Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act

I. Introduction

Retroactive land statutes have been a central theme in the interaction of real property and constitutional limitations. Courts in the past have tested the constitutionality of such laws by poorly-conceived ideals. This Note will analyze dormant mineral statutes in relation to these ideals.

First, dormant mineral statutes will be placed in their constitutional context by comparing them with other retroactive land provisions. The blatant inconsistency produced when antiquated constitutional guidelines are applied to modern situations will become apparent. Next, a general survey of modern due process law will demonstrate the constitutional limitations that should be implemented with regard to retroactive statutes in general. Perhaps, dormant mineral statutes will be the area which will enable the courts to develop clear and consistent rules for the future.

II. The Problem and the Legislative Response

A fee simple absolute is a possessory right to present enjoyment in every aspect of land, including the privilege to use minerals underneath the land. At common law, it was recognized that the right to this benefit may be severed from the fee title and be treated as a separate estate in the land.[1] This estate, known as a "severed mineral interest," may be fully owned and enjoyed as a fee in itself, separate from the right to use the surface interest.

The severed mineral interest, in conjunction with the American system of title recordation, creates a peculiar problem known as dormant mineral interests. Title to a mineral interest must be recorded,[2] and a title abstract must be obtained upon every new conveyance of the severed interest.[3] The mineral estate becomes dormant if its owner can no longer be easily connected with its title.[4] Due to the peculiar nature of a severed interest, parties desiring to acquire certain severed mineral rights may find it difficult or im-

---

[1]*See* Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 Land & Water L. Rev. 73, 73-74 (1972).

[2]*See, e.g.*, Silvers, *Abstracting in Oil and Gas Areas*, 36 Title News 4 (1957).

[3]*See, e.g.*, Deering, *Labyrinth of Royalty and Mineral Interests—A Survey* (pts. 1 & 2), 34 Dicta 195, 319 (1957).

[4]*See generally* Note, *Severed Mineral Interests, A Problem Without A Solution?*, 46 N. Dak. L. Rev. 451 (1970).

possible to locate the owner even though his name on the recorded deed may be easily accessible in the county courthouse.[5]

For example, many problems originate during periods of oil and gas booms when thousands of fragmented interests are conveyed to opportunists or corporate speculators. The severed estates which are unprofitable to develop will lie buried in the recorder's office for years. Having nothing but fleeting connections in the mineral interest's locality, the speculative owners disappear leaving no trace other than their names on a deed in a title abstract. The severed fee owner may die without notifying his heirs of the severed interest. The problem emerges when a technical development, a fluctuation in market price, or the discovery of other valuable minerals makes a formerly worthless estate a valuable resource, thereby inducing the surface owner to engage in activity inconsistent with the rights of the owner of the severed interest.[6]

The problems which result from having these valuable mineral rights tied to inaccessible owners is a major defect in the system of title recordations.[7] Besides unduly complicating abstracts,[8] unused severed mineral interests infringe upon the right of the surface owner to utilize his land at its optimum capacity.[9] A mineral servitude on the surface could deter certain types of investment in the surface estate—a resort hotel would hardly appreciate an oil rig on its beach.[10] The energy crisis has been forwarded as another argument against mineral hinderances on marketability.[11] Oil companies will not invest in the expensive gamble of oil exploration if the title system offers only a plethora of dead abstracts with phantom owners. Such companies must be assured of good title to the oil they discover.[12]

---

[5]*See id.* at 451-52.

[6]For a discussion of the general problems of dormant mineral interests, see, P. BASYE, CLEARING LAND TITLES § 38, at 148-51 (2d ed. 1970).

[7]*Id.* at 143-51.

[8]*Id.*

[9]*See* Polston, *supra* note 1, at 73, 77.

[10]*Id.* at 77. For a case which discusses the societal ramifications of severing thousands of surface acres from their mineral interests, see Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So. 2d 521 (Fla. 1973).

[11]Bickel v. Fairchild, 83 Mich. App. 467, 470, 268 N.W.2d 881, 882 (1978).

[12]*See* Brief for Appellee at 13, Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978):

> Companies with an interest in exploration or development of minerals would not expend the large sums of money necessary for such exploration or development, unless they had a lease from the owners of all mineral interests when the mineral interests had been severed for many years, it became prohibitively expensive or physically impossible to locate the owners of the severed minerals. Sections 57-228 et seq. were adopted in response to this predicament.
>
> The need for such relief is apparent in these proceedings. A number of

Attempts to deal with dormant mineral interests have involved the traditional approaches of adverse possession, marketable title statutes, and tax sales, but these methods have failed to deal effectively with the problem.[13] Legislative schemes, commonly called dormant mineral statutes, may be the best if not the only answer.[14] The Indiana statute[15] requires the record mineral fee holder to either at-

---

the defendants did not receive the notice mailed to the last address of record. Of those defendants who apparently received notice, only a few believed the severed mineral interests to be of sufficient value to retain an attorney. There can be no exploration or development of these lands without elimination of those outstanding mineral interests, and Sections 57-228 et seq. provide a fair and workable solution to the problem.

[13]*See* Polston, *supra* note 1, at 74-79.

[14]*See id.* at 73-102. *See also* P. BASYE, *supra* note 6; L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION, 239-47 (1960) [hereinafter cited as L. SIMES]; Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEX. L. REV. 129 (1964); Street, *Need For Legislation to Eliminate Interests*, 42 MICH. ST. B.J. 49 (1963). For a list of jurisdictions which have adopted dormant mineral statutes, see note 19 *infra*.

[15]IND. CODE §§ 32-5-11-1 to 8 (1976) provide:

Sec. 6. Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five hereof, and the ownership shall revert to the then owner of the interest out of which it was carved.

Sec. 2. A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals.

Sec. 3. A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument.

Sec. 4. The statement of claim provided in section one above shall be filed by the owner of the mineral interest prior to the end of the twenty year period set forth in section two [one] or within two years after the effective date of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the Recorder of Deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed.

Sec. 5. Failure to file a statement of claim within the time provided in

tempt to extract or discover minerals or to, at least, periodically record his intent to keep an active contact with his estate.[16] The latter requirement—that of re-recording—is mandatory even though the estate is already properly registered. As seen above, notice means little if the record shows ownership by a speculator who has long since disappeared. The re-recording and use requirements unite the benefits of ownership of mineral rights with certain responsibilities to society. The penalty for failing to re-record or use the mineral estate is forfeiture of the interest.[17] This forfeiture is the only practical way to eliminate interests which have become dormant,

---

section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty (60) days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within sixty (60) days after receiving actual knowledge that such mineral interest had lapsed.

Sec. 6. Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the Recorder of Deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given.

Sec. 7. Upon the filing of the statement of claim, provided for in section 4 of this chapter or the proof of service of notice as provided in section seven [six] of this chapter in the Recorder's office for the county where such interest is located, the Recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice.

Sec. 8. The provisions of this chapter may not be waived at any time prior to the expiration of the twenty year period provided in section 1.

[16] *Id.* § 32-5-11-4.

[17] *Id.* § 32-5-11-1.

while still protecting active interests.[18] The states[19] which have adopted such measures generally provide that the mineral interest either lapses back into the estate "out of which it was carved."[20] In this way, the estate holder may succeed to a full fee ownership of the mineral estate.

III. The Challenges to the Statutes and the Responses

Three basic constitutional challenges have been leveled at dormant mineral statutes. The statutes: (1) effect a deprivation of property without due process of law,[21] (2) violate privileges and immunities clauses by unequal protection due to arbitrary distinctions between classes,[22] or (3) retroactively impair contractual

---

[18]*See* Polston, *supra* note 1, at 94-101.

[19]*See* Fla. Stat. Ann. § 704.05 (Supp. 1978) (applied prospectively only); Ga. Code § 85-407.1 (1978); Ill. Rev. Stat. ch. 30, §§ 197-98 (1973); Ind. Code §§ 32-5-11-1 to 8 (1976); Mich. Comp. Laws § 554.291 (1970) (declared unconstitutional by court of appeals); Neb. Rev. Stat. § 57-229-230 (1974); N.C. Gen. Stat. § 1-42.1 (1969); Tenn. Code Ann. § 64-704 (Supp. 1978); Va. Code § 55-154 (1974); Wis. Stat. § 700.30 (1978) (held unconstitutional).

At the present time, three states have suits pending concerning dormant mineral statutes: Illinois, Indiana, and Michigan. Michigan's statute was recently declared unconstitutional by the court of appeals, but is now awaiting appeal to the Michigan Supreme Court. *See* Bickel v. Fairchild, 83 Mich. App. 467, 268 N.W.2d 881 (1978). In Indiana, a trial court has declared Indiana's act unconstitutional. *See* Pond v. Walden, No. C-78-17 (Gibson Cir. Ct., Ind. July 24, 1978); Short v. Texaco, Inc., No. C-77-248 (Gibson Cir. Ct., Ind. Sept. 18, 1978). Wisconsin is the only state with a supreme court decision that directly addresses all aspects of the problem, including the result of a retroactive application of the statute. *See* Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977) (holding unconstitutional the Wisconsin statute). The Nebraska statute was held unconstitutional by the Nebraska Supreme Court. *See* Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978).

Other states have decisions which either involve exceptions to the standard form of mineral statutes or have applied them only prospectively. *See* Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So. 2d 521 (Fla. 1973) (applied only prospectively due to a lack of a grace period); Nelson v. Bloodworth, 238 Ga. 264, 232 S.E.2d 547 (1977); Love v. Lynchburg Nat'l Bank & Trust Co., 205 Va. 860, 140 S.E.2d 650 (1965) (retroactively applied a rebuttable presumption as a rule of evidence to escape constitutional objections).

[20]Ind. Code § 32-5-11-1 (1976). *See also* Mich. Comp. Laws § 554.291 (1970).

[21]U.S. Const. amend. XIV, § 1; Ind. Const. art. 1, § 21.

[22]U.S. Const. amend. XIV, § 1; Ind. Const. art. 1, § 23. Indiana's statute seems especially vulnerable to this attack because the inadvertence clause, Ind. Code § 32-5-11-5 (1976), excepts large mineral holders, who own 10 or more mineral interests in a county, from liability due to a failure to file. This quantitative distinction is not arbitrary or irrational in light of the interests they attempt to protect. *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976); State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931). In the drafting of this legislation coal companies insisted on such an exception due to the poor state of their records. *See* Polston, *supra* note 1, at 100. Interests skipped would, therefore, be a part of a general development scheme and the policy

obligations.[23] Only the first and third objections will be discussed because they present the most pervasive as well as the most persuasive arguments.[24]

A. The First Line of Defense—Analogies between Dormant Mineral Statutes and Statutes of Limitation

The objections to dormant mineral statutes center on their retroactive application. To be effective, these statutes must apply to interests already vested—namely, dormant interests without readily accessible owners. Such dormant mineral interests will remain uselessly static for years, unless affected by the challenged statutes.[25] Yet, the virtues of the dormant mineral statutes are the very points which open them to criticism.

Generally, a prospective act that is reasonably drafted and applied suffers no constitutional challenges.[26] In the case of property, prospective application limits the types of transactions which can be entered, foreclosing only expectations. In comparison, retroactive laws add or subtract duties or privileges to transactions which have occurred.[27] Acts altering vested property rights may, in a sense, take legally fixed privileges. When laws begin to affect values

---

reasons for applying a strict rule would be absent especially in the light of the required "deligent effort" to comply with the statute. In fact, "holes" in a general scheme of coal development were one of the problems which Indiana's model statute sought to remedy. *See id.* at 82.

The Virginia statute has withstood a denial of equal protection argument. *See* Love v. Lynchburg Nat'l Bank & Trust Co., 205 Va. 860, 140 S.E.2d 650 (1965). An unequal protection argument was also made against the Michigan statute, which is directed only against oil and gas interests. Apparently, the objection was that oil and gas owners receive less protection than solid mineral owners. *See* Brief for Appellee at 21-22, Bickel v. Fairchild, 83 Mich. App. 467, 268 N.W.2d 881 (1978). Again, the question was whether the distinction is rational and neither capricious nor arbitrary. Of course, the obvious answer is that oil and gas interests are subject to much more speculation than coal or other solid minerals. *See* P. BAYSE, *supra* note 6, § 38. Coal requires a stable developer and long term plans. Prices and technology in the area are not so wildly fluctuating. *Id.* Neither the trial court nor the appellate court in *Bickel* reached this argument.

Finally, the Indiana statute could be condemned as an unlawful delegation of legislative power. IND. CONST. art. 1, § 25. This allegation's only rational basis would rest on the other arguments and whether the legislature had over-stepped due process limits.

[23]U.S. CONST. art. 1, § 25.

[24]Some courts treat due process and the contract clause as identical. *See* Heiner v. Donnan, 285 U.S. 312, 326 (1932). The distinction, however, will become clear later in this Note.

[25]*See* Polston, *supra* note 1, at 73-74.

[26]*See* L. SIMES, *supra* note 14, at 256.

[27]For a more precise definition of retroactive, see Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216 (1960).

already acquired, those laws have been condemned as retroactively depriving persons of their vested property rights.[28]

Citing retroactive application, opponents of dormant mineral statutes anchor their arguments in old constitutional prohibitions against altering vested rights.[29] Ideally, vested rights could never be impaired by legislation; hence, the right to the use or non-use of property was practically absolute.[30] Once they became static, legally fixed, or vested with present enjoyment in their title owner, the constitutional prohibition against deprivation of property without due process or just compensation protected such rights from almost any impairment.[31] Even though courts began to recognize early that the vested rights doctrine held little resemblance to legislative policy necessities,[32] many tribunals apparently still employ the doctrine as a confusing constitutional limitation.[33]

The opponents of the dormant mineral statutes utilize the courts' confusion on this issue by condemning the statutes for retroactively impairing vested rights. In *Bickel v. Fairchild*[34] the trial court accepted this argument: "'Courts, as a rule, are loath to give retroactive effect to statutes, and this is especially so when, by so doing, it would disturb contractual or vested rights.'"[35] An exception to the old vested rights doctrine, if taken literally, would still have prohibited any government alterations of rights already established. As long as the retroactive law affected only a "remedy," and not the corresponding right that the remedy was meant to enforce, the substantive relationships between the parties remained unaltered.[36] Legislation could have a retroactive effect if the law merely rearranged procedural mechanisms by which rights were enforced.[37] Implicit in this doctrine was the limitation that remedies

---

[28]*Id.* at 218.

[29]*See, e.g.*, Brief for Defendant at 10, Short v. Texaco, Inc., No. C-77-248 (Gibson Cir. Ct., Ind. Sept. 18, 1978).

[30]*See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

[31]*See* Evans-Snider-Buel Co. v. McFadden, 105 F. 293, 300 (8th Cir. 1900) (stating that vested rights "may, with reasonable precision, be held to mean some rights or interest in property that has become fixed or established, and is no longer open to doubt or controversy").

[32]*See, e.g.*, West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848).

[33]16 C.J.S. *Constitutional Law* § 226 (1963) provides: "The legislature has no power to alter or to destroy by statute the nature or tenure of vested estates in property." For a similar statement, see 5 I.L.E. *Constitutional Law* § 101 (1958).

[34]83 Mich. App. 467, 268 N.W.2d 881 (1978).

[35]No. 77-1225 (Montmorency Cir. Ct., Mich.), *aff'd*, 83 Mich. App. 467, 268 N.W.2d 881 (1978) (quoting Nash v. Robinson, 226 Mich. 146, 149, 197 N.W. 522, 524 (1924)). The *Nash* court continued: "There are, however, exceptions to the rule, and one of them is in relation to remedial legislation." *Id.*

[36]*See, e.g.*, Bronson v. Kinzie, 42 U.S. (1 How.) 311, 317-20 (1843).

[37]*Id.*

could not be altered to impair the enforcement of the corresponding right.[38] Throughout the history of the interaction between constitutional and property law, this distinction between right and remedy has been crucial and, in most cases, dispositive.[39]

For example, statutes of limitations have always been viewed as procedural measures, and do not, therefore, affect substantive rights, but merely alter the remedies by which those rights are enforced.[40] Similarly, the constitutional justification for adverse possession statutes in some cases has centered on this distinction between rights and remedies, and the courts have held that such statutes do not effect a transfer of title which would alter vested property rights, but merely bar a remedy for trespass.[41] The title owner has a cause of action against his disseisor. If the wronged party "sleeps on his rights," social policy and laches demand death for stale claims and final repose for the wrongdoer. The legislature can shorten or lengthen the period in which the action can be brought only if it affects the remedy for recovery of the property and not the right itself.[42] Moreover, the extent of the limitation on the remedy must be confined to allow the wronged party a "reasonable" time to vindicate his right.[43]

The proponents of dormant mineral statutes argue that mineral acts, like adverse possession statutes, change only the remedies of parties, not their rights. The proponents claim that the statutes merely alter the criteria for successful adverse possession of mineral rights.[44] Superficially, this assertion has some merit. Before the enactment, actual possession of the surface estate was not enough to effect a transfer of corresponding severed estates. The disseisor was required to actually "possess" the minerals by an active attempt to extract them from the land.[45] After the enactment, possession of the surface estate, or at least the estate out of which

---

[38]*See* Pritchard v. Spencer, 2 Ind. 486 (1851). A new statute of limitations for merchant contracts which was applied retroactively was held to be within the power of the legislature as long as a reasonable grace period was provided. *Id.* at 487-88.

[39]*See, e.g.*, Worthen Co. v. Kavanaugh, 295 U.S. 56, 60 (1935).

[40]*See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); Campbell v. Holt, 115 U.S. 620 (1885); Bronson v. Kinzie, 42 U.S. (1 How.) 288 (1843); Gilbert v. Selleck, 93 Conn. 412, 106 A. 439 (1919); *In re* Daniel's Estate, 208 Minn. 420, 294 N.W. 465 (1940); Bates v. Collum, 177 Pa. 633, 35 A. 861 (1896).

[41]*See, e.g.*, Steele v. Gellatly, 41 Ill. 39, 43 (1866). *See also* cases cited in P. BASYE, *supra* note 6, § 56, at 191 n.5.

[42]*See generally* Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

[43]*See, e.g.*, Wheeler v. Jackson, 137 U.S. 245 (1890).

[44]*See, e.g.*, Brief for Defendant at 8-9, Short v. Texaco, Inc., No. C-77-248 (Gibson Cir. Ct., Ind. Sept. 18, 1978).

[45]McBeth v. Wetnight, 57 Ind. App. 47, 53-56, 106 N.E. 407, 410 (1914).

the severed fee was carved, entailed a possession of the mineral interests as well.[46] If the mineral title owner failed either to use his severed interest or re-record, his inactivity would be punished by a transfer of title in favor of the disseisor surface owner.[47] Furthermore, in both adverse possession and dormant mineral situations, inactivity of the title owner justifies the bar of a limitation on remedies and a subsequent change in title. Proponents assert that this analogy assures the constitutionality of mineral statutes because, just as adverse possession statutes, mineral acts affect remedies and not substantive rights.

These claims may also be supported by comparisons to the doctrines of incorporeal hereditaments and liberative prescription.[48] Severed mineral interests in Indiana are regarded as "incorporeal hereditaments," a category which includes servitudes or easements on land.[49] Incorporeal hereditaments may be adversely possessed by the fee estate owner if the hereditament owner failed to continue an active use of his interest.[50] The proponents of the statutes claim that

---

[46]*See* IND. CODE § 32-5-11-1 (1976).

[47]*See id.*

[48]"Corporeal" interests are the more concrete or substantial estates in land. They are generally distinguished from other estates because they can be seen, handled, or touched. A "hereditament" is a general term used to refer to almost all interests in real estate that can be inherited. The term "corporeal hereditament" is employed to describe the more substantial estates in land. *See* BLACK'S LAW DICTIONARY 859 (rev. 4th ed. 1968). "Incorporeal," however, is defined as a right which stems from the corporeal estate. These rights cannot be seen or handled but are merely abstractions. *See id.* For example, a fee simple absolute is corporeal because it may be felt. On the other hand, an easement is incorporeal. *See* 73 C.J.S. *Property* § 7, at 167-68 (1955).

Because incorporeal hereditaments are not as substantial as corporeal estates, the law has afforded incorporeal title owners less security of ownership. Incorporeal hereditaments could be abandoned at common law with the title reverting to the corresponding corporeal hereditament out of which it was carved. *See* note 50 *infra.* At least in Louisiana, it is possible for the owner of a corporeal estate to adversely possess the incorporeal interests that stem from his land. This adverse possession, known as liberative prescription, begins whenever the owner of the incorporeal estate fails to use his right for a long period of time. After a period of consistent nonuse, the incorporeal interest becomes a part of its corporeal estate. If a mineral interest (treated as an incorporeal hereditament in Louisiana) is not used, the mineral holding will be forfeited to the owner of the corresponding corporeal hereditament. *See* Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute,* 25 TULANE L. REV. 30 (1950); Polston, *supra* note 1, at 81-88. *See also* W.L. SUMMERS, THE LAW OF OIL AND GAS § 139 (1954 & Supp. 1978).

[49]Heller v. Dailey, 28 Ind. App. 555, 564, 63 N.E. 490, 493 (1902).

[50]This statement is somewhat broad. At common law, an *incorporeal* hereditament could at least be abandoned. *See, e.g.,* Tietjen v. Meldrim, 169 Ga. 678, 151 S.E. 349 (1930). However, perfect legal title to a *corporeal* hereditament could not be abandoned despite long periods of nonuse. *See, e.g.,* Duncan v. Mason, 239 Ky. 570, 39 S.W.2d 1006 (1931).

the enactment merely extends the rules of adverse possession and incorporeal hereditaments to include mineral interests.

Marketable title acts[51] and recording statutes[52] constitute further analogies employed by the mineral statutes' defenders.[53] Marketable title acts were meant to clear up ambiguities in the American system of title recordation.[54] Any title chain may have outstanding defects which leave doubts about marketability. For social policy reasons, marketable title acts require the beneficiaries of such interests to re-record in a similar manner as is required by dormant mineral statutes.[55] This re-recording must be performed to prevent forfeiture of the interest.[56] Thus, recording statutes may effect a forfeiture of title which in common law was recognized as fully vested.[57] The failure to record in both instances justifies the loss of title, yet, unlike dormant mineral acts, the constitutionality of marketable title and recording acts is firmly established.[58] In all of these cases, *the inactivity of the estate holder* becomes the basis of a title transfer in the name of social policy.

"Yet, none of these laws—marketable title acts . . . or, adverse possession statutes—has the intended effect of taking a clear and unchallenged title from its owner and giving it to a person who has *not* even a *claim* to it."[59] In other words, the attackers of the dormant mineral statutes declare that the above dichotomy sufficiently distinguishes mineral statutes from the other limitation statutes mentioned. In the case of adverse possession, the wronged party has

---

[51]*See* Proposed Model Marketable Title Act, *reprinted in* L. SIMES, *supra* note 14, at 6. *See also* IND. CODE §§ 32-1-5-1 to 10 (1976).

[52]*See* Proposed Model Recording Act, *reprinted in* UNIFORM ACTS: LAND TRANSACTIONS - SIMPLIFICATION OF LAND TRANSFERS - CONDOMINIUMS 204 (1978). *See also* IND. CODE § 32-1-2-16 (1976).

[53]Brief for Plaintiff at 11, Short v. Texaco, Inc., No. C-77-248 (Gibson Cir. Ct., Ind. Sept. 18, 1978).

[54]*See* J. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND, 80-85 (1953).

[55]*See* P. BASYE, *supra* note 6, at 148-51.

[56]*Compare* IND. CODE § 32-5-11-4 (1976) (mineral statute) *with id.* § 32-1-5-4 (marketable title act).

[57]IND. CODE § 32-1-2-16 (1976). *See also* Sills v. Lawson, 133 Ind. 137, 32 N.E. 875 (1892) (recognizing common law rule that an unrecorded deed is good against everyone except subsequent purchasers for value who record first).

[58]*See* American Land Co. v. Zeiss, 219 U.S. 47 (1911); City of Miami v. St. Joe Paper Co., 347 So. 2d 622 (Fla. Dist. Ct. App. 1977); Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957); Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957). *See also* L. SIMES, *supra* note 14, at 253; Aigler, *A Supplement to "Constitutionality of Marketable Title Acts," 1951-1957*, 56 MICH. L. REV. 225 (1957); Annot., 71 A.L.R.2d 846 (1960).

[59]Brief for Appellee at 10, Bickel v. Fairchild, 83 Mich. App. 467, 268 N.W.2d 81 (1978).

a suit in ejectment against the disseisor from the moment the trespass begins.[60] Laches will take effect because the wronged party was *inactive only inasmuch as he failed to bring an action at law to recover his rights* after being notified of the challenge to them. Similarly, marketable title acts limit the time period in which the holder of a competing claim or defect in a chain of title can remain inactive before his claim will be extinguished. Such statutes "are designed to deal with conflicting claims of the title on the same piece of property. The Mineral Lapse Statute . . . deals with non-conflicting claims in separate and independent titles."[61] With mineral interests statutes, no dispute arises as to competing rights to the same title. The mineral owner's rights are unquestioned until his estate is forfeited by the operation of the statute; thus, he has no need or chance to have a legal remedy until it is too late. He is *inactive only because he has no reason or legal basis to act.* For these reasons, opponents argue that comparisons between dormant mineral statutes and marketable title or adverse possession legislation are inappropriate.

To fully understand this argument, one must clearly delineate between rights, remedies, and causes of action. A remedy is related to a situation in which the law recognizes that a right has been violated. The remedy, therefore, is the procedure by which the right is vindicated. Obviously, the law recognizes only a limited number of violations of rights. These violations correspond to particular facts or conditions called "causes of action." The presence of the cause of action activates the procedural mechanism which will rectify a deprivation of rights.[62]

No one has a vested right in a remedy because it is merely a medium through which rights are enforced;[63] however, if a remedy is limited or abolished by a statute of limitation *before the cause of action accrues,* a constitutionally protected right is impaired. While the right remains theoretically intact, the courts no longer provide a forum to enforce it. A legally recognized right without legally recognized methods to protect it is, of course, practically useless. The general rule seems to demand, therefore, that the cause of action be realized before the remedy can be affected by any statute of limitations: "The period of a statute of limitations that bars the right of an owner to recover his land and divests him of his owner-

---

[60]*See, e.g.,* IND. CODE § 34-1-48-1 (1976).

[61]Brief for Defendant at 12, Short v. Texaco, Inc., No. C-77-248 (Gibson Cir. Ct., Ind. Sept. 18, 1978).

[62]For a similar analysis, see Bronson v. Kinzie, 42 U.S. (1 How.) 288, 294-95 (1843).

[63]*See, e.g.,* Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945).

ship of it does not begin to run until there accrues to him a cause of action to recover the land."[64]

In the light of the above concepts, the opponents' argument can be better understood[65]—mineral statutes allow no cause of action or remedy to arise before the title owner's substantive rights are terminated, while, on the other hand, statutes of limitation affect remedies only after a cause of action has accrued thereby allowing the threatened owner his day in court. For example, in the case of adverse possession, the disseisor is actively challenging the rights of title owners. At the moment possession occurs on the disseisor's part, a cause in ejectment arises as a remedy for the record title holder.[66] In turn, as the remedy becomes viable, a statute of limitations begins to limit the title owner's right to the ejectment remedy—not his right to his property. In the case of a dormant mineral statute, a remedy at law for the redress of active wrongs on the part of the disseisor is never activated. A remedy never existed; hence, one may not claim that a mineral act limits only remedies. No one challenges the title owner's rights until the statute itself penalizes the owner's inactivity. The disseisor merely sits nearby exercising his domain over a totally different estate in the land—the surface—and in no sense is challenging the mineral owner's title.

This point must be conceded to the mineral statutes' attackers. Certain types of statutes of limitation, such as adverse possession provisions, can be easily distinguished from mineral acts. Yet, not all types of statutes of limitation can be differentiated from dormant mineral legislation. There are three different ways in which a remedy might be limited. First, the legislature may shorten the period in which one may bring his grievance to court *after the cause of action activating a remedy* has arisen. This type is a true statute of limitations and will be known hereinafter as a "statute of limitations." Second, a legislature may abolish a remedy altogether as long as another remedy is reasonably available to vindicate the corresponding right. Hereinafter, this type will be called an "abolition of remedy" statute.[67] Finally, the legislature may abolish a right for

---

[64]Day, *Curative Acts and Limitations Acts Designed to Remedy Defects in Florida Land Titles—IV*, 9 U. FLA. L. REV. 145, 159 (1956); *accord*, Grayson v. Harris, 279 U.S. 300 (1929); Redfield v. Parks, 132 U.S. 239 (1889).

[65]*See* note 59 *supra* and accompanying text.

[66]*See, e.g.*, IND. CODE § 34-1-48-1 (1976).

[67]*See, e.g., id.* §§ 32-8-4-1, -2 (in which the foreclosure on a mortgage is barred 20 years after its due date as designated on the recorded instrument). These statutes may be said to abolish a remedy. Twenty years after the due date on the mortgage instrument, a foreclosure on the property as a remedy for the non-payment of the secured debt would be barred by the statute. These types of statutes have been adjudged constitutional, however, because they allow a re-recording to preserve the interests and

implicit social policy reasons under the guise of limiting a remedy. This goal is accomplished by limiting, or, more accurately, abolishing a remedy *before the cause of action has arisen.* Since the limited remedy is usually the only avenue to vindicate its corresponding right, the right is, for practical purposes, negated. Hereinafter, this type of enactment will be referred to as a "pseudo-statute of limitations."[68]

It follows from the above comparisons and classifications that dormant mineral statutes are pseudo-statutes of limitation because they limit remedies before the cause of action has accrued. Until recently, pseudo-statutes of limitation were seen as unconstitutional.[69]

For instance, to promote marketable titles, legislatures have passed adverse possession statutes which did not except non-possessory estates or claimants with disabilities from the disseisor's claims.[70] These statutes usually purport to vest absolute title in the adverse possessor free of even the vested rights of remaindermen as long as the disseisor took possession under color of title and paid taxes.[71]

The courts,[72] however, refused to apply such color of title adverse possession statues to future interests because they limited

---

are therefore, permissible. *See* Yarlott v. Brown, 192 Ind. 648, 138 N.E. 17 (1923); Evans v. Finley, 166 Ore. 227, 111 P.2d 833 (1941).

[68]For an example of a pseudo-statute of limitation, see IND. CODE § 33-1-1.5-5 (Supp. 1978) (providing a limitation period for product liability actions).

[69]*See, e.g.*, Chapman v. County of Douglas, 107 U.S. 348 (1882); Sohn v. Waterson, 84 U.S. (17 Wall.) 596 (1873); Coleman v. Superior Court, 135 Cal. App. 74, 26 P.2d 673 (1933); Slover v. Union Bank, 115 Tenn. 347, 89 S.W. 399 (1905). Today, however, pseudo-statutes of limitation, especially in the area of products liability, are increasingly accepted by the courts as a legitimate exercise of the legislative police power. *See* Smith v. Allen-Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974); Hargraves v. Brackett Stripping Mach. Co., 317 F. Supp. 676, 681-83 (E.D. Tenn. 1970).

[70]*See, e.g.*, ILL. REV. STAT. ch. 83, § 6 (1973) which provides:

> Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

For a list of similar statutes, see P. BASYE, *supra* note 6, § 56.

[71]*See* P. BASYE, *supra* note 6, § 56.

[72]Beasley v. Beasley, 404 Ill. 225, 88 N.E.2d 435 (1949) (holding statutes of limitation do not run against remaindermen until the right of entry accrues); Steele v. Gellatly, 41 Ill. 39 (1866) (rejecting the objection that limitation laws operate on titles

a remedy before its cause of action had arisen.[73] The vital question in these situations was whether the aggrieved party presently possessed a cause of action. Until the remainderman gained a possessory right, thereby activating the possibility of an action in ejectment, he would be helpless to protect his rights through any legal action. The disseisor, even though in possession of the questioned estate for the last twenty years, could not make any constitutional claim against the remainderman.[74] The disseisor claimed only a right to possession and could not challenge a remainderman's interest since the remainderman had no right to present possession.

The courts concluded that all statutes of limitation were based upon a theory of laches, and no laches could be imputed to a future interest holder who had no remedy or cause of action.[75] In *Mettler v. Miller*,[76] the Illinois Supreme Court stated: "To hold [otherwise] would be to deprive such person of his estate without his day in court."[77]

The adverse possession color of title statutes and their effect on future vested interests may be compared to the Model Marketable Title Act.[78] If the courts had applied these adverse possession statutes to future interests, it seems apparent that the above provisions would have operated as "pseudo-statutes of limitation" and would have been subject to due process objections. Yet, the Model Marketable Title Act, generally recognized as constitutional,[79] applies to all interests "however denominated, whether legal or equitable, present or future."[80] In other words, the Model Marketable Title Act applies to future interests in a manner which was forbidden by the courts when they dealt with the constitutionality of adverse possession color of title statutes. Thus, the Model Act may also be subject to the same due process objections as those encountered by the adverse possession color of title statutes. Both are pseudo-statutes of limitation.

---

and refusing to apply the statute to future interests). *See generally* P. BASYE, *supra* note 6, § 56, at 191 n.5.

[73]*See* Steele v. Gellatly, 41 Ill. 39, 44 (1866).

[74]*Id. But cf.* Lewis v. Barnhart, 145 U.S. 56 (1891) (Illinois statute applied to a remainder interest).

[75]*See* authorities cited in note 72 *supra*.

[76]129 Ill. 630, 22 N.E. 529 (1889).

[77]*Id.* at 643, 22 N.E. at 532.

[78]*See* note 51 *supra*.

[79]*See* authorities cited note 58 *supra*.

[80]Proposed Model Marketable Title Act § 3, *reprinted in* L. SIMES, *supra* note 14, at 8. *See also* P. BASYE, *supra* note 6, § 52, at 180. The author stated: "Marketable Title Acts have been drafted to bar *all possible claims without exception*, including those . . . of owners of future interests . . . ." *Id.* (emphasis added).

One distinction does exist. *Marketable title acts allow re-recording to preserve future interests*[81] *whereas adverse possession color of title statutes do not.* Dormant mineral statutes also allow re-recording to preserve the questioned interests and, therefore, may be justified in a similar manner.

For instance, *A*, owner in fee simple, conveys Blackacre to *B* for life, remainder to *C* and his heirs. *B* and *C* record the transaction and have full knowledge of each other's interests. Later, *A* plans to defraud *C* and conveys Blackacre to *B* again, but this time *A* gives *B* a warranty deed for value purporting to give *B* Blackacre's remainder. *B* records the deed and remains in possession of Blackacre for sixty years and dies. Under Indiana recording laws,[82] since *B* took the deed with constructive notice of *C*'s interest, if *C* took possession of Blackacre upon *B*'s death, *B*'s heirs would have no cause of action.[83] Any claim by *B*'s heirs would have to be based on a void fraudulent deed that would not be recognized past the pleading stages in any suit to recover Blackacre.[84] Clearly, *C* has a vested remainder, a substantial property right, which is fully alienable.[85]

Assume, however, that Indiana's Marketable Title Act[86] went into effect in Blackacre's jurisdiction. The act has a traditional grace period and a fifty year re-recording requirement in order to preserve an adverse claim to any root of title including one based on an otherwise fraudulent or void deed.[87] Assume further that *B*'s warranty deed had been on record fifty years at the time the act went into effect. *C*, like most laymen, neither knew of the cloud cast on his title nor of his duty to re-record in order to preserve his interest. Indeed, he would have no reason to know of *A*'s plan. As a result, *C* failed to re-record. Logically, according to the terms of the act, *B* would have clear title in fee simple two years after the passage of the act. The act effected a forfeiture of *C*'s interest before *C* gained a possessory right.

The Model Marketable Title Act does exactly what courts in the past have considered to be unconstitutional and, as such, is a pseudo-statute of limitations similar to the color of title adverse possession statutes and dormant mineral acts.[88] In the above exam-

---

[81]*See, e.g.*, IND. CODE § 32-1-5-4 (1976).

[82]*Id.* § 32-1-2-16 (1976).

[83]*See id.*

[84]*See id.*

[85]*See* Kost v. Foster, 406 Ill. 565, 94 N.E.2d 302 (1950).

[86]IND. CODE §§ 32-1-5-1 to 10 (1976). Indiana adopted the Model Marketable Title Act without substantial change. *See* Note, *The Indiana Marketable Title Act of 1963: A Survey*, 40 IND. L.J. 21 (1964).

[87]IND. CODE § 32-1-5-4 (1976) (act applies to all interests). *See also* City of Miami v. St. Joe Paper Co., 347 So. 2d 622 (Fla. Dist. Ct. App. 1977).

[88]*See* notes 70-79 *supra* and accompanying text.

ple, *C* had no possessory right when the Marketable Title Act effected a forfeiture of his vested remainder. His remedy was limited before his cause of action accrued. Even though marketable title acts operate on future interests in the same way that color of title adverse possession statutes were intended to operate by the legislatures, the courts have consistently found marketable title acts to be constitutional.[89]

But, as asserted above, a saving distinction does exist between color of title adverse possession statutes and marketable title acts. Color of title adverse possession statues do not afford future estate holders such as *C* a chance to preserve their interests.[90] In comparison, marketable title and dormant mineral acts provide a "remedy" by affording an opportunity to re-record. Re-recording, while not a remedy in the usual legal sense,[91] does provide a viable redress by which the title owner can protect his interest and does not arbitrarily terminate his property rights. Since both statutes allow re-recording to preserve the interests of all parties as a "remedy" against possible forfeitures of property interests,[92] the conclusion is inescapable that, if dormant mineral statutes are unconstitutional,[93] marketable title acts must also be found void. This result seems unlikely even though the Michigan Court of Appeals found that state's mineral statute unconstitutional.[94] One court justified these statutes as follows: "Marketable title acts merely require filing notice rather than commencing an action; hence they may apply to vested future interests."[95]

Nevertheless, some objections can be made to the above argument. First, the examples above deal solely with non-possessory interests in land. On the other hand, dormant mineral statutes effect the forfeiture of fully vested mineral interests with present rights to enjoyment. Since future interests are non-possessory, one could argue that they are less valuable and deserve less constitutional protection. These arguments have no merit. A vested future interest is as substantial as an oil potentiality.[96] Indeed, an oil well seems merely speculative when compared to the certainty of a vested remainder. Moreover, the Model Marketable Title Act applies to

---

[89]*See* authorities cited in note 58 *supra*.

[90]*See* note 70 *supra* and accompanying text.

[91]*See* text accompanying note 62 *supra*.

[92]*See* note 56 *supra* and accompanying text.

[93]*See, e.g.*, Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

[94]Bickel v. Fairchild, 83 Mich. App. 467, 268 N.W.2d 881 (1978).

[95]Wichelman v. Messner, 250 Minn. 88, 115, 83 N.W.2d 800, 821 (1957).

[96]*See* Kost v. Foster, 405 Ill. 565, 94 N.E.2d 302 (1950).

mineral interests as well as to future interests.[97] The above examples concerning marketable title acts could just as easily have used mineral interests instead of vested remainders. Vested remainders were chosen solely for the sake of historical symmetry in comparison with adverse possession color of title statutes.

If viable objections are to be made, they must be made against both marketable title acts and dormant mineral statutes. The same due process question arises in both situations: Has the aggrieved party been deprived of his property without his day in court?[98] The challenged interest owner has no notice of his duty to re-record. *If knowledge of the duty to re-record could be assumed, it would be difficult to seriously challenge dormant mineral statutes considering the minimal burden re-recording imposes.*[99] In adverse possession and other statute of limitations situations, the challenge to the aggrieved party's rights is notice of the need for a legal remedy in ejectment. But in the case of the pseudo-statutes of limitation found in marketable title and dormant mineral statutes, the challenge to the title owner's rights does not give the estate owner notice of his need to take affirmative action.

In this regard, it is argued that severed fee owners cannot be held responsible for knowledge of the duties imposed by mineral statutes. Marketable title legislation is far harsher than mineral statutes from the title owner's perspective. Theoretically, a perfect stranger can file regarding a fraudulent transaction and gain good title after forty years.[100] Even knowledge of the law will not help in such a case since the duty to re-record only arises in the presence of a defect in title. Such defects may not be found absent the expense of abstracting every forty years. This argument will be addressed in the next sections.

B. Are Dormant Mineral Statutes Violations of Procedural Due Process?

A title owner cannot reasonably be expected to know of his duty to re-record which gives rise to a vague feeling of injustice whenever a forfeiture is effected by the statute. Mineral acts, therefore, seem arbitrary because they punish title owners for something for which they cannot be held morally responsible. In turn, an understandable prejudice is generated against the statute.

One case centered on the lack of "due notice" as a fatal constitutional defect in dormant mineral statutes. In *Chicago & North-*

---

[97]*See* L. SIMES, *supra* note 14, at 240; Note, *supra* note 86, at 31.

[98]*See* text accompanying notes 75-76 *supra.*

[99]*See* Wichelman v. Messner, 250 Minn. 88, 115, 83 N.W.2d 800, 821 (1957).

[100]*See* note 87 *supra* and accompanying text.

western Transportation Co. v. Pedersen,[101] the need for a reasonable notice of re-recording duties was equated with the notice requirements of *Mullane v. Central Hanover Bank & Trust Co.*[102] *Mullane* required that notice be actual, not constructive, whenever possible, taking into account the type of proceedings involved.[103] The Wisconsin Supreme Court in *Pedersen* held, therefore, that the owners had a constitutional right to notice and a formal judicial hearing.[104] Otherwise, forfeiture due to a lack of re-recordation would be constitutionally unacceptable. The court stated:

> Implicit in the right to a hearing is adequate notice of the hearing. Personal service is always sufficient notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Where a person's location is known or easily ascertainable, personal service is also required. *Shroeder v. City of New York*, 317 U.S. 208, 212, 213 (1962). But for, ". . . persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits . . ." For such persons publication is adequate notice.[105]

Pedersen has been used by the statutes' attackers in a pending Indiana case with considerable success.[106]

The requirement of formal personal notice as well as a full judicial hearing in such cases is impractical. To accomplish the

---

[101]80 Wis. 2d 566, 259 N.W.2d 316 (1977).

[102]339 U.S. 306 (1950).

[103]*Id.* at 314.

[104]80 Wis. 2d at 572, 259 N.W.2d at 319.

[105]*Id.*

[106]The *Pedersen* holding is pertinent only to the extent the Wisconsin court addressed the mineral statute as a marketable title law as opposed to a tax measure. Apparently, the court also viewed the statute as a property tax and, therefore, drew analogies to the due process procedures required in tax lien foreclosures. *See* Devitt v. Milwaukee, 261 Wis. 276, 52 N.W.2d 872 (1952). Clearly, this analogy is not complete. If the legislature was concerned with the collection of revenue, why did it not provide for a foreclosure proceeding to collect delinquent payments? Why did the severed interest revert to the surface owner? Such a tax is, of course, self-defeating unless the statute is seen in its true role as a marketable title provision with the tax incidental to that purpose. The court took pains, however, to avoid characterizing the statute as a registration measure: "The payment of the fees under sec. 700.-30, Stats. is a tax. The fees raise revenues beyond what is necessary to the administration of the registration scheme." 80 Wis. 2d at 573, 259 N.W.2d at 319. In any event, courts influenced by the *Pedersen* approach have failed to make the distinction between tax foreclosure and registration provisions. *See, e.g.*, Pond v. Walden, No. C-78-17 (Gibson Cir. Ct., Ind. July 24, 1978) (applying *Mullane* even though the mineral statute did not contain tax provisions). One wonders, however, whether the Wisconsin court would have reached a different result if the statute had been drafted without the taxation provisions.

legislative goals of dormant mineral statutes, either the government or the possible disseisor would have to be charged with notifying the title owner of his duty to re-record pending forfeiture. If the government were given the responsibility, every mineral title recorded in the state would have to be continuously surveyed for possible expirations of recordations. In addition, a hearing would have to be instituted in each case. In situations involving truly dormant interests, the title owner could not be expected to appear and the proceeding would be little more than a meaningless ritual. Another possibility would be to burden the disseisor with the responsibility of notifying other property owners of their duty to re-record. Yet, to expect the potential disseisor to keep track of a competing owner's dealings in land in the hope for a windfall seems unrealistic. The chance of speculative gain would be so remote and the burden so great that the likelihood of such an effort on the disseisor's part seems slim. In either case, the liabilities assumed in establishing a new "Department of Dormant Minerals" seem to outweigh the benefits derived from mineral statutes limited in the manner that the Wisconsin Supreme Court found necessary. Realistically, dormant mineral statutes in their present form seem to be the least restrictive means to accomplish legitimate legislative goals.

Moreover, if the Wisconsin rule is applied to dormant mineral statutes, notice requirements would have to be extended to marketable title statutes as well as mineral provisions as a matter of principled symmetry. One of the vital advantages of the marketable title acts is that they allow the abstractor to rely on a relatively short chain of title.[107] If notice requirements were introduced, the abstractor would be required to extract a complete chain of title from the records. He would then have to attempt to notify all owners of outstanding defects that their interest would be subject to forfeiture unless they took affirmative action. If all attempts at personal service failed, notice by publication at least would be required. Of course, these attempts at notice, if successful, would breed litigation over the disputed title. One of the purposes of marketable title legislation was to decrease litigation by cutting off stale claims.[108] Dormant mineral provisions and marketable title acts would be less effective methods of accomplishing legislative goals if procedural due process requirements were imposed.

Of course, the mere fact of impracticality is no objection to the recognition of a constitutional right. One cannot deny free speech or other fundamental rights because it may be difficult to accommodate

---

[107]*See* L. SIMES, *supra* note 14, at 5.

[108]*See id.* at 4-6.

the execution of those rights. If the legislature is required to give "due notice" to property owners, then the retroactive enactments discussed above must fail.

Fortunately, a persuasive argument can be made that the Wisconsin court erroneously equated reasonable notice or knowledge of a statutory duty with the notice required by procedural due process. "Reasonable notice," in the sense which the *Pedersen* court employed the term, consists of a man's "reasonable expectations" of the nature of the law and of how fast it should change. The constancy of law encourages men to enter transactions with confidence that their investments will not be endangered by arbitrary or capricious enactments. The requirement of re-recording where no such duty was imposed before seems arbitrary because it disturbs the title owner's "reasonable expectation" of being able to use or *not use* his severed interest as he pleases. Reasonable expectations and their constitutional protections will be discussed later as one factor in the full array of *substantive due process questions.*

If the ideas of procedural due notice and substantive reasonable expectations are equated, the legislature must give formal due process notice of every law which men may not have reasonably anticipated. This proposition is contrary to the old maxim that "ignorance of the law is no excuse." As expressed by the Supreme Court of Iowa: "[E]nactments of our state legislature and publication thereof constitute adequate notification to all concerned as to what they contain."[109] Procedural due process should deal with the initiation of judicial proceedings in which an objective magistrate sits in judgment on competing views of fact and law. Procedural due process standards evolved only to limit such judicial processes in order to promote "fair play and substantial justice,"[110] and were not designed to serve as guidelines for the legislative function. These standards break down when employed outside their rightful context. To demand that the legislature pass absolutely no unexpected laws, unless adequate notice is given, would be a fatal curtailment of legislative discretion.

Landowners are generally assumed to be aware of the legal responsibilities concomitant with their ownership. As stated by the United States Supreme Court: "All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes."[111] Procedural

---

[109]Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232, 242 (Iowa) *cert. denied*, 423 U.S. 830 (1975). *See also* Wilber Nat'l Bank v. United States, 294 U.S. 120, 124 (1934).

[110]*See* International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

[111]Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 243 (1944).

due process within the meaning of *Mullane* and notice or knowledge of the law are clearly two different concepts. The conclusion that procedural due process has no application to dormant mineral situations seems inescapable.

C. Do Dormant Mineral Statutes Violate Substantive Due Process?

(1) Has a Governmental "Taking" of Property Occurred or Are Mineral Statutes Merely Regulations of Competing Rights?—Pedersen was also concerned with substantive due process.[112] The *Pedersen* court held that the transfer or forfeiture under the statute resulted in a governmental taking of property.[113] Since the transfer of any title is a "taking" of sorts, the court concluded that the constituitonal criteria of eminent domain proceedings must be satisfied.[114] The court declared that not only did the government fail to provide "just compensation," but that the property taken was put to use for private purposes absent even a "quasi-public" justification.[115] The following statement of Justice Story is supportive:

> Although the sovereign power in free governments may appropriate all property, public as well as private, *for public purposes*, making compensation therefore; yet it has never been understood, at least, never in our republic, that the sovereign power can take the private property of A. and give it to B., by right of "eminent domain;" or, *that it can take it at all, except for public purposes;* or, that it can take it for public purposes without the duty and responsibility of *making compensation for the sacrifice* of private property of one, for the good of the whole.[116]

Nevertheless, the forfeiture of title is not a taking, but is a regulation of competing rights between the surface owner and the severed title holder. The regulation of rights between individuals has never required the safety measures of eminent domain.[117] Unfortunately, the line between a taking and a regulation of rights is unclear.

---

[112]80 Wis. 2d at 574, 259 N.W.2d at 320.

[113]*Id.*

[114]*Id.*

[115]*Id.*

[116]Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 442 (1837) (Story, J., dissenting) (emphasis added).

[117]Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). The difficulty in drawing the distinction between regulation and taking was recognized: "There is no set formula to determine where regulation ends and taking begins." *Id.* at 594.

Of course, every regulatory measure by the legislature involves the alteration of rights. These alterations may make property more or less valuable. For instance, a change in zoning laws may make a piece of property worthless through limitations on the land's use. Regulatory measures, therefore, are directed solely at the use of property, although use and value are inseparable.[118] When a regulatory measure limits such uses and devalues real estate as a result, the statute has summarily deprived the owner of his property and employed it to a public use.[119] The similarity to eminent domain proceedings is obvious.

But to hold, because of these similarities, that every regulation of the legislature which alters property values is a taking of property requiring eminent domain safeguards would emasculate legislative power. At some point, an incidental deprivation of property concomitant to the pursuit of legitimate governmental goals graduates from a mere regulation of rights to that of a taking of property. At what point does a regulation become a taking?

Pedersen seemed to embrace the poorly articulated doctrine espoused by the United States Supreme Court in *Penna Coal Co. v. Mahon*:[120] "When [the deprivation of property] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[121] Apparently, if the value of the property is impaired "a lot," then a taking occurs. Unfortunately, the Supreme Court has established no definitive guidelines regarding the degree of deprivation necessary. In *Goldblatt v. Town of Hempstead*,[122] mineral interests were effectively extinguished by a town ordinance prohibiting excavation under the water line. Even though no transfer of title occurred, the mineral interests, for all practical purposes, were forfeited to the town's use. Nevertheless, the court found no taking on the part of the municipality.[123]

Pedersen may be distinguished from *Goldblatt* because an actual transfer of title was executed in the former. In *Goldblatt*, the title owner at least nominally continued in ownership. Hence, the crucial degree of deprivation for the Wisconsin court seemed to be the transfer of nominal ownership from one party to another:

---

[118]*See id.* at 592-94.

[119]*Id.*

[120]260 U.S. 393 (1922).

[121]*Id.* at 413.

[122]369 U.S. 590 (1962).

[123]*Id.* at 592. The Court explained: "It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Id.*

> In this case, the plaintiffs' mineral rights will revert to the surface owner if they are not registered or taxes are not paid on them. At the least, the plaintiffs must have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the taxes have not been paid.[124]

If the transfer of title is recognized as the crucial degree of deprivation, recording laws designed to protect bona fide purchasers must be considered illegal eminent domain enactments. If the bona fide purchaser records in reliance on the recording laws and without constructive, or actual notice of a former vendee who failed to record his interest, a transfer of title from the negligent former vendee in favor of the buyer takes place in a manner similar to the transfer effected in dormant mineral statutes.[125] This transfer is usually justified by citing the sovereignty of the state and its license to determine the rights and duties of ownership.[126] Marketable title acts must also be considered a taking of property under the *Pedersen* view. As seen in the last section,[127] these acts also effect a forfeiture of title, especially title to future interests once considered fully marketable and secure. All of these statutes, marketable title acts, recording acts, and dormant mineral acts, are retroactive measures which might effect a taking of titles already vested in the sense elaborated by the Wisconsin court.

A more workable rule should be formulated to guide courts as to when a taking occurs. One suggestion might be to limit the doctrine of "just compensation" to governmental acquisitions of specific pieces of property in locations incidental to vital sovereign activity. Eminent domain proceedings should not be required if entire classes of property owners are involved generally throughout the jurisdiction.

This idea complements the scheme of at least one commentator[128] who emphasizes the role of the government in "just compensation" questions. Where the government plays the role of an impartial arbiter between the rights of competing societal interest groups, eminent domain safeguards ought not to be implemented.[129] If, on the other hand, the sovereign is acting as a competitor or fellow consumer within the private sector, the increased danger of tyrannical

---

[124]80 Wis. 2d 566, 572, 259 N.W.2d 316, 319 (1977).

[125]*See* note 57 *supra* and accompanying text. *See also* Bereolos v. Roth, 74 Ind. App. 100, 124 N.E. 410 (1919); Blair v. Whittaker, 31 Ind. App. 664, 69 N.E. 182 (1903).

[126]*See* authorities cited in note 58 *supra.*

[127]*See* notes 86-89 *supra* and accompanying text.

[128]*See generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

[129]*See id.* at 61-67.

measures justifies the heightened precautions of just compensation when a direct property benefit to the government is involved.[130] In the case of government as arbiter, a readjustment of competing interests to benefit the whole of society occurs; hence, the sovereign's powers should not be curtailed since no motive for an oppressive initiative is present.[131] The stringent constitutional protections of just compensation should only limit the government if an incentive for oppressive action is present.[132]

With respect to dormant mineral statutes, the state serves as an impartial arbiter. The statute is employed as a solution to a social problem and the state gains no direct benefit from a transfer of severed estates. Moreover, classes of property are involved, not specific pieces of real estate in particular locations. The conclusion which logically follows is that the rules of eminent domain should not be implemented in dormant mineral situations.

(2) Do Dormant Mineral Statutes Violate Substantive Due Process?—When legislatures have found it necessary to enact economic schemes for the public welfare, the present Supreme Court has generally deferred to their judgment.[133] Such schemes have long been recognized as legitimate exercises of a state's police power, especially if such a plan is necessary to regulate the use of private property.[134]

Nebbia v. New York[135] first articulated the modern due process limitations on a legislature's efforts at economic regulation:

> [A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither aribrary nor discriminatory, the requirements of due process are satisfied . . . .[136]

Nebbia limited the review of economic measures to two levels: If a legitimate exercise of the legislative police power is present and a reasonable relation between the operation of a constitutionally ques-

---

[130]*See id.*

[131]*Id.* at 64-67.

[132]*Id.*

[133]1 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 3:2, at 206 (1969).

[134]*See generally* 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES § 288 (1965).

[135]291 U.S. 502 (1934).

[136]*Id.* at 537.

tioned statute and the exercise of police power is established, then the act withstands substantive due process objections.[137]

The key to understanding this test lies in the following question: What exactly is a reasonable relationship between the exercise of the police power and the operation of a challenged statute? For instance, one legitimate function of the legislature is to assure a big turn-out of voters on election day.[138] Requiring employers to give their workers a half-day off with pay in order to vote is one method to assure the workers' presence at the polls. On one hand, some would claim that such a scheme was unreasonable or irrational because of the impingement on private rights. The employers never contracted to pay the workers to vote. On the other hand, a lawmaker is not totally unreasonable for believing that such extreme measures are necessary to forward a public interest.

Of course, the word "reasonable" in these contexts is capable of two interpretations. In the first sense, the word includes a *subjective* judgment on the part of the speaker. A value judgment on the questioned statute's wisdom is effectuated. In the second more narrow meaning of the term, unreasonable connotes activity which goes against universally accepted laws of nature.

Modern due process embraces the narrow or objective definition of reasonableness.[139] Thus, in *Day-Brite Lighting, Inc. v. Missouri*,[140] the Supreme Court upheld the statute requiring time off with pay in order to vote as being a reasonable regulation by the legislature to promote public welfare.[141] This view recognizes that the legislature has already balanced the gains and losses from economic legislation and has expressed the will of the people in favor of a public interest.[142] Citizens do not have a constitutionally protected liberty interest in property;[143] hence, unlike impingements on liberty interests such as free speech, the constitutional presumption is in favor of a challenged statute which abridges only property rights.[144]

---

[137]*See* 2 B. SCHWARTZ, *supra* note 134, at 57.

[137]*See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

[139]*See* 2 B. SCHWARTZ, *supra* note 134, § 276. This idea rejects the role of the Court as a super-legislature. *See* Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting). The idea is sometimes used in opinions dealing with the commerce clause. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) (Black, J., dissenting). The gist of modern due process centers upon whether the Supreme Court will determine the reasonableness of an act from the perspective of the Justices themselves or from the views of a reasonable legislator.

[140]342 U.S. 421 (1952).

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

[142]*See* 2 B. SCHWARTZ, *supra* note 134, § 276.

[143]*See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[144]*See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); *cf.* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (dealing with state educational system).

The burden of proving the lack of a rational connection between police power and the questioned enactments rests squarely on the attacking party: "[B]y their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether *any state of facts* either known or *which could reasonably be assumed* affords support for [the legislative judgment]."[145] The modern approach also prohibits a judgment regarding the wisdom or value of the suspect legislation: "[I]f our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision."[146]

If the modern due proces test is properly applied to dormant mineral acts, there is little doubt as to mineral statutes' constitutionality. For instance, the only practical difference between recording statutes and mineral acts lies in the former being primarily for the protection of third parties against fraud,[147] while the latter addresses such economic woes as the energy shortage, marketability of land, and competing rights between private ownerships.[148] Both enactments undeniably address legitimate objects of police power. Too many commentators have pointed out the need for dormant mineral provisions to permit the courts to characterize the statutory schemes as unreasonable or irrational.[149] One may disagree with these enactments by asserting that security of ownership and the value of private interests outweigh the public needs for marketable titles and energy. But, as seen above, debatable questions must be left to the legislature. The Supreme Court stated in *Day-Brite*: "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."[150] In other words, one judge should not be able to strike down an entire legislative effort merely because he prefers private property over public policy.

Unfortunately, while the above test clearly applies to prospective measures, it is uncertain whether it also applies to retroactive legislation. A higher level of review has traditionally measured the constitutionality of retroactive enactments.[151] Three tests have been forwarded for analyzing the due process requirements for retro-

---

[145]United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (emphasis added).

[146]Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952).

[147]*See* American Land Co. v. Zeiss, 219 U.S. 47, 61-62 (1911); Jackson v. Lamphire, 28 U.S. (3 Pet.) 281, 289 (1830).

[148]*See* Polston, *supra* note 1, at 73-78.

[149]*See* notes 3 & 14 *supra*.

[150]342 U.S. at 423 (1952). *See also* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

[151]*See generally* Smith, *Retroactive Laws and Vested Rights* (pts. 1 & 2), 5 TEX. L. REV. 231, 6 TEX. L. REV. 409 (1927-1928). *See also* P. BASYE, *supra* note 6, § 213.

active statutes: (1) A retroactive law is constitutional as long as it does not disturb vested rights,[152] (2) the court must balance "the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters,"[153] and (3) a retroactive law may not upset the reasonable expectations of the parties at the time they entered the preenactment transaction upon which the challenged law directly operates.[154] The vital questions are whether one or all three of the above tests apply to retroactive measures or whether the modern due process test applies.

The vested rights doctrine as a dispositive constitutional determination has long been rejected by the better authorities. In *City of El Paso v. Simmons*,[155] the Supreme Court stated: "[D]ecisions dating from *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 have not placed critical reliance on the distinction between obligation [or right] and remedy."[156] The Court then questioned the soundness of the vested rights approach.[157] The prohibition against impairments of vested interests is vitally intertwined with the primary exception to the rule, namely, the legislative power to alter remedies.[158] In admitting that rights and remedies are not easily separated, the doctrine suffers a fatal defect and should, therefore, be expressly renounced. Moreover, the doctrine has generated more confusion than clarity because of its lack of predictability. "A court lays down the rule that vested rights are protected, but rights that are not vested may be taken away. The legislature, then, cures a defective conveyance and deprives the grantor of what theretofore . . . was a vested right."[159] "[I]t has long been recognized that the term 'vested right' is conclusory—a right is vested when it has been so far perfected that it cannot be taken away by statute."[160]

Professor Hochman, a proponent of the second test, concluded that the Supreme Court balanced three factors to determine whether the questioned law overstepped constitutional limitations: "[T]he nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the

---

[152]*See* notes 29-35 *supra* and accompanying text.

[153]Hochman, *The Supreme Court and The Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697 (1960).

[154]*See* Smith, *supra* note 151.

[155]379 U.S. 497, 506 n.8 (1965).

[156]*Id.* at 506-08.

[157]*See id.*

[158]*See id.*

[159]Smith, *supra* note 151, 6 TEX. L. REV. at 426.

[160]Hochman, *supra* note 153, at 696.

asserted preenactment right, and the nature of the right which the statute alters."[161] One can make an excellent argument supporting dormant mineral provisions in two of the three Hochman categories. Important public interests are served by the statutes—marketable titles, energy exploration, and the effective utilization of land. The degree of abridgement of the preenactment rights is slight because of the opportunity to preserve the interest by re-recording. This burden seems especially small when one recognizes that due notice of the duties concomitant with land ownership are assumed.[162] That the statutes disrupt "reasonable expectations" makes this final inquiry a close question.

One would think that these factors were considered and balanced by the legislatures when they enacted dormant mineral statutes since Hochman's guidelines involve no more than a consideration of the public advantages and private disadvantages of any new statutory scheme. In weighing the above factors, is not the court turning into a super-legislature? Does not the Hochman balancing act conflict with the modern due process policy against judging the value and the wisdom of legislation? The following caveat was given by the Supreme Court in *Williamson v. Lee Optical of Oklahoma, Inc.*:[163] "But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."[164]

While Hochman concludes that the Court will employ a higher level of review when dealing with retrospective enactments, there seems to be no clear justification for this distinction between prospective and retrospective laws. Prospective laws may be just as harsh as retrospective ones.[165] Moreover, any new statutory scheme in some way affects interests already vested. If the legislature makes a certain type of contract illegal in the future, it limits the ways in which property might have been utilized and, hence, impairs property rights. If a zoning law is passed prohibiting uses not already established, even this restriction obviously deflates the value of vested interests in real estate.

The Supreme Court has not unequivocally held that the modern due process test applies to retrospective enactments, although several cases did utilize that test in retrospective situations.[166] The Supreme Court's most recent decision, however, appears to favor the modern view of due process.

---

[161] *Id.* at 697.

[162] *See* notes 109 & 111 *supra* and accompanying text.

[163] 348 U.S. 483 (1955).

[164] *Id.* at 487.

[165] *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

[166] *See, e.g.*, Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940).

In *Usery v. Turner Elkhorn Mining Co.*,[167] plaintiff mine owners challenged the constitutionality of the Black Lung Act, which required them to pay benefits to inflicted workers who had retired prior to the effective date of the Act. Plaintiffs argued that the past transactions with employees could not now become subject to added duties and liabilities. The labor received from the mine workers had, they argued, become vested property rights constitutionally sheltered from statutory impositions of added liability. The court dismissed plaintiffs' objections:

> We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the "cost-savings" enjoyed by operators in the pre-enactment period produced "excess" profits, or the degree to which the retrospective liability imposed on the early operators can now be passed onto the consumer. *It is enough to say that the Act approaches the problem of cost spreading rationally . . . .*[168]

Usery also held that the burden of establishing the absence of a rational connection between the operation of the statute and the forwarding of the public welfare is upon the party challenging the enactment.[169]

Even though the Court applied the modern due process test in its refusal to balance the interests involved,[170] the Court was equivocal as to whether such a test would be appropriate in every situation: "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as prospective aspects, must meet the test of due process, and the justification for the latter may not suffice for the former."[171] Assuming that the Court meant what it said, one wonders why, in *Usery*, it applied the modern due process test to a retroactive statute. If the Court consistently applied such a test, it would allow Congress to do that which the Court has forbidden, namely, to enact retrospectively that which may be enacted prospectively.

---

[167]428 U.S. 1 (1976).

[168]*Id.* at 18-19 (emphasis added).

[169]*Id.* at 15.

[170]*See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 433 (1978) [hereinafter cited as J. NOWAK]. The authors concluded: "Justice Marshall was unwilling to weigh competing interests to assess the constitutionality of the legislation. He deferred to the legislature judgment and refused 'to assess the wisdom of Congress' chosen scheme.'" *Id.* (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. at 16).

[171]428 U.S. at 16-17.

Usery suggests that there may be certain categories of retroactive legislation which must satisfy more rigorous due process hurdles. This proposition is supported by the Court's reference to *Railroad Retirement Board v. Alton Railroad.*[172] That case involved a fact situation similar to *Usery.* Congress had enacted a law requiring railroads to establish pension funds not only for all railway workers employed at the time the provision was enacted, but also for all workers employed a year before the effective date of the act. This pension provision bears a striking similarity to the black lung laws attacked in *Usery.* Both statutes may be said to take one person's property and give it to another since the property of railroad and mining interests were to be given to their former workers. The enactment added liabilities to employment contracts which had already been consumated and had risen to the level of a property interest. Nevertheless, the Court held the retroactive deprivation in *Alton* to be constitutionally deficient.[173]

The Supreme Court attempted to distinguish *Usery* from *Alton* in order to avoid overruling the latter: "The point of black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds."[174] In other words, because *Usery* involved a congressional attempt to curtail black lung while *Alton* involved efforts to insure material security for the elderly in the form of pensions, the Court was justified in *Alton* in its implementation of a higher level of review. Hence, the conclusion seems to follow that, in the category of pension plans, the Court may balance the interests, *i.e.*, a Hochman analysis or a justified expectation test. The Court also intimated that the same approach may be appropriate in tax cases.[175] On the other hand, when reviewing black lung provisions, "[i]t is enough to say that the Act approaches the problem of cost spreading rationally . . . ."[176]

The above distinction seems feeble. One possible explanation is that the Court engaged in a balancing process to decide which level of review would be appropriate. If the need for the legislation is great when compared to the private interest impaired, as in the case of black lung, the Court perhaps will employ a low level of review. If the social good served pales in comparison to the private right impaired, then the Court will balance the interests in a Hochman-type manner. In applying the former test, as in *Usery,* the Court would have to balance the interests to determine whether it will balance

---

[172]295 U.S. 330 (1934), *cited in* Usery v. Turner Elkhorn Mining Co., 428 U.S. at 19.
[173]295 U.S. at 350.
[174]428 U.S. at 19.
[175]*Id.* at 17 n.16.
[176]*Id.* at 19.

the interests at a higher level of review. This process seems overly cumbersome.

To avoid the result above, one cannot place much credence in the Court's dicta. The decision as a whole favors the low level of review found in modern due process. Any other result might contradict the Court's criticism of becoming a "super-legislature" and usurping the role of the lawmakers.[177] In addition, if the Court had been too broad or definite in its discussion of the appropriate test in retroactive situations, it might have disturbed well-established precedent in areas which have traditionally received special treatment, such as in tax cases.[178] Taking the above reservations into consideration, the expectation that the Court will utilize the method implemented in *Usery* to test the due process violations in most retroactive situations seems sound.

Finally, the "reasonable expectation" test provides that no law is valid which negates the reasonable expectations of the parties at the time they entered into the preenactment transaction.[179] Since the severed mineral holders never expected a re-recording or use requirement at the time they acquired title, a forfeiture due to a failure to re-record would defeat their reasonable expectations. The expectation test would, therefore, demand the downfall of mineral statutes. Indeed, this factor of "reliance" or "surprise" in tax cases has played a major role.[180] As one authority stated: "[I]f the Court is convinced that the taxpayer had reasonable notice that a certain type of property transfer would be taxed, the Justices will uphold the measure despite its retroactive effect."[181]

While the concept of "reasonable expectations," "reliance," or "surprise," may be significant in tax cases, to say that it is dispositive in every case of an unexpected law would be an overstatement. As the Supreme Court stated in *Usery*: "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."[182]

Serious problems have been shown with the Hochman test, the vested rights doctrine, and the expectation test. Also, in the most recent case dealing with the problem, the Supreme Court expressed a preference for an application of the modern due process test. For these reasons, no viable due process objections may be leveled against dormant mineral statutes. At the highest level of review,

---

[177]*See* note 150 *supra* and accompanying text.

[178]*See, e.g.*, Welch v. Henry, 305 U.S. 134 (1938).

[179]*See* Smith, *supra* note 151, 6 TEX. L. REV. at 418.

[180]*See* Welch v. Henry, 305 U.S. 134 (1938).

[181]J. NOWAK, *supra* note 170, at 431.

[182]428 U.S. at 16.

the Hochman test may force the advocates to "balance" the interests involved. Yet, even with the balancing test, it has been shown that the chance of sustaining these statutes is good. Also, if the modern due process test in *Usery* is applied, as seems likely, dormant mineral statutes would be exonerated.

D. Do Dormant Mineral Enactments Violate the Contract Clause?

Until recently, one may have plausibly asserted that the contract clause had been absorbed into due process law. Indeed, this position made sense. On one hand, a contract was considered a type of "property" which deserved as much protection by the fourteenth amendment as any other incident of ownership.[183] On the other hand, the contract clause with its traditionally wide interpretation extended not just to contracts per se, but to the fruits of contracts and anything resembling legally binding agreements.[184] "Moreover, several cases had indicated that the standard of reasonableness under the contract clause is the same as that utilized in determining the validity of retrospective legislation under the due process clauses of the fifth and fourteenth amendments."[185] The Court has

---

[183]*See, e.g.*, Addison v. Huron Stevedoring Corp., 204 F.2d 88 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953).

[184]Justice Story recognized a very wide range of property to which the contract clause applied:

> A contract is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. An executed contract is one in which the object of the contract is performed. This differs in nothing from a grant; for a contract executed conveys a *chose in possession;* a contract executory conveys only a *chose in action.* Since, then, a grant is in fact a contract executed, the obligation of which continues, and since the Constitution uses the general term, *contract,* without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the former as well as the latter. A State law, therefore, annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution, as a State law discharging the vendors from the obligation of executing their contracts of sale by conveyances. It would be strange, indeed, if a contract to convey were secured by the Constitution, while an absolute conveyance remained unprotected; that the contract, while executory, was obligatory, but when executed, might be avoided.

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1376, at 247-48 (5th ed. 1891) (footnotes omitted). Justice Story would extend the contract clause to "executed" contracts—meaning that the fruits of an agreement, or the property rights received as a result of the contract's consumation, would be protected. Essentially, this application could include all property.

[185]Hochman, *supra* note 153, at 695 (citing Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940)).

never been slow to identify the two clauses: "The restraint imposed upon legislation by the due process of the two amendments is the same."[186]

Considering the close relationship between the contract and due process clauses, one might have claimed that the contract clause was a superfluous appendage to the due process clause. This conclusion was supported by *City of El Paso v. Simmons.*[187] In *Simmons*, public land in Texas was sold by the state to raise revenue. The mortgage given by the state allowed the mortgagor to reinstate his claim after default by payment of the accrued interest. This right to reclaim the land was unlimited, provided that the interests of third parties had not intervened. The statute in question, however, retroactively narrowed this right to only five years after the first default in mortgage payments. The Court upheld the enactment on the ground that the state interest, balanced against the private right impaired, justified the Texas provision.[188] This result seems similar if not identical to the due process balancing test forwarded by Hochman.

Despite these cases, one court employed the contract clause to strike down a dormant mineral statute. The Michigan Court of Appeals, in *Bickel v. Fairchild,*[189] adopted a balancing test to determine whether the statute passed the rigors of the contract clause.[190] Rejecting the idea that the government is helpless to serve the public welfare if such service would encroach on vested rights, the court asserted that a statutory impairment to contract rights may be justified when the public interest forwarded outweighs the private rights deprived.[191] On one side of the scale, public policy involved the energy shortages, marketability of titles, and efficient utilization of land. On the other side, private parties were robbed of security of ownership and the justified expectations of the severed estate's owner. Using experienced judicial judgment, the *Bickel* court concluded that the balance tipped in favor of private ownership and vetoed the judgments of legislators, claiming that the enactment failed the test of the contract clause.[192]

Bickel depended heavily on *United States Trust Co. v. New Jersey.*[193] *United States Trust* could be viewed as breathing new life

---

[186]Heiner v. Donnon, 285 U.S. 312, 326 (1932).

[187]379 U.S. 497 (1965).

[188]*Id.* at 508.

[189]83 Mich. App. 467, 268 N.W.2d 881 (1978).

[190]*Id.* at 471-72, 268 N.W.2d at 883-84.

[191]*Id.*

[192]*Id.* at 472, 268 N.W.2d at 884.

[193]431 U.S. 1 (1977), *noted in* Bickel v. Fairchild, 83 Mich. App. at 471, 268 N.W.2d at 883. The court also relied on City of El Paso v. Simmons, 379 U.S. 497 (1965); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

into the contract clause and somehow separating that clause from due process by employing a higher level of review than that applied to due process in *Usery*.[194] Nevertheless, even a cursory reading of *United States Trust* reveals that it seems to be an exception to a general rule of *complete deference*. The Court stated: "In applying this standard [a balance of interests test], however, *complete deference* to a legislative assessment of *reasonableness* and *necessity* is not appropriate because the state's self-interest is at stake."[195] The state was attempting to break its own contractual obligations. Moreover, the above statement seems to imply that *in all other situations* complete deference would be appropriate. Thus, the courts should refrain from balancing interests and should refuse to pass on the value or wisdom of the legislation in dormant mineral situations. This interpretation would conform to the holding in *Usery* by applying the modern due process deference even if the contract clause is involved.

A very recent Supreme Court decision, however, gives the holding in *Bickel* a sound precedential basis. In *Allied Structural Steel Co. v. Spannaus*,[196] the Court struck down a Minnesota pension act.[197] The act prohibited the forfeiture of pension benefits of individuals employed more than ten years by private employers of more than one hundred persons. This prohibition was activated only if the pension would be lost because of a plant closure or termination of the pension plan. The employer-plaintiff claimed that the act impaired the collective bargaining contract and argued that the statute violated the contract clause.

Justice Stewart stated that if the contract clause "is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a state to abridge existing contractual relationships."[198] He employed several factors to determine whether prohibited impairments of contractual obligations had occurred. First, the severity of impairment will dictate the degree of review. "Severe impairment . . . will push the inquiry to a careful examination of the *nature and purpose* of the state legislation."[199] If a severe impairment is found, other factors may be considered: (1) Whether the statute has an extremely narrow focus affecting only a few people adversely, (2) whether the state traditionally regulates the area in which the contract is involved or whether the state has attempted a

---

[194]*See generally* Note, *Revival of The Contract Clause*, 39 OHIO ST. B.J. 195 (1978).
[195]431 U.S. at 25.
[196]98 S. Ct. 2716 (1978).
[197]*Id.* at 2726.
[198]*Id.* at 2721.
[199]*Id.* at 2723 (emphasis added).

totally new type of regulation, (3) whether the questioned provision deals with pervasive economic problems, (4) whether the statute upsets otherwise settled expectations of the contracting parties, (5) whether the statute permanently or temporarily alters contractual relationships, and (6) whether the statute attempted to remedy an emergency.[200] These factors are considered in the balancing of private interests against public goals. This analysis is similar to the approach taken by the *Bickel* court.

Assuming that *Spannaus* represents the latest Supreme Court perspective on the contract clause, *Bickel* seems on solid constitutional ground. *Bickel* involved the total abrogation of a gas lease entered into by the parties after the expiration of the re-recording grace period and the forfeiture in favor of the disseisor had occurred. Yet, the presence of such a "lease" or "contract" would not have been necessary for an application of the contract clause. The historically wide application of that clause applies to the "fruits" of a contract[201] and the use or nonuse of the severed interest once received by a new title owner from the land purchase contract is certainly a "fruit" of that contract.

One wonders, however, in the absence of an *executory contract* whether a severe impairment could be found. Some limit must be placed on the situations in which the contract clause can be employed. If that clause extends to *all* the fruits of a contract, it becomes essentially applicable to *all* property. Practically all ownership in a modern society is a product of contract law. Again, one is faced with the problem of either the contract clause encompassing due process analysis or *due process* encompassing the contract clause. When the *Spannaus* Court attempted to give the contract clause meaning, it did not intend, as a result, the due process clause to become merely an appendage of contract law.

If the Supreme Court's purpose is to make the contract clause a meaningful constitutional entity, the situations in which the clause is applicable must be clearly delineated. A severe impairment of a property interest should not necessarily be a severe impairment of a contract. After all, an expressed constitutional preference for contracts was provided by the founding fathers. No similar provision may be found for property. This distinction indicates that the policy considerations in reviewing laws which impair contracts as opposed to enactments abridging property rights are different. Considering the deference owed in modern due process to the legislature, is it not inconsistent to defer to the judgment of the legislature on a point under due process review and then, because the property in ques-

---

[200] *Id.* at 2725-26.

[201] *See* note 188 *supra* and accompanying text.

tion was at one time remotely connected with a contract, abandon that deference by establishing new due process dictates under the guise of the contract clause?

For instance, would the results in the following cases change if the contract clause had been applied? In *Goldblatt v. Town of Hempstead*, [202] the city stopped a mining operation by prohibiting excavation beneath the water line within the city limits. The statute was a safety measure. Even though the statute retroactively and severely impaired a property interest, the court found no due process problems and upheld its enactment.[203] If a broad application of the contract clause is allowed, the clause could have been pertinent to *Goldblatt*. The right to excavate under the water line was one of the objects of the contract when the fee simple was first acquired. Moreover, the contracting parties had "settled expectations" that excavation rights would remain intact as long as the fee simple absolute was a viable interest. Another example may be zoning laws. The right to an unlimited use of real estate is one of the fruits of a contract. If a purchaser buys property for the purpose of industrial development, and if zoning laws subsequently prohibit such development, should the problem be analyzed as an impairment of a contract or a due process problem?[204]

As Justice Brennan's dissent in *Spannaus* points out, the contract clause was never meant to protect "all contract based expectations."[205] Indeed, the founding fathers addressed only the immediate social evil of debtor relief laws.[206] But to limit the contract clause only to debtor relief situations would be to ignore subsequent historical developments.[207] There are certain features of debtor relief laws, however, that may provide some principled limits to the contract clause and prevent the clause from incorporating due process protections of property.

First, a debtor relief law involves executory contracts. The contract itself is property in the expectation of the performance of duties on both sides. Once performance on both sides has been consumated, the contract rights are no longer viable. Such rights are then recognized as general property interests free of contractual stigmas. At that point, due process should be the sole criterion of constitutionality.

---

[202]369 U.S. 590 (1962).

[203]*Id.* at 594-96.

[204]*See* Moore v. City of East Cleveland, 431 U.S. 494, 513-21 (1977) (Stevens, J., concurring). *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[205]98 S. Ct. at 2729 (Brennan, J., dissenting).

[206]*Id.* (Brennan, J., dissenting).

[207]*See generally* Hale, *The Supreme Court and The Contract Clause: I*, 57 HARV. L. REV. 512, 514-16 (1944).

Second, debtor relief laws make a once *viable contractual obligation illegal.*[208] Hence, debtor relief provisions present the problem of retroactivity in its classic form. While the contract or gas lease in *Bickel* was executory, one cannot as easily say that the lease was a viable and legal contract made illegal by Michigan's dormant mineral law. The severed estate in *Bickel* was first acquired in 1944. The Michigan statute went into effect in 1963. The statute requires re-recording for interests not "used" within twenty years.[209] The use requirement, as with most dormant statutes, includes a sale, lease, mortgage, or any transfer of the severed interest by a recorded instrument.[210] The twenty-year period for the interest in *Bickel* expired in 1964. The act has a three-year grace period.[211] Hence, if the statute was constitutionally viable, the severed interest's title owner forfeited his interest to the surface owner as of 1966. The contract supposedly impaired by the mineral statute was not entered into until 1973. Therefore, the question in *Bickel* was not one of an impairment of a contract, despite the court's assertions.[212] Given that the statute could not be objected to on due process grounds, the gas lease conveyed nothing in 1973 since the forfeiture had already been effected. Logically, a void contract cannot be impaired. The real issue was whether the forfeiture in 1966 was constitutional and that issue is a question of due process.

When a dormant mineral statute recognizes a transaction or transfer involving the severed interest as a "use," thereby preserving title for the record holder, the contract clause should never come into play. If a gas or other mineral lease is entered into *before* the re-recording period expires, the contractual transaction renews title for another twenty years. On the other hand, if a lease is entered into *after* the re-recording period expires, the forfeiture would have already occurred in favor of the disseisor-surface owner. Such a lease would be void and therefore could not be impaired. In other words, the lease would not be abridged by the statute in a retroactive manner since the operation of the dormant mineral law—the forfeiture—occurs *before* the lease is executed.

Even if courts in the future give the contract clause a wide application, *Spannaus* lists several vital factors not considered in *Bickel.* First, dormant mineral statutes involve areas of traditional legislative regulation. Comparisons between mineral statutes, recording acts, and marketable title legislation have made this clear. To reject dormant mineral statutes would be to disturb pervasive and

---

[208]*See* 98 S. Ct. at 2728-29 (Brennan, J., dissenting).

[209]MICH. COMP. LAWS § 554.291 (1967).

[210]*Id.*

[211]*Id.*

[212]83 Mich. App. at 473, 268 N.W.2d at 884.

long standing legislative attempts to improve conveyance law. Second, one questions how justified the expectation of the severed estate owner is if he asserts that after twenty years of nonuse, his title should be secure. Even a layman feels that an object of ownership is somehow "less owned" if its possessor ignores it for twenty years. This conclusion may be reached even without being familiar with analogies to adverse possession. Third, the statute affects a wide class of owners. These include oil companies with powerful lobbying voices as well as small speculators and surface estate owners. Finally, dormant statutes address pervasive economic illnesses including the marketability of land and the energy crisis.

Because of the lack of an executory or any other viable contract in these cases and because, alternatively, mineral enactments can easily be justified under the criteria set forth in *Spannaus*,[213] one must conclude that the contract clause does not present a constitutional bar to dormant mineral statutes.

IV. A Summary of the Issues—Comparisons between Anti-Reverter Statutes and Dormant Mineral Acts

The best reasoned case concerning retroactive land statutes is *Presbytery of Southeast Iowa v. Harris*.[214] A short look at the case may serve to summarize some of the issues presented in this Note. *Harris* addressed the problem of the constitutionality of anti-reverter acts. These acts usually require re-recording of all reverter interests on record in order to preserve them past a designated time period. Both anti-reverter acts and dormant mineral statutes are designed to increase the marketability of land.[215]

While the constitutionality of anti-reverter provisions is now clearly settled,[216] it was seriously questioned at one time.[217] The attackers of the reverter statute made four familiar objections: (1) That the act was an unconstitutional impairment of contract, (2) that it authorizes a divestment in violation of substantive due process, (3) that it was unreasonably vague, and (4) that the statute violated procedural due process in affording no reasonable notice to reverter owners of their duty to record.[218]

The similarities between this type of reverter statute and dor-

---

[213]98 S. Ct. at 2725-26. *See* text accompanying note 200 *supra*.

[214]226 N.W.2d 232 (Iowa), *cert. denied*, 423 U.S. 830 (1975).

[215]*See* Polston, *supra* note 1, at 78.

[216]*See, e.g.*, Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 Neb. 786, 186 N.W.2d 904 (1971). For an excellent summary of the problems in this area, see Note, *Retroactive Termination of Burdens on Land Use*, 65 Colum. L. Rev. 1272 (1965).

[217]*See* Board of Educ. of Cent. School Dist. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965) (holding unconstitutional New York's anti-reverter statute).

[218]226 N.W.2d at 234.

mant mineral enactments are apparent. Reverter statutes were justified in part as statutes of limitation, just as the proponents of dormant mineral statutes attempt to justify mineral enactments. Indeed, the court in *Harris* mentioned this point as one of the many arguments used to sustain the reverter act.[219]

This reference to reverter enactments as statutes of limitation generated enough confusion to allow the dissenter to build his argument around the point of remedies: "As applied, [the statute] would have required defendants to assert their 'claim' before it accrued and operates potentially to bar their remedy before the 'right' to enforce it matured."[220] By claiming that the statute operated as a "pseudo-statute of limitation,"[221] the dissent dismissed the possibility that the statute was within the bounds of substantive due process. The dissent never addressed the due process question of whether the challenged enactment was a legitimate exercise of police power to which the act's operation had some kind of rational connection.[222]

The statute of limitations point was not, however, pivotal to the holding. Instead, the fact that the act allowed a re-recording was vital: "'But it is well established that a statute limiting the time for assertion even of *preexisting property or contract rights* is not unconstitutional provided it allows a reasonable time after its enactment for the assertion of those rights.'"[223] While it is difficult to define a "preexisting property or contract right," the statement seems to rebut the argument that the anti-reverter statute is actually a pseudo-statute of limitation. In other words, the *Harris* court embraced the principle that a recording may be effective only for a limited period of time.[224] The legislature may then require re-recording on penalty of an instant forfeiture of substantial property rights, regardless of the fact that such a requirement was once condemned as a pseudo-statute of limitation.[225]

Moreover, the court accurately treated the problem of reverter statutes as a substantive due process question.[226] The real issue, thus, becomes one of whether the re-recording requirement was capricious or arbitrary in light of the public welfare served and the private interest impinged. Unfortunately, the court explicitly[227] used

---

[219] *Id.* at 237.

[220] *Id.* at 244 (Rees, J., dissenting).

[221] *See* notes 70-75 *supra* and accompanying text.

[222] *See* 226 N.W.2d at 244 (Rees, J., dissenting).

[223] *Id.* at 241 (quoting Selectman of Nahant v. United States, 293 F. Supp. 1076, 1078 (D. Mass. 1968) (emphasis added)).

[224] 226 N.W.2d at 232. *See also* Marshall, *Reforming Conveyancing Procedure*, 44 IOWA L. REV. 75, 80 (1958).

[225] 226 N.W.2d at 241.

[226] *Id.* at 242.

[227] *Id.*

a Hochman balancing test and, therefore, addressed the issue in a manner similar to the court in *Bickel*. Today, considering the recent *Usery* decision, a lower level of review may be appropriate.[228]

On one side, the *Harris* court saw a tremendous public service performed by reverter statutes in the name of marketability. On the other, only an insubstantial property interest was impaired. The scales of due process were tipped in favor of the statute.[229] Dormant mineral statutes should also be sustained through a similar balance.

Finally, *Harris* also involved a procedural due process issue. In a manner similar to the opponents of mineral statutes, the dissent claimed that the owners of reverters were not given sufficient due notice of their duty to re-record and that, therefore, the statute effected a forfeiture absent procedural due notice.[230] The dissent buttressed this argument by noting the Supreme Court's increased concern with due notice in garnishment situations.[231] Citing *Fuentes v. Shevin*,[232] he pointed to the irony of placing such strict procedural standards in cases concerning collection of debt and garnishment on one side, while on the other, ignoring the need of the layman to be notified of the unexpected legislative caprice that could work to the average property owner's detriment.[233]

The majority dismissed the due notice objection, however, by holding that the reverter statute itself, even as newly passed by the legislature, was sufficient notice to the damaged reverter owner of his duty to re-record: "[E]nactments of our state legislature and publication thereof constitute adequate notification to all concerned as to what they contain."[234]

The judiciary should shed the mistakes of the past and begin to address questions concerning retroactive land statutes as clearly and accurately as the *Harris* court. The hard problems of the present cannot be solved by the mechanical distinctions of vested rights, nor can they withstand an incomplete analysis. The legislature has as much discretion in the area of real property as in the other realms of due process. These statutes should not be subjected to any special tests, such as Hochman's balance or the reasonable expectations test, to determine their validity. Considering the serious problems of marketability and the energy crisis, dormant mineral statutes and other similar retroactive measures should be sustained.

GREGORY BUBALO

---

[228] *See* notes 167-178 *supra* and accompanying text.

[229] *See* 226 N.W.2d at 243.

[230] 226 N.W.2d at 244 (Rees, J., dissenting).

[231] *Id.*

[232] 407 U.S. 67 (1972).

[233] *See* 226 N.W.2d at 244.

[234] *Id.* at 242.