High above the Environmental Decimation and Economic Domination of Eastern Kentucky, King Coal Remains Firmly Seated on Its Gilded Throne

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I. INTRODUCTION

Make no mistake; the heart of Appalachia has not changed that much since John F. Kennedy famously declared war on poverty during the 1960 West Virginia Presidential Primary. In early 1964 President Lyndon Johnson, grappling with visions from his own tour of Appalachia and following the concepts of Kennedy's war on poverty, spoke about finding the Great Society, a place where everyone would be equal. The subsequent 46 years brought a col-

* J.D. Candidate, 2007, Seton Hall University School of Law; B.A. English and Political Science, 1996, George Washington University. (The author would like to thank his father for demonstrating that everyone needs an advocate, especially those who cannot speak for themselves and his mother for showing the benefit of making wise choices and decisions. The author would also like to thank Professor Rachel D. Godsil who deserves special acknowledgment for her patience and guidance throughout the semester that this paper was written. Finally, the author would like to pay homage to the late Harry M. Caudill who loved the land and people of Kentucky and whose writing inspired this paper.)

1 Appalachian Regional Commission, The Appalachian Region, http://www.arc.gov/index.do?nodeID=2. (Appalachia is a 200,000 square mile region surrounding the Appalachian Mountain range from New York south into Alabama, Georgia, and Mississippi. The region is home to nearly 23 million people, 42 percent of whom live in rural areas. The region's economy is tied to the extraction of natural resources).

2 See Jules Loh, The Longstanding Paradox of Eureka Hollow, CHARLESTON GAZETTE, Jan. 4, 1987, at A4, (describing then Presidential Candidate John F. Kennedy's visit to the home of Burley Luster, a disabled coal miner with a sick wife and eight hungry children, all living in a four-room shanty. Kennedy talked with the family for 45 minutes and afterwards, visibly shaken, stood on the Luster's sagging front steps and promised, if elected, to press Congress for federal help in Appalachia).

lection of politicians wandering through the hollows, small mining towns, and coalfields, while some stayed in Washington to proclaim the unqualified success of that war. However, those unfortunate enough to live at the intersection of America's eastern coalfields still struggle with abject poverty, high unemployment, an inadequate infrastructure, and a general disdain that puts Ap-

government Printing Office, 1965. Speaking to students at the University of Michigan, President Johnson remarked that their "imagination ... initiative, and ... indignation [would] determine whether we build a society where progress is the servant of our needs, or a society where old values and new visions are buried under unbridled growth. For in your time we have the opportunity to move not only toward the rich society and the powerful society, but upward to the Great Society."


John O. Calmore, Exploring the Significance of Race and Class in Representing the Black Poor, 61 OR. L. REV. 201, 214 (1982) (quoting Martin Anderson, President Reagan's chief domestic affairs adviser, "The 'War on Poverty' that began in 1964 has been won; the growth of jobs and income in the private economy, combined with an explosive increase in government spending and income transfer programs, has virtually eliminated poverty in the United States").

This region can be geographically defined as: Southwestern Pennsylvania, West Virginia, Western Virginia, Northeast Tennessee and Eastern Kentucky.

See supra note 1, Poverty Rates, http://www.arc.gov/search/-LoadQueryData.do?queryId=14&County=1&fips=21000. The average poverty rate for the Kentucky 5 in 2000 was 29.4 percent compared to 12.4 percent for the United States as a whole.

See Id. http://www.arc.gov/search/LoadQueryData.do?queryId=13&County=1&fips=21000. Not taking into account underemployment, the average unemployment rate for the Kentucky 5 in 2003 was 9.2 percent compared with 6 percent for the United States as a whole.

See Amy K. Glasmeier & Tracey L. Farrigan, Rethinking Sustainable Development: Poverty, Sustainability, and the Culture of Despair: Can Sustainable Development Strategies Support Poverty Alleviation in America's Most Environmentally Challenged Communities? 590 ANNALS 131, 136 (2003) (observing that an estimated 3,000 homes in Letcher County do not have access to either public sewer service or septic tanks. Instead, they run a "straight pipe" out of their house and into adjacent creeks).

See Joan Leary Matthews, Siting Mining Operations in New York -- the Mined Land Reclamation Law Supersession Provision, 4 ALB. L. ENVTL. OUTLOOK 9 (1999) (explaining the utilization of local mining and land use regula-
palachia down on the map somewhere\textsuperscript{11} between New York and Los Angeles.\textsuperscript{12} As time passed, the once rugged and pioneering people who inhabited this land were indelibly changed.\textsuperscript{13} Mining emerged as the only sustainable industry in the mineral-rich area. Established during an era of little regulation, the mining industry has taken full advantage of the law and its prominence in America's industrial revolution\textsuperscript{14} to create an atmosphere where the industry's interests are invariably protected against those it may harm. This paper illustrates the link between the environmental decimation of the land and the economic decimation of Kentucky's people, and illuminates the failure of state and federal governments and courts to protect the citizens of Kentucky from the mining industry. Whenever possible, this paper will focus on five Eastern Kentucky counties: Breathitt, Harlan, Knott, Letcher, and Pike counties (hereinafter the “Kentucky Five”). These counties represent both the success and failure of the mining industry to ameliorate environmental and economic devastation.

\textsuperscript{11} See Al Cross, Clinton launches job tour with East Kentucky stops; Governor announces 800 new jobs for area; The President in Eastern Kentucky; Region deserves a chance, Clinton says, The Courier-Journal, July 6, 1999, at A1. (During his visit to Hazard, Kentucky, President Clinton told the cheering crowd “I came here to show America who you are.”).

\textsuperscript{12} In 1993, Dr. Lee Elton Smith, the author's physician explained, “There is New York and there's Los Angeles. I fly over everything in between.”


\textsuperscript{14} See generally Alan Randall & Angelos Pagoulatos, Surface Mining and Environmental Quality: An Economic Perspective, 64 Ky. L.J. 549 (1975-6) (discussing America's industrial revolution and its economic implications).
Part I of this article describes the origins of King Coal’s modern dominance both in Kentucky and nationally. By tracking the development of the horizontal severance doctrine and the subsequent emergence of the broad form deed, we see how the industrialists exploited ambiguities in the law to develop an economic stranglehold over Appalachia. The external control of mineral rights established the foundation for the environmental and economic abuse of eastern Kentucky seen throughout the 20th century.

Part II illustrates the environmental and economic rape of eastern Kentucky. This section explores the inherent link between surface mining’s environmental harms and the poverty suffered by the inhabitants of Appalachia. Based solely on extraction, the industry leaves significant environmental destruction in its path. Once the wealth is siphoned out of a mine there is little to nothing left for the people. Poverty spreads rampantly as people struggle to maintain a living and a myriad of health consequences develop, which effectively hinder an escape from the status quo.

Part III of this paper illuminates the state and federal legislative initiatives that have failed to protect eastern Kentucky. Public choice theory provides a starting point as we attempt to understand why the War on Poverty initiated by the Kennedy and Johnson Administrations failed so miserably to eliminate poverty throughout Appalachia. This section argues that environmental laws passed by both state and federal legislatures have been largely unsuccessful in mitigating harms generated by the mining industry because lawmakers possess a fundamental proclivity to protect it. Additionally, the coal industry has used its financial generosity to inoculate itself from any serious legislative and regulatory initiatives that may pass in the legislatures at both the state and federal level.

Part IV argues that the Kentucky state courts’ loose interpretation of horizontal severance doctrine and the federal courts’ deferment to that interpretation, permitted the wholesale purchase of mineral rights throughout the state, which in turn created innumerable environmental harms and robbed the people of their eco-

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15 See infra note 56. ‘King Coal’ refers to the important role Coal has played from the industrial revolution to today’s energy security. Specifically, it has been the driving economic force throughout Appalachia.
nomic independence. The court can also be blamed for interpreting flawed legislation articulated in Part III. In doing so, the judiciary has precluded potential opportunities for individuals to remedy their injury.

Finally, Part V presents a strategy to ameliorate the extensive environmental and socio-economic harms suffered by the residents of eastern Kentucky. The first step is to reclassify poverty, not thinking of it as a purely economic condition. This paradigm shift requires both the state and federal legislative and judicial branches to employ a human rights-based approach to environmental and economic betterment. Hopefully, this recognition will give the residents of eastern Kentucky a voice in the debate over the industry's future. Without a voice, the legacy indelibly forged throughout Appalachia will be the one of environmental decimation and economic destitution.

II. THE RISE OF KING COAL

A. Historical Overview of the Horizontal Severance Doctrine

There are two maxims of property law that prevented horizontal severance from being recognized as a legal doctrine at early common law. The first maxim is *cuius est solum, ejus est usque ad coelum et ad inferos* "to whomsoever the soil belongs, he owns also to the sky and to the depths." Following this maxim, the rights to all subterranean minerals should belong solely to the owner of surface. The landowner could draw a vertical line around his property and control the property rights within from the heavens above to the depths below. The second maxim is that land transfers could

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16 Edwards et al. v. Sims, Judge, 232 Ky. 791, 794 (Ky. 1929). *But see* Dolan v. Dolan, 70 W. Va. 76 (W. Va., 1911) (holding that a conveyance of surface of land, without more, means all *solum*, the land except minerals because the word "land" is not used; if it were it would take in minerals. Instead the word used is "surface", a more limited word, and the courts have said it excepts minerals).

17 See, e.g., Edwards v. Lee's Adm'r, 265 Ky. 418, 432 (Ky. 1936) (Thomas, J., concurring). "That maxim literally followed would segmentize ownership both above and below the surface corresponding to boundaries of the latter...."
only occur through the ritual of "livery of seisin," or delivery of possession. Following this maxim, land only changed hands after the parties traveled to the land being conveyed, walked the metes and bounds, and the transferor symbolically handed the transferee a clump of soil or a tree branch taken from the land.\textsuperscript{18} Requiring the parties to grasp some physical manifestation of the land being transferred theoretically precluded the horizontal severance of undiscovered subsurface mineral lands from the surface estate.\textsuperscript{19} To transfer subsurface mineral rights, the parties would have had to meet the elements of seisin. The minerals would first have to be discovered by opening a mine. Then, the mine could be transferred through seisin.

However, as the common law developed, the strict requirements imposed by the doctrine of seisin lost their importance. Horizontal severance of property rights became possible. One theory behind the emergence of horizontal severance is the recognition of the King’s royal prerogatives at common law.\textsuperscript{20} As ruler of the land, the King is charged with defending and protecting the people\textsuperscript{21} and coining money.\textsuperscript{22} To fulfill these obligations,\textsuperscript{23} the

\textsuperscript{18} See Speed v. Buford, 6 Ky. 57, 59 (Ky. 1813) (describing the requirements of seisin).

\textsuperscript{19} See Caldwell v. Fulton, 31 Pa. 475, 483 (Pa. 1858) (discussing the difficulty of conceiving a physical interest in an unopened mine separate from ownership of the surface under English Common Law, because livery of seisin was inseparable from a conveyance of land, and livery could not be made of an unopened mine).

\textsuperscript{20} See Michelle Andrea Wenzel, The Model Surface use and Mineral Development Accommodation Act: Easy Easements for Mining Interests, 42 Am. U.L. Rev. 607, 614 (2002) (proposing the King’s prerogatives were a potential origin of the horizontal severance doctrine). See also The Case of Mines, 75 Eng. Rep. 472, 477 (Exch. Div. 1567). The Court of Exchequer’s statement of the Royal prerogatives of mines was that “all mines of gold or silver throughout the realm, or of base metal, wherein there is any ore of gold or silver of however small value, belong to the King by prerogative, with liberty to dig, and lay the same upon the land of the subject, and carry it away from thence . . . for there all shall go to the Crown by prerogative.”

\textsuperscript{21} See id. at 480. “For the King is the head of the weal-public, and the subjects are his members, and the office of the King, to which the law has appointed him, is to preserve his subjects; and their preservation consists in two things, viz. in an army to defend them against hostilities, and in good laws.”
King maintained an absolute property right to all the minerals beneath the land's surface. As the British Empire expanded around the globe, so did the concept of King's mines. The American Colonies accepted this burden, and for a time after the Revolution appropriated the concept to generate government funding. Colonial governments ignored the maxims discussed infra, and horizontal severance became possible as American property law developed. More than 100 years after the King's mines concept was abolished in the United States, the Court entirely rejected the maxims when it held in Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co. that horizontal severance could be accomplished un-

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22 See id. "If the subject should have the ore of gold and silver which is found in his land, he could not convert it into coin, nor put any print or value on it. For if he makes coin it was high-treason . . . to the King because he has the sole power to make money."

23 See id. "An army cannot be had and maintained without treasure...if the gold and silver, whereby the treasure is to be made should belong to the . . . proprietor of the land . . . he who is appointed by the law to be their defender would be destitute of power or means to defend them . . . the law has for necessity's sake appropriated the mines of gold and silver to the King."

24 The Court of Exchequer was considering a dispute between Queen Elizabeth and the Earl of Northumberland over a copper mine on the Earls lands that also contained deposits of gold and silver. See id. at 472. The land had been granted to the Earl by the late King Phillip and Queen Mary, and a mine was opened during the reign of Queen Elizabeth. See id. at 473-474. The Queen ordered that 600,000 tons of copper ore, containing gold and silver be removed from the mine for her use. See id. at 481. The Queen's Counsel pointed to the precedents of record during the reigns of several Kings, dating back to King Edward III (1312-1377), which indicated that the Queen had every authority to take the copper ore. See id. The Court not only agreed that the royal prerogative entitled the Queen to unfettered access to the Earl's mine, but also allowed the Queen to recover damages against the Earl for the interruption and disturbance she sustained during the judicial proceeding. See id. at 514.

25 See Peart's Heirs v. Taylor's Devisors, 5 Ky. 556, 561 (Ky. 1812) (discussing Virginia's abolishment of the royal mines concept in 1779 and resulting legal construction that any property formerly considered a royal mine should be held in absolute and unconditional property). This is the beginning of America's property deed system. See also Judge Lyman Chalkley, Deed of Conveyance of Land in Kentucky, Ky. L. J. (Mar. 1913) (discussing the deed requirements after Virginia's 'statute of uses' statute in 1796 and Kentucky's adoption of the Virginia statute in 1843 and again in 1873).

26 See Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 60 (1898) (holding that it is unquestionable at common law
der a theory of contract law. That decision opened the floodgates for mine operations to commence and hastened the environmental decimation of eastern Kentucky.

As the Civil War ended and America's Industrial Revolution began, the natural resources abundant throughout Appalachia became increasingly important and irresistible. "In financial and industrial circles occasional talk was heard that railroads should be built into the region and its great wealth of raw materials made available to the nation's rapidly swelling industrial complex." Northern industrialists sent a wave of land agents into Kentucky with instructions to obtain the mineral rights from the unsophisticated and illiterate mountaineers. The parties to these agreements were hardly equal. The mountaineers thought they re-

that the surface owner might convey his interest in mineral beneath the surface without relinquishing title to the surface).  
27 See id. "The possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath."  
28 See HARRY M. CAUDILL, NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA 61-69 (2001). (noting that the first natural resource targeted throughout Kentucky were the old growth forests for their lumber. When the trees were mostly gone, the coal was targeted).  
29 Id. at 61.  
30 See id. at 72. "Their goal was to buy the minerals on a grand scale as cheaply as possible and on terms so favorable to the purchasers as to grant them every desirable exploitative privilege..."  
31 See SONGCATCHER. (Lions Gate Films 2000) (depicting the pressure applied on the mountaineers by the agents).  
32 See Martin v. Kentucky Oak Mining Co., 429 S.W. 2d 395, 401 (Ky. 1968) (Hill, J., dissenting). "Strip mining was neither heard of nor dreamed of in 1905 in Knott County... the only coal mined in those days was from the outcroppings in creek beds, where a small quantity was obtained by the use of a newfound tool -- the coal pick." Based on their personal experiences, it is unlikely that the mountaineers could have predicted the rapid developments in mining technology that would allow fewer and fewer to do increasing an ever increasing amount of mining.  
33 JAMES STILL, RIVER OF EARTH 84 (1978). "I can't read writing... but I know my letters."  
34 See CAUDILL, supra note 26, at 72. "In the summer of 1885 gentlemen arrived in the county-seat towns for the purpose of buying tracts of minerals, leaving the surface of the land in the ownership of the mountaineers who resided
ceived the better deal. After all, they had traded a meaningless right to unattainable, potentially non-existent minerals, to an outsider for an outrageous sum of money. In reality, the agents had taken advantage of a superior bargaining position to swindle the residents out of their property rights. Many agents escaped with a stack of broad form deeds. Those deeds left only a nominal title to the surface and total responsibility for property taxes with the landowner. To add insult to injury, the court held those deeds conveyed the rights to excavate and remove all subsurface minerals and permitted the subsurface owner to use the surface as necessary for either removal or storage of those minerals. Southeastern Kentucky was one of the hardest hit areas. The assault was so successful that by 1910, nearly 85 percent of the mineral rights had been relinquished by the Appalachians and were under the control of outside interests. The promise of coal was high, but an eco-

35 See id. at 75. Caudill’s research revealed that the purchase price for subsurface mineral rights started at approximately 50 cents per acre gradually increasing during the next 30 years but never reaching more than $5 per acre.

36 Id. at 72-74. Caudill painted a vivid picture of these encounters. See also Watson v. Kenlick Coal Company, Inc., 498 F.2d 1183, 1185 (6th Cir. 1974). The author found himself “tuning out” while reading the text of the deed at issue in this case and can only wonder what the mountaineers of eastern Kentucky thought when they looked at the complicated text.

37 See Robert M. Pfeiffer, Kentucky’s New Broad Form Deed Law – Is It Constitutional? 1 J. Min. L. & Pol’y 57, 58 (1985). “Indeed, in some counties those who acquired mineral rights by use of the broad form deed ordered specially printed deed books so that the county clerks could simply fill in the blanks with the pertinent information.”

38 See CAUDILL, supra note 26, at 74. The land agents left the residents of Appalachia with “an illusion of ownership and the continuing responsibility for practically all the taxes which might be thereafter levied against the land.”

39 See Watson, 498 F.2d at 1185.

40 See CAUDILL, supra note 26, at 75.

41 The author notes that the overwhelming success of this assault produced a tremendous amount of pressure on those who retained their mineral rights. To mitigate this pressure, the Author’s great-grandfather, Sam Johnson, sold the mineral rights of the family’s hollow in Breathitt County to his son Carl Johnson of Cincinnati, Ohio. This ensured that the entire property right stayed in the family. Notice the irony in that these rights were then also owned by an interest outside of Appalachia.
nomic nightmare for eastern Kentucky was developing in the distance.

B. Real Politic

The reasons behind coal’s rise to dominance are clear. Coal is by far the nation’s most abundant and reliable domestic energy resource. Consequently, the coal-mining industry plays a vital role in the Appalachian economy. In Pike County, Kentucky, the coal industry can be credited with creating more than 10,000 jobs. Due to its reliance on the production of coal, the economy of the region necessarily rises and falls with the price per ton of coal. In 2003, Appalachia experienced its fifth drop in coal production in the last six years. Production declined to 376 million short tons, the lowest level seen since 1978. Coal production in


45 Id. at 57.

46 Id. at 1. “The regions economy and its residents remain vulnerable to changes in the industry’s fortunes.”


Eastern Kentucky decreased by 8.2 million short tons to 91.2 million short tons, a level not seen since 1976.\(^5^2\) The Kentucky\(^5^4\) produced 20.17 million short tons,\(^5^5\) 18.4 percent\(^5^6\) of eastern Kentucky's total coal production, from 94 strip-mining operations.

Although currently in decline, the industry is predicting and eagerly anticipating the return of King Coal.\(^5^7\) President Bush, following through on a campaign promise to reduce our dependence on foreign energy, began to tweak the rules regulating the mining industry early in his first Administration.\(^5^8\) As the President has done with many other controversial legislative initiatives in the post-September 11 atmosphere,\(^5^9\) he attempted to tie increased coal

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52 Id. at 10.
53 Id.
54 Supra note 5.
56 91.2 million divided by 20.17 million equals 18.4 percent.
57 Press Release, National Mining Association, King Coal is Ruling the Electric Power Market (Mar. 15, 2005), at http://nma.org/newsroom/press_releases.asp. Jack Gerard, President and CEO of the National Mining Association recently announced that "King coal is back on his throne, generating over half of the electricity used in this country" and that there are "more plans to build new coal-fired [power] plants have been announced in the past year than were announced in the past decade."
58 See Joby Warrick, Appalachia Is Paying Price for White House Rule Change, WASH. POST, Aug. 17, 2004, at A1 (discussing May 2002 proposed rule changes to the Clean Water Act, part of a series of rules impacting the mining industry that the President has tried to relax). The first attempt to change the rule was invalidated by Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (D. W. Va., 2002). In its second incarnation, the rule is colloquially known as "the fill rule." See also 69 Fed. Reg. 1036 (Jan. 7, 2004) (to be codified at 30 CFR Part 780, 816, and 817).
59 See Ashton B. Carter, Failed intelligence means failed policy, THE ALBANY TIMES UNION, Apr. 7, 2005, at A11 (discussing the Administration's use of national security concerns to justify the invasion of Iraq). See also, President
production to America's domestic security policy. During recent remarks to the U.S. Hispanic Chamber of Commerce Conference and in visits to Columbus, Ohio, and Minneapolis, Minnesota, the President reiterated his position on increased coal production. Coal's impact on mining states' economies, coupled with the Bush Administration's energy security policy, has all but assured a renewed dominance of King Coal. As long as America needs cheap energy, coal will continue to be King.

III. THE RAPE OF APPALACHIA

George Bush, 2004 State of the Union (Jan. 20, 2004), http://www.whitehouse.gov/stateoftheunion/2004/index.html (calling for Congress to renew the Patriot Act to provide law enforcement officials with the essential tools they need to track down terrorists); President George Bush, Immigration Reform Speech at Davis-Monthan Air Force Base (Nov. 28, 2005), http://www.whitehouse.gov/news/releases/2005/11/20051128-7.html (asking Congress to work with him to achieve significant immigration reform that will protect the homeland by controlling the borders).

Justice Talking (National Public Radio broadcast, Mar. 14, 2005) (Margot Adler, host; James L. Connaughton, Chairman of the White House Counsel on Environmental Policy, guest). Mr Connaughton countered environmentalists concern about mountaintop strip mining by saying "if we remove coal from our energy mix, energy prices go through the roof, our energy security would be dramatically diminished, and we would actually be leaving a legacy of getting our energy from other countries rather than from responsibly producing the source of that energy here in America."

President George Bush, Remarks to the U.S. Hispanic Chamber of Commerce Conference (Apr. 20, 2005) http://www.whitehouse.gov/news/releases/2005/04/20050420-4.html. "Our most abundant energy source is coal. We have enough coal to last for 250 years... To achieve greater energy security, we have got to harness -- harness the power of clean coal." See also President George Bush, Discussion of Energy Policy During Remarks at the Franklin County, Ohio Veterans Memorial (Mar. 9, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050309-5.html. "Increasing our energy security begins with a firm commitment to America's most abundant energy sources -- source, and that is coal. Our nation is blessed with enough coal to last another 250 years." See also President George Bush, Remarks to the American Association of Community Colleges Annual Convention (Apr. 26, 2004), http://www.whitehouse.gov/news/releases/2004/04/20040426-6.html. "I also know that we've got a plentiful supply of coal in our country, and that's why it's important for us to continue to explore clean coal technologies, so we can use the energy supply here at home in a way that is -- achieves, in a national objective, diversifying away from foreign sources of energy."
Coal's dominance has given the industry access to rape and pillage Appalachia. Coal mining is most profitable when it is most environmentally destructive. Surface mining has gained popularity among the mine operators precisely because it requires fewer employees, uses more efficient machinery, and therefore generates a better-cost return. The initial environmental harms are individual and largely insignificant when compared to their combined impact.

A. The Environment

Demand for a cheap and reliable energy source has often outweighed any environmental concerns. These factors have al-

62 See Andy Mead, "Conscience of Kentucky" Sees State's Well-Being Sacrificed for Profit, LEXINGTON HERALD-LEADER, Apr. 23, 2004, at B1. Picking up the mantle of Harry Caudill, Wendell Berry issued terse words about the "government's willingness to sacrifice Kentucky's land and people for a few financial scraps" when he was recently awarded the Kentucky Environmental Quality Commission's Lifetime Service Award.

63 CAUDILL, supra note 26, at x (2001).

64 Energy v. Environment: Who Wins in the Race for Coal in Kentucky? 64 Ky. L.J. 641 (1975) (quoting the EPA, "mining in any form destroys at least part of our environment...In the past, emphasis has been on the simplest and cheapest recovery of minerals possible...since World War II, surface, or strip mining, has become the most economical method of extracting coal.


67 See infra note 221. This conclusion can be drawn from the six years of legislative action preceding passage of a national surface mining law.
owed mountaintop removal mining to develop and flourish throughout Eastern Kentucky. This type of mining has radically changed the landscape and unleashed a host of evils on the region. The following discussion is limited to the environmental impacts of surface mining, the most dramatic and destructive form of mining.

1. The Land

The mountains in Eastern Kentucky, like any mountain in Appalachia, can be thought of as a "geological layer cake." The seams of coal are separated by thick bands of sandstone, slate, and shale. It is undisputed that surface mining alters the surface of the land. Mountaintop removal mining is the most destructive variant of surface mining. The mountaintop mining process is initiated by constructing a primary haul road to the mine site. This provides access via public roads for equipment, employees, and

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68 See Paul A. Duffy, How Filled was my Valley: Continuing the Debate of Disposal Impacts, 17 NAT. RESOURCES & ENV'T. 143, 144 (Winter 2003). Mining companies consider mountaintop mining to be the most profitable and cost effective way to mine coal today.

69 Draft EIS, supra note 64, at I-19. "This used to be beautiful land. Tall majestic mountains. Heavily forested. Streams fed by spring water you could drink, animals and plant life everywhere. The old settlers called this the land of milk and honey, a place of peace and security. Not so today."

70 See Erik Reece, Death of a Mountain: Radical strip mining and the leveling of Appalachia, HARPER'S MAGAZINE, Apr. 2005, at 49.

71 Id.


73 See Division of Mine Permits, Ky. Dep't for Natural Resources, http://www.minepermits.ky.gov/miningeducation/mining_methods.htm. Mountaintop mining involves the removal of most of the overburden and several seams at the highest elevations of a mountain. Instead of mining along the contour, sections of overburden and coal are removed in progression along the mountaintop or ridge. See also 30 U.S.C. §1256(a) (1994) (defining mountaintop removal mining as mining that "completely removes the upper fraction of a mountain, ridge, or hill to extract the entire coal seam running through the mountain.").

74 See Draft EIS, supra note 64, at III.I-1 (providing a detailed description of the types of mining that have been used in eastern Kentucky).

75 See id., at III.I-21.

76 Id. at III.I-11.
supplies. Internal haul roads are also built during this initial phase to allow equipment to move within the site to haul both coal and overburden77 as necessary. The site is then cleaned and cleared by shaving away all the vegetation on the mountain.78 Machines claw into the ground to create a flat, bench-like work surface. Sedimentation ponds are constructed79 as an erosion barrier.80 Blasting holes are drilled at specific intervals to either the depth of the next bench or the coal seam that is to be exposed.81 A powerful detonation shatters the rock.82 The shattered rock is removed by dragging an enormous bucket across it and loading it into haulers.83 This process is repeated across the mountain84 in a series of adjacent excavations85 until the mine pit is exposed. After the coal has been

77 See Ky. Coal Education, Glossary of Mining Terms, http://www.coaleducation.org/glossary.htm. Overburden is the layer "of soil and rock covering a coal seam." Removing the overburden prior to mining is the most profitable method of mining.

78 Draft EIS, supra note 64, at III.I-16. This process removes all of the vegetation from the area to be mined. If the topsoil is going to be salvaged for later use in reclamation, bulldozing the upper one to two feet of soil and pushing it into storage piles segregate it from the excess overburden that will be pushed into the valley. The valleys are also cleared prior to fill placement in hopes of providing a sturdier foundation.


80 But see Brian Bowling, Agency Sues Massey Over Slurry Spill, State Says Firm Hasn't Learned from Mistakes, CHARLESTON DAILY MAIL, Apr. 24, 2002, at A5. In October 2000, a slurry spill at Martin County Coal Co. dumped more than 250 million gallons of slurry into the Tug Fork and Big Sandy rivers. Again in Apr. 2002, a slurry spill at the Sidney Coal Co. dumped 135,000 gallons of sludge in two tributaries of the Tug Fork River. See also Mountain Summer Justice, Kentucky, available at http://www.mountainjusticesummer.org/Kentucky. ("The Big Sandy River was so polluted that it ran black for weeks.")

81 Draft EIS, supra note 64, at III.I-12

82 See Reece, supra note 69, at 52. The coal industry uses a combination of ammonium nitrate and fuel oil to blast the rock. This is the same material used by Oklahoma City bomber Tim McVeigh. "McVeigh detonated 4,000 pounds of this" while the "typical blast on strip mine is ten times that amount."

83 See Draft EIS, supra note 64 at III.I-16-20.

84 Id.

85 Id.
removed, the pit is backfilled with the spoil\textsuperscript{86} from the next bench. Once the mining operation has concluded, the excess spoil\textsuperscript{87} is disposed of by pushing it into an adjacent valley.\textsuperscript{88} If the mine operator has designated a specific land proposal to reclaim the site prior to the permit process that will be equal to or better than the pre-mining land use,\textsuperscript{89} it is not required to return the mountain to its approximate original contour [hereinafter "AOC"]'). Even if the mine operator was required to return the mountain to its AOC rather than simply grade and reseed the land, the erosion barrier has been adversely altered, if not permanently destroyed. The widespread erosion around current and reclaimed mine sites\textsuperscript{91} leads to its own negative environmental impact.

By stripping away the vegetation, surface mining causes increased erosion and sedimentation. A simple rainfall can dramatically increase the amount of clay, silt and sand in streams throughout Appalachia. This results in two separate but related environmental impacts. First, as the particulates settle on the bottom

\begin{itemize}
\item \textsuperscript{86} Draft EIS, \textit{supra} note 64, at III.I-12. (spoil is “material overlying a coal seam that is broken up and removed during a surface coal mining operation.”).
\item \textsuperscript{87} Draft EIS, \textit{supra} note 64, at III.K-2. (explaining that spoil can initially expand up to 140 percent of it original volume before it contracts back to about 125 percent of its original volume.
\item \textsuperscript{88} \textit{Id.} at 144.
\item \textsuperscript{89} See 30 U.S.C. §1265(c)(3) (2004) (providing examples of land use contemplated by the statute that do not require a mining operator to return the land to its original contour. Those uses include: Industrial, commercial, agricultural, residential or public facilities, including recreational facilities).
\item \textsuperscript{90} Ken Ward Jr., \textit{As High As God Did: Law to Rebuild Mountains Falls by Wayside}, CHARLESTON GAZETTE-MAIL, May 3, 1998, at 1A. West Virginia Division of Environmental Protection, agency permit supervisor Larry Alt, expresses the impossibility of returning the post-mining area to the approximate original contour. When he was asked during the course of Ward’s interview if proposed mountaintop mine reclamation could meet the “approximate original contour,” Alt “shrugged” and “laughed” when he stated, “we just can’t stack it as high as God did.”
\item \textsuperscript{91} See Division of Mine Reclamation and Enforcement, Ky. Dep’t for Natural Resources, \texttt{http://www.dmre.ky.gov/monthlystats/Top+Three+Performance+-Standards.htm}. (The Division issued 29 notices of non-compliance in December 2005, citing 42 performance standards. The second and third of the top three performance standards for which mines were cited in Feb. 2005 were backfilling and grading/contemporaneous reclamation and sediment control. Combined these two standards accounted for over 25 percent of the citations).
\end{itemize}
of the stream, an artificial island replaces the streambed.92 Once flowing water is replaced by a series of stagnant ponds when the water level is low between rains, aquatic life virtually disappears. Second, the cloudiness of the sediment-laden water reduces aquatic plant-life photosynthesis,93 which in turn decreases the dissolved oxygen in water that is necessary to break down organic waste entering the water system.94 In either occurrence, the water becomes stagnant and incapable of maintaining life.

Environmentalists have noted the drastic "change in the topography, which leaves the land subject to more flooding, results in the pollution of streams and rivers, and has an "incalculable" impact on wildlife."95 Like much of Appalachia, the communities throughout Harlan County, Kentucky, are cognizant of the potential disaster every time they receive a heavy rain.96 The mountains, littered with exposed coal seams, logging, and mining sites,97 can send torrents of water gushing into the hollows and valleys below.98 Once the streams and rivers have overflowed their banks, the sludge-and branch-laden waters can tear through the hollows and towns like runaway bulldozers. Flooding of this magnitude happens because the surface left after mining is not as stable as

92 Id.
94 See John D. Edgcomb, Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977, 58 TUL. L. REV. 299, 341 at n25 (1983) (quoting a Stanford Research Institute Study of West Virginia Surface Coal Mining in 1972, "Case studies conducted in West Virginia and Eastern Kentucky indicate that the rate of net sediment yield from individual sites is in the order of 400 to 600 tons per acre.").
95 See Penny Loeb, Special Report: Shear Madness, U.S. NEWS & WORLD REP., Aug. 11, 1997 (discussing the growing popularity of mountaintop mining during the 1990s).
96 See David Lamb, In Kentucky, Disaster Rides the River; Appalachia: Laced with logging and mining sites, the area braces for floods every time rain swells the Cumberland's banks, The L.A. TIMES, Mar. 23, 2002, at A14.
97 Id.
98 Id.
Mother Nature's version. As the water gushes down into the valleys and hollows, it exposes a large surface area to the next harm, toxic Acid Mine Drainage.

2. The Water

Surface mining’s most immediate impact on the water system through Appalachia takes place as soon as the pyrite in dirt begins to react with oxygen and water. A complex series of chemical weathering reactions are spontaneously initiated, oxidizing the mineral that is inert while buried. The foremost by-product of those reactions is sulfuric acid. The acid leaches from the excavated rock as long as it remains exposed to the air and water or until the sulfides have been completely leached out. As is often

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99 See CAUDILL, supra note 26, at 308.
100 Draft EIS, supra note 64, at 79. (Acid mine drainage [hereinafter “AMD”], is a category of mine drainage in which mineral acidity exceeds alkalinity).
101 See The Mineral Database, http://www.mindat.org/min-3314.html. Pyrite is a very common mineral, found in a wide variety of geological formations from sedimentary deposits to hydrothermal veins and as a constituent of metamorphic rocks. The brassy-yellow metallic color of Pyrite has led people to mistake it for Gold, and hence it has been given the common nickname ‘Fools Gold’.
102 Draft EIS, supra note 64, at III.E-2. (The oxidation of pyrite produces acid through two complex chemical reactions.)
103 Id. See also ENVIRONMENTAL PROTECTION AGENCY, CHEMICAL PROFILE OF SULFURIC ACID, available at http://yosemite.epa.gov/oswer/CeppoEHS.nsf/-Profiles/7664-93-97OpenDocument (describing the health hazards associated sulfuric acid that includes: inhalation of vapor may cause serious lung damage. Contact with eyes may result in total loss of vision. Skin contact may produce severe necrosis. Consumption of between one teaspoonful and one-half once of concentrated sulfuric acid is fatal in adults. Just a few drops may be fatal if the acid enters the trachea. Chronic exposure may cause tracheobronchitis, conjunctivitis, stomatitis, and gastritis. Gastric perforation and peritonitis may occur and may be followed by circulatory collapse.)
104 See Jeffrey A. Kodish, Restoring Inactive and Abandoned Mine Sites: A Guide to Managing Environmental Liabilities, 16 J. ENVTL. L. & LITIG. 381, 383 (2001). This process can take hundreds and even thousands of years.
the case at mine sites, the acid mixes with water and the contaminated drainage escapes into the downstream water system.

AMD severely degrades water quality, kills aquatic life, and causes the aquatic ecosystem to become virtually sterile. The impact is clearly visible in the distressed vegetation, fish kills, and discolored water. AMD is a serious problem throughout Appalachia. It is estimated that there are over 1.1 million acres of abandoned coalmine lands that have directly contributed to the pollution of more than 9,000 miles of streams in the region. AMD is bearing down on the rivers and streams flowing throughout Eastern Kentucky. It is negatively impacting underground aquifers that provide domestic and farm water supplies to many families in the Kentucky. For that reason, many of the streams and rivers throughout eastern Kentucky have been turned into acid drains unfit for human use.

The sulfuric acid is also distributed throughout Appalachia and across the eastern United States through clouds containing acid

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106 See Roger Alford, Mine Blowouts Rarer but Real Threat, 2 Damaged Highway, Stream Last Week, LEX. HERALD-LEADER, Apr. 25, 2005, available at http://www.kentucky.com/mld/kentucky/news/11481923.htm. "Underground coal mines can hold vast quantities of water . . . the mines can take years to fill with water, which seeps down through cracks from the surface after rains."

107 See id.

108 Id. "Two separate blowouts at abandoned underground coal mines in Eastern Kentucky in the past week killed fish" and "turned a stream orange."


110 Id.

111 Alan Maimon, 3 Groups Sue over Permits for Valley Fills, Mining practice blamed for destroying streams, LOUISVILLE COURIER JOURNAL, Jan. 28, 2005, Local Section. "Alice Jones, vice president of Kentucky Riverkeeper, said sediment runoff from valley fills is a leading source of water pollution, particularly in the Kentucky River, from which more than 600,000 Kentuckians draw their water."

112 Id.

rain. Acid rain is a byproduct of both coke production and energy generation. Burning coal dumps large quantities of sulfur dioxide into the air inside the furnaces. As the air is expelled, it lifts the sulfur dioxide into the atmosphere where it attaches to water vapor in clouds. Weather patterns generally carry the clouds easterly, where the acid rain is released. States in the Mid-Atlantic and Northeast have started to recognize the seriousness of acid rain’s impact on both people and the environment. The next part of this paper links the environmental decimation noted above to the poverty and associated health problems that have plagued eastern Kentucky.

B. The People

Appalachia was not ready for the spotlight during Kennedy and Johnson’s visits. The conditions these Presidents found were deplorable. In 1965, one in three people in the region lived in

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114 See supra note 74. Coke is another name for carbonized coal. It is a “hard, dry carbon substance produced by heating coal to a very high temperature in the absence of air.” Coke burns at a higher temperature than ordinary bituminous coal and is used primarily in steel production.

115 See Regan J. R. Smith, Playing the Acid Rain Game: A State’s Remedies, 16 ENVTL. L. 255, 257 (1986). “In the United States during 1980, approximately 26 million tons of sulfur dioxide . . . were emitted by man-made sources.”

116 See Kay M. Crider, Note and Comment: Interstate Air Pollution: Over a Decade of Ineffective Regulation, 64 CHI.-KENT. L. REV. 619, 621 (1988) (discussing the formation of sulfur dioxide and its transformation into acid rain).

117 Id.


poverty. However, it is important to distinguish the mountain-
neer's legacy, a self-sufficient poverty, from today's poverty, which
can be described as dependant on government assistance pro-
gress. Since the 1960's, strip mining has quickly spread
throughout Appalachia, embraced as part of the economic engine
people hoped would provide opportunities for employment and a
standard of living similar to that enjoyed by the rest of America.
But the mining industry has not been the savior they anticipated.
A backlash to the environmental and economic repression is de-
veloping, as the residents of the region recognize that their eco-
nomic disenfranchisement is directly related to the impact of the
mining industry.

water or no decent system of waste disposal, no firehouse, no police, no hospi-
tal, and no sidewalks. Washed-out bridges and rickety walking spans separated
some communities from the nearest road. A web of trails, some just wide
enough for opposing traffic, wound around hillsides like strewn Christmas rib-
on.

See Reid Forgrave, One county, two worlds, The Cincinnati Enquirer,
Dec. 12, 2004, at 1A.

Id. but cf supra note 62

John M. Rosenberg, Personal Reflections of a Life in Public Interest
Law: From the Civil Rights Division of the Unites States Department of Justice
practice of coal extraction by surface mining was growing at a very fast pace
and causing an untold amount of surface destruction. Surface mining practices,
being relatively primitive at the time, caused erosion of the surface and tremen-
dous pollution and siltation of streams, eventually causing flooding. Mud slides
and property damage impacted most on low-income families whose homes were
located below the strip mines.

See David W. Hawpe, Big Coal's new ways spawn new resistance, The
Louisville Courier-Journal, Nov. 4, 2001, at D1. Mr. Hawpe points out that the
industry's practice of placing strip-mining operations near places where some
mountain families have staked a precarious claim to the middle class has lead to
small scale dissent in Eastern Kentucky. "Families...no longer have all the usual
reasons to cooperate with Big Coal." See also Mountaintop Removal Mining Poll,
3868 respondents "strongly disapprove" of mountaintop removal mining com-
pared to 38 percent of respondents who "strongly approve" of the process. (last
checked Feb. 14, 2006, 7:30 p.m.).

Draft EIS, supra note 64, at I-21. Public hearing comments express general
frustration. Is it any wonder what has happened in the coalfields of West Vir-
ginia? Is it any wonder that significant infrastructure development, education
1. Poverty

The percentage of persons below the poverty level living in the Kentucky 5 is nearly twice the national average, with a median household income of one-half the national average. In the 40 years since the initiation of the War on Poverty, the number of people living below the poverty line in the Kentucky 5 has only decreased by five percent. At the close of the 20th century, 80 percent of Letcher County, Kentucky, still did not have access to public water utilities. Unemployment rates are high, but do not include underemployment and those who have simply stopped look- and school performance, improved standards of health or alternative business development are so minimal in the West Virginia coalfields compared to the rest of the country? Is it any wonder that our status as poorly educated, lacking in economic diversity, and suffering from comparable poor health relative to the rest of the country persist today despite record coal production of some $4.4 billion dollars just last year? From the coal industry perspective, this is good business. Keep the people totally dependent on one and only one industry. Keep the people poorly educated. Keep them vulnerable to health concerns. Drive away talented young, who might effectively challenge coal practices or develop other businesses, which could erode almighty coal's dominance. Keep the people desperate. That's just good business.

See U.S. Census Bureau, U.S. Dep't of Commerce, State and County QuickFacts, available at http://quickfacts.census.gov/qfd/states/00000.html. In 1999, the median household income in the United States was $41,994 and the poverty level hovered at 12.4 percent. A comparison of the Kentucky 5 economic indicators exemplifies the stark economic contrast between Appalachian and the rest of the United States. The median household income in Breathitt County was $19,155 with a poverty level of 33.2 percent. Id. at http://quickfacts.census.gov/qfd/states/21/21025.html. The median income in Harlan County was $18,665 with a poverty level of 32.5 percent. Id. at http://quickfacts.census.gov/qfd/states/21/21095.html. The median income in Knott County was $20,373 with a poverty level of 31.1 percent. Id. at http://quickfacts.census.gov/qfd/states/21/21119.html. The median income in Letcher County was $21,110 with a poverty level of 27.1 percent. Id. at http://quickfacts.census.gov/qfd/states/21/21133.html. The median income of Pike County was $23,990 with a poverty level of 23.4 percent. Id. at http://quickfacts.census.gov/qfd/states/21/21195.html. A cursory review of previous census data shows that this contrast has existed for a number of years.

Jones, supra note 116.
KING COAL REMAINS

ing for jobs that do not exist. 127 "Letcher County's true unemployment rate may run as high as 50 percent." 128

There must be an underlying cause of the economic marginalization that prevents the residents from improving their lives. Herman R. Lantz studied a typical coal mining community in Pennsylvania during the middle of the century in an attempt to discover how the residents dealt with rapid development and just as rapid economic decline that mirrored the coal industry's boom and bust cycles. 129 Lantz's research indicated that those tied by the boom and bust cycle of the mining industry often lacked motivation and possessed an aversion to take the risks associated with opportunities required to develop new enterprises. 130 The cyclical nature of Eastern Kentucky's economy has had the same effects, feeding into an overall feeling of fear and inadequacy. 131 The poverty faced by the residents of Appalachia is a condition 132 that they must overcome in order to solve the more complex problems of physical and mental health. Without the chance to make choices, the residents have become resigned to substandard living conditions.

127 Id.
128 Id. (quoting Letcher County Judge Executive, Carroll Smith, from an interview she gave to ABC news).
130 Id. at 115, 195. (concluding that the coal miners often have deep feelings of resignation about their future because they cannot control the boom and bust cycles of coal mining industry).
131 See CAROLYN PERRUCCI, ET AL., PLANT CLOSINGS: INTERNATIONAL CONTEXT AND SOCIAL COSTS 115 (1988). The feeling of economic helplessness experienced by residents in eastern Kentucky is not a new phenomenon. Purdue University Sociology Professor Carolyn Perrucci researched the anxiety of the economically disenfranchised in Monticello, Indiana, a small community severely impacted by the closing of its RCA plant in 1985. The majority felt the following sentiment best expressed their feelings: "No matter what I do it will be near impossible to find a job in the months ahead."
132 See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, U.N., HUMAN RIGHTS IN DEVELOPMENT, http://www.unhchr.ch/development/poverty-02.html. Poverty is best described as "a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."
2. Health

Americans do not have equal access to healthcare. The residents of Appalachia face a multitude of serious healthcare issues. They fall into an underprivileged class of society who are victimized by the current healthcare system. Poverty creates a significant hurdle to healthcare access. One of the most troubling is poor nutrition because of its disproportionate effect on children. The children are not consuming the recommended amounts of fruits and vegetables, and they also consume fewer dairy products than the average American child. Decreased vitamin intake and reduced nutrient levels increase their long-term risk for developing various chronic diseases. Poor nutrition has caused a growth in diabetes diagnoses throughout the Appalachian states, the treatment of which is difficult and not getting any easier.

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133 See A New Mechanism of Disease, RACHEL'S ENV'T & HEALTH WKLY., Feb. 5, 1998, at 584, http://www.rachel.org/bulletin/pdf/-Rachels_Environment_Health_News538.pdf (“The National Center for Health Statistics confirms that Americans earning $9000 or less, have a death rate 3 percent to 7 percent higher than Americans earning $25,000 or more.”)


135 See SUE FISHER, IN THE PATIENT'S BEST INTEREST: WOMEN AND THE POLITICS OF MEDICAL DECISIONS 144 (1986). Fisher describes the socioeconomic structure of American society and how that structure impacts the organization of the medical profession, the ways in which medical care is delivered, and the types and distribution of illness and disease.

136 See CTR. ON HUNGER AND POVERTY, FRIEDMAN SCH. OF NUTRITION SCI. AND POL’Y, TUFTS UNIV., Childhood Hunger, Childhood Obesity: An Examination of the Paradox, available at http://nutrition.tufts.edu/consumer/hunger. “14 million children live in food insecure homes where food may be scarce or diets altered due to limited incomes.”

137 Id.

138 Id.

139 See Liz Amrhein, Institute to Fight Diabetes Epidemic, UNIVERSITY WIRE, Oct. 2, 2003. “Diabetes cases are two to three times more prevalent in this area than in the rest of the country.”

Poor nutrition is also causing oral hygiene problems. In a recent study of tooth loss, it was discovered that those suffering the most lived in the Appalachian states of Kentucky, West Virginia, Mississippi and Tennessee. The results strongly suggest that people living in this region have not benefited appreciably from the advances in the prevention and control of oral disorders. Perhaps this is because of the region's comparative poverty and its inability to attract doctors. At any rate, there is a significant healthcare crisis developing in the poorest regions of Appalachia.

IV. THE LEGISLATIVE FAILURES TO PROTECT THE RESIDENTS

Elected officials at every level of government are presumed to desire reelection unless they indicate otherwise. Regardless of the elected officials' legislative success, their goals are often only internally realized as long as they hold elective office. As a consequence, few legislators make legislative decisions, without looking towards reelection. Their concern is often focused on the difficult [because] parts of the mountainous region . . . are isolated, [and] its residents [still] grapple with poverty and [the] lack of health care.”


See Casualty List, ROLL CALL, available at http://www.rollcall.com/-pub/casualty/ for a list of federal elected officials who have indicated their intent to retire or run for re-election. See also Postings of Mark Nickolas to Bluegrass-Report.org, http://www.bluegrassreport.org /bluegrass_politics/2006_elections/-index.html (Feb. 7, 2006 at 15:38 EST) for a similar example of state elected officials who have indicated either their intent to retire or run for re-election.

The author has worked on the personal staff of five elected officials at both the federal and state level.

See Maura Reynolds, After Schiavo, GOP’s Push on End-of-Life Issues Fades, The L.A. TIMES, Apr. 7, 2005, at A17. Debate over the politics of the issue has swirled around Washington . . . Wednesday, Sen. Mel Martinez (R-Fla.) acknowledged . . . a controversial memo laying out the political benefits of
vocal interest groups' approval, relying on a good constituent service program to overcome the voters' political concerns prior to the election.

Over the past 30 years, a collection of economic, political science and legal scholars has broadly attacked the traditional conception of democratic politics, arguing that it is based on a series of false assumptions. The underlying assumption is that the political process represents a battle between competing interest groups for scarce resources. This "pluralist" notion of politics is not inherently troubling, as long as everyone's interests receive equal consideration during the legislative process. Public choice theorists predict, however, that concentrated and well-organized constituencies will benefit from the legislative process disproportionately to their interests and that the process will further

the . . . battle for Republicans had been written by a member of his staff. The memo described the politics . . . as 'a tough issue for Democrats' that 'is an important moral issue . . . the pro-life base will be excited that the Senate is debating . . . ' See also NATIONAL MINE ASSOCIATION, U.S. COAL MINE EMPLOYMENT BY STATE, REGION AND METHOD OF MINING - 2004, available at http://www.nma.org/-pdf/c_employment_state_region_method.pdf. There are only 71,023 miners scattered over at least seventeen states. Standing alone, the small and diffuse number of coal miners makes them a very insignificant political force.


See Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 31-32 (1985) (arguing that the 'republican conception' of democratic politics works on the assumption that through discourse, citizens can escape private interests and pursue the public good).

See Alliance for Clean Coal v. Miller, 44 F.3d 591, 593 (7th Cir. 1995) (noting that domestic Electric Utility companies burned 78 percent of the 998 million tons of coal mined in 1992).

See John Cheves, House Votes to Exempt More Overweight Trucks, LEXINGTON HERALD-LEADER, Feb. 23, 2005, at A1 (discussing how the Kentucky House of Representatives recently considered and passed a legislative proposal (55 to 32) to increase the state highway, hauling weight exemptions. For nearly two decades the coal industry has enjoyed hauling weight exemptions. The legislative action was in response to a threatened legal challenge from other hauling industries, which had been threatened if the exemptions weren't expanded).
dilute the political power of more diffuse constituencies. An analysis of the coal mining industry through the public choice theory suggests that when the interests of the coal industry conflict with the interest of those living in the coal fields of Eastern Kentucky, the democratic political process favors the well-organized and well-funded mining industry at the expense of the ordinary citizen's interest rather than equally weighing the costs and benefits to all.

The mining industry has always been well organized. Of late, the industry's Political Action Committees (hereinafter "PAC"), have effectively brought its voice to the corridors of the Capitol and the White House. A PAC spends the election cycle evaluating an individual legislator's support of positions that the interest group supports and then donates to political campaigns accordingly. Though unregulated soft money is restricted, cor-

151 See GEORGE VECSEY, ONE SUNSET A WEEK viii (1974) (discussing Vecsey's interactions with coal miners and his conclusion that if the State of Appalachia should ever be established, it should only consist of the coal-bearing portions of Virginia, Tennessee, Kentucky, Ohio, and West Virginia).

152 Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771 (1994) (quoting the Senate Committee on Human Resources, years after enactment of these mine safety laws... there is still no means by which the government can bring habitual and chronic violators of the law into compliance.).

153 See Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873, 890-901, 906 (1987) (concluding that the influence of special interest groups on the political process is often overstated, but very real).

154 See Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001). Senator Feingold (WI) and Senator John McCain (AZ) coauthored the most comprehensive campaign finance scheme in the last 30 years in an attempt to regulate political contributions to PACs.


156 See, What is a PAC?, The Center for Responsive Politics, at http://www.opensecrets.org/pacs/pacfaq.asp. PACs represent business, labor or ideological interest.

Corporations can still wield influence through the hard money provided by their PACs, money which is becoming increasingly crucial for campaigns. The industry's influence is rapidly expanding in both state and federal governments. That influence can be seen in the manner legislatures draft the legislation that ultimately regulates the industry.

Most states have campaign finance laws that are more lax than those adopted for federal elections. Generous contributors can have a huge impact on state elections, which often raise fewer campaign contributions because of the parochial nature of elections. Arguably, state elections more greatly impact the daily lives of average citizens than federal elections. For example, the coal industry played a highly influential role in the 1996 campaign of

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158 See, Background on Soft Money, THE Center for Responsive Politics, http://www.opensecrets.org/pubs/glossary/softmoney.htm. Soft money is "any contributions not regulated by federal election laws." This money is used to benefit the general parties and not specific candidates. In reality, the soft money is used to pay for behind the scene expenses including office supplies, which frees up other contributions to the party for direct candidate support.


160 See Paul J. Nyden, Other Coal Interests Spread Campaign Contributions, THE SUNDAY GAZETTE MAIL, Oct. 17, 2004, at 1A (describing how the president of Massey Energy Corp., donated more than $1.7 million to a nonprofit PAC to use against West Virginia Supreme Court Justice Warren McGraw in his reelection campaign.)


162 Id. "Peabody executives were among 30 or 40 industry officials who participated in a briefing given by members of the Vice President's energy task force in meetings set up last spring by the Edison Electric Institute, the power industry's primary lobbying group."

former West Virginia Governor Cecil Underwood.\textsuperscript{164} Mining interests collectively donated $500,000 to his campaign.\textsuperscript{165} Those interests also donated to the campaigns of all 17 West Virginia State Senators serving in 1997.\textsuperscript{166} As the Fourth Circuit Court of Appeals noted in \textit{Bragg v. W. Va. Coal Ass’n},\textsuperscript{167} both the coal mining industry and the West Virginia political establishment have a history of strongly reacting to any perceived threat.\textsuperscript{168} The protection of the industry’s interests is not limited to the West Virginia government. Kentucky’s elected officials have developed the same paternalistic relationship with the mining industry.\textsuperscript{169}

There is a calculus that proposes to explain why money influences elected officials to such a great extent.\textsuperscript{170} Reelection at the end of the first term provides the single biggest payoff in election math. The legislator gains both the opportunity to serve in the second term and the chance to be reelected at the end of the second term to serve in a subsequent third term.\textsuperscript{171} The only unknown variable is the amount of money necessary to run a successful reelection campaign. The politicians clamor for it and the PACs are willing to provide it when their interests are supported. The election calculus provides one plausible explanation why elected officials have been swayed by the organized and well-funded mining industry more than their constituents.

Another plausible but diminishing explanation is competitive districting. Before legislative districts were gerrymandered to create “safe” seats, elected officials had to focus attention on the sources of campaign cash that they would need to defeat equally well-funded challengers. Perhaps a combination of explanations


\textsuperscript{165} See Loeb \textit{supra} note 92, at 29.

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} 248 F.3d 275 (4th Cir. 2001), \textit{cert. denied.}, 534 U.S. 1113 (2002).

\textsuperscript{168} See \textit{id.} at 285.

\textsuperscript{169} See discussion \textit{infra} on state failures to protect residents.


\textsuperscript{171} \textit{Id.}
applies to the state and federal governments' failures to protect the residents of Eastern Kentucky.

A. State Government's Failure

Statutes and regulations governing surface mining practices in Kentucky were slow to emerge. When the state legislature was forced to take an initial step toward regulation, the resulting legislation was at best, an ill-conceived and ineffective token attempt to stop the environmental and human ravages caused by surface mining. The legislature's motives may be best understood when viewed simply as an attempt to keep coal mining operations economically viable in Kentucky. This desire set off Kentucky's race-to-the-bottom. The legislature ignored the negative impacts of the industry in order to pass legislation designed to keep mining operations from going elsewhere. A review of subsequent legislation reveals a continuing pattern.

The Kentucky Legislature has recognized the environmental damage caused by surfacing mining, but its legislative initiatives have failed to mitigate those harms. In 1962, the state legislature created the Natural Resources and Environmental Protection Cabinet and gave it the power to promulgate administrative regulations pertaining to surface mining, investigate viola-

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172 See 1954 Ky. Acts. Ch. 8 §18. The first legislative attempt by the Kentucky General Assembly to regulate surface mining was only appropriated the paltry sum of $5,000 to enact the new law's provisions. Fiscal years 1954 and 1955, were only marginally better with $15,000 in appropriated funds. The low funding level suggests that the Legislature possessed significantly less than earnest concern for regulating the coal mining industry.


174 See KY. REV. STAT. ANN. §350.020 (LEXIS NEXIS 2004). The general Assembly further finds that unregulated surface coal mining operations cause soil erosion, damage from rolling stones and overburden, landslides, stream pollution, the accumulation of stagnant water and the seepage of contaminated water, increase the likelihood of floods, destroy the value of land for agricultural purposes, destroy the aesthetic values, counteract efforts for conservation of soil, water and other natural resources... so as to constitute an imminent and inordinate peril to the welfare of the commonwealth.

175 KY. REV. STAT. ANN. §350.028 (LEXIS NEXIS 2004).

176 Id. at (1).
tions of those regulations, issue suspension orders to violators, and impose civil fines. However, the Cabinet Secretary is a political appointee, and as such, is only as effective as the Governor wants him to be. There may not be a structural accommodation that would fix the transient authority of the Secretary, but the political solution is to place more pressure on the candidates running for Governor.

To appease the mining operators, the state legislature repealed the strip mining and reclamation fund in 1972 and replaced it with a bond pool program. Rather than pay individually for reclamation activities, members of the bond pool can opt in and pay a monthly premium. If a member of the bond pool goes bankrupt or otherwise closes its business without reclaiming the land, the bond pool intercedes and provides the necessary funding. This has created a windfall for the smaller and less scrupulous mine operators who can maximize profits, minimize risks, and let the state pick up the tab.

The state also has the ability to impose stiff penalties on mining operators who violate the provisions of state laws. The violations can be as severe as $5,000 plus an additional $5,000 per day

\[177\] Id. at (2).
\[178\] Id. at (3).
\[179\] Id. at (4).
\[180\] Mead, *Supra* note 61, at 650, (finding that between the period of July 1, 1974 and June 30, 1975 the Kentucky Division of Reclamation found that during the last six months of 1974: 224 non-compliances were issued, 74 strip mining permits were suspended and 43 out-of-court settlements had been made for $71,200. A new Administration brought dramatically different results for the first six months of 1975: 472 non-compliances were issued, 163 strip mining permits were suspended and 43 out-of-court settlements had been made for $315,500).
\[184\] Reece, *supra* note 69, at 47. “James and Aubra Dean own coal companies that are in good standing with state and federal regulations. They then set up smaller companies that lease mining equipment from the good companies and post a bond. The small company goes under and forfeits the bond. The value of the bonds is rarely enough to cover the costs of mitigation.”
for each day of operation within which the violation continues. Like Kentucky’s first attempt to regulate, this endeavor at regulation is fatally limited. There simply are not enough inspectors to find all of the violations. Inspections must be scheduled, and consequently, the arrival of the inspector is widely known. The lack of surprise limits enforcement capabilities. Operators are able to “clean” up the mine and superficially mitigate any environmental hazards prior to the inspector’s arrival.

Inspectors face an additional hurdle. Several mine safety inspectors have been indicted on bribery charges, while other inspectors must constantly face the scrutiny of their decisions.

The state legislature also specifically responded to federal efforts to curb the environmental destruction present in surface mining. After the Surface Mining Control and Reclamation Act (hereinafter “SMCRA”) was signed by President Carter, the legislature explicitly protected mountaintop removal strip mining and limited the rigorousness of state regulations to the lower limit imposed by the SMCRA. Kentucky’s race-to-the-bottom was precipitated by its competition with neighboring states for the

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185 KY. REV. STAT. ANN. §350.990 (LEXIS NEXIS 2004).
186 See MSHA Taking Hiring Efforts to Mining Communities Nationwide; Agency to Conduct Next On-Site Applicant Screening Sessions in KY, VA, US NEWSWIRE, Oct. 15, 2004. The National Mine Safety Administration has taken the unprecedented step of on-site recruiting to replace retiring mine inspectors. Insufficient numbers of mine inspectors throughout the heart of Appalachia is a common occurrence. See also Vivian Stockman, What King Coal Wants DEP Chief Should Hire Himself to do Agency’s Public Relations, THE CHARLESTON GAZETTE, Aug. 12, 2000, at A5. Michael Castle, Director of West Virginia’s Department of Environmental Protection has repeatedly noted that the state doesn’t have enough money in the budget to hire the appropriate number of mine inspectors.
187 Indictments Could Hurt Panel Advocate Says Mine Board’s Credibility Will be Questioned, CHARLESTON DAILY MAIL, May 11, 1994, at 3D. “The indictments of three federal mine-safety inspectors on bribery charges may hurt the U.S. Mine Safety and Health Administration’s credibility, which is already tenuous in eastern Kentucky, a Kentucky safety advocate said.”
188 See infra notes 218-36.
191 ENERGY INFORMATION ADMINISTRATION, U.S. DEP’T OF ENERGY, COAL PRODUCTION AND NUMBER OF MINES BY STATE AND MINE TYPE (2004),
industry's economic infusion. In an effort to spur economic development, it has enacted low environmental standards to lure mining operators into or keep them within the state. When that alone has not been enough, the state legislature has conceded to the industry's interests to keep mining alive and economically viable in Kentucky.

The Mountain Eagle provides insight into another problem facing the people of eastern Kentucky. There is a history of abuse of power in the region and those with power often apply undue influence on efforts to generate sustainable development outside of the coal industry. The mountaineers and coal miners of Eastern Kentucky have always taken their politics very seriously and have consequently acquired a long history of cronyism and nepotism. Former Governor Paul Patton wanted to have a sport arena built in Pike County. He used his elected office to bully the county's then-Judge Executive into using public funds to buy private land in downtown Pikeville for the arena. Even though


KY. REV. STAT. ANN. § 143.010 (2004). A severance tax is levied on every coal company engaged in severing and/or processing coal.

KY. REV. STAT. ANN. § 141.0405 (2004). The state provides a nonrefundable tax credit for companies to purchase coal subject to § 143.020 that is used for the purpose of generating electricity. The state legislature imposes a tax on coal production, gives a tax incentive to instate electricity producers, causing a greater demand, and receiving a larger severance tax. Creating an incentive to burn coal for electricity production also cause an increase in acid rain. See supra text accompanying notes 103-05.

See supra text accompanying notes 154-56.

The Mtn. Eagle is a weekly newspaper published in Letcher County, Kentucky.


See Glasmeier, supra note 8, at 140.


the Judge Executive went toe-to-toe with the Governor, stating her desire to provide the rural areas of the county with clean water before building a sports arena, the Governor indicated her opposition was futile. He intended to make decisions on how the coal severance money would be spent in Pike County. That attitude has continued into the current Governor's Administration.

In a huge political success for the residents of eastern Kentucky, the legislature finally passed the "Broad Form Deed Amendment" in 1988. The amendment changed Kentucky's Constitution to prevent the exploitation of the surface owner that was firmly established in Martin v. Kentucky Oak Mining Co., its antecedents and progeny. After the Constitutional adjustment, the surface owner's rights were protected by a reversion to the general assumptions held by the early mountaineers. Essentially, if the method of coal extraction was not explicitly stated in the language of the deed, then the only extraction methods permitted are those that were known at the time and were in the specific area covered by the deed. Although this eliminated the origination of

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200. KY. REV. STAT. ANN. §143.020 (2004). Coal production is statutorily taxed at 4.5 percent of the total value of coal sales for the year.
201. See Glasmeier, supra note 7, at 140
202. Tom Loftus, Coal-tax Funds Shift in Fletcher Budget; Critics Fear Delay in Some Projects, The LOUISVILLE COURIER-JOURNAL, Feb. 16, 2005, at 1B. "Senate Democrats from coal counties complained yesterday that needed water and sewer projects in the coal fields would be delayed under part of Gov. Fletcher's proposed budget . . . The Fletcher budget calls for shifting about $68 million to other programs."
204. 1988 Ky. Acts Ch. 117 §1.
205. Id. The Constitutional amendment required that "in any instrument . . . purporting to sever the surface and mineral estates . . . which fails to state or describe in express or specific the method of extraction to be employed . . . in the absence of clear and convincing evidence to the contrary . . . the intention of the parties . . . was that the coal be extracted only by the method . . . commonly in use in Kentucky in the area affected at the time the instrument was executed."
206. 429 S.W.2d 395 (Ky., 1968), overruled by Akers v. Baldwin, 736 S.W.2d 294 (Ky., 1987). See also infra Part IV.A.
207. Akers, 736 S.W.2d 294. The last in a line of cases that permitted strip mining based on the general grants in broad form deed. This line of cases was entirely overruled by State constitutional amendment in 1988.
the harm, it did not erase the accumulation of the environmental devastation that had occurred during the previous ninety years.

B. Federal Government Fails

The United States Congress passed several major pieces of environmental legislation over the last 50 years. This review starts with the Clean Water Act (hereinafter "CWA"), which plays a major role in regulating coal mining. Congress intended that the Environmental Protection Agency (hereinafter "EPA") should administer the CWA as a weapon to improve the quality of America's water resources. However, the EPA has had little success in using the statute to reduce point-source pollution like AMD that has become such a pervasive and widespread problem in Eastern Kentucky and throughout Appalachia. The circuitous structure of the statute often makes interpretation and appli-

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208 Clean Water Act, Clean Air Act, and the Surface Mining Control and Reclamation Act.
210 See Southern Pines Assoc. v. United States 912 F2d 713 (4th Cir. 1990) (concluding that the structure of the CWA indicates that Congress intended it to allow the EPA to quickly redress environmental problems without becoming entangled in protracted litigation and that judicial review of compliance orders issued under the act were necessarily precluded).
212 See Victor B. Flatt, A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act), 25 B.C. ENVTL. AFF. L. REV. 1, 2-6 (1997) (suggesting that insufficient funding for the EPA and a corresponding lack of enforcement are responsible for the stagnation of the nation's efforts to improve water quality).
213 33 U.S.C.S §1311 (2005). The legislative history of the Effluent Limitations demonstrates the problems the EPA has had in quickly redressing point-source polluters. Point-source limitations were originally supposed to be met by July 1, 1983. This date was later extended to July 1, 1988. Toxic pollution limitations were originally supposed to be met by July 1, 1984. This date was extended to Mar. 31, 1989.
214 See supra notes 89-95.
215 Citizens Coal Council & Ky. Res. Council, Inc. v. United States EPA, 385 F.3d 969, 972 (6th Cir. 2004), vacated, Citizens Coal Council v. United States EPA, 2005 U.S. App. LEXIS 3333 (6th Cir. 2005) (Gwin, D.J.). The court used the following example to demonstrate the "ridiculous number of cross references" contained in the CWA. " §304(b)(4)(B) . . . refers readers to
cation difficult.\textsuperscript{216} In fact, the EPA’s application of the CWA has arguably made things worse. Under regulations adopted by the EPA in 1985, the CWA possessed a considerable economic disincentive to re-mine and mitigate AMD from abandoned mines.\textsuperscript{217} Re-mining is the process by which an operator goes into a previously abandoned mine and uses modern mining techniques, including surface mining, to remove remaining coal deposits.\textsuperscript{218} Few re-miners were willing to accept the costs of AMD mitigation that they did not create.\textsuperscript{219}

Congressman Rahall of West Virginia introduced an amendment to the CWA in 1987\textsuperscript{220} in an attempt to increase the frequency of re-mining and consequently increase the mitigation of AMD. His amendment exempted certain re-miners from the federal water quality standards for effluent\textsuperscript{221} levels to encourage re-mining operations. However, when the EPA promulgated the rules

\textsuperscript{216} \textit{Id.} at 971. (expressing frustration with the CWA, the court stated, “The CWA is an enigmatical piece of legislation. Filled with more sesquipedalian jargon than a year’s subscription to any trade journal and a Byzantine system of cross references, its intricacies are virtually indecipherable.”).

\textsuperscript{217} \textit{Id.} at 974. “By using the same standards for both the mining of virgin land and the re-mining of abandoned mines, the regulations imposed a large potential liability for anyone who took over the land encompassing the abandoned mines.”

\textsuperscript{218} \textit{See OSM supra note 41, at http://www.osmre.gov/scripts/-album.pl?album=Remining;photo_height=150.}

\textsuperscript{219} \textit{Id.} “Faced with a need to bring re-mining operations into compliance with the same standards used for first-time mining, potential re-miners allowed abandoned mines to remain fallow.”

\textsuperscript{220} \textit{Id.} Congressman Rahall’s amendment became §301(p) of the CWA codified at 33 U.S.C. §1311(p) (2005).

\textsuperscript{221} 40 C.F.R. §401.11(i) (2000). Effluent limitation is defined as “any restriction established by the Administrator on quantities, rates, and concentrations of chemical, physical, biological and . . . dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.
to interpret this legislation, they scrambled the legislative intent. The regulations were eventually invalidated, but not before the fault lines in the EPA's management of the CWA were exposed.

Recently, the applicability of the CWA has been implicated in the turf war between the EPA and the Army Corps of Engineers (hereinafter "Corps") over valley fill permit applications. Each agency administers a permit program that directly impacts pollution standards. The EPA administers the §402 permits. The Corps administers §404 permits. The frequency of non-permitted valley fills surrounding mountain top removal mining has called into question which agency has the ultimate authority to issue or deny the requisite permit that allows mining operations to have valley fill as a point-source pollution discharge.

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222 See supra note 197, at 981. "[T]he EPA promulgated a rule that created new generally applicable regulations for coal re-miners. These regulations parallel the Rahall Amendment in some respects and run contrary to the Rahall Amendment in others." The court held that under an application of the doctrine established in Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), the EPA had reasonably read the CWA's authority allowing it to promulgate this type of regulation. However, the regulations were invalidated because they were "without observance of procedure required by law."

223 Id. The court also found that the EPA's decision to set effluent limitations through sole reliance upon site-specific factors ran afoul of the CWA's policy against site-specific regulations. Additionally, the court found that the EPA had shirked its duties under 33 U.S.C.S. §1314 (b) by adopting non-numeric effluent limitations based upon background conditions, and finally that the EPA had failed to consider all the factors set forth in §1314(b).

224 See Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 204 F. Supp. 2d 927 (D. W. Va., 2002), vacated and remanded by Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003). Chief U.S. District Judge Charles Haden ruled that the proposed valley fill rule change was illegal, and issued an injunction preventing the rule from taking effect. The injunction was overturned for being too broad in its application.


226 Id. at §1344 requires the Corps of Engineers to authorize permits for the discharge of dredged or fill material into navigable waters.

227 Letter from Thomas Welborn, Acting Deputy Director, Water Management Division, EPA Region 4, to Carl Campbell, Kentucky Department for Surface Mining Reclamation and Enforcement Commissioner (Feb. 28, 2000), available at http://www.surfacemining.ky.gov/NR/rdonlyres/859756FB-5B9E-4A11-A565-EFDA0FF8C07A/0/RAM133.PDF (expressing EPA's suspicion...
The Corps' administration of the §404 dredge and fill permit program has an EPA oversight component. The discrepancy arises over which agency's definition of "fill material" and "discharge," is applied to the statute. The EPA defines "fill material" as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." The Corps defines fill material as "material placed in the waters of the U.S. where the material has the effect of . . . replacing any portion of a water of the United States with dry land or changing the bottom elevation of [a water body]." Through the simple twist in verbiage, the EPA definition introduces a crucial ambiguity. While the Army Corps fill permit is for a purposeful activity, the EPA fill permit has been construed solely to regulate discharge of material that might fill. Consequently, the Corps permit prevents point-source discharge of a pollutant solely for the purpose of waste disposal; the EPA's does not.

Despite this ambiguity, EPA's longstanding definition of "discharge of fill material" indicates that the agency has not proposed that waste disposal would be a proper §404 permit purpose until the 2002 rule. When the Court was asked to determine which permit system should be applied to mountaintop removal mining, the court concluded that §402 permits were the

and concern that the Kentucky mining industry was not adhering to the §404 permit requirements).


40 C.F.R. §232.2 (2004). The Corps of Engineers responsibility is limited to fill used in water construction including: impoundments, causeways or road fills, dams, and artificial islands.

Id. at §232.2(e). The term does not include point-source pollution discharged into the water primarily to dispose of waste. The EPA regulates that type of discharge under §402 of the CWA.

See Nathaniel Browand, Shifting the Boundary between the Sections 402 and 404 Permitting Programs by Expanding the Definition of Fill Material, 31 B.C. Envtl. Aff. L. Rev. 617, 624 (2004) (noting that the EPA has used a consistent definition of discharge fill material since it promulgated regulations after passage of the CWA.)


See Warrick, supra note 57.
most appropriate. It enjoined the Corps from issuing any further §404 permits for mountaintop removal overburden valley fill permits. Reading the ambiguous EPA definition to allow discharges of fill material "for any purpose" is necessarily incorrect.\textsuperscript{235}

The legislative history of the Surface Mining Control and Reclamation Act of 1977 reveals an agonizing\textsuperscript{236} but widely supported\textsuperscript{237} legislative process that finally ended when President Carter signed the SMCRA into law. The federal legislature recognized that nationwide standards for surface coal mining were nec-

\textsuperscript{235} Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 204 F. Supp. 2d 927, 944 (D. W. Va., 2002), vacated, 317 F.3d 423 (4th Cir., 2003). "Section 404 fills permitted solely for waste disposal were not legal then and are not now."

\textsuperscript{236} See The Honorable Morris K. Udall, \textit{The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect}, 81 W. VA. L. REV 553, 554 (1979). "It took six years of tenacity and bitter debate to pass [SMCRA]. The history of the Act would serve as a textbook for any national legislator desiring to thwart the clear will of the majority of the Congress." The legislative endeavor included "183 days of hearings and legislative consideration, eighteen days of House action, three House-Senate Conferences and Reports, eleven Committee Reports, two Presidential vetoes, approximately 52 recorded votes in the House and Senate, and the machinations (and statesmen-like conduct) of three Presidents."

necessary to protect the environment from a host of adverse effects. The regulatory requirements had to be established by the federal government to prevent the race-to-the-bottom that occurred when states alone regulated the industry. Even then, elements of the race were evident in the federal legislation. The legislation finally signed into law represented a cooperative federalism where the federal regulations became the absolute minimum but the states were free to enact regulations as strict as they deemed necessary.

The SMCRA set out specific requirements for reclamation planning, including the requirement that mining companies acknowledge the pre-mining condition of the land and produce a detailed description of how the land will be used after post-mining reclamation. The mining company also had to make a determination of how mining and reclamation activities would affect the quality of the surface water. The company essentially had to demonstrate prior to the commencement of mining activities that reclamation of the surface could be accomplished under the state or federal requirements.

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239 See supra note 230, at 556. Representative Morris Udall managed the various bills during legislative debate on the House floor. He expressed his fears and recognized the federal legislators representing the eastern and western coalfield states were racing-to-the-bottom when he commented, “I remain convinced that various amendments offered to the performance standards or procedural provisions of the legislation were motivated by a desire to tilt the balance in one direction or the other.”
240 See Bragg v. W. Va. Coal Ass'n, 248 F.3d 275, 293 (4th Cir. 2001). “The Act provides for enforcement of either a federal program or a State program, but not both. Thus, in contrast to other ‘cooperative federalism’ statutes, SMCRA exhibits extraordinary deference to the States.”
241 Id. at 295. “While it is true that Congress’ desire to implement minimum national standards for surface coal mining drives SMCRA, Congress did not pursue, although it could have, the direct regulation of surface coal mining as its preferred course to fulfill this desire. Nor did Congress invite the States to enforce federal law directly.”
243 Id. at §1258.
244 Id. at §1258 (a)(2).
245 Id. at §1258 (a)(4).
246 Id. at §1257 (b)(11).
Based on the proof provided by the mining company, the regulating authority was able to approve or deny a surface mining permit.\footnote{247} Once mining ended, the company was required to return the land to the approximate original contour wherever possible\footnote{248} and reestablish a permanent vegetative cover.\footnote{249}

The greatest failure of the SMCRA is its enforcement. Those mining companies that do not declare bankruptcy and actually follow through on their reclamation plan certainly follow the letter but not the spirit of the law. Many companies simply plant weeds\footnote{250} and claim that the post-mining use is pastureland in a place that had previously been inhospitable to pasture land.\footnote{251} Citizen groups are permitted to file a civil action against the state or federal governments or any political subdivision of either government to compel compliance with the provisions of the SMCRA.\footnote{252} While the law provides for compensation of appropriate attorney’s fees,\footnote{253} plaintiffs must be exceedingly careful in crafting the suit. They must have some success on the merits before a court will award attorneys’ fees under the SMCRA.\footnote{254} This rule may well dissuade eligible citizen suits for fear of failure and individual responsibility for attorneys’ fees.

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\footnote{247}{Id. at §1260 (b).} \\
\footnote{248}{Id. at §1265 (b)(3). A variance permit for steep slope mining can waive this requirement.} \\
\footnote{249}{Id. at §1265 (b)(19).} \\
\footnote{250}{See Reece, supra note 69, at 53. “... suddenly we were driving across a savanna landscape so typical of a post-reclamation job. Brown lespedeza waved like prairie grass.” See also Virginia Tech University Weed Identification Guide, available at http://www.ppws.vt.edu/scott/weed_id/lescu.htm, (describing Lespedeza as a perennial with erect stems that may reach five feet in height. Sericea lespedeza as a five-foot high weed that is often prominent in pastures, hay fields, roadsides, and abandoned fields).} \\
\footnote{251}{See Roger Alford, Mountains get new industry: Horses Roam Land Reclaimed from Mining, LEXINGTON HERALD-LEADER, Mar. 21, 2005. “The process of restoring the land after the coal is extracted has made the mountaintops a grazing haven.”} \\
\footnote{252}{30 U.S.C. §1270 (a) (2005).} \\
\footnote{253}{Id. at (f).} \\
\footnote{254}{See Ruckelshaus v. Sierra Club, 463 U.S. 680, 686 (U.S., 1983) (holding that we fail to find in §307(f) [of the SMCRA] the requisite indication that Congress meant to abandon historic fee-shifting principles and intuitive notions of fairness when it enacted the section).} 
\end{flushright}
Environmentalists have become keenly aware that regulations coming from Washington are not going to be strong enough to protect the fragile environment. The mere fact that point-source polluters still exist shows that there is more to do. In a recent speech, renowned environmentalist Robert F. Kennedy, Jr. indicted the legislative process for favoring those who continue to pollute America's waters. Kennedy's acknowledgment forces concerned citizens to ask, why are federal environmental laws so weak?

One answer is that the political payoff of long-term legislation does not materialize soon enough to help in the first re-election campaign when its value is most important. Thus, the value of long-term environmental programs is intrinsically worth less to the legislator than the political payoff from a short-term program. Rather than draft legislation designed to provide long-term solutions to the environmental problems caused by the mining industry, legislators seem content merely drafting spot fixes, like bandages designed to provide temporary political cover.

The President, who is either running for reelection himself or campaigning for his party's next candidate, is willing to sign that weak legislation into law. "The whole policy of" a Presidential administration, "even his most indifferent measures, tend to the object" of reelection; "especially as the crisis approaches, his personal interest takes the place of" the public's welfare. Faced with the notion that voters would rather see an active Administration than a passive one, even if the active Administration makes mistakes, Presidents will sign legislation to develop the public perception that they are protecting the citizens.

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255 See Scott Barker, Kennedy Says Bush Hurting Environment, Knoxville News-Sentinel, Jan. 27, 2005, at B1 (Robert F. Kennedy, Jr. a noted environmentalists discussing Congress's inability to pass a meaningful Clean Air Act recently said "show me a polluter ... I'll show you a subsidy").


257 See Mary Beth Schneider, Governor Marks first 100 days in office, The Indianapolis Star, Apr. 19, 2005, available at http://www.indystar.com/apps/pbcs.dll/article?AID=/20050419/NEWS02/504190432/1008/NEWS02. (Indiana Governor Mitch Daniels, former Director of the Office of Management and Budget under President Bush II, expresses this sentiment in an interview to mark the occasion of his first 100 days in office. "If we make mistakes, let's make
Public choice theory seems to explain why state and federal legislatures have failed to protect the residents of Appalachia. The simple majority requirement for passage of legislation makes compromise essential. But can public choice theory also explain state and federal judicial failures to protect the vulnerable citizens of Appalachia? Disturbingly, the answer may be yes. If this theory is correct, once flawed legislation has been passed in the legislature and enacted by the executive, courts interpreting the statute are left with no choice but to enforce the legislative compromise, contributing to the nightmare rather than fixing it.

Courts in the coal mining regions of Appalachia have a long history of favoring coal companies. This “protectionist” sentiment was expressed by the Pennsylvania Supreme Court as early as 1886, when it held that coal operators should dominate over the residents in order “to encourage the development of the great natural resources of a country” and that when implicated “trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.” The judicial presumption that coal mines should be protected as superior to all other rights

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259 See United States House of Representatives, available at http://www.house.gov/house/MemberWWW_by_State.shtml#ky. There are 100 Senators (two from each state) and 435 Representatives (based on population.) Kentucky currently has six Representatives and two Senators.
262 Id.
263 See Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968), (rebuffing every argument presented by the plaintiff in favor of those presented by the coal mining company), overruled by Akers v. Baldwin, 736 S.W.2d 294 (Ky.1987).
has contributed significantly to the environmental devastation of eastern Kentucky.

A. State Courts Fail to Protect the Poor

The State’s judicial failure to protect the interests of the people over the interests of the mining industry begins in the trial courts. Throughout the Kentucky 5, cases initiated against defendant coal companies in county circuit courts are often dismissed, decided by summary judgment, or settled prior to trial. Lawsuits against coal companies may also be subject to outrageous delays until the plaintiffs have exhausted their funds, energy, and all sense of hope. Consequently, there is an implicit understanding that keeps cases from being filed. If there are no cases pending against a coal company, the court cannot even begin to try to protect the people’s interests.

There were the intrepid few who challenged mining operations; but for the better part of the 20th century, the court provided substandard protection for the residents of Kentucky’s coal-rich counties. In what was perhaps the state judiciary’s greatest failure, with the longest-lasting environmental impact, the Kentucky Court of Appeals consistently enforced the literal language of the broad form deed and resolved ambiguities in favor of the mineral rights owner. The court preserved the supremacy of the broad form deed in a line of cases including Martin v. Kentucky Oak Mining

264 In a survey of court records from Harlan, Knott and Letcher counties the author found that many cases filed against Coal mine operators were either settled or dismissed after substantial delays prior to trial, with few cases actually going to trial. Harlan: 16 cases, two settled and ten were dismissed. Knott: 28 cases, ten settled and ten dismissed. Letcher: 14 cases, one settled and four dismissed. Of the 58 cases, nine are still pending. The records are on file with the author.
265 In Knott County Kentucky, the case of Everage v. Faith Coal Sales, Inc., 91-CI-259 (Oct. 31, 1991) was filed in Circuit Court on October 31, 1991 and settled immediately prior to trial on Apr. 3, 2002. Settlement terms were not available.
266 See Ward v. Harding, 860 S. W. 2d 280, 282 (Ky. 1993).
Co. In *Martin*, the court held that the broad form deed conferred the right to strip mine and protected the owner of subsurface mineral rights from liability as long as mining was not conducted in a wanton, oppressive, malicious or arbitrary manner. The broad form deed, as interpreted by the Kentucky courts, eviscerated the rights of surface owners. *Martin* reaffirmed the courts' long-standing position. Between pressures from the mining industry and the judiciary, there was no safe haven for surface owners in Eastern Kentucky.

Once the right to strip mine was firmly established, the court limited the economic liability of the industry with respect to environmental impacts. In *N. E. Coal Co. v. Hayes* the court held that mineral owners' rights were subservient to surface owners' rights to be free from subsidence, but there was no liability because it would be difficult for mine operators to anticipate any damage they may cause to the surface. Compensation damages for subsidence are measured by the difference in market value of the surface before and after the subsidence occurred. Rather than protect the people and hold mine owners liable for the damage they caused under a trespass or waste theory, the court limited liability to the market price. Liability has minimized further because no one
wants to move into a home within the vicinity of a mine for fear of uncompensated damage and the resulting loss in market value of the property.

Once damage to the surface was effectively limited, the court set its sights on protecting the industry from damage to the ambient air quality. In the 1974 case of Kentland-Elkhorn Coal Co. v. Charles,273 the Kentucky Court of Appeals denied relief to surface owners for coal dust pollution. The surface owners relied on a nuisance theory. The court required proof that the coal operator chose a more harmful procedure over a less harmful, equally available procedure, thus reversing the trial court's judgment for the surface owners. Justice Stephenson's concurrence suggested strict liability should be imposed upon the mineral owner for damages to the surface owner's improvements.274 However, that theory that has not gained acceptance.

Notwithstanding the passage of the SMCRA and enforcement and regulatory activities by the State government, Kentucky's trial courts still coddle the industry. In Natural Resources and Environmental Protection Cabinet v. Kentucky Harlan Coal Co., Inc.,275 the Kentucky Court of Appeals reversed the Harlan Circuit Court's holding that the Environmental Protection Cabinet had overstepped its authority when it assessed a regulatory penalty against Kentucky Harlan Coal Company.276 The Court of Appeals

273 514 S.W.2d 659 (Ky. Ct. App. 1974).
274 Id. at 665 (Stephenson, J., concurring) (reasoning that because older case law states that rights contained in a deed to a property do not absolve the mine operator from liability, strict liability should be imposed for damages to the surface owners' improvements and concurring in the reversal judgment only because of an error in the jury instructions).
275 870 S.W.2d 421, 423 (Ky. Ct. App. 1993). In Apr. 1981, Harlan Coal was issued a notice of noncompliance alleging that they had illegally dumped waste rock materials outside of the areas authorized by its permits. In October and again in November, 1986 Harlan Coal was issued a notice of noncompliance after an agency inspector observed them dumping waste rock materials into a residential yard for use as fill material. After a preliminary hearing, the agency issued a cessation order to the company representative who was present; however, the order was not mailed until November 26 and was not received by Harlan Coal until December 2, 1986. Harlan Coal did not start mitigation until after the order was received by mail. The agency assessed a $16,900 penalty for Harlan's failure to timely remedy the cited violations.
276 Id. at 423. At issue was Kentucky Harlan Coal's, coal-washing plant.
reversed and remanded so that the agency’s order could be reinstated.

B. Federal Courts Interpret the Law to Benefit the Industry

Since the turn of the last century, the federal courts have protected the mining industry at the expense of individuals. In 1882, the U.S. Supreme Court stated, "It is the policy of the country to encourage the development of its mineral resources." Since then, plaintiffs have pursued various theories in their attempts to redress the harms caused by mining operators. In the following discussion of cases, it should be noted that the federal judiciary has had the power to change the direction of environmental protection laws and has steadfastly refused to do so.

The most critical failure of the federal courts regarding the environment in Appalachia was their preservation of the ill-conceived broad form deed. It would be naïve to presuppose mountaintop mining would have never been allowed otherwise. However, had the court ruled differently in several key cases, more time might have passed before mountaintop mining gained it's foothold throughout eastern Kentucky. This in turn would have postponed the cumulative effects of the aforementioned harms.

In a Virginia case, J. M. Mullins et al. v. Beatrice Pocahontas Company, the defendant subsurface rights owner was sued by the surface rights owners, a group of people living and working

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279 432 F.2d 314 (4th Cir. 1970).
in the vicinity of the mine alleging that coal dust from the company’s processing plant contaminated the air. Plaintiffs sought both damages and injunctive relief. The court held that even thought the right to deposit dust on the surface was not contemplated by the deeds between Pocahontas and the plaintiffs, Pocahontas was nonetheless allowed to produce the amount of coal dust reasonably necessary to produce marketable coal. It could not however emit more than reasonably necessary nor could it compel the property owners to bear the cost of its pollution if means of collecting the dust were reasonably available. The court left the definition of a reasonably necessary burden on the surface as an issue of fact to be determined from the evidence. Although the facts in this case flip the traditional roles in mining litigation, as a consequence of the courts holding, the principles underlying the broad form deed were upheld. Coal production was allowed to continue under what the court termed necessary and reasonable disruptions to the surface.

In Buchanan v. Watson, an imaginative plaintiff attempted to persuade the Sixth Circuit that the destruction of his property as a result of strip mining was actionable under the Civil Rights Act. The Sixth Circuit Court of Appeals rejected that argument, holding that the Kentucky Courts’ interpretation of the broad form deed, in allowing strip mining, did not amount to an unconstitutional taking of the surface owner’s rights. In dicta, the court noted that the remedy lies solely in the jurisdiction of the state legislature and courts, essentially closing the circuit’s doors to further action regarding the broad form deed. Justice Douglas took the opportunity in a six-page dissent to the Court’s denial of certiorari

280 Id. at 315.
281 Id. at 320.
282 Id. at 319.
283 290 S.W. 2d 40, 43 (Ky. Ct. App 1956).
284 Id. at 1189. “It is contended that the Court of Appeals . . . has an improper motive with respect to mining deeds. The Watson’s . . . argue . . . the Court has given the . . . mining industry a privileged position in derogation of the rights of surface owners . . . this argument [is not] persuasive.”
285 Id. at 1190. “Property law is, and must be, a creature of state law, with peculiar nuances in each jurisdiction.”
in *Watson* to summarize the history of "environmental and human despoliation" that has occurred throughout Eastern Kentucky.

In a 1977 judicial action that consolidated 22 cases attacking regulations promulgated by the Secretary of Interior pursuant to the SMCRA, *In re Surface Mining Regulation Litigation*, the D.C. District Court held that Congress had intended to allow mountaintop removal strip mining. It merely required that commitments and assurances concerning post-mining use were given to regulators prior to the issuance of a mining permit.

A series of recent cases in the Fourth Circuit raised the extraction of mineral resources to one of the most hotly contested environmental issues in the country. The debate took an unexpected but fleeting twist in favor of environmentalists. In June 2002, a federal district court in West Virginia ruled that valley fills, a key step in the mountaintop surface mining method, is illegal under federal environmental laws. The court noted that the Corps' Huntington, West Virginia, District Office had a longstanding practice of issuing permits solely for purposes of allowing the disposal of mountaintop mining waste into underlying valleys. The court ruled that both the Corps' permitting practice and the valley fills were illegal under the CWA. Chief Judge Charles Haden issued an injunction preventing the Corps from issuing further valley fill permits. However, a three-judge panel for the Fourth Circuit U.S. Court of Appeals quickly reversed, vacated, and remanded the injunction. The Fourth Circuit held that the

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287 *Id.* at 1017 n.10, "It is interesting to note that Kentucky courts stand virtually alone in the degree to which they have expanded grantees' rights under broad form deeds."
290 *Id.* at 345.
293 See Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 430 (4th Cir. 2003).
injunction issued against the Corps was too broad and therefore could not survive.\textsuperscript{294}

The federal judiciary's handling of mining issues has left much to be desired. Rather than deal directly with the causes of the environmental decimation, the courts have consistently relied on the states to regulate. Legendary United Mine Workers President John L. Lewis\textsuperscript{295} expressed this frustration during his fight to have the Court recognize the rights of miners in black-lung litigation. The federal judiciary has clearly abdicated its role in the protection of the most vulnerable for the expediency of protecting the mining industry from liability.

VI. WHERE DO WE GO FROM HERE?

It is a question of interdependence. As America moves forward with plans to solidify "Energy Security" (FN See supra note 59) coal will play a major role. We must find a compromise between society's needs and the exacerbated devastation of Eastern Kentucky's environment and economic constriction. However, several significant political and structural barriers stand in the way of any compromise.\textsuperscript{296} If Appalachia is to be saved, it is imperative that we find a way around those barriers.

The first and foremost barrier is the Eastern Kentucky residents' lack of political influence. Since the residents of Eastern Kentucky are bereft of excess money to invest in the political process, it seems that the quickest solution would be to create the independent state of Appalachia. Appalachia's legislature, federal representatives and its judiciary would, in theory, be able to focus its political influence on legislation to protect the region's environment and improve its economy. The Legislature could work to develop sustainable economic opportunities outside of the mining industry. But noting that the elected leaders in the newly estab-

\textsuperscript{294} Id.
\textsuperscript{295} JAMES P. JOHNSON, THE POLITICS OF SOFT COAL 228 (1979) (quoting John L. Lewis, "It is a sad commentary on our form of government... when every decision of the Supreme Court seems designed to fatten capital and starve labor.").
lished state of Appalachia would fall victim to the same influences that have hampered current state and federal legislatures from passing laws with positive long-term environmental impacts, the discussion will have to focus on measures to improve the status quo.

The standard of living has been so low for so long that most of Eastern Kentucky is dependent on assistance.\textsuperscript{297} To correct this inequity, the state should immediately and unilaterally relinquish the coal severance tax in favor of individual economic reparations similar to the oil dividend in Alaska.\textsuperscript{298} The severance tax acts like a shiny penny distracting the lawmakers’ attention from the long-term environmental harms in favor of the short-term economic benefits to the state. But those benefits are not returned to those who need them most.\textsuperscript{299} A dividend would return the money directly to the place where its value was generated and in turn help prop up the faltering local and personal economies throughout eastern Kentucky.

To overcome Eastern Kentucky’s lack of influence without creating a separate state, it is necessary to further tighten campaign finance rules. While McCain-Feingold was a good step in limiting the influence of special interest, it only limited campaign donations to federal candidates. As a concerned citizenry, people must take the next step and fight to establish stricter campaign finance laws throughout the 50 states. Collectively, society should not feel comfortable when those with a particular political agenda are donating millions of dollars to unregulated campaign organizations to achieve their goals. To correspond with stricter campaign finance laws in the states, it is also necessary to return to the model of citizen-legislator that was established by the founding fathers. If political careers were limited, then the internal pressure for reelection

\textsuperscript{297} See R. G. Dunlop, Series: Welfare Dilemma; In Eastern Kentucky; System often fails single mothers seeking child support; Delinquency rate is staggering, and so is lack of enforcement, The COURIER-JOURNAL, May 3, 1999, at A6 (discussing the welfare problems that have been especially severe in the 49 Appalachian counties of Kentucky and noting that “several national studies have estimated that as many as 25 percent of absent fathers are too poor to contribute substantially [to the welfare of their children].”)

\textsuperscript{298} ALASKA STAT. §43.23.005 et. seq. (2005).

\textsuperscript{299} See supra note 184.
would diminish and legislatures would find it easier to pass legislation with long-term impacts rather than a quick fix. The paradigm of politics would shift from personal power to public good. Only when the influence of money in politics is diluted will the poorest Americans find a political voice.

Structurally, we must develop a sense of shared responsibility. The environmental devastation experienced in Eastern Kentucky is impacting California to the west just as much as New York to the east. At the same time, the economic strength of the nation is impacting Eastern Kentucky. If Newton’s third law of motion\(^\text{300}\) is applied then we can improve our decision-making capabilities by looking at all conceivable implications and appropriately weighing the benefits versus the costs. An application of this cost/benefit analysis, for example, would strengthen the federal regulations surrounding mountaintop removal mining to prevent the mine operators from filling up valleys and polluting streams. The impact on downstream aquifers and water systems would be too significant to ignore.

Presidents Kennedy and Johnson, along with every President and Congress for the past 46 years, neglected to absorb the larger conception. Throwing more money at it will not solve the problem of poverty. We must fix the condition of poverty. The underprivileged have poor sanitation, nutrition, and live in environmentally hazardous conditions.\(^\text{301}\) The lack of money is only one characteristic of the condition of poverty. The United Nations’ approach to eradicating global poverty provides us with a good model from which to develop a domestic anti-poverty agenda.\(^\text{302}\) As International Labor Organization Director-General Juan

\(^{300}\) See Newton’s Three Laws of Motion, at http://csep10.phys.utk.edu/~astr161/lect/history/newton3laws.html. Newton’s Third Law of Motion provides that “for every action, there is an equal and opposite reaction.”

\(^{301}\) See supra Part II and Part III.

Somavia explained, eliminating poverty is ultimately "about the economic, social and political empowerment of people." 303

As stated above, poverty comes with a host of associated health impacts. One of them is the disparity in healthcare provision attendant with poverty. It is often difficult to attract doctors and other healthcare providers to treat Appalachia’s poor. 304 Willingness to recognize healthcare as a fundamental human right could promote a "bottom-up" 305 approach to healthcare, whereby doctors would be required to serve in a national health corps that would serve to strengthen our overall healthcare system.

VII. CONCLUSION

It will take many years to curb the environmental and economic devastation that has freely accumulated throughout Eastern Kentucky for the past century. The legislative and judicial systems at both state and federal levels of government made serious decisions with tragic consequences at the beginning of the 20th Century and they stubbornly adhered to them until the people raised their collective voice in opposition. While the legal justification for the broad form deed was eliminated in 1988, the environmental mitigation required to mend Mother Nature and the efforts necessary to develop sustainable economic opportunities outside of the coal mining industry will stretch forward for decades. The best scenario for an immediate improvement is shifting our national approach to poverty. When we stop blindly throwing money at the problems in Appalachia and realize that Appalachians, just like all other Americans have the right to a clean environment and economic

303 Id.
304 See Michael M.E. Johns, Mandatory National Health Service: An Idea Whose Time Has Come, 269 JAMA 3156 (1993) (proposing one solution to help underserved areas get quality medical care by expanding the National Health Service Corps and incorporating national health service into graduate medical education).
305 See Lewis D. Solomon & Tricia Asaro, Community-Based Health Care: A Legal and Policy Analysis, 24 FORDHAM URB. L.J. 235, 275 (1997) (suggesting that the provision of healthcare services at smaller and more comprehensible facilities would both facilitate their revitalization [and] also provide affordable preventive and primary health care, especially for the uninsured and underinsured").
opportunities, the War on Poverty will be triumphant and President Johnson’s Great Society will finally be realized.