

were still a “legitimate” basis for regulation, these concerns could not justify disproportionate burdens on interstate commerce.³¹¹

Subsequently, in the context of recreational rather than commercial activity, the Court reached a result more deferential to state authority, holding that access to recreational big game hunting is not within the category of rights protected by the Privileges or Immunities Clause, and that consequently a state could charge out-of-staters significantly more than in-staters for a hunting license.³¹² Suffice it to say that similar cases involving a state’s efforts to reserve its fish and game for its own inhabitants are likely to be challenged under commerce or privileges or immunities principles, rather than under substantive due process.

Ownership of Real Property: Rights and Limitations

Zoning and Similar Actions.—It is now well established that states and municipalities have the police power to zone land for designated uses. Zoning authority gained judicial recognition early in the 20th century. Initially, an analogy was drawn to public nuisance law, so that states and their municipal subdivisions could declare that specific businesses, although not nuisances *per se*, were nuisances in fact and in law in particular circumstances and in particular localities.³¹³ Thus, a state could declare the emission of dense smoke in populous areas a nuisance and restrain it, even though this affected the use of property and subjected the owner to the expense of compliance.³¹⁴ Similarly, the Court upheld an ordinance that prohibited brick making in a designated area, even though the specified land contained valuable clay deposits which could not profitably be removed for processing elsewhere, was far more valuable for brick making than for any other purpose, had been acquired before it was annexed to the municipality, and had long been used as a brickyard.³¹⁵

With increasing urbanization came a broadening of the philosophy of land-use regulation to protect not only health and safety but also the amenities of modern living.³¹⁶ Consequently, the Court has recognized the power of government, within the loose confines of

³¹¹ 441 U.S. at 336, 338–39.

³¹² *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371 (1978).

³¹³ *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (location of a livery stable within a thickly populated city “is well within the range of the power of the state to legislate for the health and general welfare”). See also *Fischer v. St. Louis*, 194 U.S. 361 (1904) (upholding restriction on location of dairy cow stables); *Bacon v. Walker*, 204 U.S. 311 (1907) (upholding restriction on grazing of sheep near habitations).

³¹⁴ *Northwestern Laundry v. Des Moines*, 239 U.S. 486 (1916). For a case embracing a rather special set of facts, see *Dobbins v. Los Angeles*, 195 U.S. 223 (1904).

³¹⁵ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

³¹⁶ Cf. *Developments in the Law: Zoning*, 91 HARV. L. REV. 1427 (1978).