Virginia Code § 55-154.2: An Unconstitutional Taking of Virginia Landowners' Ownership Interest in Mine Voids for the Benefit of Private Industry

By Henry Webb[1] and Patrick R. Baker[2]

HEADNOTE: This article examines the law of the Commonwealth of Virginia regarding the ownership of the increasingly valuable mine voids left behind after coal or other minerals have been removed from beneath a parcel of property. First, the article analyzes the rule of law from 1920 until 1981 under the Virginia Supreme Court's decision in the *Clayborn v. Camilla Red Ash Coal Co.* case and an associated case, which confirmed that it was Virginia landowners, and not the coal companies, that owned the mine voids beneath the landowners' property. Second, the article considers Virginia Code § 55-154.2 as originally enacted in 1981 and as amended in 2012, which stripped the landowners of their ownership interest in the mine voids and gave that ownership interest to private coal companies. Finally, the article establishes that Virginia Code § 55-154.2 constitutes an unconstitutional taking of private property for a non-public use under Article I, Section 11 of the Constitution of Virginia.

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I. Introduction

Mine voids or pore spaces (collectively, "Mine Voids") are the hollow, underground spaces left behind after coal or other minerals have been removed from beneath a parcel of property.[3] Historically, Mine Voids were considered to have very little, if any, value. More recently, however, they have become highly sought by coal companies seeking to dispose of waste byproducts from coal mining operations.[4] In addition, recent scientific and technological advances allowing Mine Voids to be used for natural gas storage and carbon sequestration have further increased the demand for Mine Void ownership and transformed Mine Voids into valued resources.[5]

Prior to 1981, the law governing the Mine Void ownership in the coal-rich Commonwealth of Virginia remained unchanged for 61 years. In Clayborn v. Camilla Red Ash Coal Co., Inc., the Virginia Supreme Court held that when a landowner transferred the mineral rights to a coal company, the coal company owned: (1) an estate determinable in the coal itself; and (2) an incidental easement to use the resulting Mine Void in connection with the coal company's ongoing mining operations on that particular parcel of property.[6] Once those mining operations ceased, however, the coal company's easement to use the Mine Void automatically terminated by operation of law.[7] In other words, at all relevant times the landowner's ownership of the Mine Void continued unabated, and all the coal company possessed with regard to the Mine Void was an incidental easement to use the Mine Void until the coal beneath the subject property was exhausted.

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[3] Patrick R. Baker & Henry Webb, *The Mine Void and Pore Space Conundrum Posed by the Anti-Kelo Movement*, 66 OIL, GAS & ENERGY Q. 1, 9 (2017).
[4] Stanton D. Ernest & William C. Illingworth, *Underground Disposal of Slurry and Coal Refuse in Mine Voids: Does the Coal Owner/Lessee Have the Legal Right to Dispose of Slurry and Coal Refuse in the Mine Voids*, 28 ENERGY & MIN. L. INST. 318, 318 (2008).
[5] Baker & Webb, OIL, GAS & ENERGY Q., 2017, at 2.
[6] Clayborn v. Camilla Red Ash Coal Co., Inc., 105 S.E. 117, 119 (Va. 1920).
[7] *Clayborn*, 105 S.E. at 119.

In 1981, the Virginia legislature took that ownership interest in Mine Voids away from Virginia landowners and gave it to the coal companies by enacting Virginia Code § 155-54.2. That statute provides that "[e]xcept as otherwise provided in the deed by which the owner of minerals derives title, the owner of minerals shall be presumed to be the owner of the shell, container chamber, passage, and space opened underground for the removal of the minerals, with full right to haul and transport minerals from other lands and to pass men, materials, equipment, water and air through such space."[8] In 2012, Virginia Code § 155-54.2 was amended to clarify that coal companies also retain the right to continue to use the Mine Voids associated with a mineral rights grant for any activities related to the removal of coal from "any lands for which a permit to mine has been approved." This allows the coal companies to continue to use the Mine Voids to service mines located on properties other than the property beneath which the original mine was located – even after the coal that was the subject of the original mineral rights grant has been exhausted, the original mine has been sealed, and the mining permit on that original mine has expired or been abandoned.[9]

Virginia Code § 155-54.2, both as originally enacted in 1981 and as amended in 2012, completely and indefinitely strips Virginia landowners of their ownership interest in Mine Voids, the same ownership interest confirmed by the Virginia Supreme Court in *Clayborn*, and transfers that ownership interest to private coal companies. Virginia Code § 155-54.2 thus constitutes an unconstitutional taking under Article I, Section 11 of the Constitution of Virginia which, as amended on January 1, 2013, provides that "the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. . . . [A] taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing

[8] VA. CODE ANN. § 55-154.2 (2012).
[9] VA. CODE ANN. § 55-154.2 (2012).

tax revenue, or economic development, except for the elimination of a public nuisance existing on the property."[10] The coal companies to which Virginia legislature gifted Virginia landowners' ownership interest in Mine Voids are in no way public entities, nor can it be said that Virginia Code § 155-54.2 is necessary to eliminate a public nuisance existing on the landowners' properties. Thus, Virginia Code § 155-54.2 is unconstitutional under Article I, Section 11 of the Constitution of Virginia, as amended, and the statute is unlikely to survive a legal challenge.

Part II of this article will consider Virginia law regarding the ownership of Mine Voids from 1920 to 1981 under *Clayborn* and an associated case, Levisa Coal Co. v. Consolidation Coal Co. Part III will further examine Virginia Code § 155-54.2. Finally, Part IV will demonstrate that Virginia Code § 155-54.2 constitutes an unconstitutional taking under Article I, Section 11 of the Constitution of Virginia.

II. From 1920 to 1981, Virginia Landowners at All Relevant Times Possessed an Ownership Interest in Mine Voids Under Clayborn v. Camilla Red Ash Coal Co. and Levisa Coal Co. v. Consolidation Coal Co.

For more than 60 years, Virginia law regarding Mine Void ownership was clear: the landowner at all relevant times maintained ownership of the Mine Voids, with the mineral rights owner possessing merely an incidental easement for the use of the Mine Voids until the coal that was the subject of the mineral rights grant was exhausted.

A. Clayborn v. Camilla Red Ash Coal Co.

The Virginia Supreme Court established the above rule of law in the 1920 Clayborn v. Camilla Red Ash Coal Co. case. In *Clayborn*, the Clayborns owned fee simple title to an eight-acre tract of land known as the "Helton Tract," except for the coal thereunder, which had been deeded to the Camilla Red Ash Coal Company ("Camilla") in 1887. Camilla also owned a tract of land on the western side of the Helton Tract (the "Western Tract") and leased the coal

[10] Va. Const. art. I, § 11

beneath a different tract of land on the eastern side of the Helton Tract known as the "Burk Tract."[11]

Camilla had bored a tunnel beneath the Helton Tract, and was using that tunnel to transport coal mined from beneath the eastern, Burk Tract, under the Helton Tract, and to a coal tipple Camilla operated on the Western Tract.[12] The Clayborns objected to Camilla's use of the tunnel beneath the Helton Tract to transport coal from the Burk Tract and, when Camilla ignored the Clayborns' objections, the Clayborns filed a lawsuit in equity against Camilla asking the court to enjoin Camilla's further usage of that tunnel to transport coal from the Burk Tract, as well as for damages.[13]

The Court first noted the issue raised by the Clayborns' lawsuit was a matter of first impression in Virginia, and stated that "[t]he prevailing, if not wholly unbroken, current of authority supports the general proposition that a grantee of coal in place is the owner, not of an incorporeal right to mine and remove, but of a corporeal freehold estate in the coal, including the shell or containing chamber, and that as such owner he has the absolute right, until all of the coal has been exhausted, to use the passages opened for its removal for any and all purposes whatsoever, including in particular the transportation of coal from adjacent lands, so long as he operates and uses the passages with due regard to the rights of the surface owner."[14]

The Court then, after much deliberation, declined to follow the above rule:

> Undoubtedly, the grantee of coal in place owns a corporeal hereditament; but all the American authorities agree that the right of the grantee to use the space left by the removal of coal terminates and the space reverts to the grantor when the coal has been exhausted. If, as contended, the conveyance of the coal carries with it the stratum above and below the coal the containing chamber - why should the ownership of the space terminate as soon as all of the coal on the tract has been mined?

[11] *Clayborn*, 105 S.E. at 117-118.
[12] *Clayborn*, 105 S.E. at 118.
[13] *Clayborn*, 105 S.E. at 118.
[14] *Clayborn*, 105 S.E. at 118.

> We think the true and rational view is that the reverter [to the landowner] takes places because the grantee has never at any time had a corporeal interest in the containing walls, and that the conveyance carries the estate in the coal only, with the necessary incidental easement to use the containing walls for support and for the purpose of getting it out. . . .[15]

The Court noted that Camilla either owned the substrata under the coal on the Helton Tract in fee simple, or it only had the right to use those substrata to remove the coal from beneath that property. "If the former, it can use the substrata for any purpose it pleases; if the latter, it can use [the substrata] only as an easement in connection with mining the coal on that tract."[16] The Court continued by noting that when the deed or lease granting the coal rights to the coal company said nothing more than that the coal itself was granted, or that the coal was granted along with the right to mine and remove it, "nothing but the coal and the right to remove ought to be understood to pass" by the instrument. "If the coal owner expects more in connection with his easement for removing the coal, he ought to stipulate for it."[17]

The Court included a helpful analogy comparing the mineral rights owner to someone who buys a standing tree:

> A somewhat similar situation arises when one buys a standing tree. He gets the tree as a part of the real estate, with an easement for support and removal, but he does not acquire any corporeal right in the soil or in the space which the tree occupies. It seems to us that the true and perfectly patent principle is that when a man buys coal, whether he stipulates for the privilege of taking it out or not, he simply gets the coal, with the right to remove it. The coal is his property. As to that he has a corporeal estate just as he has in standing timber. Coal and timber become personal property as soon as they are severed. The right to mine and remove is an incorporeal hereditament, and easement expressed in or incident to the grant of the fee, and in the exercise of this easement the grantee has no more right to put

[15] *Clayborn*, 105 S.E. at 119.
[16] *Clayborn*, 105 S.E. at 121.
[17] *Clayborn*, 105 S.E. at 122.

> an additional burden upon the servient estate than he would have to haul timber from an adjoining tract over a tract upon which he had bought the timber with the right of removal.[18]

Finally, the Court held that Camilla's use of the tunnel beneath the Helton Tract to transport coal from the Burk Tract placed an "additional and unlawful burden upon the estate of the [Clayborns], which ought to be restrained. . . . The track through the Helton tunnel rests upon land owned by the appellants. The coal company has the unquestioned right to use that tunnel so long as it needs it in hauling coal from the residue of the Helton tract. . . . The use of it for any other purpose is a trespass, for which the only adequate remedy is an injunction." After agreeing to grant the injunction sought by the Clayborns, the Court remanded the case back to the trial court for a determination of what, if any, damages the Clayborns were entitled to.[19]

Thus, beginning in 1920, Virginia law with regard to Mine Void ownership was that a landowner granted to a coal company only an estate determinable in the coal, as well as certain incidental easements as necessary to mine and remove the coal, including an easement for the use of the Mine Void, until such time as the coal that was the subject of the mineral rights grant was exhausted. The landowner at all relevant times continued to possess an ownership interest in the Mine Void and, upon the removal of all coal from beneath the landowner's property, the coal company's incidental easement for the use of the Mine Void was automatically terminated by operation of law.

B. Levisa Coal Co. v. Consolidation Coal Co.

The durability of the rule of law established in *Clayborn* was demonstrated by another recent decision of the Virginia Supreme Court, Levisa Coal Co. v. Consolidation Coal Co. In that case the Levisa Coal Company ("Levisa Coal") acquired the mineral rights on various

[18] *Clayborn*, 105 S.E. at 120.
[19] *Clayborn*, 105 S.E. at 122-123.

parcels of property via a 1937 severance deed. That deed granted Levisa Coal ownership of the "the coal, metals and timber, together with all of the rights, privileges, and easements incident thereto, in, on, or under" those parcels of property. The deed did not, however, expressly convey to Levisa Coal the right to use any part of the estate conveyed or the associated easements to support mining activities on other lands.[20]

In 1956, Levisa Coal entered into a lease with Island Creek Coal Company ("Island Creek") and granted Island Creek "the sole and exclusive right and privilege of mining and removing all of the coal from all the seams underlying the Tiller Vein or seam of coal or the horizon of such seam," with the Tiller Vein being located among the parcels Levisa Coal acquired via the 1937 severance deed.[21] The lease also gave Island Creek the right "to make any use of the leased premises which [Island Creek] may deem needful or convenient in carrying on its mining or other operations." One permitted use expressly mentioned in the 1956 lease was Island Creek's right to "dump water or refuse on said premises." The lease qualified the rights given to Island Creek as "limited to such rights as [Levisa Coal] owns and has the right to lease," however, and the lease did not expressly give Island Creek any right to use its leasehold to support mining operations on other lands.[22]

In 1993, CONSOL, Inc. ("CONSOL") acquired Island Creek and all of its assets, including the rights and obligations of the 1956 lease. A subsidiary of CONSOL, Consolidation Coal Company ("Consolidation"), the defendant-appellee in this case, maintained a coal mining operation, the "Buchanan Mine" that was located near a former mine operated by Island Creek, the "VP3 Mine," which had been idled in 1998.[23]

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[20] Levisa Coal Co. v. Consolidation Coal Co., 662 S.E.2d 44, 45-46 (Va. 2008).
[21] Because both of the conveyance instruments at issue in *Levisa Coal Company* predated the 1981 enactment of Virginia Code § 55-154.2, which does not apply retroactively, it was not necessary for the Court to consider the effect of that statute.
[22] *Levisa*, 662 S.E.2d at 46.
[23] *Levisa*, 662 S.E.2d at 46-47.

At some point, Consolidation stopped pumping excess groundwater collecting in the Buchanan Mine into the Levisa River and began to instead pump that groundwater, as well as additional water released into the Buchanan Mine as a result of Consolidation's mining operation there, into a number of idled mines formerly operated by Island Creek, including the VP3 Mine. At that time Consolidation was pumping nearly 2,500 gallons of wastewater per minute into the VP3 Mine, which had the capacity to hold approximately 6.4 billion gallons of wastewater.[24]

In July 2006, Levisa Coal filed a lawsuit against Consolidation seeking injunctive relief and a declaratory judgment prohibiting Consolidation from continuing to pump wastewater from the Buchanan Mine into the VP3 Mine. At a hearing on Levisa Coal's request for a preliminary injunction in November 2006, Consolidation argued it had the legal right to pump wastewater from the Buchanan Mine into the VP3 Mine because Island Creek had agreed to permit Consolidation to do so. In response, Levisa Coal argued that while the 1956 lease had provided Island Creek with the right to mine coal from the VP3 Mine, it provided Island Creek with no right to permit Consolidation to pump wastewater into that mine. Consolidation then asserted that it was actually Island Creek itself, which CONSOL had continued to maintain as a separate entity after acquiring the company, which was pumping the wastewater into the VP3 Mine. Consolidation argued that Island Creek's storage of wastewater in the VP3 Mine was a "use of the leased premises which [Island Creek] may deem needful or convenient in carrying on its mining or other operations," and so was a permitted use under the 1956 lease.[25]

At the conclusion of that hearing, the circuit court denied Levisa Coal's request for a preliminary injunction. The court then ruled that, in considering Consolidation's request for a declaratory judgment, the provision in the 1956 lease that allowed Island Creek to use the

[24] *Levisa*, 662 S.E.2d at 47.
[25] *Levisa*, 662 S.E.2d at 47-48.

leased property for any purpose Island Creek deemed "needful of convenient in carrying out its mining operations or other operations" was "about as broad and expansive as we might imagine." Applying that interpretation of the lease, the court ruled that Consolidation "has the right to place any kind of storage water in the VP3 Mine." The circuit court's final order reflecting the above was entered in December 2006.[26]

Levisa Coal appealed the circuit court's order and, on appeal, the Virginia Supreme Court first considered the issue of whether the circuit court correctly construed the 1956 lease as providing Island Creek and/or Consolidation with the right to store excess wastewater from the Buchanan Mine in the VP3 Mine. Levisa Coal argued that the circuit court had misinterpreted the 1956 lease's "use of the leased premises" as allowing the support of mining operations on other lands. Citing *Clayborn*, Levisa Coal argued the 1937 deed conveying to Levisa Coal the solid mineral estate of the subject parcels of property permitted only a "necessary incidental easement" for purposes of removing the coal and other minerals. Levisa Coal argued the 1937 deed did not grant to Levisa Coal the right to support mining operations on other lands by permitting the inundation of the subsurface area with wastewater. As such, Levisa Coal argued, Island Creek could not have obtained the right to pump wastewater into the VP3 Mine under the 1956 lease because that lease expressly limited the easements granted to Island Creek to those rights Levisa Coal owned and had the right to lease.[27]

The Court stated that it agreed with Levisa Coal regarding this issue:

> In *Clayborn*, . . . we held that a deed or lease transferring a coal estate or portion thereof is 'the grant of an estate determinable [and w]hen the coal is all removed the estate ends for the plain reason that the subject of it has been carried away.' . . . Thus, 'the space [the coal] occupied reverts to the grantor by operation of law.' . . . Accordingly, we concluded that the right to use the tunnels and shafts extended only to the mining operations within the determinable estate, and not to the support of mining

[26] *Levisa*, 662 S.E.2d at 50.
[27] *Levisa*, 662 S.E.2d at 51.

> operations on other lands. We further held that '[i]f the coal owner expects more' than the right to mine and remove the coal within his estate 'he ought to stipulate for it' in the deed or lease.[28]

The Court observed that it discerned no practical distinction between supporting adjoining mining operations by using tunnels to transport coal, as in *Clayborn*, and in storing wastewater from adjoining mining operations in the voids, tunnels, and shafts of an unrelated mine, as in this case. As such, the Court held, "when the 1937 deed conveyed the solid mineral estate of the . . . parcels to Levisa Coal, the parties to that deed contemplated only that the coal and other minerals would be mined from that estate, and that the deed conveyed only an incidental easement to use that portion of the parcels retained by the surface owner as was necessary to support such mining operations. Nothing in the deed conveyed any right to use the voids, tunnels and shafts created below the surface for any purpose other than to support the mining operations on those parcels."[29]

Based on the above, the Court held that since the 1937 deed did not convey any right to use any portion of the mineral estate to support mining operations on other lands, the 1956 lease could not have granted such rights to Island Creek. Simply put, Levisa Coal never possessed the right to use the mineral estate to support mining operations on other lands, and so could never have granted any such right to Island Creek: "[Island Creek] simply lacks the authority to permit [Consolidation] to store wastewater from other mining operations in the VP3 Mine. Clearly, [Island Creek] did not stipulate for such a use of the leasehold in the 1956 lease, nor could Levisa Coal have granted such rights even if they had been sought." Pursuant to *Clayborn*, the ownership of the VP3 Mine's Mine Voids remained with the original landowners who first deeded the mineral estate to Levisa Coal back in 1937, and all Levisa

[28] *Levisa*, 662 S.E.2d at 51, *quoting Clayborn*, 105 S.E. at120.
[29] *Levisa*, 662 S.E.2d at 52.

Coal, Island Creek, or Consolidated ever possessed was an incidental easement to use those Mine Voids until the coal within the VP3 Mine was exhausted. Consequently, the Court ruled the circuit court had erred in ruling that Consolidation had the right to store wastewater from the Buchanan Mine in the VP3 Mine, reversed the circuit court's ruling, and remanded the case for further proceedings consistent with the Court's opinion.[30]

As both the 1920 *Clayborn* case and the 2008 *Levisa* case make clear, the rule of law regarding Mine Void ownership was well-settled in Virginia prior to the enactment of Virginia Code § 155-54.2 in 1981: When a landowner granted a coal company the ownership of the coal beneath a parcel of property, the landowner granted to a coal company only an estate determinable in the coal, as well as certain incidental easements as necessary to mine and remove the coal, including an easement for the use of the Mine Void created by the removal of the coal until such time as the coal that was the subject of the mineral rights grant was exhausted. The landowner at all times continued to own the Mine Void itself, and upon the exhaustion of the coal granted to the coal company, the coal company's incidental easement to use the Mine Voids was terminated by operation of law.

III. Virginia Code § 55-154.2: The Virginia Legislature Takes Landowners' Ownership Interest in Mine Voids Away and Gives it to Private Coal Companies

First enacted in 1981, Virginia Code § 55-154.2 stated as follows:

> Except as otherwise provided in the deed by which the owner of minerals derives title, the owner of minerals shall be presumed to be the owner of the shell, container chamber, passage, and space opened underground for the removal of the minerals, with full right to haul and transport minerals from other lands and to pass men, materials, equipment, water and air through such space. No injunction shall lie to prohibit the use of any such shell, container chamber, passage or space opened underground by the owner of minerals for the purposes herein described. The provisions

[30] *Levisa*, 662 S.E.2d at 52-54.

> of this subsection shall not affect contractual obligations and agreements entered into prior to July 1, 1981.[31]

By transferring ownership of the Mine Voids from the landowners to the coal companies, Virginia Code § 155-54.2 completely departed from the Virginia Supreme Court's holding in *Clayborn* and essentially overruled the precedent.

In 2012, the Virginia legislature further overruled the *Clayborn* decision by amending Virginia Code § 155-54.to add the following provisions:

> B. Notwithstanding the provisions of subsection A[32], with respect to the coal mineral estate, unless expressly excepted by the instrument creating the mineral ownership or lease interest[33], the owner or, if leased, the lessee of the coal mineral estate or its successor, assign, sublessee, or affiliate retains the right to any coal remaining in place after the removal of surrounding coal, as well as the right to use the shell, container chamber, passage, space, or void opened underground that was created by the removal of the coal.
>
> 1. Any such shell, container chamber, passage, space, or void opened underground that is within the boundaries of a mine permit issued under Title 45.1 may be used consistent with state and federal regulations for any activity related to removal of coal from any lands for which a permit to mine coal has been approved, and no injunction shall lie to prohibit such use.
>
> 2. Any such shell, container chamber, passage, space, or void opened underground that is located in a sealed mine for which a mining permit no longer exists may be used consistent with state and federal regulations for any activity related to removal of coal from any lands for which a permit to mine coal has been approved only with the consent of the owner of such shell, container chamber, passage, space, or void. Such consent shall not be unreasonably withheld if the

[31] VA. CODE ANN. § 55-154.2 (1981).
[32] Subsection A of the amended statute is the original text of the statute as enacted in 1981, quoted above.
[33] On its face, VA Code § 55.154.2 only shifts ownership of the Mine Voids to the coal companies in cases where the instrument granting the mineral rights to the coal company did not expressly state that the ownership of the Mine Voids remained with the landowner and did not pass to the coal company. In reality, however, the vast majority of mineral rights grants to which the statute is applicable fall under that exception. Most of the instruments to which the statute is applicable made no mention of Mine Voids whatsoever, as at the time they were drafted Mine Voids were considered worthless and neither the landowner nor the coal company cared who would own them once the mining operations ceased. Baker & Webb, OIL, GAS & ENERGY Q., 2017, at 16.

> owner has been offered reasonable compensation for such use. In determining whether an offer of compensation is reasonable, a court shall be guided by the compensation set forth in other leases for the use of mine voids as is customary in the area.
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> C. The provisions of subdivisions B 1 and B 2 (i) shall not affect any provision contained in any contract in effect as of July 1, 2012, expressly prohibiting the use of any shell, container chamber, passage, space, or void opened underground that was created by the removal of the coal; (ii) shall not alter any contract entered into prior to July 1, 2012, that provides for the payment of compensation from the lessee to the lessor expressly for the use of any shell, container chamber, passage, space, or void opened underground that was created by the removal of the coal; and (iii) shall have no bearing on or application to any determination of ownership rights in natural gas or coalbed methane.[34]

Subsection B clarifies that not merely an owner of mineral rights, but also that owner's "successors, assigns, sublessees, and affiliates" are the owners of the associated Mine Void, such that the original landowner will likely be deprived of its ownership interest in the Mine Void in perpetuity.

Subsection B(1) clarifies that any Mine Void that is within the boundaries of a mine permit issued under Title 45.1 of the Virginia Code "may be used consistent with state and federal regulations for any activity related to removal of coal from any lands for which a permit to mine coal has been approved, and no injunction shall lie to prohibit such use."[35] The effect of Subsection B(1) is to make it clear that, for any mine that remains permitted under the provisions of Title 45.1, the coal company may use the Mine Voids within the boundaries of that mine for any activities related to the removal of coal from any lands for which a mining permit has ever been granted. Interestingly, subsection B(1) does not require that the Mine

[34] VA. CODE ANN. § 55-154.2 (2012).
[35] VA. CODE ANN. § 55-154.2(b)(1) (2012).

Void be used only in connection with the mining of coal from other actively permitted mines, but instead allows the use of the Mine Void in connection with the removal of coal from the much broader and more nebulously defined "any lands for which a permit to mine coal has been approved." Thus, a coal company could, under Subsection B(1) use a Mine Void within the boundaries of a permitted mine for any activities related to the removal of coal from any parcel of property which has ever been permitted for mining, even if that mining permit may have expired or been abandoned long ago.

Subsection B(1) also in no way limits the coal company's right to use the Mine Voids in connection with such activities on other lands only until the coal within the boundaries of the original mine is exhausted. On its face, Subsection B(1) grants the coal company the right to use the Mine Voids within the boundaries of a permitted mine for as long as the coal company chooses to maintain the permit on the original mine, even after the coal within the boundaries of the original mine has been exhausted.

Finally, Subsection B(2) expressly provides that the mineral rights owner may use the Mine Voids within the boundaries of even a "sealed mine for which a mining permit no longer exists" for any activities related to the removal of coal from any lands for which a mining permit has ever been granted. Seemingly crafted specifically to abrogate the rule of law set out in *Clayborn* and *Levisa Coal Company*, Subsection B(2) provides that the coal company continues to own the Mine Voids even after the coal within the boundaries of a mine has been completely exhausted, the mine has been sealed, and the mining permit has expired or been abandoned.

Somewhat incomprehensibly, and in direct conflict with the original language of Virginia Code § 155-54.2 providing that the mineral rights owner is the outright "owner" of the Mine Void[36], Subsection B(2) goes on to provide that the coal company's continued use of

[36] Which original language is retained as Subsection A of the amended statute.

the Mine Voids after the mine has been sealed shall be allowed "with the consent of the owner" of the Mine Voids, provided however that "[s]uch consent shall not be unreasonably withheld if the owner has been offered reasonable compensation for such use. In determining whether an offer of compensation is reasonable, a court shall be guided by the compensation set forth in other leases for the use of mine voids as is customary in the area."[37] Thus, as long as the coal company offers the landowner compensation that comports with the amount of compensation coal companies have paid to other landowners for the continued use of their Mine Voids, the landowner is completely powerless to prevent the coal company from continuing to own and use the landowner's Mine Voids in perpetuity.

Although the language of Subsection A and Subsection B(2) of the 2013 amendment regarding which party is the "owner" of the Mine Voids is contradictory and appears to have been poorly drafted, the end result is the same: Virginia Code § 155-54.2 takes the landowners' ownership interest in the Mine Voids as recognized by the Virginia Supreme Court in the *Clayborn* case and transfers that ownership interest to the private coal companies. As discussed below, Virginia Code § 155-54.2 is an unconstitutional taking, and is thus void and without effect, pursuant to the Article I, Section 11 of the Constitution of Virginia.

IV. Virginia Code § 55.154.2 is an Unconstitutional Taking Under Article I, Section 11 of the Constitution of Virginia

Prior to January 1, 2013, Article I, Section 11 of the Constitution of Virginia stated:

> That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be

[37] VA. CODE ANN. § 55-154.2(b)(2) (2012).

> abridged, except that the mere separation of the sexes shall not be considered discrimination.[38]

Thus, even prior to the January 1, 2013 amendment of Article I, Section 11, Virginia Code § 155-54.2 constituted an unconstitutional taking, as it was clearly not for a "public use" and as such did not comply with either Article I, Section 11 of the Constitution of Virginia or the Fifth and Fourteenth Amendments to the United States Constitution.

The constitutionality of Virginia Code § 155-54.2 under the pre-amendment version of Article I, Section 11 of the Constitution of Virginia was challenged in Bailey v. Spangler, which considered ownership of Mine Voids in connection with an 1887 severance deed. The plaintiff, who owned the surface estate overlying the Mine Voids, asked the Virginia Supreme Court to declare Virginia Code § 155-54.2, as enacted in 1981, "unconstitutional both facially and as applied because it deprived her of her private property rights in the mine void underneath her property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States."[39]

Ultimately, the Court did not decide whether Virginia Code § 155-54.2 constituted an unconstitutional taking, as it decided the case on other grounds rendering that particular issue moot.[40] Notably in that case, however, Conrad Spangler, the Director of the Virginia Department of Mines, Minerals and Energy, admitted that "the coal owner became the actual owner [of the Mine Void] on July 1, 1981," when Virginia Code § 155-54.2 went into effect.[41] The Virginia legislature will seemingly have a difficult time arguing in good faith that Virginia Code § 155-54.2 does not constitute an unconstitutional taking when, in *Bailey*, the Director of the Virginia state agency responsible for regulating mining operations admitted that the

[38] Va. Const. art. I, § 11 (1971).
[39] Bailey v. Spangler, 771 S.E.2d 684, 685 (Va. 2015).
[40] *Bailey v. Spangler*, 771 S.E.2d at 687.
[41] *Bailey v. Spangler*, 771 S.E.2d at 685-686

statute took ownership of the Mine Voids away from the landowners and delivered it to the private coal companies upon its enactment in 1981.

On January 1, 2013, the Virginia legislature amended Article I, Section 11 of the Constitution of Virginia to better protect the rights of private property owners to be free from unconstitutional takings of their private property for non-public uses:

> That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. **In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.** The condemnor bears the burden of proving that the use is public, without a presumption that it is.[42]

That Amendment was in response to the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which broadly expanded the definition of what constitutes "public use" within the takings clause of the Fifth Amendment to the Constitution of the United States.[43] Virginia voters approved amending the Constitution of

[42] Va. Const. art. I, § 11 (emphasis added).
[43] Baker & Webb, OIL, GAS & ENERGY Q., 2017, at 4-7

Virginia to strengthen its protection of private property rights via a voter referendum in November 2012, and the Constitution was formally amended on January 1, 2013.[44]

As amended, Article I, Section 11 expressly prohibits the taking or damaging[45] of private property for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except as necessary to eliminate a public nuisance existing on the private property.[46] Further, the Amendment places the burden of proving that the use is public upon the "condemnor," the governmental entity exercising its power of eminent domain.

Thus, following its amendment, Article I, Section 11 even more clearly establishes the unconstitutionality of Virginia Code § 55.154.2. As demonstrated above, prior to 1981, a Virginia landowner who granted mineral rights to coal companies, whether by deed or by lease, continued to own the Mine Voids created by the removal of coal from beneath the landowner's property. The coal company possessed only an incidental easement to use the Mine Voids until such time as the coal that was the subject of the mineral rights grant was exhausted. In 1981, Virginia Code § 155-54.2 stripped Virginia landowners of their ownership interest in the Mine Voids and delivered that ownership interest to private coal companies. The 2012 amendment of that statute, although poorly drafted, went even further in depriving Virginia landowners of their ownership interest in the Mine Voids, as the amended statute allowed the coal companies to use the Mine Voids in the service of lands for which a mining permit had

[44] Danielle B. Ridgely, *Will Virginia's New Eminent Domain Amendment Protect Private Property?*, 26 REGENT U. L. REV. 297, 298 (2013-2014).

[45] While the authors believe Virginia Code § 155-54.2 clearly constitutes an outright taking, it also without question damages the landowners' ownership interest in the Mine Voids. First, it prevents the landowners from occupying or using the Mine Voids in perpetuity. Second, if the Mine Voids are used to store wastewater and/or mining refuse or slurry, as is commonly the case, any remaining coal or other minerals beneath the landowners' property will be irreversibly damaged and rendered essentially worthless.

[46] While the Amendment clarifies that circumstances where a public service company, public service corporation, or railroad exercises the power of eminent domain for the authorized provision of utility, common carrier, or railroad service clearly constitute a public use, it is unclear to what degree the Virginia legislature possesses authority to further define public use. Sharon E. Pandak and Andrew A. Gore, *Virginia's "Property Rights" Constitutional Amendment: A Fundamental Right to Uncertainty*, Virginia State Bar 2013 Annual Meeting, Virginia Beach, Virginia (June 14, 2013).

ever been approved rather than only in connection with currently permitted mining operations, and even after the mine containing the coal that was the subject of the coal companies' mineral rights grant was exhausted, the mine was sealed, and the mining permit had expired or was abandoned, all in direct contravention of the Virginia Supreme Court's decision in *Clayborn*.

It appears difficult, if not impossible, to argue in good faith that, pursuant to Virginia Code § 155-54.2, landowners are being deprived of their ownership interest in Mine Voids for a "public use" under Article I, Section 11 of the Constitution of Virginia. A coal company is not a "public service company, public service corporation, or railroad," nor are the Mine Void ownership rights of Virginia landowners being taken "for the authorized provision of utility, common carrier, or railroad services." Finally, those ownership rights are not being taken to "eliminate a nuisance on private property." As such, it is clear that, pursuant to Article 1, Section 11 of the Constitution of Virginia as amended, the landowners' ownership interest in Mine Voids is not being taken for any "public use." Instead, it is being taken for the expressly prohibited "private gain, private benefit, [and] private enterprise" of the private coal industry.

In any event, the burden of proving that a taking is for a "public use" is placed upon the condemnor, which in this case is the Virginia legislature. It is difficult to envision a scenario in which the legislature will be able to successfully satisfy its burden of proof and convince a court that stripping Virginia landowners of their longstanding ownership interest in Mine Voids and delivering that interest directly to private coal companies somehow constitutes a "public use."

V. Conclusion

If, or as seems more likely, when Virginia Code § 155-54.2 is challenged in a Virginia court, the question before the court will be a simple one: Can the Virginia legislature sustain its burden of proof and convince a court that its taking of the landowners' ownership interest in the Mine Voids was truly for a "public use" under Article 1, Section 11, as amended? Based

upon the above, it appears extremely likely that a court's answer to that question will a resounding "no," resulting in Virginia Code § 155-54.2 being declared unconstitutional. Thereafter, coal companies will once again possess merely an incidental easement to use a Virginia landowner's Mine Void only until such time as the coal that was the subject of the mineral rights grant is exhausted. In other words, Virginia law will revert back to being the same as it was under the *Clayborn* case from 1920 to 1981.