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INTRODUCTION

It has long been recognized that an owner of real property may sever the mineral and surface estates, either by grant or reservation.[1] Since the minerals themselves would be useless without the right to mine them, certain mining rights arise by necessary implication from the grant or reservation.[2] Other mining rights, such as the right to strip or surface mine, are not implied and attach to the mineral estate only if supported by the language of the severance deed. The issue of whether the mineral owner may surface mine property has historically been a controversial one in Kentucky, especially in cases in which the mining rights of the mineral owner spring from a particular type of severance deed known as the "broad form deed."

In 1984, the Kentucky General Assembly enacted House Bill 32 (HB 32)[3] in the latest of a series of efforts to restrict the right of the grantee under a broad form deed to surface mine the property. Almost immediately, questions were raised as to the constitutionality of the legislation. This issue is made particularly urgent by the recent decision of the U.S. District Court for the Eastern District of Kentucky enjoining the Natural Re-

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[1] *E.g.*, Kincaid v. McGowen, 4 S.W. 802 (Ky. 1887). Although there may be reasons for treating a grant of mineral rights differently than a reservation (*see* Croley v. Round Mountain Coal Co., 374 S.W.2d 852 (Ky. 1964)), the Kentucky courts have not made such a distinction. Thus, although this article speaks primarily of grants, it is applicable to reservations as well.

[2] *See* Commerce Union Bank v. Kinkade, 540 S.W.2d 861 (Ky. 1976). ("Any deed of minerals carries with it the right to use as much of the surface as may be reasonably necessary to exploit the minerals. . . .")

[3] Act of July 13, 1984, ch. 28, 1984 Ky. Acts 47 (codified at KY. REV. STAT. §§ 381.930 -.945) (Supp. 1984) [hereinafter cited as KRS]. *See infra* note 44 for the text of the statute.

sources and Environmental Protection Cabinet from issuing any surface mining permits to persons claiming a right to surface mine on the basis of the prior interpretation of broad form deeds.[4] This case raises interesting questions concerning the interpretation of the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA),[5] but an in-depth discussion of the case is beyond the scope of this article. Instead, this article will focus on the historical background of HB 32 and the constitutional challenges likely to be made to it.

I. HISTORY OF BROAD FORM DEEDS

The phrase "broad form deed" is a loosely-defined term applied to certain deeds severing the mineral estate from the surface estate. The broad form deed is, as its name suggests, a mere form. Many of these deeds are identical except for particulars such as names and addresses. Indeed, in some counties those who acquired mineral rights by use of the broad form deed ordered specially printed deed books so that county clerks could simply fill in the blanks with the pertinent information.[6] Nonetheless, it is difficult to definitely recite the terms of the broad form deed. It is likely that there were several versions of the broad form deed, and many of the courts interpreting deeds identified as "broad form" do not recite the terms of the deed in question. This omission is understandable in light of the great length of these deeds. The turn-of-the-century draftsmen, blissfully unaware of the more modern concern for brevity, penned an agonizingly detailed description of the rights conveyed.[7]

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[4] Akers v. Baldwin, Sec., Nat. Res. & Environ. Protection Cabinet, No. 84-88 (E.D. Ky. filed Feb 28, 1984).

[5] Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1318 (1982)).

[6] Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395, 400 (Ky. 1968) (Hill, J., dissenting).

[7] An example of a typical broad form deed is set forth in Watson v. Kenlick Coal Co., 498 F.2d 1183 (6th Cir. 1974). The deed at issue in that case conveyed:

> [A]ll coal minerals and mineral substances and products; all oils and gases; all salt and salt mineral waters; all fire and potters clay; all iron and iron ores; all stone; all slate; all ores and mines; and all subterranean substances and products; and all combinations of same, or any or all of the same; situated, lying and being in, on or under the hereinafter described land, or that may hereafter be found thereon, therein or thereunder; and such of the standing timber thereupon as may, at any time of the use thereof, be,

Typically, these deeds convey all minerals including a number of substances specifically named in each deed. They further

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or by the party of the second part, its successors or assigns, be deemed necessary or convenient for mining purposes, or so deemed necessary or convenient for the exercise and enjoyment of any or all the property, rights and privileges herein bargained, sold, granted or conveyed, including timber necessary for dams and railroads, or branch lines thereof, as may hereafter be constructed upon the said lands; and the exclusive rights-of-way for any and all railroads, tram roads, haul roads and other ways, pipe lines, telephone and telegraph lines that may hereafter be located on said land by the parties of the first part, their heirs, representatives or assigns, or by the party of the second part, its successors or assigns, or by any person or corporation with or without the authority of either of said parties, their, or its heirs, representatives, successors or assigns; and also the right to maintain, keep in repair and operate the same and said railroads, tram roads, haul roads, ways, pipe lines, telephone and telegraph lines; and also the exclusive right to enter upon said land and drill thereupon for oil and gas, and to pump for and store the same upon said land, and remove pipe and transport the same therefrom; and to use and operate the said land and surface thereof and any and all parts thereof, including the right to use, divert, dam and pollute water courses thereon in any and every manner that may, by party to the second part, its successors or assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property, rights and privileges hereby bargained, sold, granted or conveyed, including, but not limiting to, that of drilling, mining, pumping and therefrom removing or otherwise utilizing the said pipe, telegraph and telephone lines, rights-of-way, roads, ways, timber, coal, minerals, slate, oil, gas, saltwater, clay, iron ore, mines, stone and subterranean substances and products thereof, and any and all property and rights hereby bargained, sold, granted or conveyed, and for the transportation therefrom of said articles; and also the right to build, erect, alter, repair, maintain and operate upon said land, and at its option to therefrom remove, any and all houses, shops, buildings, tanks, derricks, inclines, tipples, dams, cokeovens, store and ware rooms, and machinery and mining and any and all equipment, that may, by party of the second part, its successors or assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property, rights and privileges hereby bargained, granted, sold or conveyed; and the right to thereupon convert, reduce, refine, store, dump and manufacture the said, or any or all of said property, or products, in, upon or under said land, or other land owned, or hereafter acquired by said party of the second part, its successors or assigns, by purchase, lease or otherwise; and the right to dump, store and leave upon said land any and all muck, bone, shale, water or other refuse from said mines, wells, ovens or houses; and any and all matters and products that may be excavated from mines or produced by the exercise or enjoyment of any or all the property, rights and privileges hereby bargained, sold, granted or conveyed; and the right to remove all pillars and other lateral and subjacent supports without leaving pillars to support the roof or surface; and the right to use said land for removal or storage of the products taken out of any other land owned, or hereafter

convey such surface rights as the grantee may deem "necessary or convenient for the full and free exercise and enjoyment" of the mineral rights conveyed.[8] The deed may specifically give the mineral owner the right to remove all pillars and other lateral and subjacent support. Some deeds contain an express waiver of liability for the grantee's use of the land and surface.[9] Finally, the deeds generally reserve to the grantor only such surface rights as are "consistent with the rights conveyed to the grantee."[10]

It is important to note that each deed must, of course, be interpreted according to its own terms and, if ambiguous, according to the facts surrounding its execution. Thus the cases that have interpreted certain broad form deeds to include the right to strip mine are not strictly applicable to any but identical deeds. Indeed, several recent cases have affirmed that a severance deed must contain a "definite enlargement of specified mining rights" in order to effectively grant the right to strip mine.[11] Unfortunately, the cases interpreting broad form deeds do not clearly specify the language from which the right to surface mine arises.[12] It is often difficult, therefore, to determine whether a particular non-broad form deed grants the right to surface mine. This question is beyond the scope of this article, which will use the term "broad form deed" in reference to those deeds which have been held to include the right to strip mine.

> acquired by party of the second part, its sucessors [sic] or assigns by lease or otherwise; and the right to erect upon said land and maintain, use, repair and operate, and at their pleasure remove therefrom, any and all buildings and structures, and machinery and mining and any and all equipment, whether specifically enumerated herein or not, that may, by party of the second part, its successors or assigns, be deemed necessary or convenient for the exercise or enjoyment of any or all the property, rights and privileges herein bargained, sold, granted or conveyed; and also the free access to, upon and over said land for the purpose of surveying and prospecting for said property and interests.

Id. at 1185-86.

[8] *See supra* note 7.

[9] *See, e.g.*, Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956) (absent malicious destruction).

[10] *Id.* at 43.

[11] *See* Commerce Union Bank v. Kinkade, 540 S.W.2d 861, 863 (Ky. 1976); *see also* Peabody Coal Co. v. Pasco, 452 F.2d 1126 (6th Cir. 1971) and Peabody Coal Co. v. Erwin, 453 F.2d 398 (6th Cir. 1971).

[12] *See, e.g., Commerce Union Bank*, 540 S.W.2d at 863.

The history of these broad form deeds is, to a large extent, the story of one man, John C. C. Mayo, who was born in 1864 to a poor Pike County farming family but became the richest and most powerful coal baron of his time.[13] At a time when a college education was practically unheard of in Kentucky's hill country, Mayo managed to attend Kentucky Wesleyan College at Millersburg. There, Mayo studied geology and learned for the first time of eastern Kentucky's wealth of mineral resources. After graduation, Mayo formed a trading company for the purpose of acquiring minerals. With $450 in capital, Mayo began a process of acquisition that would ultimately entitle him to hundreds of thousands of acres of minerals in Eastern Kentucky.[14]

Mayo rarely bought land outright, preferring instead to acquire just the minerals, using broad form deeds that he prepared. This left the surface owner with the right to use the property for agricultural purposes consistent with the grant of minerals, as well as the responsibility for all property taxes. The minerals alone were not, at that time, subject to taxation.

The first Kentucky cases interpreting these deeds did so in the context of deep mine operations. They established the general principal that broad form deeds were effective to grant extraordinarily broad surface rights to the mineral owner. For instance, in *McIntire v. Marian Coal Company*,[15] Kentucky's highest court was confronted with the question of the right of the grantee under a broad form deed to build structures on the surface. The court stated:

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[13] *See* H. CAUDILL, THEIRS BE THE POWER 57-67 (1983).

[14] *Id.* According to Caudill, Mayo's methods were simple and effective:

> He combed through the deed books in county courthouses, identified the landowners with the best semblance of titles, and compared their holdings against his notes made in the Kentucky Wesleyan College library. Where titles to valuable minerals appeared worth the risk, he approached a landowner (who Mayo generally viewed as a mere squatter) and offered him 50¢ or $1.00 for an option to buy the minerals underlying his land. The option or "agreement to purchase" was for a term of several years and provided for ultimate payments from 50¢ to $5.00 or $6.00 per acre. Almost all farmers were eager to execute the options. They signed their names (or, in most instances, affixed their marks) and prayed that Mayo could raise the purchase money within the time specified.

Id. at 61.

[15] 227 S.W. 298 (Ky. 1921).

> Undoubtedly, under the plain terms of the deed, the Marion Coal Company has the right and could by showing the necessity of convenience thereof use and occupy the whole surface of the land in question even to exclude the plaintiff and taking his house and garden, but such taking would have to be after satisfaction of adjudged compensation for such improvements, which is but another way of saying that the mineral estate under the deed is dominant, superior, and exclusive in every circumstance or condition where the owner thereof shall deem it necessary or convenient to make such use of the surface as the deed allows.[16]

Buchanan v. Watson,[17] decided in 1956, was the first Kentucky case to squarely face the question of whether the broad form deeds authorized strip mining. The court there held that the deed in question did permit strip mining, and further, that the mineral owner would not be liable for damages caused to the surface unless he acted "oppressively, arbitrarily, wantonly, or maliciously."[18] *Buchanan* is generally cited as the seminal case on this point, but interestingly, the court's opinion in that case purports to do nothing more than apply settled law, relying on earlier cases involving deep mining, such as *McIntire*.

Almost from its inception, the *Buchanan* rule came under strong, sometimes visceral, criticism. Surface owners have complained that the rule unfairly deprives them of their land. In many cases, these surface owners have lived for generations on a particular tract of land, claiming it as their own. It is not uncommon for surface owners to be unaware of a prior mineral reservation in their chain of title. Their first notice of the mineral owners' claim may be when the strip mining begins. Furthermore, under previous court holdings, surface owners' homes could arguably be bulldozed into the ground, provided that the mineral owners' operators were not acting in a manner that was "arbitrary, wanton, or malicious."[19]

Despite such criticism, the Kentucky courts have not only consistently upheld *Buchanan*, but have expanded its reach as

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[16] *Id.* at 300.

[17] 290 S.W.2d 40 (Ky. 1956).

[18] *Id.* at 43.

[19] *See, e.g.*, Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725 (Ky. 1960); Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968).

well. Subsequent cases have held that broad form deeds permit the mineral owner to employ the auger mining method as well as the strip mining method;[20] and to strip mine even in cases in which the coal could have been mined by other methods.[21] In *Croley v. Round Mountain Coal Co.*,[22] the court held that the owner of minerals under either a grant or a *reservation* of minerals had the right to strip or auger mine, and would not be liable for damages caused thereby unless the mining was carried on in an "arbitrary, wanton and malicious manner." *Croley* is also significant because the reservation of minerals in that case did not contain a waiver of damage clause such as that which was present in *Buchanan* and other earlier cases. Thus the court in *Croley*, rather than distinguishing the case's factual situation based on the lack of a waiver of damages clause, chose instead to extend *Buchanan*'s rule to include reservations of minerals as well.

Still, the foes of the *Buchanan* rule continued to seek some relief in the Kentucky courts. In 1968, *Martin v. Kentucky Oak Mining Co.*,[23] presented the state's highest court with an opportunity to reevaluate *Buchanan*. The issue was briefed thoroughly by both parties and also by a number of *amici curiae*, including the Kentucky Civil Liberties Union, the Commonwealth of Kentucky, the Appalachian Group to Save The Land And People, Inc., the Kentucky Members of the National Council of Coal Lessors, Inc., the Sierra Club, and the Big Sandy-Elkhorn Operators Association.

Martin is interesting in its treatment of the arguments voiced against the *Buchanan* rule. The surface owners and their allies essentially argued that the parties to the mineral deeds could not reasonably have intended to permit strip mining. They pointed

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[20] Kodak Coal Co. v. Smith, 338 S.W.2d 699 (Ky. 1960) (permitting a mineral owner to auger mine when other methods were available even if it meant destruction of trees and land, as long as the mining was not carried on in an arbitrary, wanton or malicious manner).

[21] *See* Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725 (Ky. 1960) (holding that where deed granted mineral owner the right to use the surface in any manner that might be deemed to be necessary, any property damage to trees or surface caused by the exercise of that right was not actionable since the activity was not arbitrary, wanton or malicious).

[22] 374 S.W.2d 852 (Ky. 1964).

[23] 429 S.W.2d 395 (Ky. 1968).

out that strip mining results not merely in the "use" of the surface, but in its "destruction" as well.[24] There would be little point to the land owners retaining surface title if it could be rendered worthless by the mineral owner. Finally, they asserted that strip mining was unknown at the time of the execution of these deeds.

In rejecting these arguments, the court stated: "Whether or not the parties actually contemplated or envisioned strip or auger mining is not important—the question is whether they intended that the mineral owners' rights to use the surface in removal of the minerals would be superior to any competing right of the surface owner."[25] In that regard, the court recited a number of facts concerning the execution of the broad form deeds:

> In 1900 only 17 percent of the land in Knott was *improved* agricultural land. A great percentage of the land (as was the case with the 90-acre tract of which the Martin parcel was a part) was *hillside* land of no productive value. The average value per acre of land in Knott County (in 1900) was only *$2.90 per acre*. The predecessors in title to the Martin land were paid *$3.00* per acre in 1905 for the mineral rights only.[26]

The fact that so little of the land in Knott County was improved agricultural land indicates that the grantors of the broad form deeds may have been relatively unconcerned about surface destruction. Moreover, inasmuch as the land owners appear to have been paid close to the full value of their land for the mineral rights alone, it is reasonable to assume that they retained the bare surface title for whatever value it had. Indeed, it is difficult to argue that the surface owners retained nothing of value, since even under the *Buchanan* rule they had unrestricted rights in the surface for many years, and will again have unrestricted surface rights following the strip mining. Of course, not all grantors under broad form deeds received as much as $3.00 per acre.

The landowners in *Martin* argued that strip mining was unknown at the time the broad form deeds were executed, a

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[24] *Id.* at 397.

[25] *Id.*

[26] *Id.* at 398 (emphasis in original).

point on which there is some dispute.[27] The court pointed out, however, that even customary deep mining methods resulted in some surface destruction, although obviously not as extensive as in the case of strip mining.[28] Accordingly, as it appeared that the parties to the broad form deeds probably did contemplate at least some surface destruction and were paid for substantially all the value of the combined surface and mineral estates, the court held that the plain meaning of the language contained in the broad form deeds was controlling, and should be given effect.[29] The *Buchanan* rule was thus upheld. Additionally, the landowners in *Martin* argued that the mineral owners should be estopped from strip or auger mining in any area where they have permitted the surface owner to make improvements. However, the court rejected this argument on the ground that it was essentially unreasonable to expect the owner of thousands of acres of mineral property to keep track of any improvements made on the land and to notify the improver that his rights were subordinate to those of the mineral owner.[30]

The trial court in *Martin* had constructed, apparently out of whole cloth, a Solomonic solution to the broad form deed problem by ruling that, although the broad form deeds gave the mineral owner the right to strip and auger mine, the mineral owner should be obligated to pay damages for destruction of the surface caused by such operations.[31] Although such a solution may have had fairness to recommend it, it found no support in any case law, and the appellate court in *Martin* rejected it, saying:

> It appears to us that if, as we in substance are holding, the mineral owner bought and paid for the right to destroy the surface in a good faith exercise of the right to remove the minerals, then there is no basis upon which there could rest an obligation to pay damages for exercising that right.[32]

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[27] *See* Comment, *Broad-Form Deed - Obstacle to Peaceful Coexistence Between Mineral and Surface Owners*, 60 KY. L.J. 742 (1971-72).

[28] *Martin*, 429 S.W.2d at 398.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 396.

[32] *Id.* at 399 ("except of course for arbitrary, wanton or malicious acts").

Judge Hill, dissenting, pointed out that many broad form deeds were essentially forms, prepared and filled in by the grantee.[33] Accordingly, the common law rule that a deed is to be construed most strongly against the grantor is arguably not applicable in these cases. Further, inasmuch as strip mining was allegedly unknown at the time of the execution of the deeds, and is so much more destructive of the surface than deep mining, the deeds in question should not be read so as to permit strip mining. In this regard, the dissent cites *Wiser Oil Co. v. Conley*,[34] which held that the owner of oil and gas rights had no right to use the water-flooding method of recovering oil without the consent of the owner of the surface. Judge Hill noted that in *Wiser*, the court stated:

> Even though appellants assert that the water-flooding process was known prior to March 10, 1917, the date of execution of the lease, and was employed to some extent in other states before that time, *we conclude it was the intention* of the parties that the oil should be produced by drilling in the customary manner *that prevailed when the lease was executed.* Any exemption from liability would therefore be limited to the damages which might be caused by this *contemplated* means of bringing oil to the top.[35]

The majority in *Martin* made some attempt to distinguish *Wiser*, but ultimately decided "to adhere to *Buchanan* whether or not it conflicts with *Wiser*."[36] To the dissent, however, *Wiser* and *Buchanan* were "as inconsistent as sin and salvation."[37]

Despite the diverse positions taken by the majority and the dissent in *Martin*, it was obvious that this case represented a negative response to the well-framed arguments made by the large variety of interested parties. Accordingly, it became evident that to change the interpretation of broad form deeds, a new approach was needed. One such approach was advanced in *Watson v. Kenlick Coal Co.*[38] The plaintiff in *Watson* argued that *Buchanan*'s construction of broad form deeds constituted a

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[33] *Id.* at 400 (Hill, J., dissenting).
[34] 346 S.W.2d 718 (Ky. 1960).
[35] *Id.* at 721-22 (emphasis in original).
[36] *Martin*, 429 S.W.2d at 399.
[37] *Id.* at 402 (Hill, J., dissenting).
[38] 498 F.2d 1183 (6th Cir. 1974), *cert. denied*, 422 U.S. 1012 (1975).

taking of private property in violation of the United States Constitution.[39] The Sixth Circuit Court of Appeals disagreed, and the United States Supreme Court denied an application for certiorari, despite a spirited dissent by Justice Douglas.[40]

Another approach taken by the surface owners and their supporters was a legislative attack. They secured passage of legislation[41] requiring that an application for a strip mining permit be accompanied by a statement of consent signed by each holder of a freehold interest in the land. Thus, a mineral owner, even though he may have had the right to strip mine under his deed, would have been unable to obtain a permit without the consent of the surface owner. In effect, this statute gave the surface owner the power to veto strip mining. In *Department for Natural Resources & Environmental Protection v. No. 8 Ltd.*,[42] Kentucky's highest court struck down the statute as unconstitutional, stating: "It is beyond cavil that the primary purpose and effect of Subsection 8 is to change the relative legal rights and economic bargaining positions of many private parties under their contracts rather than acheive any public purpose. It is, therefore, axiomatic that Subsection 8 is unconstitutional."[43] Thus, the stage was set for yet another legislative attempt to undo the interpretation of broad form deeds developed by the courts in *Buchanan* and its progeny.

II. HOUSE BILL 32

Basically, HB 32[44] provides that any instrument purporting to sever the surface and mineral estates that fails to state in

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[39] *Watson*, 498 F.2d at 1186.

[40] *Watson*, 422 U.S. at 1012 (Douglas, J., dissenting in the denial of certiorari).

[41] KRS § 350.060(2) (1974) (effective Jan. 1, 1975).

[42] 528 S.W.2d 684 (Ky. 1975).

[43] *Id.* at 686-87.

[44] Act of July 13, 1984, ch.28, 1984 Ky. Acts 47 (codified at KRS § 381.930 - .945 (Supp. 1984)). The chapter reads in part as follows:

> *381.930 Purposes of KRS 381.935 to 381.945* — The purposes of KRS 381.935 to 381.945 are as follows:
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> (1) To facilitate and require the demonstration of a clear understanding between the owners of surface and mineral estates in land concerning their respective rights to use and occupy or injure the surface of the land;
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> (2) To protect the security of titles to land and improvements thereto;
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> (3) To promote the free alienability of land;
>
> (4) To prevent hardship and injustice to surface or mineral owners

express terms the methods of mining permitted shall be held, "in the absence of clear and convincing evidence to the contrary,"[45] to grant rights to mine only by such methods "of coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed."[46] It is obvious that this statute is aimed primarily at prohibiting surface mining under broad form deeds, particularly those which were executed in the latter part of the nineteenth or early part of the twentieth centuries when strip mining as currently practiced was

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arising from uncertainty of the law;

(5) To promote the conservation and the full and efficient use of all natural resources of the state, including the land, the making of improvements to the land, the growth of agriculture, the development of new industry and the general economic well-being of the state and its people;

(6) To codify a rule of construction for mineral deeds relating to coal extraction so as to implement the intention of the parties at the time the instrument was created; and

(7) To foster certainty and uniformity in the operation of the law.

381.935 Definitions — For the purpose of KRS 381.940, "method" and "methods" mean underground, surface, auger, or open pit mining and nothing in KRS 381.940 shall be interpreted to adversely affect the use of modern equipment or machinery with respect to mining methods permitted under KRS 381.940.

381.940 Rules of construction for mineral deeds relating to coal extraction — In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate only for the purposes of coal extraction by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

381.945 Written agreement in deed directing how surface to be reclaimed — In any deed in which the minerals are severed from the surface, the present owners of the surface rights may enter into a written agreement directing how the surface shall be reclaimed, and how the property shall be left after the extraction of the minerals, and in compliance with federal and state rules and regulations.

[45] KRS § 381.940 (Supp. 1984).

[46] *Id.*

unknown. It is not entirely clear what is intended by the phrase "clear and convincing evidence to the contrary."[47] Certainly this would allow a court to consider language in a deed which, although not explicitly mentioning surface mining, indicates that the parties contemplated extraordinary, then-unknown mining methods. It is less clear, however, whether a mineral owner may introduce extrinsic evidence concerning the circumstances surrounding the execution of the deed of severance in support of his claim that the deed grants surface mining rights.[48] Moreover, it is doubtful that anything less than evidence of a thorough discussion of the possibility of strip mining and resultant surface destruction would suffice to alter the construction legislatively imposed by HB 32. Since strip mining as known today did not exist then, it is highly unlikely that any such conversations occurred. For all intents and purposes then, the presumption mandated by HB 32 is irrebuttable, at least as regards nineteenth century severance deeds.

In cases involving more recent severance deeds, HB 32 may have entirely unexpected consequences. As mentioned earlier, recent cases have held that a severance deed that does not contain a "definite enlargement of specified mining rights" does not grant the right to strip mine.[49] The mineral owner claiming under such a deed executed recently could reasonably argue that HB 32 actually *expands* his mining rights. Since the deed fails to state expressly the mining methods to be used, HB 32 gives rise to a presumption that "the intention of the parties to the instrument was that coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed,"[50] which presumably would include surface min-

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[47] For a discussion of the stated and implied purposes of HB 32, see *infra* text accompanying notes 126-27. *See also* KRS § 381.930 (Supp. 1984) *supra* note 44.

[48] Such extrinsic evidence is generally not admissible to explain or supplement the provisions of a deed or other writing unless the written instrument is ambiguous. *See* Luigart v. Federal Parquatry Mfg. Co., 228 S.W. 758 (Ky. 1922). Neither *Buchanan* nor *Watson* clearly finds the broad form deed to be ambiguous, but both appear to consider extrinsic evidence. In any case, the difficulty of producing credible extrinsic evidence concerning a severance deed executed eighty or ninety years ago is overwhelming.

[49] *See supra* note 11 and accompanying text.

[50] KRS § 381.940 (Supp. 1984).

ing. The use of the word "only" may indicate that HB 32 is intended solely to restrict, rather than to enlarge, mining rights. Such a construction makes the presumption mandated by HB 32 appear more arbitrary, however, and thus may create constitutional problems.

Another problem of construction presented by HB 32 concerns the meaning of the phrase "method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed."[51] The language raises several questions. Must the mining method have been in use in the local area, or is it sufficient that it was in use somewhere in Kentucky? Who must have known of its use? The mining industry? The general populace of the local area, or of the state? What effect should a particular grantor's knowledge or lack of knowledge of mining practices have on interpretation of his deed? These questions remain to be answered by the courts that must apply HB 32. The legislature's failure to adequately deal with these questions suggests that the statute was aimed primarily or exclusively at nineteenth century severance deeds, and that the function of the "presumption" raised by the Act is simply to deprive the mineral owner of the right to surface mine. This perceived purpose differs from that which is stated in the Act, and, as discussed further below,[52] the true purpose of the Act may be important in determining its constitutionality.

If upheld, HB 32 will have a tremendous impact on the development of coal resources in Eastern Kentucky: it will undoubtedly discourage development since the effect of the bill is to shift from the mineral owner to the surface owner the control over which methods may be used to mine coal on hundreds of thousands of acres. The surface owner therefore is given a veto power over the strip mining of coal. In areas where coal may be economically mined only by the surface mining method, the result of HB 32 may be to prevent production altogether.

HB 32, of course, will have no effect on the strip mining of lands where the minerals and surface are owned by the same party, or where the minerals have been severed under a deed or

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[51] *Id.*

[52] *See infra* text accompanying note 111.

reservation which specifically grants the right to strip mine, or where mineral owners have prudently acquired leases from the surface owners specifically granting the mineral owner the right to strip mine. HB 32 thus offers little comfort to those who oppose strip mining on environmental grounds because it does not prohibit surface mining in those cases mentioned above. Furthermore, even where HB 32 does apply, it is likely that the mineral owner will be willing to pay the surface owner whatever he demands in order to exploit the minerals under the surface. Therefore, the ultimate result will be that much of the land will be strip mined anyway, but at a higher cost to the operator.

The extensive regulatory scheme concerning surface mining is unaffected by HB 32 and will remain applicable to all such mining regardless of how the operator acquired his rights. HB 32 contains a rather cryptic section dealing with reclamation, which reads as follows:

> In any deed in which the minerals are severed from the surface, the present owners of the surface rights may enter into a written agreement directing how the surface shall be reclaimed, and how the property shall be left after the extraction of the minerals, and in compliance with federal and state rules and regulations.[53]

It is not immediately obvious what the legislature intended by this section. It is a generally accepted principle of real property law that a grantor of an interest in property is free to make such conditions of his grant, consistent with applicable laws, as he deems proper.[54] Thus, it would appear that a landowner severing the minerals to his property could impose any additional, consistent reclamation requirements on the mineral owner that he wished. He cannot, of course, relieve the mineral owner of any reclamation requirements imposed upon him by law.[55] This section of the bill may have simply been intended to codify this general rule of property law.

Prior to its passage, HB 32 was questioned on constitutional grounds. Its authors were apparently aware of these problems

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[53] KRS § 381.945 (Supp. 1984)).

[54] *See* R. POWELL AND P. ROHAN, POWELL ON REAL PROPERTY, ¶¶ 670-79 (1983).

[55] *Id.* at ¶ 679[4].

and attempted to avoid them by careful construction.[56] Nonetheless, serious questions as to the constitutionality of HB 32 remain to be resolved. Indeed, at this writing, several cases are pending which challenge HB 32's validity.[57] The bill is constitutionally suspect on at least four grounds: first, that it results in a "taking" of private property without just compensation; second, that it impairs the obligation of contracts; third, that it constitutes a usurpation of the duties and responsibilities of the court system by the legislature; and finally, that the presumption mandated by the statute is, in fact, irrebuttable, and as such denies the mineral owners due process of law. Each of these contentions will be examined in turn.

III. THE "TAKING" QUESTION

Both the federal and Kentucky constitutions contain essentially identical provisions prohibiting the state from "taking" private property without just compensation.[58] There does not appear to be any appreciable difference between the interpretations given the two sections. Accordingly, the following discussion will focus on federal decisions.

Any discussion of taking as it relates to HB 32 must begin with *Pennsylvania Coal Co. v. Mahon*.[59] *Pennsylvania Coal* involved a challenge to a Pennsylvania statute forbidding the mining of anthracite coal in such a way as to cause the subsidence of dwellings or certain other structures. In an opinion by Justice Holmes, the Supreme Court held that the Pennsylvania statute worked a "taking" without due compensation.[60] In

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[56] HB 32 is practically identical to a Tennessee statute, TENN. CODE ANN. § 64-511 (Supp. 1980) (currently codified at TENN. CODE ANN. § 66-5-102 (1982)). The constitutionality of this statute was upheld in Doochin v. Rackley, 610 S.W.2d 715 (Tenn. 1981) (*see infra* notes 175-181 and accompanying text for a discussion of the case). It would appear that the drafters of HB 32 used the Tennessee Act as a model.

[57] *See, e.g.*, Baker v. Wooten, No. 83-CI-429 (Perry Cir. Ct. filed April 3, 1985); Akers v. Baldwin, Sec., Nat. Res. & Environ. Protection Cabinet, No. 84-88 (E.D. Ky. filed Feb. 28, 1985).

[58] *Compare* U.S. CONST. amend. V *with* KY. CONST. § 13.

[59] 260 U.S. 393 (1922).

[60] The Pennsylvania statute under review was P.L. 1198, commonly known in Pennsylvania as the Kohler Act. The statute forbade the mining of anthracite coal in any manner which would cause subsidence of any structure used as a human dwelling. The statute clearly destroyed previously existing rights of property and contract. *Pennsylvania Coal*, 260 U.S. at 412-13.

Holmes' view, most, if not all, governmental regulations produce some adverse effect on individual property rights.[61] A state may not, however, totally escape the effect of the taking clause by describing its action as a mere regulation. The question becomes one of delineating between those state regulations that, although adversely affecting some property interest, are nonetheless valid without compensation, and those state actions that, although justified as valid regulations, nonetheless effect a deprivation of property rights constituting a "taking."[62] In drawing this line, Holmes focused on the extent of the diminution in property rights and concluded that the Pennsylvania Act had the effect of making the mining of certain coal commercially impractical, and, "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[63]

Pennsylvania Coal is important not merely for its holding, but also because it deals with a question closely analogous to that presented by HB 32. The Pennsylvania Act, like HB 32, attempted to regulate a dispute between mineral owners and surface owners.[64] In overturning the Pennsylvania act, the Court was mindful that the Pennsylvania legislature had apparently concluded that the mining in question was injurious to public health, safety and welfare, and that this conclusion may well have been a reasonable one. But,

> [T]he question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.[65]

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[61] *Id.* at 413.

[62] *Id.*

[63] *Id.* at 414.

[64] The surface owners in Pennsylvania had, for the most part, conveyed away their rights to subjacent support by instruments similar to the broad form deeds dealt with by HB 32. Had they not done so, the mineral owner presumably would have been liable for any subsidence under general principles of property law. *Pennsylvania Coal*, 260 U.S. at 414.

[65] *Id.* at 416.

Justice Brandeis, in dissent, would have upheld the act, since the prohibited mining was in the nature of a public nuisance.[66] As such, Pennsylvania's attempt to abate the nuisance, although undoubtedly working some hardship on the mineral owners, would not constitute a taking. "Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put."[67] Thus, the dissent focuses more strongly on the character of the activity sought to be regulated, while Holmes' analysis gives greater weight to the extent of diminution in the plaintiff's property.[68]

Although the Court has never overruled *Pennsylvania Coal*, it has nonetheless backed away from Justice Holmes' analysis. In *Goldblatt v. Town of Hempstead*,[69] the Court upheld an ordinance which was apparently applicable only to the appellant's mining operation and which would prevent any further mining on their property, thereby making the property worthless. After stating the general principle that some governmental regulation is permissible without compensation under the state's police power, even though that regulation may work to prohibit a beneficial use to which the property had previously been devoted, the Court went on to explain that Justice Holmes' diminution-in-value test was only one part of its analysis.[70] The Court implied that the validity of an ordinance would turn on its reasonableness, which is based on such factors as, "the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance."[71] It is possible to construe this analysis as mere dicta, however, since the Court goes on to hold that the appellants had failed to meet their burden on the issue of reasonableness.[72] Apparently, there was no evidence produced at trial as to diminution in value of the property.

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[66] *Id.* at 417 (Brandeis, J., dissenting). In the words of Justice Brandeis, the statute merely prohibited a "noxious use."

[67] *Id.* at 418 (Brandeis, J., dissenting).

[68] *Id.* at 413.

[69] 369 U.S. 590 (1962).

[70] *Id.* at 594.

[71] *Id.* at 595.

[72] *Id.*

Several cases arising under the taking clause have focused on the question of whether the government's action constitutes an actual physical invasion or appropriation of the property. For instance, in *United States v. Central Eureka Mining Co.*,[73] the Supreme Court reviewed a War Production Board order requiring nonessential gold mines to cease operating, and decided that the order was not a violation of the taking clause because "the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them."[74] On the other hand, when the challenged governmental action does constitute a physical invasion of the property, the Court is more willing to find a taking, even though the economic effect on the owner is minimal. In *Loretto v. Teleprompter of Manhattan CATV Corp.*,[75] the Court struck down a New York law requiring landlords to permit installation of cable television equipment on rental property even though the infringement was admittedly minor.[76] The Court concluded that, "a permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve."[77]

Although the Court in these recent cases focused on the character of the governmental action, it has not abandoned the approach of *Pennsylvania Coal*. In 1978, the Court reviewed its decisions concerning the taking clause in *Penn Central Transportation Co. v. New York City*,[78] and concluded that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[79] Thus, the outcome in any particular case depends on all the

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[73] 357 U.S. 155 (1958).

[74] *Id.* at 165-66.

[75] 458 U.S. 419 (1982).

[76] The equipment in question consisted of about 30 feet of 1/2" cable and two 4" x 4" x 4" metal boxes.

[77] *Loretto*, 458 U.S. at 426.

[78] 438 U.S. 104 (1978). In *Penn Central*, the Court upheld a New York City ordinance that provided a procedure for designating buildings as "landmarks," thereafter restricting the use of such buildings. As a result of the ordinance, the owner of Grand Central Terminal was prevented from constructing a 55-story office building above the terminal.

[79] *Id.* at 124.

facts and circumstances of that case.[80] It was apparent that, although the Court continued to honor Justice Holmes' approach in *Pennsylvania Coal*, it gave the "character of the governmental action" predominant consideration.

The effect of HB 32 is unlike any of the governmental actions previously discussed. Rather than merely restricting one's right to use his property in a certain way or actually expropriating the property, HB 32 takes a particular quill from the bundle of rights constituting ownership of property—the right to strip mine—and transfers it from one individual to another. Since, in a strict sense, mining rights are pertinent to the ownership of the coal, one might object to this characterization, finding it absurd to speak of transferring mining rights to one who does not own the coal. Nonetheless, under HB 32 the surface owner does control these rights even if he does not, in fact, possess them. It would perhaps be more accurate therefore to say that HB 32 takes an affirmative easement away from the mineral owner and creates a corresponding negative easement in the surface owner.

The situation may be somewhat analogous to that presented by *Loretto*, where the challenged law essentially transferred an easement from the landlords to the cable company.[81] HB 32, however, differs from the statute challenged in *Loretto* in two important respects: under HB 32, there is no "permanent physical occupation," and in many cases the diminution in value of the property may be substantial. For those tracts of land which may be mined economically only by the surface mining method, depriving the mineral owner holding under a broad form deed

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[80] As the Court noted:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id.

[81] *Loretto*, 458 U.S. at 421. The statute under review was N.Y. EXEC. LAW § 828(1) (McKinney Supp. 1981-1982).

of the right to mine greatly decreases the value of the property—perhaps even to the point of making it totally worthless.

There is some language in *Penn Central*, however, that suggests that such considerations may be inappropriate. Although the owner in *Penn Central* argued that an ordinance deprived it of gainful use of its "air rights" above the Grand Central Terminal and thus constituted a "taking," the Court upheld the ordinance, saying:

> "Taking" jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."[82]

The Court's reasoning could easily be applied to negate a HB 32 "taking" challenge: HB 32 works no diminution in the value of the property "as a whole," since the stripping rights are merely displaced from the owner of one interest to the owner of another. However, such an argument ignores some important economic realities and is probably a misreading of *Penn Central*. To have allowed the plaintiffs in *Penn Central* to evaluate the diminution in the value of their "air space," separately from the value of their remaining interest would exaggerate the total diminution. No such exaggeration occurs in a case in which the loss of surface mining rights makes the coal owned by the mineral owners economically unmineable. It is instead the diminution in value of the mineral estate "as a whole" that should be considered, and in certain cases this may be quite substantial.

In a recent Supreme Court case, *Texaco, Inc. v. Short*,[83] the Court ruled on the constitutionality of the Indiana Mineral Lapse Act,[84] which provided that a severed mineral interest that is not used for a period of twenty years automatically lapses and reverts to the current surface owner of the property unless the mineral

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[82] *Penn Central*, 438 U.S. at 130-31.

[83] 454 U.S. 516 (1982).

[84] IND. CODE §§ 32-5-11-1 to -8 (1976) (entitled the Dormant Mineral Interests Act).

owner files a statement of claim in the local county recorder's office. Texaco and others claimed, among other things, that the statute effected a taking of private property for public use without just compensation.[85] The Court noted that property interests were not created by the United States Constitution, but rather were created and defined by state law.[86] Once having been created, they are entitled to some constitutional protection, but "just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[87] The Court found that Indiana had not exercised its power in an arbitrary manner.[88] Indeed, "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation."[89] The Court similarly dismissed arguments that the statute constituted an unconstitutional impairment of contracts,[90] or that lack of prior notice offended the due process clause.[91]

Short is especially relevant to the issue presented by HB 32 since the case seeks to adjust the property rights between the mineral and surface owner. It is, however, distinguishable on at least three grounds. Under the Indiana statute,[92] the owner of a severed mineral interest could protect that interest simply by filing a statement of claim the county recorder's office. The Kentucky statute has no such saving provision.[93] Indeed, the holder of a mineral interest under a broad form deed simply no longer has surface mining rights after the passage of HB 32. The Court in *Short* concluded that Indiana had not acted arbitrarily; that a state may well conclude that the interest of eliminating stale and abandoned claims justified the minimal burden

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[85] *Short*, 454 U.S. at 522.
[86] *Id.* at 526.
[87] *Id.*
[88] *Id.* at 529.
[89] *Id.* at 530.
[90] *Id.* at 531. *See infra* note 132 and accompanying text.
[91] *Short*, 454 U.S. at 538.
[92] IND. CODE § 32-5-11-4 (1976).
[93] *See* KRS §§ 381.930-.945 (Supp. 1984), *supra* note 44.

imposed on the owner of the minerals by the act.[94] The legislative rationale which motivated the passage of HB 32 is not as clear, but it certainly was not the state's interest in eliminating stale claims: the Kentucky Act applies not only to stale claims, but to active ones as well. It works to deprive certain mineral owners of stripping rights whether those rights have been used or not. Therefore, HB 32 contains no saving provisions whatsoever.[95] The Court in *Short* simply sidesteps the taking issue by holding that it is the failure of the mineral owner to register his interest, and not the action of the state, that results in the extinguishment of his claim.[96] Such is not the case with HB 32 since it is clearly the action of the legislature in passing HB 32 that deprives certain mineral owners of their stripping rights. Thus, although *Short* may at first appear to be on point, there are many differences which suggest a different outcome would result from an HB 32 challenge.

Moreover, the dissent in *Short* strongly suggests that the four dissenting Justices would not look kindly upon HB 32: "If Indiana were by simple fiat to 'extinguish' all preexisting mineral interests in the State, or to transfer those interests to itself, to surface owners, or indeed to anyone at all, the action would surely be unconstitutional and unenforceable—at least absent just compensation."[97] This hypothetical is nearly identical to what is presented by HB 32. HB 32 in effect deprives mineral owners of certain preexisting mineral interests: namely, the right to surface mine. That right is now contingent upon the consent of the surface owner. It is true that HB 32 does not apply to all severed mineral interests—only those that are silent as to the method of mining—and merely purports to propose a rule of construction. Indeed, it could be argued that HB 32 does not transfer any interests at all, but merely gives effect to the intention of the original parties to broad form deeds. Nonetheless, the prior judicial interpretation of these deeds has been so long-standing, and the effect of HB 32 is so sweeping, that it is difficult to construe its effect other than as a taking.

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[94] *Short*, 454 U.S. at 538.

[95] *See* KRS §§ 381.930-.945 (Supp. 1984), *supra* note 44.

[96] *Short*, 454 U.S. at 530.

[97] *Id.* at 542 (Brennan, J., dissenting).

Although the applicable precedents are at times confused and contradictory, taken together they do produce a general outline of the Court's approach in taking cases. That approach involves a consideration of both the diminution in value resulting from challenged governmental action and the nature of that action. Under this analysis, HB 32 is indeed questionable at best. Despite the Court's recent reluctance to require compensation for governmental actions that may be termed "regulatory," the Court might well see HB 32 in a much different light since HB 32 is not at all regulatory. It does not prevent strip mining nor does it regulate the reclamation of surface mined land. It simply redresses what the legislature must have felt was an injustice—a bad deal for surface owners—by reversing the settled judicial interpretation of that deal.

IV. THE CONTRACT CLAUSE

Another potential constitutional challenge to HB 32 will doubtless center upon the contract clauses of the United States and the Kentucky constitutions. Article 1, section 10 of the United States Constitution provides that, "No state shall . . . pass any . . . Law impairing the Obligation of Contracts."[98] The Kentucky constitution contains a similar provision, similarly interpreted.[99]

The federal provision was apparently intended to restrain the states from enacting various forms of debtor relief, which might work to dry up credit for the emerging nation.[100] Early Supreme Court decisions, during Chief Justice Marshall's tenure, interpreted the clause much more broadly, however. In fact, the contract clause was for a time the Court's principal weapon to invalidate state legislation that infringed on private property rights.[101] Between 1874 and 1898, the contract clause was invoked in thirty-nine cases to invalidate state legislation.[102] Beginning in approximately 1898, however, cases decided under the contract clause began to diminish, in part because the Court began to

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[98] U.S. CONST. art. 1, § 10, cl. 1.

[99] KY. CONST. § 19.

[100] *See* J. NOWAK, R. ROTUNDA AND J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 419 (1978).

[101] *Id.*

[102] *Id.* at 424.

rely on the more flexible doctrine of substantive due process to strike down certain state legislation.[103]

The contract clause again came to the forefront during the Great Depression, when several states enacted debtor relief legislation, the constitutionality of which was challenged on contract clause grounds. The first of these cases was *Home Building & Loan Ass'n v. Blaisdell*.[104] In *Blaisdell*, the Court upheld a Minnesota statute providing a procedure by which the period of redemption for mortgages could be extended.[105] In so doing, the Court noted that despite the seemingly absolute nature of the contract clause, "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."[106] Indeed, The Court noted that there are numerous instances in which states are free to enact legislation, even though it may literally impair the obligation of some contract. Nonetheless:

> Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.[107]

In upholding the Minnesota statute, the Court noted five circumstances that it found significant, the first of which was the presence of an emergency.[108] The Minnesota legislation expressly declared the existence of an economic emergency and the Court found that such declarations "cannot be regarded as a subterfuge or as lacking in adequate basis."[109] Second, the legislation was enacted "not for the mere advantage of particular

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[103] *Id.* at 424-25.

[104] 290 U.S. 398 (1934).

[105] The statute under review was the Minnesota Mortgage Moratorium Law, MINN. STAT., ch. 339 (1933).

[106] *Blaisdell*, 290 U.S. at 428.

[107] *Id.* at 439.

[108] *Id.* at 444.

[109] *Id.*

individuals but for the protection of a basic interest of society."[110] Third, the relief afforded by the statute was appropriate to the emergency. Fourth, the conditions imposed as a prerequisite to extending the period of redemption appear to be reasonable. And finally, the legislation was a temporary measure, which by its terms was to expire no later than two years after its enactment.[111]

Subsequent cases allowed states even greater latitude in legislatively interfering with contractual expectations. The low water mark of the contract clause was reached in *City of El Paso v. Simmons*.[112] At issue in that case was the constitutionality of a Texas statute that essentially amended the terms of sale of certain state land.[113] The State of Texas had sold the land in question in 1910 under a statute that provided for forfeiture of the land to the State in the event of nonpayment of interest, but gave the purchaser or his vendee an unlimited right to reinstate his claim by paying the full amount of interest due. The statute was amended in 1941 to limit the right to reinstate to within five years after the date of forfeiture. The U.S. Supreme Court upheld the Texas statute, despite the fact that the contract in question was between the state and a private party, and would therefore be subject to stricter scrutiny than would a legislative infringement upon a purely private contract. The Court reasoned that since the promise of reinstatement "was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking,"[114] a change in that provision would not violate the contract clause. Following *El Paso*, several commentators suggested that the contract clause was dead,[115] but recently it has made a surprising recovery.

In 1977, the Supreme Court again used the contract clause to strike down state legislation in *United States Trust Co. v.*

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[110] *Id.* at 445.

[111] *Id.* at 445-47.

[112] 379 U.S. 497 (1965).

[113] The statute under review was 1941 Tex. Gen. & Spec. Laws, ch. 191, § 3, TEX. STAT. ANN., art. 5326 (Vernon 1941).

[114] 379 U.S. at 514.

[115] *E.g.*, H. CHASE AND C. DUCAT, THE CONSTITUTION AND WHAT IT MEANS TODAY 105 (rev. ed. 1973).

New Jersey.[116] In 1962, the states of New York and New Jersey had entered into a statutory covenant authorizing the Port Authority of New York and New Jersey to acquire, construct and operate a railroad, but prohibiting the Port Authority from subsidizing the railroad with any other income, all of which had been pledged as security for certain bonds. In 1974, both states repealed the 1962 covenant, and a trustee and holder of Port Authority bonds filed suit challenging the constitutionality of New Jersey's repealing legislation. The Court determined that by diminishing the security available to the bond holders, the repealing legislation had impaired contractual obligation of the states, but noted that, "a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."[117] Citing *Blaisdell* and *El Paso*, the Court held that the repeal of the covenant was neither essential nor reasonable in light of the surrounding circumstances, and therefore was prohibited under the contract clause.[118] The precedential value of this case is limited, however, by the fact that it was a 4-3 opinion with Justices Stewart and Powell taking no part in the case. Moreover, since the contract involved was a public one and thus subjected to greater scrutiny, it was unclear whether the case would be extended to statutes infringing on private contracts.

These limiting factors were effectively removed, however, in *Allied Structural Steel Co. v. Spannaus*.[119] In that case, the Court was called upon to decide the constitutionality of a Minnesota statute which assessed a "pension funding charge" against certain employers who closed offices within the state.[120] Following passage of the act, the plaintiff Allied had closed its Minnesota office in a move planned prior to the act's passage. Pursuant to the act, the State notified Allied that it owed a pension funding charge of $185,000. Allied contended that this constituted a

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[116] 431 U.S. 1 (1977) (4-3 decision). The statute under review were 1974 N.J. LAWS, c. 25 and 1974 N.Y. LAWS, c. 993.

[117] 431 U.S. at 21.

[118] *Id.* at 31.

[119] 438 U.S. 234 (1978).

[120] The statute under review was the Private Pension Benefits Protection Act, MINN. STAT. § 181B.01 (1974).

violation of the contract clause in that it essentially increased the appellant's funding obligations under its pension plan. The Court applied the principles set out in *Blaisdell* and held the Minnesota law unconstitutional.[121] The Court emphasized that Allied had no reason to anticipate that its funding obligations would be increased, and that it had "relied heavily, and reasonably, on this legitimate contractual expectation in calculating its annual contributions to the pension fund."[122] Moreover, since the law applied only to certain specified employers, it could "hardly be characterized, like the law at issue in the *Blaisdell* case, as one enacted to protect a broad societal interest rather than a narrow class."[123] Finally, the Court noted that in enacting the challenged law, the Minnesota legislature entered a field that it never before sought to regulate.[124]

Taken together, these cases indicate that the Supreme Court has recently breathed new life into the contract clause. Although the Court appears willing to defer to legislative judgments as to the best method to deal with broad social problems, and to allow some incidental infringement on contractual rights, the Court has clearly placed significant limits on legislative impairment of contracts. It seems unlikely that the Court will soon back down from the holdings of *United States Trust Co.* or *Spannaus.*[125]

These holdings appear to prohibit the kind of retroactive adjustment of contract rights mandated by HB 32. HB 32 cannot be said to have been enacted in response to an emergency, nor is it of temporary duration. The stated purposes of HB 32 speak in general terms of the many beneficial consequences expected to flow to society at large by virtue of the Act's passage.[126] It is arguable, however, that the true purpose of HB 32 is much more

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[121] *Spannaus*, 438 U.S. at 250.

[122] *Id.* at 246.

[123] *Id.* at 249.

[124] *Id.* at 234.

[125] Indeed, only three members of the Court (Justices Brennan, White and Marshall) dissented in each case. The majority opinion in *United States Trust Co.* was by Blackmun, J., joined by Burger, C.J., and Rehnquist and Stevens, JJ.; Stewart and Powell, JJ. did not participate. In *Spannaus*, the majority opinion was by Stewart, J., joined by Burger, C.J., and Powell, Rehnquist and Stevens, JJ.; Blackmun, J. did not participate. Thus, five of the current justices have aligned themselves with the majority opinions in either *United States Trust Co.* or *Spannaus*. Justice O'Connor, the newest member of the Court, did not take part in either case.

[126] *See* KRS § 381.930 (Supp. 1984), *supra* note 44.

narrow. Given the history surrounding HB 32, it is reasonable to infer that the true purpose of the Act is simply to adjust the respective rights between mineral owners and surface owners in order to reach what the legislature considered to be a more equitable result. Accordingly, it may well be said that the act is, in fact, addressed to "the mere advantage of particular individuals," rather than "the protection of a basic interest to society."[127]

The Act speaks of promoting certainty and uniformity in the operation of the law, and the free alienability of land, but the effect of the Act may be just the opposite. Prior to the passage of the Act, an owner of minerals under a broad form deed could rely upon his right to surface mine. Now he must determine whether the language of his particular deed states "in express and specific terms the method of coal extraction to be employed,"[128] and if not, whether strip mining was commonly in use in that locale at the time the instrument was executed. Admittedly, the answer to these questions should be relatively clear for a typical broad form deed executed in the late nineteenth century. However, since the presumption mandated by HB 32 that no stripping rights were intended to be transferred is rebuttable by "clear and convincing evidence," a mineral owner may attempt to prove that the parties to the severance deed intended to permit strip mining. Thus, the question of whether the mineral owner may surface mine certain land may be substantially less clear after the passage of HB 32 than before.

Two other factors discussed in *Blaisdell* also argue against the constitutionality of HB 32. Since there is no real emergency, it cannot be said that the relief afforded by the Act is "appropriately tailored to the emergency it was designed to meet."[129] Finally, the reasonableness of the conditions imposed by the Act is open to serious question. Indeed, whether one views HB 32 as reasonable may depend on whether one is a mineral owner or a surface owner. Just as the plaintiff in *Spannaus* relied heavily and reasonably on its legitimate contractual expectation, so too have both surface and mineral owners made business decisions based on a reasonable belief that the broad form deed

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[127] *See supra* note 110 and accompanying text.

[128] KRS § 381.940 (Supp. 1984).

[129] *Spannaus*, 438 U.S. at 242.

included the right to surface mine. They may in fact have purchased the minerals from someone else in reliance on the Kentucky cases interpreting the broad form deed as including the right to strip mine.[130] Most of the mineral and surface holdings in Eastern Kentucky have changed hands many times since the original severance deeds. Any such transfers since 1956, the date of *Buchanan*, were made with constructive, if not actual, knowledge of the legal effect of broad form deeds. Both mineral and surface owners who have acquired their interests recently probably did so at prices that were based upon the *Buchanan* holding. HB 32 not only deprives the mineral owner of a valuable right, but confers an unbargained-for bonanza upon surface owners. There has been far too much justifiable reliance upon *Buchanan* to turn away from that decision now.

In *Spannaus*, the Court concluded: "Entering a field it had never before sought to regulate, the Minnesota Legislature grossly distorted the company's existing contractual relationships with its employees by superimposing retroactive obligations upon the company substantially beyond the terms of its employment contracts."[131] Similarly, although the Kentucky legislature has regulated strip mining in the past, the Kentucky legislature has not in the past regulated the interpretation of broad form deeds. With this first entrance into the field, the legislature has substantially altered the rights, rather than the obligations, of the mineral owner.

Not all recent Supreme Court cases are favorable to the mineral owners' position, however. Several have upheld legislation challenged on contract clause grounds, but they are distinguishable. In *Texaco Inc. v. Short*,[132] discussed earlier, the Indiana Mineral Lapse Act[133] was challenged not only as a taking of property without just compensation, but also under the contract clause. It is not clear whether the mineral owners in *Short* alleged that the act impaired the obligation of the original severance

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[130] *See, e.g.*, Commerce Union Bank v. Kinkade, 540 S.W.2d 861, 863 (Ky. 1976); Croley v. Round Mountain Coal Co., 374 S.W.2d 852 (Ky. 1964); Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956); McIntire v. Marian Coal Co., 227 S.W. 298 (Ky. 1921). *See also* Peabody Coal Co. v. Pasco, 452 F.2d 1126 (6th Cir. 1971) and Peabody Coal Co. v. Erwin, 453 F.2d 398 (6th Cir. 1971).

[131] *Spannaus*, 438 U.S. at 249-50.

[132] 454 U.S. 516 (1982); *see supra* note 83 and accompanying text.

[133] *See supra* note 84 and accompanying text.

deeds or of subsequently executed leases. In any case, the Supreme Court did not reach the former issue. Noting that the leases in question had not been executed until after the statutory lapse, the Court stated:

> The statute cannot be said to impair a contract that did not exist at the time of its enactment. Appellants' right to enter such an agreement of course has been impaired by the statute; this right, however, is a property right and not a contract right. In any event, a mineral owner may safeguard any contractual obligations or rights by filing a statement of claims in the county recorder's office. Such a minimal "burden" on contractual obligations is not beyond the scope of permissible state action.[134]

The situation presented by HB 32 is much different. The contracts involved, the severance deeds themselves, were executed prior to passage of the Act. Moreover, as noted in the earlier discussion of the Court's treatment of the taking clause issue in *Short*, HB 32 (unlike the Indiana Act) contains no savings clause. Accordingly, *Short*'s holding on the contract clause issue is clearly distinguishable.

In another recent case raising contract clause questions, *Exxon Corp. v. Eagerton*,[135] the Supreme Court had occasion to consider the constitutionality of an Alabama statute that increased the severance tax on oil and gas extracted from Alabama wells and prohibited producers from passing on the increase to their purchasers.[136] Several oil and gas producers filed suit, contending among other things that the prohibition of pass-through provisions was an unconstitutional impairment of contract, at least as applied to pre-existing contracts containing such provisions. The Supreme Court rejected this argument, however, saying, "the pass-through prohibition did not prescribe a rule limited in effect to contractual obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance a 'broad societal interest,' . . . protecting consumers from ex-

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[134] *Short*, 454 U.S. at 531.

[135] 462 U.S. 176 (1983).

[136] The statute under review was 1979 Ala. Acts, No. 79-434, p. 687. § 1, as amended, ALA. CODE § 40-20-2(d) (1982).

cessive prices."[137] The Court distinguished *United States Trust Co.* and *Spannaus*, stating that the statutes challenged in those cases directly adjusted the rights of contracting parties, while the Alabama statute challenged in *Eagerton* left intact most of the rights and obligations established by the parties' contract and had only an incidental effect on a rather minor provision of the contract.[138]

Such is not true with HB 32. Often, mining may be commercially unfeasible by any methods other than strip mining. In such cases, HB 32 may effectively deprive the mineral owner of all the rights he may have reasonably expected under his deed of severance. Moreover, the alleged impairment of contractual rights is hardly incidental. The sole purpose and effect of HB 32 is to alter what was formerly held to be the contractual obligations of the grantor and grantee under a deed of severance.

V. SEPARATION OF POWERS

Another argument against the constitutionality of HB 32 centers on the doctrine of separation of powers. By mandating a particular interpretation for a class of deeds, the legislature may have unconstitutionally invaded the province of the judiciary. Although there is no federal constitutional requirement that state legislatures refrain from exercising judicial power, the Kentucky constitution clearly mandates such a separation of powers.[139]

The question then becomes whether the interpretation of broad form deeds is exclusively within the "judicial power." That term is not defined in the Kentucky constitution itself, but its meaning has been discussed in *Rohde v. City of Newport*.[140] At issue in *Rohde* was the validity of a Kentucky statute prohibiting any city council from issuing public bonds until a court

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[137] *Eagerton*, 462 U.S. at 191.

[138] *Id.* at 192.

[139] KY. CONST. § 109. Section 109 provides: "The judicial power of the commonwealth shall be vested exclusively in one Court of Justice. . . ." The Kentucky constitution further prohibits encroachment upon this power in § 28: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

[140] 55 S.W.2d 368 (Ky. 1932).

of competent jurisdiction had approved the issuance as being constitutional. The plaintiff argued that this was an unconstitutional grant of nonjudicial power to the courts. Kentucky's highest court disagreed, saying: "It is the distinctive nature of judicial power to determine rights and obligations with reference to transactions that are past, or concerning conditions that exist at the time of the exercise of the power."[141]

The interpretation of deeds certainly is a determination of rights and obligations with reference to tranactions that are past, and would, therefore, fall within the general definition of judicial power found in *Rohde*. There are, however, many instances of state legislation that confirm or modify in some way the interpretation of deeds or other legal instruments. It may be useful, therefore, to examine the limits of this legislative power.

It is generally held that, despite constitutional prohibitions against assuming judicial powers, the legislature is free to enact curative statutes as long as they do not impair vested rights or deprive persons of specific titles.[142] The Kentucky statute providing that a conveyance shall not be void or invalid because of a defective certification by the county clerk[143] is an example of such a curative statute. There are, presumably, adverse claimants who might take title to property if such deeds were held to be invalid, but such a claim is probably too speculative to be deemed a vested right, and the legislature is therefore free to extinguish it.

Similarly, there are numerous examples of legislation enacted to codify existing common law rules of interpretation. For instance, Kentucky has by statute defined such familiar deed terms as "without heirs,"[144] "estate for life, remainder to heirs,"[145] "general warranty"[146] and "special warranty."[147] These definitions appear to comport closely with common law and, therefore, are not unconstitutional assumptions of judicial power by the legislature. Were they to vary prior judicial

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[141] *Id.* at 370.

[142] *See* H. BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 297 (3rd ed. 1910).

[143] KRS § 382.230 (1972).

[144] KRS § 381.080 (1972).

[145] KRS § 381.090 (1972).

[146] KRS § 382.030 (1972).

[147] KRS § 382.040 (1972).

interpretations, however, they would present a constitutional question.

A number of statutes, however, do alter common law rules of construction. Some are explicitly limited to deeds made after the effective date of the statute.[148] Others have been interpreted to apply only prospectively. For instance, Kentucky has provided by statute (in contrast to the common law rule) that a conveyance of real estate to husband and wife does not create a right of survivorship unless that right is expressly provided for.[149] In *Elliot v. Nichols*,[150] Kentucky's highest court held that this statute applied only prospectively, and, indeed, suggested that the legislature could not have made the rule retroactive. The Court reasoned that prior to enactment of the statute a grant to husband and wife vested title in both. Thus, "[t]he Legislature could not have diverted any portion of the title, and we must presume did not intend to do so, ..."[151]

Notwithstanding this language, several Kentucky statutes in derogation of the common law purport to apply retroactively. One such statute is Kentucky Revised Statutes (KRS) section 381.221, which makes unenforceable any possibility of reverter or right of entry created prior to enactment of the statute unless the owner thereof records a declaration of intent to preserve his interest within five years from passage of the act. Apparently, this savings provision was added to surmount constitutional objections,[152] and the courts have since upheld the statute on two grounds: first, the savings clause transforms the statute into "the equivalent of a statute of limitations,"[153] and second, a possibility of reverter or right of entry amounts to no more than a mere expectancy, and

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[148] *E.g.*, KRS § 381.219 (1972) which states in part:

> A fee simple subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty (30) years from the effective date of the instrument creating such fee simple subject to a right of entry. If such contingency occurs within said thirty (30) years the right of entry, which may be created in a person other than the person creating the interest or his heirs, shall become exercisable notwithstanding the rule against perpetuities.

[149] KRS § 381.050 (Supp. 1984).

[150] 67 Ky. 502 (1868).

[151] *Id.* at 506.

[152] *Compare* KRS § 381.218-19 (1972) *with* KRS § 381.221 (1972) (the former have no saving provisions while the latter does).

[153] Atkinson v. Kish, 420 S.W.2d 104, 109 (Ky. 1967).

does not come within the constitutional protection afforded "vested rights."[154]

One Kentucky statute amending the common law purports to apply retrospectively without any savings clause. KRS section 381.070 converts estates entailed into estates in fee, whether created prior or subsequent to the passage of the statute.[155] There are apparently no cases reaching the constitutional question raised by retroactive application of this statute. However, the interest cut off by this statute was a possibility of reverter which has been held in another context to be not sufficiently "vested" as to acquire constitutional protection.[156]

These examples raise questions discussed in the previous sections of this article, and demonstrate the interrelation of the constitutional issues involved here. To the extent that a property interest is "vested," a statute invalidating it may constitute an impairment of contractual obligations or a "taking." Moreover, a legislative attempt to affect "vested" rights, by dictating a particular construction for a class of deeds, may unconstitutionally infringe on the power of the courts.

There are several Kentucky cases dealing with alleged exercises of judicial power by the legislature, but none are directly applicable. Most of these cases deal with an act of the legislature which purports to prescribe a rule of procedure. For instance, the Kentucky courts struck down statutes limiting punishment for contempt of court in *Arnett v. Meade*[157] and limiting the prayer for damages in malpractice actions in *McCoy v. Western Baptist Hospital.*[158] More recently, the Kentucky Supreme Court in *Lewis v. Smothers*[159] struck down a statute prohibiting the courts from enjoining the operation of an administrative order for the revocation of suspension of a liquor license pending appeal.[160] In so holding, the court stated:

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[154] Cline v. Johnson County Bd. of Educ., 548 S.W.2d 507, 508 (Ky. 1977).

[155] KRS § 381.070 (1972).

[156] *See Cline*, 548 S.W.2d at 508.

[157] 462 S.W.2d 940 (Ky. 1971) (the court found the legislation to be an unreasonable restriction which could defeat or materially impair the exercise of judicial functions).

[158] 628 S.W.2d 634 (Ky. Ct. App. 1981) (holding the action to be an invasion of rule making power of courts).

[159] 672 S.W.2d 62 (Ky. 1984).

[160] *See* KRS § 243.580(2) and (3) (1981) which was the statute under review.

> This issue is in essence the "flip side" of the *Arnett v. Meade, supra*, issue. As we discussed earlier, in *Arnett*, the legislature tried to place limits upon the punishment a court could mete out for contempt. This Court held that the legislature could not set limits that interfered with the inherent judicial power to function. *Id.* at 948. In the case at bar the legislature has attempted to interfere with the judicial power in an inverse manner. Rather than attempting to limit the court's power to punish, it has attempted to limit the court's power to stay a possibly unjustly imposed punishment. In KRS 243.580(2) as in *Arnett* the legislative attempt so interferes with the judicial power as to render those legislated limits unconstitutional.[161]

One might read these Kentucky cases as merely prohibiting the legislature from enacting procedural rules. Such a reading would be too narrow, however. In *Thweatt v. Bank of Hopkinsville*,[162] Kentucky's highest court considered an act of the General Assembly purportedly validating a deed entered into by the Bank of Kentucky. The court struck down the law since it had been passed during the pendency of the lawsuit. In dicta, the court indicated that the statute would be constitutional as applied to a case not pending at the time of its enactment, since it did not impair the obligation of contract, or affect substantial equities or vested rights. This latter test also expresses a limit of legislative power.

This is similar to the rule followed by other jurisdictions. For instance, in *Davis v. Union Pacific Ry.*,[163] the Kansas Supreme Court considered the constitutionality of a statute that attempted to avoid the operation of a judicial determination.[164] A prior Kansas case had held that a grant of property to two people "or the survivor of them" was not sufficient to create a joint tenancy.[165] In response, the legislature enacted the challenged statute, which dictated an opposite result. In striking down the act, the court cited this paragraph from a treatise on constitutional limitations:

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[161] *Lewis*, 672 S.W.2d at 65.
[162] 81 Ky. 1 (1883).
[163] 476 P.2d 635 (Kan. 1970).
[164] The statute under review was KAN. STAT. ANN § 58-2270 (Supp. 1969).
[165] *Davis*, 476 P.2d at 638, citing Riggs v. Snell, 250 P.2d 54 (Kan. 1960).

> As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. "To declare what the law *is*, or *has been* is a judicial power, to declare what the law *shall be* is legislative. . . ."[166]

The *Davis* case is closely analogous to that presented by HB 32. Both involve legislative attempts to undo the interpretation of certain deeds by the courts. Both involve statutes that apply retroactively, in that they purport to dictate a particular interpretation of deeds executed prior to their enactment. Although the absence of applicable Kentucky precedent makes it difficult to predict how the Kentucky courts may deal with HB 32, the rationale of the *Davis* court is compelling. The interpretation of deeds is normally a judicial function. Certainly there are many instances in which the legislature has acted to confirm the validity of certain titles or to prospectively change the law dealing with transfer of interest in real property. When, however, the legislature seeks to "determine rights and obligations with reference to transactions that are passed,"[167] it exercises a power which is essentially judicial. Accordingly, HB 32 may well violate the separation of powers mandated by the Kentucky constitution.

DUE PROCESS AND "IRREBUTTABLE" PRESUMPTIONS

A final constitutional challenge to HB 32 focuses on the presumption mandated by the Act. In instances where HB 32 applies, a presumption arises concerning the intent of the parties to a severance deed. This presumption may be rebutted by "clear and convincing evidence to the contrary."[168] As noted above, such evidence will not normally be available,[169] and the requirement that any such proof be "clear and convincing" may as a practical matter render HB 32's presumption irrebuttable.

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[166] *Davis*, 476 P.2d at 641 (quoting COOLEY'S CONSTITUTIONAL LIMITATIONS 191 (8th ed. 1977)).

[167] *Rohde*, 55 S.W.2d at 370.

[168] KRS § 381.940 (Supp. 1984).

[169] *See supra* notes 44-48 and accompanying text.

If so, the Act may well be unconstitutional, for as the Supreme Court noted in the recent case of *Vlandis v. Kline*,[170] "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."[171] At issue in *Vlandis* was the constitutionality of a Connecticut statute that created an irrebuttable presumption that certain individuals were non-residents for the purpose of calculating tuition due at state universities.[172] In striking down the law, the Court stated that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment."[173]

Although the presumption created by HB 32 is not irrebuttable on its face, it may nonetheless "operate to deny a fair opportunity to rebut it." [174] The Supreme Court has not, however, had occasion to consider whether a presumption that is rebuttable, at least in name, may be irrebuttable in fact—and thus violative of due process. Given the more serious constitutional problems which face HB 32 as discussed above, it is unlikely that a court would overturn the Act on this basis alone.

VII. *Doochin v. Rackley*

Finally, a word must be said concerning the Tennessee case of *Doochin v. Rackley*.[175] In *Doochin*, the Tennessee Supreme Court was called upon to determine the constitutionality of a Tennessee statute almost identical to HB 32.[176] Indeed, it appears that the Tennessee statute was used as a model for HB 32.[177] The Tennessee court upheld the statute against the same constitutional challenges discussed in this article, as well as one based on the equal protection clause. The case is distinguishable, however, since the Tennessee courts had previously held that some

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[170] 412 U.S. 441 (1973).

[171] *Id.* at 446.

[172] *Id.* at 442-43; *see also* CONN. GEN. STAT. REV. § 10-329(b) (Supp. 1969) as amended by Public Act No. 5, § 122 (June Sess. 1971).

[173] *Vlandis*, 412 U.S. at 446 (quoting Heiner v. Donnan, 285 U.S. 312, 329 (1932)).

[174] *Id.* (also quoting *Heiner*, at 329).

[175] 610 S.W.2d 715 (Tenn. 1981).

[176] *See* TENN. CODE ANN. § 64-511 (Supp. 1980) (currently codified at TENN. CODE ANN. § 66-5-102 (1982)).

[177] *See supra* note 64.

(if not all) deeds of severance did not grant the right to surface mine.[178] This fact is crucial to the reasoning of the court:

> Since neither the plaintiffs nor their predecessor in title was ever conveyed the legal right to strip mine, it follows, and we hold, that the 1977 Act did not deprive them of property without due process. The Act merely codified the common law governing the construction of deeds and other such contracts.
>
> Nor does the Act encroach upon the domain of the Judiciary. Rather, the statutes codify the age-old, common law rule that the intent of the parties governs in the construction of contracts, deeds, wills and the like.[179]

In Kentucky, by contrast, courts have construed the broad form deed as conveying grantees the legal right to strip mine.[180] Depriving them of that right therefore has very different constitutional implications. Moreover, the Kentucky Act does more than simply "codify the age-old, common law rule."[181] Although it purports to do no more than give effect to the intent of the parties, the statute actually upsets the settled judicial interpretation of that intent. The intent has not changed: what has changed is the legal effect of the parties' manifestation of that intent. Since the Tennessee statute challenged in *Doochin* did not work such a change, *Doochin* is of questionable relevance to HB 32.

CONCLUSION

HB 32 is constitutionally suspect on several grounds. Whether it is ultimately upheld may depend on how firmly the Kentucky

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[178] An earlier Tennessee case, Campbell v. Campbell, 199 S.W.2d 931 (Tenn. Ct. App. 1946), held that a mineral reservation "with sufficient privilege to operate and market the same" did not reserve to the grantor the right to destroy the surface by causing subsidence. It is difficult to determine how far this holding would have been extended. Such determination is rendered unnecessary, however, since the *Doochin* court, without citing *Campbell*, concluded as a matter of common law that deeds such as those described by the statute did not grant the right to strip mine.

[179] *Doochin*, 610 S.W.2d at 719.

[180] *See, e.g.*, Commerce Union Bank v. Kinkade, 540 S.W.2d 861, 863 (Ky. 1976); Croley v. Round Mountain Coal Co., 374 S.W.2d 852 (Ky. 1964); Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956); McIntire v. Marian Coal Co., 227 S.W. 298 (Ky. 1921). *See also* Peabody Coal Co. v. Pasco, 452 F.2d 1126 (6th Cir. 1971) and Peabody Coal Co. v. Erwin, 453 F.2d 398 (6th Cir. 1971).

[181] *Doochin*, 610 S.W.2d at 719.

Supreme Court is wedded to its prior interpretation of broad form deeds. To the extent that the court remains loyal to its prior cases, this legislative attempt to reverse the holdings of those cases will face serious constitutional problems. But if the judiciary's attitude toward broad form deeds has changed in recent years, and it seeks a way out of its previous holdings, HB 32 may provide just such an opportunity. In any case, it is clear that the final word on broad form deeds in Kentucky has yet to be heard.