LEGAL THEORY AND PROPERTY JURISPRUDENCE OF OLIVER WENDELL HOLMES, JR., AND LOUIS D. BRANDEIS: AN ANALYSIS OF PENNSYLVANIA COAL COMPANY V. MAHON

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I. INTRODUCTION

The relationship between two of the greatest jurists of the twentieth century, Oliver Wendell Holmes, Jr. and Louis D. Brandeis, was something out of the ordinary. The two men, with very different backgrounds, often came to similar conclusions when they shared the high bench together. Yet, in the foundational regulatory takings case of Pennsylvania Coal Co. v. Mahon, these two Justices came to opposite conclusions. One found that a state regulation, which limited mining underneath a property owner's house, could not stretch far enough to be included within the sovereign's police power. The other thought such a regulation was a reasonable enactment in protecting the safety of property owners. This essay will analyze the backgrounds of Oliver Wendell Holmes, Jr. and Louis D. Brandeis, their legal theories and what their rationale was in coming to opposite conclusions.

II. OLIVER WENDELL HOLMES—THE BALANCING PHILOSOPHER

Oliver Wendell Holmes, Jr. was a New England patrician, offspring of the earliest American settlers and reared in the customs of the Mayflower aristocracy. After graduating from Harvard and serving in the Civil War with the Union Army, Holmes studied law. After graduating from law school, Holmes began practicing law, and became a professor at Harvard in 1882. That professorship was shortened by his appointment to the Supreme Judicial Court of Massachusetts in

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1. 260 U.S. 393 (1922).
4. Id.
December 1882. He served on the Massachusetts high bench for twenty years, three of them as Chief Justice, until he was elevated to the United States Supreme Court in 1902.

Oliver Wendell Holmes is described by his admirers as having the foresight of a philosopher and the imagination of a poet. Holmes had a great affection for the common law, which impacted his outlook and methods as a judge. Before appointed to the Supreme Court, Holmes delivered a series of lectures, which were later published in 1881, called The Common Law. In these lectures, Holmes rejected “the notion that a given [legal] system, ours, for instance, can be worked out like mathematics.” Instead, he declared, “the law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained the axioms and corollaries of a book of mathematics.” For Holmes, “the life of the law has not been logic: it has been experience.” As such, Holmes argued that courts should realize that they have an obligation to perform a legislative function, in a deeper sense.

In the words of former Attorney General Francis Biddle, Holmes was describing a new era of jurisprudence that would “break down the walls of formalism and empty traditionalism which had grown up around the inner life of the law in America.” For others, Holmes was describing what the law was and how it came to be that way. Nevertheless, Holmes “was making a prescriptive statement of what the law ought to be.” During his tenure on the Supreme Court, Holmes’s view did not carry the majority of the Court. Yet, his opinions thematically championed judicial deference to legislative bodies in the realm of economic decision-making.

In his work on the Supreme Court, Justice Holmes gave complete devotion to Justice Marshall’s premise that “it is the Constitution we are expounding.” Holmes “treated the Constitution as a broad charter of powers for the internal clashes of society, and [not] as though it

5. Id. at 192.
6. Id.
8. See SCHWARTZ, supra note 3, at 191.
9. Id. (quoting Oliver Wendell Holmes, The Path of the Law, in COLLECTED LEGAL PAPERS 167, 180 (1920)).
10. Id. (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881)).
11. Id.
12. Id. at 191.
13. Id. (citing FRANCIS BIDDLE, MR. JUSTICE HOLMES 61 (Greenwood Press 1986)).
14. Id. at 192.
16. See FRANKFURTER, supra note 7, at 58 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)).
were a code prescribed in detail[ed] answers for the social problems of all time." Holmes understood the Constitution allowed legislatures to make laws that "put burdens which are disagreeable to them on the shoulders of somebody else." A law, Holmes felt, "should easily and quickly . . . modify itself in accordance with the will of the de facto supreme power in the community . . . [and] reduce the sacrifice of minorities to a minimum." To Holmes, legal 'principles' were rarely absolute, but were "sententious expressions of conflicting or overlapping policies."

It is no wonder that Justice Holmes dissented from his brethren in the more famous economic legislation cases of *Lochner v. New York*, [21] *Coppage v. Kansas*, [22] and *Adkins v. Children's Hospital*. [23] In each case, the majority struck down the state's economic regulation because the statute interfered with the right to contract under the Substantive Due Process right to liberty and property under the Fourteenth Amendment. [24] The majority view, from which Holmes dissented, argued that the freedom to contract was an expanded dogma grounded in basic liberty rights of the due process clause. [25]

In *Lochner*, Holmes rejected the Court's application of substantive due process to economic legislation. At the same time, he acknowledged that a statute would violate the Fourteenth Amendment if it

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17. Id.
18. Id.
19. Id. (emphasis in original).
21. 198 U.S. 45 (1905). In *Lochner*, the Court struck down a New York law that limited the employment in bakeries to sixty hours per week and ten hours a day. The Court found that such a law deprived employers of liberty without due process of law by infringing on the employer's right to contract. Holmes thought the majority decided the case on an "economic theory" and that the "states can regulate life in many ways . . . that interfere with the liberty of contract." *Lochner* v. New York, 198 U.S. 45, 75 (1905).
22. 236 U.S. 1 (1915). In *Coppage*, the Court struck down a Kansas statute outlawing yellow-dog contract, i.e. agreements not to remain or become union members. The Court found that such a law was repugnant to the due process clause under the Fourteenth Amendment, because both employer and employees "have equality of right and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract." Holmes believed there was nothing in the Constitution to prevent the legislature from enacting laws "to establish equality of position between the parties in which liberty of contract begins." *Coppage* v. Kansas, 236 U.S. 1, 27 (1915).
23. 261 U.S. 525 (1923). In *Adkins*, the Court struck down a federal statute prescribing minimum wages for women in the District of Columbia. The Court found that the statute violated due process of the Fifth Amendment, because "it was a price-fixing law, confined to adult women, [who] are legally as capable of contracting for themselves as men." and interfered with their right to contract. Conversely, Justice Holmes believed that this law was not at all different from any other law that "forbid men to do some things that they want to do, and contract is no more exempt from law than other acts." *Adkins* v. Children's Hosp., 261 U.S. 525, 568 (1923).
24. See supra notes 21-23 and accompanying text.
25. See Frankfurter, supra note 7, at 63.
“would infringe fundamental principles as they have been understood by the traditions of our people and our law.”

26 Holmes also distinguished the Just Compensation Clause and the Takings Clause of the Fifth Amendment, where in his dissent in *Madisonville Traction Co. v. Saint Bernard Mining*, 27 he found that the “public use” limitation of the Takings Clause was not a fundamental principle guaranteed by Due Process. 28

Thus, Holmes’ dissents in *Lochner v. New York, Coppage v. Kansas* and *Adkins v. Children’s Hospital* were framed around the theory that he found “nothing in the Constitution to prevent legislation, which sought to remove some of the more obvious inequalities in the distribution of economic power.” 29 Holmes understood that the law not only confirmed property interests, but also created them. 30 For Holmes, “the availability of legal remedies may itself be a potent instrument of economic power.” 31 Concurrently, withholding such remedies may influence “the balance of conflicting interest in the economic struggle.” 32

In his work as a Massachusetts judge, Holmes recognized that courts should defer to legislative economic acts. 33 In The Common Law, Holmes declared that the “first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community.” 34 Moreover, the legislature embodied those demands and had decided to shield the employee when it enacted the law at issue. 35


27. 196 U.S. 239 (1905) (holding that respondent in state condemnation action may remove case to federal court upon demonstrating diversity of citizenship). The case was decided by a slim majority where Holmes’s dissent garnered the votes of Chief Justice Fuller, Justices Brewer and Peckham.

28. See Brauneis, supra note 26, at 669 (citing Madisonville Traction Co. v. Saint Bernard Mining, 196 U.S. 239, 260-61 (1905) (Holmes, J., dissenting)). When Holmes wrote for the Court, he had to accept the Court’s precedent holding that the Fourteenth Amendment did contain a “public use” requirement; but his Fourteenth Amendment public use opinions always stressed the breadth of state power to define public use. See, e.g., *Henderson Light & Power Co. v. Blue Ridge Intercity Ry.*, 243 U.S. 563 (1917).

29. See Frankfurter, supra note 7, at 66.

30. Id. at 67.

31. Id.

32. Id.


34. See Baker, supra note 2, at 299.

35. Id.
Yet, such deference had its limits. Holmes never agreed with the legislation he upheld and had no concern in men's efforts to "regenerate society via property." 36 Nevertheless, even Holmes knew his individual intolerances did not justify striking down legislation. 37 This came from his faith in the "gradual power to pierce nature's mysteries through man's indomitable endeavors." 38 Such faith allowed him to "reach an attitude of [the] widest tolerance." 39

Professor Brauneis argues that Holmes viewed law "based on duties and not rights," 40 because "[d]uties precede rights logically and chronologically." 41 For example, Holmes stated that "[t]he direct operation of law is to limit freedom of action or choice on the part of a greater or less number of persons in certain specified ways." 42 Brauneis believes Holmes "used this framework to analyze legal concepts, such as possession, property and contract . . . [which] according to Holmes, are reducible to a set of legal duties." 43 To 'have' property in the legal sense is not the ability to use it, but to "prevent other men . . . from interfering with my use or abuse." 44

Holmes was particularly skeptical of the state acting under the police power. Holmes described the 'police power' as "[a] phrase . . . invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary." 45 One Holmes Scholar, Patrick J. Kelley observes that Holmes rejected the view that the "police power . . . [was] qualitatively different from the power to take property." 46

36. Id.
37. Id.
38. See Frankfurter, supra note 7, at 61.
39. Id. at 62.
41. Id.
42. Id. (quoting 3 Oliver Wendell Holmes, Jr., Possession, in THE COLLECTED WORKS OF JUSTICE HOLMES 37 (Sheldon M. Novick ed., 1995)).
43. Id.
44. Id. As Brauneis states, for Holmes "the law does not only define what property is; it also defines the circumstances under which a property right (that is, the power to remove or enforce certain duties on others) will be recognized in a particular person." Id at 633 n.89.
In Rideout v Knox, Holmes articulated the view that the difference between the legitimate exercise of the police power and uncompensated takings was a “difference of degree, not of kind.”47 In finding that there is a “difference of degree,” he used a balancing test of: “the smallness of the private injury, the nature of the evil to be avoided ... and the [extent] that police regulations may limit the use of property which greatly diminish[es] its value.”48 Thus, before his appointment to the United States Supreme Court, Holmes’s takings jurisprudence was marked by balancing and deference, and he looked favorably on government regulation that advanced non-traditional ends.49

On the Supreme Court, Holmes’s takings jurisprudence also used a balancing test weighted in favor of the government rather than following categorical rules. Before Mahon, Holmes balanced on one side: [T]he “public interest.” These interests “become strong enough to hold their own when a certain point is reached,” and the regulation is then constitutional. On the other side of the balance is private property. At some point, “the rights of property would prevail over the other public interest, and the police power would fail.” Precedent over time increasingly establishes how the balance should be struck: “The boundary at which the conflicting interest balance cannot be determined by any general formula ... but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.”50

While not apparent in a casual reading of Mahon, Holmes used a similar balancing test in weighing the interests of the surface property owner and state with that of the coal company’s interest.

III. LOUIS D. BRANDEIS—THE SOCIAL SCIENTIST FAVORING BRIGHT LINE RULES

Louis Dembitz Brandeis was the first Jewish Justice on the Supreme Court. Brought up in Louisville, Kentucky, he was the son of immigrants educated in the traditions of nineteenth century European liberalism.51 Brandeis attended Harvard Law School and was a successful attorney in Boston. As an attorney, Brandeis “became active as a reformer ... known as the ‘People’s Attorney’ since he worked without a fee for a great number of public causes.”52

47. Id. at 841 (quoting Rideout, 148 Mass. at 372).
48. Id. (quoting Rideout, 148 Mass. at 374).
49. Id. at 844.
50. Id. at 846 (quoting Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1909)).
51. See Baker, supra note 2, at 542.
52. See Schwartz, supra note 3, at 215.
As a lawyer, Brandeis “piled facts upon facts having to do with labor, fatigue, health, economic productivity... all for the purpose of showing the urgent social need for the legislation he [supported].”

As a jurist, Brandeis was a “social scientist,” a “fearless, objective investigator, with an extraordinary gift for collecting and analyzing masses of data.” Brandeis is best remembered for being the first attorney to emphasize the facts as applied to the law.

His renowned “Brandeis Brief” first appeared before the Supreme Court in Muller v. Oregon, to persuade the Court to uphold an Oregon law that prohibited women from working in factories more than ten hours a day. Brandeis’s brief in Muller v. Oregon, argued “that there [were] reasonable grounds for holding that to permit women in Oregon to work... more than ten hours in one day is dangerous to the public health, safety, morals or welfare.” The brief itself for Muller amassed over 100 pages of facts that the Court was asked to accept as “facts of common knowledge.”

When he was appointed to the Bench in 1916, Brandeis continued to emphasize the facts, believing that “the judicial weighing of interests involved should be made in the light of facts.” His methods were used on the bench “to reject the prevailing notion that the law was to be ‘equated with theories of laissez faire.’” Rather than embodying the philosophical style of Holmes, Brandeis’s opinions and “dissents tended to be learned treatises on the history and background of the provisions in question.” His dissents were much like his infamous briefs, designed to demonstrate the reasonableness of the laws. Brandeis argued that “the Court should acquire knowledge, and must... take judicial notice, whenever required to perform the

54. Id.
55. Id. at 604 (quoting R.L. Duffus, Brandeis: Crusader at Eight, N.Y. TIMES, Nov. 8, 1936, at 4).
56. 208 U.S. 412 (1908).
58. See Schwartz, supra note 3, at 215.
59. Id. at 216 (quoting Dean Acheson, Morning and Noon 82 (1965)).
60. Id. (quoting Letter from Oliver W. Holmes to Harold J. Laski (May 18, 1919), in Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 204, 209 (Mark D. Howe ed., 1953)).
62. Id.
delicate judicial task." For Brandeis, "knowledge is essential to understanding; and understanding should precede judging." The primary difference between Brandeis and his brethren on the Court was that he "openly declared that judges should take the social and economic context of cases into account." Brandeis believed that bad economic conditions, including extreme hours of labor, irregular employment, and big business organizations were "undermining the fundamentals of popular government." Brandeis saw legal issues in social and economic "realities." Yet, Brandeis was criticized for, "like his conservative colleagues ... [translating] his own economic and social views into the Constitution." Uninfluenced by such criticism, Brandeis believed that if "economic difficulties existed because of 'evils' embedded in the structure of American industry, those evils could be corrected" by the Court.

Brandeis understood that while capitalism brought about "great industrial and social problems," capitalism would also "find solution[s]." It was in this sense that Brandeis embodied the progressivism philosophy of the day. Progressive jurisprudence "rejected the idea of law 'as an abstract and autonomous system of norms,'" and skeptically viewed the affirmation of abstract rights in the constitution. Brandeis favored active statutory reforms of private corporations and the evils they perpetuated in the name of the greater good. He "regarded concentrated power as overbearing and criticized 'bigness' in all its forms."

63. Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 533 (1924) (Brandeis, J., dissenting). Here, the Court struck down a Nebraska law limiting weight of loaves of bread and establishing two-ounce limit of tolerance violates due process clause.
64. Jay Burns Baking Co., 264 U.S. at 520 (Brandeis, J., dissenting). In Jay Burns Baking Co., Brandeis wrote "knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold. But, in this case, we have merely to acquaint ourselves with the art of bread making and the usages of the trade." Id. at 520 (Brandeis, J., dissenting). Brandeis branded the Court's second-guessing of legislative facts the "exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review." Id. at 534.
65. See White, supra note 53, at 598-99.
67. See White, supra note 53, at 603.
68. See KONEFSKY, supra note 66, at 275.
69. Id.
70. Id. at 78 (quoting LOUIS D. BRANDEIS, BUSINESS: A PROFESSION 12 (1971)).
72. Id. at 2172.
Simultaneously, Brandeis did not seek to abolish the institution of private property. Instead, he wanted to improve the conditions and alter the power relations for which capitalism had brought to real property. Thus, Brandeis thought that the "rights of property and the liberty of the individual must be remolded, from time to time to meet the changing needs of society." 74 Indeed, it was Brandeis who observed in 1918 that "an essential element of individual property is the legal right to exclude others from enjoying it." 75

Holmes and Brandeis were on the United States Supreme Court for sixteen years together. 76 The relationship and friendship between the two jurists was out of the ordinary, a yin and a yang that complemented each other. Holmes was the perceptive thinker, politically blameless, talking of the battle in the abstract. 77 Brandeis was the balanced practitioner, yet always in the middle of the fight. Holmes was the artist, poised and literary, giving one a sense of being a disconnected observer. Brandeis was the social science technician, giving the economic and social realities of the situation. Holmes "hate[d] facts," and preferred theoretical generalizations instead. 78 Brandeis favored bright line rules. Holmes's character was at the level of philosophy. Brandeis's resonance was public policy.

Yet, the public policy aspects of Brandeis's opinions "appear to be grounded in the same philosophical apparatus that informed Holmes's decisions." 79 They agreed judges "made law," which judicial decisions amounted to policy judgments on competing policy issues, and that doctrinal formulas obfuscated rather than clarified the process of legal reasoning. 80 Additionally, Holmes and Brandeis saw constitutional law as "fluid, experimental, alive . . . the document itself . . . must respond to the 'felt necessities of the time.' " 81 Unlike most of their brethren, Holmes and Brandeis did not fear change. 82 Holmes viewed change as the creation of evolutionary forces. Brandeis viewed change

74. See KONEFSKY, supra note 66, at 129 (quoting Truax v. Corrigan, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting)). 75. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). 76. Louis Brandeis was on the Bench from 1916-1939. Oliver Wendell Holmes was on the Bench from 1902-1932. Thus, the two were on the bench together from 1916-1932, until Holmes retired. 77. See BAKER, supra note 2, at 543. 78. See White, supra note 53, at 588 (quoting Letter from Oliver W. Holmes to Harold J. Laski (May 18, 1919), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 204, 204-05 (Mark D. Howe ed., 1953) (discussing Brandeis's suggestion that Holmes "devote . . . [his] next leisure to the study of some domain of fact"). 79. See White, supra note 53, at 616. 80. Id. 81. See BAKER, supra note 2, at 543. 82. Id.
as sought-after, something that men may effectuate and government progress.  

IV. THE SUPREME COURT—PROPERTY RIGHTS AND SUBSTANTIVE DUE PROCESS BEFORE MAHON

Legal observers during the 1930s perceived that the Supreme Court was "particularly active since World War I in striking down legislation, both State and Federal." From 1920 through 1926, the Supreme Court had struck down social and economic legislation as unconstitutional under the Due Process Clauses of either the Fifth or Fourteenth Amendment in more cases than in the Court's fifty-two previous years. This was due to the composition and theories of the Court during the Taft era of 1921-1930. During that time the Court contained four conservative Justices including Willis VanDevanter, James McReynolds, George Sutherland and Pierce Butler, and several liberals including Louis Brandeis, Oliver Wendell Holmes, John H. Clarke, and until 1922, William R. Day and Mahlon Pitney. By the time Pennsylvania Coal Co. v. Mahon was decided, eight justices heard the case argued and only seven participated in its opinion.

Over thirteen hundred law reviews are written on Pennsylvania Coal Co. v. Mahon. Mahon is deemed by Justice Rehnquist to be "the foundation of our 'regulatory takings' jurisprudence." However,

83. Id.
84. Robert C. Post, Defending the Lifeworld: Substantive Due Process in the Taft Court Era, 78 B.U. L. Rev. 1489, 1493 n.30 (1998) (citing Felix Frankfurter, The Supreme Court and the Public, 83 Forum 329, 333 (1930)). "The World War and its aftermath ushered in once again a period dominated by fears—the fear of change, the fear of new ideas—and these fears were written into the Constitution." Id.
85. See Currie, supra note 61, at 65 n.1 (quoting Ray A. Brown, Due Process of Law, Police Power, and the Supreme Court, 40 Harv. L. Rev. 943, 944 (1927)).
86. Joseph McKenna, Oliver Wendell Holmes, Willis Van Devanter, Mahlon Pitney, James McReynolds, Louis Brandeis, William Taft and George Sutherland, heard the case argued on November 14, 1922. Justice William Day resigned the day before Mahon was argued and Justice Pierce Butler, Justice Day's replacement, was not sworn in until January 1923. See Brauneis, supra note 26, at 620 n.29.
88. A recent May 2004 LexisNexis search revealed over 2600 cites to Pennsylvania Coal Co. v. Mahon. This number includes 1337 law reviews, 1156 lower court cases and 46 Supreme Court opinions including almost every significant Supreme Court takings case since Armstrong v. United States, 364 U.S. 40 (1960).
as Professor Charles Haar argues, "a literal reading of [the] Takings Clause [did] not reveal authority either for invalidating a regulation or for providing compensation in the absence of an affirmative exercise of the government’s . . . power of eminent domain to ‘take’ or ‘condemn’ property."\(^{90}\)

Many scholars believe that "the history of framing and adoption of the Fifth Amendment [did not] reveal such authority."\(^{91}\) Evidence of the original intent of the Takings Clause demonstrates that the Clause applied to physical takings where the government physically appropriated property.\(^{92}\) William Treanor illustrates, "the original understanding of the Takings Clause . . . required compensation when the federal government physically took private property but not when government regulations limited the ways in which property could be used."\(^{93}\) Because regulations restricting land use were pervasive during colonial times, the judicial understanding of the Takings Clause in the nineteenth century followed this understanding.\(^{94}\)

Fundamentally, many commentators argue that Mahon was more of a Contracts Clause and a Substantive Due Process case than a Takings Clause case under the Fifth Amendment.\(^{95}\) A year after Justice Holmes wrote the opinion, Justice Frankfurter classified Mahon as a Contract Clause case, and omitted the fact that the opinion referred to construction of the Takings Clause, such as Bruce Ackerman, Private Property and the Constitution 156 (1977), and those who favor a broad readings of the clause such as Richard Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1, 12 ("Pennsylvania Coal has long been regarded as perhaps the single most important decisions in the takings literature").

90. See Haar & Wolf, supra note 71, at 2164 (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 231-23 (1984) (where the Supreme Court upheld a Hawaii statute that allowed taking title in property from landlords and transferring them to their tenants to reduce the intensity of land ownership) and Berman v. Parker, 348 U.S. 26, 35-36 (1954) (where the Supreme Court held that the public use requirement of the Fifth Amendment allowed the District of Columbia to condemn property and resell or lease it to private interests so long as a development plan accomplished a public purpose)).

91. Id. at 2164 (citing William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 782 (1995)).


93. Id. at 782.


95. See Brauneis, supra note 26, at 666. Additionally, Frankfurter classified Mahon as a Contract Clause case, and does not mention that the opinion refers to the Due Process Clause. Justice Brandeis also told Frankfurter that Mahon was, in Holmes’s mind, a substantive due process case.
Due Process.\textsuperscript{96} But from the nineteenth century up until the mid 1930s\textsuperscript{97} Substantive Due Process was used by the Court to invalidate "state legislation that conflicted with the doctrine of laissez faire [capitalism], which dominated the thinking at the turn of the century."\textsuperscript{98}

As Professor Treanor illustrates, before \textit{Mahon} was decided, "the Supreme Court protected property under Substantive Due Process analysis using distinct rationales that produced three lines of cases: classic police power cases, cases of businesses 'affected with a public interest' and eminent domain cases."\textsuperscript{99} Under the police power line of cases the Court upheld state legislation if the legislature's goal was to protect public health, safety, morals or welfare and the means chosen by the legislature was suited to achieve that goal.\textsuperscript{100} Thus, in accord with the original understanding of the Takings Clause, the police power cases did not award compensation when a regulation was a valid exercise of the police power.\textsuperscript{101}

Under the businesses "affected with a public interest" line of cases, rate regulation was permissible if it only affected business that impacted the public interest and that business offered "indispensable ... services."\textsuperscript{102} Under the eminent domain line of cases, compensa-


\textsuperscript{97} See Nebbia v. New York, 291 U.S. 502 (1934), which signaled the end of invalidating state laws under substantive due process because they interfered with laissez faire capitalism. Written by Justice Roberts who was joined by C.J. Hughes, Brandeis, Stone and Cardozo, the Court upheld a New York law that fixed milk prices. Justice Roberts wrote, "the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." Id. at 537. \textit{See also} West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upheld a Washington minimum wage law against a Fourteenth Amendment Due Process challenge and directly overruled \textit{Adkins v. Children's Hospital}, 261 U.S. 525 (1923)).

\textsuperscript{98} See \textit{Schwartz}, supra note 3, at 182.

\textsuperscript{99} See \textit{Treanor}, supra note 15, at 832.

\textsuperscript{100} Mugler v. Kansas, 123 U.S. 1 (1873), where the Court distinguished police power regulations from takings:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interest.

\textit{Id.} at 668-69.

\textsuperscript{101} See \textit{Treanor}, supra note 15, at 836.

\textsuperscript{102} \textit{Id.} at 838 (quoting Wolff Packing Co. v Court of Indus. Relations of Kansas, 262 U.S. 522, 537 (1923)) (decided the year after \textit{Mahon}, Wolff reflected the approach that rate regulation was within the public interest because they were natural monopo-
tion arose when the government took physical action, which if done by a private citizen would have violated an enforceable property right.\textsuperscript{103} Here, the Government must tangibly harm the property owner by causing some direct physical damage to the property through some noxious use.\textsuperscript{104}

Of the 130 opinions written by the Supreme Court from 1916 through 1932 holding that a state action was invalid under Substantive Due Process of the Fourteenth Amendment, Holmes dissented in 35 opinions and Brandeis dissented in 43.\textsuperscript{105} Yet, Holmes approved of Brandeis's disagreement with the Court in striking down an economic regulation under Substantive Due Process seventy-two percent of the time.\textsuperscript{106} Moreover, of the 130 substantive due process cases from 1916-1932, Brandeis and Holmes came to differing opinions in 17 of the 130 cases, or thirteen percent. Thus, one could presume that Brandeis and Holmes customarily came to the same conclusions regarding the validity of state action under the Fourteenth Amendment. But in \textit{Mahon}, these two titans of jurisprudence came to differing conclusions.

IV. \textit{PENNSYLVANIA COAL COMPANY V. MAHON} DISSECTED

The \textit{Mahon} case involved a challenge to the constitutionality of the Kohler Act.\textsuperscript{107} The Kohler Act was a 1921 Pennsylvania statute that barred the mining of anthracite coal under "structures used for human habitations" if it caused the land at the surface to subside and cave in.\textsuperscript{108} The surface rights of the property in question had been bought from the Pennsylvania Coal Company by Margaret Mahon's father in 1878.\textsuperscript{109} The company retained, under the surface, lateral

\textsuperscript{103} See \textit{Pumpelly v. Green Bay Co.}, 80 U.S. 166 (1871) (the Court construed the Wisconsin Constitution which was almost identical to the federal constitution).


\textsuperscript{105} See \textit{FRANKFURTER, supra} note 7, at Appendix.

\textsuperscript{106} Holmes had joined or written his own dissent thirty-one out of the forty-three times Brandeis dissented in these cases.

\textsuperscript{107} See \textit{Mahon v. Pennsylvania Coal Co.}, 118 A. 491, 492 (Pa. 1922) (summarizing Kohler Act). The Act made it illegal to mine anthracite coal in such a way that would cause the cave in, collapse or subsidence of (1) public buildings or places used customarily as places of assemblage; (2) any facility used for service of the public such as roads, tracks, pipelines and wires, or (3) any structure used for human habitation, used as factor, store or place of employment, or used as a cemetery or public burial ground. \textit{Id.} at 492.

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} See \textit{Treanor, supra} note 15, at 818.
support rights and the right to remove any remaining coal. Then, support rights were considered an estate at land under Pennsylvania law.\textsuperscript{110} In such a transaction, the buyer assumed the risk that the ground on which his home stood could be weakened. Additionally, the buyer waived any rights he had in pursuing a claim against the coal company if subsidence occurred. Thus, before the passage of the Kohler Act, a coal company owning the support rights had no liability to the owner of the surface when mining caused subsidence.\textsuperscript{111}

When the land was sold in 1878, the risks of subsidence looked small. During that time, it was coal-mining practice to mine only about two thirds of the coal underneath the surface. The rest of the coal was left in the form of ‘pillars’ used to hold up the roof of the mine.\textsuperscript{112} But as times changed, “pillar robbing” had become a serious problem. This was due in part to the fact that Pennsylvania courts upheld the waiver clause.\textsuperscript{113}

Four days after the Kohler Act went into effect, the Pennsylvania Coal Company informed the Mahons that they intended to mine beneath their property.\textsuperscript{114} The Mahons went to court for an injunction, invoking the Kohler Act. The company countered that the law was unconstitutional and the lower court agreed. The Supreme Court of Pennsylvania reversed the lower court, and upheld the statute as a “police measure, which does not, in any true legal sense, contemplate the taking of private property for public use.”\textsuperscript{115}

When the case came before the United States Supreme Court, the issue was whether the Kohler Act took away property without compensation. But Holmes, writing for the majority, addressed the issue as “whether the police power can be stretched so far . . . [to destroy previously existing rights of property and contract.]”\textsuperscript{116} In striking down the Kohler Act, Holmes laid out the competing concerns of individual constitutional protection versus governmental power. He saw these competing concerns as a matter of degree.\textsuperscript{117}

Sticking to his philosophy of legislative deference, Holmes first acknowledged governmental power can diminish the value of property. Holmes stated, “some values are enjoyed under an implied limi-

\begin{itemize}
\item\textsuperscript{110} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412, 414 (1922).
\item\textsuperscript{111} See Treanor, supra note 15 at 818 (citing Penman v. Jones, 100 A. 1043, 1044 (Pa. 1917) (surface owner's right of support can be waived if waiver express or “the intention of the waiver clearly appears”).
\item\textsuperscript{112} See Friedman, supra note 104, at 2.
\item\textsuperscript{113} Penman, 100 A. at 1044. (surface owner's right of support can be waived if waiver express or “the intention of the waiver clearly appears”).
\item\textsuperscript{114} See Friedman, supra note 104, at 3.
\item\textsuperscript{115} Mahon v. Pennsylvania Coal Co., 118 A.491, 493 (Pa. 1922).
\item\textsuperscript{116} Mahon, 260 U.S. at 413.
\item\textsuperscript{117} See Friedman, supra note 104, at 4.
\end{itemize}
tation and must yield to the police power." Additionally, government could not operate without affecting property values: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Thus, courts should be reluctant to overturn legislation: "The greatest weight is given to the judgment of the legislature." Thus, a heavier weight should be placed on the property owner's side of the scale.

However, Holmes stated the police power is limited by the Contract and Due Process clauses of the constitution. Thus, it was the "general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The question of how far is "too far" was never fully explained by Justice Holmes.

Professor Brauneis contends that Holmes had two elements in his approach to constitutional property rights. The first element "is that the rights of property and contract that the Constitution protects are defined by historically contingent standing positive law." For example, a regulation that codifies an ancient common law rule will not raise a constitutional issue. The second element is "that there is no categorical difference between the legal changes that the Constitution forbids and those changes that it allows without compensation." Together, the Constitution partially protects against those legal changes that go "too far," and the Constitution allows destruction of the kind of property rights it protects. Thus, Holmes recognized that the Constitution's tolerates small uncompensated takings all under the guise of the police power. Holmes specified that a police power goes "too far" when the regulation causes a "diminution" in value of the property. Once the diminution in value "reaches a certain magnitude . . . there must be . . . compensation."

Next, Holmes addressed the limited character of the interests protected by the Kohler Act. Here, Holmes acknowledged the extensive scope of the public power over property. Holmes observed that a

118. Mahon, 260 U.S. at 413.
119. Id.
120. Id.
121. Id. at 415. This sentence has been the basis for the development of the current regulatory takings jurisprudence.
122. See Brauneis, supra note 26, at 621. Brauneis explains that "standing positive law" is "the law actually enforced in a particular jurisdiction at a particular time, including judge-made, administrative, and statutory." Id. at 621 n.34.
123. Id. at 622.
124. Mahon, 260 U.S. at 413.
125. Id.
126. See Treanor, supra note 15, at 819.
private interest could justify the exercise of the police power, but that power was limited. But in this case the public interest to protect the Mahons was not warranted because the potential damage, "is not a public nuisance." Holmes believed the Mahons assumed the risk of subsidence when they bought the surface rights of the land. Because the Mahons bargained away their support rights, the State's police power could not 'stretch' to shift the burden to the mine owner. Instead, the interests of the coal company, as the support rights property owner, compelled Holmes to state, "the extent of the taking is great. [The statute] purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate."  

Implicitly, Holmes balanced the public interest in exercising its police power to prevent subsidence against the company's private estate interest. Applying this test, Holmes found that the balance supported the company: "If we were called upon to deal with the [Mahons'] position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the [company's] constitutionally protected rights." But the difference between a regulation and a taking was one "of degree—and cannot be disposed of by general propositions." Thus, Holmes suggested that there is a permissible level of public zoning authority without the courts defining how to calculate when the line is crossed into an impermissible taking. 

Holmes also revealed a more fundamental objection to his suggestion that a sufficiently strong public interest would dispense with the need of compensation for what would amount to a taking: "[T]he protection of private property in the Fifth Amendment presupposes a valid public purpose "but provides that it shall not be taken for public use without compensation." By using a balancing test, Holmes implied that property "could be taken without compensation if there was sufficient public need." 

In his dissent, Brandeis applied the traditional notion that a regulation that is a valid exercise of the police power is a constitutional: "restriction imposed to protect the public, health, safety or morals

127. Id. at 819 (quoting Mahon, 260 U.S. at 413).
129. Id.
130. Id. at 416.
131. "[W]e should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." Mahon, 260 U.S. at 414. See also id. at 415 (distinguishing a requirement that miners leave pillars of coal standing sufficient to prevent flooding as "requirement for the safety of employees invited into the mine").
132. Id. at 415.
133. See Currie, supra note 61, at 95.
from danger threatened is not a taking. The restriction here . . . is merely the prohibition of a noxious use.” Brandeis then cited cases where the Court upheld statutes in which “the police power [was] exercised . . . to protect the public from detriment and danger.” Nevertheless, Justice Brandeis acknowledged “[when] the use prohibited ceases to be noxious, the restriction will have to be removed and the owner will again be free to enjoy his property.”

As Professor Brauneis contends, one of the philosophical differences between Holmes and Brandeis was their “deference to the legislative judgment in Mahon.” At the same time that Holmes balanced, Brandeis applied traditional categories. Holmes did not accept the traditional notions of the police power. Conversely, Brandeis used the police power to justify the statute as furthering the public interest. Brandeis’s dissent reflects the categorical rule that the Kohler Act was constitutional because it was a safety regulation. For Brandeis, case law provided sufficient support to defer to the legislative judgment. Moreover, requiring compensation for a regulation Brandeis deemed to be within the police powers of the state acted as a deterrent for governments to regulate.

Brandeis believed that Holmes misapplied his balancing test to the facts of Mahon:

If we are to consider the value of the coal kept in place by the restriction we should compare it with the value of all other parts of the land . . . For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal . . . which may be extracted despite the statute.

Holmes suggested “that the public interest forbidding the undermining of homes was not great: The statute: is not justified as a protection of personal safety. That could be provided for by notice.”

134. Mahon, 260 U.S. at 417 (Brandeis, J., dissenting).
135. Id. at 422 (Brandeis, J., dissenting) (citing Pierce Oil Corp. v. Hope, 249 U.S. 495, 498 (1919) (owner prohibited from using his oil tanks); Hadacheck v. Sebastian, 239 U.S. 394 (owner prohibited from using his brickyard); Reinman v. Little Rock, 237 U.S. 171 (1915) (owner prohibited from using his livery stable); Powell v. Pennsylvania, 127 U.S. 678 (1888) (owner prohibited from using his oleomargarine factory); and Mugler v. Kansas, 123 U.S. 623 (1887) (owner prohibited from using his brewery)).
137. See Brauneis, supra note 26, at 676.
139. Id. at 419 (Brandeis, J., dissenting).
140. See Currie, supra note 61, at 94 (quoting Mahon, 260 U.S. at 414). Nor did the statute protect the safety of lessees of surface rights from coal companies, since it allowed undermining the company’s own land.
Brandeis retorted by alluding to two of Holmes’s prior opinions which emphasized the need for deference to reasonable legislative decisions, and suggested “that mere notice of intention to mine would not in this connection secure the public safety.”

Brandeis drew on recognized theory to illustrate that before the Taking Clause was read into the Fourteenth Amendment, the prohibition of nuisances was not a deprivation of property without due process:

[Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation.]

However, for Holmes, the terms of the conveyance to the Mahons’ negated the obligation to support the surface. Additionally, the conveyance gave the company the right to undermine under the Mahons’ land. Thus, Brandeis’s argument, which would support the usual case, failed in Mahon. It failed because the right to undermine the land was reserved in contract. Moreover, the statute’s prohibition to undermine deprived the company of their preexisting property rights.

Yet, Brandeis knew that Holmes’s prior opinions recognized that existing contracts between private individuals cannot preclude the exercise of the police power. Pointing to a string of precedent, Brandeis contended that, “one whose rights . . . are subject to state restrictions, cannot remove them from the power of the state by making a contract about them.” In response, Holmes limited those


142. Id. at 422 (Brandeis, J., dissenting).

143. Id. at 417 (Brandeis, J., dissenting); cf. Munn v. Illinois, 94 U.S. 113, 145 (1887) (Field, J., dissenting) (“The doctrine that each one must so use his own as not to injure his neighbor—sic utere tuo ut alienum non laedas—is the rule by which every member of society must possess and enjoy his property”).

144. See Currie, supra note 61, at 95-96 (citing 1 Herbert Tiffany, The Law of Real Property and Other Interests in Land, § 309 (“The owner of the surface of land may grant or release to the owner of the subjacent soil or minerals the right to work or mine the latter, even though this causes a disturbance or sinking of the surface”)).

145. Id. at 96.


147. Mahon, 260 U.S. at 421 (citing Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908); Knoxville Water Co. v. Knoxville, 189 U.S. 434, 438 (1903); Rast v. Van Deman & Lewis Co., 240 U.S. 342 (1916) (Florida statute that taxed merchants advertising coupons was not in violation of the Contract Clause)).
opinions by recognizing that their reasoning posed a danger to the survival of the constitutional provision: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."\(^{148}\)

Brandeis suggested that a provision requiring miners to leave coal pillars along the property line to prevent flooding of adjacent mines was justified by "an average reciprocity of advantage."\(^{149}\) Yet, Brandeis argued:

Reciprocity of advantage is an important consideration, and may even be essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage.\(^{150}\)

For Brandeis, nuisance law distinguished the two situations of when an owner must benefit his neighbor and when the owner is prohibited to harm him. In the former case there is a taking. In the latter case no taking occurs. It is this distinction that Brandeis built upon. Brandeis believed it was fair to make an individual property owner stop polluting his neighbors. Concurrently, it was unfair for an individual property owner to contribute his land for a government purpose without compensation.\(^{151}\) But even Brandeis realized that the Kohler Act gave the Mahons a benefit they never bargained for.\(^{152}\)

As illustrated, Brandeis and Holmes differed on what needed to be balanced to determine if the Kohler Act was a valid police power regulation. Holmes focused on the property owner, whereas Brandeis focused on the public health promoted by the regulation. For Holmes, the greater the diminution in value that resulted from a police power statute, the more likely the regulation affected a taking. For Bran-

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148. See Currie, supra note 61, at 96 n.174.
149. Mahon, 260 U.S. at 415 (Brandeis, J., dissenting) (citing Plymouth Coal Co. v. Pennsylvania, 213 U.S. 531 (1914)).
150. Id. at 422 (Brandeis, J., dissenting).
151. See Currie, supra note 61, at 97 (citing Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 428-29 (1935) (Brandeis, J., opinion) (holding unconstitutional a requirement that railroad pay for elimination of grade crossing where reason was promotion of highway speed rather than safety: "[t]he promotion of public convenience will not justify requiring of a railroad . . . the expenditure of money, unless it can be shown that a duty to provide the particular convenience rest upon it"); see also Allison Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 71-81. Here, the taking clause and the police power can coexist as complementary components of the property owner's general right to be left alone.
152. Curry, supra note 61, at 97.
deis, if the regulation was unlikely to stop a danger to the public health, safety or welfare, the more likely it affected a taking. Both jurists drew from their legal backgrounds to compose these doctrinal tests.

Brandeis's concern was the public safety. As a social scientist, Brandeis took all the facts of the case to draw upon his reasoning of how the law should be formed. Brandeis knew that the Kohler Act was passed to save sinking cities like Scranton: "Our once level streets are in humps and sags, our gas mains have broken, our water mains threaten to fail us in time of conflagration . . . ." Brandeis knew that the public danger was great. As such, he saw a significant public need, which justified the Kohler Act's preemption of contract waivers.

Yet, Brandeis was the lone dissenter. He saw the travesty the Court was putting forth in its majority opinion. Because the coal companies were mining more than their fair share of coal safely, people were losing their homes and their town. Brandeis also saw the correction the Kohler Act was trying to perpetuate. The Kohler Act corrected the bargaining power of people who waived their claims to hold the coal company liable for any subsequent subsidence. As such, Brandeis saw the Kohler Act as a response to the great public needs of not only preventing cave-ins, but to forestall residents from bargaining away their rights.

Holmes focused on the Kohler Act's extinguishment and conveyance of rights the coal company held underneath the property. Holmes knew that the Kohler Act granted more rights to the Mahons than they had bargained for when they bought the land. As such, Holmes believed the legislature overstepped its bounds in transferring the subsurface rights the coal company owned to the Mahons. Yet, Holmes may have come to a different conclusion, if Pennsylvania did not recognize subsurface and support rights as a separate and valuable estate in land.

V. MAHONS' PRINCIPLES ARE FORGOTTEN AND THEN REDISCOVERED

In a contemporaneous comment on Mahon, Thomas Reed Powell suggested that the difference between Brandeis and Holmes shed more light on the "reasoning" habits of each than on their conception of the "reasonableness" of the public regulations. Powell contended that the two opinions "afford such striking illustration of the compara-

tive merits of reasoning and reasonableness that they merit the care-
ful study of all who are interested in the mental processes that play
such a part in directing the development of law.”155 Others contend,
and I agree, that the reasoning of Brandeis and Holmes in their
Mahon opinions was more dictated by the constitutional nature of the
legislation, rather than their methods as jurists.156

Brandeis was disappointed with the position Holmes took.157
Brandeis was well aware of Holmes’s detached view of the imminent
disaster in Pennsylvania coal mining communities, which the lawyers
for the city of Scranton as amicus curiae had described. Additionally,
Brandeis knew of the conflict Holmes faced when his deference to the
legislature was pitted against his respect for contractual obliga-
tions.158 Brandeis concluded that Holmes’s turnabout in Mahon was
attributed to a “heightened respect for property [that] has been part of
Holmes’ growing old,” and a reversion to “views not of his manhood
but his childhood.”159 Brandeis also ascribed Holmes’s vote to an in-
tellectual weakness that followed Holmes’s surgery from the previous
summer.160

Yet, the magnitude of Justice Holmes decision in Mahon was not
felt in private property or constitutional jurisprudence for over thirty
years. From 1922 to 1935, Mahon was part of the Court’s wider Sub-
stantive Due Process precedent. Eleven of the twelve citations during
that period emerged only in Fourteenth Amendment Due Process cases.
161

Additionally, the constitutional revolution of the 1930s rejected
the Due Process Clause as a home for substantive economic rights,162
and appeared to seal Mahon’s fate to forgotten precedents. For over

155. Id.
156. See Konefsky, supra note 66, at 247.
157. See Baker, supra note 2, at 568.
158. Id. at 569.
159. Melvin I. Urofsky, The Brandeis-Frankfurter Conversations, 1985 SUP. CT.
REV. 299, 321 (quoting Frankfurter’s written recollections of conversations with Bran-
deis, The Louis Brandeis Papers (on file with the Harvard Law School library)) (inter-
nal quotations omitted).
160. See Baker, supra note 2, at 567.
161. See Brauneis, supra note 26, at 678 (citing the twelfth case of Omnia Commer-
cial Co. v. United States, 261 U.S. 502 (1923), in which Justice Sutherland applied the
traditional distinction between direct and consequential injury in holding that the fed-
eral government’s requisition of goods that a private party had contracted to buy does
not constitute a taking of that party’s contract right. Justice Sutherland cites Mahon for
the proposition that the doctrine of public necessity may be based on tradition). Id. at
508.
162. See Nebbia v. New York, 291 U.S. 502 (1934); see also West Coast Hotel Co. v.
Parrish, 300 U.S. 379 (1937), which upheld a Washington minimum wage law against a
Fourteenth Amendment Due Process challenged and directly overruled Adkins v. Chil-
dren’s Hospital, 261 U.S. 525 (1923).
two decades thereafter, *Mahon* failed to be cited in a single majority opinion. Between 1935 and 1958, *Mahon* only appeared in a dissent by Justice Frankfurter in *United States v. Commodities Trading Corp.* Frankfurter cited *Mahon* for the observation that “in the exercise of its constitutional powers, Congress by general enactments . . . cause even appreciable pecuniary loss without compensation.” It was not until *Mahon* was “rediscovered—and to some extent reinvented—as the ‘foundation of regulatory jurisprudence,’” did its holding have any significance.

Commentators continue to press that *Mahon* was not a regulatory takings case at all, but a Substantive Due Process case, “differently only in degree” from *Lochner.* In his dissenting opinion in *Dolan v. City of Tigard,* Justice Stevens suggested that “Holmes’ dictum [in *Mahon*] . . . ha[d] an obvious kinship with the line of substantive due process cases that *Lochner* exemplified.” Additionally, Justice Stevens observed that *Mahon* and *Lochner* have “similar ancestries,” in that both cases concerned “potentially open-ended sources of judicial power to invalidate state economic regulations that members of this Court view as unwise or unfair.”

Today, the Supreme Court quotes Justice Holmes in *Mahon* for the recognition of the invalidity of a government regulation that goes

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163. 339 U.S. 121 (1950) (Frankfurter, J., dissenting in part) (a case concerning the amount that the United States should pay for black pepper it requisition during World War II).
166. Id. at 615.
168. Dolan v. City of Tigard, 512 U.S. 374, 407 (1994) (Stevens, J., dissenting) (footnote omitted). Justice Stevens took the position that the cases that are generally treated as the Supreme Court’s early takings cases were actually substantive due process cases. He wrote:

The Court began its constitutional analysis by citing *Chicago, B.& Q.R. v. Chicago* (1897), for the proposition that the Takings Clause of the Fifth Amendment is “applicable to the States through the Fourteenth Amendment.” That opinion however, contains no mention of either the Takings Clause or the Fifth Amendment, it held that the protection afforded by the Due Process Clause of the Fourteenth Amendment extends to matters of substance as well as procedure, and that the substance of “the due process enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of the State.” It applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker’s liberty interest in working 60 hours a week and 10 hours a day.

Id. at 405-06. See also *Lochner v. New York,* 198 U.S. 45 (1905).
170. Id. (Stevens, J. dissenting).
too far when it takes private property for public use under the Fifth Amendment. Yet, San Diego Gas & Electric and First English powerfully contributed to the Court's jurisprudence of Mahon being the influential and foundational Takings Clause case.

In San Diego Gas & Electric v. City of San Diego, Justice Brennan's dissent drew on Holmes's opinion in Mahon to support his conclusion that the Constitution mandated monetary damages for takings. Justice Brennan argued that "[t]he general principle that a regulation can effect a . . . 'taking' . . . has its source in Justice Holmes' opinion for the Court in Pennsylvania Coal Co. v. Mahon." Justice Brennan reasoned that the Mahon Court "contemplated that a regulation could cross the boundary surrounding valid police power exercise and become a Fifth Amendment 'taking.'"

Six years after San Diego Gas & Electric, the Supreme Court adopted Justice Brennan's argument in First English Evangelical Lutheran Church v. County of Los Angeles, that the Constitution mandated a damage remedy for temporary regulatory takings. In the First English Court's view, "when Holmes stated that 'if a regulation goes too far it will be recognized a taking,' he meant a Fifth Amendment taking, and he meant to acknowledge that the Fifth Amendment provided a damages remedy regardless of whether the government had formally instituted condemnation proceedings." Amusingly, four years after Mahon was decided, Holmes returned to the position he took in Madisonville, that "the truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."


172. See Brauneis, supra note 26, at 688.
175. San Diego Gas, 450 U.S. at 648-49 (Brennan, J., dissenting).
176. See Brauneis, supra note 26, at 687 (quoting San Diego Gas, 450 U.S. at 650 (Brennan, J., dissenting)).
177. See Brauneis, supra note 26, at 687-88.
178. See Brauneis, supra note 26, at 669 n.260 (quoting Tyson & Brother-United Ticket Offices, Inc. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting)).
VI. CONCLUSION

Oliver Wendell Holmes and Louis Brandeis shared the Supreme Court bench for sixteen years. Throughout that time, these jurists became great friends and respected intellects. The two jurists had completely different backgrounds and diverse approaches in framing economic and social jurisprudence. Profoundly, Brandeis and Holmes usually came to an agreement from their seemingly distinct thought processes. However, in *Mahon*, the two friends addressed a slight distinction in their views of an active legislature trying to protect property owners from the danger of subsidence.

Holmes saw the public interest as too attenuated, limited to Mahons only, and not grand enough to warrant upholding the statute under the state’s broad police power. Brandeis saw the greater safety interest that the Kohler Act was trying to prevent throughout the State of Pennsylvania. Holmes viewed this case narrow to the facts. Here was one Scranton property owner who had bargained away his support and subsurface rights to the coal company, and such rights were recognized by the state as a valuable estate in land. In short, for Holmes, one property owner does not a public interest make. Brandeis looked at the broader social and economic implications this case had for the state of Pennsylvania. If the Mahons were faced with the danger of losing their house, and the State of Pennsylvania passed the Kohler Act, such was warranted to protect the greater public from losing their homes. In the end, Holmes’s opinion won the minds of later Supreme Court jurists. His words are continuously cited for establishing the benchmark test of modern regulatory takings jurisprudence today.