

Chapter 4

THE EASEMENT OF THE MINERAL ESTATE FOR SURFACE USE: AN ANALYSIS OF ITS RATIONALE, STATUS, AND PROSPECTS

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§ 4.01 Introduction

A fundamental principle of United States property law is that the right to extract minerals can be severed from the bundle of rights that constitutes property ownership.¹⁽²⁾ Where the mineral interest has been severed from the surface interest, the courts have recognized an implied easement burdening the surface interest and benefiting the mineral interest to use the surface in such manners and locations as may be reasonably necessary to obtain minerals from the property.

Common law rules must be reexamined constantly to determine whether the rationales that led to their recognition still apply, however, for the customs and expectations are the foundation of the common law. Population growth, urbanization, suburban sprawl, and intensive agriculture, on the one hand, and technologies that have identified more and more “minerals” and the means to extract them efficiently, on the other, have made conflicts between minerals development and surface uses everyday fare. As a result, the implied easement for surface use has come under the increasingly close scrutiny of the courts and the legislatures.

Although many excellent papers over the years have addressed problems of the implied easement for

surface use both in the Rocky Mountain Mineral Law Foundation papers²⁽³⁾ and in other publications,³⁽⁴⁾ the environmental awareness of the 1990's gives us good reason to reexamine the rationale, status, and future prospects for the implied easement for surface use.

§ 4.02 The Traditional Rule

Where the mineral interest has been severed from the surface interest, whether by grant or reservation, or by lease or conveyance, and whether that severed interest constitutes an estate in land or a lesser interest such as a profit-a-prendre, the surface estate is subject to an implied easement appurtenant belonging to the mineral owner that empowers the mineral owner to make such uses of the surface at such locations as are reasonably necessary to explore for, produce, and market the minerals from the property.⁴⁽⁵⁾

The courts have given broad application to the general rule that the mineral owner or lessee has an implied right to use the surface, permitting the easement owner great discretion both as to the *kinds* of uses and to the *location* of those uses, without the surface owner's permission,⁵⁽⁶⁾ without payment of compensation,⁶⁽⁷⁾ and without any obligation to restore the surface,⁷⁽⁸⁾ subject only to the limitation that the easement owner may not destroy the surface.⁸⁽⁹⁾ Specific applications of the principle have included recognition of the mineral owner or lessee's right to use the surface in virtually every manner useful to mineral exploration and development, including conducting seismic surveys,⁹⁽¹⁰⁾ locating wells and related facilities,¹⁰⁽¹¹⁾ destroying crops,¹¹⁽¹²⁾ and using gravel, clay, water, or other materials¹²⁽¹³⁾ found on the land, constructing roads¹³⁽¹⁴⁾ and pipelines,¹⁴⁽¹⁵⁾ and disposing of wastes produced with oil or gas.¹⁵⁽¹⁶⁾ So broad have been the applications that some have said that the mineral owner or lessee's right to use the surface is superior to the right of the surface owner.¹⁶⁽¹⁷⁾ This is a shorthand way of saying that the mineral interest is the dominant estate and the surface interest is the servient estate.¹⁷⁽¹⁸⁾

At common law, intent is the rationale of the rule that the mineral owner or lessee has the right of surface use. "This rule is based upon the principle that, when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted."¹⁸⁽¹⁹⁾ Thus, "[t]he grant of the oil carried with it a grant of the way, surface, soil, water, gas and the like essential to the enjoyment of the actual grant of the oil."¹⁹⁽²⁰⁾ The parties would not sever the minerals from the surface or lease the minerals if they did not intend that the mineral owner should have the right to obtain the minerals. "One who grants a thing is presumed to grant also whatever is essential to its use. The right of entry is an incident to the grant of an estate in the mineral rights."²⁰⁽²¹⁾

In the interest of certainty of title, the intent to which the common law courts refer is an objective intent — an intent implied from the circumstances and words of the conveyance as a matter of law — not a subjective intent. "The rights implied from the grant are implied by law in all conveyances of the mineral estate and, absent an express limitation thereon, are not to be altered by evidence that the parties to a particular instrument of conveyance did not intend the legal consequences of the grant."²¹⁽²²⁾

Public policy also supports the implied easement for surface use. Society has an interest in the availability of plentiful supplies of extracted minerals. The common law courts interpret private agreements in the context of public needs. The Pennsylvania Supreme Court stated the point concisely and clearly early in the history of the oil and gas industry in a dispute between a surface owner who also owned oil and gas rights and a severed coal owner:

No one will deny the title of the surface owner to all that lies beneath the strata which he has sold. It is as much a part of his estate as the surface. If he is denied the means of access to it, he is literally deprived of an estate which he has never parted with. In such case the public might be debarred the use of the hidden treasures which the great laboratory of nature has provided for

man's use in the bowels of the earth. Some of them, at least, are necessary to his comfort. Coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong. Abounding, as our state does, with these mineral treasures, so essential to our common prosperity, the question we are considering becomes of a quasi public character. It is not to be treated as a mere contest between A. and B. over a little corner of earth.²²⁽²³⁾

Spanish law embodied a concept similar to the implied easement based upon elements of both intent and public policy. Spanish law recognized the *dominio radical*, literally the “root ownership,” the King's ownership of minerals contained in the soil of the lands of his subjects. “As with all royal patrimonies, the sovereign's separate and severed mineral ownership on private lands rendered the surface estate servient and subject to any use the King might find necessary to mine for and produce the minerals on or beneath the lands of his subjects.”²³⁽²⁴⁾ “Under this theory of law, no mention of minerals needed to be made in title papers granting or patenting land....Land grants simply had nothing to do with minerals and did not affect their ownership.”²⁴⁽²⁵⁾ Spanish law differed from the common law in that it was based upon the *res nullius* principle — minerals were things not subject to private ownership — while the common law started with the principle that ownership of land included everything held in the soil.²⁵⁽²⁶⁾

Whatever the origin of the implied easement for surface use, the effect of the rule in all jurisdictions of the United States is that a severed surface owner or a fee simple owner subject to a mineral lease is not the absolute master of the land. The surface interest does not “own” exclusive control of the surface, but must share the surface with the mineral owner. That fact is the predicate of countless disputes and thousands of lawsuits between surface owners and mineral developers.

Mineral owners and lessees who press their rights in surface use disputes generally win. The courts will protect the mineral owner's implied right of surface use against interference by both legal and equitable doctrines. Compensatory damages are the usual remedy for aggrieved mineral owners,²⁶⁽²⁷⁾ though punitive damages²⁷⁽²⁸⁾ and equitable remedies such as injunction may be available.²⁸⁽²⁹⁾

A special protection for leasehold owners, whose rights may terminate if access to the leased property is denied, is the obstruction doctrine, which suspends the running of the lease primary term or extends a lease beyond the end of the primary term.²⁹⁽³⁰⁾ The obstruction doctrine is predicated upon the implied covenant of quiet enjoyment; if the lessor obstructs the lessee either by denying access to the property or by attacking the lessee's title, the lessor is precluded from denying the continued validity of the lease.³⁰⁽³¹⁾

§ 4.03 Limits to the Traditional Rule

Broad though the implied easement for surface use is, it is not an absolute right to use the surface. “[T]he question of what constitutes reasonable use of the surface in the development of oil and gas rights is the concept that the right of an oil and gas lessee to reasonably necessary surface uses must be exercised with due regard to the rights of the owner of the surface....”³¹⁽³²⁾ The rationale of the implied easement sets limitations. The mineral owner or lessee's use of the surface must be (a) reasonable, (b) in accord with the accommodation doctrine, and (c) for the benefit of the mineral estate alone.

The courts enforce the limits on the implied right of surface use by the same devices that they invoke to protect the easement itself. Abuse of the easement — negligent use or broader use than is reasonably necessary³²⁽³³⁾ — is generally remedied by compensatory damages,³³⁽³⁴⁾ which for the surface owner may result in either temporary or permanent damages. Temporary damage is damage that can be cured or repaired by restoration. The measure of temporary damage is the reasonable cost of repairing the damage and restoring the land to its former condition, not to exceed the depreciated value of the land itself.³⁴⁽³⁵⁾

Permanent damage is damage that continues indefinitely and is constant, that “may not be successful [sic] repaired so that it will be substantially in as good a condition as it was before the injury.”³⁵⁽³⁶⁾ Punitive damages may be awarded when the abuse is egregious.³⁶⁽³⁷⁾ Where the abuse is ongoing, the surface owner may obtain an injunction,³⁷⁽³⁸⁾ and even cancellation of the right of surface use in circumstances that would justify a permanent injunction.³⁸⁽³⁹⁾

[1] Reasonable Use

The implied easement for surface use gives the mineral owner or lessee the right only to reasonably necessary surface uses. “[I]f the lessee negligently and unnecessarily damages the lessor's land, either surface or subsurface, his liability to the lessor is no different from what it would be under the same circumstances to an adjoining landowner.”³⁹⁽⁴⁰⁾ In fact, liability follows unreasonable or excessive use even in the absence of negligence,⁴⁰⁽⁴¹⁾ though the courts have consistently refused to find strict liability.⁴¹⁽⁴²⁾ An easement owner who exceeds the scope of the rights granted is a trespasser against the possessory rights.⁴²⁽⁴³⁾

Reasonable use is a jury issue, and what constitutes an abuse of the implied easement for surface use depends upon the facts and circumstances.⁴³⁽⁴⁴⁾ Several courts have held that, while the mineral owner or lessee does not need the surface owner's permission to use the surface, the mineral owner may be held liable for the failure to give reasonable notice so that the surface owner can protect surface operations against harm.⁴⁴⁽⁴⁵⁾ Even the times and locations of surface uses may be subject to the courts' scrutiny.⁴⁵⁽⁴⁶⁾

In the 1990's, complaints that the implied easement has been unreasonably used are likely to focus on environmental damage, and to include demands for punitive damages. *Marshall v. El Paso Natural Gas Co.*⁴⁶⁽⁴⁷⁾ illustrates the threat of such suits. El Paso Natural Gas and Meridian Oil Inc. (collectively Meridian) held the oil and gas leasehold rights in land owned by Marshall. Meridian entered Marshall's land and drilled a poor well that Meridian decided to plug.⁴⁷⁽⁴⁸⁾ Meridian failed to comply with various pit and pond regulations in plugging the well, but an Oklahoma Corporation Commission field inspector was at the site when the work was done and “approved the plugging as proper.”⁴⁸⁽⁴⁹⁾ Marshall initially asked the Corporation Commission to take action against Meridian to rectify the situation. The Commission dismissed the landowner's complaint without any action.⁴⁹⁽⁵⁰⁾ Marshall then sued Meridian, asserting several tort theories, including nuisance. The jury awarded Marshall \$350,050 for diminution in value of the property, \$50,000 for nuisance damages, and \$5,000,000 in punitive damages. The Tenth Circuit court affirmed the jury's award and the trial court's refusal to refer the matter to the Oklahoma Corporation Commission.⁵⁰⁽⁵¹⁾ To add insult to injury, the Oklahoma Corporation Commission ultimately ordered Meridian to remedy the problems it had created at the Marshall site; Meridian paid the Marshalls \$5,400,050 for damage to a tract worth approximately 1/15th of that amount and then had to restore the premises.⁵¹⁽⁵²⁾

A positive statement of the reasonableness limitation is that the lessee must act in accord with customary good practice of the industry. Reasonableness is a “flexible yardstick” that reflects changing societal and technological standards. For example, though there is precedent that an oil and gas lessee was entitled to locate a derrick, engine, boiler, and slush pit literally in the front yard of a residence,⁵²⁽⁵³⁾ that case would probably not be decided the same way by a Texas court in the 1990's. On the other hand, what is reasonable use must be determined by reference to the purpose of the easement — to find and produce oil and gas.⁵³⁽⁵⁴⁾ Drilling activities and producing equipment must be located somewhere.

[2] The Accommodation Doctrine

Several states have adopted the principle that where a severed mineral interest owner or lessee asserts a right to surface uses that will substantially impair existing uses of the surface owner, the mineral owner

or lessee must accommodate the existing surface uses if reasonable alternatives are available.⁵⁴⁽⁵⁵⁾

Though the principle had been recognized previously,⁵⁵⁽⁵⁶⁾ the accommodation doctrine was first articulated by the Texas Supreme Court in *Getty Oil Co. v. Jones*.⁵⁶⁽⁵⁷⁾ In *Getty* a surface owner sued to restrain an oil and gas lessee from using beam-type pumping units that prevented the surface owner from continuing to use an automatic seven foot high “center-pivot” sprinkler system; the upstrokes of the pumping units interfered with the moving irrigation system. The Texas Supreme Court rejected Getty's argument that its use of the land was reasonable because the beam-type pumping units were more economical than using underground hydraulic pumping units.⁵⁷⁽⁵⁸⁾ The court recognized that there is an obligation of the mineral owner to accommodate the surface owner's uses where: (1) there is an existing use of the surface, (2) that the mineral owner's proposed use of the surface would substantially impair, and (3) the mineral owner has reasonable alternatives available.⁵⁸⁽⁵⁹⁾ The court based its conclusion on both the intent of the parties and “the public policy of developing our mineral resources while, at the same time, permitting the utilization of the surface for productive agricultural uses.”⁵⁹⁽⁶⁰⁾

The accommodation doctrine is best understood as a specific application of the general limitation that surface use under the implied easement for surface use must be reasonable, and the Texas articulation of the standard may be unduly narrow. In Texas, the doctrine is not available to the surface owner unless the surface use preceded the proposed mineral development use, and consideration of what reasonable alternatives are available to the mineral owner is limited to alternatives available on the servient land.⁶⁰⁽⁶¹⁾ This is logically unnecessary. The point of the accommodation doctrine is that the reasonableness of a claim to use must be judged by reference to the needs of surface owners and society, as well as by the needs of the mineral owner. As the *Getty* court noted:

What might be a reasonable use of the surface by the mineral lessee on a bald prairie used only for grazing by the servient surface owner could be unreasonable within an existing residential area of the City of Houston, or on the campus of the University of Texas, or in the middle of an irrigated farm. What we have said is that in determining the issue of whether a particular manner of use of the dominant mineral estate is reasonable or unreasonable, we cannot ignore the condition of the surface itself and the uses then being made by the servient surface owner.⁶¹⁽⁶²⁾

There is no reason to limit this logic to existing uses⁶²⁽⁶³⁾ or to alternatives available on the land.

[3] For the Benefit of the Mineral Estate Alone

Like any easement, the implied easement for surface use is limited by the purpose for which it is implied. The mineral owner or lessee has no right to use the surface subject to the implied easement to benefit mineral development on other lands, whether by using the surface for access,⁶³⁽⁶⁴⁾ transporting minerals across the surface,⁶⁴⁽⁶⁵⁾ subsurface disposal of saltwater or other wastes,⁶⁵⁽⁶⁶⁾ or otherwise.⁶⁶⁽⁶⁷⁾

That use of the surface by the mineral owner or lessee must be related exclusively to obtaining the minerals under the premises, is an application of the general real property law principle that an appurtenant easement may not be used to benefit non-dominant land: an easement appurtenant exists to benefit some particular tract of land and can only be utilized for the purpose for which it was created.⁶⁷⁽⁶⁸⁾

Where the mineral owner or lessee's use depends not upon the rights granted in a deed or lease but upon rights granted by the state pursuant to its police power, however, this limitation does not apply; the police power may override the intent of the parties.⁶⁸⁽⁶⁹⁾

§ 4.04 Stresses and Strains on the Common Law

The implied easement for surface use is often the subject of hard negotiations between mineral lessors

and lessees, and more and more frequently, the courts and the legislatures give the common law rules close scrutiny. The intent of the parties that the severed mineral owner should have the right to do whatever is necessary to obtain the minerals — the predicate for the implied easement for surface use — is increasingly rejected.

[1] Modification of the Implied Easement by Agreement

The parties to any agreement may expand or restrict the rights created by the agreement. The grantors of oil and gas or mining leases frequently place lengthy restrictions and standards upon mineral developers, and restrictions are occasionally seen in mineral deeds, as well. Mineral lessees also may seek to alter the implied easement, usually by expanding permitted uses or limiting liabilities.

The limitations on surface use desired by a rancher or farmer depend very much upon where the land is located — e.g., is it swampy, or dry — and upon the uses made by the surface owner — e.g., the concerns of a rice farmer in Louisiana are very different from those of a rancher in Wyoming. It is virtually impossible to draft “standard” surface use clauses for landowners.⁶⁹⁽⁷⁰⁾ Virtually any restriction may be acceptable to minerals developers if they want a lease badly enough, however, and agreements limiting the implied easement for surface use are generally given broad effect.⁷⁰⁽⁷¹⁾

When oil companies and mining companies seek to expand or clarify their right of surface use, their efforts are less likely to be effective.⁷¹⁽⁷²⁾ Probably the best example of the tendency of courts to interpret pro-development provisions narrowly are the many cases refusing to enforce damage waivers or releases. For example, in *Fox v. Nally*,⁷²⁽⁷³⁾ the Arkansas Court of Appeals held that execution of a surface damage release did not preclude recovery of site restoration costs. The court held that the scope of the damage release signed by the landowner extended only to permanent damages, not to temporary damages such as site restoration. The court reasoned that the lessee's surface use right was temporary because it was limited to the duration of the lease. In *Fischer v. Atlantic Richfield Co.*,⁷³⁽⁷⁴⁾ a federal district court held that a landowner's damage release did not bar a claim for pollution from salt water spillage because a lease is void to the extent that it authorizes violation of a law and a release may be avoided if the parties mistakenly believe that only surface damages could result from operations.⁷⁴⁽⁷⁵⁾ While such cases turn on their facts and the terms of the agreements, as well as the canon that agreement ambiguities are interpreted against the party that drafted them⁷⁵⁽⁷⁶⁾ and a public policy that limitations of liability are to be strictly interpreted,⁷⁶⁽⁷⁷⁾ an underlying fact that courts rarely discuss is that juries and judges are likely to identify more easily with the plight of surface owners than the interests of oil or mining companies.⁷⁷⁽⁷⁸⁾

[2] Modification by Statutes, Ordinances, Rules, and Regulations

Many governmental bodies have exercised the police power to restrict the scope of the implied easement for surface use. Conservation agency requirements that operators obtain drilling permits, maintain safe distances from dwellings, and properly plug and abandon wells have been common since the early 20th century. States and federal agencies have used rules and regulations to impose many of the same kinds of surface restrictions that large private landowners have negotiated.

In the past twenty years the states have enacted a variety of laws designed to adjust the relationship between surface owners and minerals developers by limiting the exercise of the implied easement for surface use. Many states require that the surface owner be given notice before mineral development begins.⁷⁸⁽⁷⁹⁾ Many states and the federal government have enacted statutes that require mineral developers to restore the land surface after mineral development is completed.⁷⁹⁽⁸⁰⁾ Texas has a statute that enables either oil and gas lessee or surface owner to propose a development plan and, after an appropriate comment period, avoid liability by developing in accordance with that plan.⁸⁰⁽⁸¹⁾ In 1990,

the Uniform Law Commissioners adopted a model act that encompasses a similar but broader scheme, including codification of the accommodation doctrine.⁸¹⁽⁸²⁾

Perhaps the most discussed of the legislation adjusting the rights of mineral owners, however, are the surface damages acts, which have been enacted by several states, including North Dakota,⁸²⁽⁸³⁾ Montana,⁸³⁽⁸⁴⁾ Oklahoma,⁸⁴⁽⁸⁵⁾ South Dakota,⁸⁵⁽⁸⁶⁾ Tennessee,⁸⁶⁽⁸⁷⁾ and West Virginia.⁸⁷⁽⁸⁸⁾ The province of Alberta also has such a law.⁸⁸⁽⁸⁹⁾ Other states, including Colorado and New Mexico, have considered such legislation and likely will do so again. Surface damages acts are generally aimed at protecting agricultural and ranching uses from disruption by oil and gas operations,⁸⁹⁽⁹⁰⁾ though some apply to mining as well as oil and gas development.⁹⁰⁽⁹¹⁾ The surface damages statutes impose strict liability for surface damages, reversing the common law rule that the mineral owner has the right of reasonable surface use without any obligation to pay damages.⁹¹⁽⁹²⁾ Under the acts, minerals developers are generally required to attempt to negotiate damage settlements before commencing operations. If the companies and surface owners cannot reach an agreement, the developer has the right to proceed to develop, and damages are resolved by litigation or arbitration.

Surface damages acts have grown out of the wish of the minerals extractive industries to avoid confrontations. Though the existence and broad application of the implied right of surface use is well-established, oil and gas and mining companies rarely rely upon it. To avoid disputes over whether uses are “reasonable,” minerals extractors often voluntarily pay surface damages. In addition, leases frequently create an obligation for the lessees to pay damages where the common law would not require them and limit uses permitted by the common law. Payment of surface damages has become virtually a custom of the oil and gas and mining industries, so that it is not surprising that landowners who have been unhappy with the amount they have received or the speed with which damages have been paid have descended upon legislators demanding their “right” be protected by statute.

Whenever legislation interfering with the traditional practices of the minerals industries is proposed there is speculation about whether it will pass constitutional muster, usually centering upon whether the state has “taken” property. Because minerals lawyers do not deal with constitutional issues frequently and because the U.S. Supreme Court has redefined the limits of state property use regulation in several recent cases, it is appropriate to consider the issue of unconstitutional takings here.⁹²⁽⁹³⁾

[3] Unconstitutional Takings

Both the Fifth Amendment⁹³⁽⁹⁴⁾ and the Fourteenth Amendment⁹⁴⁽⁹⁵⁾ to the United States Constitution contain due process clauses that prohibit “takings” of private property for public benefit without compensation. The language of the provisions is virtually identical: one may not be deprived “of life, liberty, or property, without due process of Law.”⁹⁵⁽⁹⁶⁾ The Fifth Amendment goes on to provide specifically, however, that “nor shall private property be taken for public use, without just compensation.”⁹⁶⁽⁹⁷⁾ Before 1897, the U.S. Supreme Court held that the Fifth Amendment takings provision did not apply to the states.⁹⁷⁽⁹⁸⁾ Since then the Court has held the takings proscription of the Fifth Amendment to be incorporated into the Fourteenth Amendment and binding upon the states as well as the federal government.⁹⁸⁽⁹⁹⁾

Legislation may be struck down as a taking where an owner of constitutionally-protectible “property” shows either that the legislation of which the party complains (1) “does not substantially advance legitimate state interests”⁹⁹⁽¹⁰⁰⁾ or (2) denies an owner all “economically viable use of his land.”¹⁰⁰⁽¹⁰¹⁾

The threshold issue of any takings challenge is whether the interest affected is “property” for which the complaining party may claim the protection of the amendments. The single case to have considered the constitutionality of a surface damages statute as this paper is written may be read to suggest that the

implied right of surface use is not constitutionally protected property. In *Murphy v. Amoco Production Co.*,¹⁰¹⁽¹⁰²⁾ the Eighth Circuit, in upholding the constitutionality of the North Dakota statute, observed that “Amoco’s right not to compensate Murphy for unavoidable damage to Murphy’s surface estate, if indeed it is ‘property’ at all, amounts to only a minor strand in the full bundle of rights which constitutes Amoco’s mineral estate.”¹⁰²⁽¹⁰³⁾ Both severed mineral interests and mineral lease rights clearly qualify as property, however, because they are classified either as real property or personal property for state law purposes.¹⁰³⁽¹⁰⁴⁾ The Supreme Court has never suggested that the right to take minerals owned is not property.¹⁰⁴⁽¹⁰⁵⁾ The statement in *Murphy* is either hyperbole or just plain wrong.¹⁰⁵⁽¹⁰⁶⁾

[a] Legitimate State Interests

The first “leg” of a takings analysis is whether the government has a valid public purpose for regulation.¹⁰⁶⁽¹⁰⁷⁾ The state may take private property only for public uses, even when it is willing to compensate the owner.¹⁰⁷⁽¹⁰⁸⁾ Before the state may exercise its police power “it must appear...that the interests of the public...requires such interference.”¹⁰⁸⁽¹⁰⁹⁾ The state may not use its power for the purpose of benefiting one group of private citizens at the expense of another.

The classic resources case illustrating the public purpose element of takings analysis is *Pennsylvania Coal Co. v. Mahon*.¹⁰⁹⁽¹¹⁰⁾ There, a Pennsylvania statute (referred to as the Kohler Act) prohibited coal mining in such a manner as to cause subsidence of structures on the surface. Surface owners sought an injunction against mining, even though the coal company had reserved the right to mine without regard to subsidence. One of the contentions of the mining company was that the statute was to benefit private individuals rather than the public, that the law was “robbery under the forms of law.”¹¹⁰⁽¹¹¹⁾ The Court, in an opinion written by Justice Holmes, agreed:

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate....[T]he statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant’s constitutionally protected rights.¹¹¹⁽¹¹²⁾

An expansive view of public purpose has been taken by some Supreme Court cases. The most significant case for the purposes of this inquiry is *Keystone Bituminous Coal Ass’n v. DeBenedictis*,¹¹²⁽¹¹³⁾ in which the U.S. Supreme Court refused to find a Pennsylvania statute nearly identical to the one in *Mahon* to be a prohibited taking. Justice Stevens distinguished *Mahon*’s public-purpose reasoning on the grounds that the legislature had acted to promote public, not private, purposes:

[T]hey [the coal companies] have not satisfied their burden of showing that the Subsidence Act constitutes a taking. First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare....

...

Unlike the Kohler Act, which was passed upon in *Pennsylvania Coal*, the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas. Section 2 of the Subsidence Act provides: “This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than 'open pit' or 'strip' mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania.” Pa. Stat. Ann., Tit. 52, § 1406.2 (Purdon Supp. 1986). The District Court and the Court of Appeals were both convinced that the legislative purposes set forth in the statute were genuine, substantial, and legitimate, and we have no reason to conclude otherwise.¹¹³⁽¹¹⁴⁾

The Court even more recently has recognized limits to legislative creativity in defining public purposes, however. In *Nollan v. California Coastal Commission*,¹¹⁴⁽¹¹⁵⁾ at issue was a lateral access easement across the beachfront of the Nollans' land required by the California Coastal Commission as a predicate to grant of a rebuilding permit. The Court, in an opinion by Justice Scalia, concluded that a taking had occurred, reasoning that the access condition was not sufficiently related to and did not advance legitimate state interests because the public purposes that the state argued justified the lateral access condition—beach views, minimal development, and preventing congestion¹¹⁵⁽¹¹⁶⁾ — were not furthered by the easement from one beachfront property to another.¹¹⁶⁽¹¹⁷⁾ The Court sounded a warning to overreaching legislators: “We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.”¹¹⁷⁽¹¹⁸⁾

In 1992 in *Lucas v. South Carolina Coastal Council*,¹¹⁸⁽¹¹⁹⁾ the Court again looked hard at a legislatively-expressed public purpose. In *Lucas*, the Court considered a beachfront property owner's challenge to a ban on construction in the South Carolina coastal zone enacted after the property owner bought his lots. The state legislature had expressly found that beach erosion and attendant damage had been accelerated by “unwise development”¹¹⁹⁽¹²⁰⁾ and the South Carolina Supreme Court had concluded that the statute was a valid exercise of the police powers of the state to prevent harm to the public that required no compensation.¹²⁰⁽¹²¹⁾ The Supreme Court, in a decision by Justice Scalia, held that “the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated”¹²¹⁽¹²²⁾ unless “the proscribed use interests were not part of his title to begin with,”¹²²⁽¹²³⁾ as when the claimed use would have constituted a nuisance at common law. Though *Lucas* analysis centered upon the third element of takings analysis — when a regulation is so burdensome that compensation is necessary even though there is a valid public purpose — the case indicates that the Court is willing to scrutinize rigorously the relationship between regulatory goals and methods and may look behind legislative findings.¹²³⁽¹²⁴⁾

Nonetheless, the reasons stated for legislation may make the difference between constitutionality or not, and the burden of showing that there is an inadequate public purpose is upon the party contending that an enactment is unconstitutional.¹²⁴⁽¹²⁵⁾ By the reasoning of *Keystone*, the *Mahon* Court's conclusion that no legitimate state interest was substantially advanced by the Kohler Act is a product of poor legislative drafting, rather than application of a fundamental principle of constitutional law. Knowledgeable legislators are not likely to make that mistake often.

Arguably, however, the drafters of several of the surface damages laws, enacted before *Nollan* and

Lucas, may have made precisely that mistake. The Montana Legislature declared that its surface damages act “is necessary to protect the economic well-being of individuals engaged in agricultural production.”¹²⁵⁽¹²⁶⁾ The North Dakota law expresses similar concern for the agriculture industry: “It is necessary to exercise the police power of the state to protect the public welfare of North Dakota which is largely dependent on agriculture, and to protect the economic well-being of individuals engaged in agricultural production.”¹²⁶⁽¹²⁷⁾ The South Dakota law uses almost identical language.¹²⁷⁽¹²⁸⁾ In fact, the Oklahoma law appears to be the only surface damages act that does not explicitly embrace agricultural protection as a public purpose. Such legislative statements raise the issue whether protection of an industry, even one essential to the economic well-being of the state, is a “legitimate state interest” if the means adopted is to burden a competing use to the advantage of the favored class.

The Eighth Circuit Court of Appeals addressed precisely that issue in *Murphy v. Amoco Production Co.*:¹²⁸⁽¹²⁹⁾

[T]he mere fact that a government act benefits a private party does not necessarily mean that it does not also advance the public welfare....[W]here different persons have incompatible interests in the same property, the state can legitimately exercise its police power to protect the interest that matters most to the public welfare, even at the cost of uncompensated destruction of other interests. *Miller v. Schoene*, 276 U.S. 272, 279-80...(1928).¹²⁹⁽¹³⁰⁾

But *Miller v. Schoene* may be seen as a nuisance case, a situation in which the state had to choose between the destruction of the disease-bearing red cedar, “not cultivated or dealt in commercially on any substantial scale,”¹³⁰⁽¹³¹⁾ and apple growing, “one of the principal agricultural pursuits in Virginia,”¹³¹⁽¹³²⁾ and therefore had the broadest possible discretion to act to prevent harm. And even if *Miller v. Schoene* is not seen as a nuisance case, its reasoning may no longer be valid in light of the Court's rigorous analysis in *Nollan* and *Lucas*. Oil and gas and mining are not analogous to “a fungoid organism which is destructive of the fruit and foliage of the apple.”¹³²⁽¹³³⁾ In most instances minerals development can exist simultaneously with agriculture.

A second issue raised by the surface damages acts is whether there is a proper relationship between legislative ends and means where a statute ostensibly seeks to protect agriculture or to preserve the environment against damage, but provides for transfer payments from minerals developers to surface owners without any requirement that those payments be applied to repairing damage. Two state courts have addressed analogous situations in striking down laws that required that applications for strip mining permits be accompanied by statements of consent from all freehold owners. The Kentucky Court of Appeals in *Department for Natural Resources and Environmental Protection v. No. 8 Limited of Virginia*¹³³⁽¹³⁴⁾ said that “[i]n order to be justified it must stand as an environmental conservation measure.... Here the legislation is ineffective as an environmental conservation measure.... It puts the surface owner in a position to be paid again for what he or his predecessor in title has already received compensation.”¹³⁴⁽¹³⁵⁾ In *Western Energy Co. v. Genie Land Co.*,¹³⁵⁽¹³⁶⁾ the court concluded that “[t]he statute does not bear the requisite 'substantial relation to the public health, safety, morals, or general welfare.' Nor does it address reclamation, conservation, or any other policy goal. It does not prevent strip-mining operations, does not regulate the manner in which mining or reclamation is performed, nor does it conserve agricultural land.”¹³⁶⁽¹³⁷⁾

A nexus between the public purpose of statutes modifying the common law implied easement for surface use and the means they require is suggested by the Supreme Court's opinion in *Keystone* — such laws may be justified as an attempt to minimize commercial or environmental damage through the market mechanism of financial responsibility. Addressing the coal companies' argument that a provision of the Subsidence Act that required coal companies to pay surface structural repair costs was unnecessary

because the state already had an insurance program, the Court noted that “[t]he requirement that the mine operator assume the financial responsibility for the repair of damaged structures deters the operator from causing the damage at all — the Commonwealth’s main goal...”¹³⁷⁽¹³⁸⁾ The deterrent effect of the “financial responsibility for repair” is present even though the surface damages payment is not applied to repairs.¹³⁸⁽¹³⁹⁾

[b] Economically Viable Use

Until the *Mahon* decision, the takings proscription had been limited to physical invasions of property.¹³⁹⁽¹⁴⁰⁾ Justice Holmes recognized in *Mahon*, however, that pervasive regulation might become the functional equivalent of a physical taking. “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁴⁰⁽¹⁴¹⁾ Even if the state has a valid public purpose for its regulation, if the burden on private property becomes so great that “an average reciprocity of advantage”¹⁴¹⁽¹⁴²⁾ between the public and the individual is lost, there is a taking.

The quandary for generations of constitutional scholars and attorneys has been to determine how far is too far.¹⁴²⁽¹⁴³⁾ It is clear that there may be a taking without a physical appropriation. It is equally clear that the state may exercise its police powers for the public welfare without any obligation to pay for incidental damage to private property. Little more can be said with certainty. Whether regulation amounts to a taking depends upon “the particular facts,”¹⁴³⁽¹⁴⁴⁾ of what are “essentially ad hoc, factual inquiries,”¹⁴⁴⁽¹⁴⁵⁾ and the cases are a confusing morass.

In *Mahon*, surface owners sought an injunction against mining. The coal company countered by asserting that the statute was a prohibited taking because it would destroy the right reserved in the original deeds conveying the surface to remove all the coal. Justice Holmes focused upon the extent of the diminution in property value caused by exercise of the police power: “[O]ne fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the Act.”¹⁴⁵⁽¹⁴⁶⁾ The *Mahon* Court concluded that the police power could not “be stretched so far”¹⁴⁶⁽¹⁴⁷⁾ across the continuum between permissible regulation and prohibited taking as to sustain the Pennsylvania law requiring that coal be left underground to prevent subsidence:

[T]he 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....

....

For practical purposes, the right to coal consists in the right to mine it.... What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.¹⁴⁷⁽¹⁴⁸⁾

Whether the diminution of property value deprived the owner of the economically viable use of property was also the focus, but with a different result, in *Penn Central Transportation Co. v. New York City*.¹⁴⁸⁽¹⁴⁹⁾ Justice Brennan concluded that a city ordinance that permitted a commission to designate historical landmarks and then require that they be kept in good repair and bar alterations was not a taking because the law did not prevent the property owner from making a reasonable return on its investment. The Court noted that Penn Central, which had sought to demolish Grand Central Station, could continue to use the terminal as a railway station with space for offices and concessions,¹⁴⁹⁽¹⁵⁰⁾ that it might build a structure above the terminal,¹⁵⁰⁽¹⁵¹⁾ and that a provision in the ordinance permitting the transfer of development rights to other properties in the area mitigated any loss.¹⁵¹⁽¹⁵²⁾

The Court applied the economically viable test again in *Keystone Bituminous Coal Association v. DeBenedictis*,¹⁵²⁽¹⁵³⁾ a challenge to a law very much like the one it had struck down in *Mahon*. The procedural status of the case was important to the result in *Keystone*. The suit was a “facial challenge,” a claim that the mere enactment of a statute constituted a taking, rather than a claim that the impact of a regulation upon a specific property required compensation.¹⁵³⁽¹⁵⁴⁾ Thus, in determining whether the regulation went too far, the Court looked not at a particular application of the statute to a particular mine, as in *Mahon*, but at the big picture. The Court compared the estimated amount of coal that the Subsidence Act would require to be left in place — 27 million tons¹⁵⁴⁽¹⁵⁵⁾ — to the total coal in the 13 mines identified in interrogatories as affected by the Subsidence Act — 1.46 billion tons.¹⁵⁵⁽¹⁵⁶⁾ Not surprisingly, given the “especially steep” burden of proof,¹⁵⁶⁽¹⁵⁷⁾ the Court concluded that “there is no showing that petitioners' reasonable 'investment backed expectations' have been materially affected by the additional duty to retain the small percentage that must be used to support the structures....”¹⁵⁷⁽¹⁵⁸⁾ Obviously, the result may be different when the Subsidence Act is applied to a distinctive fact situation.

The consistent thread in the cases from 1922 to 1992 is the comparison of “the value that has been taken from the property with the value that remains in the property”¹⁵⁸⁽¹⁵⁹⁾ to determine whether regulation has so diminished the value of property that its use has become “commercially impracticable.” The examination has centered upon whether what is left to the property owner after regulation is sufficient to fulfill the owner's reasonable “investment-backed expectations.”¹⁵⁹⁽¹⁶⁰⁾ The Court's conclusion in *Mahon* was that the Pennsylvania statute effectively barred the coal company from mining because it would have been commercially impracticable to mine in compliance with the Kohler Act's terms. In *Penn Central* and *Keystone*, the Court conducted a similar inquiry but concluded that the regulations' impact was de minimus.

Following corresponding reasoning, the Eighth Circuit Court of Appeals in *Murphy v. Amoco Production Co.*,¹⁶⁰⁽¹⁶¹⁾ upheld North Dakota's surface damages act. The court held that:

[U]nder the statute, mineral owners still own what they owned before its enactment, and remain as free to develop their property as they were previously (subject only to the reasonable and unburdensome requirement that they notify the surface owner before they begin development).... Amoco's right not to compensate Murphy for unavoidable damage to Murphy's surface estate, if indeed it is “property” at all, amounts to only a minor strand in the full bundle of rights which constitutes Amoco's mineral estate.¹⁶¹⁽¹⁶²⁾

A 1992 decision, however, articulates an additional limit upon the state's powers. Historically, “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.”¹⁶²⁽¹⁶³⁾ “[S]ince no individual has the right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its right to enjoin nuisance-like activity.”¹⁶³⁽¹⁶⁴⁾ In 1992, the Court considered how far the state might go in defining “nuisance-like activity” in *Lucas v. South Carolina Coastal Council*.¹⁶⁴⁽¹⁶⁵⁾ Lucas, a beach front property owner, challenged a ban on construction in the coastal management zone that was adopted by the state after he bought his property. The South Carolina Supreme Court upheld the denial of the permit to Lucas, reasoning that the legislative statement for the statute, which Lucas had not controverted, established that beach front construction was akin to a public nuisance, which a “long line” of Supreme Court decisions had held could be proscribed without constituting a taking.¹⁶⁵⁽¹⁶⁶⁾ The Supreme Court, in an opinion by Justice Scalia holding that the ban constituted a taking, sharply limited the state's ability to avoid a taking by defining the regulated activity as a nuisance:

“Harmful or noxious use” analysis was ... simply the progenitor of our more contemporary statements that “land-use regulation does not effect a taking if it 'substantially advance[s]

legitimate state interests'”**166(167)**

....

[N]oxious-use logic cannot serve as a touchstone to distinguish regulatory “takings” — which require compensation — from regulatory deprivations that do not require compensation. A fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed.**167(168)**

....

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not a part of his title to begin with.**168(169)**

The importance of *Lucas* to the minerals extractive industries is that the Court recognizes that a regulatory taking may occur when a statute prevents a use of property that is otherwise lawful under common law principles, a concept that should include the right to exercise the implied easement for surface use without paying compensation. The focus of the Court was upon total deprivation of all economic value of Lucas' property, but the opinion includes a footnote that suggests that legislative abrogation of an important stick in the bundle of property rights may also be a taking:

Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole....The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the “interest in land” that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.**169(170)**

In many states, a severed mineral interest or oil and gas or mining leasehold is a fee simple estate.**170(171)** In other states, those interests are classified as profits a prendre.**171(172)** Whatever the classification, interests in minerals have a “rich tradition of protection at common law,” as the initial sections of this paper document.**172(173)**

In the author's opinion, however, this analysis does not lead to the conclusion that statutes that modify common law rights, such as surface damages acts, violate the takings proscription. The Court's comments in *Lucas* were made in the context of a complete deprivation of value of the whole property or some discreet part, while surface damages acts affect only a “minor strand in the full bundle of rights....”**173(174)** *Nollan v. California Coastal Commission***174(175)** may appear at first reading to support a challenge to surface damages acts, because the offending regulation actually took only a portion of the bundle of sticks of property ownership — “the right to exclude' others.”**175(176)** But *Nollan* is a public purpose case, not an economically viable use case. Had there been a valid relationship between the ends

and the means in *Nollan*, the Court apparently would have found no taking.

If the ultimate test of a taking is whether regulation will make use of property commercially impracticable, statutes that adjust the relationship between surface owners and minerals developers by limiting the exercise of the implied easement for surface use should pass muster in most instances.¹⁷⁶⁽¹⁷⁷⁾ None of the statutes bars the exercise of the implied easement or even conditions it upon payment of money or performance of some duty.¹⁷⁷⁽¹⁷⁸⁾ The obligation to pay a few extra hundreds or even thousands of dollars in surface damages or restoration expenses will not ordinarily make drilling commercially impracticable. Moreover, the courts will likely consider the amount of surface damages companies usually pay voluntarily in working the imprecise takings equation. The minerals extractive industries commonly make voluntary payments of surface damages in advance to surface owners to avoid disputes over whether their use is “reasonable.”¹⁷⁸⁽¹⁷⁹⁾ If the test is whether a regulation makes development “commercially impracticable,” the issue becomes whether the *extra* burden imposed by the regulation will dissuade mineral owners and lessees from drilling or digging. While one may expect that surface damages acts will tend to increase the amount of damages paid, because the statutes make surface owners the holders of rights rather than mere beneficiaries of custom, the *extra* costs imposed upon the industry or individual companies may be modest. Mineral developers may win some cases on the basis of the second leg of takings analysis, but they will win only a ruling that the statute is a taking in the particular facts of the case rather than a blanket overruling of the statute.

§ 4.05 Conclusion

This paper has addressed only the legal issues of challenges to the implied easement. There are political issues too, and their resolution is likely to be more important to the future of the implied easement than the legal issues. We have substantial agreement in the 1990's that it is fair that those who create products ought to have the major share of the benefits of the creation of those products. The corollary principle is that those who create or use products also ought to bear the costs that are associated with their creation or with their use — that costs such as damage to land and others' economic ventures should be internalized. There is also virtual consensus in the 1990's that the most effective governmental regulations are those that harness market forces, that the market should be used to settle disputes wherever possible. These broad societal agreements are likely to give new impetus to legislative and judicial attempts to reform or limit the implied easement for surface use.

The easement of the mineral estate for surface use remains alive and well, both in the case law and in reason. One of the trends of 20th Century jurisprudence, however, has been to marry the logic of the common law to market economics. A consensus is developing in the United States that law is fairer and works better when it is consistent with market forces. The effect has been to shift the focus of debate over surface uses from the implied intent of the parties to the relative costs and benefits of development. As a result, we can expect to see continued attempts to limit or reshape the implied easement in the legislatures and administrative agencies, and even in the courts.

Neither the legislatures nor the courts need be timid in redefining property rights. There is a strong tradition in the common law that the rules will change — even those affecting property rights — as conditions change.¹⁷⁹⁽¹⁸⁰⁾ Change in the law should be principled, however. It should grow either from the considered judgements of our elected representatives or from the logic of the common law applied to new circumstances, not from political expediency.

In sum, the rationale of the implied easement for surface use is as clear and as sound as ever it has been. The cases amply support the status of the implied easement. The prospects for the implied easement, however, will depend upon how successful mineral lawyers are in communicating their clients' needs and the benefits of their clients' activities.

Endnotes

1 (Popup - Vol 39 Ch 4 Fn *)

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2 (Popup - Vol 39 Ch 4 Fn 1)

¹See, e.g., *Mitchell v. Espinosa*, 243 P.2d 412 (Colo. 1952); 2 *American Law of Property* § 10.6 (1952). Property rights are often likened to a bundle of sticks, which the owner can use or sell as a sheaf, or extract and sell one at a time.

3 (Popup - Vol 39 Ch 4 Fn 2)

²See, e.g., Harold H. Healy, "Rights of Mineral Owners in Surface," 1 *Rocky Mt. Min. L. Inst.* 85 (1955); John D. Knodell, Jr., "Liability for Pollution of Surface and Underground Waters," 12 *Rocky Mt. Min. L. Inst.* 33 (1966); William R. Scott, "Oil and Gas Lease Clauses Relating to Surface Damage and the Use of the Surface," 13 *Rocky Mt. Min. L. Inst.* 377 (1967); Morris G. Gray, "A New Appraisal of the Rights of Lessees Under Oil and Gas Leases to Use and Occupy the Surface," 20 *Rocky Mt. Min. L. Inst.* 227 (1975); John C. Lacy, "Conflicting Surface Interests: Shotgun Diplomacy Revisited," 22 *Rocky Mt. Min. L. Inst.* 731 (1976); Owen M. Lopez, "Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners," 26 *Rocky Mt. Min. L. Inst.* 995 (1980); Lowell C. Davis, "Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner," 8 *Rocky Mt. Min. L. Inst.* 315, 354-64 (1963).

4 (Popup - Vol 39 Ch 4 Fn 3)

³See, e.g., Ernest E. Smith, "Evolution of Oil and Gas Rights in the Eastern United States," 10 *E. Min. L. Inst.* 16-1 (1989); J. Thomas Lane, "Easements and Rights-of-Way in Mineral Development: Need Them But Don't Need Them," 5 *E. Min. L. Inst.* 20-1 (1984); John S. Lowe, "Developments in Nonregulatory Oil and Gas Law: Issues of the Eighties," 35th *Oil & Gas Inst.* 1, 21-40 (Matthew Bender 1984); John S. Lowe, "Eastern Oil and Gas Operations: Do Recent Developments Suggest New Answers to Old Problems?" 4 *E. Min. L. Inst.* 20-1, 20-14 — 20-25 (1983); Phillip E. Norvell, "Developing Lands Characterized by Separate Ownership of Oil and Gas and Surface Movable Coal and Uranium — The Other Side of *Acker v. Guinn* and its Progeny," 33rd *Oil & Gas Inst.* 193 (Matthew Bender 1982); William B. Browder, Jr., "Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner," 25th *Oil & Gas Inst.* 85 (Matthew Bender 1974); Lee Sellers, "How Dominant is the Dominant Estate? or, Surface Damages Revisited," 13th *Oil & Gas Inst.* 377 (Matthew Bender 1962).

5 (Popup - Vol 39 Ch 4 Fn 4)

⁴2 *American Law of Property* § 10.28 (1952).

6 (Popup - Vol 39 Ch 4 Fn 5)

⁵*Mingo Oil Producer v. Kamp Cattle Co.*, 776 P.2d 736 (Wyo. 1989); *Justice v. Pennzoil Co.*, 598 F.2d 1339 (4th Cir.), cert. denied sub nom. *McKinney v. Pennzoil Co.*, 444 U.S. 967 (1979).

7 (Popup - Vol 39 Ch 4 Fn 6)

⁶See, e.g., *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650 (Tex. Civ. App. 1953); *Bonds v. Sanchez-O'Brien Oil & Gas Co.*, 715 S.W.2d 444 (Ark. 1986).

8 (Popup - Vol 39 Ch 4 Fn 7)

⁷Amoco Prod. Co. v. Carter Farms Co., 703 P.2d 894 (N.M. 1985); McLeod v. Cities Service Gas Co., 131 F. Supp. 449 (D. Kan. 1955), *aff'd*, 233 F.2d 242 (10th Cir. 1956); Warren Petroleum Corp. v. Monzingo, 304 S.W.2d 362, 363 (Tex. 1957); Fox v. Cities Service Oil Co., 200 P.2d 398 (Okla. 1948). *But see* Bonds v. Sanchez-O'Brien Oil & Gas Co., 715 S.W.2d 444 (Ark. 1986) (finding an implied duty of the lessee to restore the surface as nearly as practicable to pre-development condition). *See generally* Karen L. Ellmore, "Duty of Oil or Gas Lessee to Restore Surface of Leased Premises Upon Termination of Operations," 62 *A.L.R. 4th* 1153 (1988).

9 (Popup - Vol 39 Ch 4 Fn 8)

⁸*See, e.g.*, United States v. Stearns Coal & Lumber Co., 816 F.2d 279 (6th Cir. 1987); Smith v. Moore, 474 P.2d 794 (Colo. 1970). The usual rationale is that the parties to the severance do not intend that the mineral owner should own substances that require surface destruction to extract. *See* the discussion at John S. Lowe, "What Substances are 'Minerals'?" 30 *Rocky Mt. Min. L. Inst.* 2-1 (1984). Victor-American Fuel Co. v. Wiggins, 746 P.2d 58, 60 (Colo. Ct. App. 1987) ("Although the right to destroy the surface may be reserved, the reservation of such right must be made clear and expressed in terms *so plain that there can be no doubt*").(emphasis added).

10 (Popup - Vol 39 Ch 4 Fn 9)

⁹Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979).

11 (Popup - Vol 39 Ch 4 Fn 10)

¹⁰*See, e.g.*, Feland v. Placid Oil Co., 171 N.W.2d 829 (N.D. 1969) (salt water disposal pits); Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Civ. App. 1919) (derrick, engine, boiler, and slush pit on a city lot close to a house); Parker v. Texas Co., 326 S.W.2d 579 (Tex. Civ. App. 1959) (wellsite interfered with landowner's ability to fly airplanes from the surface).

12 (Popup - Vol 39 Ch 4 Fn 11)

¹¹*See, e.g.*, Robinson Drilling Co. v. Moses, 256 S.W.2d 650 (Tex. Civ. App. 1953); Adkins v. United Fuel Gas Co., 61 S.E.2d 633 (W. Va. 1950).

13 (Popup - Vol 39 Ch 4 Fn 12)

¹²Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972) (potable groundwater); B.L. McFarland Drilling Contractor v. Connell, 344 S.W.2d 493 (Tex. Civ. App.), *set aside on other grounds*, 347 S.W.2d 565 (Tex. 1961) (clay to construct roads); Ricks Explor. Co. v. Oklahoma Water Resources Bd., 695 P.2d 498 (Okla. 1984) (groundwater for oil and gas development).

14 (Popup - Vol 39 Ch 4 Fn 13)

¹³Livingston v. Indian Territory Illumin. Oil Co., 91 F.2d 833 (10th Cir. 1937).

15 (Popup - Vol 39 Ch 4 Fn 14)

¹⁴Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96 (Tex. Ct. App. 1987); Lewis v. Ada Oil Co., 279 So. 2d 622 (Miss. 1973).

16 (Popup - Vol 39 Ch 4 Fn 15)

¹⁵Leger v. Petroleum Engineers, Inc., 499 So. 2d 953 (La. Ct. App. 1986).

17 (Popup - Vol 39 Ch 4 Fn 16)

¹⁶Joyner v. R.H. Dearing & Sons, 112 S.W.2d 1109 (Tex. Civ. App. 1937). *See also* John S. Lowe, *Oil and Gas Law in a Nutshell* 160 (West 2d ed. 1988).

18 (Popup - Vol 39 Ch 4 Fn 17)

¹⁷*See, e.g.*, Mingo Oil Prod. v. Kamp Cattle Co., 776 P.2d 736 (Wyo. 1989). An extensive survey of the cases dealing with specific surface uses may be found in John C. Lacy, "Conflicting Surface Interests;

Shotgun Diplomacy Revisited,” 22 *Rocky Mt. Min. L. Inst.* 731, 734-48 (1976). See also Douglas Hale Gross, “What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, Lessee, or Driller Under an Oil and Gas Lease or Drilling Contract,” 53 *A.L.R. 3d* 16 (1973).

19 (Popup - Vol 39 Ch 4 Fn 18)

¹⁸*Squires v. Lafferty*, 121 S.E. 90, 91 (W. Va. 1924).

20 (Popup - Vol 39 Ch 4 Fn 19)

¹⁹*Guffey v. Stroud*, 16 S.W.2d 527, 528 (Tex. Comm'n App. 1929).

21 (Popup - Vol 39 Ch 4 Fn 20)

²⁰*Callahan v. Martin*, 43 P.2d 788, 796 (Cal. 1935) (citations omitted).

22 (Popup - Vol 39 Ch 4 Fn 21)

²¹*Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972).

23 (Popup - Vol 39 Ch 4 Fn 22)

²²*Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893).

24 (Popup - Vol 39 Ch 4 Fn 23)

²³*Sun Oil*, 483 S.W.2d at 816 (Daniel, J., dissenting).

25 (Popup - Vol 39 Ch 4 Fn 24)

²⁴*Walace Hawkins, El Sal del Rey* 9 (Tex. State Hist. Ass'n 1947).

26 (Popup - Vol 39 Ch 4 Fn 25)

²⁵The king's right derived from the Mining Ordinance of 1783, which applied to all the Spanish Americas but Peru. The ordinance entitled a surface owner to compensation in damages for use of his surface by a miner and authorized a miner's royalty to the king, the *derecho del quinto*, “the tax of the fifth part.” *Id.* at 7-9.

27 (Popup - Vol 39 Ch 4 Fn 26)

²⁶See, e.g., *Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980) (locked gate to access road triggered damages measured by increased day rate drilling costs); *Martens v. Prairie Prod. Co.*, 668 S.W.2d 889 (Tex. Ct. App. 1984) (damages for contractor standby time); *Short v. Wise*, 718 P.2d 604 (Kan. 1986) (damages for improperly denying use of disposal well, decline in value of oil reserves, and for profits of landowner from operation of disposal well, under lease clause that broadened right to leases “in the same general area”); *Sekula v. Chaparral Energy Corp.*, 570 S.W.2d 244 (Tex. Civ. App. 1978) (surface owner liable for damage done to production facilities by root plowing operations); *Reno Livestock Corp. v. Sun Oil Co.*, 638 P.2d 147 (Wyo. 1981) (surface owner liable for machinery downtime).

28 (Popup - Vol 39 Ch 4 Fn 27)

²⁷For example, treble damages are provided under N.D. Cent. Code § 32-03-29 (1976).

29 (Popup - Vol 39 Ch 4 Fn 28)

²⁸See, e.g., *Mid-America Pipeline Co. v. Lario Enter. Inc.*, 942 F.2d 1519 (10th Cir. 1991) (injunction for obstruction of pipeline easement); *Columbia Gas Trans. Corp. v. Burke*, 768 F. Supp. 1167 (N.D. W. Va. 1990) (injunction for interference with pipeline); *Mid-America Pipeline Co. v. Wietharn*, 787 P.2d 716 (Kan. 1990) (farmer ordered to remove four buildings that had been constructed over a pipeline easement). *Butler v. Germann*, 822 P.2d 1067 (Mont. 1991) (injunction and specific performance for interference with ditch easement).

30 (Popup - Vol 39 Ch 4 Fn 29)

²⁹The cases are summarized and discussed at 3 Howard R. Williams, *Oil and Gas Law* § 604.7 (1992).

31 (Popup - Vol 39 Ch 4 Fn 30)

³⁰By this analysis, the obstruction doctrine should not apply where the interference is by a severed surface owner who was neither a lessor nor a mineral owner, because there is no privity of contract or estate to support a covenant of quiet enjoyment. Several courts have applied the doctrine as a broad equitable doctrine, however, to extend leases in the face of interference by severed surface owners. *See* *Burger v. Wood*, 575 P.2d 977 (Okla. Ct. App. 1978); *21st Century Inv. Co. v. Pine*, 734 P.2d 834 (Okla. Ct. App. 1986); *Corley v. Craft*, 501 So. 2d 1049 (La. Ct. App.), *cert. denied*, 503 So. 2d 18 (1987). For a discussion of these cases and the obstruction doctrine, *see* M. Todd Konsure, “Obstruction Doctrine: An Equitable Tool or Tool of Injustice?” 43 *Okla. L. Rev.* 655 (1990).

32 (Popup - Vol 39 Ch 4 Fn 31)

³¹Douglas Hale Gross, Annotation, “What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, Lessee, or Driller Under an Oil and Gas Lease or Drilling Contract,” 53 *A.L.R. 3d* 16, 77 (1973).

33 (Popup - Vol 39 Ch 4 Fn 32)

³²*Thompson v. Andover Oil Co.*, 691 P.2d 77, 82 (Okla. Ct. App. 1984); *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362 (Tex. 1957).

34 (Popup - Vol 39 Ch 4 Fn 33)

³³*Gulf Oil Corp. v. Walton*, 317 S.W.2d 260 (Tex. Civ. App. 1958) holds that compensatory damages are sufficient to adequately compensate a surface owner for excessive use of the surface for roads and well sites, and refuses to grant a temporary injunction.

35 (Popup - Vol 39 Ch 4 Fn 34)

³⁴*Keck v. Bruster*, 368 P.2d 1003, 1004 (Okla. 1962).

36 (Popup - Vol 39 Ch 4 Fn 35)

³⁵*Id.* at 1005. The importance of classification of environmental damages as temporary or permanent is the statute of limitations. The statute of limitations begins to run for permanent damages as soon as the damage is discovered or should be discovered. The statute for temporary damages begins to run anew with each act of abuse.

37 (Popup - Vol 39 Ch 4 Fn 36)

³⁶*See, e.g.*, *Jensen v. Sierra Petroleum Co.*, 370 P.2d 425 (Kan. 1962) (cattle drank oil permitted to seep into water after warning); *Hurley v. Northern Pac. R.R.*, 455 P.2d 321 (Mont. 1969) (mineral owner constructed a road over the spillway of a dam in disregard of the surface owner's rights, creating an unreasonable risk of harm).

38 (Popup - Vol 39 Ch 4 Fn 37)

³⁷*See, e.g.*, *Speedman Oil Co. v. Duval County Ranch Co.*, 504 S.W.2d 923 (Tex. Civ. App. 1973).

39 (Popup - Vol 39 Ch 4 Fn 38)

³⁸It is hornbook law that excessive use of an easement ordinarily does not extinguish or forfeit an easement. Roger A. Cunningham, William B. Stoebuck, & Dale A. Whitman, *The Law of Property* § 8.12 (1984). However, the courts have the inherent power to cancel easements that are willfully abused, and abuse of the use of the surface under an oil and gas lease is precisely the kind of fact circumstance in which that discretion might be exercised; *see, e.g.*, the trial court's action in *Gillette v. Pepper Tank Co.*, 694 P.2d 369 (Colo. Ct. App. 1984) (conditionally canceling a lease for poor maintenance); *Thurner v. Kaufman*, 699 P.2d 435 (Kan. 1984) (upholding lease cancellation as a remedy for “continuous unreasonable” breach of express surface use covenants); *Speedman Oil*, 504 S.W.2d at 929 (where the court said: “Conduct that results in destruction or a serious change in the nature of property either physically or in the character in which it is being used does irreparable injury and justifies interlocutory

injunctive relief.”).

40 (Popup - Vol 39 Ch 4 Fn 39)

³⁹Brown v. Lundell, 344 S.W.2d 863, 866 (Tex. 1961). *See also* Fry Land & Cattle Co. v. Colorado Interstate Gas Co., 805 P.2d 695 (Okla. Ct. App. 1990) (duty to construct fence reasonably). *See also* 4 W.L. Summers, *The Law of Oil and Gas* § 652 (1962).

41 (Popup - Vol 39 Ch 4 Fn 40)

⁴⁰Buras v. Shell Oil Co., 666 F. Supp. 919 (D. Miss. 1987); Edwards v. Jeems Bayou Prod. Co., 507 So. 2d 11 (La. Ct. App. 1987) (damages due for unreasonable use without showing of negligence).

42 (Popup - Vol 39 Ch 4 Fn 41)

⁴¹*See, e.g.*, Williams v. Amoco Prod. Co., 734 P.2d 1113 (Kan. 1987), where the Kansas Supreme Court refused to impose strict liability for damages caused by the drilling and operation of natural gas wells. Farmers had brought an action against Amoco to recover damages for leakage of natural gas into irrigation water. The Kansas Supreme Court has adopted §§ 519 and 520 of the *Restatement (2d) of Torts*, which impose strict liability for damages caused by an “abnormally dangerous” activity and set forth factors to be considered in determining whether an activity is abnormally dangerous. The trial court determined that Amoco was strictly liable for the damages, implicitly finding that Amoco had been engaged in an abnormally dangerous activity. The Kansas Supreme Court reversed, holding that Amoco's liability should be determined under a negligence standard. The court noted that the drilling and operation of natural gas wells was not an abnormally dangerous activity in relation to the type of harm the farmers had sustained, nor did those activities constitute a non-natural use of the land.

43 (Popup - Vol 39 Ch 4 Fn 42)

⁴²Yates v. Gulf Oil Corp., 182 F.2d 286, 290 (5th Cir. 1950).

44 (Popup - Vol 39 Ch 4 Fn 43)

⁴³Thompson v. Andover Oil Co., 691 P.2d 77, 82 (Okla. Ct. App. 1984).

45 (Popup - Vol 39 Ch 4 Fn 44)

⁴⁴*See, e.g.*, Jurisich v. Louisiana Southern Oil & Gas Co., 284 So. 2d 173 (La. Ct. App. 1973) (failure to give notice to oyster bed operator so that he could protect himself was negligence); Gage v. Texas Co., 395 P.2d 411 (Okla. 1964) (general rule that lessee has no duty to fence slush pits does not apply where surface owner does not know of drilling operations and so cannot protect his cattle).

46 (Popup - Vol 39 Ch 4 Fn 45)

⁴⁵East Ohio Gas Co. v. Duncan, 410 N.E.2d 769 (Ohio Ct. App. 1978) (lessee not entitled to pick its own time and path to serve a monitoring well in gas storage area).

47 (Popup - Vol 39 Ch 4 Fn 46)

⁴⁶874 F.2d 1373 (10th Cir. 1989).

48 (Popup - Vol 39 Ch 4 Fn 47)

⁴⁷*Id.* at 1376.

49 (Popup - Vol 39 Ch 4 Fn 48)

⁴⁸*Id.* at 1381.

50 (Popup - Vol 39 Ch 4 Fn 49)

⁴⁹*Id.* at 1379.

51 (Popup - Vol 39 Ch 4 Fn 50)

⁵⁰*Id.* at 1376.

52 (Popup - Vol 39 Ch 4 Fn 51)

⁵¹For other examples of environmental damage suits, *see also* Central Oil Co. v. Shows, 149 So. 2d 306 (Miss. 1963) (poisonous chemicals in slush pits); Trosclair v. Superior Oil Co., 219 So. 2d 278 (La. Ct. App. 1969) (oil spill pollution of oyster beds).

53 (Popup - Vol 39 Ch 4 Fn 52)

⁵²Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Civ. App. 1919). The case arose in the context of an oil and gas lease granting clause, but the analysis of the court did not distinguish between reasonable use in the setting of a lease clause and the implied easement.

54 (Popup - Vol 39 Ch 4 Fn 53)

⁵³Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865 (Tex. 1973).

55 (Popup - Vol 39 Ch 4 Fn 54)

⁵⁴*See, e.g.*, Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971); Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972); Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160, 163 (Ark. 1974); Flying Diamond Co. v. Rust, 551 P.2d 509 (Utah 1976); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979); Norcken Corp. v. McGahan, 823 P.2d 622, 628 (Alaska 1991).

56 (Popup - Vol 39 Ch 4 Fn 55)

⁵⁵*See, e.g.*, Gulf Pipe Line Co. v. Pawnee-Tulsa Petroleum Co., 127 P. 252 (Okla. 1912).

57 (Popup - Vol 39 Ch 4 Fn 56)

⁵⁶470 S.W.2d 618 (Tex. 1971).

58 (Popup - Vol 39 Ch 4 Fn 57)

⁵⁷*Id.* at 621.

59 (Popup - Vol 39 Ch 4 Fn 58)

⁵⁸*Id.* at 622.

60 (Popup - Vol 39 Ch 4 Fn 59)

⁵⁹*Id.* at 622-23.

61 (Popup - Vol 39 Ch 4 Fn 60)

⁶⁰In Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972), an owner of severed surface rights who farmed by irrigation from the Ogalala Aquifer that supplies irrigation water for much of the irrigated lands of Colorado, Kansas, Oklahoma, and Texas, sued Sun to prevent the use of potable water in a secondary recovery water-project. Testimony indicated that extraction of the ground water by Sun would shorten the life of Whitaker's farming operation by 15% to 20% and that Sun could bring in water for its purposes at economically feasible prices. Reversing the lower court's ruling that Sun's use of groundwater was unreasonable under the circumstances, the Texas Supreme Court noted that:

To hold that Sun can be required to purchase water from other sources or owners of other tracts in the area, would be in derogation of the dominant estate.

Our holding in Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971), is not applicable under the facts of this case. It is limited to situations in which there are reasonable alternative methods that may be employed by the lessee *on the leased premises* to accomplish the purposes of this lease.

Id. at 812 (emphasis in original).

62 (Popup - Vol 39 Ch 4 Fn 61)

⁶¹Getty, 470 S.W.2d at 627-28.

63 (Popup - Vol 39 Ch 4 Fn 62)

⁶²In Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974), the Arkansas Supreme Court

upheld a judgment of damages to a surface owner where a gas well had been located on the site of the surface owner's planned retirement home.

64 (Popup - Vol 39 Ch 4 Fn 63)

⁶³See, e.g., *East v. Pan American Petroleum Corp.*, 168 So. 2d 426 (La. Ct. App. 1964) (excavation of large amount of dirt to build road to well on adjoining property not reasonable); *Tutwiler v. Etheredge*, 231 So. 2d 93 (Ala. 1970) (mineral owner who built a road to reach adjoining property was a trespasser).

65 (Popup - Vol 39 Ch 4 Fn 64)

⁶⁴See, e.g., *Mountain Fuel Supply Co. v. Smith*, 471 F.2d 594 (10th Cir. 1973); *Delhi Gas Pipeline Corp. v. Dixon*, 737 S.W.2d 96 (Tex. Ct. App. 1987) (may not transport gas from other leases). *But see* *Roye Realty & Dev., Inc. v. Watson*, 791 P.2d 821 (Okla. Ct. App. 1990) (fact that pipeline might benefit other leases does not negate the lessee's right to use so much of the surface as is reasonably necessary).

66 (Popup - Vol 39 Ch 4 Fn 65)

⁶⁵See, e.g., *Gill v. McCollum*, 311 N.E.2d 741 (Ill. Ct. App. 1974); *Farragut v. Massey*, 612 So. 2d 325 (Miss. 1992) (may not dispose of saltwater from other leases or operators).

67 (Popup - Vol 39 Ch 4 Fn 66)

⁶⁶See, e.g., *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973) (bars use of produced waters off the lease in unit to which lease had been committed).

68 (Popup - Vol 39 Ch 4 Fn 67)

⁶⁷Roger A. Cunningham, William B. Stoebuck, & Dale A. Whitman, *The Law of Property* § 8.9 (1984).

69 (Popup - Vol 39 Ch 4 Fn 68)

⁶⁸See, e.g., *Railroad Comm'n v. Manziel*, 361 S.W.2d 560 (Tex. 1962); *Raymond v. Union Texas Petroleum Corp.*, 697 F. Supp. 270 (E.D. La. 1988) (no liability for agency-approved injection); *Dunn v. Southwest Ardmore Tulip Creek Sand Unit*, 548 P.2d 685 (Okla. Ct. App. 1976) (salt water from lease may be used to repressure other wells in a compulsory unit). An exercise of the police power may amount to an unconstitutional taking, however; see the discussion *infra* at § 4.04[3]. Furthermore, the scope of an exercise of the police power will generally be interpreted to avoid a taking. *Snyder Ranches, Inc. v. Oil Conserv. Comm'n*, 798 P.2d 587 (N.M. 1990) (Conservation Commission permit to inject salt water into underground formation did not authorize a trespass beneath adjacent landowner's property).

70 (Popup - Vol 39 Ch 4 Fn 69)

⁶⁹Several writers, including this one, have addressed how the interests of mineral owners can be protected in lease negotiating and drafting. The best treatment of the subject is Owen L. Anderson, "David v. Goliath: Negotiating the 'Lessor's 88' and Representing Lessors and Surface Owners in Oil and Gas Lease Plays," 27B *Rocky Mt. Min. L. Inst.* 1029 (1981). See also John S. Lowe, "Representing the Landowner in Oil and Gas Leasing Transactions," 31 *Okla. L. Rev.* 257 (1978), reprinted in 16 *Pub. Land & Res. L. Dig.* 184 (1979).

71 (Popup - Vol 39 Ch 4 Fn 70)

⁷⁰See, e.g., *Frankfort Oil Co. v. Abrams*, 413 P.2d 190 (Colo. 1966) (surface owner third party beneficiary of lease damages clause); *Anderson v. Britt*, 375 S.W.2d 258 (Ky. 1963) (implied easement orally negated by representations that lessee would seek access through other lands). *Cf.* *Reed v. Williamson*, 82 N.W.2d 18 (Neb. 1957); *Devendorf v. Akbar Petroleum Corp.*, 577 N.E.2d 707 (Ohio Ct. App. 1989) (drilling violates "residential use only" covenant).

72 (Popup - Vol 39 Ch 4 Fn 71)

⁷¹An obvious limitation upon the ability of a mineral lessee to acquire expanded rights of surface use

by agreement is the principle “Nemo plus juris transferre potest quam ipse habet,” which means that one cannot transfer a better title than he himself has. Olin Browder, Roger Cunningham, Grant Nelson, William Stoebuck, & Dale Whitman, *Basic Property Law* 756 (5th ed. 1991). A mineral lessee cannot get rights of use — such as gas storage rights — from a severed mineral owner that belong to the severed surface owner. *See, e.g., Ellis v. Arkansas Louisiana Gas Co.*, 450 F. Supp. 412 (E.D. Okla. 1978), *aff’d*, 609 F.2d 436 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980).

73 (Popup - Vol 39 Ch 4 Fn 72)

⁷²805 S.W.2d 661 (Ark. Ct. App. 1991).

74 (Popup - Vol 39 Ch 4 Fn 73)

⁷³774 F. Supp. 616 (D. Okla. 1989).

75 (Popup - Vol 39 Ch 4 Fn 74)

⁷⁴*Id.* at 618.

76 (Popup - Vol 39 Ch 4 Fn 75)

⁷⁵*See, e.g., Farragut v. Massey*, 612 So. 2d 325 (Miss. 1992) (release ambiguity interpreted against the drafter).

77 (Popup - Vol 39 Ch 4 Fn 76)

⁷⁶17 *Am. Jur. 2d* “Contracts” § 297 n.74 (1991).

78 (Popup - Vol 39 Ch 4 Fn 77)

⁷⁷*But see* *Holmes v. Alabama Title Co.*, 507 So. 2d 922 (Ala. 1987) (clause expressly relieving the grantor from any liability for damage to the surface caused by past or future mining operations, including subsidence, barred even damages arising out of mining in a negligent or willful or wanton manner); *Roye Realty & Dev., Inc. v. Watson*, 791 P.2d 821 (Okla. Ct. App. 1990) (clause that specifically granted the lessee the right to lay pipelines authorized pipeline that might benefit other leases); *Short v. Wise*, 718 P.2d 604 (Kan. 1986) (damages awarded against landowner for improperly denying use of disposal well, decline in value of oil reserves, and for profits of landowner from operation of disposal well, under lease clause that broadened right to leases “in the same general area”). “In another forum, this author has concluded that there is no general trend toward a “softer,” less-principled law of contract formation and interpretation. *See* John S. Lowe, “Developments in Nonregulatory Oil and Gas Law: Are We Moving Toward a Kinder and Gentler Law of Contracts?” 42nd *Oil & Gas Inst.* 1-1 (Matthew Bender 1991).

79 (Popup - Vol 39 Ch 4 Fn 78)

⁷⁸*See, e.g.,* N.D. Cent. Code § 38-11.1-.05 (1987); Okla. Stat. Ann. tit. 52, § 318.3 (West 1992).

80 (Popup - Vol 39 Ch 4 Fn 79)

⁷⁹*See, e.g.,* La. Min. Code art. 122 (West 1992), the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1988), and the Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291-301 (1988).

81 (Popup - Vol 39 Ch 4 Fn 80)

⁸⁰Mineral Use of Subdivisions Act of 1983, Tex. Nat. Res. Code ch. 92 (West 1993). *See* Scott Lansdown, “Predesignation of Surface Sites under Chapter 92 of the Texas Natural Resources Code,” 48 *Tex. B.J.* 400 (1985).

82 (Popup - Vol 39 Ch 4 Fn 81)

⁸¹*See* Uniform Model Surface Use and Mineral Development Accommodation Act, 14 U.L.A. 66 (West Supp. 1993). The Model Act is discussed in Clyde O. Martz, “The New Surface Use and Mineral Development Accommodation Act,” 5 *Nat. Res. & Env.* 30 (ABA Winter 1991). *See also* Cal. Civ. Proc. Code §§ 772.010-772.060 (West Supp. 1992).

83 (Popup - Vol 39 Ch 4 Fn 82)

⁸²N.D. Cent. Code §§ 38-11.1-01 through -10 (Supp. 1992).

84 (Popup - Vol 39 Ch 4 Fn 83)

⁸³Mont. Code Ann. §§ 82-10-501 through -503 (Supp. 1992).

85 (Popup - Vol 39 Ch 4 Fn 84)

⁸⁴Okla. Stat. Ann. tit. 52, §§ 318.2 through .9 (West 1992 & Supp. 1993).

86 (Popup - Vol 39 Ch 4 Fn 85)

⁸⁵S.D. Codified Laws Ann. §§ 45-5A-1 through -11 (Supp. 1992).

87 (Popup - Vol 39 Ch 4 Fn 86)

⁸⁶Tenn. Code Ann. §§ 60-1-601 through -608 (Supp. 1992).

88 (Popup - Vol 39 Ch 4 Fn 87)

⁸⁷W. Va. Code §§ 22B-2-1 through -9 (Supp. 1992).

89 (Popup - Vol 39 Ch 4 Fn 88)

⁸⁸Alta. Code § 27.1 (1983).

90 (Popup - Vol 39 Ch 4 Fn 89)

⁸⁹Indeed, Oklahoma's surface damages act is the only law of the six cited that does not explicitly embrace the goal of agricultural protection.

91 (Popup - Vol 39 Ch 4 Fn 90)

⁹⁰In *Alpine Constr. Corp. v. Fenton*, 764 P.2d 1340 (Okla. 1988), the court refused to apply Oklahoma's Surface Damages Act to coal and asphalt mining, noting that the law specifically limits damages to oil and gas development situations.

92 (Popup - Vol 39 Ch 4 Fn 91)

⁹¹Surface damages acts may also limit the rights of surface owners. *See, e.g., Turley v. Mewbourne Oil Co.*, 715 F. Supp. 1052 (D. Okla. 1989), where a federal district court denied a surface owner's request for an injunction against an oil company on the grounds that the Oklahoma Surface Damages Act, which the oil company had observed, provided an adequate remedy in damages for the surface owner. However, § 22B-2-4 of the West Virginia statute specifically preserves all common law remedies to the landowner.

93 (Popup - Vol 39 Ch 4 Fn 92)

⁹²State regulation to limit the implied easement of surface use may also violate the Contracts Clause or the Equal Protection Clause of the Constitution. U.S. Const. art. I, § 10, cl. 1 and U.S. Const. amend. XIV, § 2. This author has discussed the principles that govern application of these limitations upon state action previously, however, in John S. Lowe, "Developments in Nonregulatory Oil and Gas Law: Issues of the Eighties," 35th *Oil & Gas Inst.* 1, 21-31 (Matthew Bender 1984), and does not think that the analysis has changed since then.

94 (Popup - Vol 39 Ch 4 Fn 93)

⁹³U.S. Const. amend. V.

95 (Popup - Vol 39 Ch 4 Fn 94)

⁹⁴U.S. Const. amend. XIV.

96 (Popup - Vol 39 Ch 4 Fn 95)

⁹⁵U.S. Const. amends. V & XIV, § 1.

97 (Popup - Vol 39 Ch 4 Fn 96)

⁹⁶U.S. Const. amend. V.

98 (Popup - Vol 39 Ch 4 Fn 97)

⁹⁷Davidson v. New Orleans, 96 U.S. 97, 105 (1877).

99 (Popup - Vol 39 Ch 4 Fn 98)

⁹⁸See Chicago, Burlington, & Quincy R.R. v. Chicago, 166 U.S. 226 (1897), cited for the proposition that the Fifth Amendment takings proscription is imposed upon the states through the Fourteenth Amendment in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 159 (1980).

100 (Popup - Vol 39 Ch 4 Fn 99)

⁹⁹Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

101 (Popup - Vol 39 Ch 4 Fn 100)

¹⁰⁰*Id.* An excellent history of the development of takings jurisprudence is found at Hendler v. United States, 952 F.2d 1364, 1371-78 (Fed. Cir. 1991).

102 (Popup - Vol 39 Ch 4 Fn 101)

¹⁰¹729 F.2d 552 (8th Cir. 1984).

103 (Popup - Vol 39 Ch 4 Fn 102)

¹⁰²*Id.* at 558 (emphasis added).

104 (Popup - Vol 39 Ch 4 Fn 103)

¹⁰³See, e.g., Dougherty v. California Kettleman Oil Royalties, Inc., 69 P.2d 155 (Cal. 1937); South v. Wishard, 267 P.2d 827 (Cal. Ct. App. 1954); Wagner v. Mallory, 62 N.E. 584 (N.Y. 1902); Millcreek Township v. N.E.A. Cross Co., 620 A.2d 558, 561 (Pa. Commw. Ct. 1993); Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923). For discussion, see 1 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* § 212 (1992).

105 (Popup - Vol 39 Ch 4 Fn 104)

¹⁰⁴Both Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) — which found a state statute requiring that 50% of the coal in seams be left in place to provide surface support to be a taking — and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) — which found a nearly identical state statute not to be a taking — implicitly recognize the right to use the surface to take minerals as a property right.

106 (Popup - Vol 39 Ch 4 Fn 105)

¹⁰⁵The statement is probably hyperbole. The statement in *Murphy* that the right to use the surface without compensation may not be property at all is made in the context of the court's explanation that Amoco still had nearly the “full bundle of rights which constitutes Amoco's mineral estate.” *Murphy*, 729 F.2d at 558.

107 (Popup - Vol 39 Ch 4 Fn 106)

¹⁰⁶Professor Jan G. Laitos argues that the first element of the takings analysis “does not follow the wording of the Takings Clause,” (13 *J. of Energy, Nat. Res., & Env. L.* 9, 33 (1993)) and he is right. The focus in this paper, however, is upon how the analysis that the Supreme Court appears likely to apply will fit legislative modifications of the implied right of surface use. For an interesting discussion of what the law ought to be and may eventually be, see Jan G. Laitos. “The Public Use Paradox and the Takings Clause,” 13 *J. of Energy, Nat. Res., & Env. L.* 9 (1993) and John Martinez, “Trees in the Forest: A Reply to Professor Laitos,” 13 *J. of Energy, Nat. Res., & Env. L.* 51 (1993).

108 (Popup - Vol 39 Ch 4 Fn 107)

¹⁰⁷For historical development, see John E. Nowak, Ronald D. Rotunda, & J. Nelson Young,

Constitutional Law § 11.13 (West 1986).

109 (Popup - Vol 39 Ch 4 Fn 108)

¹⁰⁸Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

110 (Popup - Vol 39 Ch 4 Fn 109)

¹⁰⁹260 U.S. 393 (1922).

111 (Popup - Vol 39 Ch 4 Fn 110)

¹¹⁰*Id.* at 396-97, citing Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875).

112 (Popup - Vol 39 Ch 4 Fn 111)

¹¹¹*Id.* at 413-14 (citations omitted).

113 (Popup - Vol 39 Ch 4 Fn 112)

¹¹²480 U.S. 470 (1987). The case was decided by a 5-4 majority.

114 (Popup - Vol 39 Ch 4 Fn 113)

¹¹³*Id.* at 485-86.

115 (Popup - Vol 39 Ch 4 Fn 114)

¹¹⁴483 U.S. 825 (1987).

116 (Popup - Vol 39 Ch 4 Fn 115)

¹¹⁵*Id.* at 834.

117 (Popup - Vol 39 Ch 4 Fn 116)

¹¹⁶*Id.* at 838-39, 841-42.

118 (Popup - Vol 39 Ch 4 Fn 117)

¹¹⁷*Id.* at 841. “[I]f *Nollan* is limited to its facts, it may represent no more than the principle that states cannot condemn an easement across private property without paying for it.” George C. Coggins, *Public Natural Resources Law* § 3.04[3][b][ii] (Clark Boardman 1993). On the other hand, *Nollan* may be the harbinger of an increased judicial willingness to find a regulatory taking on the basis of the first prong of the *Keystone* test.

119 (Popup - Vol 39 Ch 4 Fn 118)

¹¹⁸112 S. Ct. 2886 (1992).

120 (Popup - Vol 39 Ch 4 Fn 119)

¹¹⁹*Id.* at 2897 n.10.

121 (Popup - Vol 39 Ch 4 Fn 120)

¹²⁰*Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 899 (1991).

122 (Popup - Vol 39 Ch 4 Fn 121)

¹²¹*Lucas*, 112 S. Ct. at 2899.

123 (Popup - Vol 39 Ch 4 Fn 122)

¹²²*Id.*

124 (Popup - Vol 39 Ch 4 Fn 123)

¹²³George C. Coggins, *Public Natural Resources Law* § 3.04[3][b][ii] (Clark Boardman 1993).

125 (Popup - Vol 39 Ch 4 Fn 124)

¹²⁴*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495-96 (1987); *Millcreek Township v. N.E.A. Cross Co.*, 620 A.2d 558, 562 (Pa. Commw. Ct. 1993).

126 (Popup - Vol 39 Ch 4 Fn 125)

¹²⁵Mont. Code Ann. § 82-10-501 (1991).

127 (Popup - Vol 39 Ch 4 Fn 126)

¹²⁶N.D. Cent. Code § 38-11.1-01 (1992).

128 (Popup - Vol 39 Ch 4 Fn 127)

¹²⁷S.D. Codified Laws Ann. § 45-5A-1 (Supp. 1983).

129 (Popup - Vol 39 Ch 4 Fn 128)

¹²⁸729 F.2d 552 (8th Cir. 1984).

130 (Popup - Vol 39 Ch 4 Fn 129)

¹²⁹*Id.* at 555.

131 (Popup - Vol 39 Ch 4 Fn 130)

¹³⁰*Miller v. Schoene*, 276 U.S. 272, 279 (1928).

132 (Popup - Vol 39 Ch 4 Fn 131)

¹³¹*Id.*

133 (Popup - Vol 39 Ch 4 Fn 132)

¹³²*Id.* at 278.

134 (Popup - Vol 39 Ch 4 Fn 133)

¹³³528 S.W.2d 684 (Ky. 1975).

135 (Popup - Vol 39 Ch 4 Fn 134)

¹³⁴*Id.* at 686.

136 (Popup - Vol 39 Ch 4 Fn 135)

¹³⁵737 P.2d 478 (Mont. 1987).

137 (Popup - Vol 39 Ch 4 Fn 136)

¹³⁶*Id.* at 481 (citations omitted).

138 (Popup - Vol 39 Ch 4 Fn 137)

¹³⁷*Keystone*, 480 U.S. at 487.

139 (Popup - Vol 39 Ch 4 Fn 138)

¹³⁸The *Keystone* Court mirrored the analysis of the Eighth Circuit in *Murphy v. Amoco Production Co.* without giving the court of appeals judges the credit. *See* 729 F.2d 552, 555-56. *See also* *Old Ben Coal Co. v. Dep't of Mines & Minerals*, 562 N.E.2d 1202 (Ill. Ct. App. 1990) (holding that a subsidence repair or restoration requirement did not constitute a “taking”).

140 (Popup - Vol 39 Ch 4 Fn 139)

¹³⁹An interesting statement about development of the regulatory takings doctrine may be found in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

141 (Popup - Vol 39 Ch 4 Fn 140)

¹⁴⁰*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

142 (Popup - Vol 39 Ch 4 Fn 141)

¹⁴¹*Id.* “While each of us is burdened somewhat by ... restrictions, we, in turn, benefit greatly from the restrictions that are placed upon others.” *Keystone*, 480 U.S. at 491.

143 (Popup - Vol 39 Ch 4 Fn 142)

¹⁴²Professor Charles Haar has described the attempts to differentiate permissible regulation from unconstitutional taking as “the most haunting jurisprudential problem in the field of contemporary land-use law ... one that may be the lawyer's equivalent of the physicist's hunt for the quark.” Charles Haar, *Land-Use Planning* 766 (3d ed. 1976), *quoted at* Lawrence H. Tribe, *American Constitutional Law* 596 (2d ed. 1988).

144 (Popup - Vol 39 Ch 4 Fn 143)

¹⁴³*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473 (1987).

145 (Popup - Vol 39 Ch 4 Fn 144)

¹⁴⁴*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

146 (Popup - Vol 39 Ch 4 Fn 145)

¹⁴⁵*Mahon*, 260 U.S. at 413.

147 (Popup - Vol 39 Ch 4 Fn 146)

¹⁴⁶*Id.*

148 (Popup - Vol 39 Ch 4 Fn 147)

¹⁴⁷*Id.* at 414. Logically, Justice Holmes did not need to consider whether the regulation was so extensive as to amount to a taking, because he had already concluded that the regulation lacked a public purpose.

149 (Popup - Vol 39 Ch 4 Fn 148)

¹⁴⁸438 U.S. 104, 136 (1978).

150 (Popup - Vol 39 Ch 4 Fn 149)

¹⁴⁹*Id.*

151 (Popup - Vol 39 Ch 4 Fn 150)

¹⁵⁰*Id.*

152 (Popup - Vol 39 Ch 4 Fn 151)

¹⁵¹*Id.*

153 (Popup - Vol 39 Ch 4 Fn 152)

¹⁵²480 U.S. 470 (1987). The case was decided by a 5-4 majority.

154 (Popup - Vol 39 Ch 4 Fn 153)

¹⁵³*Id.* at 493, 495.

155 (Popup - Vol 39 Ch 4 Fn 154)

¹⁵⁴*Id.* at 496.

156 (Popup - Vol 39 Ch 4 Fn 155)

¹⁵⁵*Id.*

157 (Popup - Vol 39 Ch 4 Fn 156)

¹⁵⁶*Id.* at 495.

158 (Popup - Vol 39 Ch 4 Fn 157)

¹⁵⁷*Id.* at 499, *quoting* *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

159 (Popup - Vol 39 Ch 4 Fn 158)

¹⁵⁸*Keystone*, 480 U.S. at 497.

160 (Popup - Vol 39 Ch 4 Fn 159)

¹⁵⁹Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

161 (Popup - Vol 39 Ch 4 Fn 160)

¹⁶⁰729 F.2d 552 (8th Cir. 1984).

162 (Popup - Vol 39 Ch 4 Fn 161)

¹⁶¹*Id.* at 558.

163 (Popup - Vol 39 Ch 4 Fn 162)

¹⁶²*Mungler v. Kansas*, 123 U.S. 623, 665 (1887) (upholding a law that prohibited the manufacture of alcoholic beverages).

164 (Popup - Vol 39 Ch 4 Fn 163)

¹⁶³*Keystone*, 480 U.S. at 492 n.20.

165 (Popup - Vol 39 Ch 4 Fn 164)

¹⁶⁴112 S. Ct. 2886 (1992).

166 (Popup - Vol 39 Ch 4 Fn 165)

¹⁶⁵*Id.* at 2896-897.

167 (Popup - Vol 39 Ch 4 Fn 166)

¹⁶⁶*Id.* at 2897 (citations omitted).

168 (Popup - Vol 39 Ch 4 Fn 167)

¹⁶⁷*Id.* at 2899.

169 (Popup - Vol 39 Ch 4 Fn 168)

¹⁶⁸*Id.*

170 (Popup - Vol 39 Ch 4 Fn 169)

¹⁶⁹*Id.* at 2894 (citations omitted).

171 (Popup - Vol 39 Ch 4 Fn 170)

¹⁷⁰The cases are grouped and analyzed at 1 Eugene Kuntz, *The Law of Oil & Gas* §§ 2.4, 3.1, & 3.2 (Anderson 1987).

172 (Popup - Vol 39 Ch 4 Fn 171)

¹⁷¹*Id.*

173 (Popup - Vol 39 Ch 4 Fn 172)

¹⁷²*But see* Millcreek Township v. N.E.A. Cross Co., 620 A.2d 558, 562 n.8 (Pa. Commw. Ct. 1993), upholding a zoning ordinance that barred gas wells on property leased by a gas company (“*Lucas* involved a fee simple interest in land which was rendered valueless by the relevant regulation, and there is nothing in that opinion to indicate that the holding extends to leasehold interests.”).

174 (Popup - Vol 39 Ch 4 Fn 173)

¹⁷³*Id.* at 558.

175 (Popup - Vol 39 Ch 4 Fn 174)

¹⁷⁴483 U.S. 825 (1987).

176 (Popup - Vol 39 Ch 4 Fn 175)

¹⁷⁵*Id.* at 831 (citations omitted).

177 (Popup - Vol 39 Ch 4 Fn 176)

¹⁷⁶It may be important both to the public interest analysis and to the economically viable use analysis

that the statutes be drafted or interpreted to apply only prospectively. *See Collins v. Oxley*, 897 F.2d 456 (10th Cir. 1990) and *Davis Oil Co. v. Cloud*, 766 P.2d 1347 (Okla. 1986), both holding that the Oklahoma Surface Damages Act applies to wells drilled after the statute's effective date under leases that predated the Act.

178 (Popup - Vol 39 Ch 4 Fn 177)

¹⁷⁷A law that conditioned use of the surface upon a prior payment would be much closer to the facts of *Nollan* and *Lucas*, and probably be subjected to a much closer scrutiny. *See Cabre Exploration Ltd. v. Arndt*, 51 D.L.R. 4th 451, 10 A.C.W.S. (3d) 178 (Alta. Ct. App. 1988), in which the court upheld the Alberta Surface Rights Act, noting that “this right [the implied easement] is now circumscribed in order to provide for peaceful entries, and for other reasons. It nonetheless remains a right....The analogy to expropriation is imperfect.”

179 (Popup - Vol 39 Ch 4 Fn 178)

¹⁷⁸¹ Eugene Kuntz, *The Law of Oil & Gas* § 3.2(d) (Anderson 1987).

180 (Popup - Vol 39 Ch 4 Fn 179)

¹⁷⁹Speaking of the legal order of the common law, Roscoe Pound commented in 1922:

On the one hand we must take account of the social or cultural needs of the time and place in all their possibilities of overlapping and of conflict and in all their phases, economic, political, religious and moral. On the other hand we must take account of suggestion, imitation, traditional faiths or beliefs, and particularly of the belief in logical necessity or authority expressing the social want or demand for general security. We must think not in terms of an organism, growing because of and by means of some inherent property, but once more, as in the eighteenth century, in terms of a building, built by men to satisfy human desires and continually repaired, restored, rebuilt and added to in order to meet expanding or changing desires or even changing fashions. We must think of a body of materials in actual use handed down from the past on which we work consciously and subconsciously to achieve the desires and satisfy the wants of the present; eking them out through suggestion and imitation, creating new ones now cautiously and now boldly when the old fail us, and molding all to the form which those desires and wants have given to traditional faiths and beliefs; but held back by those traditional faiths and beliefs and especially in law by the rules and modes of thought of the art in which lawyers have been trained, become an instinct to follow logical compulsion and authority.

Roscoe Pound, *Interpretations of Legal History* 21 (1923).