



January 1988

Constitutional Validity of The Kentucky Unmined Coal Tax: *Gillis v. Yount*

Robin L. Fields
University of Kentucky

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



Part of the [Constitutional Law Commons](#), and the [Tax Law Commons](#)

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

Recommended Citation

Fields, Robin L. (1988) "Constitutional Validity of The Kentucky Unmined Coal Tax: *Gillis v. Yount*," *Journal of Natural Resources & Environmental Law*: Vol. 4 : Iss. 1 , Article 8.

Available at: <https://uknowledge.uky.edu/jnrel/vol4/iss1/8>

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

Constitutional Validity of The Kentucky Unmined Coal Tax: *Gillis v. Yount*

INTRODUCTION

For over a decade, owners of unmined coal in Kentucky have been allowed a substantial tax benefit by statutory enactment.¹ In 1976, the Kentucky General Assembly created a separate class of property by severing unmined coal from the class of real property.² By creating a distinct class of property, the General Assembly allegedly had the constitutional authority³ to tax unmined coal at the low rate of one-tenth of one cent (.001) per one hundred dollars (\$100) value assessed.⁴ Furthermore, the General Assembly allegedly acted without overreaching the limitations on legislative classification provided by the Kentucky Constitution.⁵ On March 3, 1988, the Kentucky Supreme Court redefined the constitutional authority of the legislature to classify real property for taxation purposes in *Gillis v. Yount*.⁶

This Comment examines the constitutional validity of Kentucky Revised Statutes (KRS) section 132.020(5) which hinges upon the amount of authority historically⁷ given to the legislature to create classifications⁸ for taxation purposes. Primarily, the Comment addresses the degree of legislative authority which exceeds limitations imposed by uniformity,⁹ real property equal-

¹ KY. REV. STAT. ANN. § 132.020(5) (Bobbs-Merrill 1988) [hereinafter KRS].

² Act of March 29, 1976, ch. 84, § 7, 1976 Ky. Acts 168 (codified as amended at KRS § 132.020).

³ KY. CONST. § 171.

⁴ Act of March 28, 1978, ch. 116, § 3, 1978 Ky. Acts 239, 241 (codified at KRS § 132.020).

⁵ KY. CONST. § 3.

⁶ *Gillis v. Yount*, 748 S.W.2d 357 (Ky. 1988).

⁷ See *infra* notes 15-40 and accompanying text.

⁸ See *infra* notes 59-68, 100-03 and accompanying text.

⁹ See *infra* notes 43-51 and accompanying text.

ity,¹⁰ and exemption restrictions.¹¹ The Comment further addresses the effect¹² and possible future implications¹³ of *Gillis*.¹⁴

I. HISTORICAL BACKGROUND

Several constitutional provisions support the basic concepts governing taxation on property in the state of Kentucky.¹⁵ Generally, Kentucky's Constitution¹⁶ provides that no property shall be exempt from taxation except as provided within the Constitution.¹⁷ Section 170 of the Kentucky Constitution then carves out the specific allotments of property as exceptions to this rule.¹⁸ Section 171 of the Kentucky Constitution requires unifor-

¹⁰ See *infra* notes 52-58 and accompanying text.

¹¹ See *infra* notes 59-65 and accompanying text.

¹² See *infra* notes 69-114 and accompanying text.

¹³ See *infra* notes 115-44 and accompanying text.

¹⁴ 748 S.W.2d 357.

¹⁵ KY. CONST. §§ 3, 170-172, 174.

¹⁶ KY. CONST. (1792, amended 1799, 1850, 1891).

¹⁷ KY. CONST. § 3 as follows:

Men are equal—No exclusive grant except for public services—Property not to be exempted from taxation—Grants revocable.—All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; *but no property shall be exempt from taxation except as provided in this Constitution* and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment. (emphasis added).

¹⁸ KY. CONST. § 170 (1850, amended 1891) as follows:

Property exempt from taxation—Cities may exempt factories for five years. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions or purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education, public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods of a person used in his home; crops grown in the year in which the assessment is made, and in the hands of the producer; (homestead provision omitted). All laws exempting or omitting property from taxation

imity of taxation¹⁹ upon all property of the same class²⁰ and Section 172 determines the rate of assessment.²¹ Finally, Section 174 stipulates that all property shall be taxed in proportion to its value.²²

The state of Kentucky, when originally founded, preserved Virginia's system²³ of specific taxation.²⁴ Kentucky adopted

other than the property above mentioned shall be void. The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not to exceed five years, as an inducement to their location.

¹⁹ KY. CONST. § 171 (1891, amended 1915) as follows:

State tax to be levied—Taxes to be levied and collected for public purposes only and by general laws, and to be uniform within classes—Classification of property for taxation—Bonds exempt—Referendum on act classifying property.—The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

(Referendum provision omitted).

²⁰ *Id.*

²¹ KY. CONST. § 172 is as follows:

All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law.

²² KY. CONST. § 174 is as follows:

Property to be taxed according to value, whether corporate or individual—Income, license and franchise taxes.—All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.

²³ Kentucky became a commonwealth in 1792, severing ties with Virginia, but preserving Virginia's system of taxation. See generally N. TAFF, HISTORY OF STATE REVENUE AND TAXATION IN KENTUCKY (1931)(general background of the progression of Kentucky taxation); see also LEGISLATIVE RESEARCH COMMISSION RESEARCH REPORT NO.

the ad valorem system of taxation in 1814,²⁵ and this property tax supplied the large majority of tax revenues.²⁶ Kentucky's first three constitutions²⁷ had no guidelines for tax legislation.²⁸

The first relevant debate on revenue and taxation took place on January 9, 1891,²⁹ resulting in a general property tax³⁰ with specific exemptions.³¹ Although the intent of these framers was "to let the weight of taxation rest equally on all,"³² inequalities in the general property tax required the taxation sections of the Kentucky Constitution to be the first amended.³³ Most significantly, Section 171 of the Kentucky Constitution was amended to retreat from the older concept of subjecting all property in the state to the same mode and rate of taxation. The amended version of Section 171 simply required uniformity within a class.³⁴ Change was achieved by allowing the legislature to separate property into distinct categories³⁵ for taxation purposes.

137, A CITIZEN'S GUIDE TO THE KENTUCKY CONSTITUTION 75-98 (revised 1987) (includes explanation to citizen of Kentucky's scheme of taxation).

²⁴ BLACK'S LAW DICTIONARY 1308 (5th ed. 1979). "A tax imposed as a fixed sum on each article or item or property of a given class or kind, without regard to its value; opposed to ad valorem tax." *Id.*

²⁵ *Id.* at 48 ("[d]uty is laid in the form of a percentage on the value of the property. . .").

²⁶ TAFF, *supra* note 23, at 59-61.

²⁷ See *supra* note 16.

²⁸ *But see* City of Lexington v. McQuillan's Heirs, 39 Ky. (9 Dana) 513 (1840)(allowed exemption from taxation individuals or corporations who had performed a public service.)

²⁹ DEBATES OF THE CONSTITUTIONAL CONVENTION: OFFICIAL REPORT, Vol. II & III, 2372-2820 (1890-91) [hereinafter DEBATES].

³⁰ BLACK'S LAW DICTIONARY 1308 (5th ed. 1979). A property tax is a "[g]eneric term describing a tax levied on the basis of the value of either personal or real property owned by the taxpayer." *Id.*

³¹ KY. CONST. § 170 (1850, amended 1891).

³² DEBATES, *supra* note 29, at 2382 (statement of Mr. P. Johnston, Chairman of Committee on Revenue and Taxation). "If the burden is born equally by all, it rests lightly upon all. . . . If you exempt the property of one man, or class of men, you thereby put the burden on the shoulder of the remainder." *Id.*

³³ REPORT OF THE SPECIAL TAX COMMISSION, 73 (1915). It attempted to tax [a] "book account upon which interest is rarely charged . . . upon the same basis as an iron mine, and the family cook stove on the same basis as a street railway." *Id.*

³⁴ See *supra* note 19.

³⁵ Commonwealth v. Walsh's Trustee, 177 S.W. 398, 399 (Ky. 1909) (relating to legislative discretion in taxation of corporate stock); Commonwealth v. Hemingray's

More than fifty years later, in 1976, the Kentucky General Assembly amended K.R.S. section 132.020 by adding subsection (5), which created a separate classification for unmined coal.³⁶ Ironically, unmined coal was taxed at the same rate as all real property, even though separated within the statute.³⁷ Perhaps the action taken in 1976 was in anticipation of the course taken in 1978 when the legislature reduced the rate of unmined coal under K.R.S. section 132.020(5) from thirty-one and one-half cents per 100 dollars of real property valued,³⁸ to 0.10 cents per 100 dollars of real property valued.³⁹ Currently, any increase in ad valorem taxation on real property which exceeds four percent over the amount of revenue produced in the preceding year,⁴⁰ is prohibited.

II. THE POWER OF THE LEGISLATURE

Although the legislature concededly possesses constitutional authority to make classifications in property taxation,⁴¹ interpretations over the extent of this authority vary. Major disputes arise in allocating legislative discretion to draw these property classes. Notably, legislative discretion must be curbed to remain within constitutional limitations.⁴²

A. Uniformity

The first three constitutions of Kentucky contained no provisions dealing with the uniformity of taxation.⁴³ Kentucky courts

Ex'r., 215 S.W.2d 69 (1919) (power of legislature to limit time for assessment of omitted property).

³⁶ KRS § 132.020.

³⁷ Act of March 29, 1976, ch. 84, § 7, 1976 Ky. Acts 167, 168 (codified at KRS § 132.020).

³⁸ Taxation of real property was at 31.5 cents per 100 dollars of value assessed; at this time, unmined coal was equally taxed at the rate of 31.5 cents per 100 dollars of value assessed, but was designated a separate class by subsection (5).

³⁹ Act of March 28, 1978, ch. 116, § 3, 1978 Ky. Acts 239, 241 (codified at KRS § 132.020).

⁴⁰ KRS § 132.020(7) (Baldwin 1979 Extra Session ch. 25 § 3).

⁴¹ See *supra* note 19, 35 and accompanying text.

⁴² See W. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND QUALITY IN STATE TAXATION (1984) (examines the meaning of "uniformity" of taxation, and the limits thereon, by comparing the 50 constitutional states).

⁴³ See *supra* note 16.

originally relied on the opinion of *City of Lexington v. McQuillan's Heirs*⁴⁴ as authority for imposing equality in taxation. However, the rationale in *McQuillan* imposing uniformity as a general limitation on the ability to tax was based on the notions of fundamental common law.⁴⁵ Specific constitutional provisions as applicable to taxation were not addressed. This idea of uniformity and equality in taxation as a constitutional command without specific reference to a constitutional provision was accepted as sufficient justification in subsequent cases.⁴⁶

Yet, in 1915, an amendment to Section 171 of the Kentucky Constitution added the phrase "of the same class" to modify property and allowed property to be classified for the purpose of applying different rates to different classes.⁴⁷ Section 172 contains a separate requirement concerning the permissible method of taxing property.⁴⁸ This section provides that all property, not exempt from taxation by the Kentucky Constitution, shall be assessed for taxation at its fair cash value.⁴⁹ The Kentucky Court of Appeals reaffirmed the full-value standard in 1965 in the court's decision of *Russman v. Luckett*.⁵⁰ Thus the legislature was given the power to classify real property for taxation.⁵¹ However, a class would be exempted from taxation only under a specific provision of the Kentucky Constitution.

⁴⁴ 39 Ky. (9 Dana) 513 (1840).

⁴⁵ *Id.* at 516-17 (noting "[Taxation is] limited by some of the declared ends and principles of the fundamental law. Among these political ends and principles, equality, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our State Constitution.").

⁴⁶ See, e.g., *Pearson v. Zable*, 78 Ky. 170 (1879); *Preston v. Roberts*, 75 Ky. (12 Bush) 570 (1877); *City of Louisville v. Hyatt*, 41 Ky. (1 B.Mon.) 177 (1841). *But see* *Howell v. Bristol*, 71 Ky. (8 Bush) 493 (1871)(inequality as a violation of taking clause).

⁴⁷ KY. CONST. § 171 (1891, amended 1915). See *NEWHOUSE*, *supra* note 42, at 559.

⁴⁸ See *supra* note 21.

⁴⁹ See *Raydure v. Bd. of Supervisors*, 209 S.W. 19 (Ky. 1919) (taxation of oil leases and value of property assessed).

⁵⁰ 391 S.W.2d 694 (Ky. 1965) (a group of taxpayers challenged the Kentucky Dept. of Revenue for allowing inequalities in valuation).

⁵¹ *Williams' Adm'r. v. Union Bank & Trust Co.*, 143 S.W.2d 297 (Ky. 1940). See, e.g., *Kentucky Bank and Trust Co. v. Ashland Oil and Transp. Co.*, 310 S.W. 2d 287 (Ky. 1958); *Commonwealth v. Elkhorn-Piney Coal Mining Co.*, 43 S.W.2d 684 (Ky. 1931) (coal mining leasehold and its appurtenances held "real estate" for purposes of taxation); *Wakenna Coal Co. v. Johnson*, 28 S.W.2d 737 (Ky. 1930) (lease granting right to mine coal, cut standing timber and other rights held "real estate").

B. Real Property

In *William's Administrator v. Union Bank & Trust Co.*,⁵² Kentucky's highest court held that "minerals in place are real estate and such minerals may be severed into distinct estates separate from the surface."⁵³ Moreover, leasehold estates in mineral lands have been regarded as real estate for purposes of conveyances,⁵⁴ liens,⁵⁵ dower,⁵⁶ and a variety of other transactions.⁵⁷ Perhaps, most important to the issue at hand, Kentucky courts have held that the rights created by a coal lease to remove coal from the land constitutes real estate for purposes of taxation.⁵⁸ Clearly, unmined coal has been recognized as the equivalent of real property in a broad spectrum of areas.

C. Legislative Power to Classify and Exempt

The legislature's classification authority does not extend to allow complete exemption of a class once it has been created. Originally, the power of the legislature concerning taxation re-

⁵² 143 S.W. 2d 297 (Ky. 1940).

⁵³ *Id.* at 300.

⁵⁴ See, e.g., *Duncan v. Mason*, 39 S.W.2d 1006 (Ky. 1931) (instrument intended to effect sale of mining property constitutes conveyance of minerals in place); *Kentucky Rock Asphalt Co. v. Milliner*, 27 S.W.2d 937 (Ky. 1930) (instrument conveying title in oil bitumen and their products held as lease); *Gray-Mellon Co. v. Fairchild*, 292 S.W. 743 (Ky. 1927) (deed granting oil rights held to convey interest in land); *Hester v. O'Rear*, 259 S.W. 41 (Ky. 1924) (oil lease upheld as conveyance of interest).

⁵⁵ See, e.g., *Scottsville Oil Co. v. Dye*, 262 S.W. 615 (Ky. 1924) (owners of oil and gas leases and mortgage held estopped to disclaim lien on leases); *Gordon v. Hurt & Petty*, 255 S.W. 857 (Ky. 1923) (personal judgment on lien claim against oil well); *Stark v. Petty*, 243 S.W. 50 (Ky. 1922) (oil lease held chattel real to which lien for work attaches).

⁵⁶ See, e.g., *Trimble v. Kentucky River Coal Corp.*, 31 S.W.2d 367 (Ky. 1930) (wife, on death of husband owning mineral rights, was at once vested with dower therein); *Collins v. Lemaster*, 22 S.W.2d 567 (Ky. 1929) (where widow and remaindermen execute, both join in oil and gas lease); *Williamson v. Williamson*, 4 S.W.2d 392 (Ky. 1928) (widow granting, with remaindermen, mineral estate in land held entitled to interest on one-third of royalty during lifetime).

⁵⁷ See also *Brandenburg v. Petroleum Exploration*, 291 S.W. 757 (Ky. 1927) (defining extent of homestead interest); *Union Gas & Oil Co. v. Wiedeman Oil Co.*, 277 S.W. 323 (Ky. 1924) (for purposes of partition); *Kentucky Counties Oil Co. v. Culper*, 265 S.W. 334 (Ky. 1924) (in the application of the statute of frauds).

⁵⁸ *Commonwealth v. Elkhorn-Piney Coal Mining Co.*, 43 S.W.2d 684 (Ky. 1931). See *Head v. Little*, 226 S.W.2d 322 (Ky. 1950) (minerals may be severed from the land by a lease and become a separate taxable estate).

vealed that the General Assembly was authorized to completely exempt the property of individuals or corporations, provided that entity had performed a public service to the state.⁵⁹ Constitutional revision of this property exemption was not addressed until 1891.⁶⁰ Debates at the Constitutional Convention of 1890 were rigorous on the topic of taxation,⁶¹ resulting in specified exemptions of classes being added to the Kentucky Constitution.⁶²

The legislature's role was consequently defined by the Kentucky Court of Appeals in 1937 by *Martin v. High Splint Coal Co.*,⁶³ wherein the court reestablished the legislature's power to categorize property into classes for the purposes of taxation. However, the court of appeals strongly noted that the legislature was not authorized to exempt classes from taxation entirely.⁶⁴ Proponents of the one mil (.001) rate argue that the legislature has in fact remained within its realm of authority by assessing the class of unmined coal at a numerical tax rate. Conversely, opponents propose that the one mil (.001) rate is simply a numerical rate equivalent to exemption.⁶⁵

In 1965, the General Assembly began what is now the current system for determining the differing classes of property and the

⁵⁹ See *supra* note 28 and accompanying text.

⁶⁰ DEBATES, *supra* note 29.

⁶¹ *Id.*, at 2418-21 (proposing a system on the income tax principle, this was labeled fanatic); *Id.* at 2424 (consideration of taxing a matter of quid pro quo . . . dollar for value and value for dollar); *Id.* at 2449 (expresses favorable exemptions to support state, county or city government allowing churches, educational and charitable institutions, public property, and cemeteries); *Id.* at 2453 (protesting exemption from taxation where only basis was policy reason).

⁶² DEBATES, *supra* note 29, at 2741. Act of March 17, 1932, ch. 141, 1932 Ky. Acts 669-70.

⁶³ 103 S.W.2d 711, 714 (Ky. 1937).

⁶⁴ See *id.* at 714.

[I]t by no means follows therefrom that the right to exempt any class of property from taxation was given to the legislature by the 1915 amendment; since the mere right to classify for purposes of taxation does not embody or include the right to exempt from taxation when there are constitutional provisions against . . . exemption.

Id. at 714.

⁶⁵ Brief for Appellant at 16-18, *Yount v. Gillis*, Nos. 85-CA-2662-MR, 85-CA-2717-MR (Ky. Ct. App. Mar. 27, 1987) (Gary Gillis was then Secretary of the Revenue Cabinet).

rate at which they would be taxed.⁶⁶ The legislature at that time first utilized the one mil (.001) rate on a class of property⁶⁷ and has since that time placed the disputed one mil (.001) rate on various other classes of property with no visible dispute to the contrary.⁶⁸

III. *Gillis v. Yount*

As previously addressed,⁶⁹ the Kentucky legislature has in recent years passed legislation which classifies and taxes property at a one mil (.001) rate with no visible dispute. Legislative action in 1978 dropped the rate of taxation on the separate class of unmined coal from its previous rate⁷⁰ to the one mil (.001) rate. Taxation was based upon each one hundred dollars (\$100) assessed.⁷¹ With this drop in tax rate, litigation arose in the controversial and visible⁷² case of *Gillis v. Yount*.⁷³

Gillis examined the constitutionality of K.R.S. section 132.020(5) in both technical and practical contexts. Kentucky's court of appeals reemphasized that Kentucky law clearly holds that unmined coal in place is real property. The trial court focused on the Revenue Cabinet's Annual Report,⁷⁴ in which the

⁶⁶ First Extra Session, 1965 Ky. Acts 3-4.

⁶⁷ *Id.* at 4 (pertaining to 0.10 of one cent tax rate upon each 100 dollars of value assessed on farm implements or farm machinery and upon all livestock and waterfowl).

⁶⁸ Act of April 1, 1982, ch. 229, § 1, 1982 Ky. Acts 560 (codified at KRS § 132.020) (amended KRS § 132.020(1)) (farm implements, alcohol production facilities, livestock and domestic fowl, tangible personal property in foreign zones); Act of April 10, 1986, ch. 431, § 1 1986 Ky. Acts 1102 (codified at KRS § 134.800) (amended KRS § 132.020(12) (registered motor vehicles).

⁶⁹ See *supra* notes 67-68 and accompanying text.

⁷⁰ KY. CONST. § 171.

⁷¹ *Id.*

⁷² Mueller, *Push Resumes for Higher Tax on Unmined Coal*, [sic] Lexington Herald-Leader, Feb. 27, 1983, at D1, Col. 1 (Metro Final Edition).

⁷³ 748 S.W.2d 357 (Ky. 1988). *Gillis* is a consolidation of two Kentucky cases, *Gillis v. Yount* and *Kentucky Coal Ass'n v. Moore*. In the first case Yount and other similarly situated real property owners, claim that the statute is unconstitutional because the General Assembly has arbitrarily classified one type of real property from other real property. In the second case Moore and other similarly situated automobile owners, claim that the one mil (.001) rate is unconstitutional because it is an exemption and not a tax. Interestingly, the trial court found the rate to be unconstitutional; the court of appeals addressed both issues of classification and rate while the supreme court addressed only the arbitrariness of the class.

⁷⁴ See *infra* note 77.

Cabinet admitted to exercising statutory power and "for all intents and purposes exempted unmined coal from the state property tax" (by imposing a .001 per \$100 rate upon it).⁷⁵ Furthermore, the trial court emphasized that K.R.S. section 132.020(5) achieved exemption of unmined coal from taxation in two ways.⁷⁶ First, it produced a very low amount of revenue.⁷⁷ Secondly, it made that low amount of revenue uneconomical to collect⁷⁸ and irrational to assess.⁷⁹

On appeal, Kentucky's court of appeals reemphasized that Kentucky law clearly holds that unmined coal is treated as real property.⁸⁰ The court of appeals next addressed the question which necessarily follows, whether unmined coal must be taxed as real property.⁸¹ The court of appeals upheld the lower court's ruling that K.R.S. section 132.020(5) had effectively exempted unmined coal from property taxation.⁸² The court of appeals opinion further expanded on this application of the statute by practical example, numerically proving⁸³ that it is impossible to raise revenue through K.R.S. section 132.020(5).

Unlike the trial court, Judge Gudgel, in a concurring opinion, evaluated the constitutionality of K.R.S. section 132.020(5) addressing the separate classification issue.⁸⁴ Judge Gudgel questioned whether it was arbitrary and unreasonable for the legislature to create a separate class for unmined coal and to tax the coal at a much lower rate than that applicable to other real property.⁸⁵ Specifically noted was the tax rate variation in min-

⁷⁵ See *Gillis v. Yount*, 748 S.W.2d 357, 368 (Ky. 1988) (Leibson, J., concurring).

⁷⁶ *Gillis v. Yount*, Nos. 84-CI-815, 85-CI-589, 84-CI-867 (Franklin Cir. Ct. 1985) (Findings of Fact No. 3).

⁷⁷ KENTUCKY REVENUE CABINET, ANNUAL REPORT (1983) (total yield from levy on unmined coal in 1983, the most current report, was \$2,076 on assets worth six to twelve billion dollars) [hereinafter ANNUAL REPORT].

⁷⁸ See *id.* In 1978; prior to the .001 rate on unmined coal approximately 50 counties had assessments of unmined coal on their tax books, but by 1983, this number had fallen to 23. *Id.*

⁷⁹ See *id.* (administrative costs exceeded taxation yield).

⁸⁰ See *supra* notes 52-58.

⁸¹ *Yount v. Gillis*, Nos. 85-CA-2662-MR, 85-CA-2717-MR (Ky. Ct. App. Mar. 27, 1987).

⁸² Nos. 84-CI-815, 85-CI-589, 84-CI-867, slip op. at Findings of Fact No. 1.

⁸³ Nos. 85-CA-2662-MR, 85-CA-2717-MR, slip op.

⁸⁴ *Id.*, slip op. at Judge Gudgel's concurring opinion.

⁸⁵ KRS § 132.020(1).

erals such as oil and gas as compared to coal.⁸⁶ The opinion concludes that the separation of unmined coal as a class and the fixing of a comparably lower rate served no legitimate governmental or public purpose, and was therefore invalid.⁸⁷

A majority of the Kentucky Supreme Court focused on the classification question as the threshold issue on discretionary review.⁸⁸ The court is quick to establish that the Revenue Cabinet admitted that the concept of a one mil rate was developed to avoid the tax burden for certain types of property.⁸⁹ The question necessarily followed whether the procedure implemented⁹⁰ to achieve this goal is a legitimate tax avoidance or unconstitutional tax evasion: does the method instituted to avoid the constitutional limitations in section 172 impale itself upon the constitutional limitations in sections 171 and 174?⁹¹

Justice Leibson, writing for the majority, immediately dispenses with movants' argument that the constitutional language is "outmoded" in that it fails to take into account the present need to promote economic development.⁹² Stressing that present conditions are not so different as to ignore constitutional restrictions on the power of the General Assembly, Leibson draws

⁸⁶ *Id.*

⁸⁷ Brief for Appellee, Kentucky Coal Association, Inc. (recites the governmental purpose for the tax of 0.10 of 1% per 100 dollars assessed value on unmined coal is to preserve the vitality of the coal industry and as a consequence strengthen Kentucky's economy).

⁸⁸ *Gillis v. Yount*, 748 S.W.2d 357, 358 (Ky. 1988).

⁸⁹ *Id.* at 359. (These properties did not enjoy constitutional exemption but were perceived by the General Assembly as needing de facto exemption in the public interest.).

⁹⁰ The two stage procedure implemented required the General Assembly to first classify unmined coal as separate from other real estate and second to tax it at the one mil rate.

⁹¹ 748 S.W.2d at 359.

⁹² *Id.* at 359-60. Justice Leibson was unpersuaded. Quoting a portion of the Revenue Cabinet's argument:

The politics and issues of Kentucky in 1890 are as foreign to this generation as the intrigues of ancient Rome. The Revenue provisions of the Constitution shackled the hand of the legislature to keep it from embracing the corrupt and polluting grasp of wealthy corporations. Today there is no need to tighten those shackles to prevent the legislature from extending a benevolent hand to . . . other [presumably the owners of unmined coal] who honor their debt to the Commonwealth in ways worthy of legislative consideration.

Id.

from *Russman* and concludes, "law today is just as vital and enforceable as it was the day it was written into the Constitution."⁹³ The court specifically notes this special tax treatment is shown to benefit only the coal owners.⁹⁴

The court calls attention to the basic purpose for taxation which is to raise revenue which, "with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year."⁹⁵ Quoting *United States v. Butler*,⁹⁶ the court assesses its duty "to lay the article of the Constitution which is evoked beside the statute which is challenged and decide whether the latter squares with the former."⁹⁷

The Kentucky Supreme Court also makes clear that the intended effect in granting additional power in local taxation⁹⁸ reflects a conscious decision by the legislature to make only one change in the restrictions on state property taxes.⁹⁹ With this concept established, the court narrows its focus to determine what "classes" are defined by the Kentucky Constitution for purposes of ad valorem taxation. Relying on the general principles stated in *Board of Education of Jefferson Co. v. Board of Education of Louisville*,¹⁰⁰ the court summarizes that all constitutional provisions allowing classification are curtailed by limitations requiring the scheme to be reasonable, not arbitrary, and based on an appreciable relevancy to the subject matter of the legislation.¹⁰¹ No legitimate purpose in promoting the function of taxation is achieved by creating a separate classification for unmined coal. There is no justification¹⁰² to create a separate

⁹³ 748 S.W.2d at 360 (quoting *Russman v. Luckett*, 391 S.W.2d 694, 697 (Ky. 1965)).

⁹⁴ *Id.* (The Court notes that the best argument advanced by proponents of the special tax treatment involves assessing payment of severance taxes.).

⁹⁵ See KY. CONST. § 171. See also *Atlantic Coastline R.R. v. Commonwealth*, 193 S.W.2d 749 (Ky. 1946); *Gray v. Methodist Episcopal Church*, 114 S.W.2d 1141, 1143 (Ky. 1938).

⁹⁶ *United States v. Butler*, 297 U.S. 1, 62 (1935).

⁹⁷ 748 S.W.2d at 362.

⁹⁸ *Id.* at 362-63.

⁹⁹ *Id.*

¹⁰⁰ 472 S.W.2d 496, 498 (Ky. 1971).

¹⁰¹ *Id.* at 498.

¹⁰² *But see* 748 S.W.2d at 363. Movants claim the economic importance of the coal industry as justification to create a separate classification for unmined coal. The Ken-

tax classification for unmined coal and to treat it differently from all other interests in real estate, especially other interests with similar characteristics such as oil and gas.¹⁰³

In separate concurring opinions, Justice Wintersheimer and Justice Leibson address the one mil tax rate enacted in K.R.S. section 132.020(5).¹⁰⁴ Citing *Commonwealth v. O'Harrah*,¹⁰⁵ both justices conclude that the rate¹⁰⁶ indirectly results in de facto exemption from property taxation and is therefore unconstitutional.¹⁰⁷ Justice Leibson continues that this rule applies even if the General Assembly is persuaded that the legislation is of economic benefit¹⁰⁸ and popularly supported.¹⁰⁹

In a strong dissenting opinion,¹¹⁰ Justice Stephenson first refutes the "similar characteristics of oil and gas" analysis¹¹¹ presented by the majority of the Court. Justice Stephenson contends that there are no similar characteristics between unmined coal and unmined oil and gas. As support, Justice Stephenson first explains that oil and gas cannot be assessed to certainly exist within a tract of land¹¹² and secondly, if it is

tucky Supreme Court evaluates the flaws in this argument as twofold:

- 1.) Assuming that coal has a special economic importance, the class and rate does not promote the coal industry as a whole, but only the coal owners.
- 2.) If the large size of the coal industry is used to justify its economic importance, size alone does not justify a separate classification unless size produces other qualitative differences related to the purpose of the classification.

Board of Education of Jefferson Co. v. Board of Education of Louisville, 472 S.W.2d 496, 498 (Ky. 1971).

¹⁰³ 748 S.W.2d at 363. *Contra Id.* at 371 (Stephenson, J., dissenting).

¹⁰⁴ 748 S.W.2d at 365 (Wintersheimer, J., concurring); *Id.* at 366 (Liebson, J., concurring).

¹⁰⁵ 262 S.W.2d 385 (Ky. 1953).

¹⁰⁶ Interestingly, Justice Wintersheimer in a concurring opinion writes that the determination that KRS section 132.020(5) is unconstitutional does not in any way affect other sections of KRS section 132.020. *But see* 748 S.W.2d at 371 (Justice Stephenson's dissenting opinion).

¹⁰⁷ 748 S.W.2d at 366.

¹⁰⁸ *Id.* at 369.

¹⁰⁹ *Id.*

¹¹⁰ Justice Stephenson begins his opinion "[i]t is also unfortunate that these cases caught a majority of the court in one of its 'we know better than the legislature or anybody else' moods." 748 S.W.2d at 370 (Stephenson, J., dissenting).

¹¹¹ *Id.* at 363.

¹¹² *Id.* at 371.

actually determined to exist, it cannot be accurately assessed as to its amount and value.¹¹³ Regarding the practicality of the assesment issue, Justice Stephenson observes that any accurate assessments establishing the fair value of the unmined coal will also be difficult if not impossible to obtain.¹¹⁴

IV. POLICY ANALYSIS

In most states the provision as to equality and uniformity is held to preclude the legislature from either expressly exempting part of the property from taxation, or accomplishing the same result by failure to tax such property, except in so far as exemptions are especially provided for by the constitution.¹¹⁵

Undisputedly, the coal industry is a major economic force in Kentucky's development. The promotion of the stability and future growth of Kentucky's economy are legitimate purposes to invoke statutory action.¹¹⁶ However, *Gillis v. Yount* has invalidated K.R.S. section 132.020(5) as the means to achieve this goal.

Gillis correctly designated unmined coal as the equivalent of real estate for taxation purposes.¹¹⁷ However, *Gillis* effectively mandated unmined coal as only a subclass of real property, not a separate class. Along with this determination, constitutional provisions require that the classification of real property, including unmined coal, to be taxed uniformly within the class.¹¹⁸

The Kentucky Supreme Court's determination that K.R.S. section 132.020(5) was unconstitutional, and therefore invalid, will actually stabilize and promote the goal of future growth of the coal industry more than the original enactment of the statute itself. Both the Kentucky Court of Appeals¹¹⁹ and the Kentucky

¹¹³ *Id.*

¹¹⁴ *Id.* at 372. See also *Dolan v. Land*, 667 S.W.2d 684, 687 (Ky. 1984) (setting out mathematical requirements for assessing real property).

¹¹⁵ COOLEY, *THE LAW OF TAXATION*, § 273, 580 (1924).

¹¹⁶ *Stratford v. State-House, Inc.*, 542 F. Supp. 1008, 1014 (E.D. Ky. 1982) (where no fundamental right is involved, all that due process requires is that the statute or ordinance be rationally related to some legitimate state objective).

¹¹⁷ See *supra* notes 52-58, and 103.

¹¹⁸ See *supra* note 19 and accompanying text.

¹¹⁹ *Yount v. Gillis*, Nos. 85-CA-2662-MR, 85-CA-2717-MR (Ky. Ct. App. Mar. 27, 1987).

Supreme Court¹²⁰ examined the logical fallacies of enacting K.R.S. section 132.020(5) as a stimulant to the coal industry. Both excerpts convincingly rely on a theory that the coal industry is made up of "layers of players"¹²¹ and only one "layer" is benefited by the legislation. These sources suggest only a select interest group comprised of the owners of unmined coal reap the benefits of taxation.¹²²

As a policy matter, it is interesting to note that these exempted owners are frequently absentee owners or land-holding companies which rarely mine the coal themselves and usually have very little contact with Kentucky.¹²³ As a practical matter, the underinclusiveness of this class allows other "players" to be discriminated against by allowing the benefit of a low tax rate to these few.¹²⁴ Judge Gudgel's concurring opinion at the court of appeals level went as far as to suggest this special interest group of owners could, contrary to the statute's purposes, hinder coal development by waiting until the most beneficial market factors occur before extracting the unmined coal.¹²⁵

Another viewpoint which would allow the legislature broad discretion in classifying taxable property was expressed in *Madden v. Kentucky*.¹²⁶ Advocates draw an analogy to the United States legislature and the fourteenth amendment's equal protection clause of the United States Constitution.¹²⁷ Similarly, the leeway in congressional discretion should be given to Kentucky's legislature. Under this analysis, the legislature's discretion would

¹²⁰ Gillis v. Yount, 748 S.W.2d 357 (Ky. 1988).

¹²¹ "Layers of players" is a term used by Professor Frederick W. Whiteside, University of Kentucky College of Law, to describe the composition of the Kentucky coal industry.

¹²² 748 S.W.2d at 363 (Ky. 1988); Nos. 85-CA-2662-MR, 85-CA-2717-MR, slip op. at J. Gudgel's concurring opinion.

¹²³ See THE APPLACHIAN LAND OWNERSHIP TASK FORCE, WHO OWNS APPALACHIA: LAND OWNERSHIP AND ITS IMPACT (1983).

¹²⁴ 748 S.W.2d at 363-64.

¹²⁵ Gillis v. Yount, Nos. 84-CI-815, 85-CI-589, 84-CI-867 (Franklin Cir. Ct. 1985).

¹²⁶ Madden v. Kentucky, 309 U.S. 83, 88 (1940).

¹²⁷ Delta Air Lines, Inc. v. Commonwealth of Kentucky, Dept. of Revenue, 689 S.W.2d 14, 18 (Ky. 1985) (standards for classification under state constitution are the same as those under fourteenth amendment to the Federal Constitution); Reynolds Metal Co. v. Martin, 107 S.W.2d 251 (Ky. 1937), *appeal dismissed*, 302 U.S. 646 (power to tax is inherent in state sovereignty except when prohibited or limited by state or Federal Constitution).

be upheld as valid if the classification were reasonably related to a legitimate purpose.¹²⁸ Proponents of this analysis would additionally impose a high burden of proof upon those opposed to the classification in question. Those opposed to the class must demonstrate that the class constitutes oppressive and hostile discrimination.¹²⁹ To overcome the burden of proof, any rational basis the legislature may have conceived in creating such a class must be negated.¹³⁰ Furthermore, the legislature's motives¹³¹ in creating the class or the actual results¹³² may not be considered. By this rationale courts in other jurisdictions with similar constitutional classification provisions¹³³ have upheld separate classifications.¹³⁴ Yet the *Gillis* ruling distinguishes this rationale, which is based primarily on excise taxes, from state property taxes in the case at bar which are limited to the purpose of raising revenue.¹³⁵

Consequently, returning the rate on unmined coal to the equivalent of the rate on real property creates a more suitable means to the ends sought. More revenue will be raised by a higher tax,¹³⁶ and as a result there will be an incentive to collect the revenue because administrative cost will no longer exceed the total yield.¹³⁷

¹²⁸ *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356 (1973); *Dept. of Revenue v. Spalding Laundry & Dry Cleaning*, 436 S.W.2d 522, 523 (Ky. 1968) (constitutional limits on taxing new industry prohibit only classifications which are arbitrary and unreasonable in having no relation to permissible governmental purpose); *Reynolds Metal Co. v. Martin*, 107 S.W.2d 251 (Ky. 1937).

¹²⁹ 309 U.S. at 88.

¹³⁰ 542 F. Supp. at 1014.

¹³¹ *Rosado v. Wyman*, 397 U.S. 397, 419 (1970); *Jefferson County Police Merit Bd. v. Bilyeu*, 634 S.W.2d 414, 416 (Ky. 1982); *Adams v. City of Richmond*, 340 S.W. 2d 204, 206 (Ky. 1960).

¹³² *R.C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570, 582 (W.D. Ky. 1935); *Board of Trustees v. City of Newport*, 187 S.W.2d 806 (Ky. 1945).

¹³³ M. BERNARD, *CONSTITUTIONS, TAXATION, AND LAND POLICY* (1979) (contains abstracts of actual provisions dealing with real property taxation to be found in the United States Constitution and in 50 state constitutions).

¹³⁴ *Heisler v. Thomas Colliery Co.*, 118 A. 394, 396 (Pa. 1922), *aff'd*, 260 U.S. 245. *Apartment Operators Ass'n v. City of Minneapolis*, 254 N.W. 443 (Minn. 1934).

¹³⁵ *Gillis v. Yount*, 748 S.W.2d at 364.

¹³⁶ By raising the rate of taxation on unmined coal from .001 cents per 100 dollar value assessed to the rate of real property, currently at approximately 22 cents per 100 dollar value assessed, revenue would be increased over 20 cents per 100 dollar valued.

¹³⁷ Currently the low rate of taxation on unmined coal provides no incentive to

CONCLUSION

Gillis does not limit any rights which were in fact given constitutionally to the legislature to create classes of property for purposes of taxation, but instead defines coal as within a class already created, real property. As such, unmined coal falls under the mandatory ad valorem tax¹³⁸ and may only be exempt from taxation by the Constitution of Kentucky.¹³⁹

After invalidation of K.R.S. section 132.020(5) the court leaves unanswered additional facets of the unmined coal taxation question. First, in construing the one mil (.001) rate of taxation as an "effective" exemption of the class of unmined coal, has this ruling invalidated *all* one mil rates?¹⁴⁰ Probably not. *Gillis* seems to address only the legislative barrier imposed when a unique classification of real property¹⁴¹ is created.

Secondly, and more importantly, by invalidating K.R.S. section 132.020(5) as unconstitutional, will the state of Kentucky be entitled to back-pay for underassessment of taxation for the years the one mil rate was in effect?¹⁴² If the statute is held to be *ab initio*, it is as if the tax on unmined coal remained the same as the tax on other real estate in the disputed years.¹⁴³ This newly required revenue could be utilized immediately to help revitalize the underfunded education system in Kentucky.¹⁴⁴ Additional questions relating to the procedures in assessing value of the unmined coal and timing to begin taxation at a new rate are outside the scope of this Comment.

collect the almost non-existent revenue created from this taxation. With an increase in the tax rate, administrative costs would no longer outweigh the total amount of revenue yielded.

¹³⁸ *Miller v. Covington Development Auth.*, 539 S.W.2d 2 (Ky. 1976). See KY. CONST. § 174; *Raydure v. Board of Sup'rs. of Estill County*, 209 S.W. 19, 25 (Ky. 1919); *Levi v. City of Louisville*, 30 S.W. 973, 974 (Ky. 1895).

¹³⁹ KY. CONST. § 3.

¹⁴⁰ See *supra* notes 66-68, 106 and accompanying text.

¹⁴¹ *But see* 748 S.W.2d at 372 (Stephenson, J., dissenting).

¹⁴² *Chicago, I. & L. Ry. v. Hackett*, 228 U.S. 559, 566 (1913); *City of Henderson v. Lieber's Ex'r*, 192 S.W. 830, 831 (Ky. 1917) (construing an unconstitutional statute as one which has no effect).

¹⁴³ This would require property value assessors (P.V.A.'s) to reassess taxes on unmined coal property from 1978 to the present to compute the amount each was underassessed and then to fine accordingly.

¹⁴⁴ *The Council for Better Education v. Wallace Wilkinson, Governor*, 85-CI-1759 (Franklin Cir. Ct. May 31, 1988).

Gillis v. Yount is a narrow interpretation of the legislature's authority to subdivide the class of real property. The decision in holding K.R.S. section 132.020(5) unconstitutional corrects an effective exemption of unmined coal from taxation and allows for a higher tax rate. This result is consistent with the ultimate goal of raising revenue by taxation.

ROBIN L. FIELDS