



January 1989

Kentucky's Broad Form Deed Amendment: Constitutional Considerations

Carolyn S. Bratt
University of Kentucky

Karen J. Greenwell
Wyatt, Tarrant & Combs, LLP

Follow this and additional works at: <https://uknowledge.uky.edu/jnrel>



Part of the [Oil, Gas, and Mineral Law Commons](#), and the [Property Law and Real Estate Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

Bratt, Carolyn S. and Greenwell, Karen J. (1989) "Kentucky's Broad Form Deed Amendment: Constitutional Considerations," *Journal of Natural Resources & Environmental Law*: Vol. 5 : Iss. 1 , Article 3.
Available at: <https://uknowledge.uky.edu/jnrel/vol5/iss1/3>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in *Journal of Natural Resources & Environmental Law* by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Kentucky's Broad Form Deed Amendment: Constitutional Considerations

CAROLYN S. BRATT* AND KAREN J. GREENWELL**

Kentucky's 1988 general election saw yet another attempt to deal with the continuing problem of broad form deeds. Eighty-three percent of the voters approved the so-called Broad Form Deed Amendment [hereinafter Amendment] to the Kentucky Constitution.¹ The Amendment provides:

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 for the purposes of coal extraction by only 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.²

* W.L. Matthews Professor of Law, University of Kentucky College of Law. B.A., 1965, State University of New York at Albany; J.D., 1974, Syracuse University. The author gives special recognition to the research assistance of Gladys Green, 2d year law student, University of Kentucky College of Law.

** B.A., 1976, J.D., 1985, University of Kentucky. Associate with Wyatt, Tarrant & Combs, Lexington, Kentucky. The opinions expressed in this article are those of the authors. An earlier version of parts of this article appeared in Greenwell, *On The Constitutionality of Kentucky's Mineral Deed Act*, 13 N. KY. L. REV. 219 (1986).

¹ 882,960 voted yes and 187,119 voted no. "Presidential Preference Primary" published by the Office of Bremer Ehrler, Secretary of State (March 8, 1989).

² KY. CONST. § 19(2).

The Broad Form Deed Amendment retroactively imposes a special rule of interpretation on instruments which create a right to mine coal. The rule is cast in the form of a rebuttable presumption that the original parties to these agreements intended to limit the mineral estate owner to the use of those mining methods which were "commonly known to be in use" at the time the instrument was executed. Most broad form deeds were executed in the early 1900s when deep-shaft mining was the common method of mineral extraction.³ Therefore, the Amendment limits today's mineral owners who hold under a broad form deed to the use of deep-shaft mining methods unless they can overcome the Amendment's presumption by clear and convincing evidence.

The presumption reverses a long line of judicial decisions in Kentucky.⁴ Kentucky's courts have consistently held that the mineral owner under a broad form deed had a virtually unrestricted power to employ later-developed mining methods to extract its coal. The presumption is both practically and factually irrebuttable. Since the original parties to the transaction are long since dead, no direct evidence is available to rebut the Amendment's presumption. It is factually impossible to overcome the presumption because the mineral owner cannot prove that the contemporary mining method the owner wants to employ was in common use in Kentucky before the method was actually developed.⁵

The Amendment is a thinly disguised attempt to readjust property rights in favor of the surface owner and against the mineral estate owner by mandating the reinterpretation of contracts made almost one hundred years ago.⁶ Such a law raises a

³ Absent clear and convincing evidence to the contrary, the Amendment prohibits mineral extraction by surface mining, augering, long wall mining, and continuous seam mining since those techniques were developed well after most broad form deeds were executed.

⁴ See *infra* text accompanying notes 11-54 for a discussion of the history of Kentucky case law and statutory law concerning the rights of the respective parties to a broad form deed.

⁵ The Kentucky Supreme Court made the same point in *Akers v. Baldwin*, 736 S.W.2d 294, 308-9 (Ky. 1987). Modern surface mining, the primary target of the Broad Form Deed Amendment, was non-existent in the early 1900s when most, if not all, broad form deeds were executed.

⁶ *Id.* at 310.

The legislative preamble to the Amendment articulates seven other purposes for the Amendment. They are:

[I]t is necessary to facilitate and require the demonstration of a clear

number of federal constitutional considerations. Does the application of the Broad Form Deed Amendment to already existing contracts of severance constitute a taking of property without compensation in violation of the fifth and fourteenth amendments?⁷ Does the Amendment impermissibly interfere with private contracts?⁸ Does either the Amendment's retroactive effect or its factually irrebuttable presumption impermissibly infringe on the due process protections afforded by the fourteenth amendment?⁹ Does the Amendment create classes which contravene the guarantees of the equal protection clause of the fourteenth amendment?¹⁰ This article will explore and evaluate each of these federal constitutional questions raised by the Kentucky Broad Form Deed Amendment.

I. JUDICIAL AND LEGISLATIVE HISTORY OF THE BROAD FORM DEED

Kentucky law has long recognized that severance can create distinct legal estates in the surface of the land and in the minerals

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; and

[I]t is desirable to protect the security of titles to land and improvements thereto; and

[T]he free alienability of land must be promoted; and

[W]e must prevent hardship and injustice to surface or mineral owners arising from uncertainty of the law; and

[W]e should 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; and

[W]e should 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

[I]t is desirable to foster certainty and uniformity in the operation of the law.

1988 KY. ACTS, ch. 117.

⁷ U.S. CONST. amend. V provides in part: "nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. XIV provides in part: "nor shall any State deprive any person of . . . property, without due process of law."

⁸ U.S. CONST. art. I, § 10 provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

⁹ U.S. CONST. amend. XIV provides in part: "nor shall any State deprive any person of life, liberty or property, without due process of law."

¹⁰ U.S. CONST. amend. XIV provides in part: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

under the land.¹¹ However, creating theoretically separate, but practically intertwined estates in the same piece of land has led to much litigation and various legislative attempts to define the rights of the owners of these competing interests. The resolution of these conflicts has been particularly difficult in Kentucky because of the widespread use of broad form mineral deeds to sever the mineral estate from the surface estate.¹²

A broad form mineral deed contains a very long and detailed description of all the rights granted to the mineral owner.¹³ In addition to conveying "all" the minerals to the grantee, a broad form deed usually includes a grant of such surface rights as the mineral owner deems "necessary or convenient" for the full and free exercise and enjoyment of the mineral estate. Typically, the broad form deed also contains an express waiver of liability for damage caused by the mineral owner's use of the surface in its mining operation. The interest retained by the surface owner is expressly limited only to such surface rights as are consistent with the mineral rights conveyed.¹⁴

As early as 1916 in *Blue Grass Coal Corp. v. Combs*,¹⁵ Kentucky's highest court held that, after severance, the surface estate is servient to the mineral estate. A few years later, in *McIntire v. Marion Coal Company*,¹⁶ the same court interpreted a mineral deed granting the mineral owner the right to use the surface of the land as the mineral owner deemed "necessary and convenient" and reserving the surface rights to the grantor. The

¹¹ See *Kincaid v. McGowan*, 4 S.W. 802 (1887). The doctrine of severance is recognized in all jurisdictions except Louisiana. 4 D. VISH, *COAL LAW AND REGULATION*, § 80.01[1] (1983). The doctrine of severance was also part of the English common law. See Note, *The Common Law Rights To Subjacent Support and Surface Preservation*, 38 Mo. L. REV. 234, 234-35 (1973).

¹² Various types of broad form mineral deeds were used by coal and land companies in Kentucky. The most prevalent broad form deed in the early 1900s was the Mayo deed named for its creator John C.C. Mayo. For a history of the Mayo and other broad form mineral deeds see, Pfeiffer, *Kentucky's New Broad Form Deed Law - Is It Constitutional?* 1 J. MIN. L. & POL'Y 57 (1985-86); Note, *Kentucky's Experience With The Broad Form Deed*, 63 KY. L.J. 107 (1974-75); and Note, *Broad-Form Deed-Obstacle to Peaceful Co-Existence Between Mineral and Surface Owners*, 60 KY. L.J. 742 (1971-72).

¹³ For examples of typical broad form deed language see *Watson v. Kenlick Coal Co.*, 498 F.2d 1183, 1185-86 (6th Cir. 1974); and *Case v. Elkhorn Coal Corp.*, 276 S.W. 573, 574 (Ky. 1925).

¹⁴ *Akers*, 736 S.W.2d at 300.

¹⁵ 182 S.W. 207 (Ky. 1916).

¹⁶ 227 S.W. 298 (Ky. 1921).

McIntire court strongly reaffirmed the dominance of the mineral estate. It held the mineral estate was “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.”¹⁷

In the *McIntire* decision the court found that the rights conveyed to the mineral estate owner were far superior to the rights retained by the surface estate owner. The mineral owner had the power to exclude the surface owner so long as the mineral grantee paid compensation for any surface improvements it destroyed.¹⁸ The court refused to examine the wisdom of the grantor’s action in entering into such a transaction. Instead, the court chose to construe the deed strictly according to its terms and against the grantor.

Kentucky’s highest court has also recognized a limitation on the mineral owner’s power to use the surface of the land. In *Case v. Elkhorn Coal Corp.*,¹⁹ the court held the surface owner could complain about the mineral owner’s use of the surface if the mineral owner exercised its power “oppressively, arbitrarily, wantonly or maliciously.” Later cases made it clear that this was not a very significant restriction on the mineral owner’s use of the surface.

For example, in *Rudd v. Hayden*, the Court of Appeals stated that a mineral owner’s right to use the surface may include the right to employ mining techniques other than the deep-shaft method such as “open,” “cut,” “strip,” or “hydraulic” methods of mining.²⁰ In *Wells v. North East Coal Company*, the high court held that the mineral owner could use the surface in any way it deemed necessary to obtain its minerals.²¹ Kentucky’s highest court reached the same conclusion in its first surface coal mining case, *Treadway v. Wilson*.²² The mineral owner was permitted to remove its coal by any proposed surface mining methods as long as it was not exercised “oppressively, arbitrarily, wantonly or maliciously.”²³

¹⁷ *Id.* at 300.

¹⁸ *Id.*

¹⁹ 276 S.W. 573 (Ky. 1925).

²⁰ 97 S.W.2d 35, 37 (Ky. 1936).

²¹ 72 S.W.2d 745 (Ky. 1934).

²² 192 S.W.2d 949 (Ky. 1946).

²³ *Id.* at 950. The court quoted from *Case*, *supra* note 19.

Finally, in the 1956 case of *Buchanan v. Watson*,²⁴ Kentucky's highest court squarely faced the twin issues of the right of the mineral owner under a broad form deed to employ modern surface mining methods to extract the coal and the effectiveness of the waiver of damage provision in a broad form deed. Both issues were resolved in favor of the owner of the minerals.

The trial court in *Buchanan* had found that surface mining would destroy the surface and was the only feasible and economical way to mine the coal. The surface owner argued that the parties had not contemplated using surface mining techniques when the deed was executed in 1907. Therefore, according to the surface owner, the mineral owner's use of such a later-developed mining method violated the surface owner's rights.²⁵

The *Buchanan* court held that, although the parties may not have specifically contemplated surface mining, the mineral deed nevertheless granted the right to remove *all* the minerals.

It seems clear that the parties intended the conveyance of the coal. To deny the right to remove it by the only feasible process is to defeat the principal purpose of the deed.

We think the [trial court] correctly decided that since the appellant had the right to remove all of the coal in, on, and under the surface of this tract, the particular method contemplated by the parties (in the absence of language prohibiting other methods) does not preclude him from utilizing the only feasible process of extracting the coal.²⁶

The *Buchanan* court also sustained the enforceability of the deed's waiver of damage clause. It found that when a mineral estate was created by a broad form deed containing a waiver of damage provision, the mineral owner is only liable for damages when the surface is destroyed arbitrarily, wantonly, or maliciously.²⁷

The *Buchanan* court predicated its decision on the need it perceived for certainty and uniformity of mineral titles as well as the hardship uncertainty would cause.²⁸ The court said:

²⁴ 290 S.W.2d 40 (Ky. 1956).

²⁵ As is typical of broad form deeds, the deed did not mention the types of mining methods to be used.

²⁶ *Buchanan*, 290 S.W.2d at 42-43.

²⁷ *Id.* at 43.

²⁸ *Id.* at 44.

[T]he rule [that no damages are assessed when the surface is damaged by modern mining methods] has become so firmly established that it is a rule of property law governing the rights under many mineral deeds covering much acreage in Eastern Kentucky. To disturb this rule now would create great confusion and much hardship It is especially desirable that the law of property rights should remain stable after it has been settled.²⁹

Later judicial decisions did not disturb the *Buchanan* court's determination of these two principles of Kentucky's property law.³⁰ For example, in *Blue Diamond Coal Co. v. Neace*,³¹ the court extended the *Buchanan* rationale by permitting the mineral owner under a broad form deed with a waiver of damage provision to use auger mining techniques to extract its coal. The *Blue Diamond* decision further strengthened the rights of mineral owners because the court stated that:

The mere exercise of a right to mine in a particular fashion cannot of itself be classified as arbitrary, wanton, or malicious. It is the manner of the mining operation, as distinguished from the fact of its being carried on, that determines the liability for damages.³²

In *Kodak Coal Company v. Smith*,³³ a mineral owner was permitted to auger mine under its broad form deed, even though the coal could have been mined by other methods less destructive to the surface.³⁴

²⁹ *Id.* at 43-44.

³⁰ For example, in *Bevander Coal Co. v. Matney*, 320 S.W.2d 301 (Ky. 1959), the court reaffirmed that a waiver of damage provision in a mineral deed precluded the surface owner from obtaining damages unless the mining was oppressive, arbitrary, wanton or malicious. The decision in *Wiser Oil Co. v. Conley*, 346 S.W.2d 718 (Ky. 1960), may appear to be an exception to *Buchanan's* no-damage rule. The surface owner was permitted to sue for damages when the mineral estate owner extracted oil and gas by a new technique called "water flooding." However, the *Wiser* court distinguished *Buchanan* because the mineral deed in *Wiser* did not contain a waiver of damage provision. In *Croley v. Round Mountain Coal Co.*, 374 S.W.2d 852 (Ky. 1964), the court permitted the surface owner to recover damages from the mineral owner who was auger mining on other land and casting waste material on the land of the surface owner. The practice was found to be mining conducted in an oppressive, arbitrary, wanton or malicious manner.

³¹ 337 S.W.2d 725 (Ky. 1960).

³² *Id.* at 727.

³³ 338 S.W.2d 699 (Ky. 1960).

³⁴ Other cases in which the *Buchanan* decision was adhered to and extended

Kentucky's adherence to the principles of property law articulated in the *Buchanan* decision did not occur merely because of a lack of opportunity to reconsider and reverse that decision. In 1968, in *Martin v. Kentucky Oak Mining*,³⁵ the Kentucky Court of Appeals was presented with a coordinated challenge to the *Buchanan* decision. The Kentucky Civil Liberties Union, the Appalachian Group to Save The Land and People, Inc., and the Sierra Club joined the plaintiff surface owner and argued that the court should overrule its decision in *Buchanan*.³⁶ The court, however, affirmed both the correctness and the continued vitality of the *Buchanan* decision. It once again held that under a broad form deed containing a waiver of damage provision, the mineral owner has the right to employ later-developed mining methods, including surface mining, without incurring liability for the damage such mining methods cause to the surface.

The *Martin* court based its reaffirmation of the *Buchanan* decision, in part, on its determination that "the mineral owner [under a broad form deed] bought and paid for the right to destroy the surface in a good faith exercise of the right to remove the minerals"³⁷ Therefore, the court found no basis for obligating the mineral owner to pay damages for exercising that right. Similarly, the *Martin* court determined that the parties to a broad form deed intended the mineral owner's right to use the surface would be superior to any competing right of the surface owner.³⁸ As a result, the court said the mineral owner could not

include: *Ritchie v. Midland Mining Co.*, 347 S.W.2d 548 (Ky. 1961); *Wright v. Bethlehem Minerals Co.*, 368 S.W.2d 179 (Ky. 1963); *Blue Diamond Coal Co. v. Campbell*, 371 S.W.2d 483 (Ky. 1963); and, *Croley v. Round Mountain Coal Co.*, 374 S.W.2d 852 (Ky. 1964). The Kentucky Supreme Court's opinion in *Commerce Union Bank v. Kinkade*, 540 S.W.2d 861 (Ky. 1976), is not in conflict with the *Buchanan* decision. The mineral estate owner was not permitted to surface or open pit mine the minerals because the mineral deed was not a broad form deed.

³⁵ 429 S.W.2d 395 (Ky. 1968).

³⁶ *Id.* at 397.

³⁷ *Id.* at 399. The conclusion that the mineral owner had bought and paid for the right to destroy the surface was not without foundation. The *Martin* court found that in 1900, a time when the use of broad form deeds was proliferating in Eastern Kentucky, the average value per acre of land in the county in which the contested mineral operation was located was then only \$2.90 per acre. The mineral estate at issue in *Martin* had been purchased for \$3.00 per acre. *Id.* at 398.

³⁸ *Id.* at 397-99. The conclusion that the parties to a broad form deed intended the mineral owner's right to use the surface to be superior to any competing right of use in the surface owner also had a basis in fact. The court relied on the fact that in the county wherein the *Martin* controversy arose a great percentage of the land was

be forced to repurchase the right to use the surface merely because it chose to employ a later-developed mining method.

The opponents of surface mining were consistently unsuccessful in their attempts to prohibit the use of modern mining methods, particularly surface mining, through judicial decisions. However they also pursued legislative solutions.³⁹ In 1974, the Kentucky legislature passed a statute which required a mineral owner to secure the written consent of the surface owner before the state could issue a surface mining permit.⁴⁰ In *Department for Natural Resources & Environmental Protection v. No. 8 Ltd. of Virginia*,⁴¹ the Kentucky Supreme Court held the statute was an unconstitutional exercise of the state's police power. The court determined the statute was not an environmental conservation measure because it did not prohibit surface mining or regulate its attendant problems. The statute merely granted the surface owner, at its option, the right to veto or permit surface mining of the land. The court found that the state was really motivated by an impermissible purpose of changing "the relative legal rights and economic bargaining positions of many private parties under their contracts rather than achiev[ing] any public purpose."⁴²

hillside land of no productive value. As to the small amounts of bottom land, the court accepted the argument that to obtain the best price possible for the mineral rights in the hillside land, the owner sold the rights to the bottom land. The owner could reasonably be understood to be "willing to take the chance on future destruction of his bottom land to get the immediate money." *Id.* at 398. The court said that if the surface owner had intended otherwise, the bottom land could have been excluded from the deed. Also, the court justified its finding that the parties intended the possible destruction of the surface because such a possibility existed even if mining were restricted to deep mining methods.

Slag and waste could have been piled on the land; tram roads requiring land fills could have been built and slides could have been caused (see *Wells v. North East Coal Co.*, 255 Ky. 63, 72 S.W.2d 745); springs could have been filled with dirt and muck, stones and other debris could have been deposited so as to destroy the land for agricultural purposes (see *United Carbon Co. v. Webb*, 282 Ky. 79, 137 S.W.2d 733); tipples and mine houses could have been built.

Id. at 398.

³⁹ The opponents of surface mining fared no better in federal court than they had in state court. In *Watson v. Kenlick Coal Co.*, 498 F.2d 1183 (6th Cir. 1974), *cert. denied*, 422 U.S. 1012 (1975), the court rejected the surface owner's contention that the *Buchanan* construction of broad form deeds was an unconstitutional taking of private property under the fifth and fourteenth amendments to the United States Constitution.

⁴⁰ KY. REV. STAT. ANN. § 350.060(2)(1974)(effective Jan. 1, 1975)(Michie/Bobbs-Merrill 1985) [hereinafter KRS].

⁴¹ 528 S.W.2d 684 (Ky. 1975).

⁴² *Id.* at 687.

In 1977 Congress enacted the Surface Mining Control and Reclamation Act⁴³ (SMCRA) which established a comprehensive regulatory scheme for surface mining and reclamation operations on both federal and private lands within the United States. If a state desired to assume permanent and exclusive regulatory authority (primacy) over surface mining, the Secretary of the Interior had to approve the state's proposed permanent program. To secure that approval, the state had to enact laws and regulations embodying SMCRA's environmental protection and performance standards. Kentucky achieved primacy for its permanent program on May 18, 1982.⁴⁴

Not mollified by the enactment of extensive federal and state programs regulating surface mining, the opponents of surface mining launched another legislative initiative in 1984 which culminated in the Mineral Deed Act.⁴⁵ This was an attempt to statutorily impose the same presumption on the interpretation of broad form deeds as is now contained in the Broad Form Deed Amendment. In fact, the Broad Form Deed Amendment is a verbatim replica, including the alleged purposes, of the ill-fated Mineral Deed Act.

In *Akers v. Baldwin*,⁴⁶ the Kentucky Supreme Court invalidated the Mineral Deed Act to the extent it purported to apply to instruments in existence at the time the statute was enacted. As to already existing instruments, the court found the statutory presumption was an unconstitutional violation of the principle of separation of powers⁴⁷ embodied in Sections 27, 28 and 109 of the Kentucky Constitution.⁴⁸

⁴³ Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1326 (1988)).

⁴⁴ 47 Fed. Reg. 21,404 (1982). For a history of Kentucky's actions to secure primacy, see Bratt, *Surface Mining in Kentucky*, 71 Ky. L.J. 7, 7-9 (1982-83).

⁴⁵ KRS §§ 381.930-.940.

⁴⁶ *Akers*, 736 S.W.2d at 310.

⁴⁷ *Id.* at 309. The Kentucky Supreme Court, citing *Department For Natural Resources v. No. 8, Ltd. of Virginia*, 528 S.W.2d 684 (1975), also held that the statute was an unconstitutional impairment of the obligation of a contract. *Akers*, 736 S.W.2d at 310.

⁴⁸ KY. CONST. § 27 provides: "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

KY. CONST. § 28 provides: "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."

KY. CONST. § 109 provides: "The judicial power of the commonwealth shall be

The most important aspect of the *Akers* decision for analyzing the Broad Form Deed Amendment was the court's decision to revisit *Buchanan v. Watson*.⁴⁹ The *Akers* court reaffirmed the *Buchanan* decision holding that the minerals may be removed by any method of mining the mineral owner deems appropriate so long as the mining operation is not conducted oppressively, arbitrarily, wantonly or maliciously.⁵⁰ However, the *Akers* court overruled *Buchanan's* denial of damages to a surface owner whose land is surface mined.⁵¹ The *Akers* court held that the waiver of damage provision in a broad form deed only immunizes the mineral estate owner from surface damage caused by using the mining methods expressly mentioned in the deed or in common use when the deed was executed. Otherwise, the mineral owner must pay damages when it uses a later-developed mining method which damages the surface.⁵²

The *Akers* decision was not, however, the victory long sought by surface mining opponents. The Kentucky Supreme Court expressly excluded from its new damage rule all conveyances by broad form deeds, as well as leases and mining efforts under broad form deeds, made between the date of the *Buchanan* decision (May 4, 1956) and the date of the *Akers* decision (July 2, 1987).⁵³ The *Buchanan* no-damages rule continued to apply to these exempted conveyances, leases, and mining efforts. Also, the *Akers* court held that if a conveyance or lease was made while the *Buchanan* decision was in effect, any future conveyance, lease, or mining effort pertaining to that property was controlled by *Buchanan's* no-damages rule. The court decided to exclude such conveyances, leases, and mining efforts "[b]ecause of the possible adverse effect of our decision [to overrule the damage portion of *Buchanan*] on mineral rights acquired in reliance on *Buchanan*"⁵⁴

vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. The court shall constitute a unified judicial system for operation and administration. The impeachment powers of the general assembly shall remain inviolate."

⁴⁹ 290 S.W.2d at 40.

⁵⁰ *Akers*, 736 S.W.2d at 305.

⁵¹ *Id.* at 305-6.

⁵² The measure of damages was established by the court as the difference in the market value of the surface estate, including improvements thereon, immediately before and immediately after the use of the surface by the mineral owner. *Id.* at 307.

⁵³ *Id.* at 307.

⁵⁴ *Id.*

Therefore, on the eve of the adoption of the Broad Form Deed Amendment to the Kentucky Constitution, Kentucky's law concerning the respective rights of mineral and surface owners under broad form deeds was clear and unequivocal. All judicial and legislative attempts to change the hierarchical relationship between the surface and mineral estates had been unsuccessful. Whether pre-*Buchanan*, post-*Buchanan* or post-*Akers*, the mineral owner had the right to extract its minerals by any mining method, including surface mining, it chose to employ.

Before the *Buchanan* decision, it was not crystal clear whether a waiver of damage provision in a broad form deed immunized the mineral owner from paying for the surface damage it caused by surface mining the coal. That precise question had not previously reached Kentucky's highest court. However, the *Buchanan* court viewed its no-damages rule as the natural extension or codification of long recognized principles of Kentucky property law. Certainly, after *Buchanan* there was no basis for any confusion. The decision clearly and expressly held that if the surface disturbance occurred because of mining operations conducted under a broad form deed containing a waiver of damage provision, the surface owner had no grounds upon which it could recover.

The *Akers* decision did reverse the damage portion of the *Buchanan* decision. However, because the *Akers* court exempted from its decision all broad form deeds, leases, and mining efforts which occurred post-*Buchanan* and pre-*Akers*, most mineral estates created by a broad form deed continued to be subject to the *Buchanan* no-damages rule.

The Broad Form Deed Amendment does not purport to address Kentucky's law on the effect of a waiver of damage provision in mineral instruments. It does, however, radically rewrite Kentucky's law on the right of mineral owners under a broad form deed to employ surface, or other, modern mining methods. Before the enactment of the Amendment, the right to employ later-developed mining methods to extract coal was unquestionable because the state's highest court had consistently recognized such a right in the mineral owner. Due to the enactment of the Broad Form Deed Amendment, mineral owners are now required to use turn-of-the-century mining methods unless they can secure the permission of the surface owner to use modern methods of mining.

II. TAKINGS

The fifth amendment of the United States Constitution provides in pertinent part: “[N]or shall private property be taken for public use, without just compensation.”⁵⁵ That prohibition applies to the states through the due process clause of the fourteenth amendment as well as to the federal government.⁵⁶ Any governmental action, including the adoption of a state constitutional amendment, which interferes with private property rights must be evaluated in light of this express federal constitutional directive. If the governmental action amounts to taking private property for a public use, the government must compensate the property owner or it must refrain from such action.

The first step in a taking analysis of the Broad Form Deed Amendment is to determine whether the pre-Amendment right of a Kentucky mineral owner under a broad form deed to mine coal by later-developed mining methods is a property right protected by the fifth amendment. If that question is answered affirmatively, additional inquiry is needed to determine whether the Broad Form Deed Amendment was enacted to further a valid public purpose. If that question is answered negatively, the Amendment fails. Finally, the fifth amendment does not require every governmental infringement on private property rights to be either compensated or avoided. If a mineral owner has a property interest in its right to employ modern mining methods, the destruction of that right by the Broad Form Deed Amendment must be analyzed to determine if it is the type of infringement on property which is constitutionally impermissible.

A. *Determining What Constitutes Private Property*

Private property interests are protected but not created by the United States Constitution. Property interests are created and their dimensions are defined by existing rules or understandings that come from an independent source such as state law.⁵⁷ Moreover, property is not the thing itself, but the rights one has in the thing. This right of property is not a single indivisible

⁵⁵ U.S. CONST. amend. V.

⁵⁶ Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

⁵⁷ Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

concept, but a bundle of legally protected interests.⁵⁸ For example, one of the legally protected property interests in a landowner's bundle of property rights is the owner's right to use and enjoy that real property.⁵⁹

Kentucky law permits the creation of separate surface and mineral estates in real property.⁶⁰ One person can have a legally protected interest in the use and enjoyment of the surface of the land while another has a legally protected interest in the use and enjoyment of the minerals beneath the surface.⁶¹ However, the mineral owner can only use and enjoy its property by mining the minerals.⁶² For purposes of the guarantees of the fifth amendment, the mineral estate owner's right to use and enjoy its estate by extracting the mineral is property.⁶³

Property owners can also have constitutionally protected property interests in certain expectations they have concerning their property.⁶⁴ A property owner's mere unilateral expectation or belief concerning the use it can make of its property is not protected by the fifth amendment. On the other hand, a reasonable, investment-backed expectation is property for purposes of the fifth amendment's guarantees.⁶⁵ Kentucky mineral owners holding under broad form deeds executed before the Broad Form Deed Amendment have such a constitutionally protected property interest in their expectation that they can employ modern mining methods to extract their coal.

If an owner's expectation is not bound up with its decision to invest in that property, then the owner's right is not protected by the Constitution. In *Penn Central Transp. Co. v. New York*

⁵⁸ *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Examples of the legally recognized interests included in the "full bundle" of rights a person may have as a property owner are the right to exclude, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); the right to possess, *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); the right to transfer inter vivos by sale or gift, *Andrus v. Allard*, 444 U.S. 51 (1979); and, the right to pass property by devise or intestate inheritance, *Hodel v. Irving*, 481 U.S. 704 (1987).

⁵⁹ *Andrus v. Allard*, 444 U.S. 51, 66 (1979); see also *United States v. Causby*, 328 U.S. 256 (1946).

⁶⁰ *Kincaid v. McGowan*, 4 S.W. 802 (1887).

⁶¹ *Id.* at 804.

⁶² *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 392 (1922).

⁶³ *Id.* at 414.

⁶⁴ *Roth*, 408 U.S. at 577.

⁶⁵ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

City,⁶⁶ the owners of the Grand Central Terminal challenged the constitutionality of New York City's Landmarks Preservation Law. After the terminal was designated a landmark by the city, the owners were denied permission to build a multistory office building over the terminal. The owners claimed they had a constitutionally cognizable expectation under the fifth amendment because of their belief, acquired before enactment of the preservation law, that they could develop the air space above the terminal. The United States Supreme Court rejected that claim as "untenable."

The Supreme Court found that the terminal owners' belief did not rest on any expectation created by an act of the state itself. That belief merely reflected the terminal owners' personal desires, hopes, or wishes. Moreover, the full use of the air rights had not played an integral role in the terminal owners' decision to purchase the terminal. They had merely bought a terminal. Even after the city denied the owners the right to build an office building over the terminal, the terminal was still able to function profitably as a terminal. The government had not deprived the owners of any "reasonable" or "investment-backed" expectations when it denied them the right to develop the airspace by building an office tower.

In contrast, a Kentucky mineral owner's expectation that it can employ modern mining methods is inextricably bound up with the decision to purchase and invest in the mineral estate. After all, minerals have no use unless they can be mined for a profit. The mineral owner's expectation that it can employ modern mining methods is reasonable in both the everyday and constitutional meanings of the word. It is axiomatic that a mineral owner acquires a mineral estate for the purpose of mining the minerals. Only in a Luddite⁶⁷ society would it be reasonable to presume that the parties to a broad form deed intended the mining methods used by the mineral estate owner to remain static. Inherent in the very nature of our capitalist economy is that the methods of mining will evolve as mineral owners search for more efficient means by which to mine their minerals.⁶⁸ The sweeping language used in broad form deeds to

⁶⁶ 438 U.S. 104 (1978).

⁶⁷ Luddites was the name given to organized bands of English craftspersons who rioted in favor of the destruction of textile machinery that was displacing them. VI *ENCYCLOPEDIA BRITANNICA* 375-76 (1978).

⁶⁸ *Akers*, 736 S.W.2d at 304-5.

describe the nature of the mineral owner's rights (and to limit the rights of the surface owner) also supports the conclusion that a mineral owner can reasonably expect to employ mining methods developed after the broad form deed was executed.

A Kentucky mineral owner's investment-backed expectation that it may employ modern mining methods to extract its coal is constitutionally reasonable because that expectation is firmly grounded in Kentucky's law. In *Kaiser Aetna v. United States*⁶⁹ and *Ruckelshaus v. Monsanto*,⁷⁰ the United States Supreme Court found that the challenged governmental action impermissibly interfered with the property owner's reasonable investment-backed expectations because the government created those expectations.

The property owners in the *Kaiser Aetna* case expended significant amounts of money to connect their private lagoon to an adjacent navigable bay as part of developing the lagoon into a marina for their own private use. Despite the fact that public access to the marina was still physically possible after the dredging operation was complete, the lagoon owners expected to be able to exclude the public from the marina due to the actions of officials in the Army Corps of Engineers. Before dredging the connection and making other improvements to the lagoon, the lagoon owners checked with the Corps. Officials in the Corps informed the property owners that the lagoon was a nonnavigable water which was not subject to its jurisdiction. After the connection was made and the improvements were built, the Corps claimed that the property owners could not charge an access fee to the public because the private lagoon had been converted into a navigable water of the United States.

The United States Supreme Court disagreed. It held that the government had to pay just compensation to the lagoon owners if it wanted to obtain free access for the public to the marina. The Court said that "[w]hile the consent of individual officials representing the United States cannot 'estop' the United States . . . it can lead to the fruition of a number of expectancies embodied in the concept of 'property' - expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property."⁷¹

⁶⁹ 444 U.S. 164 (1979).

⁷⁰ 467 U.S. 986 (1984).

⁷¹ *Kaiser Aetna*, 444 U.S. at 179.

In another case, *Ruckelshaus v. Monsanto*,⁷² the Supreme Court employed the same logic and reached the same result. The Monsanto Company had submitted trade secrets to the Environmental Protection Agency pursuant to a federal statute which guaranteed to the company both nondisclosure and exclusive use of the submitted material. Later, the statute was amended to permit the EPA to disclose trade secrets and to allow other companies to use the information. The Supreme Court held that the disclosure authorized by the statutory amendments "would frustrate Monsanto's reasonable investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted."⁷³

Until the adoption of the Broad Form Deed Amendment in 1988, Kentucky law never wavered from consistently upholding the right of the mineral estate owner claiming under a broad form deed to employ modern mining methods to extract its coal.⁷⁴ The state itself created the mineral owner's expectation. Also, the Kentucky mineral owner's expectation that it could adopt newer, cheaper, and safer mining methods as those methods were developed was an integral part of the value of the mineral estate in Kentucky. That value is reflected in the price the mineral owner paid for that interest. Such a reasonable expectation, backed by actual investment of money by the mineral owner, is a form of property protected by the fifth amendment.

Constitutionally protected property rights may exist in intangible as well as tangible things.⁷⁵ Contract rights have long been recognized as a form of intangible property for purposes of the fifth amendment's protections.⁷⁶ Contract rights include not only the express terms of the contract, but also contemporaneous state law concerning interpretation and enforcement of the contract.⁷⁷ For example, in one United States Supreme Court case

⁷² 467 U.S. 986.

⁷³ *Id.* at 1011.

⁷⁴ See *supra* text accompanying notes 15-54.

⁷⁵ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (trade secrets); and *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935)(real estate lien).

⁷⁶ *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19, n. 16 (1977); see also, *Contributors to Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20 (1917); and *El Paso v. Simmons*, 379 U.S. 497, 533-34 (Black, J., dissenting)(1965).

⁷⁷ *United States Trust Co.*, 431 U.S. at 19-20, n. 17; see also *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 429-30 (1934); *Von Hoffman v. City of Quincy*, 4 Wall. 535, 550 (1867); and *Ogden v. Saunders*, 12 Wheat. 212, 259-60, 297-98 (opinions of Washington and Thompson, JJ.)(1827).

a public transit authority issued bonds pursuant to state laws which placed restrictions on the use the transit authority could make of the money generated by its transit operations. The restrictions were state created security provisions for the benefit of the bond purchasers. The Supreme Court held that the restrictions became an integral part of the property rights acquired by the bondholder pursuant to its contract with the transit authority.⁷⁸ The state could not thereafter retroactively eliminate the restrictions.

Kentucky's highest court⁷⁹ has determined that Kentucky's law is, and always has been, that a mineral owner under a broad form deed has the right to decide the type of mining method to use to extract its minerals as long as the mining operation itself is not conducted in an oppressive, arbitrary, wanton or malicious manner.⁸⁰ Not a single decision by Kentucky's highest court has ever denied that right to a mineral owner under a broad form deed.⁸¹ The mineral owner's right to select the method of mining

⁷⁸ *United States Trust Co.*, 431 U.S. 1.

⁷⁹ The United States Supreme Court will accept as binding upon it the Kentucky Supreme Court's determination of its own state law. It is not the function of the United State Supreme Court to construe state law contrary to the construction given it by the highest court of the state. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874). See also *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620-24 (1976); *Fuller v. Oregon*, 417 U.S. 40, 42 n. 2 (1974); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); and *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629 (1973).

⁸⁰ In reaching its decision in *Buchanan v. Watson*, 290 S.W.2d at 43-44, Kentucky's highest court believed that it was merely applying a "firmly established . . . rule of property law governing the rights under many mineral deeds covering much acreage in Eastern Kentucky." In *Blue Diamond Coal Company v. Neace*, 337 S.W.2d at 728, Kentucky's highest court held that the *Buchanan* decision permitting the mineral owner to surface mine its coal without liability for surface damage had "not upset any existing law . . ." In *Akers*, 736 S.W.2d at 305, the Kentucky Supreme Court reaffirmed that as long as "the method of mining is not oppressive, arbitrary, wanton or malicious, the minerals may be removed by the owner of the mineral rights, which include the right to use the surface."

⁸¹ Kentucky law concerning the validity and enforceability of the waiver of damage provision may not have been as consistent as the law's treatment of the mineral estate owner's right to choose the method by which the coal is extracted. In *McIntire v. Marian Coal Co.*, 227 S.W. 298, a deep mining case, the court determined that the mineral grantee had the right to use as much of the surface as it deemed necessary or convenient to its mining business. The court indicated that the mineral owner would have to compensate the surface owner for any improvements it disturbed on the surface. However, the *McIntire* deed, as excerpted in the case, did not include a waiver of damage provision.

In *Buchanan v. Watson*, 290 S.W.2d 40, the court sustained the validity of an expressed waiver of damage provision in a broad form deed even when the mineral estate owner chooses to surface mine the coal. In *Wiser Oil Co. v. Conley*, 346 S.W.2d

is the contemporaneous Kentucky law incorporated into all broad form deed contracts executed prior to the adoption of the Broad Form Deed Amendment. As a form of intangible property, it is protected by the fifth amendment.⁸²

A Kentucky mineral owner whose interest was created by a broad form deed has a number of property interests as defined by Kentucky state law. The mineral owner has a property interest in its right to use and enjoy its minerals by mining them for a profit. The mineral owner has a reasonable investment-backed expectation that it can employ the mining method of its choice, including later-developed methods, to extract its coal. Finally, the mineral owner has a property interest in its contractual right to choose the method of mining it will use. Under Kentucky law that right is an implied term of every broad form deed executed prior to the 1988 Broad Form Deed Amendment.⁸³

718, no express waiver of damage provision was in the oil and gas lease. Therefore, the mineral estate owner was found liable for the damage caused to the surface by the use of a mining technique not known at the time the lease was executed.

In *Martin v. Kentucky Oak Mining Company*, 429 S.W.2d 395, the Kentucky Court of Appeals reaffirmed the *Buchanan* decision that a waiver of damage provision in a broad form deed is enforceable. *Akers v. Baldwin*, 736 S.W.2d 294, is the Kentucky Supreme Court's most recent decision on the validity of waiver of damage provisions. In that case the court partially overruled *Buchanan*. The court determined that whenever a mineral owner under a broad form deed causes injury to the surface while extracting the minerals, the mineral owner must pay damages to the surface owner. If the conveyance expressly sets out the methods of mining that may be employed, the waiver of damages is valid for any damage caused by the use of such methods. However, the court expressly excluded from its decision all conveyances by broad form deed, leases and mining efforts under broad form deeds, made between the effective date of the *Buchanan* decision and the date of the *Akers* decision. Similarly, if a conveyance or lease was made while *Buchanan* was in effect, all future conveyances, lease or mining efforts pertaining to the same property shall continue to be controlled by *Buchanan*.

⁸² Arguably, the enforceability and validity of the waiver of damage provision in broad form deeds were also part of the contemporaneous Kentucky law incorporated into all broad form deeds. The Kentucky Supreme Court has recognized that, at least as to conveyances, leases or mining efforts undertaken while the *Buchanan* decision was in effect the law of Kentucky, incorporated into those transactions was that the waiver of damage provision was valid regardless of the particular mining method employed by the mineral owner. *Akers*, 736 S.W.2d at 307.

⁸³ The enforceability of a damage waiver in a broad form deed regardless of the mining method which causes the damage may also be an implied term of the contract of severance. *Id.* Although a mineral owner has a property interest in its contract rights created by a broad form deed, this section of the article will not analyze whether the Broad Form Deed Amendment effects a "taking" of those property rights. Instead, the reader is referred to the Contract Clause discussion. See *infra* text accompanying notes 180-296.

B. *Determining What Constitutes A Public Use*

In any taking analysis of the Broad Form Deed Amendment, it is essential to determine whether the Amendment serves a valid public purpose. The existence of a valid public purpose is a necessary prerequisite to the government's exercise of its taking power.⁸⁴ Even a compensated taking would violate the fifth amendment if it were not for a valid public use.⁸⁵ In addition, the relative strength or weakness of the public use supposedly served by the governmental action must be weighed against the magnitude of the interference with the owner's property rights. A relatively weak public purpose cannot support an extensive destruction of property rights.⁸⁶

The scope of the public use requirement of the takings clause is coterminous with the state's police power.⁸⁷ That is, if the object of the Broad Form Deed Amendment falls within the state's power to legislate for the health, safety and welfare of its citizens, the public use requirement is satisfied. Also the United States Supreme Court generally will not substitute its judgment for a legislative judgment that a particular law was enacted for the health, welfare and safety of the state's citizens.⁸⁸ However, even though the public use requirement is equated with the state's police power, the Supreme Court would have a role to play in determining the constitutionality of the Broad Form Deed Amendment.⁸⁹

The Court would have to determine if the stated purposes of the Amendment are its real purposes.⁹⁰ To do that, it would examine the operative provisions of the Amendment, not just the purposes enumerated in the legislative preamble to the Amendment.⁹¹ Once the Court ascertained the real purposes of

⁸⁴ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

⁸⁵ *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937).

⁸⁶ In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413-14, the United States Supreme Court was reviewing the constitutionality of Pennsylvania's Kohler Act. The Court found that "the extent of the public interest is shown by the statute to be limited" Therefore, the Court concluded that "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."

⁸⁷ *Hawaii Housing Authority*, 467 U.S. at 240.

⁸⁸ *Id.* at 241.

⁸⁹ Seven purposes for the Broad Form Deed Amendment appear in the legislative preamble to the Amendment. See *supra* note 6.

⁹⁰ *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 486 (1987).

⁹¹ *Id.* at 487 n. 16; and *Pennsylvania Coal Co.*, 260 U.S. at 413-14.

the Amendment, it would then determine if these purposes are legitimate objectives for the state to pursue.⁹² For example, if the real purpose of the Amendment was found to be merely to serve the private interests of some property owners, the Amendment could not be sustained as a proper exercise of the state's police power.⁹³ Even if the Court determined that the real purpose of the Amendment was a legitimate state interest, the Court would also have to ascertain whether the presumption created by the Amendment substantially advanced the attainment of those purposes.⁹⁴

The United States Supreme Court has found that a statute's failure to apply uniformly to mineral transactions strongly indicates the statute does not serve a valid public purpose. The conclusion that such a statute serves private not public purposes is particularly cogent when the lack of uniformity of application is coupled with an extensive interference with the mineral owner's ability to extract its coal.

For example, in *Pennsylvania Coal Co. v. Mahon*,⁹⁵ the Court found Pennsylvania's Kohler Act constituted an impermissible "taking" of the mineral owner's "rights of property and contract." The Kohler Act prohibited the mining of anthracite coal if the mining would cause the subsidence of any structure used for human habitation.⁹⁶ However, the statutory prohibition did not apply to the mining of anthracite coal when the surface owner also owned the mineral estate.⁹⁷ The Kohler Act only prohibited mining which caused subsidence when the mineral owner did the mining.

The United States Supreme Court concluded that because of the lack of uniformity in the application of the Act's prohibitions "the extent of the public interest is shown . . . to be limited."⁹⁸ The Court rejected the Pennsylvania legislature's determination that the Kohler Act was a proper exercise of the state's police

⁹² *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 486.

⁹³ *Id.* at 484; and *Hawaii Housing Authority*, 467 U.S. at 245.

⁹⁴ *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 485; *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). See also *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 834 and n. 3 (1987).

⁹⁵ *Pennsylvania Coal Co.*, 260 U.S. at 413-14.

⁹⁶ *Id.* at 412-13.

⁹⁷ *Id.* at 414.

⁹⁸ *Id.*

power. Instead, the Court determined the Act involved a balancing of the private economic interests of surface owners against the private interests of the mineral owners. As such, the Act primarily served private interests and not the interests of the public's health or safety.⁹⁹

While the Supreme Court recognized there could be a slight public interest even in the ordering of private affairs, the Court's decision to invalidate the Kohler Act as an impermissible taking rested partly on the magnitude of the interference with the mineral owner's property and contract rights. Under the original deeds which severed the mineral estate from the surface, the mineral owner contracted for the right to mine the coal. The value of this right to mine was in the mineral owner's ability to exercise that right with a profit. The Supreme Court found that the Kohler Act made it commercially impracticable to mine certain coal.¹⁰⁰ Thus, even if the Kohler Act served some slight public interest, it was still an impermissible taking. The public interest was not sufficient to warrant such an extensive destruction of the mineral owner's property rights.¹⁰¹

Finally, the Court found the state's claimed interest in the surface owner's personal safety was also insufficient predicate to sustain the Kohler Act. The Supreme Court found that the state's interest in the personal safety of the surface owner could easily have been accommodated by requiring the mineral owner to give notice to the surface owner of its intent to mine.¹⁰² It was relevant to the Court's decision that a simple alternative was available which was significantly less destructive of property rights than the method chosen. The existence of an alternative supported the Court's determination that the real purpose of the Kohler Act was merely to augment the private property rights of the surface owner at the expense of the property rights of the mineral owner.

The recent Supreme Court decision in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*¹⁰³ sustaining Pennsylvania's Subsidence Act against a takings challenge does not represent a retreat or departure from the Court's rationale in *Pennsylvania Coal*.

⁹⁹ *Id.*

¹⁰⁰ *Pennsylvania Coal Co.*, 260 U.S. at 414.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 480 U.S. 470.

Both before and after the *Keystone* decision, courts must determine the legislation's true purposes by examining the operative provisions of a statute, not just its stated purposes. Also state laws which infringe on property rights must serve public, not private, purposes. State laws which significantly interfere with previously existing property rights must be supported by more weighty public purposes than are necessary to support laws which only minimally interfere with property rights. Both before and after the *Keystone* decision, the presence or absence of an alternative method less destructive of property rights than the method chosen by the state to accomplish its purpose is relevant in determining whether the stated purpose is the real purpose of the statute. The *Keystone* decision merely applies the principles employed in *Pennsylvania Coal* to another fact situation. Since the facts and the acts were different, it is not surprising that the results were different, too.

Both the Subsidence Act sustained by the Supreme Court in *Keystone* and the Kohler Act struck by the Court in *Pennsylvania Coal* purported to regulate coal mining that caused subsidence damage to pre-existing public buildings, dwellings and cemeteries.¹⁰⁴ But that is the extent of the similarity between the two legislative enactments.

The constitutionally permissible Subsidence Act, unlike the Kohler Act, did not exempt mining operations which cause subsidence merely because a person who owns both the mineral and surface estates conducts the mining.¹⁰⁵ Neither the surface owner nor the mineral owner acting alone or in concert could waive the requirements of the Subsidence Act.¹⁰⁶ The United States Supreme Court found that the uniform application of the Subsidence Act was a strong indication that the statute was enacted for the alleged purposes of protecting the health, safety and welfare of Pennsylvania's citizens and not to confer a benefit on surface owners.¹⁰⁷ The *Keystone* Court was further persuaded that the legislative purposes set forth in the Subsidence Act were genuine because the United States District Court for the Western

¹⁰⁴ *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 476 and *Pennsylvania Coal*, 260 U.S. at 412-13.

¹⁰⁵ *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 486.

¹⁰⁶ The current surface owner can only waive the protection of the Act if the state consents. *Id.* See also, 25 PA. CODE § 89.145(b)(1983).

¹⁰⁷ *Id.*

District of Pennsylvania and the United States Court of Appeals for the Third Circuit had reached that conclusion.¹⁰⁸

The Subsidence Act permitted the mineral owner to remove 50% of the coal beneath a protected structure. The remaining coal had to be left in place to provide surface support.¹⁰⁹ Evidence was presented at trial that the Subsidence Act only required the challengers to leave 2% of all their coal unmined.¹¹⁰ The Kohler Act, on the other hand, had made it commercially impracticable for the challengers to mine *any* of their coal. As the impact of the Subsidence Act on the mineral owners' right to mine their coal was relatively small, the Supreme Court found that the state's interest was sufficiently weighty to sustain the statute from a takings challenge.¹¹¹

The *Keystone* Court also found that the challengers to the Subsidence Act could not suggest any alternative methods the state could use to achieve its purposes.¹¹² This was not true of the challengers of the Kohler Act in *Pennsylvania Coal*. The *Keystone* Court viewed the lack of readily employable alternatives as further support for its determination "that the details of the statute do not call the stated public purposes into question."¹¹³

Kentucky's Broad Form Deed Amendment has many of the indicia identified in the *Keystone* and *Pennsylvania Coal* cases of a law enacted solely for the benefit of private parties—in this case surface owners. The operative provisions of the Amendment create a presumption applicable to all broad form deeds.¹¹⁴ The

¹⁰⁸ *Id.*

¹⁰⁹ *Keystone Bituminous Coal Ass'n*, 480 U.S. at 477.

¹¹⁰ *Id.* at 496.

¹¹¹ *Id.* at 484, n. 13 and 485.

¹¹² *Id.* at 486.

¹¹³ *Id.* at 487, n. 16.

¹¹⁴ The language of the Amendment describing the instruments which are subject to the Amendment is confusing. The Amendment's presumption applies to:

any instrument . . . purporting to sever the surface and mineral estates or to grant a right to extract minerals, which [1] fails to state or describe in express and specific terms the method of coal extraction to be employed, or [2] where said instrument contains language subordinating the surface estate to the mineral estate . . . KY. CONST. § 19(2).

Generally, broad form deeds do not specify the method of coal extraction. Specifically, broad form deeds do not specify surface mining as a method of coal extraction because surface mining as practiced today was "non-existent in the early 1900s, when most, if not all, of the broad form deeds were executed." *Akers*, 736 S.W.2d at 309. Also, if a broad form deed did specify surface mining as a method of coal extraction,

presumption is that the parties to a broad form deed intended 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 for the purposes of coal extraction by only 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.¹¹⁵

In theory, mineral owners can rebut this presumption. But it can only be done by "clear and convincing evidence" that the original parties to the broad form deed intended to permit "methods of coal extraction not commonly known to be in use in Kentucky in the area affected at the time the instrument was executed."¹¹⁶ The Kentucky Supreme Court has taken judicial notice that no such evidence is available today.¹¹⁷ Thus, as to mineral owners, the Amendment's presumption is a positive rule of law because it is irrebuttable in fact.

The Amendment's substantive rule of law only binds mineral owners.¹¹⁸ It prohibits mineral owners from employing later-developed mining methods to extract their coal, but it does not prohibit a surface owner from permitting the use of modern

but contained language subordinating the surface estate to the mineral estate the Amendment would be applicable." *Id.* at 298 (a broad form deed is a conveyance which specifically grants to the grantee "all surface rights grantee deems necessary or convenient for the full and free exercise and enjoyment of the minerals conveyed." Most broad form deeds reserve to the grantor "only such surface rights as may be consistent with the mineral rights conveyed"). For an example of broad form deed language, see *Watson v. Kenlick Coal Co.*, 498 F.2d 1183 (6th Cir. 1974). Thus, if the Amendment means what it says, a broad form deed which specifies that surface mining is a method by which the coal may be extracted is nonetheless subject to the presumption because the deed contains language subordinating the surface estate to the mineral estate.

¹¹⁵ KY. CONST. § 19(2).

¹¹⁶ *Id.* The Amendment creates a number of conceptual dilemmas. The language of the Amendment purports to make the presumption applicable to deeds which specify the method of coal extraction, but subordinate the surface estate to the mineral estate. What additional evidence, beyond the express words of the deed, would the grantee have to produce to establish that the parties intended to permit the method of coal extraction already expressly permitted by the words of the deed? Also, how can a current mineral owner produce evidence that the original parties expressly intended to permit a modern method of mining which by definition is a mining method not known at the time the deed was originally executed?

¹¹⁷ *Akers*, 736 S.W.2d at 309.

¹¹⁸ *Id.*

mining methods. The surface owner can, at any time, unilaterally authorize the mineral owner to use modern mining techniques.¹¹⁹

If the mineral owner is unable to overcome the Amendment's presumption and is unable to secure the consent of the surface owner, it cannot employ modern mining methods to extract its coal. However, if the mineral owner is unable to overcome the Amendment's presumption, but *is* able to secure consent of the surface owner, no doubt at a price, the mineral owner can use modern mining technology. In light of such an anomalous result, it is impossible to argue that the Amendment embodies any public purpose. The private decision of a private party (in this case the surface owner), unregulated by any governmental oversight, can override whatever purposes the Amendment was supposed to serve. The real purpose of the Amendment is revealed in the creation of this unilateral power in the surface owner to consent to mining by modern mining methods. It demonstrates that the Amendment was actually intended to readjust the respective rights of the mineral and surface owners in favor of the surface estate.

The Amendment, like the Kohler Act, is an attempt to enhance the private economic interests of surface owners at the expense of the mineral owners. Kentucky's Supreme Court has indicated its agreement with this characterization of the real purpose of the Amendment.¹²⁰ In 1984 the Kentucky legislature passed the Mineral Deed Act,¹²¹ which contained the same provisions and preamble as the Broad Form Deed Amendment. In *Akers v. Baldwin*¹²² the Kentucky Supreme Court invalidated the Mineral Deed Act as it applied to most broad form deeds. The Court found the Act was similar in tactics to an earlier unconstitutional attempt by the legislature "to change the relative legal rights and economic bargaining positions of many private parties under their contracts."¹²³

¹¹⁹ To assume that in many instances the surface owner would be willing, for a price, to exercise its right to authorize the use of modern mining techniques would not be unreasonable.

¹²⁰ *Akers*, 736 S.W.2d 294.

¹²¹ Act of July 13, 1984, ch. 28, 1984 Ky. Acts 47 [codified at KRS §§ 381.930-.945 (1984)].

¹²² *Akers*, 736 S.W.2d 294.

¹²³ *Id.* at 310. The Court compared the statute to the legislature's action which was at issue in *Department for Natural Resources v. No. 8 Ltd.*, 528 S.W.2d 684, 686-87 (1975).

The Broad Form Deed Amendment resembles the unconstitutional Kohler Act more than the constitutional Subsidence Act because it, too, totally prohibits mining "certain coal."¹²⁴ In the *Akers* decision, the Kentucky Supreme Court determined that the effect of the Mineral Deed Act and, by extension, the Broad Form Deed Amendment, was to prevent all surface mining of coal to which it applied.¹²⁵ Much of the remaining coal in Kentucky can be removed only by mining methods which came into existence long after the execution of most broad form deeds.¹²⁶ It is either commercially impractical or technically impossible to remove most of Kentucky's remaining coal by turn-of-the-century, deep shaft mining methods.¹²⁷ The Amendment erects an insurmountable impediment to that coal's extraction.

The purposes enumerated in the preamble to the Broad Form Deed Amendment are merely attempts to create a patina of legitimacy. To survive constitutional scrutiny, the expressed purposes must be the real purposes of the Amendment and not merely legislative attempts to rationalize the Amendment. If the Amendment's express purposes are to legitimate the Amendment, the presumption created by the Amendment must substantially advance the attainment of those purposes.¹²⁸ If the presumption does not do that, then no matter how legitimate the express purposes are in the abstract they can not provide a basis for determining that this particular amendment to the Kentucky Constitution serves a valid public purpose.

Three of the seven expressed purposes of the Amendment¹²⁹ involve claims that the presumption is intended to clarify the rights of mineral and surface owners to use the surface land by eliminating uncertainty and by providing uniformity in the law. The truth is that Kentucky law has been clear, certain and

¹²⁴ *Pennsylvania Coal Co.*, 260 U.S. at 414.

¹²⁵ *Akers*, 736 S.W.2d at 308-9. The effect of the Amendment is also to prohibit auger mining, longwall mining and continuous mining techniques as they were not mining methods in use at the time most broad form deeds were executed.

¹²⁶ Kentucky has 95,834.73 million short-tons of remaining coal reserves. J. COBB, R. BRANT, J. CURRENS, A. WILLIAMSON, *KENTUCKY COAL* (1985).

¹²⁷ Approximately a third of all of Eastern Kentucky's demonstrated coal reserve base is in coal which is mined by surface mining. C. HARVEY, *COAL IN APPALACHIA*, 62 (1985).

¹²⁸ *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 485; *Agins*, 447 U.S. at 260; and *Penn Central Transportation Co.*, 438 U.S. at 127, see also *Nollan*, 483 U.S. at 834 and n. 3.

¹²⁹ See *supra* note 6 for the complete text of the purposes of the Amendment.

uniform from its inception concerning the respective rights of the parties to a broad form deed to use the surface of the land. As discussed earlier in this article,¹³⁰ the mineral owner in Kentucky has always had the right to use the surface to extract its coal by any method of coal mining it chose to employ. Thus, under the guise of achieving a legitimate goal, the Amendment actually undoes the clarity of Kentucky's law on this point.

The Amendment also creates confusion where none existed. Litigation has already risen to determine what types of conveyances and mining methods are subject to the Amendment's presumption. For example,¹³¹ the owner of the top seams of coal under a piece of land in eastern Kentucky has taken the position that the Broad Form Deed Amendment prohibits the mining of the lower seams of coal by any method other than room and pillar. The owner of the upper seams seeks to prevent the owner of the lower seams from longwall mining because longwall mining methods were not in common use in eastern Kentucky in 1926 when the severance deed was executed.

Two other alleged purposes of the Amendment are to secure titles to land and improvements and to promote the free alienability of land.¹³² In *Texaco v. Short*,¹³³ the United States Supreme Court recognized that both these goals are valid public purposes for a state to pursue. However, merely reciting these two purposes does not sustain the Broad Form Deed Amendment. The creation of a presumption against the use of modern mining methods to extract coal bears no relationship, substantial or otherwise, to promoting security of land titles or the free alienability of land.

Indiana's Dormant Mineral Interest Act¹³⁴ was at issue in *Texaco*. That act provided that a severed mineral interest not used for a period of 20 years automatically lapsed and reverted to the current surface owner. The mineral owner could prevent the lapse of its unused mineral interest by filing a statement of claim in the local county recorder's office before the end of the twenty-year period of nonuse or within a two-year grace period after the effective date of the Act. Indiana's highest court had

¹³⁰ See *supra* text accompanying notes 15-54.

¹³¹ *U.S. v. Stearns Coal & Lumber Co.*, No. 78-169 (E.D.Ky. 1978).

¹³² See *supra* note 6 for the complete text of the purposes of the Amendment.

¹³³ 454 U.S. 516 (1982).

¹³⁴ *Id.* at 518 and n.1.

determined that the existence of stale and abandoned mineral interests created uncertainties in land titles, which, in turn, impeded the development of the mineral interests as well as the surface.¹³⁵

The relationship between the Dormant Mineral Act's objective of encouraging the productive use of the mineral and surface estates and the operative provisions of the Act is clear. Stale and abandoned mineral interests create uncertainties in titles. If the title to a mineral interest is uncertain neither the mineral estate nor the surface estate will be put to productive use until this cloud on the mineral title is removed. The Dormant Mineral Act eliminates this impediment to the productive development of the land and its minerals by clearing the title to unused mineral interests. After twenty years of nonuse and nonrecording, the mineral interest is presumed to be abandoned. Title to the mineral estate is returned to the owner of the surface estate, making the entire productive potential of the property available for exploitation.

With the Broad Form Deed Amendment, on the other hand, there is no relationship between its express objectives to secure titles and promote the free alienability of land and the Amendment's presumption against the right of the mineral owner to use modern mining techniques. Title to real property interests is insecure when a cloud is on the title. A cloud on the title arises when the *ownership* of the estate cannot be ascertained with certainty because of outstanding adverse claims or long periods of nonuse of the property. The type of mining method a mineral owner may or may not use to extract its coal is not an adverse claim of ownership of an interest in the surface estate. Using modern mining methods to extract coal is unrelated to the title problems caused by nonuse or abandonment.

The Broad Form Deed Amendment does not affect the free alienability of land. If the Amendment's presumption is sustained the surface owner's interest will become more valuable, but it will be no more or less alienable. The irrebuttable nature of the presumption means the surface owner will be able to prohibit or permit the mineral owner to use modern mining methods. That power can be exploited economically by the surface owner to force the mineral owner to purchase the right to

¹³⁵ *Id.* at 523.

use modern mining techniques from the surface owner. Thus, ownership of the surface may be seen as more desirable than it has been in the past. But, increasing or decreasing the economic desirability of the ownership of a particular property interest is totally unrelated to whether the interest is freely alienable. Unresolved adverse claims against the property and long periods of nonuse indicating possible abandonment impede the free alienability of land. The type of mining method the mineral estate owner may use to extract its coal does not.

The express purposes the Amendment is supposed to accomplish of securing title and promoting the free alienability of land are not the real purposes of the Amendment. They are merely recitations of theoretically permissible purposes unrelated in any way to the operative provisions of the Amendment.

A similar type of subterfuge is at work in the part of the Amendment's preamble in which it is claimed that the Amendment will:

[P]romote 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[.]¹³⁶

This alleged purpose is cast in words and phrases meant to create the impression that the state is exercising its power to legislate for the health, safety and welfare of its citizens.¹³⁷

Kentucky certainly has a legitimate interest in providing for the conservation of surface lands which may be affected by the use of modern mining methods such as surface mining or auguring. A law, whether created by statute or constitutional amendment, seeking to accomplish such a purpose would have a valid public purpose. Pennsylvania's Subsidence Act was sustained by the United States Supreme Court in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*,¹³⁸ because the Act was a valid land use regulation which did not deny the mineral owner the economically viable use of its land.

¹³⁶ 1988 Ky. Acts ch. 117.

¹³⁷ The purposes are contradictory. For example, the Amendment is supposed to promote the conservation of all of the state's natural resources while at the same time it is supposed to promote the full use of these very same resources.

¹³⁸ *Keystone Bituminous Coal Ass'n.*, 480 U.S. 470.

Conservation of surface land or other natural resources of the state is not the real purpose of the Broad Form Deed Amendment. A cursory perusal of the operative provisions of the Amendment demonstrates that the Amendment was never intended to conserve surface land. Any conservation objective can be thwarted by the unilateral action of private individuals, since the Amendment does not forbid or regulate mining which causes surface damage. It merely places in the hands of the surface owner the option to permit (for a price) or not permit such mining. There is no real relationship between the presumption against the use of after-developed mining methods and the conservation claims in the Amendment's preamble. The surface owner can decide to authorize the use of modern mining techniques even if the use of such methods would actually impede the attainment of the state's alleged goals of promoting the conservation and full use of all the state's natural resources. Thus, the Broad Form Deed Amendment is not a land use regulation and it does not facilitate conservation.

Nor is the Amendment an exercise of the state's police power to protect the public health and welfare. It permits private parties to consent to the use of modern mining methods to extract coal. Consequently the legislature must have determined that using such mining techniques does not impede the state's public health and welfare goals of promoting the conservation and full use of the state's natural resources, making improvements to the land, encouraging the growth of agriculture, and developing new industry and the general economic well-being of the state. Since modern mining methods do not impede these goals, a presumption against modern mining methods does not improve the general public health and welfare. Thus, the Amendment's presumption cannot find its justification in the claim that it is an exercise of the police power exerted in the interest of the public.¹³⁹

¹³⁹ *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 120-21 (1928). A trust company which owned a home for elderly people in a residential area of Seattle was denied a permit to enlarge the structure. The zoning ordinance provided that such a building should be permitted if the written consent of two-thirds of the property owners within 400 feet of the proposed building consented. The denial was based upon the sole ground that the trust company had not obtained the consent of the requisite number of surrounding property owners. The consent requirement was struck as violative of the fourteenth amendment's due process clause.

If the Amendment's purpose was to improve the public health and welfare, the burden imposed by the Amendment should be shared by the general public. As applied to coal which can only be extracted by later-developed mining methods, the Amendment totally denies the mineral owner the ability to exercise its right to use its property for a profit. Moreover, the state has readily available alternative methods to achieve the goal of conserving and making full use of its natural resources. For example, Kentucky could strengthen its present laws regulating surface mining and reclamation operations.¹⁴⁰ This would be consistent with the fifth amendment and would avoid forcing only mineral owners to bear the public burden of conserving surface land. This burden "in all fairness and justice, should be borne by the public as a whole."¹⁴¹ The Amendment does not spread the burden among the general public. Nor does it benefit the general public since it allows individual surface owners to choose whether to allow modern mining methods. A law which allows individuals to have this option does not benefit the general public and is not a valid exercise of the state's police power.

The preamble to the Amendment contains the bald assertion that "we should 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."¹⁴² Most broad form deeds were executed in the early part of this century. Therefore, the only evidence that remains for determining the original parties' intentions is the words they used in their deed. Since their deed, a contract, is unambiguous, no need exists for a special rule of construction as to intention.

As discussed earlier,¹⁴³ a broad form deed contains a conveyance of "all" the minerals described in the deed as well as a very lengthy description of the mining rights granted to the mineral owner. The deed also expressly conveys to the mineral owner such surface rights as the mineral owner deems "necessary or convenient" for the full and free exercise and enjoyment of its minerals. Finally, the deed reserves to the surface owner *only*

¹⁴⁰ Although Kentucky administers the Federal Surface Mining Control and Reclamation Act, the Kentucky legislature affirmatively chose not to make Kentucky's surface mining and reclamation laws more stringent than the minimum required by federal law. KRS § 350.025.

¹⁴¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹⁴² 1988 Ky. Acts ch. 117.

¹⁴³ See *supra* text accompanying notes 13-14.

such surface rights as may be consistent with the rights granted to the mineral owner.

The Kentucky Supreme Court has consistently held that the language of a broad form deed demonstrates the parties intended to permit the mineral owner to remove the minerals by any method it chose to employ.¹⁴⁴ As recently as 1987, the Kentucky's highest court said:

The provisions in typical broad form deeds are, *beyond cavil*, clear and unambiguous. They are, in fact, *overwhelming* in their language to demonstrate an intent to convey away the rights to the minerals described. The right to the minerals carries with it the right to mine them. That a certain method of mining was known at the time the document was executed is simply not relevant. A sale implies the right to obtain and use the item sold. Without it there is, in effect, no sale. It can be argued that the parties in their wisdom recognized that fertile minds will always seek and achieve new ways of doing things, and therefore generally, if not specifically, contemplated new mining techniques which were faster, cheaper and better. (Emphasis in original)¹⁴⁵

The Amendment's presumption actually does violence to the probable intention of the original parties because it requires the courts to ignore the natural import of the words the original parties actually used. Thus, as the Kentucky Supreme Court recognized when it struck the Mineral Deed Act which contained the identical presumption, a presumption against the right of the mineral estate owner to employ modern mining methods is not substantially related to the implementation of the original parties' true intention.¹⁴⁶

The foregoing discussion demonstrates that the stated purposes of the Broad Form Deed Amendment are not the real purpose. The real purpose is to readjust the relative legal rights and economic bargaining position of the parties to a broad form deed in favor of the surface owner. Such a purpose is not a valid public one.

C. *Determining What Constitutes A Taking*

An inherent tension exists between the Constitution's prohibitions against the taking of private property for public use

¹⁴⁴ See *supra* text accompanying notes 15-54.

¹⁴⁵ *Akers*, 736 S.W.2d at 304-5 (emphasis in original).

¹⁴⁶ *Id.* at 309.

without just compensation and the reality that government could not go on if the state had to pay for every change in its general laws which diminished values incident to property.¹⁴⁷ In an attempt to resolve this tension, the United States Supreme Court has held that the fifth amendment's guarantee does not forbid all interferences with property rights. Rather, it is designed to bar the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁴⁸

The United States Supreme Court has not articulated a set formula for determining when "fairness and justice" requires the state to pay compensation for the economic injury caused by its action.¹⁴⁹ Instead, the Court examines each allegation of a taking on a case-by-case basis to determine "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it"¹⁵⁰

The Supreme Court's prior decisions establish three particularly significant factors in making a takings determination: (1) the character of the governmental action; (2) its economic impact; and (3) its interference with the reasonable investment-backed expectations of the property owner.¹⁵¹ All three factors need not be present for the Court to find a taking.¹⁵²

1. The Character of the Governmental Action

The starting point in a takings analysis is the character of the governmental action. When the governmental action is a

¹⁴⁷ *Pennsylvania Coal Co.*, 260 U.S. at 413.

¹⁴⁸ *Armstrong*, 364 U.S. at 49 (a taking was found when the transfer to the federal government of title to certain property prevented a material supplier from enforcing its lien against the property); see also *Penn Central Transp. Co.*, 438 U.S. at 123-24 (a taking was not found when the city's preservation law was employed to deny the owner of Grand Central Station permission to build a multi-story office building above the station).

¹⁴⁹ *Penn Central Transp. Co.*, 438 U.S. at 124.

¹⁵⁰ *Id.*

¹⁵¹ *Kaiser Aetna*, 444 U.S. at 175.

¹⁵² See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A New York statute required landlords to permit a cable television company to install its equipment on the landlord's building. The landlord was only entitled to such payment from the company as determined by a state commission. The commission determined that a one-time payment of \$1 was reasonable. Even though the cables installed by the company had only a de minimus economic impact when measured against the landlord's aggregate rights in its building, an unconstitutional taking had occurred.

direct, physical invasion of the complainant's property, the Court will find a taking even though the occupation has only a minimal economic impact on the owner's property.¹⁵³ It is as though the Court makes no distinction between grand and petty larceny in a direct, physical invasion case. Similarly, the Court readily finds an impermissible taking when the government appropriates a person's property for the government's own use.¹⁵⁴ Even a direct physical invasion or appropriation does not, however, require compensation if the government is acting to prevent an impending danger.¹⁵⁵ The Broad Form Deed Amendment's presumption against modern mining methods involves neither a physical invasion of the mineral estate nor an appropriation of the mineral owner's property for the government's own use.

At the other end of the spectrum from physical invasion and taking for the government's own use is governmental action to abate or prevent a nuisance. When the state acts to restrain uses of property that are tantamount to a public nuisance,¹⁵⁶ the Court is very hesitant to find a taking.¹⁵⁷ In his recent dissent in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*,¹⁵⁸ Justice

¹⁵³ *Id.* See also *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 488, n. 18.

¹⁵⁴ *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980). A Florida statute authorized the county to take all interest accruing on interpleader funds while the funds were deposited with the county court. This was an unconstitutional taking of the beneficial use of the fund owner's property while it was deposited with the court. See also *United States v. Causby*, 328 U.S. 256 (1946) (the Court found a taking when the government used the air space above the claimants' land as a flight path for military aircraft).

¹⁵⁵ *Miller v. Schoene*, 276 U.S. 272 (1928). In *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 491-92, the Court said, "[l]ong ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." See also *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 313 (1987) in which the Court said "[w]e accordingly have no occasion to decide . . . whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." See also *Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926) and *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1923).

¹⁵⁶ In upholding a state order that the owners of cedar trees had to destroy the trees to prevent the spread of a disease to nearby apple orchards, the Court did not consider it necessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute." *Miller v. Schoene*, 276 U.S. 272, 280. But, "[t]he nuisance exception to the taking guarantee . . . is not coterminous with the police power itself." *Penn Central Transportation Co.*, 438 U.S. at 145 (Rehnquist, J. dissenting).

¹⁵⁷ *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 491.

¹⁵⁸ *Id.* at 492-93. But see *id.* at 511-14 (Rehnquist, J. dissenting).

Rehnquist indicated this "nuisance exception," standing alone, regardless of the economic impact on the property owner, might support the Court's holding that the Subsidence Act did not constitute a taking. Even if statutes prohibiting noxious uses of property are exempted from the just compensation clause of the fifth amendment, the Broad Form Deed Amendment does not come within that nuisance exception.

In the past unregulated or underregulated surface mining activities were fairly susceptible to being characterized as noxious uses, since the mining activities caused significant off-site damage. However, the Amendment is not intended to regulate noxious use or nuisance-like activity. On its face, the Amendment purports to merely create a presumption applicable to the interpretation of broad form deeds. All of the Supreme Court's previous decisions employing the "nuisance rationale," in whole or in part, to sustain a law from a takings challenge have involved governmental acts which expressly purported to prohibit certain noxious land uses.¹⁵⁹ As discussed earlier in this article, the central purpose of the Broad Form Deed Amendment is "to change the relative legal rights and economic bargaining positions" of the surface and mineral owners under a broad form deed.¹⁶⁰ Such a purpose belies any attempt to characterize the Amendment as a regulation of a nuisance or noxious use.

The Amendment seeks to achieve its objective by creating what amounts to a positive rule of law that mineral owners cannot employ modern mining methods to extract their coal.¹⁶¹ The surface owner, however, can unilaterally authorize the mineral owner to use modern mining methods. The Amendment is therefore not analogous to the nuisance prohibition statutes the Court has previously sustained. The Amendment does not strictly prohibit any type of coal mining regardless of whether the mining activity is tantamount to a public nuisance. It merely gives

¹⁵⁹ See, e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (Pennsylvania's Subsidence Act); *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981)(Surface Mining Control and Reclamation Act of 1977); *Hodel v. Indiana*, 452 U.S. 314 (1981)(Surface Mining Control and Reclamation Act of 1977); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)(City of Los Angeles Ordinance prohibiting the operation of brickyards within the city limits); and *Mugler v. Kansas*, 123 U.S. 623 (1887)(state constitutional amendment prohibiting the manufacture and sale of liquor).

¹⁶⁰ *Akers*, 736 S.W.2d at 310. For complete discussion of the purpose of the Amendment, see *supra* text accompanying notes 11-54.

¹⁶¹ *Akers*, 736 S.W.2d at 308-9.

the surface owner the power to grant or withhold that right from the mineral owner for any (or no) reason.

When the governmental act is not a physical invasion or an appropriation of the complainant's property and it is not a restraint on property uses which are tantamount to a public nuisance, the takings analysis becomes more complicated. Although the character of the governmental act remains a factor, the economic impact of the state's action and its interference with the reasonable, investment-backed expectations of the property owner also become a part of the analysis.

2. Economic Impact

The United States Supreme Court has resolved a number of takings challenges to laws regulating land uses which could not be properly characterized as tantamount to a public nuisance or noxious use. For example, in *Andrus v. Allard*,¹⁶² the Eagle Protection Act prohibited a person from selling eagle feathers even if the feathers were legally acquired before the Eagle Protection Act was enacted. The Court sustained the statute even though it deprived the owner of the most profitable use of its property. The Court said that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."¹⁶³ Thus, the Court found no taking because the owners were not deprived of all the value of their property.

In *Agins v. City of Tiburon*,¹⁶⁴ the Supreme Court rejected a takings challenge to a city zoning ordinance for the same reasons. After a property owner acquired five acres of unimproved land, the city adopted a zoning ordinance. Under the terms of the ordinance, the property owner was limited to developing the land to a maximum of five single-family residences. The Supreme Court determined that the mere enactment of a comprehensive land use regulatory scheme does not constitute a

¹⁶² 444 U.S. 51 (1979).

¹⁶³ *Id.* at 65-66.

¹⁶⁴ 447 U.S. 255 (1980).

taking unless it denies the owner *all* economically viable use of its land.¹⁶⁵

The Broad Form Deed Amendment works an impermissible taking under the Fifth Amendment, because it deprives mineral owners of certain coal of all economically viable use of their property. For all intents and purposes, the value of the ownership of coal consists only of the right to mine it for a profit.¹⁶⁶ This is the only strand in a mineral owner's bundle of property rights in its minerals. Thus, when a state law makes it impossible, commercially or technologically, to mine the coal, that act deprives the mineral owner of *all* economically viable uses of its property. A state action making it impossible for a mineral owner to mine its coal cannot be sustained by characterizing it as a destruction of only one strand in the bundle of property rights of the mineral owner.

The Amendment creates a presumption that modern mining methods cannot be employed by the mineral owner to extract its coal. As to any mineral owners who cannot overcome the presumption, the Amendment functions as a positive rule of law. Such mineral owners are barred from using surface mining, auger mining, longwall mining, continuous seam mining and other modern mining technologies because the methods did not exist at the time the original broad form deeds were executed.¹⁶⁷ Those mineral owners are confined to extracting their coal by the deepshaft mining methods which existed in the early part of this century. However, removing much of Kentucky's remaining coal by such antiquated mining techniques is neither commercially nor technically feasible. Thus, the Amendment is unlike those state actions which were sustained by the Supreme Court because they merely deprived the property owner of the most profitable use of its property.¹⁶⁸ The Amendment effects a total taking of the property of those mineral owners who cannot

¹⁶⁵ *Id.* at 260. See also *Keystone Bituminous Coal Ass'n.*, 480 U.S. 470; *Hodel v. Virginia Surface Mining & Recl. Ass'n.*, 452 U.S. 264; and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104. An example of a statute which did constitute an impermissible taking because it deprived the property owner of all use of its property can be found in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393.

¹⁶⁶ *Pennsylvania Coal Co.*, 260 U.S. at 414-15.

¹⁶⁷ *Akers*, 736 S.W.2d at 308-9.

¹⁶⁸ See *Agins v. Tiburon*, 447 U.S. 255 (zoning ordinance limited the property owner to building one to five single-family dwellings on its property); *Andrus v. Allard*, 444 U.S. 51 (Eagle Protection Act prohibited the owner of eagle feathers from selling them, but permitted exhibition of the feathers for an admission charge).

overcome the presumption. It denies them the ability to mine their coal at all by making it physically impossible or commercially impracticable to remove the coal.¹⁶⁹

3. Investment-backed Expectations

Even if the Board Form Deed Amendment was not a total taking of the mineral owner's property, the Supreme Court's takings jurisprudence recognizes a governmental act may be constitutionally impermissible when it materially interferes with the reasonable investment-backed expectations of a property owner.¹⁷⁰ Not all expectations concerning the use of property constitute a constitutionally protected reasonable, investment-backed expectation. However, a Kentucky mineral owner whose property interest was created by a broad form deed executed prior to the Amendment does have such a protectable property interest.¹⁷¹

For at least seventy years, Kentucky's highest court has consistently recognized that under a broad form deed the mineral estate is dominant to the surface estate.¹⁷² The Court has found that a mineral conveyance granting surface rights "necessary and convenient for mining" means that the only restriction upon mining methods is that mining operation may not be conducted in an oppressive, arbitrary, wanton or malicious manner.¹⁷³ Absent oppressive, arbitrary, wanton or malicious mining conduct, the express damage waiver provision embodies the original parties' agreement that damage to the surface, regardless of the mining technique employed, will not result in any liability.¹⁷⁴

Current owners of coal mineral estates acquired their property interests and made enormous financial investments in reasonable reliance on these long established legal principles. It is axiomatic that the value of a mineral estate in large part depends on the cost of extracting the mineral. Thus, it is not illogical to

¹⁶⁹ See *Armstrong v. United States*, 364 U.S. 40 (a material supplier's lien was totally destroyed when its lien against a ship could not be enforced because title to the ship had been transferred to the United States government); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (Kohler Act made it commercially impracticable to mine anthracite coal in Pennsylvania).

¹⁷⁰ *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 499.

¹⁷¹ See *supra* text accompanying notes 64-74.

¹⁷² *Bluegrass Coal Corp. v. Combs*, 182 S.W. 207, 212 (Ky. 1916).

¹⁷³ *Case*, 276 S.W. at 574.

¹⁷⁴ *Buchanan*, 290 S.W.2d at 43.

assume that the pre-Amendment price of mineral estates in coal reflected the fact that the coal could be extracted by new mining techniques as well as by those mining techniques employed at the time the original broad form deed was executed. Reliance on the respective rights of the parties to a broad form deed as defined by the Kentucky courts has been greatest among those contemporary mineral owners who purchased coal which can only be extracted by surface mining or some other mining technique not known at the time the mineral estate was severed. The Amendment totally impairs the value of a such a mineral estate, because it functionally prohibits the mining of such coal. Thus, the reasonable, investment-backed reliance of purchasers of such mineral estates in coal has been defeated by the Amendment.

The economic value of the right to employ modern mining methods is significant. Without that right, the mineral owner must use turn-of-the-century mining methods, purchase the right to employ modern mining methods from the surface owner, or refrain from mining. Thus, the retroactive application of the Broad Form Deed Amendment would significantly interfere with the reasonable investment-backed expectations of Kentucky mineral owners claiming under broad form deeds executed prior to the adoption of the Amendment.

The takings issue arises in the context of Kentucky's Broad Form Deed Amendment¹⁷⁵ because the Amendment changes the property rights of mineral owners whose interests were created by broad form deeds. Before the enactment of the Amendment, a mineral owner in Kentucky who held under a broad form deed had the right to choose any method to mine the coal including modern surface mining methods.¹⁷⁶ The only limitation on this right was that the mining operation could not be conducted in an oppressive, arbitrary, wanton or malicious manner.¹⁷⁷

Since Kentucky enacted the Amendment, the *same* mineral owner holding under the *same* broad form deed may now only use those mining methods which were expressly provided for in the deed or which were in common use when its deed was executed. A contemporary mineral owner in Kentucky can employ other mining techniques only if it establishes by clear and convincing evidence that the original parties to the broad form

¹⁷⁵ KY. CONST. § 19(2).

¹⁷⁶ *Akers*, 736 S.W.2d at 305.

¹⁷⁷ *Blue Diamond Coal v. Neace*, 337 S.W.2d at 727.

deed intended to permit extracting coal by later-developed mining methods.

Surface mining as practiced today was not in use at the time most broad form deeds were executed.¹⁷⁸ It is impossible to establish by any evidence that this not-yet-developed mining method was in common use when the deed was originally executed. It is also highly improbable that the original parties to the broad form deed expressly provided for the use of a mining method which was not yet developed. Such prescience is rare. As the Kentucky Supreme Court has noted, the Amendment's presumption effectively eliminates the mineral owners pre-Amendment legal right to use modern mining techniques to extract its coal.¹⁷⁹ The Amendment forces the current mineral owner to repurchase that right from the surface owner.

Because the Amendment deprives mineral owners of a reasonable investment-backed expectation, it violates the takings clause of the U.S. Constitution.

III. THE CONTRACT CLAUSE

The constitutionality of the Broad Form Deed Amendment can also be evaluated in light of the contract clause of the United States Constitution¹⁸⁰ which provides that "No State shall . . . pass any . . . Law impairing the Obligations of Contracts"¹⁸¹ This provision was enacted against a background of economic depression and was intended to deal with a specific problem that had arisen under the Articles of Confederation. In response to the economic difficulties of their debtor citizens, many states had enacted legislation relieving debtors of their obligations by readjusting the contractual obligations between debtors and creditors. This legislative tinkering with established contractual rights created its own economic problems by discouraging extensions of credit and hampering trade.¹⁸² The contract clause was an attempt to stabilize contractual relationships

¹⁷⁸ *Akers*, 736 S.W.2d at 308-9. Augering is another contemporary mining method which was not in common use at the time most broad form deeds were executed. *Id.* at n. 21. The Amendment probably also prohibits longwall mining and continuous seam mining because they are contemporary mining methods not commonly used in the early 1900s.

¹⁷⁹ *Id.* at 308.

¹⁸⁰ U.S. CONST. art. I, § 10.

¹⁸¹ *Id.*

¹⁸² *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 427-28 (1934).

by preventing legislative interference with them. This situation was described by Chief Justice Marshall in his dissent in *Ogden v. Sanders*:

The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all . . . and destroys all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private fate. To guard against the continuance of the evil, was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.¹⁸³

After its inclusion in the Constitution, the reach of the contract clause was soon expanded beyond debtor/creditor relations. In *Fletcher v. Peck*,¹⁸⁴ the first Supreme Court case to interpret the contract clause, the issue was the state's ability to rescind land grants which had been obtained by bribery in the Great Yazoo Land Scandal. Again, in *Dartmouth College v. Woodward*,¹⁸⁵ the issue was whether the state had the power to alter the corporate charter granted to Dartmouth College. The Court found the charter was a contract and the state was prohibited by the contract clause from passing legislation to amend it.

In the early years of this country the contract clause was the most widely used means of protecting individual property rights against state regulation.¹⁸⁶

Before 1889 the contract clause had been considered by the court in almost 40% of all cases involving the validity of state legislation. So successfully was its protection invoked that it was the constitutional justification for 75 decisions in which state laws were held unconstitutional, almost half of all of those in which the legislation was declared invalid by the Supreme Court.¹⁸⁷

¹⁸³ 25 U.S. (12 Wheat.) 212, 354-55 (Marshall C.J., dissenting)(1819).

¹⁸⁴ 10 U.S. (6 Cranch) 87 (1810).

¹⁸⁵ 17 U.S. (4 Wheat.) 518 (1819).

¹⁸⁶ Comment, *The Contract Clause: A Constitutional Basis For Invalidating State Legislation*, 12 LOY. L.A.L. REV. 927 (1979).

¹⁸⁷ B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 95 (1938).

In the late 19th Century, the influence of the contract clause began to wane with the rise of due process analysis under the fifth and fourteenth amendments to the United States Constitution.¹⁸⁸ During the Depression of the 1930s, the states again attempted to enact legislation readjusting debtor/creditor relations. Part of the analysis of the constitutionality of those statutes involved the contract clause.¹⁸⁹

After that brief resurgence, the contract clause again lapsed into dormancy until 1977 and 1978 when the United States Supreme Court resurrected it to strike two statutes in *United States Trust Company v. New Jersey*¹⁹⁰ and *Allied Structural Steel v. Spannaus*.¹⁹¹ For its contract clause analysis in these two cases, the Court turned to a test set out in an earlier case, *Home Building and Loan Association v. Blaisdell*.¹⁹² *Blaisdell* has become the benchmark case for modern contract clause interpretation since, as Justice Blackman described it in *United States Trust Company*, it is "regarded as the leading case in the modern era of contract clause interpretation."¹⁹³

A. *Blaisdell*

*Home Building and Loan Association v. Blaisdell*¹⁹⁴ involved a challenge under the contract clause to the Minnesota Mortgage Moratorium Law. In 1933, the Minnesota legislature declared a state of emergency because of the economic depression that gripped the United States at that time. As a response to that state of emergency, the Minnesota legislature provided a judicial means for postponing mortgage foreclosures and sales and for lengthening the mortgagor's redemption period after a foreclosure.

The purpose of the legislation was to prevent massive foreclosures and the dislocation of large portions of the population into homelessness as well as large deficiency judgments against mortgagors.¹⁹⁵ The Act was by its terms temporary since it was

¹⁸⁸ *United States Trust Co.*, 431 U.S. at 1, 14-15.

¹⁸⁹ *Blaisdell*, 290 U.S. 398.

¹⁹⁰ *United States Trust Co.*, 431 U.S. at 1.

¹⁹¹ *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978).

¹⁹² *Blaisdell*, 290 U.S. 398.

¹⁹³ *United States Trust Co.*, 431 U.S. at 15.

¹⁹⁴ *Blaisdell*, 290 U.S. 398.

¹⁹⁵ *Id.* at 421, n. 3.

to remain in effect only until the emergency abated or for two years, whichever came first. Under this legislation, mortgagors did not receive complete relief from their contractual obligations. The mortgage agreements remained in effect, but the foreclosures were postponed, and during the forbearance period, mortgagors were required to make rental payments to the mortgage holders.¹⁹⁶

In support of its legislation, Minnesota argued the act was a response to an emergency situation and was a valid exercise of the state's police power to protect the public welfare. The *Blaisdell* Court was then faced with the task of reconciling the state's right to exercise its police power with the contract clause's absolute command that the state enact no laws impairing the obligations of contracts. The Court concluded that despite its absolute terminology, the contract clause does not absolutely prohibit impairment of contracts by the state's police power. The Court further determined that the state's police power and the mandate of the contract clause must be reconciled and balanced. "To ascertain the scope of the constitutional prohibition [of the contract clause] we examined the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."¹⁹⁷

Rather, the contract clause is subject to qualification by the state's police power to protect public welfare, just as the state's police power is restricted by the contract clause. "The reserved powers [of the state] cannot be construed so as to destroy the limitation [of the contract clause], nor is the limitation to be construed to destroy the reserved power [to the state] and its essential aspects. They must be construed in harmony with each other."¹⁹⁸ Applying this notion of harmonization to the Minnesota Mortgage Moratorium Law, the Court found it was a valid exercise of the state's police power and did not offend the contract clause.¹⁹⁹

The Court identified five factors it considered in upholding the statute. First, the statute was specifically enacted to address an emergency that had been declared by the state. The Court

¹⁹⁶ *Id.* at 425.

¹⁹⁷ *Id.* at 428.

¹⁹⁸ *Id.* at 439.

¹⁹⁹ *Blaisdell*, 290 U.S. at 447.

confirmed that emergency by judicial notice.²⁰⁰ Second, the legislation addressed a general social problem and the statute “was not for the mere advantage of particular individuals.”²⁰¹ The Court’s third consideration was the means by which the statute addressed the general social problem. It determined that the means adopted by the legislature were well suited to address the situation.²⁰²

Fourth, the Court noted that the conditions imposed by the legislation were not unreasonable in that they did not destroy the obligations of contract. They merely postponed the enforcement of those obligations for a temporary period.²⁰³ In addition, the statute provided for compensation to the mortgagee during the time that the mortgagor’s obligations were suspended.²⁰⁴ In this part of its analysis, the Court did not give full deference to the determinations of the state legislature. Rather, it analyzed the reasonableness of the purpose of the legislation and the means chosen by the legislature to meet that purpose. The fifth factor that the Court noted in upholding the Minnesota Moratorium Act was that the legislation was temporary.²⁰⁵

With these five factors, the *Blaisdell* Court created a stringent test for evaluating whether a state’s exercise of its police power offends the contract clause. However, in the years following *Blaisdell*, the stringency of this test diminished, and the contract clause fell again into disuse until it was resurrected in 1977 in *United States Trust Company v. New Jersey*.²⁰⁶

B. *United States Trust and Allied*

In its decision in *United States Trust Company*, the Supreme Court used the contract clause to strike a statute for the first time in nearly 36 years. At issue in this case was the repeal by the legislatures of New York and New Jersey of legislative covenants that served as security for bonds issued by the Port Authority of New York and New Jersey.

The Port Authority was organized in 1921 to coordinate transportation around and through the Port of New York. In

²⁰⁰ *Blaisdell*, 290 U.S. at 444.

²⁰¹ *Id.* at 445.

²⁰² *Id.*

²⁰³ *Blaisdell*, 290 U.S. at 445-46.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 447.

²⁰⁶ *United States Trust Co.*, 431 U.S. 1.

1960, the Port Authority proposed to acquire the Hudson and Manhattan Railroad, a bankrupt commuter system that served an area around the port. This expansion plan required using Port Authority income in ways that conflicted with the covenants previously given by the legislatures of New York and New Jersey as security for bonds issued by the Port Authority. When the legislatures proposed to repeal those covenants, that repeal was attacked as an impairment of the contract between the states and the bond holders.²⁰⁷ Both states repealed their covenants, but suit was brought only against New Jersey.

The Court first addressed whether there was an impairment of the contract at all. The states contended that although the covenants were a part of the bondholders' contracts, the repeal of the covenant had an insignificant effect on the market value of the bonds. The Court rejected this attempt to focus on the extent of the impairment as a prerequisite to implication of the contract clause.²⁰⁸ The Court found that since there was an impairment of the contract, the issue was whether that impairment which was prohibited by the contract clause could be reconciled with the state's exercise of its police powers.²⁰⁹ "Thus, 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."²¹⁰

The Court also noted that simply having a legitimate public purpose for the legislation is not of itself sufficient to protect the legislation from a contract clause challenge. "Yet the contract clause limits otherwise legitimate exercises of the state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation."²¹¹

Balancing the dictates of the contract clause and the state's police powers, the *United States Trust* Court looked to the stringent test set out in *Blaisdell*. The Court noted, however, that the stringency of the *Blaisdell* test should be tempered by the policy of legislative deference which was articulated in *East New York Savings Bank v. Hahn*.²¹² "As is customary in review-

²⁰⁷ *Id.* at 4-14.

²⁰⁸ *Id.* at 17-21.

²⁰⁹ *Id.* at 21.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945).

ing economic and social regulations, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.”²¹³ The Court went on to say that when a state enacts legislation impairing its own contracts, no legislative deference is appropriate. The Court must determine for itself the reasonableness and necessity of the legislation. For a state’s impairment of its own obligations, the Court adopted a stricter scrutiny.²¹⁴

The Court acknowledged that encouraging mass transportation and energy conservation were legitimate state goals.²¹⁵ It then examined whether the means used by the legislature of New Jersey in repealing its covenants were “both reasonable and necessary”²¹⁶ using a very strict test of necessity. First it considered whether a mere modification of the covenant—something less drastic than total repeal—would have served the state’s purpose. The Court was not willing to leave the choice of the means of obtaining its legitimate goal solely to the legislature. The Court found the state had failed “to demonstrate that repeal of the 1962 covenant was similarly necessary.”²¹⁷

The next year the Court used a similar analysis in *Allied Structural Steel v. Spannaus*²¹⁸ to invalidate a Minnesota statute dealing with private contracts. At issue in *Allied* was the Minnesota Private Pension Benefits Act. This statute affected only private employers with 100 or more employees (with at least one in Minnesota) that also provided pension benefits under a plan that qualified for tax treatment under Section 401 of the Internal Revenue Code.²¹⁹ If such an employer terminated the pension benefit plan or left the State of Minnesota, it would be subject to a “pension funding charge.”²²⁰

The statute required such an employer to pay into its pension benefit plan the difference between the amount already in the fund and the amount that would be necessary to cover full pensions for all employees who had worked at least ten years for the company. If the employer left the state, the statute, in

²¹³ *United States Trust Co.*, 431 U.S. at 22, 23.

²¹⁴ *Id.* at 23, 24.

²¹⁵ *Id.* at 28.

²¹⁶ *Id.* at 29.

²¹⁷ *Id.* at 31.

²¹⁸ *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978).

²¹⁹ *Id.* at 238.

²²⁰ *Id.*

effect, provided the employees with ten year cliff vesting regardless of the terms of the particular benefit plan.²²¹

Allied closed its Minnesota office in 1974 and was assessed a funding charge of approximately \$185,000.00.²²² Allied challenged the statute in Federal District Court²²³ where it was upheld.

The Supreme Court had no difficulty in making the initial determination that the statute substantially altered the private contractual obligations between Allied and its employees. As in *United States Trust*, the Court then proceeded to analyze the balancing between the state's asserted interest in what it claimed to be an exercise of its police power and the contract clause.²²⁴

The Court noted that unlike the legislation at issue in *United States Trust*, the Minnesota Private Pension Benefits Protection Act affected only private contracts and not contracts of the state itself.²²⁵ However, the Court did not automatically adopt a policy of deference towards the Minnesota legislature's determinations of the purpose and reasonableness of the Act. Instead, the Court analyzed the severity of the legislation's impairment of private contracts. The Court stated that if the alteration of the contract was minimal and placed little burden on the individual, the analysis might terminate with no further investigation of the legislation's purpose and means. "Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."²²⁶ Thus, the *Allied* Court determined that when the impairment of a contract between individuals is severe, it will receive the same close scrutiny given to a state's impairment of its own obligations.²²⁷

To determine whether the legislation's impairment of a private contract was severe, the Court looked primarily at the degree to which the impairment undermined reasonable reliance on the contract. The Court used reliance as the measure since it saw the protection of the stability of contractual relations (and

²²¹ *Id.* at 238-40.

²²² *Id.* at 239.

²²³ *Fleck v. Spannaus*, 421 F.Supp. 20 (D. Minn. 1976).

²²⁴ *Allied Structural Steel*, 438 U.S. at 240, 241.

²²⁵ *Id.* at 243, 244.

²²⁶ *Id.* at 245 (citations omitted).

²²⁷ *Id.*

the consequent reliance on those contracts) as one of the primary purposes of the contract clause.²²⁸

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.²²⁹

The Court found Allied significantly relied on its contract with its employees regarding pension benefits. Allied based its contributions to the pension fund on actuarial calculations directly related to the vesting requirements set out in the plan. By establishing new vesting requirements and requiring different pension contributions from Allied, the legislation undermined the corporation's reasonable reliance on its contracts with its employees.²³⁰

Having established that the legislation significantly impaired private contracts, the Court then examined the necessity and reasonableness of the legislation using the nondeferential test set out in *Blaisdell*. The Court incorporated the five factors in *Blaisdell* into its analysis in their original form.

In upholding the state mortgage moratorium law, the [Blaisdell] court found five factors significant. First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. [Blaisdell] at 444. Second, the state law was enacted to protect the basic societal interest, not a favored group. *Id.* at 445. Third, the relief was appropriately tailored to the emergency that it was designed to meet. *Id.* Fourth, the imposed conditions were reasonable. *Id.* at 445-447. And finally, the legislation was limited to the duration of the emergency. *Id.* at 447.²³¹

In applying these factors to the Minnesota legislation, the Court found it did not address an important general social problem.

Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet

²²⁸ *Id.*

²²⁹ *Id.* at 245.

²³⁰ *Allied Structural Steel*, 438 U.S. at 245-47.

²³¹ *Id.* at 242.

an important general social problem. The presumption favoring “legislative judgment as to the necessity and reasonableness of a particular measure,” *United States Trust Company*, 431 U.S. at 23, simply cannot stand in this case.²³²

The Court also found that the legislation was not a response to an emergency or a pressing social problem.²³³ Although the Court pointed out that “an emergency of great magnitude” is not a prerequisite, the legislation must address a “broad societal interest.”²³⁴

Finally, the Court considered whether the subject addressed by the legislature had been previously regulated.²³⁵ The Court reasoned that if one enters into a contract in an area that is highly regulated, it is more reasonable to expect that the contractual relations might be changed by legislation. This would reduce legitimate reliance on the contractual terms.²³⁶

The Court summarized its finding that the Minnesota Private Pensions Benefits Protection Act violated the contract clause by comparing that act to the Mortgage Moratorium Act upheld in *Blaisdell*. The Court struck the Private Pension Benefits Protection Act because: [1] it was not enacted to deal with a “broad, generalized, economic or social problem”; [2] “[i]t did not operate in an area already subject to state regulation”; and [3] “[i]t did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent and immediate change in those relationships irrevocably and retroactively.”²³⁷

C. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*²³⁸

In this case, the United States Supreme Court evaluated the constitutionality of the Kansas Natural Gas Price Protection Act against a challenge that it violated the contract clause. The Kansas Act imposed price controls on intrastate gas sold under contracts entered into prior to April 20, 1977. Kansas enacted

²³² *Id.* at 247.

²³³ *Id.* at 249.

²³⁴ *Id.* at 249, n. 24.

²³⁵ *Id.* at 250.

²³⁶ See *Veix v. Smith Ward Bldg. & Loan Ass'n.*, 310 U.S. 32 (1939).

²³⁷ *Allied Structural Steel*, 438 U.S. at 250.

²³⁸ *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983).

this statute pursuant to the federal Natural Gas Policy Act of 1987 which established price controls for numerous categories of gas with the goal of eventually deregulating the price of natural gas.²³⁹ The Kansas Act prevented intrastate gas prices from rising pursuant to escalation provisions in the affected contracts. Those contract provisions increased gas prices in accordance with governmental ceiling prices or prices paid under certain other contracts.²⁴⁰

In 1975, the Kansas Power & Light Co. (KPL) had entered into two natural gas supply contracts for intrastate gas with Quinton Oil Company. Quinton Oil Company was the predecessor in interest of Energy Reserves Group, Inc. (ERG). Both of these contracts contained two kinds of indefinite price escalators. One escalator was a governmental price provision which allowed the price under the contract to escalate to the maximum price permitted by a governmental authority. The second indefinite escalation provision allowed ERG, the seller, to have the contract price redetermined at given intervals. The redetermined contract price was to be based on the average of the prices paid under three other contracts chosen by the parties.²⁴¹

The Energy Reserves Group attempted to escalate the price of intrastate gas under these contracts to the highest price set by the federal government for interstate gas under the National Gas Policy Act. KPL responded that the Kansas Act prevented ERG from invoking the governmental price escalator to raise the price of intrastate gas under the contracts. When that issue was litigated, the trial court and the Supreme Court of Kansas affirmed that interpretation of the Kansas Act and determined the Act did not violate the contract clause. The state courts found Kansas had a "legitimate interest in addressing and controlling the serious economic dislocations that the sudden increase in gas prices would cause"²⁴² On its review of the legislation, the United States Supreme Court agreed.

The Court began with the proposition that, although the contract clause is facially absolute, it must be balanced with the state's inherent police power to protect the "vital interest" of its citizens.²⁴³ The Court looked to its recent decisions in *United*

²³⁹ *Id.* at 405-6.

²⁴⁰ *Id.* at 407.

²⁴¹ *Id.* at 403-4.

²⁴² *Id.* at 409.

²⁴³ *Energy Reserves*, 459 U.S. at 410.

States Trust and *Allied* and determined that “the threshold inquiry is ‘whether the state law has, in fact, operated as a substantial impairment of a contractual relationship’. *Allied Structural Steel Co.*, 438 U.S. at 244.”²⁴⁴ The Court also adopted the position from *Allied* that “[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.”²⁴⁵ According to the Court, one measure of the extent of impairment is the degree to which the area covered by the legislation in issue has been previously regulated. “In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.”²⁴⁶

If it is determined as a threshold issue that the legislation creates a substantial impairment of the contract, then the inquiry would shift to the state’s interests in promulgating the legislation. “If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, *United States Trust Company*, 431 U.S., at 22, such as the remedying of a broad and general social or economic problem.”²⁴⁷ The Court also noted that requiring the state to have a general *public* purpose insures that the legislation is truly an exercise of the state’s police power and not legislation enacted for the benefit of certain individuals or special interests.²⁴⁸

If the state can demonstrate that the legislation is an exercise of its police power by showing that it has a legitimate public purpose, then the Court must determine whether the conditions imposed by the legislation are appropriate to its purpose. This final analysis is limited, however, to legislation in which a state impairs the obligations of its own contracts or to legislation which imposes a severe impairment of contractual relations.²⁴⁹

In making the threshold determination whether the Kansas Act significantly impaired ERG’s contractual rights, the Court first noted that the natural gas industry is heavily regulated.²⁵⁰ The Court reviewed the long history of federal regulation of

²⁴⁴ *Energy Reserves*, 459 U.S. at 411.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 411-12.

²⁴⁸ *Energy Reserves*, 459 U.S. at 412.

²⁴⁹ *Id.* at 412-13.

²⁵⁰ *Energy Reserves*, 459 U.S. at 413.

interstate gas prices and the effect of that regulation on intrastate prices. Indeed, the very existence of a governmental escalator clause and contractual provisions making the agreement subject to present and future state and federal law was an acknowledgement by the parties of the extensive regulation of the natural gas industry.²⁵¹ The Court found that price regulations such as those imposed by the Kansas Act were foreseeable by the parties as the type of legislation that could alter their contractual relations. "In short, ERG's reasonable expectations have not been impaired by the Kansas Act."²⁵²

Since the Court found no substantial impairment, the analysis could have ended there. However, the Court went on to review the interest of the state in enacting the gas price regulations. The Court found that it was a valid exercise of the state's police power as an attempt to protect its citizen consumers from the effect of deregulation of natural gas prices and consequent escalation of those prices.²⁵³ In reviewing the means that Kansas chose to implement its legitimate purpose, the Court noted that the statute was temporary as it was designed to follow the federal deregulation of natural gas prices.²⁵⁴

In analyzing the Kansas Act, the Court seems to have emphasized the expectations of the parties in making the contract and their knowledge and expectation that the legislation could alter their agreement. Having such knowledge and contracting in an area that was heavily regulated, the Court determined that the parties must have expected that their contractual obligations could be altered. Thus it found that the Kansas Act did not violate their reasonable expectations in their contractual obligations.

D. *Exxon Corp. v. Eagerton, Commissioner of Revenue of Alabama*²⁵⁵

The next year, the Court addressed an analogous situation involving an Alabama act which amended that state's longstanding severance tax on oil and gas. The existing statute provided that the severance tax was levied on the ownership interest in

²⁵¹ *Id.* at 415-16.

²⁵² *Id.* at 416.

²⁵³ *Energy Reserves*, 459 U.S. at 416-17.

²⁵⁴ *Id.* at 418.

²⁵⁵ 462 U.S. 176 (1983).

the oil and gas, but would be paid by the entity in charge of the production operations. In 1979, the Alabama legislature amended that Act to increase the amount of the severance tax. The amendment also provided that royalty owners were exempt from the payment of any of the increased tax. To insure that the producers of the oil and gas did not simply pass the increase in the severance tax on to the consumers, the statute prohibited the pass-through of the increased tax.²⁵⁶

The legislation was challenged by producers who had production contracts requiring the owners of royalty interests in oil and gas to bear part of the severance taxes. The producers also had sale contracts which required the purchasers of the oil and gas to reimburse the producers for all severance taxes. One basis for the challenge was that it impaired the producers' contractual rights under these two groups of contracts.²⁵⁷ The trial court found the Alabama statute unconstitutional and struck it in its entirety. On appeal, the Supreme Court of Alabama reversed and found the entire statute valid.²⁵⁸

Once this Act was before the United States Supreme Court, the first issue addressed was the constitutionality of the statute's exemption of royalty owners from paying the increased severance tax. The Court found this to be a non-issue under the contract clause since it determined the statute did not nullify any contractual rights. It interpreted the statute merely to prohibit the *state* from levying against the royalty owners for the increased taxes. The Court found that the statute did not prevent the royalty owners from voluntarily agreeing to share in that increase. Thus, no contractual rights or obligations were impaired by that aspect of the statute.²⁵⁹

The Court found that the pass-through prohibition, on the other hand, did affect the producers' contractual rights. That provision nullified the contractual terms requiring the purchasers of the oil and gas to reimburse the producers for all severance taxes. Such a contractual provision would in effect pass severance taxes through to the purchaser, so it was prohibited by the statute.²⁶⁰

²⁵⁶ *Id.* at 178-79.

²⁵⁷ *Id.* at 180.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 187-89.

²⁶⁰ *Id.* at 189.

In its analysis of whether this impairment of a contractual right violated the contract clause, the Court took a slightly different approach from its previous contract clause cases. The Court began with the proposition that it must balance the state's legitimate exercise of its police power against the mandate of the contract clause. It reviewed the many cases in which it had upheld state legislation enacted for the public good, even though the legislation tangentially or indirectly affected contract rights. These are statutes such as those prohibiting lotteries²⁶¹ and the sale of beer,²⁶² and workers' compensation statutes which applied to pre-existing employment contracts.²⁶³

In reviewing those cases, the Court noted that none of the statutes involved had the acknowledged purpose of affecting or impairing contracts. The impairment of the contracts was nothing more than an *indirect consequence* of the state's determination that beer and lotteries were injurious to the public welfare and that workers' compensation statutes were beneficial to its citizens.²⁶⁴

Following this line of reasoning, the *Exxon* Court pointed out that the pass-through prohibition contained in the Alabama statute was not directed at any *particular* contracts and was not designed to directly affect any specific contractual obligations. However the statute was designed to protect consumers from bearing the burden of the increase in the severance tax, which the Court had found to be a legitimate public interest.²⁶⁵

Like the laws upheld in these cases [prohibiting lotteries, etc.], 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," *Allied Structural Steel Co.*, *supra* at 249: protecting consumers from excessive prices. The prohibition applied to all oil and gas producers, regardless of whether they happened to be parties to sale contracts that contained a provision permitting them to pass tax increases through to their purchasers. The effect of the pass through prohibition on existing contracts that did contain such a pro-

²⁶¹ *Stone v. Mississippi*, 101 U.S. 814 (1880).

²⁶² *Beer Co. v. Massachusetts*, 97 U.S. 25 (1878).

²⁶³ *New York Central R. Co. v. White*, 243 U.S. 188 (1917).

²⁶⁴ *Exxon*, 462 U.S. at 191.

²⁶⁵ *Id.* at 191-92.

vision was incidental to its main effect of shielding consumers from the burden of the tax increase.²⁶⁶

The Court distinguished the Alabama statute from the statutes which were struck in *United States Trust Co.* and *Allied*. It found that the statutes in the latter cases were designed to directly affect contractual rights as opposed to merely having an indirect effect on them.²⁶⁷

The Court also acknowledged Alabama's power to enact the statute in issue. It noted that the Court had on many occasions approved rate-setting legislation, even though that legislation replaced contractually agreed upon rates.²⁶⁸

With the *Exxon* case, the Court injected a new element into its contract clause analysis: whether the legislation's purpose was to directly affect contractual relationships and obligations. If the effect on contracts is indirect or secondary and the legislation is enacted for different legitimate police power purposes, the legislation may be sustained. However, the Court did not explain how this new element fits into the *Blaisdell* test nor how it is to be weighted.

E. *Keystone Bituminous Coal Ass'n. v. DeBenedictis*²⁶⁹

The Court's most recent contract clause analysis was in 1987 with its decision in *Keystone*,²⁷⁰ in which the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act was challenged. That Act required coal operators to leave 50% of the coal beneath certain structures, water courses, and cemeteries to provide surface support and to prevent subsidence.²⁷¹ The Act also authorized the Pennsylvania Department of Environmental Resources to take certain punitive measures against coal operators who had failed to repair subsidence damage, failed to satisfy any claims arising from subsidence, or had not deposited security for payment of that damage within six months of the claim.²⁷²

The Keystone Bituminous Coal Association challenged the Act in part on the basis that Section 6, which addressed the

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 192.

²⁶⁸ *Id.* at 192-94.

²⁶⁹ *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 476-77.

²⁷² *Id.* at 477.

sanctions for failure to repair subsidence damage, violated the contract clause. The members of the Association were parties to numerous contracts in which the owners of the surface had waived any damage to the surface arising out of mining. The Association claimed that Section 6 of the Act impaired their rights under those contracts.²⁷³

That challenge was brought in the United States District Court for the Western District of Pennsylvania. The District Court rejected the Association's contract clause challenge, found that the statute had a public purpose, and gave great deference to the state legislature's determination of the necessity and reasonableness of the legislation since it only affected private contracts.²⁷⁴ The Court of Appeals affirmed, as did the United States Supreme Court.

In responding to the challenges to the Act, the Supreme Court first addressed the Association's claim that the Act constituted a taking of property in violation of the takings clause.²⁷⁵ After a lengthy and painstaking analysis, the Court determined that the Act did not constitute an impermissible taking and turned its attention to the contract clause challenge. That analysis was much more cursory. In its takings analysis, the Court had already determined that the Act was a valid exercise of the state's police power with the legitimate general public purpose of protecting the citizens of Pennsylvania from subsidence caused by underground mining.²⁷⁶

In its contract clause analysis, the Court acknowledged that the Act created a substantial impairment of a contractual relationship and then turned to the justifications for the impairment.²⁷⁷ The Court attempted neither to analyze the extent of the impairment nor to determine whether a stricter level of scrutiny (as where a state impairs its own contract) was appropriate. The Court acknowledged that having found an impairment, even though the purpose of the legislation was proper, it needed to look at the reasonableness of the conditions imposed upon contractual relationships in serving that purpose.²⁷⁸ How-

²⁷³ *Id.* at 478-80.

²⁷⁴ *Id.* at 478-81.

²⁷⁵ See *supra* text accompanying notes 55-171.

²⁷⁶ *Keystone Bituminous Coal Ass'n*, 480 U.S. at 485-93.

²⁷⁷ *Id.* at 504.

²⁷⁸ *Id.* at 505.

ever, the Court did not perform its own analysis of those conditions, but simply deferred to the determinations of the Pennsylvania legislature that the conditions were appropriate.²⁷⁹

The opinion in *Keystone* leaves no doubt that the Court's contract clause analysis was far secondary to its analysis of the constitutionality of the Act under the takings clause. Whether this case heralds a new decline for the contract clause or is simply an aberration remains to be seen. It may simply indicate the takings test is so much more stringent, that only when the Act has survived a takings clause challenge is it subject to the secondary contract clause analysis. *Keystone* in no way officially reversed or impugned any of the elements of analysis that the Court has developed in its modern contract clause jurisprudence. Until the Court clarifies its contract clause analysis, any evaluation of the constitutionality of legislation under the contract clause must consider all of the various tests the Court has articulated in recent years.

F. *Kentucky's Broad Form Deed Amendment*

To decide whether Kentucky's Broad Form Deed Amendment violates the contract clause of the United States Constitution, one must first determine whether it impairs or alters the rights and obligations of the parties to broad form deeds. One must also examine whether it impairs the contracts of those who have made subsequent contractual relationships such as deeds or leases based on those original broad form deeds. Like the statute at issue in *United States Trust*,²⁸⁰ there is little question that the Amendment impairs these contracts. The operative section of the Amendment *expressly* affects the rights and obligations of the parties to broad form deeds.

One characteristic of broad form deeds is a provision stating that the owner of the minerals has the right to use the surface of the mineral property for all purposes "necessary or convenient" to mining, transporting or preparing the coal removed from that property.²⁸¹ One would assume from the plain language of the deed that the right to use the surface for all necessary and convenient purposes related to mining would per-

²⁷⁹ *Id.*

²⁸⁰ *United States Trust v. New Jersey*, 431 U.S. 1.

²⁸¹ *Akers v. Baldwin*, 736 S.W.2d 294, 298.

mit the mineral owner to use methods of mining developed after the date of the deed. The Kentucky Supreme Court reached this conclusion in *Buchanan v. Watson*²⁸² and recently reaffirmed it in *Akers v. Baldwin*.²⁸³ By its very terms, the Broad Form Deed Amendment would impair that right to use the surface for all necessary and convenient purposes by prohibiting the use of modern mining methods unless the mineral owner obtained the consent of the owner of the surface. Like the pension statute at issue in *United States Trust*, the Amendment directly and purposefully readjusts the rights of the parties to the contract (the broad form deed) and their successors in interest.

Once it is determined that the Amendment impairs the obligations of contracts either of the original parties to the broad form deed or their successors in interest, the next issue is whether the Amendment is a legitimate exercise of the state's police power. If it is a proper exercise of the police power, then the state's interest in protecting the public welfare must be balanced against the prohibition of the contract clause.

To be a legitimate exercise of the state's police power, the legislation in issue must address a broad societal problem.²⁸⁴ One reason for requiring that an exercise of the police power address a broad societal problem is to insure that it is not made for the benefit of a few individuals or a small group.²⁸⁵

As discussed above, the Amendment is not a valid exercise of the police power because it does not serve a general public purpose.²⁸⁶ By its terms the Amendment gives each individual surface owner the right to waive the provisions of the Amendment. A statute can hardly be said to be enacted for the public good if individuals can short-circuit its supposedly beneficial purposes.

The Amendment is unlike statutes previously approved by the United States Supreme Court prohibiting lotteries or the sale of beer or authorizing the application of workers compensation statutes to existant contracts.²⁸⁷ In *Exxon Corp. v. Eagerton*,²⁸⁸ the Court upheld the natural gas rate statute at issue there by

²⁸² *Buchanan v. Watson*, 290 S.W.2d 40.

²⁸³ 736 S.W.2d at 305.

²⁸⁴ *Allied Structural Steel*, 438 U.S. at 247; *Energy Reserves*, 459 U.S. at 411-12.

²⁸⁵ *Energy Reserves*, 459 U.S. at 412.

²⁸⁶ See *supra* notes 84-146 and accompanying text.

²⁸⁷ See *Energy Reserves*, 459 U.S. at 400 and cases cited therein.

²⁸⁸ *Exxon*, 462 U.S. at 190-91.

likening it to such cases involving the prohibition of lotteries and beer sales and the implementation of workers' compensation statutes. The Court noted that legislation in these cases was directed at what the state determined to be a general public evil or good which was then abolished or implemented wholesale for the public benefit. Unlike such legislation, the Amendment makes no general determinations. Rather, it permits *individual* surface owners to determine whether or not they will permit the use of modern coal mining methods. Any statute which permits individuals to accept or reject it can only have been for the benefit of those few individuals who are given the choice.

Since the Amendment is not a valid exercise of the state's police power, it need not be balanced against the contract clause. In such a case, the contract clause would become absolute to prohibit *any* impairment of contracts by the Amendment. Rather than doing a balancing analysis, the Amendment would simply be struck as an impermissible impairment of contracts violating the contract clause.

If the Broad Form Deed Amendment was found to be a proper exercise of the state's police power, it would not necessarily pass constitutional muster under the contract clause. Further analysis would be necessary to determine whether the impairment of contracts caused by the Broad Form Deed Amendment is severe. According to the *Allied* court, if the impairment is severe, the legislation will receive the same extensive, non-deferential evaluation used for a state's impairment of its own contracts.²⁸⁹ If the impairment is not severe, the Court will only review the state's articulated purposes for the statute. The Court will defer to the legislature's determination that the means they used and the conditions they imposed are reasonable and necessary.

To determine whether the impairment of contracts wrought by the Broad Form Deed Amendment is severe, the *Allied* court test requires one to look at the parties' reliance on the terms of the contract.²⁹⁰ Obviously, both the purchaser of the minerals under a broad form deed and all of that purchaser's successors in interest relied heavily on the grant of the minerals and mining rights contained in the severance deed. Hundreds of millions of dollars have been expended for minerals in this state on the

²⁸⁹ *Allied Structural Steel*, 438 U.S. at 245.

²⁹⁰ *Id.* at 245-46.

assumption that the severing broad form deed granted the property interest and the rights it purported to transfer. That reliance on individuals' ability to order their affairs through private contracts is what the contract clause was intended to protect.²⁹¹

One test for whether the parties relied on the terms of the agreement in question in ordering their affairs is whether the subject matter of the contract was heavily regulated by the state at the time the contract was made. The contracts affected by the Amendment deal primarily with the severance and transfer of (mineral) property interests. Obviously those deeds and all the subsequent transfers of that property interest are governed by state laws governing the transfer of real property. Property laws are designed primarily to maintain the status quo.²⁹² If anything, the parties to the severance deeds and their successors *relied* on the state's property law to *maintain* their contractual rights and interests. The normal analysis found in the contract clause cases is reversed in this situation. Normally, when it is determined that the area was regulated by the state, the implication is that the parties knew their contractual obligations could be changed by statute and their reasonable expectations in the continuance of their contract is decreased. In the area of property law, the parties' reasonable expectations were that their contract would remain *unchanged* by state law. Thus, one can conclude that the parties to the severance deeds and their successors placed a great deal of reliance on the terms of those contracts and expected state law to maintain the status quo of those contractual obligations, as opposed to changing them. This reliance on contractual relations, and the lack of any reason for the parties to expect that they would be changed by statute, indicates that the obligations of contracts created by the Amendment is severely impaired.

Having determined that the impairment is severe, the means used by the Kentucky legislature and the conditions imposed by the Broad Form Deed Amendment are subject to further scrutiny.²⁹³ Under the analysis for legislation which creates a severe impairment of a contract or legislation in which a state impairs its own contracts, the Court gives no deference to the determinations of the legislature regarding the propriety, reasonableness

²⁹¹ *Id.* at 245.

²⁹² *Buchanan*, 290 S.W.2d at 44.

²⁹³ *Id.*

or necessity of the means used by the legislature in reaching its goals and the conditions imposed by the legislation. The Court does its own non-deferential, virtually *de novo* review of the purposes, means, and conditions of the legislation. These stringent tests reach all the way back to *Blaisdell* through the court's analysis in *Allied*.²⁹⁴

In reviewing the *Blaisdell* factors, one sees that Kentucky's Amendment meets few if any of the required factors. The impairments caused by the Amendment are not temporary. Rather, they are "a severe, permanent and immediate change in those relationships; irrevocably and retroactively."²⁹⁵ The Amendment was not enacted to protect a basic societal interest. Rather it benefits only a small group who can choose to bring themselves within its strictures or to remove themselves from those requirements.

The Amendment neither proclaims nor implies the existence of an emergency nor does it indicate that the relief it seeks to provide is appropriately tailored to meet any such emergency. Moreover, on analysis, the relief which the Amendment purports to provide does not facilitate any of the purposes listed in the Amendment itself.²⁹⁶ Thus, the Amendment is not well tailored to the purposes it was supposedly designed to meet. Finally, upon examining whether the conditions imposed by the Amendment are reasonable, the Amendment once again fails. It is hardly reasonable to permit individuals to slow or stop the progress of the mining industry toward more efficient and safer methods of mining.

In the final analysis, the Amendment fails in its balancing against the contract clause and is unconstitutional.

III. DUE PROCESS

The strongest challenges to the Broad Form Deed Amendment are under the takings clause and the contract clause. In the interest of completeness, this article will also review possible challenges to the Amendment under the due process and equal protection clauses of the U.S. Constitution. The due process

²⁹⁴ *Allied Structural Steel*, 438 U.S. at 247-51.

²⁹⁵ *Id* at 250.

²⁹⁶ See *supra* text accompanying notes 84-146.

clauses of the fifth²⁹⁷ and fourteenth²⁹⁸ amendments impose limitations on the government's ability to enact retroactive legislation²⁹⁹ or to adopt irrebuttable presumptions. A retroactive law is one that attempts to change the legal effect of conduct which occurred before the enactment of the law.³⁰⁰ The Broad Form Deed Amendment is, by its terms, a retroactive law, because it imposes a constitutional rule of construction on all instruments *heretofore* or hereafter executed that sever the mineral and surface estates.

A. *Retroactive Legislation*

Objections to retroactive legislation predate the United States Constitution. One commentator traced the roots of the objections to the Roman Code that required laws to be construed prospectively.³⁰¹ This rule of construction was later carried into English law. When it came to the United States, the rule also became a restraint on the enactment of retroactive legislation.³⁰²

Retroactive legislation is disfavored for three primary reasons. Those reasons are: (1) reliance - the need to be able to plan one's activities knowing their legal consequences;³⁰³ (2) stability - the need to have past transactions remain static;³⁰⁴ and (3) fairness - the danger that retroactive legislation can be easily manipulated to harm a disfavored class of citizens since it is known in advance who will benefit from or be injured by the law.³⁰⁵ The Broad Form Deed Amendment arguably offends all of these considerations.

²⁹⁷ U.S. CONST. amend. V imposes due process requirements on the federal government.

²⁹⁸ U.S. CONST. amend. XIV imposes due process requirements on state government.

²⁹⁹ There are explicit guarantees against retroactive legislation. The contract clause, U.S. CONST., art I, § 10, provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The contract clause does not apply to the federal government. Neither Congress, U.S. CONST. art. I, § 9, cl. 3, nor the states, U.S. CONST. art. I, § 10, cl. 1, may pass ex post facto penal laws or bills of attainder.

³⁰⁰ Hochman, *The Supreme Court and The Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

³⁰¹ Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U.L. REV. 540 (1956).

³⁰² *Id.* at 541.

³⁰³ Hochman, *supra* note 300.

³⁰⁴ *Id.* at 693.

³⁰⁵ *Id.*

As discussed earlier,³⁰⁶ Kentucky law has consistently recognized that the mineral estate created by a broad form deed is dominant to the surface estate. Similarly, Kentucky's highest court has uniformly permitted the mineral owner under a broad form deed to employ any mining method as long as the mining operation is not conducted in an oppressive, arbitrary, wanton or malicious manner. The Broad Form Deed Amendment reverses these long established legal principles and defeats the mineral owner's legitimate reliance on the legal consequences of the mineral owner's transaction with the surface owner.

The Amendment also upsets the stability of past contractual transactions by destroying the contractual stability which existed under the Kentucky court's clear and consistent treatment of damage waiver provisions in broad form deeds. Before the adoption of the Amendment, damage waivers prohibited claims for surface damage regardless of whether the damage was caused by subsidence from underground mining, placement of spoil on the surface, surface mining or some other activity permitted under the terms of the broad form deed. The Amendment nullifies this mutually bargained for contract provision.

Finally, the Amendment does not impose a neutral rule of contract interpretation. In effect, it imposes a substantive rule of law which forbids the surface mining of coal without the consent of the surface owner.³⁰⁷ The purposes of the Amendment's supporters were transparent. The Kentucky Supreme Court recognized those purposes when it found the Amendment was just another effort, in a long line of tactics by opponents of surface mining, "to change the relative legal rights and economic bargaining positions"³⁰⁸ of surface and mineral owners. The Amendment confers a right on surface owners of coal land (the right to prohibit surface mining without their consent) by taking away a longstanding, preexisting right of owners of mineral estates in coal (the right to employ new mining techniques to extract the coal). By reaching into the past to change contractual relations, the Amendment acts retroactively to benefit and burden specific, known groups of people.

³⁰⁶ See *supra* text accompanying notes 11-54.

³⁰⁷ The Kentucky Supreme Court reached the same conclusion when it determined that the statutory counterpart of the Broad Form Deed Amendment violated the state constitution's provision on separation of powers. See *Akers*, 736 S.W.2d at 308-9.

³⁰⁸ *Id.* at 310.

The retroactive effect of the Amendment standing alone, however, is not a sufficient constitutional basis for declaring the Amendment unconstitutional. "Retroactivity is a ground for holding a law void only if it contravenes a specific provision of the Constitution."³⁰⁹ Thus, the question is whether the Amendment's retroactivity violates the fourteenth amendment due process clause.³¹⁰

Such a claim is a relatively weak constitutional claim. The Supreme Court has said it will accord to retroactive laws in the field of economic policy the same deference it accords to other types of social and economic legislation.³¹¹ That is, the Court will not pass judgment on the wisdom of such legislation. It will merely determine whether the law bears a rational relationship to a legitimate governmental purpose.³¹²

However, retroactive legislation must meet a burden not faced by legislation that has only prospective effects. Both its retroactive effect and its prospective application must satisfy the requirements of due process. The Court has said that "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation . . . must meet the test of due process, and the justifications for the latter may not suffice for the former."³¹³

The starting point in an analysis of the limitations imposed on retroactive legislative by the due process clause is the United States Supreme Court's decision in *Usery v. Turner Elkhorn Mining Co.*³¹⁴ In that case the Supreme Court upheld legislation that provided black lung benefits to former miners and placed

³⁰⁹ Hochman, *supra* note 300, at 694.

³¹⁰ Whether the retroactive effect of the Broad Form Deed Amendment violates the contract clause of the United States Constitution is discussed in this article *supra* text accompanying notes 180-296. The principles embodied in the due process clause are not coextensive with the constitutional prohibitions against state impairments of pre-existing contracts. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984). Whether the retroactivity of the Amendment violates the takings clause of the fifth amendment is discussed in this article *supra* text accompanying notes 55-179.

³¹¹ *Pension Benefit Guaranty Corp.*, 467 U.S. at 729-30.

³¹² *Id.* at 729.

³¹³ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976).

³¹⁴ *Id.* All citations in this discussion of the due process clause as a limitation on the state's power to enact retroactive laws are to federal decisions. These federal decisions apply the fifth amendment due process clause guarantees to federal government actions with retroactive effect. This is because most retroactive state laws have been reviewed by the courts under the contract clause. The contract clause is not applicable to the federal government.

some of the financial burden for those benefits on the miners' former employers. Coal mine operators had to pay benefits to some miners who had left their employ before the effective date of the Act.³¹⁵ The Court found that the retroactive aspects of the legislation met the test of due process because imposing retroactive liability was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers."³¹⁶

In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,³¹⁷ the Supreme Court again sustained general economic legislation in the face of a due process challenge to the retroactive aspect of the statute. Congress had enacted a liability provision which applied to employers who withdrew from multiemployer pension plans. Withdrawing employers had to pay an amount equal to their proportionate share of the plan's unfunded vested benefits prior to withdrawal. The liability provision applied to any employer who withdrew from a multiemployer pension plan within the five months preceding the enactment of the statute as well as to those employers who withdrew subsequent to the adoption of the law. The Supreme Court concluded that it was rational for Congress to retroactively apply the statute to prevent employers from taking advantage of the lengthy legislative process by withdrawing without liability while Congress debated the statute.

Similarly, in two cases concerning the retroactive application of tax statutes, the Supreme Court sustained legislation that was challenged on due process grounds. In *United States v. Hemme*,³¹⁸ a provision of the Tax Reform Act of 1976 reduced post-1976 unified estate and gift tax credit by a percentage of pre-1977 gift tax exemptions. In *United States v. Darusmont*,³¹⁹ the Court sustained the 1976 amendments to the tax code which increased

³¹⁵ How many coal operators were actually forced to pay retroactive benefits because it was required that a claim for benefits had to be filed within three years of the discovery of total disability from black lung was controversial. Although the Court recognized that this would be true for most underground mine operators, nonunderground operators faced potential liability for disabilities which arose before their responsibility had been enacted into law. *Usery*, 428 U.S. at 16, n. 14. Thus, the Court was willing to subject a law with limited retroactive effect to due process scrutiny.

³¹⁶ *Id.* at 18.

³¹⁷ 467 U.S. 717.

³¹⁸ 476 U.S. 558 (1986).

³¹⁹ 449 U.S. 292 (1981).

the rate of the minimum tax and decreased the allowable exemptions for the entire year in which the statute was passed even though the statute was not enacted until June of 1976.

The United States Supreme Court has explained the results in these cases in a variety of ways. In *Turner Elkhorn*,³²⁰ the Court considered whether a person who could have anticipated the potential liability attaching to her or his course of conduct would not have engaged in that conduct to avoid the liability. If a person would have engaged in the conduct even if she or he were able to anticipate the imposition of liability for those actions, retroactive application of the statute did not violate the due process clause.

The retroactive legislation in *Turner Elkhorn*³²¹ satisfied that test. Even if coal mine operators had anticipated they might incur financial liability for disability benefits payable to employees who contracted black lung, the operators would not have ceased mining coal. However, the retroactive effect of the Broad Form Deed Amendment cannot be overcome by that argument. If a current owner of a mineral estate in coal could have anticipated adoption of the Amendment, the owner probably would not have bought coal which could only be extracted by later-developed mining techniques.

The cases involving the retroactive application of tax laws also do not sustain the Broad Form Deed Amendment from a due process challenge. Retroactive tax laws are permitted unless, after considering the nature of the tax and the circumstances in which it is laid, it can be said that its retroactive application is so "harsh and oppressive" as to transgress the Constitution.³²²

The taxpayer in *Hemme*³²³ actually paid a lower estate tax under the retroactive application of the new tax law than if the pre-1976 tax law had been left in place. This was hardly a "harsh and oppressive" application of the law. Compared to the taxpayer in *Hemme*,³²⁴ applying the Broad Form Deed Amendment to the current owner of a mineral estate in coal does yield "harsh and oppressive" results. Prior to the enactment of the Amend-

³²⁰ *Usery*, 428 U.S. at 17, n. 16.

³²¹ *Id.*

³²² *Welch v. Henry*, 305 U.S. 134, 147 (1938). The *Welch* test was cited with approval in *U.S. v. Hemme*, 476 U.S. 558, 568-69.

³²³ *Id.*

³²⁴ *Id.*

ment, owners of any mineral estate in Kentucky created by a broad form deed had purchased the right to remove the coal by later-developed mining techniques. After the passage of the Amendment, owners of the same mineral estate in coal cannot extract the coal by new mining methods unless they once again purchase that right from the surface owner.

Retroactive tax statutes also were sustained because they did not create a new tax. For example, the taxpayer in *Hemme*³²⁵ knew that intervivos gifts had estate and gift tax consequences. However, while the new statute changed some of those consequences, it did not impose a wholly new tax.³²⁶ The Broad Form Deed Amendment, however, completely changes and totally reverses Kentucky's law as to the right to employ new mining methods to mineral estates created by broad form deeds. Thus, the Broad Form Deed Amendment fails to provide those subject to its provisions with constitutionally adequate notice. As the Supreme Court has said, "[o]ne of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute."³²⁷ The Broad Form Deed Amendment does just that.

The retroactive application of tax statutes, the retroactive penalty imposed for withdrawal from multiemployer pension plans, and the retroactive liability imposed on coal operators for black lung benefits are different from the operation of the Broad Form Deed Amendment for another reason. In all of the cases in which the Supreme Court sustained the retroactive effect of the law, the retroactive reach of the statute was confined to short and limited periods of time prior to enactment of the legislation.

In *Pension Benefit Guaranty Corp.*,³²⁸ the retroactive penalty was imposed on pension fund withdrawals which occurred in the five months preceding enactment of the statute. The change in the minimum tax provisions in *Darusmont*³²⁹ reached back

³²⁵ *Id.*

³²⁶ *Cf. Untermeyer v. Anderson*, 276 U.S. 440 (1928)(the Supreme Court concluded that the retroactive operation of the Revenue Act of 1924 was unconstitutional as it applied to gifts completed before the enactment of the statute. The principle objection to the act's retroactive effect was the lack of notice to the taxpayer because this was the first gift tax imposed on such transfers).

³²⁷ *Hemme*, 476 U.S. at 569.

³²⁸ 467 U.S. 717.

³²⁹ 449 U.S. 292 (1981).

only to the beginning of the calendar year in which the legislation was adopted. These retroactive conditions were necessary because of the practicalities of producing legislation. For example, the purpose of the withdrawal penalties in *Pension Benefit*³³⁰ was to protect multiemployer funds from the economic consequences of uncompensated withdrawals. A retroactive provision would have been defeated by employers who intentionally chose to withdraw from multiemployer pension funds while the legislation was pending before Congress.

Other retroactive legislation has withstood a due process challenge. For example, in its decision in *Texaco v. Short*,³³¹ the United States Supreme Court sustained the Indiana Dormant Mineral Interests Act from a due process challenge. That Act also reached back to affect all mineral interests whenever severed. However, that Act differs from the Broad Form Deed Amendment, because it applies to all mineral interests, not just coal. If unused for a period of 20 years, the title to unused minerals reverts to the surface owner. However it also allows mineral owner to preserve any pre-Act property rights in the unmined minerals by registering its ownership within two years of the effective date of the Act.³³²

The Broad Form Deed Amendment, on the other hand, only affects ownership of mineral estates in coal. More importantly, the owner of the minerals can do nothing to preserve or protect its pre-Amendment legal rights to use and enjoy its mineral estate if that use requires employing modern mining methods. As a result, the Amendment completely changes the legal relationship between the parties claiming under broad form deeds without providing a mechanism for the owner of the mineral estate to preserve its pre-Amendment legal status quo.³³³

³³⁰ 467 U.S. 717.

³³¹ 454 U.S. 516.

³³² *Id.*

³³³ *Cf. Hodel v. Irving*, 481 U.S. 704 (1987)(the Supreme Court invalidated a federal statute which attempted to abolish inheritance rights as to certain interests in tribal lands. The Court said a statute providing for the lapse, escheat or abandonment of private property cannot impose conditions on the continued ownership of property that are unreasonable. *Id.* at 729. An unreasonable condition would be one that either cost too much to comply with or did not allow the property owner a reasonable opportunity to perform them and thereby avoid the loss of their property).

See also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (the Supreme Court invalidated a state statute which required landlords to permit a cable television company to install its equipment on the landlords' building for a one-time

The retroactive reach of the Broad Form Deed Amendment applies to broad form deeds executed as long ago as 80 or 90 years.³³⁴ The United States Supreme Court has said that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."³³⁵ However, the cases in which the Court has sustained the constitutionality of retroactive legislation typically involve merely extending a duty or liability, not completely destroying a pre-existing legal right.³³⁶

In the few instances in which the retroactive legislation might be characterized as destroying a pre-existing legal right, Congress was exercising one of its expressly granted constitutional powers.³³⁷ Those cases are best understood as merely holding that when a person acquires a legal right or interest which Congress has the express constitutional right to regulate, the interest is acquired subject to the possible exercise of Congress' authority to regulate it.

If the due process clause has any meaning as a restraint on retroactive legislation, it should prohibit the enactment of a law which reaches back almost one hundred years to radically alter

payment of \$1. The Court said that the state had no right to take private property without paying for it and without providing the owner with an opportunity to avoid or mitigate the consequences of the deprivation. *Id.* at 436-37).

³³⁴ *Akers*, 736 S.W.2d at 309. If the date of the first Kentucky case to expressly recognize that the mineral estate is superior to the surface estate is used as the point for measuring the retroactive reach of the Broad Form Deed Amendment, it reaches back 73 years to change the law of Kentucky. See *Bluegrass Coal Corp. v. Combs*, 182 S.W. 207. Even if the *Buchanan* decision is used, the retroactive reach of the Amendment is almost 35 years. See *Buchanan*, 290 S.W.2d at 40.

³³⁵ *Usery*, 428 U.S. at 16.

³³⁶ See *Lichter v. United States*, 334 U.S. 742 (1948). Congress could authorize the recovery of excessive profits on government contracts entered into prior to the statute's enactment as long as final payment had not been made pursuant to such contracts prior to the statute's enactment. See also *Welch v. Henry*, 305 U.S. 134 (1938)(a state could impose a retroactive tax on stock dividends) and *Funkhouser v. Preston Co.*, 290 U.S. 163 (1933)(a state could impose a remedy requiring the payment of interest on verdict for breach of a contract entered into before the statute was enacted).

³³⁷ See *Norman v. Baltimore & O. R.R. Co.*, 294 U.S. 240 (1935)(Congress enacted a Joint Resolution concerning the holding of or dealing in gold pursuant to its express power to issue and regulate currency. Therefore, the resolution's provision authorizing the payment of all debts in the then legal tender overrode private contract provisions ("gold clauses") which had required payment in gold); and *Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467 (1911)(Congress enacted the Interstate Commerce Act pursuant to its express power to regulate interstate commerce. The act required that the cost of all passenger transportation had to be paid in money. The provisions of the act overrode prior contracts the railroads had entered into with their injured employees in which the railroads had contracted to provide free transportation for those employees).

the respective legal rights of the parties to a private contract. Such a pernicious type of retroactive legislation defeats the reasonable reliance of purchasers of minerals as to the nature of their interests. It destroys the stability and predictability of the law which is a necessary prerequisite for all economic transactions. It takes away the legally recognized rights of the present owners of mineral estates in coal by creating new rights in the present owners of the surface estate.³³⁸

B. *Irrebuttable Presumptions*

An irrebuttable presumption is created when a law declares that a certain fact is relevant to a determination, but a certain class of litigants is denied the right to establish that fact. An example of an irrebuttable presumption would be a state law which provides that "no X's are Y's," and accompanies that presumption with a rule "and only Y's may obtain a driver's license."³³⁹ In theory, a mineral owner may rebut the Amendment's presumption against the permissibility of using modern mining methods by introducing clear and convincing evidence that the original grantor and grantee actually intended to permit using such mining methods. However, as most broad form deeds were executed 80 to 90 years ago before the advent of surface mining and other modern mining methods,³⁴⁰ the presumption is irrebuttable in fact.

The Broad Form Deed Amendment contains the presumption that, in the absence of clear and convincing evidence to the contrary, the parties to a broad form deed are determined to have intended that the coal should be mined only by the methods of commercial coal extraction "commonly known to be in use in Kentucky in the area affected at the time the instrument was

³³⁸ In his dissent in the *Texaco* case, Justice Brennan correctly pointed out that "[t]he mineral interests of the appellants . . . were . . . assuredly within the scope of the dual constitutional guarantees that there be no taking of property without just compensation, and no deprivation of property without the due process of law." *Texaco, Inc. v. Short*, 454 U.S. at 540-541. He also correctly recognized that "[i]f Indiana were by simple fiat to 'extinguish' all pre-existing mineral interests in the State, or to transfer those interests to itself, to surface owners, or indeed to anyone at all, that action surely be unconstitutional and unenforceable . . ." *Id.* at 542 (emphasis added).

³³⁹ *Michael H. v. Gerald D.*, ___ U.S. ___, 109 S.Ct 2333, 2357 (1989)(Brennan, J., dissenting).

³⁴⁰ Pfeiffer, *Kentucky's New Broad Form Deed Law—Is It Constitutional?* 1 J. OF MIN. L. & POL'Y. 57, 69, n. 48 (1984-85).

executed”³⁴¹ Before the United States Supreme Court could find such a presumption unconstitutional, it would have to find that the Amendment’s ostensibly rebuttable presumption is really an irrebuttable presumption. However, not all irrebuttable presumptions are constitutionally impermissible. The Court also would have to find that the presumption resembles the irrebuttable presumptions it has invalidated in previous decisions.

When the Kentucky Supreme Court invalidated the Broad Form Deed Amendment’s statutory counterpart,³⁴² the court expressly stated that surface mining as it is practiced today was non-existent in the early 1900s when most, if not all, broad form deeds were executed. Surface mining was not a commercially viable method of coal extraction in Kentucky until after World War II. Most broad form deeds were executed in the early part of this century.³⁴³ Thus, in its practical application, the Amendment functions as an irrebuttable presumption.

The Amendment, like the statute before it, “converts a rebuttable evidentiary presumption into an irrebuttable one”³⁴⁴ Since it is factually impossible to overcome the presumption, the United States Supreme Court could conceivably reach the same conclusion as Kentucky’s highest court, because the United States Supreme Court has recognized that “in passing on the constitutionality of a state law, its effect must be judged in the light of its practical application”³⁴⁵

However, even if the United States Supreme Court were to reach that conclusion, not all irrebuttable presumptions are constitutionally infirm. The cases in which the Court has most readily found that an irrebuttable presumption violates the due process clause are cases in which the presumption made an impact on a constitutionally protected interest.³⁴⁶ For example,

³⁴¹ KY. CONST. § 19(2).

³⁴² KRS §§ 381.930-940.

³⁴³ *Akers*, 736 S.W.2d at 308-09.

³⁴⁴ *Id.* at 309.

³⁴⁵ *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

³⁴⁶ Justice Scalia has suggested that the Supreme Court’s irrebuttable presumption cases must be analyzed as calling into question the adequacy of the “fit” between the classification and the policy that classification serves. *Michael H. v. Gerald D.*, ___ U.S. ___, 109 S.Ct. at 2340-41. See also Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071, 1102-06 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); and, Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

in *Stanley v. Illinois*,³⁴⁷ the Supreme Court invalidated a state statute which created an irrebuttable presumption that all illegitimate fathers were unfit to have custody of their biological children. The presumption impinged upon the constitutionally protected liberty interest a father has in maintaining his on-going parental relationship with his biological children. Similarly, in *Cleveland Board of Education v. LaFleur*,³⁴⁸ the impermissible, irrebuttable presumption that no woman more than five months pregnant was physically capable of teaching, implicated a woman's constitutionally protected liberty interest in procreating.

Conversely, the United States Supreme Court has sanctioned the use of irrebuttable presumptions when the presumption does not impinge upon constitutionally recognized rights or interests. For example, in *Michael H. v. Gerald D.*,³⁴⁹ the Supreme Court's most recent irrebuttable presumption case, a majority of the Court concurred in the judgment sustaining a state law which created an irrebuttable presumption that a child born to a married woman living with her husband is the child of the marriage. The majority reached this conclusion despite the fact that the statutory presumption prevented the biological father, who was not the husband of the child's mother, from establishing his paternity. The majority found that a biological father did not have a liberty interest in establishing his paternity of a child born into a functioning marital unit. Thus, the irrebuttable presumption at issue did not impinge on a constitutionally protected interest of the biological father.

The Supreme Court reached the same result for similar reasons in *Weinberger v. Salfi*.³⁵⁰ The Court validated a Social Security Act provision which denied a woman and her child Social Security benefits as the widow and child, respectively, of a deceased wage earner. The Social Security Act defined the terms widow and child to irrebuttably exclude a widow and stepchild who had their relationships to the deceased wage earner for less than nine months prior to his death. The Court distinguished the *Salfi* case from cases like *Stanley*³⁵¹ and *LeFleur*³⁵²

³⁴⁷ 405 U.S. 645 (1972).

³⁴⁸ 414 U.S. 632 (1974).

³⁴⁹ ____ U.S. ____, 109 S.Ct. 2333.

³⁵⁰ 422 U.S. 749 (1975).

³⁵¹ 405 U.S. 645.

³⁵² 414 U.S. 632.

because the latter two cases dealt with constitutionally protected liberty interests while *Salfi* only involved "a noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status."³⁵³

The presumption created by the Broad Form Deed Amendment does not clearly impinge upon other constitutionally cognizable rights or interests. Therefore, it is unlikely that the Amendment would be found to violate the due process clause's restrictions on the state's ability to create irrebuttable presumptions.³⁵⁴

V. EQUAL PROTECTION

Like the due process challenge, a challenge to the Broad Form Deed Amendment under the equal protection clause is relatively weak and is only included here for completeness. The equal protection clause of the fourteenth amendment of the United States Constitution³⁵⁵ imposes limitations of varying degrees of severity on a state's power to classify its citizens. A state may act to classify people upon a "suspect"³⁵⁶ basis such as race or in terms of their exercise of a fundamental right³⁵⁷ only if the classification satisfies a strict scrutiny review. This review requires that the classification serve a compelling state purpose and have an extremely close relationship to promoting that compelling state purpose. Under the rational relationship test, classifications created by general economic and social welfare legislation satisfy the commands of the equal

³⁵³ *Salfi*, 422 U.S. at 772.

³⁵⁴ See *United States v. Locke*, 471 U.S. 84 (1985). The Supreme Court upheld a federal statute which terminated the interest of an owner of mining claims on federal land who had failed to comply with an annual filing requirement. The statute provided that the failure to file annually by the date specified "shall be deemed conclusively to constitute an abandonment of the mining claim . . ." *Id.* at 89 (quoting 43 U.S.C. § 1744(c)). The Supreme Court said that the statute did not create an irrebuttable presumption because the statute merely established a property regulation that terminated all mining claims for failure to meet this reasonable regulation.

³⁵⁵ U.S. CONST. amend. XIV.

³⁵⁶ *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Although the Supreme Court sustained the temporary exclusion and detention of Japanese Americans in this case, the majority opinion announced the strict scrutiny standard of review for race, ancestry and national origin classifications.

³⁵⁷ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938). Although the Supreme Court sustained a congressional prohibition on interstate shipments of "filled" milk, the majority opinion announced the strict scrutiny standard of review for governmental restrictions on fundamental constitutional values.

protection clause if the state has a permissible purpose and the classification bears a rational relationship to attaining that purpose.³⁵⁸ Finally, certain classifications such as those based on gender are tested by the United States Supreme Court under an intermediate standard of review.³⁵⁹ The state must demonstrate that using the classification it has employed is substantially related to accomplishing an important governmental objective.

The Broad Form Deed Amendment is subject to equal protection scrutiny because it creates a constitutional presumption applicable only to one class of mineral owners.³⁶⁰ By its express terms, the Amendment's presumption applies only to owners under deeds which sever an estate in unmined *coal* from the surface estate.³⁶¹ The presumption does not apply to deeds which sever from the surface a mineral estate in any other unmined minerals such as limestone or gravel.³⁶² Because

³⁵⁸ See *Railway Express Agency v. New York*, 336 U.S. 106 (1949). The Supreme Court sustained a city ordinance which prohibited owners of delivery trucks from advertising on the outside of their trucks unless the advertisement was for the owner's business. The classification scheme was found to have a conceivable relationship to the stated purpose of reducing distractions for drivers of other vehicles and pedestrians.

³⁵⁹ *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Supreme Court invalidated an Oklahoma statute which permitted the sale of 3.2% beer to women at age eighteen but not to males until they reached the age of 21. The middle level test has also been employed when the classification is based on alienage, see *Foley v. Connelie*, 435 U.S. 291 (1978), or legitimacy, see *Levy v. Louisiana*, 391 U.S. 68 (1968).

³⁶⁰ The classes created by the Amendment can be defined in other ways. For example, surface mining has been used as a method of commercial coal extraction in western Kentucky prior to its large-scale use in eastern Kentucky. Thus, owners of coal mining rights in eastern Kentucky would be disproportionately affected by the Amendment merely because of the geographical location of their coal property. However, the United States Supreme Court has held that an equal protection violation "cannot rest solely on a statute's lack of uniform geographic impact." *Hodel v. Indiana*, 452 U.S. 314, at 332.

³⁶¹ The first line of the Amendment announces what appears to be a presumption of general applicability. It expressly states that amendment applies to "any instruments . . . purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals . . ." KY. CONST. § 19(2). However, the Amendment then limits the general applicability of the presumption it creates by expressly providing that if such an instrument fails to express in specific terms the "method of coal extraction to be employed," absent clear and convincing evidence to the contrary, it "shall be held" that the intention of the parties 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 . . ." *Id.*

³⁶² Kentucky has 95,834.73 million short-tons of coal reserves. J. COBB, R. BRANT, J. CURRENS, A. WILLIAMSON, *KENTUCKY COAL* (1985). It has 841 billion cubic feet of natural gas and 31 million barrels crude oil reserves. VIII BASIC PETROLEUM DATA BOOK

of the Amendment, an owner of coal and coal mining rights must overcome, by clear and convincing evidence, the presumption that the coal may not be extracted by a mining method³⁶³ not in use in Kentucky at the time the deed was executed. However, the owner of any other type of mineral estate who wants to employ new mining methods does not have to overcome such a presumption.

The Broad Form Deed Amendment is social or economic legislation that does not involve a fundamental constitutional right, suspect classification, or the characteristics of gender, legitimacy or alienage. Therefore, the Supreme Court would employ the rational relationship test and subject the two classes of mineral owners created by the Amendment to equal protection scrutiny.³⁶⁴ Neither the reasonableness nor the wisdom of the legislation would be reviewed by the Court. The Amendment would be struck down only if the Court found that the differing treatment of owners of coal mining rights and owners of all other mineral rights served no legitimate governmental interest or that the classification was so unrelated to the achievement of a legitimate purpose that the law was irrational.³⁶⁵

Since the rational basis test is not difficult to pass, an equal protection challenge to the constitutionality of the Broad Form Deed Amendment would be less likely to succeed than the other constitutional challenges discussed in this article. While the test employs the Court's most deferential standard of review, the standard is "not a toothless one."³⁶⁶ State action has failed to satisfy this minimum test for constitutionality either because the state was not pursuing a permissible purpose

n. 2. Kentucky also has 3,420 million barrels of in-place tar-sand resources. N. NOGER, *TAR-SAND EXPLORATION IN KENTUCKY* (1984). In-place oil shale resources are estimated to be capable of producing more than 20 million barrels of shale oil. J. HAVER, *KENTUCKY OIL SHALE DEVELOPMENT* (1982). Kentucky's sand, gravel, clay and limestone reserves are too large to estimate. In 1988 alone, Kentucky mined 885 thousand short-tons of clay, 6,600 thousand short-tons of sand and gravel as well as 43,800 metric tons of crushed limestone. L. PROSSER & G. DEVER, *THE MINERAL INDUSTRY OF KENTUCKY* (1988).

³⁶³ Contemporary mining methods which were not in common use in eastern Kentucky at the time most mineral estates were severed with by a broad form deed include surface mining, longwall mining and augering. *Martin*, 429 S.W.2d 395.

³⁶⁴ *Hodel v. Indiana*, 452 U.S. at 331.

³⁶⁵ *Vance v. Bradley*, 440 U.S. 93 (1979).

³⁶⁶ *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981).

when it created the challenged classes or because the classes it created were not related to the achievement of a legitimate state interest.³⁶⁷

The United States Supreme Court has held that a state is not pursuing a legitimate state interest when it creates classes out of a desire to harm an unpopular group or to give effect to the public's dislike, fear or antipathy towards a particular group. For example, in *United States Department of Agriculture v. Moreno*,³⁶⁸ the Court employed the rational relationship test to strike an amendment to the Food Stamp Act. The amendment disqualified households of unrelated individuals from receiving food stamps. The history of the amendment revealed a congressional intent to prevent "hippies" and "hippie communes" from participating in the food stamp programs.³⁶⁹ The Court said that such a congressional purpose could not sustain the challenged classification. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a 'legitimate' governmental interest."³⁷⁰

³⁶⁷ *Quinn v. Millsap*, U.S. , 109 S.Ct. 2324 (1989)(invalidated a state law which required the appointment of only those who owned real property in the area to a government board developing plans to reorganize local government); *Williams v. Vermont*, 472 U.S. 14 (1985)(invalidated a state use tax on automobiles to the extent it granted a credit to Vermont residents who bought a car in another state and paid a sales tax in that state, but did not grant an exemption to a resident of another state who bought a car and paid a sales tax in that state and then moved to Vermont); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)(invalidated a city zoning ordinance requiring only group homes for mentally retarded persons to obtain a special use permit); *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), *reh'g denied* 471 U.S. 1120 (1985)(invalidated a state law imposing higher taxes on nonresident insurance companies than on resident insurance companies unless the state could demonstrated on remand that the classification related to some interest other than a desire to discriminate against nonresident businesses); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985)(invalidated a state tax exemption granted to veterans who were residents of the state before a specified date, but did not grant an exemption to veterans who established their residency after that date); and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973)(invalidated a section of Food Stamp Act disqualifying households of unrelated individuals from eligibility to receive food stamps). See Comment, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454 (1986); and Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184 (1986).

³⁶⁸ 413 U.S. 528.

³⁶⁹ *Id.* at 534 (quoting H.R. Conf. Ref. No. 91-1793) p. 8; 116 Cong. Rec. 44439 (1970)(Sen. Holland).

³⁷⁰ *Id.* (quoting 345 F. Supp., at 314, n. 11).

Similarly, in *Cleburne v. Cleburne Living Center*,³⁷¹ the Supreme Court invalidated a city ordinance which excluded mentally retarded people, but not other unrelated people, from living in group homes. The exclusion reflected the public's dislike, negative attitude and fear of mentally retarded people, which the Supreme Court recognized as constitutionally impermissible. The public's antipathy towards mentally retarded people did not provide a legitimate basis for treating a group home for the mentally retarded differently from other group homes.

The preamble to the Broad Form Deed Amendment recites a number of purposes the Amendment is supposed to serve. Nevertheless, the enumerated reasons fail to explain why mineral owners of *coal* are singled out and forced to meet a higher evidentiary standard to prove their right to surface mine than are other mineral owners. The singling out of coal owners could reflect the public's lingering animosity toward coal owners because of the abuses which occurred in Kentucky when the surface mining of coal was virtually unregulated. Due to the damage and destruction caused by unscrupulous coal mine operators, owners of coal mining rights in Kentucky have been the objects of public scorn and hatred. Literature,³⁷² film,³⁷³ and song³⁷⁴ reinforce the public's belief that coal owners are rapacious destroyers of homes and land. The proponents of the Broad Form Deed Amendment used that theme in their campaign slogan "Save The Homestead." The public's negative images of coal mine operators accurately portray abuses by coal owners in the past. However, for more than a decade, it has been illegal for coal owners to exercise their mining rights to destroy buildings, create off-site damage, or to leave the surface of the land scarred and unreclaimed after the coal has been mined.³⁷⁵

³⁷¹ 473 U.S. 432.

³⁷² See, e.g., D. GARDINA, *STORMING HEAVEN* (1987); H. CAUDILL, *THEIRS BE THE POWER* (1983); AND H. Caudill, *My Land Is Dying* (1971).

³⁷³ See, e.g., *Matewan* (1987) and *Bloody Harlan* (1978).

³⁷⁴ Hear, e.g., Reel World String Band, "Crank's Creek," In *Good Time* (Flying Fish 1985) and Reel World String Band, "Drag Line," *They'll Never Keep Us Down* (Rounder Records 1980).

³⁷⁵ In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA), Pub.L.No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)). SMCRA established a comprehensive regulatory scheme for surface mining and recla-

If the Court viewed the Amendment as a codification of the public's fear of coal mining abuses and its negative attitudes toward a historically unpopular class of property owners, the Amendment would fail the rational relationship test. The state has no legitimate interest in penalizing a group merely because significant public animosity exists toward that group.

The depth and breadth of public support for the Amendment³⁷⁶ would not make it immune from constitutional attack. As the Supreme Court has recognized, the electorate as a whole, whether by amendment, referendum or otherwise, cannot immunize the state from the requirements of the equal protection clause. Moreover, the state could not avoid the requirements of the clause by deferring to the wishes or objections of some part of the body politic.³⁷⁷

Even if the Supreme Court determined that the Amendment's presumption is a product of something other than the public's general antipathy toward the owners of coal mining rights, the rational relationship test would not be fully satisfied. The Court must also evaluate the "fit" between the classes created and the achievement of some legitimate, identifiable governmental purpose. The "fit" does not have to meet a mathematical test for precision, but the classification scheme must "rationally advanc[e]" a permissible governmental objective.³⁷⁸ Despite the deference which the Court

mation operations of both federal and non-federal lands within the United States. If a state desired to assume permanent and exclusive regulatory authority (primacy) over surface mining, it had to receive approval of a proposed permanent program from the Secretary of the Interior. To secure that approval, the state had to enact laws and regulations embodying the environmental protection and performance standards of SMCRA. Kentucky received approval of its permanent program on May 18, 1982. 47 Fed.Reg. 21,404 (1982). For history of Kentucky's actions to secure primacy *see*, Bratt, *Surface Mining in Kentucky*, 71 Ky. L. J. 7, 7-9 (1982-83). By statute, Kentucky forbids surface coal mining operations within certain distances of public roads and buildings, occupied dwellings and cemeteries. KRS § 350.085(3) - (4). In *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987), the United States Supreme Court sustained the constitutionality of similar restrictions imposed by Pennsylvania on coal mining that causes subsidence damage to pre-existing buildings, dwellings, and cemeteries. Kentucky's performance standards and reclamation requirements for surface mining are codified in KRS §§ 350.090 to 350.117.

³⁷⁶ The Amendment was passed in 1988 by an 83% majority. 882,960 voted yes and 187,119 voted no. "Presidential Preference Primary" published by the Office of Bremer Ehrler, Secretary of State - March 8, 1988.

³⁷⁷ *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-37 (1964).

³⁷⁸ *Schweiker*, 450 U.S. at 235.

accords to a state's decision to use classes to advance its legitimate purposes, "[t]he State's rationale [for using classes] must be something more than the exercise of a strained imagination"³⁷⁹

Elsewhere in this article, the purposes of the Broad Form Deed Amendment as found in the preamble to the Amendment are discussed.³⁸⁰ That discussion demonstrates that retroactively imposing a presumption that the ownership of a mineral estate in coal does not include the right to use later developed mining methods to extract the coal does not facilitate the accomplishment of any of the asserted rationales for the Amendment. If, as that previous discussion demonstrates, the presumption does not advance any of the articulated purposes of the Amendment, then imposing the presumption on this one class of mineral owners is arbitrary and irrational.

VI. CONCLUSION

The Commonwealth of Kentucky has a legitimate and important interest in regulating the mining of coal to prevent practices which result in destroying buildings, creating off-site damage and failing to reclaim the land after the mining has been completed. Both the federal and state governments have enacted extensive programs which impose environmental protection and performance standards on surface mining. If Kentucky's program does not adequately address the problems caused by surface mining, the U.S. Constitution does not prevent the Kentucky legislature from enacting a more stringent regulatory scheme.

When a severed mineral estate is not used for a long period of time, uncertainties of title may arise. Such uncertainties in the title to the minerals impede the productive development of both the surface and the mineral estates. The Kentucky legislature has enacted a statutory scheme which authorizes the commercial development of the mineral interests of unknown or missing owners.³⁸¹ If the requirements of the statute are

³⁷⁹ Logan v. Zimmerman Brush Co., 455 U.S. 422, 442 (Blackmun, J., joined by Brennan, Marshall and O'Connor, JJ.).

³⁸⁰ See *supra* text accompanying notes 84-146.

³⁸¹ KRS §§ 353.460-.476.

satisfied, the court also has the power to reunite the ownership of the mineral and surface estates in the surface owner.³⁸²

Because of Kentucky's very real interest in eliminating stale and abandoned mineral interests, the legislature could enact a dormant mineral act to supplement or substitute for its present law on severed mineral interests of unknown or missing owners. A dormant mineral act would provide a mechanism for clearing title to unused mineral interests without first requiring the development of the minerals. Nothing in the Constitution of the United States prevents the Commonwealth from enacting such legislation. Similarly, Kentucky has a cognizable interest in the improvement of land titles. That interest could be constitutionally achieved by the development of a quiet title statute that would permit the title to land to be determined as against the world rather than only against named defendants.³⁸³

The United States Constitution does, however, prevent the Commonwealth of Kentucky from retroactively imposing a special rule of interpretation on instruments which create a right to mine coal. Kentucky cannot constitutionally limit contemporary mineral owners holding under a broad form deed executed prior to the adoption of the Broad Form Deed Amendment to the mining methods commonly known to be in use at the time the instrument was executed.

The Amendment violates the fifth amendment's prohibition against the taking of private property for public use without compensation. The pre-Amendment right of a Kentucky mineral owner under a broad form deed to mine coal by later developed mining methods is a property right created by state law and protected by the fifth amendment. The Amendment does not further a valid public interest. Its real purpose is to achieve the constitutionally impermissible objective of changing the economic bargaining positions of the surface and mineral owners by mandating the reinterpretation of contracts entered into at the turn-of-the century.

The destruction of the mineral owner's right to employ modern mining methods is the type of infringement on property which is constitutionally impermissible. As to any mineral owners who cannot overcome the Amendment's presumption,

³⁸² KRS § 353.470.

³⁸³ KRS § 411.120—action to quiet title. This statute only permits the action to be brought against named defendants who assert a claim to the land.

the Amendment affects a total taking of the mineral owners' property. It denies them the ability to mine their coal at all by making it physically impossible or commercially impracticable to remove the coal.

The Supreme Court's takings jurisprudence also recognizes that a governmental act is constitutionally impermissible under the fifth amendment when the act materially interferes with a property owner's reasonable investment-backed expectations. A Kentucky mineral owner whose estate was created by a broad form deed executed prior to the adoption of the Broad Form Deed Amendment has a state-created, constitutionally protected property interest in its investment-backed expectation that it can employ modern mining methods to extract the coal.

The Broad Form Deed Amendment also offends the contract clause of the United States Constitution. The United States Supreme Court, however, is unlikely to base its decision on a contract clause analysis of the Amendment. Unlike the fifth amendment's prohibitions against state actions which take private property without just compensation, the contract clause has only been used twice since the 1930s by the Supreme Court to invalidate state acts.

As developed by numerous Supreme Court decisions, the takings clause imposes more stringent limitations on state action than does the contract clause. If a state action implicates both the takings clause and the contract clause and the action offends the takings clause it may also offend the contract clause. The reverse is also true. A state action which passes constitutional muster under a takings clause analysis probably cannot offend the contract clause. Thus, the Court is unlikely to resurrect the contract clause as its primary rationale for a decision in any case challenging the constitutionality of the Broad Form Deed Amendment.

Abstract arguments can be crafted to support a determination that the Amendment's irrebuttable presumption and retroactive application offend the due process clause of the fourteenth amendment. Similarly, the Amendment raises possible violations of the equal protection clause guarantees. However, in practice, both the due process and equal protection arguments are insufficient bases to support a declaration of the unconstitutionality of the Broad Form Deed Amendment. The Supreme Court's jurisprudence demonstrates that such claims are relatively weak constitutional claims. The Court accords great deference to leg-

islative enactments challenged under either provision because the Court is loath to pass judgment on the wisdom of state legislation. Thus it is highly unlikely that the Court would use either of these constitutional bases to strike the Broad Form Deed Amendment.

The constitutionality of the Broad Form Deed Amendment depends primarily on the Amendment's ability to survive first a takings clause analysis and then a contract clause analysis. As this article demonstrates, it is unlikely that the Amendment can withstand such scrutiny.

