censor acquires, and thereby extends his control to, rights which were not granted within the four corners of the patent. It is not the fact of control but what is controlled and how control was established that are relevant. Therefore, the mere fact that control is extended quantitatively cannot be an invalidating consequence of this license.

It is apparent that the license in suit would necessarily have certain consequences which are arguably adverse to the public interest. These consequences, arising as they do from the existing patent system rather than from this particular license, present problems for legislative consideration. The bare possibility that this license may produce other results, peculiar to the facts of this case, affords no basis sufficiently certain to justify extension of the doctrine of misuse beyond the established rule.

STATE LEGISLATION

REGULATION OF STRIP COAL MINING

I.

An Illinois statute[1] required the operator of strip coal mines to level the spoil ridges to approximately the original contour upon completion of mining operations. The statute provided that the final cut could remain unfilled where the adjacent spoil ridge was not sufficient to fill that cut.[2] Certain coal mine operators[3] sought to enjoin the Director of Mines and Minerals from enforcing the act, alleging a denial of due process and equal protection.[4] The Illinois Supreme

1. Ill. Rev. Stat. (1943) c. 93, §162.
2. "Any person . . . engaged in 'open cut' or 'strip' mining in which the soil over or covering any bed or strata of coal is removed shall spread such soil so that the contour of the land is approximately the same as before the mining operation was begun. Such levelling operations shall be done progressively . . . so that no more than three spoil ridges shall be left unlevelled . . . . When the mining . . . is completed, the remaining spoil ridges shall shall be levelled . . . provided, however, that the operator shall not be required to totally fill the last open cut where the adjacent spoil ridge will not fill such cut." Ibid.
3. Plaintiffs were owners of 30,000 acres of strip mine land and producers of 95% of the total strip mined coal in Illinois.
4. The record indicates that plaintiffs invoked both the Fourteenth Amendment to the Constitution of the United States, and the following provisions of the Illinois Constitution: Article II, § 2 ("No person shall be deprived of life, liberty or property, without due process of law."); § 14 ("No . . . law . . . making any

Court affirmed the trial court's decree awarding an injunction and held that the statute invaded the rights of property under the guise of a police regulation and that it set up an unreasonable classification.[5] *Northern Illinois Coal Corp. v. Medill*, 72 N.E.2d 844 (Ill. 1947).

The case presents an old problem—the extent and propriety of an investigation by the judiciary of the appropriateness of legislative enactments—applied to a new field, conservation legislation relating to strip mining. Assuming that at the state level the doctrine of substantive due process still has considerable force, we may examine its relation to this particular type of conservation legislation.

In the Illinois case the court construed the statute in the light of the State's contentions that the statute represented a valid exercise of the police power as a health and conservation measure. The argument that the statute was desigued to protect health by decreasing mosquito and bacteria breeding ponds[6] was rejected since the act did not require the filling in of *all* pools of water. Pools of stagnant water are a health menace, a fact of which courts might well take judicial notice,[7] and a statute which decreased the number of noxious pools could be reasonably related to the public health. In addition the generall accepted rule is that the legislature does not have to cure every possible evil in one statute.[8]

The contention that the statute was a valid conservation

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irrevocable grant of special privileges or immunities shall be passed."); Article IV, § 22 ("The general assembly shall not pass local or special laws in any of the following enumerated cases . . . Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.").

5. At no point did the Supreme Court refer to specific constitutional provisions upon which it based its decision, but since the only cases cited in the opinion were Illinois cases, and since state courts tend to rest constitutional decisions solely on their own constitutions, it may be assumed that the court construed only the Illinois constitution.

6. Unlevelled, mined-over land collects numerous pools of water and defendant argued that the statute decreased the number of these pools and thereby lessened danger to public health.

7. In this connection, see the discussion of the recent Indiana case, Dept. of Ins. v. Schoonover, 72 N.E.2d 747 (Ind. 1947), which held that the determination of the validity of a statute involving an exercise of the police power was a question of law, and only those extrinsic facts are admissible of which a court will take judicial notice. Note, 23 Ind. L. J. 176 (1948).

8. Radice v. New York, 264 U.S. 292 (1924).

measure was also rejected, the court disagreeing that the statute evidenced a legislative determination that the chief economic value of the land to be preserved was its value as land capable of cultivation. This could not be the purpose of the act because ". . . the State has no authority , *under the guise of a conservation theory,* to compel a private owner, at his own expense, to convert his property to what it considers to be a higher or better use."[9] [Italics supplied]. One may ask how the purpose of a statute is to be determined, if an attempt at conservation legislation, made in good faith, is called a "guise." As an alternative the court held that even if the act were a valid exercise of the police power it was nevertheless fatally defective because there was no reasonable ground for distinguishing strip mine operators on the basis of the mineral produced. The court found that the undesirable result from a health or conservation standpoint occurred because of the *method* of mining employed, not the nature of the product removed.

By using the doctrine of substantive due process the court overruled the legislature's judgment as to the object of the act, the appropriateness of the means selected, and the reasonableness of the classification employed. Thus an attempt at health and conservation legislation failed.

II.

Considering the fate of the Illinois statute, are there valid grounds for sustaining this kind of legislation, even though the "presumptive validity"[10] accorded these statutes may be slight?

A statute to be valid must be reasonable in its classification. Reasonable classification is variously and ambiguously defined. It must be "natural," "rational," "germane to the subject matter," etc., in short, it must be "reasonable." The problem of classification, therefore, is not *what* is reasonable but rather *who* is to determine what is reasonable. The test in the United States Supreme Court of the "reasonable legis-

9. Northern Illinois Coal Corp. v. Medill, 72 N.E.2d 844, 847 (Ill. 1947).

10. ". . . in the exercise of the police power of a State it is for the legislature to determine when the conditions exist calling for the exercise of that power, and . . . when the legislature has acted the presumption is that the act is a valid exercise of such power." People v. Stokes, 281 Ill. 159, 169, 118 N.E. 87, 90 (1917) ("loan-shark" law held constitutional).

lator" is given at least lip service by the states: ". . . debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. . . . There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none."[11] When considering a statute similar to that involved in the principal case, reasonable men might find many reasons for distinguishing between kinds of strip mine operators, justifying the regulation of coal mines only. The following bases are suggestive: a greater acreage may be involved in coal stripping;[12] types of soil affected by coal stripping may differ from those in strip mining of other minerals; costs may be more easily bourne by the coal industry than by other industries; other means of coal extraction may exist whereas gravel could be removed only by stripping. Unless a court intends to mock the legislature's policy judgment and substitute its own, the argument of unreasonable classification will not defeat the statute.

But a statute must also avoid the pitfalls of the due process requirement. Therefore a second ground for assailing the statute's validity is that conservation legislation which regulates the use of land is a denial of due process, i.e., the attempted exercise of the police power is too broad and constitutes a "taking." However it cannot be denied that the state may prescribe certain activity in the use of one's land. An example are statutes which regulate the owner's disposal of slashings and debris from the cutting or manufacture of timber on his land, in order to minimize the danger of forest fires.[13] Moreover, the state can compel an owner

11. Sproles v. Binford, 286 U.S. 374, 388, 296 (1932); quoted with approval by the Illinois Supreme Court in People v. Monroe, 349 Ill. 270, 289, 290, 182 N.E. 439, 447 (1932); accord, Tigner v. Texas, 310 U.S. 141, 147 (1940); Bolivar Twp. Bd. of Fin. v. Hawkins, 207 Ind. 171, 183, 184, 191 N.E. 158, 162, 163, (1934).

12. Cf., "Report of the Strip Mining Study Commission to the Governor and the 97th General Assembly of the State of Ohio," January 15, 1947 (unpublished) at 6: "The commission observed stripping operations which involved minerals other than coal, but as there had been no reclamation attempted and as the acreage involved was small in comparison, the following facts and findings apply to coal stripping only."

13. Minn. Stat. Ann. (Mason, Supp. 1938) § 4031-19.

to use his land so as to avoid injuring the land of others[14] (an exercise of power particularly pertinent in view of the physical[15] and esthetic[16] effects of strip mining on adjacent land). In addition, it should be noted that limitations on the *use* of property through zoning ordinances have been upheld as a valid exercise of police power.[17] If the state may greatly decrease the value of private property and restrict its use through an ordinance enacted for the general welfare, it is arguable by analogy that the state may also regulate the *use* of strip mined land.[18] Finally, under certain circumstances an individual's interest may even be destroyed because of a superior public interest.[19] The foregoing analogies should be persuasive to a court when considering the appropriateness of the legislative means selected to accomplish the desired object of conservation. Moreover, a court, when the validity of a statutory regulation is brought before it, must recognize the capacity of the legislature to determine appropriate meth-

14. The right to abate a nuisance, public or private, derives from the state's power to protect the general welfare in this respect.

15. See, e.g., the Ohio Strip Mining Commission Report, supra n. 12, at 10. The Commission found that "adjoining lands to strip mining operations are affected by placing thereon spoil banks and other refuse which makes an additional 20% in acreage to the total acreage stripped directly affected by strip mining operations." The inter-relation of vegetation and soil erosion suggests yet another reason for regulation.

16. See 17 Ind. L.J. 172, 173 (1941).

17. Village of Euclid v. Ambler, 272 U.S. 365 (1926); accord, City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925); Board of Commissioners v. Sanders, 218 Ind. 43, 30 N.E.2d 713 (1940).

18. Note, in this connection, the Indiana zoning ordinance which applies in part to strip mining areas. Zoning Ordinance No. 1, Board of Commissioners, Daviess County (1946). And see, Ops. Att'y Gen., Ind. (1946) No. 95.

19. " . . . where public interest in involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." Miller v. Schoene, 276 U.S. 272, 279, 280 (1928) (see, infra, n. 25); cf. State ex rel Mavity v. Tyndall, 74 N.E.2d 914, 916, 917 (Ind. 1947): "Property or property rights may not be taken or destroyed under the guise of the police power or of a police regulation, unless the taking or destruction has a just relation to the protection of the public health, welfare, morals or safety. Unless it affirmatively appears by the act, or the history of its enactment that it has no such just relation, the police power extends even to the taking and destruction of property. It will be presumed that the act is reasonable, unless the contrary appears from facts of which the courts will take notice." Contra: Penn. Coal Co. v Mahon, 260 U.S. 393 (1922), cf. Brandeis' dissent in this case, p. 417: 'the right of the owner to use his land is not absolute . . . uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare."

ods. Where similar regulations have been upheld in the past it would seem illogical for a court to declare present means "unreasonable."

III.

With the growing realization that our natural resources are not unlimited[20] conservation legislation[21] has increased in volume in the past thirty years. Concurrently the notion of a "right" to unfettered exploitation has necessarily waned. The power of a state to legislate to protect its resources is not questioned,[22] and the theory sustaining such legislation is that which lies behind any valid exercise of the police power: the state, in the interest of the general health, safety, welfare, and morals, may impose reasonable limitations on rights of property and individual liberty in order to preserve the general good.[23] Generally, conservation measures attempt to deal directly with the resources to be conserved.[24] Occasionally however, the legislation regulates one resource in

20. For general discussions, see Gustafson, "Conservation in the United States" (1944); Wilbur, "Conservation in the Department of the Interior" (U.S. Gov't Prn't Off. 1931).

21. Typical enactments are state model district soil conservation acts, drainage district acts, forestry conservation acts, etc. See, State Law Index (1925-1944); "State Planning, A Review of Activities and Progress" National Resources Board (U.S. Gov't Prn't Off. 1935). For a discussion of federal constitutional limitations on state conservation legislation, see, Rosenson, "The Power of a State over its Natural Resources" 17 Tulane L.Rev. 256 (1942-43).

22. See, Williams, "Conservation of Mineral Resources: A Brief Survey" 47 W.Va.L.Q. 247 (1940-41). The state's power extends even to the protection and preservation of fossils. See note, "Statutory Restrictions on the Collection of Fossils" 45 Col. L. Rev. 634 (1945).

23. ". . . no community confines its care of the public welfare to the enforcement of the principles of the common law . . . it [the state] exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskillful, careless or unscrupulous." Freund, "Police Power" § 8 (1904).

24. E.g., statutes regulating the drilling of oil fields. For a discussion of statutory regulation in this field see Marshall and Meyers, "Legal Planning of Petroleum Production" 41 Yale L.J. 33 (1931-32); Summers, "The Modern Theory and Practical Application of Statutes for the Conservation of Oil and Gas" 13 Tulane L.Rev. 1 (1938).

order to conserve another.[25] Statutes regulating the strip mining of coal are of the second type. Because of the nature of the strip mining method of coal extraction many acres of land are laid waste[26] and, in order to remedy this depletion of soil and vegetation, legislatures have imposed statutory reclamation duties on the mine operator. Six states[27] engage in 85% of the total coal production[28] and in these states coal is mined by both the underground or shaft method, and by the surface or strip method.[29] Five of these states have enacted strip coal mining regulatory statutes in the past ten years. These statutes, while similar, vary in some details.

In 1941, Indiana passed a statute[30] applying to coal strip mine operators which requires them to plant seeds or cuttings of trees and shrubs in a manner approved by the Department of Conservation. The statute does not require the operator to level the land, and it applies only to those operators who mine more than 250 tons yearly.[31]

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25. The constiutionality of two such statutes was determined in: Miller v. Schoene, 276 U.S. 272 (1928) (diseased cedar trees destroyed in order to protect apple trees); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900) (oil extraction regulated to conserve natural gas supplies).

26. In strip mining the surface layer of earth covering the coal seam is removed, and piled in a bank, or "spoil ridge" on land adjacent to the first "cut." The excavation proceeds in parallel lines, the spoil ridge of the second cut being placed in the trench left by the first cut, etc. When the mining is completed the land lies in a series of long humps and depressions, barren of vegetation and unsuitable for agriculture. For a factual description see the Report of the Ohio Strip Mining Commission, supra n. 12.

27. Illinois, Indiana, Kentucky, Ohio, Pennsylvania, West Virginia. Of the six states only Kentucky is without a similar statute. See the editorial urging adoption of a statute, Louisville Courier-Journal, January 25, 1948, §3, p.2, col. 2.

28. Total coal production in the U.S. in 1944 (in millions of net tons): 683.3. Bituminous coal and lignite produced by leading states: Ill., 76.8; Ind., 28.0; Ky., 71.3; Ohio, 33.9; Pa., 146.0; W.Va., 164.6. Anthracite coal produced: Pa., 63.6. Total by states: 584.2. Percentage of whole: 85.5. Source: Minerals Yearbook 861 (U.S. Dep't. Int. 1945).

29. Bituminous coal and lignite in the U.S. mined underground and from strip pits in 1944 (in millions of net tons): Ill., underground, 58.8, stripping, 18.0; Ind., underground, 13.9, stripping, 14.1; Ky., underground, 66.1, stripping, 5.2; Ohio, underground, 22.2, stripping, 11.7; Pa., underground, 123.5, stripping, 22.5; W.Va., underground, 151.8, stripping, 12.8. Source: Minerals Yearbook 885 (U.S. Dep't Int. 1945). Peunsylvania anthracite: underground, 52.7, stripping, 10.9. Id. at 918.

30. Ind. Acts 1941, c. 68, Ind. Stat. Ann. (Burns, Supp. 1945) §§ 46-1501 to 1515.

31. It should be noted that this feature presents an even narrower ground of classification than did the Illinois statute. Nevertheless,

The West Virginia statute,[32] enacted in 1939, requires that planting be done under the supervision of a state agency, but exempts non-agricultural land. The non-exempt land must be filled in, re-graded, and drained, and debris must be removed. The operator may maintain areas for drift-mining and haulage ways if he so desires.

The provisions of the Pennsylvania statute,[33] passed in 1945, like those of the West Virginia statute, require revegetation under the guidance of a state agency, and permit the maintenance of areas for drift-mining and haulage ways. The ground must be leveled to the extent that the required planting can be done. The act applies only to those operators who mine more than 250 tons yearly.

The Ohio statute of 1947,[34] did not take effect until January 1, 1948. It too requires supervised revegetation, allows areas for drift-mining and haulage ways, and applies only to producers of more than 250 tons yearly. It requires the spoil ridges to be levelled to a minimum width of fifteen feet cross section.

These variations indicate a difference of legislative opinion as to *what* is factually necessary in an effective conservation measure, but the statutes are unanimous in recognizing the *need* for legislative control to ameliorate the destructiveness of strip mining. This legislative determination is apparent, not only from the provisions of the statutes, but by their accompanying preambles.[35] The Indiana preamble, for example, states that the re-seeding is to aid in the protection of wild life, to enhance the value of land for taxation, to decrease soil erosion, the hazard of floods, the pollution of

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exemption of producers of less than 250 tons may have a rational basis—for example, problems of administration. See 17 Ind. L. J. 172, 173 (1941).

32. W.Va. Acts 1939, c. 84. The statute was repealed and the Code amended by insertion of a similar but more detailed regulation in 1945 (W.Va. Acts 1945, c. 85).

33. Pa. Stat. Ann. (Purdon, Supp. 1946) tit. 52, § 1396.1.

34. Ohio Acts 1947 (House Bill 314).

35. While a preamble cannot extend or restrain the meaning of an act unambiguous on its face, it nevertheless is useful in indicating legislative policy, especially when the legislation attempts to regulate a new field where the scope and purpose of the act may not be known. See 2 Sutherland, "Statutory Interpretation" §§ 4804 to 4809 (3d. ed., Horack's, 1943).

lakes and streams, and generally to restore the use and enjoyment of the lands.[36]

None of these statutes has been held invalid[37] and if a court should find one unconstitutional it would seem to be a clear invasion of the legislative function, under the color of substantive due process.

CONSTITUTIONAL LAW

CONSIDERATION OF FACTS IN DUE PROCESS CASES

In *Department of Insurance v. Schoonover*, 72 N.E.2d 747 (Ind. 1947), a provision of the Indiana Insurance Law of 1935,[1] which restricted the selling of fire and casualty insurance in Indiana to agents employed on a commission basis only, was declared unconstitutional. Schoonover, an agent employed on salary, was refused a license to sell insurance by the Department of Insurance. He brought an action seeking to enjoin the Department from limiting the issuance of licenses for fire and casualty insurance to agents employed solely on a commission basis.[2] He contended that the statute deprived him of his right to work on such terms as he might freely secure; that the statute made a discriminatory classification between salaried and commission agents; and that it therefore violated the due process[3] and equal protection[4] provisions of the Indiana Constitution and the Fourteenth

36. Ind. Acts 1941, c. 68, Ind. Stat. Ann. (Burns, Supp. 1945) § 46-1501. Cf., Ops. Att'y Gen., Ind. (1943) p. 301: "The real purpose of the statute is not so much to encourage strip mining, but to make sure that on land where strip mining had already been done . . . the Conservation Commission would see to it that the land would be restored to usefulness again and reforested."

37. Neither the Indiana nor the West Virginia statutes have been challenged. The Ohio statute was not efective until 1948. The Pennsylvania statute was held constitutional as a valid classification and not a denial of due process, in Dufour v. Maize, —A.2d— (Pa. January 19, 1948).

1. Ind. Acts 1935, c. 162, § 209(a), Ind. Stat. Ann. (Burns, Repl. 1940) § 39-4501(a).

2. The Hardware Mutual Casualty Co., which had previously employed agents on salary in Indiana, was joined as party plaintiff. The Indiana Association of Insurance Agents, an association of agents on commission (comprising about 85 per cent of the insurance agents in the state), were joined as party defendants and for all practical purposes defended the action; the Attorney General joined in all motions, etc., for the purpose of getting a determination of the cause.

3. Ind. Const. Art. I, § 1.

4. Ind. Const. Art. I, § 23.