No. 24635 - Linda Adkins, Pamela Chapman, Dorothy Ann Grimmett, West Virginia Education Association, United Mine Workers of America, International Union, West Virginia Citizen Action Group, and West Virginia Environmental Council v. Robin Capehart, Secretary of the West Virginia Department of Tax and Revenue and Tax Commissioner, in his official capacity

Starcher, Justice, dissenting:

In 1995, in the predecessor case to the instant case, the United Mine Workers of America, the West Virginia Education Association, the West Virginia Citizen Action Group and the West Virginia Environmental Council joined with several individual citizens to assert the claim that West Virginia's present system for valuing, assessing and taxing coal reserves is unconstitutional.

This is not an abstract issue. These plaintiffs have a lot at stake in the taxation of coal reserves. Unconstitutionally low taxation of coal reserves means less money for public education, for environmental protection, and for worker retraining -- to name a few important concerns of the plaintiffs. And if some coal reserve property is taxed at more than its fair market value, then thousands of West Virginia property owners are paying more taxes on their coal than they should.[1]

In the 1995 case, the State Tax Department vigorously denied the plaintiffs' charge that the present system is inaccurate or unconstitutional. The 1995 case settled

[1]Moreover, the interests of all citizens of West Virginia are affected by the State's system of coal reserve tax valuation and assessment. "If one party is not required to pay taxes based on market value of coal reserves and thus is under-assessed, the resulting injury is to all other members of the taxing district who are subjected to discriminatory assessment and denied the benefits of full and equitable taxation." *Tug Valley Recovery Center, Inc. v. Mingo County Comm'n*, 164 W.Va. 94, 105, 261 S.E.2d 165, 172 (1979).

when the Tax Department offered to conduct a study of the present system. The plaintiffs went along, confident that the study would show that the plaintiffs were correct.

The plaintiffs' confidence was not misplaced. The Tax Department study concluded unequivocally that the present system does not value and assess coal reserves at fair market value.[2] This means that it is unconstitutional, under article X, section 1 of the *West Virginia Constitution*. *See Killen v. Logan County Comm'n*, 170 W.Va. 602, 295 S.E.2d 689 (1982).

After the study was released, the Tax Department developed a proposal to change the system. The Department submitted the proposed changes to the 1998 Legislature, along with the Department's critique of the present system. That critique said that the present system "doesn't work."

The Legislature failed to change the present system. In the meanwhile, the plaintiffs went back to court in the instant case, again seeking a declaration by the circuit court that the system is unconstitutional, and an order requiring the Department to implement a system that passes constitutional muster.

[2] For example, for large-acreage coal reserves purchased by coal companies: reserves that sold for 26.3 million dollars were valued by the Tax Department's current methodology at 6.2 million dollars; reserves that sold for 11.3 million dollars were valued at 2.3 million dollars; reserves that sold for 13 million dollars were valued at 1.5 million dollars; and so forth for numerous properties. On the other hand, the Tax Department valued many small coal acreages, not purchased by coal companies for their reserves, at far above the actual purchase prices.

After the plaintiffs presented their case to the circuit court, in which the evidence of the present system's unconstitutionality was essentially unrefuted, the circuit court entered an order denying the plaintiffs any relief. That is the order that we review today. The circuit judge said, in a cover letter that accompanied the court's order: "An order has been entered today *which resolves all the issues in controversy.*" (Emphasis added.)

The circuit judge was entirely correct in stating that his order resolved (albeit adversely to the plaintiffs) all of the claims made by the plaintiffs.

First, the plaintiffs had asked for a declaratory judgment saying that the Tax Department's present method was unconstitutional. The circuit court's order refused this request. Second, the plaintiffs had asked for an injunction against the further use of an unconstitutional valuation method. The court's order also denied this request. Third, the plaintiffs had asked for an order requiring the tax commissioner to appraise property at fair market value. The court's order said that the plaintiffs weren't entitled to this requested relief either.

Yes, the plaintiffs had asked the circuit court to "retain jurisdiction" in the case -- but only to monitor the compliance of the defendants with an order requiring them to implement a constitutional system. In the absence of any finding by the court that the present system of valuing and assessing coal reserves is unconstitutional, the circuit court had and has no jurisdiction to keep the case before the court.

To summarize, the circuit court's order was a *final* and resounding "no" to each of the plaintiffs' requests. As the saying goes -- what part of "no" don't we understand?

Thus, because the circuit court's order is an appealable "final order," the majority is wrong in its stated rationale for failing to review the merits of the circuit court's refusal to grant the plaintiffs' requested relief.

Turning briefly to the merits of that refusal, it appears that the circuit court may have been concerned that declaring the present system to be unconstitutional -- although such a ruling would be entirely supported and indeed is compelled by the evidence -- would jeopardize tax collections until a proper system is put in place.

But there is no merit in such a fear, because a declaration of unconstitutionality does not in itself mean that the existing system must be immediately scrapped. This principle is illustrated by the decisions in which this Court held that the conditions of confinement at the Moundsville prison were unconstitutional. *See, e.g.*, *Crain v. Bordenkircher*, 182 W.Va. 787, 392 S.E.2d 227 (1990).

Although the conditions at Moundsville were unconstitutional, our rulings gave the Executive and the Legislature ample time and deference to plan and build a new facility. And the same should be true with coal reserve valuation and assessment.

But the first step toward any needed change, as in the Moundsville cases, is

to decide the constitutionality issue -- as these plaintiffs have been asking the courts to do for over three years.[3]

It is interesting to compare the majority opinion in the instant case with this Court's recent ruling in another case that is similar to the Moundsville cases -- *State ex rel. Stull v. Davis*, ___ W.Va. ___, ___ S.E.2d ___, Nos. 24459 *et al*. (December 8, 1998).

In *Stull*, this Court determined that prisoners lodged in county and regional jails are being denied their statutory right to be housed in state correctional facilities. We appointed a special master and are requiring development and implementation of a plan to move those inmates.[4]

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[3]Absent such a threshold determination by this Court, what incentive is there for the Tax Department and Legislature to timely develop and implement a constitutional system? What would have happened in 1956, if the United States Supreme Court had said: "It's true that all of the evidence shows that segregated schools are unconstitutional, but because the lower court "kept jurisdiction" (but denied all relief), our hands are tied."? Also, no one closed all of our nation's segregated schools, on the day after *Brown v. Board of Education* was decided. A declaration of unconstitutionality does not result in the immediate collapse of the system in question.

[4]It is with great reluctance that I support rulings, however legally correct, that may effectively drive the construction of more prison and jail beds. In 20 years as a trial judge, I learned (as nearly every judge I know has learned) that prison and jail incarceration is expensive overkill for a substantial percentage of the people who are convicted of crimes.

To put it bluntly, I know beyond the shadow of a doubt that hundreds of the people who are "overcrowding" West Virginia's jails and prisons could be safely, soundly and fully punished for their crimes -- without being housed, fed, doctored, and otherwise cared for in costly jails and prisons for which taxpayers have to pay.

So I find it hard to "enable" the construction of more prison beds, when I am sure that a significant fraction of the existing beds are being wasted (e.g., recently in Kanawha

County two men were jailed -- one for fishing without a license, the other for possessing fishing paraphernalia). I fear that once built, these beds will be filled without much regard for whether they are really needed. The demographics of our state suggest strongly that we are an aging population. What will result is a diminished need for prison beds in the future.

As a citizen, lawyer, parent, husband, property owner, taxpayer and judge, the maximum possible use of alternatives to imprisonment appeals to me because it means my taxes can go to support more productive activity, like building good schools and providing medical care for children and the elderly. Another attractive aspect of the use of alternative punishment is that less people get to receive the highly effective, publicly-funded, graduate education in criminal behavior that jails and prisons offer.

I note that in *Stull,* this Court has not required the prisoners at the regional and county jails to come up with a plan to create space for them in the state prisons. That is the job of jail and prison authorities. In the instant case, the circuit court faulted the appellants for not themselves offering a "better" system for coal reserve tax valuation. Following *Stull,* we should not uphold a requirement that school teachers develop and implement a plan to tax coal reserves fairly. That is the job of the Tax Department and the Legislature.

In *Stull*, this Court was properly protective of the statutory rights of people who are convicted of crimes. But in the instant case, the majority shows little inclination to protect the constitutional rights of school teachers, union coal miners, environmentally concerned citizens, small property owners, and taxpayers generally.

What explains the difference in the two cases' approaches?

I believe that any attempt at answering this question would be pointless, speculative, and counterproductive. Instead, I look to the future. "Hope springs eternal in the human breast." Alexander Pope, *An Essay on Man* (1733-34).

So, my hope is that the plaintiffs in the instant case will go back to the circuit court and vigorously press their request that the circuit court directly rule -- up or down -- on the constitutionality of this state's coal reserve valuation and assessment system. If the circuit court still will not make such a ruling, I hope that the plaintiffs will ask for mandamus relief from this Court, to require the circuit court to rule.

And if this Court faces these issues again, I hope that we will choose to give the same consideration and protection to the rights of law-abiding taxpayers that we give to the rights of incarcerated criminals. Both are deserving of and entitled to our attention.

For the foregoing reasons, I dissent from the court's decision to dismiss the appeal.