" of federal takings jurisprudence—at least until *Keystone*.

The other crucial Supreme Court precedent in this field is *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Penn Central* provided for the first time an analytical framework in which to view claims that governmental regulation effect an unconstitutional taking. There the Court identified as the relevant factors "[t]he economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with investment-backed expectations, [and] the

character of the governmental action.” 438 U.S. at 124. In *Penn Central* the Court upheld a municipal landmark ordinance that precluded the owners of Grand Central Station from building a modern office building atop that venerable site.

The criteria identified in *Penn Central* seems fairly straightforward. Yet they have done little to clarify that illusory line which separates legitimate exercises of the police power from unconstitutional “takings” of private property. Attesting to that fact are the plethora of regulatory takings cases finding their way to the Supreme Court docket (four in the 1986-87 term alone), as well as the growing number of such disputes clogging the state and lower federal courts.

The Supreme Court’s decision in *Keystone* represents the latest chapter in this complex tale.

Keystone—The Factual Background

In 1966, the Pennsylvania Legislature enacted the Bituminous Mine Subsidence and Land Conservation Act. The Act was a reaction to a rather dramatic environmental and safety hazard emanating from the bituminous coal fields of western Pennsylvania. Underground coal mining often causes ground subsidence of devastating proportions. It results in structural damage to buildings, makes vacant land impossible to develop, destroys groundwater and surface ponds and—given its unpredictable nature—can even threaten human life. Recognizing the potential for such damage, coal companies purchased access and mining rights from thousands of Pennsylvania surface owners many years ago.

The Pennsylvania statute attempts to minimize the threat of subsidence in a variety of ways. Most important are two requirements: the first prohibits mining that causes subsidence damage to public buildings, private dwellings and cemeteries that were in place when the Act was passed. (Pennsylvania has interpreted this provision to require 50 percent of the coal

beneath such structures or areas to remain in place as a means of providing surface support.) The second provision requires a coal company to forfeit its mining permit if its removal of coal causes damage to these protected sites for which the company has not promptly compensated the surface owner.

If this statute sounds vaguely familiar, it should. The 1966 Act is very similar to the Pennsylvania statute invalidated by the Supreme Court decades earlier in the *Pennsylvania Coal* decision. Relying on that precedent, major bituminous coal operators filed suit in federal court in 1982. They mounted a facial challenge to the Act, claiming that it violated both the Takings Clause and the Contracts Clause of the U.S. Constitution. The stipulated facts in the case revealed that the Act required plaintiff companies to leave an aggregate 27 million tons of coal in the ground, but that figure averaged only 2 percent of the available coal deposits in individual mines.

Understandably, plaintiffs based their constitutional claim first and foremost upon *Pennsylvania Coal*. Nevertheless, both the District Court and the Court of Appeals upheld the Act, finding that case distinguishable. The coal companies were successful in obtaining Supreme Court review, with former U.S. Solicitor General Rex Lee serving as their counsel of record.

The Supreme Court’s Decision in Keystone

In a 5-4 decision authored by Justice Stevens, the Supreme Court sustained the lower court rulings and upheld the Act. The manner in which the majority reached that result suggests that *Keystone* may be the most important takings precedent since *Penn Central*. It also calls into serious question the primacy of the *Pennsylvania Coal* decision.

Justice Stevens first treated and distinguished *Pennsylvania Coal*. He noted that the earlier case involved a private property dispute between a coal company and a surface landowner; no governmental entity was named

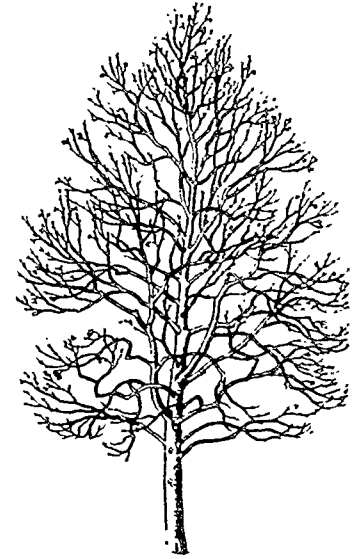
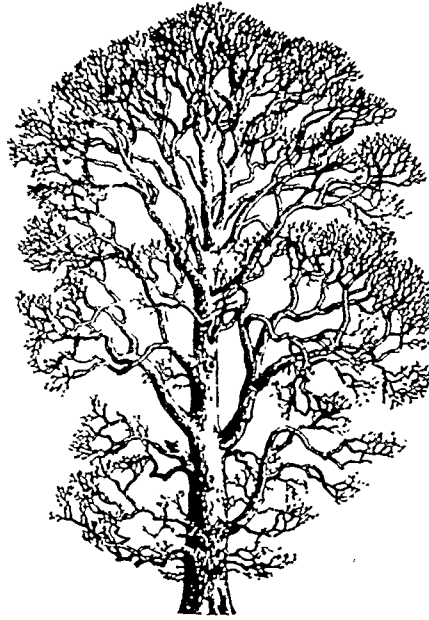
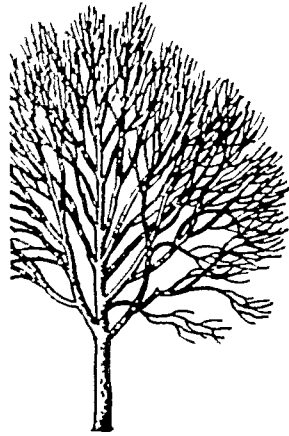
as a party. While the *Pennsylvania Coal* decision contains language concerning the alleged public purpose of the statute involved, *Keystone* characterizes this “uncharacteristic . . . advisory opinion” by Justice Holmes. 55 U.S.L.W. at 4330. Relying on the stated public purpose of the 1966 Act to distinguish it from the private controversy at the heart of *Pennsylvania Coal*, Justice Stevens concluded that “the similarities [between the two cases] are far less significant than the differences, and that *Pennsylvania Coal* does not control this case.” 55 U.S.L.W. at 4329. Thus Justice Stevens effectively transforms the “cornerstone” of takings jurisprudence into mere dictum.

The *Keystone* decision next proceeded to apply the *Penn Central* criteria to the stated facts. It is here that *Keystone* takes on its greatest significance. Whereas property owners (and some courts) had generally considered the economic impact of the contested regulation on the property owner to be the key variable, the Court for the first time in *Keystone* elevated the “character of the governmental action” criterion to primary significance.

The Court pointed out that the 1966 Subsidence Act was predicated upon detailed legislative findings, and that the legislative purposes involved “were genuine, substantial and legitimate . . .” The majority opinion notes:

[T]he Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals [who previously contracted away their surface rights to the coal companies] erred in taking a risk cannot estop the State from exercising its police power to abate activity akin to a public nuisance.

55 U.S.L.W. at 4331. *Keystone* relies on several pre-*Pennsylvania Coal* cases that upheld government’s power to terminate commercial operations found to be offensive, e.g., breweries, brothels, etc. Many property owners and commercial interests had argued that this line



of cases had been effectively overruled by *Pennsylvania Coal* and *Penn Central*. The Supreme Court expressly rejected this interpretation in *Keystone*:

Under our system of government, one of the state's primary ways of preserving the public wealth is restricting the uses individuals can make of their property These restrictions are "properly treated as part of the burden of common citizenship" Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community" [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." 55 U.S.L.W. at 4332.

While the Court in *Keystone* hinted that it could have rested its decision on this "character of the governmental action" factor alone, it chose not to do so. Instead, it relied on the other *Penn Central* criteria and found them no more helpful to the mining companies.

The majority opinion found, for example, that the companies had failed to demonstrate that they had suffered a severe economic impact resulting from the Act. This, in turn, was in large part attributable to the fact that they

had chosen to mount a *facial* challenge to the statute rather than an "as applied" attack. The Supreme Court in recent years has repeatedly spurned such facial takings challenges as lacking a concrete set of facts against which the Court can apply the *Penn Central* analysis with precision. "[W]e have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of governmental action on a specific piece of property requires the payment of just compensation." 55 U.S.L.W. at 4333. Stating what by now should be obvious to property owners, the Court concluded this portion of its analysis by stating that property owners "face an uphill battle in making a facial attack on [statutes] as a taking." *Id.*

The coal companies' case was made even more difficult in the eyes of the Court, given the relatively small economic impact the Subsidence Act had on their aggregate operations: "The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests" *Id.*

The majority's analytical framework for this issue is critical. Justice Stevens refused

to consider the 27 tons of unexploited coal in isolation; instead, he opined, it had to be viewed in conjunction with the companies' property interest as a whole:

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." *Id.*

Having construed the "denominator" in the broadest possible manner, Justice Stevens' conclusion was not surprising:

The 27 tons of coal do not constitute a separate segment of property for takings law purposes There is no basis for treating the less than 2 [percent] of petitioners' coal as a separate parcel of property." 55 U.S.L.W. at 4334. The majority opinion concluded its takings analysis by noting that the coal companies retain the ability to mine coal profitably, even if they may not destroy or damage surface structures at will in the process.

The Court then briefly addressed and disposed of the companies' Contracts Clause argument. The Court first noted that it has traditionally viewed regulation which implements the

general police power in a more deferential light for Contracts Clause purposes than governmental acts which attempt to relieve government of its own proprietary contractual responsibilities. The statute challenged in *Keystone* indisputedly fell into the former category.

The majority opinion conceded that the Subsidence Act works a substantial impairment of a private contractual relationship. Nonetheless, observed Justice Stevens, Pennsylvania's action was based on its strong public interest in preventing widespread environmental damage, an interest which the Court felt transcended any private agreement between contracting parties. The Act, furthermore, represents a reasonable and appropriate response to the threatened danger. Thus Justice Stevens concluded that "the Commonwealth's strong public interests in the legislation are more than adequate to justify the impact of the statute on petitioners' contractual agreements." 55 U.S.L.W. at 4335.

The Keystone Dissent

Chief Justice Rehnquist wrote a dissent in *Keystone*, in which he was joined by Justices Powell, O'Connor and Scalia. Rehnquist was most troubled by the majority's treatment of *Pennsylvania*

Coal. The Chief Justice disparaged the distinctions cited by the majority between that case and the operative facts of *Keystone*. He rather clearly perceived *Pennsylvania Coal* to be controlling. "Examination of the relevant factors presented here convinces me that the differences between them and those in *Pennsylvania Coal* verge on the trivial." 55 U.S.L.W. at 4337.

Chief Justice Rehnquist did not disagree with the notion that there exists a "nuisance exception" to the constitutional proscription against government takings without compensation. "[A] taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." *Id.* This conclusion is not surprising in light of Rehnquist's statement of the same principle in his earlier dissent in *Penn Central*. 438 U.S. at 144-146.

The Chief Justice *did* part company with the *Keystone* majority in two important respects. First, he would read the "nuisance exception" far more narrowly to encompass only private "misuse or illegal use" of property, and even then only when the regulation does not completely extinguish the value of the property.

Second, Rehnquist disagreed with the "denominator" of the takings equation selected by the majority. He would find it necessary to treat the 27 million tons of coal left unexploited by the Act as a discrete property interest for purposes of the Takings Clause. Since that property interest is effectively destroyed by the Subsidence Act, Rehnquist concluded, an unconstitutional takings has occurred.

In light of this conclusion, Chief Justice Rehnquist found it unnecessary to address the companies' Contracts Clause argument in his dissent.

The Broader Implications of Keystone

What, then, are the significance and implications of *Keystone* for the future? The

most pronounced impact of the decision is on *Pennsylvania Coal*, a precedent that has occupied case books and the attention of law students for decades. *Keystone* appears to relegate *Pennsylvania Coal* to its specific facts. The only ongoing significance of Justice Holmes' landmark decision is its creation of the notion of "regulatory takings," a concept over which the Court has equivocated in recent years but with which it now seems comfortable. See *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); and *Riverside Bayview Homes v. United States*, ___U.S.____, 106 S.Ct. 455 (1985).

Perhaps more significant is what *Keystone* portends for the future of government's exercise of the police power. Environmental regulation can be divided into two basic categories: the first is the more traditional type which seeks to prevent or minimize harmful private conduct. Hazardous waste, air pollution and water quality laws are prominent examples. The second category seeks primarily to promote aesthetic values important to a well-ordered community. Planning and zoning laws most typically embody these concerns.

Keystone strongly suggests that for purposes of analysis under the Takings Clause, the former type of government activity will be treated with more deference by the courts. Given the broad language of *Keystone*, it will be difficult for plaintiffs to overcome the presumption of validity that attaches to such measures. (This assumes, of course, that government can justify its regulatory actions on the basis of strong findings and an ample record—factors which the majority found to exist in *Keystone*.)

That *Keystone*'s significance extends far beyond the coal fields of western Pennsylvania can be seen from one local example. California and Nevada have adopted a bistate compact which creates the Tahoe Regional Planning Agency (TRPA) and gives that agency broad authority to
(continued on page 7)



Defending the Lost Coast—Fighting Roads in the King Range

by Lora Moerwald and Jim Eaton



Along most of California's coast, State Highway 1 hugs the shoreline, providing beautiful vistas of rocky cliffs, sandy beaches, and the Pacific Ocean. But thirty miles north of Fort Bragg, the steep and rugged terrain known as the "Lost Coast" forces the Coast Highway inland, leaving a long, unique stretch of roadless shoreline. Many of the Lost Coast beaches, coastal slopes, and bluffs lie within the King Range National Conservation Area (KRNCA) and the newly expanded Sinkyone Wilderness State Park. Conservationists are distressed about the management of the KRNCA and its impact on the unique wilderness

characteristics of the area.

In the King Range, mountains seem to rise directly out of the sea. Kings Peak, only three miles from the beach, towers 4,087 feet. Further south, a steep trail descends Chemise Mountain to the cobblestone beach below, dropping 2,600 feet in about one-half mile.

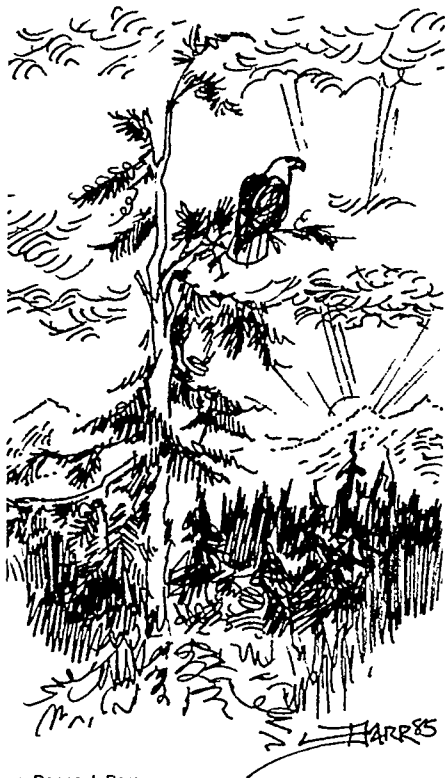
Besides magnificent vistas, the KRNCA possesses many other values. Among the 258 bird species reported within the area are rare species such as the bald eagle, peregrine falcon, brown pelican, and spotted owl. Steelhead, silver salmon, and king salmon spawn in the area's rivers and streams. Additionally,

the recently introduced Roosevelt elk roams the KRNCA.

Within the KRNCA lie 32,900 acres of the King Range Wilderness Study Area (WSA), managed by the Bureau of Land Management (BLM). Under the Federal Land Policy and Management Act of 1976 (FLPMA), the BLM is required to inventory its holdings nationwide, conduct detailed studies of its wild lands, and make recommendations to Congress regarding the suitability for wilderness designation of those areas. While in WSA status, areas are to be managed to maintain their wilderness character. Activities that impair the natural values are prohibited until Congress makes a final determination on the disposition of each WSA.

In the fall of 1985, the BLM released its preliminary proposal for the King Range WSA. BLM proposed recommending only 21,200 acres as suitable for wilderness designation. At public hearings only a few individuals suggested a smaller wilderness area. More than 80 people expressed their dissatisfaction with the proposal and asked the BLM to recommend a larger area. Furthermore, local conservationists believe that additional lands not part of the King Range WSA should be considered for wilderness designation. They support wilderness for the *entire* KRNCA, except for a small corridor along Shelter Cove Road, which separates the larger wilderness from Chemise Mountain WSA to the south.

Not only is the BLM making plans for the future of wilderness in the KRNCA, it is also proposing significant changes in the portions of the KRNCA open to off-road vehicle (ORV) use. The use of ORVs in the KRNCA has long been controversial. ORVs,



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such as jeeps, dune buggies, and motorcycles are permitted on only two miles of the King Range beach, although many stray into the closed area, disturbing wildlife, hikers, and archeological sites. Many conservationists contend that the BLM, because of a lack of staff, cannot control ORVs along the shoreline.

In the fall of 1985, the BLM introduced a transportation plan for KRNCA, allowing visitors to drive *inside* the WSA—a move considered blatantly illegal by conservationists. The plan would open to ORVs four roads within the WSA. As a result of the plan, the BLM would permit more vehicles into the heart of the proposed King Range Wilderness, leading to an increase in ORV trespass into wild lands. The consequences of implementing this plan were very briefly considered in an "environmental analysis," a document much less comprehensive than an Environmental Impact Statement (EIS).

There was, however, a public comment period on the transportation plan. Conservationists criticized the plan and requested notification of the BLM Area Manager's decision concerning the plan. After the close of the public comment period, the BLM

Area Manager quietly approved the plan, ignoring the prior public requests for notification. The BLM subsequently published notice of the decision in the Federal Register.

Outraged over the decision, five conservation groups filed appeals to the Interior Board of Land Appeals (IBLA) in Washington, D.C. The California Wilderness Coalition, Environmental Protection Information Center, and the Wilderness Society contested the legality of opening roads within the King Range WSA. The conservation groups requested that the IBLA (1) declare the transportation plan invalid, (2) order that all roads within the WSA be closed to vehicle use, and (3) compel preparation of an EIS for any future transportation plan.

The BLM's transportation plan was not the subject of an EIS even though, appellants argue, the plan is likely to have significant impacts on erosion, wildlife, archaeological values, opportunities for primitive wilderness recreation, and suitability for wilderness designation. The BLM's analysis recognized *no* negative impacts resulting from implementation of the plan in spite of, and in direct contradiction with, earlier BLM documents outlining potential negative consequences.

In a rather flippant brief, filed in September of 1986, the BLM referred to the appellants as "several organized groups purporting to represent persons concerned about the environmental effects, if any, which the adoption of the King Range Transportation Plan would have upon the land and other natural resources . . ."

The BLM justifies opening the roads within the WSA based on its 1974 management plan for the KRNCA, which anticipated vehicle use throughout the area. The conservation groups point out that this 1974 plan was not revised to reflect changes mandated by FLPMA, especially the wilderness review provisions. They argue that the roads in question were not open to public use when FLPMA was enacted in

1976, and therefore the BLM cannot rely on its outdated plan to open the WSA to off-road vehicles.

Other events have complicated this controversy. In a surprising move, the California Coastal Commission voted unanimously in the summer of 1986 that the controversial transportation plan was not consistent with the California Coastal Act. The BLM must now work with the Commission to resolve their differences.

Another complication occurred last summer when a contractor hired by the BLM to improve the roads in KRNCA illegally constructed a new route in the WSA. In March 1987 BLM announced that maintenance again would be authorized on the four KRNCA roads previously approved. The Wilderness Society protested this decision. Early this month the BLM denied the protest. The Wilderness Society is currently preparing an appeal.

As of April 1987, the IBLA has not ruled on the appeals of the transportation plan. Since the IBLA often has taken a year or more to issue a decision, this skirmish in the battle over roads in the King Range may not be decided this year.

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From Pennsylvania Coal to Keystone

continued from page 4

control development in the Lake Tahoe Basin. TRPA accumulated ample evidence that private development on fragile lands was generating enormous sediment runoff which was in turn polluting Lake Tahoe and gradually causing it to lose the pristine clarity for which the lake is world-renowned.

In response to those facts, TRPA adopted a revised Regional Plan in 1984 that sought to limit substantially private development on fragile lots within the Tahoe Basin. Private homeowners filed suit against TRPA, California and Nevada in federal court, challenging the plan as an unconstitutional taking of their property in violation of the Takings Clause.

A principal justification advanced by the defendants was that the Regional Plan constituted a measured response to an amply documented record of Lake Tahoe's environmental decline. Accordingly, they argued, the Regional Plan is valid irrespective of the economic impact on plaintiffs' property. Adopting the logic of an earlier trial court decision, they argued that private landowners simply have no constitutional right to turn Lake Tahoe brown.

While defendants prevailed in the district court on other theories, see *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 631 F.Supp. 126 (D.Nev. 1986), the court did not directly adopt the above theory. To do so, mused the district judge at oral argument, could violate prior "regulatory takings" decisions of the U.S. Supreme Court.

That decision has now been appealed to the Ninth Circuit Court of Appeals. It would appear that the intervening *Keystone* decision strongly enhances the defendants' chances of victory in the Tahoe litigation. The legal argument they advanced in the district court is certainly consistent with the Court's broad

reading of the "nuisance exception" to the Takings Clause in *Keystone*.

Other likely applications of the Keystone decision are easily conjured up. A state or local government, for example, could shut down a commercial facility found to be emitting hazardous substances regardless of the firm's culpability or the economic impact upon it of the plant's closure. The constitutionality of floodplain zoning measures is also assured to a far greater degree by the *Keystone* opinion.

Conclusion

The long-term significance of the Supreme Court's decision in *Keystone* cannot easily be overstated. The broad language employed in the majority opinion should prove of substantial assistance to governmental officials as they grapple with an

ever-growing list of complex environmental problems. The latitude the Court confers in *Keystone* upon reasonable exercises of the police power will prove especially helpful in those cases where government acts to prevent a private party from "externalizing" the negative effects of its conduct so as to harm its neighbors. Conversely, the *Keystone* decision increases significantly the legal burden on those who seek to strike down environmental regulation in reliance upon the Takings Clause.

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