AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era – Federalism/Police Powers

**Lawton v. Steele, 152 U.S. 133 (1894)**

*In 1880, the state of New York adopted “An Act for the Appointment of Game and Fish Protectors.” A provision of that act, as later amended, specified that no one could take fish by any means other than a hook and line or handheld fishing rod within one mile of shore from the waters of Henderson Bay or Lake Ontario. Any nets set to capture fish were declared to be a public nuisance and were to be summarily destroyed when discovered by game constables. Subsequently, a group of fishermen were using nets to catch fish on Black River Bay on Lake Ontario. A group of game protectors discovered the nets, took them away and destroyed them. The fishermen sued game protectors in state court for the value of the nets. A jury awarded the fisherman $216 damages plus court costs. A state appellate court reversed, observing that the New York statute specified that no legal action could be taken against game protectors for damages arising from the seizure and destruction of illegal fishing nets. The fishermen appealed to the U.S. Supreme Court contending that the New York statute violated the federal constitution by depriving the citizen of his liberty and property without due process of law and by interfering with the maritime jurisdiction of the United States. In a 6-3 decision, the Court upheld the constitutionality of the state law, holding that such laws were within the police power of the state and that the efficacy of the government’s ability to protect the public interest necessitated allowing the summary destruction of property of small value. The case provided a canonical discussion of the police power by the U.S. Supreme Court.*

JUSTICE BROWN, delivered the opinion of the Court.

. . . .

The extent and limits of what is known as the "police power" have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power, it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame, and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly* (1885).

To justify the state in thus interposing its authority in behalf of the public, it must appear first that the interests of the public generally, as distinguished from those of a particular class, require such interference, and second that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus, an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace, and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported conditioned to indemnify the state against any expense for the support of the persons named for four years thereafter was held by this Court to be indefensible as an exercise of the police power, and to be void as interfering with the right of Congress to regulate commerce with foreign nations. Henderson v. New York (1875). A similar statute of California requiring a bond for certain classes of passengers described, among which were "lewd and debauched women," was also held to show very clearly that the purpose was to extort money from a large class of passengers or to prevent their immigration to California altogether, and was held to invade the right of Congress. Chy Lung v. Freeman (1876). So, in Railroad Co. v. Husen (1878), a statute of Missouri which prohibited the driving of Texas, Mexican, or Indian cattle into the state between certain dates in each year was held to be in conflict with the commerce clause of the Constitution, and not a legitimate exercise of the police powers of the state, though it was admitted that the state might, for its self-protection, prevent persons or animals having contagious diseases from entering its territory. In Rockwell v. Nearing (NY 1866), an act of the Legislature of New York which authorized the seizure and sale, without judicial process, of all animals found trespassing within private enclosures was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law.. . . In all these cases, the acts were held to be invalid as involving an unnecessary invasion of the rights of property and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests.

The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts. Thus, in *Smith v. Maryland* (1855), it was held that the state had a right to protect its fisheries in Chesapeake Bay by making it unlawful to take or capture oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. The avowed object of the act was to prevent the destruction of the oysters by the use of particular instruments in taking them. "It does not touch," said the Court,

"the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whom it may belong, and by whomsoever it may be enjoyed."

. . . . In State v. Roberts (NH 1879) which was an indictment for taking fish out of navigable waters out of the season prescribed by statute, it was said by the court:

"At common law, the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and therefore it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game considered valuable as articles of food or merchandise. For this purpose, fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." *Commonwealth v. Chapin* (MA 1827). . . .

As the waters referred to in the act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. Hooker v. Cummings (NY 1822). The duty of preserving the fisheries of a state from extinction by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

The main and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries is to be treated as a public nuisance. . . .

The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them. Hart v. Mayor of Albany (NY 1832). An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained unless it is plainly violative of the Constitution or subversive of private rights. In this case, there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic, distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance and subject to summary abatement. Instances of this are the power to kill diseased cattle, to pull down houses in the path of conflagrations, the destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and, if the object to be accomplished is conductive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark & South Orange Horse Car Railway Co. v. Hunt* (1888).

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as for instance if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.

The value of the nets in question was but $15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings would largely exceed the value of the net, and doubtless the state would in many cases be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a state in the union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. Callan v. Wilson (1888). So, the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases, the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case. *American Print Works v. Lawrence* (1847). . . . Indeed it is scarcely possible that any actual injustice could be done in the practical administration of the act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles -- such, for instance, as cards, dice, and other articles used for gambling purposes -- are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law, and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose, but where minor articles of personal property are devoted to such use, the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. Ely v. Supervisors (NY 1867). The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question, People v. West (NY 1887), and in such case the legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance.

. . . .

Affirmed.

CHIEF JUSTICE FULLER, with whom JUSTICE FIELD and JUSTICE BREWER join, dissenting.

In my opinion, the legislation in question, so far as it authorizes the summary destruction of fishing nets and prohibits any action for damages on account of such destruction, is unconstitutional.

Fishing nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the legislature of a state the power to declare them public nuisances, even when put to use in a manner forbidden by statute, and on that ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form.

The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard.

It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use. Indeed, I think that that argument is to be deprecated as weakening the importance of the preservation, without impairment in ever so slight a degree, of constitutional guaranties.

. . . .