READINGS FOR THE FIRST WEEK

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CHAPTER ONE

I. INTRODUCTION: THE POWER OF LEGISLATURES TO CONTROL PRIVATELY HELD LAND

Note on Legislative Power to Repeal Statutes

The power of a legislature to repeal its own statutes or those of earlier legislatures is one that is not doubted, for, as the United States Supreme Court has explained, "The repeal of laws is as much a legislative function as their enactment." District of Columbia v. J.R. Thompson Co., 346 U.S. 100, 114 (1953). Consider, for example, the following cases:

(1) Will of Hofbaehr, 18 N.J. 229, 113 A.2d 654 (1955), grew out of one John Bennett's adoption of Emma L. Hofbaehr in 1949. Bennett died in 1950, leaving his estate to Emma, and Emma died three years later in 1953. At her death, two of her natural brothers interposed a claim to her estate as her heirs. The New Jersey statute in effect at the time of her adoption had provided that natural siblings of an adopted child could, under specified circumstances, inherit from the child, but legislation that took effect in 1952 had changed the rule and provided that natural siblings could not inherit. In rejecting the brothers' claim that the legislature lacked authority to change the rule, the Court said:

Rules of inheritance are the "creatures of the municipal or civil law, and, except as to rights already vested, may be changed and modified at pleasure. * * * The legislature has power to change the course of descent, and such change will operate instantly upon all estates which may subsequently descend. The law existing at the time of descent must govern the right to inherit. A mere expectation of property in the future is not considered a vested right, and hence the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner."

(2) City of Geneva v. Illinois Northern Utilities Co., 363 Ill. 89, 1 N.E.2d 392 (1936), was a suit by the city to compel the power company to remove its electric utility poles and wires from the city's streets. The city alleged that it had been incorporated by an 1865 statute which conferred upon it title to all the streets, subject only to the public's right to use them for travel. It further alleged that in 1923 it had given the power company permission to place its poles and wires in the streets for a ten-year period, that the ten-year period had expired in 1933, but that the power company had refused to remove its equipment. The power company admitted the city's factual allegations, but contended that the Public Utilities Act of 1921 prohibited the city from interfering with the company's use of the streets. In holding that the Act of 1921 had priority over that of 1865, the court said:

Cities and kindred municipalities have no inherent powers. They are creatures of the state, and the General Assembly may breathe life into them and may take it away in accordance with its legislative will. It follows that any powers, rights, estates, or functions that may be granted to such municipalities may be modified, restricted, or entirely withdrawn at will by the sovereign, acting through its
lawmaking body. The state may set up new administrative bodies and confer upon them some, or all, of the powers and rights which were formerly prerogatives of the city or municipality.

Accord, *Laramie County v. Albany County*, 92 U.S. 307, 312 (1875) (*dictum*).

(3) The royal patent issued by Charles II in 1664 granting New York to his brother, the Duke of York, contained the following proviso:

AND LASTLY OUR WILL and pleasure is and wee doe hereby declare and Graunt that these our Letters Patents or the Inrollment thereof shall bee good and effectual in the Law to all intents and purposes whatsoever NOTWITHSTANDING the not reciting or menconing of the premises or any other part thereof or the Meets or Bounds thereof or of any formar or other Letters Patents or Graunts heretofore made or Graunted by the premises or of any part thereof by us or of any of our Progenitors unto any other Person or Persons whatsoever Bodies Politique or Corporate or any Act Lawe or other Restraint Incertainty or ypperfocon whatsoever to the contrary in any wise notwithstanding ALTHOUGH EXPREISSE MENCON of the true yearly value of certainty of the premises or of any of them or of any other Guifis or Graunts by us or by any of our Progenitors or Predecessors heretofore made to the said James Duke of Yorke in these presents is not made or any Statute Act Ordinance Provisioun Proclamacon or Restricon heretofore had made Enacted Ordeyned or provided or any other matter Cause or thing whatsoever to the contrary thereof in any wise notwithstanding IN WITNESS whereof Wee have caused these our Letters to bee made Patents WITTNES our Selfe att Westminster the Twelveth day of March in the Sixteenth year of our Raigne.

By the King Howard

(4) Assume that Richard Roe, relying on the relevant sections of the Internal Revenue Code, purchases a $400,000 home with the expectation that he will be able to deduct from his income the real estate taxes on the home and the interest payments on the mortgage totaling some $40,000 per year. As a result of these deductions, he expects to save some $10,000 per year in federal income taxes, without savings he will be unable to maintain the home. Does Congress have power to disappoint Roe’s expectations and thereby force him to sell his home, perhaps at a substantial loss, by eliminating from the Code the deductions for real estate taxes and interest payments? *Cf. Miller v. Commissioner*, 115 F.2d 479 (9th Cir. 1940).

**QUESTIONS**

Could society function if legislatures were not permitted to repeal statutes in order to conform the law to new and changing social needs? If you think it could not function, then how can the result in *Fletcher v. Peck* (below), which you should read next, be justified?
Fletcher v. Peck,
6 Cranch 87 (1810)

MARSHALL, Ch. J. delivered the opinion of the court as follows:

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Guinn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, 'that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act.' The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. The court cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The 3d covenant is, that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c; and so the title of the state of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the state of Georgia.
To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights required, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means much be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the state of Georgia, to annul the contract, nor does it appear to the court, by this count, that the state of Georgia is dissatisfied with the safe that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the state of Georgia, under a deed conveying that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favour of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The circuit court, therefore, did right in overruling this demurrer.

The 4th covenant in the deed is, that the title to the premises has been, in no way, constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices, and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The count proceeds to recite at large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joiner.

The importance and the difficulty of the questions, presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully
competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, those purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cases to be obligatory.

It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and, if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exercising a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may devest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this resounding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this; that a legislature may, by its own act, devest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reproved, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantees, clothed with all the solemnities which law can bestow. This estate was transferrable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of
purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other person of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of nullifying them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantor should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction the constitution, grants are comprehended under the terms contracts, is a grant from the state excluded from the operation of
the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favour of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law nullifying the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law nullifying the original grant?

The argument in favour of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally inbred in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was liable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the 3d plea, therefore, there is no error.

The first covenant in the deed is, that the state of Georgia, at the time of the act of the legislature thereof, entitled as aforesaid, was legally seized in fee of the soil thereof subject only to the extinguishment of part of the Indian title thereon.

The 4th count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia.

To this court the defendant pleads, that the state of Georgia was *seized*; and tenders an issue on the fact in which the plaintiff joins. On this issue a special verdict is found.
The jury find the grant of Carolina by Charles second to the Earl of Charlon and others, comprehending the whole country from 36 deg. 30 min. north lat. to 29 deg. north lat., and from the Atlantic to the South Sea.

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35 deg. of north lat. was the boundary line between North and South Carolina.

That seven of the eight proprietors of the Carolinas surrendered to George 2d in the year 1729, who appointed a Governor of South Carolina.

That, in 1732, George the 2d granted, to the Lord Viscount Percival and others, seven eighths of the territory between the Savannah and the Alathamah, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony and called Georgia.

That the Governor of South Carolina continued to exercise jurisdiction south of Georgia.

That, in 1752, the grantees surrendered to the crown.

That, in 1754, a governor was appointed by the crown, with a commission describing the boundaries of the colony.

That a treaty of peace was concluded between Great Britain and Spain, in 1763, in which the latter ceded to the former Florida, with Fort St. Augustine and the bay of Pensacola.

That, in October, 1763, the King of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida, and Grenada; and prescribing the bounds of each, and further declaring that all the lands annexed to Georgia, and St. Mary's should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters.

That, in November, 1763, a commission was issued to the Governor of Georgia, in which the boundaries of that province are described, as extending westward to the Mississippi. A commission, describing boundaries of the same extent, was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace acknowledging them as sovereign and independent states.

That in April, 1787, a convention was entered into between the states of South Carolina and Georgia settling the boundary line between them.

The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that state and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of the Indians, contained in the proclamation of 1763, excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular state.

The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commission subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a state can be seized in fee of lands, subject to the Indian title, and whether a decision that they
were seized in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

Judgment affirmed with costs.

JOHNSON, J.

In this case I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in no wise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes infinitely blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's.

As to the idea, that the grants of a legislature may be void because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power, and declared themselves pure, and the intermediate legislature corrupt.

The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequences of their own immoral conduct.

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification, had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well-known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, 'acts impairing the obligation of contracts,' can be construed to have the same force as must have been given to the words 'obligation and effect of contracts,' is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word 'contract,' given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word 'obligation,' which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is functus officio the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time
within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision, yet where to draw the line, or how to define or limit the words, ‘obligation of contracts,’ will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the state powers in favour of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

'The other point on which I dissent from the opinion of the court, is relative to the judgment which ought to be given on the first count. Upon that count we are called upon substantially to decide, ‘that the state of Georgia, at the time of passing the act of cession, was legally seized in fee of the soil, (then ceded,) subject only to the extinguishment of part of the Indian title.’ That is, that the state of Georgia was seized of an estate in fee-simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia. It would seem that the mere vagueness and uncertainty of this covenant would be a sufficient objection to deciding in favour of it, but to me it appears that the facts in the case are sufficient to support the opinion that the state of Georgia had not a fee-simple in the land in question.

This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry. But I am called upon to make a decision, and I must make it upon technical principles.

The question is, whether it can be correctly predicated of the interest or estate which the state of Georgia had in these lands, ‘that the state was seized thereof, in fee-simple.’

To me it appears that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seized to a use.

The correctness of this opinion will depend upon a just view of the state of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the states: others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside; others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seized of a fee-simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was anything more than a mere possibility, it certainly was reduced to that state when the state of Georgia ceded, to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent upon a purchase or conquest to be made by the United States.

I have been very unwilling to proceed to the decision.
of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon any

scruples, in the belief that they would never consent to impose a mere feigned case upon this court.

**Note on Government Takebacks**

Like it or not, it takes money to run a government. Salaries are needed for government employees, and government needs money to pay for various supplies, ranging from sophisticated weapons to electricity for powering offices. In early, growing societies, governments sometimes have financed their needs by granting land to those providing goods and services. But what can governments do when their supply of land is exhausted? At that point, despite the holding of *Fletcher v. Peck*, they must tax -- that is, they must take back wealth to which citizens previously have obtained title. But the power to take wealth back cannot be unlimited. If it were unlimited, *Fletcher* would be meaningless. Thus, there must be a line distinguishing taxation from an impermissible taking; Chapter II will address that line.

What if government does not wish to raise general revenue, but merely wants to take back a specific piece of property it has previously granted? Presumably, it could buy the property on the open market. But what if the owner refuses to sell and the government desperately needs his particular tract of land? For a military facility? A commercial airport? A productive factory? When can the government take land back? This is the topic of Chapter III.

What if government does not wish to raise revenue or to take specific land back, but only to prohibit some noxious use of land? That is the subject of the next three cases and of all the later chapters in the course.
THE CORPORATION OF THE BRICK PRESBYTERIAN CHURCH IN THE CITY OF NEW-YORK

v.

THE MAYOR OF THE CITY OF NEW-YORK et al.

5 Cow. 538 (N.Y. Sup. Ct. 1826)

SAVAGE, Ch. Justice.

This action is brought for an alleged breach of the covenant for quiet enjoyment.

On the 25th of February, 1766, the defendants conveyed to those whom the plaintiffs represent, the premises on which the brick presbyterian church now stands, in the city of New-York. By the deed, the lessees covenanted for the payment of an annual rent, and also that, within ten years, the premises should be enclosed in a fence; and that a church should be built thereon, or the premises should be used as a cemetery; and also that they should never be used for private secular uses.

The defendants then covenanted, that the lessees and their assigns, paying the rent and performing the conditions, should quietly use, occupy and enjoy the premises, without any let or hindrance of the defendants or any other person, & c.

The plaintiffs aver performance on their part, and a breach of the covenant on the part of the defendants, by reason of their by law of the 27th of October, 1823, prohibiting the use of the premises, as a cemetery, for the interment of the dead.

The defendants, by plea, justify under their charter of incorporation, and the act of the legislature of the state, (2 R. L. 445, § 267;) by which they have full power and authority to make and pass such by-laws and ordinances as they shall, from time to time, deem necessary and proper, "for regulating, or if they find it necessary, preventing the interment of the dead within the said city." To this plea the plaintiffs have demurred.

The principal question, and the only one which it is necessary to decide, is, whether the by law of October, 1823, is, per se, a violation of the covenant for quiet enjoyment, contained in the deed of the 25th February, 1766, for which the defendants are liable to pay damages.

The validity of the by-law is asserted by both parties. We are relieved, therefore, from any enquiry on that point.

The defendants are a corporation, and in that capacity are authorized by their charter, and by law, to purchase and hold, sell and convey real estate, in the same manner as individuals. They are considered a person in law within the scope of their corporate powers; and are subject to the same liabilities, and entitled to the same remedies, for the violation of contracts, as natural persons. They are also clothed, as well by their charter as by subsequent statutes of the state, with legislative powers; and, in the capacity of a local legislature, are particularly charged with the care of the public morals, and the public health within their own jurisdiction.

In ascertaining their rights and liabilities as a corporation, or as an individual, we must not consider their legislative character. They had no power, as a party, to make a contract which should control or embarrass their legislative powers and duties. Their enactments, in their legislative capacity, are to have the same effect upon their individual acts, as upon those of any other persons, or the public at large, and no other effect.

The liability of the defendants, therefore, upon the covenant in question, must be the same as if it had been entered into by an individual; and the effect of the by-law upon it the same as if that by-law had been an act of the state legislature. It is expressly authorized by the legislature; and whether it be their act or an act of the local city legislature, makes no difference. (4 Wheat. 652.)

The plaintiffs, then, are entitled to the same remedy as if the premises had been conveyed to them by an individual,
under the like conditions and covenants. This being so, the defendants' proposition is, that the act of the legislature rendering the covenant unlawful, the covenant itself becomes inoperative.

There are but few authorities on this question, and those few are at variance. The case of Broxon v. Dean, (3 Mod. 39.) decided in 1683, was covenant upon a charter party for the freight of a ship. The defendant pleaded that the ship was loaded with French goods prohibited by law to be imported. And, upon demurrer, judgment was given for the plaintiff; for the court were all of opinion, that if the thing to be done was lawful at the time when the defendant entered into the covenant, though it was afterwards prohibited by act of parliament, yet the covenant was binding. But in the case of Browster v. Kichits, (1 Ld. Ray. 317, 321.) A. D. 1698, a different, and a more rational doctrine is established. It is there said, "For the difference when an act of parliament will amount to a repeal of a covenant, and when not, is this: when a man covenants not to do a thing which was lawful for him to do, and an act of parliament comes after, and compels him to do it, then the act repeals the covenant, and vice versa. But when a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant."

In 1 Salk. 198, where the same case is reported, the proposition is thus stated: "Where H. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repented. But if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant."

That such is the correct rule, as between individuals, seems to be admitted by the counsel for the plaintiffs. But it is contended that the rule is not applicable to a case, where the same party makes the covenant, and afterwards makes the legislative act, which abrogates the covenant. There is, indeed, a seeming inconsistency; but the solution has already been given, viz, that the defendants had no power to limit their legislative discretion by covenant; and they are not stopped from giving this answer. (2 T. R. 169.)

The reasonableness of acting upon the rule, in this case, cannot be more strongly exemplified, than by the case itself. Sixty years ago, when the lease was made, the premises were beyond the inhabited part of the city. They were a common; and bounded on one side by a vineyard. Now they are in the very heart of the city. When the defendants covenanted that the lessees might enjoy the premises for the purpose of burying their dead, it never entered into the contemplation of either party, that the health of the city might require the suspension, or abolition of that right. It would be unreasonable in the extreme, to hold that the plaintiffs should be at liberty to endanger not only the lives of such as belong to the corporation of the church, but also those of the citizens generally, because their lease contains a covenant for quiet enjoyment. Suppose these premises had been let for a certain purpose which is proper in itself, in a detached situation, but a nuisance in a city thickly inhabited—for instance, a slaughter house—could it be seriously contended, that when the use of the property in the way contemplated by the parties to the conveyance, was forbidden by the legislature, an action would lie against the grantor? Such a rule, I apprehend, would be extremely oppressive and unjust, as to individuals; and equally so, as to the defendants in this case.

The defendants are entitled to judgment on the demurrer.

Judgment for the defendants.
COMMONWEALTH

v.

CYRUS ALGER.

61 Mass. 53 (7 Cush. 1851)

SHAW, C. J.

In proceeding to give judgment in the present case, the court are deeply impressed with the importance of the principles which it involves, and the magnitude and extent of the great public interests, and the importance and value of the private rights, directly or indirectly to be affected by it. It affects the relative rights of the public and of individual proprietors, in the soil lying on tide waters, between high and low water mark, over which the sea ebbs and flows, in the ordinary action of the tides.

The defendant has been indicted for having erected and built a wharf over and beyond certain lines, described as the commissioners’ lines, into the harbor of Boston. The case comes before this court, upon a report of the judge of the municipal court, who, deeming the questions of law involved in the case doubtful and important, with the consent of the defendant, pursuant to the statute, reported the same for the consideration of this court. Probably the opinion was given pro forma, and a verdict taken by consent, with a view to present the whole question to this court.

The case thus presented, must depend on the construction, validity, and effect of the laws in question, establishing the lines of the harbor, as they affect public and private rights; regarding, as they do, the rights of the public in tide waters and the areas of the sea, and the nature, extent, and limits of the rights of private proprietors in flats and sea-shores. *65 The uncontested facts in the present case are, that the defendant was owner of land, bounded on a cove or arm of the sea, in which the tide ebbed and flowed, that he built the wharf complained of, on the flats before his said land, between high and low water mark, and within one hundred rods of his upland, but below the commissioners’ lines as fixed by one of these statutes; although it was so built as not to obstruct or impede navigation. This certainly presents the case most favorably for the defendant.

We may, perhaps, better embrace the several subjects involved in the inquiry, by considering,

First, What are the rights of owners of land, bounding on salt water, whom it is convenient to designate as riparian proprietors, to the flats over which the tide ebbs and flows, as such rights are settled and established by the laws of Massachusetts; and,

Second, What are the just powers of the legislature to limit, control, or regulate the exercise and enjoyment of these rights.

* * *

We have thought it proper to examine, with some care, the foundation, on which the right of property in land, situated between high and low water mark in Massachusetts, rests, though it has not been much contested in reference to these harbor lines, except indirectly, and in vague and general terms. And we think it is entirely clear that, since the adoption of the colony ordinance, every grant of land, bounding upon the sea, or any creek, cove, or arm of the sea, and either in terms including flats to low water mark, or bounding the land granted on the sea or salt water, with no terms limiting or restraining the operation of the grant, and where the land and flats have not been severed by any intervening conveyance, has had the legal effect to pass an estate in fee to the grantee, subject to a limited right of way for boats and vessels. We have seen that the entire right of property in the soil was granted by the charter to the colonists, with a full power of disposal, and that the colonial government was clothed with so much of the royal prerogative and power, as was necessary to maintain and regulate all public rights and immunities in the same. If land so situated had, previously to the ordinance, been conveyed by the government, to companies of proprietors or individuals, the act was in the nature of a grant of the flats to such prior grantees. It is said that it was not of itself a grant, but a general law affecting the character of property. Be it so. It was an authoritative declaration of owners, having a full right of property and power of disposal, annexing additional land to that previously granted, to hold in fee, subject to a reserved easement; and, if not strictly a grant, it purtook of most of the characteristics of a grant, and could not be revoked by the power that gave it. In regard to all grants made by the government after the ordinance, the terms of the grant, bounding the lands granted upon the sea, or arm of the sea, or places where the tide ebbed and flowed, would, ex vi termini, carry a fee to low water mark, or one hundred rods; so that in one or other alternative, this ordinance must govern and control the shore rights of riparian proprietors in every part of the commonwealth.
II. Assuming, then, that the defendant was owner in fee of the soil and flats upon which the wharf in question was built, it becomes necessary to inquire whether it was competent for the legislature to pass the acts establishing the harbor lines, and what is the legal validity and effect of those acts.

There is now no occasion and no ground to deny or question the full and sovereign power of the commonwealth, within its limits, by legislative acts, to exercise dominion over the sea and the shores of the sea, and all its arms and branches, and the lands under them, and all other lands flowed by tide water, subject to the rights of riparian ownership. Whether any portion of this sovereignty remained in the British crown after the colonial and provincial charters were granted, it is now immaterial to inquire; for it is quite certain that the entire right of property in the soil was granted to the colonists in their aggregate capacity, and if any power remained in the crown, it was that of dominion and regulation of the public right, and this was wholly determined by the Declaration of Independence, acknowledged and accorded to by the treaty of peace, sanctioned by an act of parliament. This right of dominion and controlling power over the sea and its coasts, shores, and tide waters, when relinquished by the parent country, must vest somewhere; and, as between the several states and the United States, whatever may have been the doubts on the subject, it is settled that it vested in the several states, in their sovereign capacity, respectively, and was not transferred to the United States by the adoption of the constitution intended to form a more perfect union. Special jurisdiction has been from time to time vested in the general government for special purposes, but the general jurisdiction remains with the several states, subject, however, to such regulations as congress may make in the exercise of their admitted powers to regulate foreign commerce, and commerce among the states. Such is the principle determined by the supreme court of the United States, the ultimate tribunal to decide questions of this kind. New Orleans v. The United States, 10 Pet. 662, 737; Pollard v. Hagan, 3 How. 212.

But the power of the commonwealth, by the legislature, over the sea, its shores, bays, and coves, and all tide waters, is not limited, like that of the crown at common law. By the common law, the king was held to be the owner and proprietor of the soil under the sea, its shores, and all tide waters, and as such could grant the right of property therein to a subject; though this was not usually done without the previous execution and return of a writ of ad quod damnum, to ascertain whether such grant would cause any injury to any public right. But it was further held, at common law, that, beyond a right of property, the king's prerogative extended to the dominion and control of the shores of the sea, as a power held in trust for the security and protection of the public rights in the navigation and fisheries; that these were among the regalia or incidents of sovereignty, which could not be alienated by a royal grant alone, or held by a subject. But we believe it was never doubted that the British parliament, exercising all the powers of dominion and sovereignty, had full authority to regulate, protect, and secure all public rights; and it is under this authority, we suppose, that acts have often been passed regulating ports, harbors, and tide waters. Lowe v. Govett, 3 B. & Ad. 863; The King v. Montague, 4 B. & C. 398; Attorney General v. Burridge, and Same v. Parmeter, 10 Price, 350, 378, 412.

Supposing, then, that the commonwealth does hold all the power which exists anywhere, to regulate and dispose of the sea-shores, and tide waters, and all lands under them, and all public rights connected with them, whether this power be traced to the right of property or right of sovereignty as its principal source, it must be regarded as held in trust for the best interest of the public, for commerce and navigation, and for all the legitimate and appropriate uses to which it may be made subservient. Assuming, then, that the commonwealth does hold this power, within certain limits, the question recurs, whether the acts under consideration are within its just and legitimate exercise.

In considering this question, it becomes necessary to inquire, and ascertain as far as practicable, the nature and character of the laws in question, and the object which the legislature had in view in passing them. The first act, though not the one upon which this prosecution is founded, was passed on the 19th of April, 1837, St. 1837, c. 229, and is entitled "an act to preserve the harbor of Boston, and to prevent encroachments therein." It establishes a line by local objects designated along the easterly and northerly side of the city from the lower South Boston Free Bridge, round to a point above Charles River Bridge, and provides, § 3, that no wharf, pier, or building, or encumbrance of any kind, shall ever hereafter be extended beyond the said line, into or over the tide water of said harbor.

The next succeeding act was passed on the 17th of March, 1840, St. 1840, c. 35. It establishes the line of the harbor, from the lower free bridge, on the Boston side, to the old South Boston Bridge, and on the
South Boston side, from the old South Boston Bridge to the Free Bridge, and thence easterly. The fourth section of the act of April 26, 1847, St. 1847, c. 278, establishing certain lines in South Bay, is the statute upon which the present prosecution is instituted. The premises of the defendant are situated on the South Boston side, immediately above the upper bridge. This act provides, § 1, that no wharf or pier shall ever be extended beyond said line into or over the tide water of the commonwealth. Section 5 reiterates this prohibition, and § 6 provides that any person offending against the provisions of the act, shall be deemed guilty of a misdemeanor, and may be prosecuted therefor and punished, by indictment; and that any erection or obstruction, which shall be made contrary to the provisions and intent of the act, shall be liable to be removed and abated as a public nuisance. The other acts recited in the indictment, extend the line, with similar provisions, to other parts of the harbor, but do not materially affect the present question.

The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right. If this can be done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well as that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious, that all well regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows, near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a smallpox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, sic utere tuo, ut alienum non pravis. It is not an appropriation of the property to a public use, but the
restraint of an injurious private use by the owner, and
is therefore not within the principle of property taken
under the right of eminent domain. The distinction,
we think, is manifest in principle, although the facts
and circumstances of different cases are so various,
that it is often difficult to decide whether a particular
exercise of legislation is properly attributable to the
one or the other of these two acknowledged powers.

These principles were somewhat discussed, and
similar views were substantially adopted, in the case
of Commonwealth v. Tewksbury, 11 Met. 55. Perhaps
the facts in that case were imperfectly stated, or some
of the positions and illustrations were expressed in
too broad and unqualified a manner; but we are of
opinion that the principle on which that judgment
proceeded was correct. It assumes that all real estate,
whether on the sea-shore, derived immediately or
remotely from the government of the state, is taken
and held under the tacit understanding that the owner
shall so deal with it as not to cause injury to others;
that when land is so situated, or such is its
conformation, that it forms a natural barrier to rivers
or tidal watercourses, the owner cannot justifiably
remove it, to such an extent as to permit the waters to
desert their natural channels, and overflow, and
perhaps inundate fields and villages, render rivers,
ports and harbors shallow, and consequently desolate,
and thereby destroy the valuable rights of other
proprietors, both in the navigation of the stream, and
in the contiguous lands. It expresses nearly the same
legal truth, which is expressed in the familiar maxim,
that no owner, through whose land a natural watercourse runs, can lawfully divert it to the damage
of others. But what is the diversion of a watercourse?
Ordinarily, and when no such circumstances exist,
the owner of land has a perfect right to use and
remove the earth, gravel and clay of which the soil is
composed, as his own interest or convenience may
require. But can he do this when the same materials
form the natural embankment of a watercourse? He
may say, perhaps, that he merely intends to make use
of materials which are his own, and to which he has a
right, and for which he has other uses. But we think
the law will admit of no such excuse; he knows that,
when these materials are removed, the water, by the
law of gravitation, will rush out, and all the
mischievous consequences of diverting the
watercourse will follow. He must be presumed to
have intended all the necessary and natural
consequences of his own acts; of course that he
intended, by those acts, to divert the watercourse; and
the law holds him responsible for them accordingly.

Principles are tested by taking extreme cases. Take
the case of the river Mississippi, where large tracts
of country, with cities and villages, depend for their
protection upon the natural river bank, which is
private property. Perhaps, under such circumstances,
it might not be too much to say, not only that the
owner cannot do any positive act towards removing
the embankment, but that he may properly be held
responsible for the permissive waste of it, by
negligence and inattention. And the other cases
hereinbefore stated, though very different in their
facts, are similar in principle, all being cases in which
the specific use prohibited, is so prohibited because
it would be noxious, and cause or threaten damage to
the lives, health, comfort, or property of other
members of the community, equally entitled to
protection. We think, therefore, that that case was
rightly decided.

Supposing the principle itself to be well established,
the great question then is, whether the act in question,
fixing certain harbor lines, was within it; and we are
of opinion that it is, although it may in some cases
seem to trench somewhat largely on the profitable
use of individual property. This opinion is founded
on several considerations.

We have already alluded to the point, that a particular
use of land, as well inland as on the sea-shore, which,
in one situation, would be greatly injurious to
common and public rights, in another position would
be wholly harmless. A man having a hill of gravel on
his farm, not constituting the embankment of a
stream, may remove the earth at his pleasure, because
such use can injure no one; while under other
circumstances, it would be greatly injurious. Whether
any restraint upon the use of land is necessary to the
preservation of common rights and the public
security, must depend upon circumstances, to be
judged of by those to whom all legislative power is
intrusted by the sovereign authority of the state, so to
declare and regulate as to secure and preserve all
public rights.

* * *

Considering, therefore, that all real estate derived
from the government is subject to some restraint for
the general good, whether such restraint be regarded
as a police regulation on of any other character;
considering that sea-shore estate?? though held in fee
by the riparian proprietor, both on account of the
qualified reservation under which the grant was
made, and the peculiar nature and character, position
and relations of the estate, and the great public
interests associated with it, is more especially subject
to some reasonable restraints, in order that the
exercise of full dominion over it, by the proprietor,
may not be noxious to others, and injurious to the
public, the court are of opinion that the legislature has power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties.

Wherever there is a general right on the part of the public, and a general duty on the part of a landowner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades, and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereof, or otherwise using it, for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings; although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties.

This principle of legislation is of great importance and extensive use, and lies at the foundation of most enactments of positive law, which define and punish malae prohibita. Things done may or may not be wrong in themselves, or necessarily injurious and punishable as such at common law; but laws are passed declaring them offenses, and making them punishable, because they tend to injurious consequences; but more especially for the sake of having a definite, known and authoritative rule which all can understand and obey. In the case already put, of erecting a powder magazine or slaughterhouse, it would be indictable at common law, and punishable as a nuisance, if in fact erected so near an inhabited village as to be actually dangerous or noxious to life or health. Without a positive law, every body might agree that two hundred feet would be too near, and that two thousand feet would not be too near; but within this wide margin, who shall say, who can know, what distance shall be too near or otherwise? An authoritative rule, carrying with it the character of certainty and precision, is needed. The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance; builders of houses need to know, to what distance they must keep from the obnoxious works already erected, in order to be sure of the protection of the law for their habitations. This requisite certainty and precision can only be obtained by a positive enactment, fixing the distance, within which the use shall be prohibited as noxious, and beyond which it will be allowed, and enforcing the rule thus fixed, by penalties.

Many cases will suggest themselves, where the legislature interposes by statute to declare, protect and regulate public rights, although those rights are public easements only, over lands of which the fee of the soil is in private proprietors. Such are laws regulating the construction and repairs of roads, highways and bridges; declaring how they shall be graded, what barriers shall be erected to guard travellers against dangerous places, and what obstructions shall be removed.

* * *

But in reference to the present case, and to the act of the legislature, establishing lines in the harbor, beyond which private proprietors are prohibited from building wharves, it is urged that such a restraint upon the estate of an individual, debarring him to some extent from the most beneficial use of it, is in effect taking his estate. If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable. But we are to consider the subject matter, to which such restraint applies. The value of this species of estate, that of shore and flats, consists mainly in the means it affords of building wharves from the upland towards deep water, to place merchandise and build wharves upon, and principally to afford access, to vessels requiring considerable depth of water, from the sea to suitable landings. Now, if along a shore where there are flats of considerable extent, one were restrained to a certain length, whilst others were allowed to extend further, the damage might be great. So if one were allowed to extend, and the contumacious proprietors adjacent were restrained, it would be obviously more injurious. The one extended would stop or check the current along the others, cause mud to accumulate near them, and thus render the water shoal at those wharves. But where all are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves,
with the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.

But of this the legislature must judge. Having once come to the conclusion that a case exists, in which it is competent for the legislature to make a law on the subject, it is for them, under a high sense of duty to the public and to individuals, with a sacred regard to the rights of property and all other private rights, to make such reasonable regulations as they may judge necessary to protect public and private rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others.

In regard to the case of Mr. Alger, the report states that a certain piece of wharf, called a triangular piece, was erected and placed in its position beyond the line, after the law fixing the line had been passed; but that some other portions, though actually beyond the line, were erected, and the obstructions complained of actually placed in their position, before the law was passed; and also that the wharf complained of does not obstruct the navigation of boats and vessels.

In regard to the first suggestion, it may be necessary to examine the facts more minutely before any final judgment is entered. If any portion of this erection, described in the indictment, had been actually made and placed in its position before the act was passed, the court are all of opinion that the owner is not liable to its penalties. These laws were future and prospective in their terms and in their operation. They proceed on the assumption, that before they were passed, every man had a right to build on his own flats, if the erection did not in fact operate to impede navigation, and render him indelible as at common law; and that the common law, in thus lending its aid in the prosecution of actual injuries to navigation, to be proved in each case as nuisances, would be sufficient to secure the public against encroachments, without legislation. But, for the reasons hereinbefore given, it seems to us highly important to have a more precise and definite law made and promulgated, by which all persons may more certainly know their own and the public rights, and govern themselves accordingly.

If, indeed, before the passing of these laws, any one had so built into navigable water as to cause a public nuisance, he may be liable to indictment and punishment, but not by these laws, fixing harbor lines. It follows, therefore, that all persons who built on their own soil before these laws, in a manner not amounting to a public nuisance, independently of them, had exercised only their just and lawful right; and any laws, made to punish acts lawful at the time they were done, would be ex post facto, contrary to the constitution and to the plainest principles of justice, and of course inoperative and void.

In regard to the other suggestion, that it is found by the case that the particular wharf of Mr. Alger did not obstruct or impede navigation, it is proper to say, that if we are right in principle, we are bound to hold that this circumstance can afford no defence. A consideration of this fact illustrates the principles we have been discussing. The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide water is a nuisance at common law or not; and when ascertained and adjudged, it affords no rule for any other case, and can have little effect in maintaining and protecting the acknowledged public right. It is this consideration, (the expediency and necessity of defining and securing the rights of the public,) which creates the exigency, and furnishes the legislature with the authority to make a general and precise law; but when made, because it was just and expedient, and because it is law, it becomes the duty of every person to obey it and comply with it. The question under the statute therefore is, not whether any wharf, built after the statute was made and promulgated, was an actual obstruction to navigation, but whether it was within the prohibited limit.

On the whole, the court are of opinion that the act fixing a line within the harbor of Boston, beyond which no riparian proprietor should erect a wharf or other permanent structure, although to some extent it prohibited him from building such structure on flats of which he owned the fee, was a constitutional law, and one which it was competent for the legislature to make; that it was binding on the defendant, and rendered him obnoxious to its penalties, if he violated its provisions.
QUESTION

What policy arguments in favor of narrow or broad readings of the police power and strict or loose enforcement of constitutionally protected property rights are suggested by the majority and dissenting opinions in People v. Stover, the next case?


*  *  *

OPINION OF THE COURT

Fuld, Judge.

The defendants, Mr. and Mrs. Stover, residents of the City of Rye since 1940, live in a 2 1/2-story I-family dwelling, located in a pleasant and built-up residential district, on the corner of Rye Beach and Forest Avenues. A clothesline, filled with old clothes and rags, made its first appearance in the Stovers' front yard in 1956 as a form of "peaceful protest" against the high taxes imposed by the city. And, during each of the five succeeding years, the defendants added another clothesline to mark their continued displeasure with the taxes. In 1961, therefore, six lines, from which there hung tattered clothing, old uniforms, underwear, rags and scarecrows, were strung across the Stovers' yard -- three from the porch across the front yard to trees along Forest Avenue and three from the porch across the side yard to trees along Rye Beach Avenue.

In August of 1961, the city enacted an ordinance prohibiting the erection and maintenance of clotheslines or other devices for hanging clothes or other fabrics in a front or side yard abutting a street (General Ordinances, § 4-3.7). However, the ordinance provides for the issuance of a permit for the use of such clotheslines if there is "a practical difficulty or unnecessary hardship in drying clothes elsewhere on the premises" and grants a right of appeal to the applicant if a permit is denied.1

Following enactment of the ordinance, Mrs. Stover, the record owner of the property, applied for a permit to maintain clotheslines in her yard. Her application was denied because, she was advised, she had sufficient other property available for hanging clothes and she was directed to remove the clotheslines which were in the yards abutting the streets. Although no appeal was taken from this determination and no permit ever issued, the clotheslines were not removed. Relying upon the ordinance, the city thereupon charged the defendants with violating its provisions. They were tried and convicted and their judgments of conviction have been affirmed by the County Court of Westchester County. Upon the trial the defendant Webster Stover disputed the sufficiency of the evidence to connect him with the erection or maintenance of the clotheslines but he does not do so here, urging instead that the ordinance, as it has been applied to him and his wife, is unconstitutional both as an interference with free speech and as a deprivation of property without due process.2

It is a fair inference that adoption of the ordinance before us was prompted by the conduct and action of the defendants but we deem it clear that, if the law would otherwise be held constitutional, it will not be stricken as discriminatory or invalid because of its motivation. (Cf. Town of Hempstead v. Goldblatt, 9 N.Y.2d 101, affd. 369 U.S. 590.) Our problem, therefore, is to determine whether the law violates First Amendment rights or otherwise exceeds the police power vested in a city on the ground that it was enacted without regard to considerations of public health, safety and welfare.

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The People maintain that the prohibition against clotheslines in front and side yards was "intended to provide clear visibility at street corners and in driving out of driveways, and thus avoid and reduce accidents; to reduce distractions to motorists and pedestrians; and to provide greater opportunity for access in the event of fire". Although there may be considerable doubt whether there is a sufficiently reasonable relationship between clotheslines and traffic or fire safety to support an exercise of the police power, it is our opinion that the ordinance may be sustained as an attempt to preserve the residential appearance of the city and its property values by banning, insofar as practicable, unsightly clotheslines from yards abutting a public street. In other words, the statute, though based on what may be termed aesthetic considerations, proscribes conduct which offends sensibilities and tends to degrade the community and reduce real estate values.

There are a number of early decisions, both in this State (see People ex rel. Wineburgh Ady. Co. v. Murphy, 195 N. Y. 126) and elsewhere (see, e.g., Farney & Green v. Williams, 153 Cal. 318; City of Chicago v. Gunning System, 214 Ill. 628; City of Passaic v. Paterson Bill Posting Adv. & Sign Painting Co., 72 N. J. L. 283; Bryan v. City of Chester, 212 Pa. 259 which hold that aesthetic considerations are not alone sufficient to justify exercise of the police power. But since 1930 this court has taken pains repeatedly to declare that the issue is an open and "unsettled" one in New York. (People v. Rubenfeld, 254 N. Y. 245, 248-249; see, also, Perlmuter v. Greene, 259 N. Y. 327, 332; New York State Thruway Auth. v. Ashley Motor Ct., 10 N Y 2d 151, 156-157.) In addition, we have actually recognized the governmental interest in preserving the appearance of the community by holding that, whether or not aesthetic considerations are in and of themselves sufficient to support an exercise of the police power, they may be taken into account by the legislative body in enacting laws which are also designed to promote health and safety. (See, e.g., Matter of Wulfsbom v. Burden, 241 N. Y. 288, 303; Dowsey v. Village of Kensington, 257 N. Y. 221, 230; Perlmuter v. Greene, 259 N. Y. 327, 331-332, supra; Baddour v. City of Long Beach, 279 N. Y. 167, 174; Matter of Pressnell v. Leslie, 3 N Y 2d 384, 389; New York State Thruway Auth. v. Ashley Motor Ct., 10 N Y 2d 151, 157, supra.) "Aesthetic considerations", this court wrote in Dowsey v. Village of Kensington (257 N. Y. 221, 230, supra.), "are, fortunately, not wholly without weight in a practical world."

Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power. If zoning restrictions "which implement a policy of neighborhood amenity" are to be stricken as invalid, it should be, one commentator has said, not because they seek to promote "aesthetic objectives" but solely because the restrictions constitute "unreasonable devices of implementing community policy." (Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Prob. 218, 231.) Consequently, whether such a statute or ordinance should be voided should depend upon whether the restriction was "an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community — and not upon whether the objectives were primarily aesthetic." (Dukeminier, loc. cit.) And, indeed, this view finds support in an ever-increasing number of cases from other jurisdictions which recognize that aesthetic considerations alone may warrant an exercise of the police power. (See, e.g., Berman v. Parker, 348 U. S. 26, 33; General Outdoor Adv. Co. v. Department of Public Works, 289 Mass. 149, 187-188, app. dism. 297 U. S. 725; Sunad, Inc., v. City of Sarasota, 122 So. 2d 611 [Fla.]; State ex rel. Civello v. New Orleans, 154 La. 271, 284-285; Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 116-117; State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 271-272, cert. den. 350 U. S. 841; Churchill & Tait v. Raftery, 32 P. I. 580, app. dism. 248 U. S. 591; see, also, 8 McQuillin, Municipal Corporations [3d ed.], § 25.31.) As Mr. Justice Douglas, writing for an unanimous court in Berman, put it (348 U. S., at p. 33):

"The concept of the public welfare is broad and inclusive. ** The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. ** * If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

Cases may undoubtedly arise, as we observed above, in which the legislative body goes too far in the name of aesthetics (cf. Matter of Mid-State Adv. Corp. v. Bond, 274 N. Y. 82; Dowsey v. Village of Kensington, 257 N. Y. 221, supra; Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Prob. 218, 231) but the present, quite clearly, is not one of them. The ordinance before us is in large sense regulatory rather than prohibitory. It causes no undue hardship to any property owner, for it expressly provides for the issuance of a permit
for clotheslines in front and side yards in cases where there is practical difficulty or unnecessary hardship in drying clothes elsewhere on the premises. Moreover, the ordinance imposes no arbitrary or capricious standard of beauty or conformity upon the community. It simply proscribes conduct which is unnecessarily offensive to the visual sensibilities of the average person. It is settled that conduct which is similarly offensive to the senses of hearing and smell may be a valid subject of regulation under the police power (see, e.g., People v. Rubenfeld, 254 N. Y. 245, supra.), and we perceive no basis for a different result merely because the sense of sight is involved.

Nor is there any warrant or justification for a charge -- which seems to have been abandoned on this appeal -- that the ordinance is being enforced solely against the defendants or that there is a pattern of discrimination consciously being practiced against them. As the court below noted, the building superintendent testified, without contradiction, that all applications for permits were checked and investigated, that other applications for permits had been denied and that the defendants were the only persons who refused to remove clotheslines violative of the ordinance.

Having concluded that the ordinance here in question is validly grounded on a proper exercise of the police power, we turn to the defendants' principal contention, that it is invalid as applied to them because it constitutes an unconstitutional infringement of their freedom of speech. The defendants erected the six clotheslines on their property as a protest against their tax assessment. This form of nonverbal expression is, we shall assume, a form of speech within the meaning of the First Amendment. (See Stromberg v. California, 283 U. S. 359, 369 [exhibition of red flag]; Board of Edu. v. Barnette, 319 U. S. 624, 632-633 [flag salute]; Garner v. Louisiana, 368 U. S. 157, 201 [sit-in demonstration] [per Harlan, J., concurring].) However, it is perfectly clear that, since these rights are neither absolute nor unlimited (see, e.g., Kovacs v. Cooper, 336 U. S. 77; Chaplinsky v. New Hampshire, 315 U. S. 568; Stromberg v. California, 283 U. S. 359, 368, supra; Gitlow v. New York, 268 U. S. 652), they are subject to such reasonable regulation as is provided by the ordinance before us. Although the city may not interfere with nonverbal speech, it may proscribe conduct which invites to violence or works an injury on property, and the circumstance that such prohibition has an impact on speech or expression, otherwise permissible, does not necessarily invalidate the legislation.

It must be borne in mind that the ordinance here in question is, in the language of a recent Supreme Court case (Edwards v. South Carolina, 372 U. S. 229, 236), a "precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed." (See, also, Schneider v. State, 308 U. S. 147, 160-161.) As the court aptly observed in the Schneider case (308 U. S. 147, 160-161, supra.), "a person could not exercise [his freedom of speech] by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

This reasoning is equally applicable to the case before us. The prohibition against clotheslines is designed to proscribe conduct which offends the sensibilities and tends to depress property values. The ordinance and its prohibition bear "no necessary relationship" to the dissemination of ideas or opinion and, accordingly, the defendants were not privileged to violate it by choosing to express their views in the altogether bizarre manner which they did. It is obvious that the value of their "protest" lay not in its message but in its offensiveness.

The judgment appealed from should be affirmed.

Van Voorhis, Judge (Dissenting).

My concern in this case is not with limitation of free speech nor whether aesthetic considerations are enough in themselves to justify zoning regulations in prescribed instances, but with the extent to which a municipality can go in restricting the use of private property. The ordinance whose validity is now being upheld prohibits the erection and maintenance of clotheslines in a front or side yard abutting a street. Exceptions may be granted, and we were told upon the argument that 26 exceptions have been allowed in Rye, with the practical result that this ordinance is
enforced against few others, if any, than the appellants. Even if that be held not to undermine the ordinance, it seems to me to exceed zoning powers for municipalities such as this to dictate to owners of houses and lots where they may put their clotheslines. The validity of ordinances may be tested in court according to whether the exercise of power delegated to the municipality is reasonable or arbitrary (People ex rel. City of Olean v. Western N. Y. & Pa. Traction Co., 214 N. Y. 526; Commissioners of Palisades Interstate Park v. Lent, 240 N. Y. 1). In the case last cited it was said that "What is reasonable is in large part tested by what is ordinary usage and common experience" (p. 8). What has happened here is that these defendants conceived the unusual idea of hanging what the majority opinion describes as "tattered clothing, old uniforms, underwear, rags and scarecrows" across their yards as a form of protest against the amount of their taxes. The city, at the instance of other residents in the area, fought back by adopting this ordinance from the operation of which almost every other property owner applying for a permit has been excepted. Although the origin of this dispute is evidently political in nature, the validity of this ordinance is sought to be upheld entirely on the basis of aesthetic considerations, e.g., that the eye is offended by what hangs from these clotheslines. No cases have been cited from this or any other jurisdiction holding that a municipal corporation or political subdivision can direct house and lot owners where they shall hang their clothes. Aesthetic considerations, in a certain sense, underlie all zoning, usually in combination with other factors with which they are interwoven. Lot area, setback and height restrictions, for example, are based essentially on aesthetic factors. Occasionally public safety considerations are blended with aesthetics, such as the tendency of billboards to distract the attention of automobile drivers or of high hedges to block their view at street intersections. Aesthetic factors are given effect, in such cases, but have been limited to specific situations and not extended to anything which offends the taste of the neighbors or of the local legislature. One may assume, for example, that a clothesline ordinance would be invalid which permitted the hanging of white but not red blankets, or allowed shirts to be put out to dry after washing but not underwear. Probably, at least until the next step in zoning law, a municipality would be held unauthorized to direct house owners what colors their homes should be painted, or what kinds of trees or shrubbery they should be allowed to grow and where they should be planted. Nevertheless if they can be told where to hang their clothes in their yards, those items would be but a small step beyond the present holding, or to prescribe what architectural designs should be adopted so as to harmonize with the designs of the neighbors. To direct by ordinance that all buildings erected in a certain area should be one-story ranch houses would scarcely go beyond the present ruling as a question of power, or to lay down the law that they should be all of the same color, or of different colors, or that each should be of one or two or more color tones as might suit the aesthetic predilections of the city councilors or zoning boards of appeal.

This ordinance is unrelated to the public safety, health, morals or welfare except insofar as it compels conformity to what the neighbors like to look at. Zoning, important as it is within limits, is too rapidly becoming a legalized device to prevent property owners from doing whatever their neighbors dislike. Protection of minority rights is as essential to democracy as majority vote. In our age of conformity it is still not possible for all to be exactly alike, nor is it the instinct of our law to compel uniformity anywhere diversity may offend the sensibilities of those who cast the largest numbers of votes in municipal elections. The right to be different has its place in this country. The United States has drawn strength from differences among its people in taste, experience, temperament, ideas, and ambitions as well as from differences in race, national or religious background. Even where the use of property is bizarre, unsuitable or obstreperous it is not to be curtailed in the absence of overriding reasons of public policy. The security and repose which come from protection of the right to be different in matters of aesthetics, taste, thought, expression and within limits in conduct are not to be cast aside without violating constitutional privileges and immunities. This is not merely a matter of legislative policy, at whatever level. In my view, this pertains to individual rights protected by the Constitution.

Aesthetic factors have always played an important part in zoning, as they have in the licensing of television and radio, theatre and entertainment, as well as other forms of music, art, philosophy and literature are closely involved in aesthetics, which are not a veneer but are fundamental to the human mind and spirit. Nor are aesthetics confined to landscape gardening, tract development or architectural design. The avoidance by courts, sometimes seemingly to the point of evasion, of sustaining the constitutionality of zoning solely on aesthetic grounds has had its origin in a wholesome fear of allowing government to trespass through aesthetics on the human personality. In this instance, hanging tattered clothing, underwear, rags and scarecrows on a clothesline can scarcely be regarded as articulating a protest against excessive taxation, but to prohibit it by law upon the ground that it offends the aesthetic sensibilities of the neighbors or of the public officials of the municipality means -- unless well defined and effectively enforced limits are placed upon this power to rule aesthetics by government -- opening the door to the invasion by majority rule of a great deal of territory that belongs to the individual human being. It was once said of a famous lady of
history that she had so much taste, and all of it so bad. Individual taste, good or bad, should ordinarily be let alone by government.

In authorizing the regulation of setback lines, yard areas, height of buildings and many permitted uses, the dominant factor has often been and should be aesthetic. But it is important not to allow general or unlimited power in government to regulate aesthetics in zoning or other departments of municipal administration. Extending aesthetic factors to the regulation of clotheslines suggests that zoning power, in the future, may extend to many other types of regulation also, since municipal boards and councils are being authorized in large degree to impose their ideas of aesthetics, and may be expected to do so on an expanding scale to placate the wishes of other property owners who constitute a larger segment of the electorate. Unless clotheslines create traffic or health hazards, it seems to me that they should not be interfered with by law in suburban or rural areas. More important than this, however, does it seem that extensions of categories of local legislation for purely aesthetic purposes should be defined and limited, and, if they are to be enlarged, it should not be under reasoning which sets no ascertainable bounds to what can be done or attempted under this power.

The judgments of conviction of appellants should be reversed and the charges against them dismissed.

Chief Judge Desmond and Judges Dye, Burke, Foster and Scileppi concur with Judge Fuld; Judge Van Voorhis dissents in an opinion.

Judgment affirmed.

Footnotes

1 The full text of the ordinance reads in this way (General Ordinance, § 4-3.7):

"Clothes lines. No clothes lines, drying racks, poles or other similar devices for hanging clothes, rags or other fabrics shall be erected or maintained in a front yard or side yard abutting a street. If there is a practical difficulty or unnecessary hardship in drying clothes elsewhere on the premises, a permit shall be issued by the City Clerk permitting the use of said front or side yard for such purpose upon approval of and a finding by the Building Inspector that drying of clothes elsewhere on the premises would create a practical difficulty or unnecessary hardship. If a permit is denied, the applicant may appeal to the Board of Appeals of this city. The provisions of this section shall be applicable to existing conditions."

2 We merely note that the proof of Mr. Stover's participation is more than ample to support the conviction. He not only acknowledged, at a public hearing before the Rye City Council, that he had erected the lines as a protest against his taxes and was leaving them there "until he got some action on his assessment" but he alleged the same thing in a complaint in a declaratory judgment action which he and his wife had instituted against the city.
Note: Loretto v. Teleprompter Manhattan CATV Corp.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), suggests an alternative approach to the issue of the scope of state power to interfere with private property rights. The case arose out of Teleprompter's installation of its cable TV wires on Loretto's apartment building in Manhattan. The cable, which was approximately 1/2 inch in diameter and 35 feet in length, ran along the length of the building approximately 18 inches above the roof top and was attached to the building by screws, nails, and other items penetrating the masonry of the building at two-foot intervals. At the time Loretto brought suit, section 828 of New York's Executive Law provided that an owner of a building could not interfere with the installation of cable television facilities upon his property nor demand payment from the television company or from a tenant connected to cable TV "in excess of any amount" that the state regulatory agency "determine[d] to be reasonable." The state agency determined that a one-time $1 payment from the TV company was the only fee to which a building owner was entitled.

The state sought to justify this stringing of TV cables across rooftops as the most efficient available way to bring cable TV service to Manhattan -- far more efficient than digging up the streets. In an opinion by Justice Thurgood Marshall, however, the Supreme Court ruled that the screws, nails, and other items attaching the TV cable to Loretto's building constituted a permanent physical occupation of a portion of the rooftop and that any "permanent physical occupation of property" constituted "a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Accordingly, the Court refused to sustain the New York statute as a valid regulation and ordered that Teleprompter remove its cable unless it reached an agreement with Loretto for its maintenance.

Is the Loretto approach preferable to the view extracted from the cases considered earlier in this chapter?