Buffalo Law Review

Volume 10 | Number 2 Article 9

1-1-1961

The Periphery of "Exclusive" Federal Power to Legislate Over Federally Ceded Lands

Alfred Hetzelt

trarily terminate the use after the initial five-year period had run, without regard for the pecuniary exigencies of the case, Camarco would have to once again resort to judicial process for additional time. A round of such legal jousts is foreseeable. A more suitable approach would be to discard that portion of the ordinance which calls for the flat five-year period in all cases, and substitute a realistic appraisal by the zoning board of each nonconforming use. The board would presumably be guided, in setting the grace periods, by an ordinance incorporating a standard based on the factors previously set out by the Court of Appeals.[40]

This approach would concededly have the drawback of requiring an administrative body to determine the proper time period for each nonconforming use. However, a number of very desirable results would be accomplished. First, it would reduce the amount of litigation likely to result in cases such as the instant one. In addition, it would provide the user with a reasonable expectancy as to the future economic position of his business, to the extent it reduced threats to him from the possible vagaries of future zoning boards. Most important—were this method adopted and effectuated by means of suitably drafted zoning regulations, there is little doubt that every nonconforming use or structure would be limited in time. Given a due regard for the private interest involved, but keeping in mind that ". . . zoning legislation looks to the future in regulating district development and the eventual liquidation of nonconforming uses,"[41] the overall goals of zoning would be substantially furthered. This would contrast sharply with the many frustrations of its purposes in recent years.

SANFORD ROSENBLUM

THE PERIPHERY OF "EXCLUSIVE" FEDERAL POWER TO LEGISLATE OVER FEDERALLY CEDED LANDS

An area of less than ten square miles which a state has ceded to the federal government for military purposes and which is on all sides surrounded by land over which the state has undisputed control presents the problem of which government, state or federal, has jurisdiction over the tiny area of land. If the jurisdiction lies not entirely with either government, the more difficult problem is what is the extent of the jurisdiction of each government.

The solution of this problem depends on how Article I, Section 8, Clause 17 of the United States Constitution is interpreted. The pertinent clause reads as follows:

The congress shall have power: . . .

(17) To exercise exclusive legislation in all cases whatsoever over

40. Anderson, supra note 9 at 239.
41. Supra note 22 at 127, 272 P.2d 8-9.

> such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings; . . .

This problem has recently arisen in *Board of County Commissioners v. Donoho*.[1] The federal government area involved therein was a military reservation, Fort Logan, located wholly within the geographical boundaries of Arapahoe County, Colorado. The issue was whether the claimant, Mrs. Donoho, who resided at Fort Logan, was entitled to receive benefits under a state relief program called "Aid to the Needy Disabled." The Supreme Court of Colorado decided that she was so entitled.

The Court, by its decision in *Donoho,* was in effect deciding that the word "exclusive" in Article I, Section 8, Clause 17 of the Constitution was not to be interperted as creating in the federal government "a unique and unreservedly exclusive sovereignty within the federal enclave."[2] Rather, the term "exclusive" as used in this clause "relates to protection of the federal government against state or local conflicting regulations."[3] In other words, the Colorado Supreme Court, by its holding, acknowledges in effect that the term "exclusive" means only that state law controls, regardless of the time of its passage, unless a conflicting federal statute governing the area is actually in existence.

For this proposition the Colorado court relied heavily on two United States Supreme Court decisions, *Penn Dairies v. Milk Control Commission of Pennsylvania*[4] and *Pacific Coast Dairy v. Department of Agriculture*.[5] The transaction involved in *Penn Dairies* was a sale of milk within a federal enclave to the United States itself. The enclave was not ceded to or purchased by the federal government. It was covered by a mere permit involving no surrender of state jurisdiction. No mention is made in the majority opinion nor in the majority opinion nor in the concurring or dissenting opinions of Article I, Section 8, Clause 17 of the United States Constitution. Yet, the Colorado court cited the *Penn Dairies* case as support for its interpretation of the term "exclusive" as it is used in Clause 17. Clearly, the Supreme Court in *Penn Dairies* was not at all concerned with an interpretation of the term "exclusive."

Furthermore, the central issue in *Penn Dairies* differed from that in *Donoho*. The issue in *Donoho* was the extent of state jurisdiction over the federal enclave. In the *Penn Dairies* case it was conceded by both parties that

1. — Col. —, 356 P.2d 267 (1960).
2. Id. at —, 356 P.2d 270.
3. Id. at —, 356 P.2d 272.
4. 318 U.S. 261 (1942).
5. 318 U.S. 285 (1942).

"the permit involved no surrender of state jurisdiction or authority over the area occupied by the camp."[6] The question was whether the State could regulate a transaction involving the United States or whether the United States, as one of the parties to the milk sale transaction, had governmental immunity from state regulation which indirectly burdened it. In any case, the issues in *Penn Dairies* and *Donoho* differed. The Colorado court's heavy reliance on *Penn Dairies* may then be subject to effective rebuttal.

As to the *Pacific Coast* case, the Supreme Court therein held that California was precluded from revoking the license of a violator of the state minimum price statute in sales to the government for use in an area ceded to the United States. The Colorado court cited *Pacific Coast* as supporting "the view that the term 'exclusive' as used in this clause relates to protection of the federal government against state or local conflicting regulations."[7] Some justification exists for this position of the Colorado court. The Supreme Court in *Pacific Coast* recognized a principle established in *James Stewart & Co. v. Sadrakula*[8] that a state regulation enacted before the federal enclave is created applies, provided the regulation does not conflict with federal policy. This principle lends support to the view that the term "exclusive" in Article I, Section 8, Clause 17 does not mean entirely exclusive of all state regulation. It does not establish, however, that any state regulation, regardless of the time of its passage, which is not in conflict with an existing federal statute, is enforceable in a federal enclave.

> Said Mr. Justice Roberts for the majority in *Pacific Coast*:
> "When the federal government acquired the tract, local law not inconsistent with federal policy remained in force until altered by national legislation (citing *Stewart*). The state statute involved was adopted long after the transfer of sovereignty and was without force in the enclave. It follows that contracts to sell and sales consummated within the enclave cannot be regulated by the California law."[9]

Insofar as the Colorado court in *Donoho* cites the Pacific Coast case for the proposition that the term "exclusive" in Article I, Section 8, Clause 17 is not absolute, it is on solid ground. What the Colorado court actually did, however, was to base its decision on language in the dissent to *Pacific Coast* by Mr. Justice Frankfurter. The conclusion Frankfurter reached was in effect the Colorado court's holding—that, as long as no existing federal statute conflicts with a state regulation, regardless of its time of passage, such state regulation controls in a federal enclave. It is interesting to note that Frankfurter went so far as to label the phrase "exclusive" in Article I, Section 8, Clause 17 of the United States Constitution a "misnomer." "The phrase is indeed a misnomer for the manifold legal phases of the diverse situations

6. Supra note 4 at 267 (1942).
7. Supra note 1 at —, 356 P.2d 272 (1960).
8. 309 U.S. 94 (1940).
9. Supra note 5 at 294 (1942).

arising out of the existence of federally-owned lands within a state—problems calling not for a single, simple answer but for disposition in the light of the national purposes which an enclave serves."[10]

Thus, the Colorado court extended the meaning of the word "exclusive" beyond any point thus far reached by a majority of the United States Supreme Court. It is difficult to see how the Colorado decision does not directly conflict with the *Pacific Coast* decision. Nonetheless, the question remains whether the loose interpretation of the Colorado court is legally sound. In other words, can and ought the Supreme Court adopt the position of Frankfurter in his *Pacific Coast* dissent?

It should first be noted that "exclusive legislation," in reference to a power of the federal government, on its face, could reasonably mean that the federal government has the sole power to legislate and that this power prohibits any state legislation. This interpretation has been decisively rejected by the Supreme Court, at least in interpretation of Article I, Section 8, Clause 17. The term "exclusive legislation" could also reasonably mean what Justice Frankfurter and the Colorado court thought it meant, namely, that state legislation will control unless a conflicting federal statute is in existence. The present position of the Supreme Court, however, as evidenced by the *Stewart* decision, allows only that state legislation in existence at the time of cession or purchase of the enclave, and not contrary to any federal legislation, to control.

The reasoning which supports the *Stewart* rule is hard to uncover. The Court therein made clear why state laws in existence at the time of cession or purchase should apply in an enclave. "This assures that no area however small will be left without a developed legal system for private rights."[11] No reason appears in the opinion, however, why state laws passed subsequent to the cession or purchase should not also apply in a federal enclave. The Court did, however, cite *Arlington Hotel Co.* v. *Fant*[12] in support of the rule. In *Arlington,* an Arkansas statute relieving innkeepers from liability as insurers for property of guests destroyed in a fire, which statute was passed after cession to the federal government, was held unavailing as a defense to an innkeeper's common law liability in accordance with Arkansas law before the cession. The opinion in *Arlington,* however, did not even discuss whether a state statute passed after the cession was valid in the enclave. The Court discussed a different issue, namely, whether the cession itself was valid under Clause 17 because the land was not being used for one of the purposes expressly contained therein. In deciding that the cession was valid the Court impliedly presumed that the state statute in effect at the time of the cession was controlling. The Court gave no reasoning for this position.

10. Id. at 300.
11. Supra note 8 at 99 (1940).
12. 278 U.S. 439 (1929).

The rationale for the implied presumption in *Arlington* and the express holding in *Stewart,* though not even mentioned in either of those opinions, might well have been what was the losing argument in the case of *United States v. Sharpnack.*[13] Therein the Supreme Court upheld the Assimilative Crimes Act of 1948 as constitutional.[14] The statute provided that in federal enclaves the state penal law in force at the time of the criminal act or omission involved would control. The losing argument for the statute's unconstitutionality made in *Sharpnack* was not based on the term "exclusive legislation" found in Article I, Section 8, Clause 17. Rather, the argument, adopted by the dissent, was based on Article IV, Section 3, Clause 2 of the Constitution which reads: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . ." It concerned an unconstitutional delegation to the states of federal legislative power. To adopt state laws in existence at the purchase of the enclave was, in effect, to merely legislate federally. To approve at the time of the purchase, however, all state laws which might be passed in the future as applicable to a federal enclave was to give to a state the power to legislate which belonged only to Congress.

The majority in *Sharpnack* did not agree. They decided that the federal statute was not an unconstitutional delegation to the states of federal legislative power. Said the Court: "Having the power to assimilate the state laws, Congress obviously has like power to renew such assimilation annually or daily in order to keep the laws in the enclaves current with those in the states."[15] The present state of the law is, therefore, that, if a federal statute specifically provides that state legislation subsequent to cession or purchase shall control in a federal enclave, the federal statute is constitutional and the state legislation shall so control. In the absence of such a federal statute the *Stewart* rule applies to limit the effective state legislation to that in force at the time of cession or purchase of the federal enclave.

Thus, an express statute which makes state law subsequently passed applicable to a federal enclave is not an unconstitutional delegation of federal legislative power. The question is why is a federal statute necessary in order to allow a state statute passed subsequent to cession or purchase of a federal enclave and not in conflict with a federal statute to control in the enclave? If a state statute in force at the time of cession or purchase of the enclave controls by virtue of Article I, Section 8, Clause 17 and the constitutional objection to control by a subsequently passed statute has been eliminated by *Sharpnack,* should not a subsequently passed statute also control in the enclave?

One might argue "no" to the above question because of the word "exclusive" in Article I, Section 8, Clause 17. The word "exclusive" must have

13. 355 U.S. 286 (1958).
14. 18 U.S.C. § 13 (1949).
15. Supra note 13 at 293 (1958).

some meaning. If a state statute in force at the time of cession can control in the enclave, nothing is left for the word "exclusive" to mean except that subsequently passed state statutes can never control in the enclave. This argument can be effectively countered, however, because the exclusiveness of federal legislative power is not at all impaired by the control in the enclave of a state statute passed subsequent to cession. Congress can nullify the application of a state statute passed subsequent to cession by enacting a contrary statute. Congress retains the ultimate or "exclusive" control of the enclave. Article I, Section 8, Clause 17 is satisfied.

Therefore, no reason appears why the Supreme Court should stop short of allowing subsequently passed state statutes to control in a federal enclave. It now holds the midstream position that, if the state statute is enforced before the federal enclave is created and if the statute does not conflict with a federal statute, the state statute applies in the enclave. A federal statute can allow a subsequently passed state statute to control. Such is the Supreme Court's present position but the holding of the Colorado Supreme Court in *Donoho* and the dissenting opinion of Mr. Justice Frankfurter in *Pacific Coast* appear to this writer the better reasoning.

ALFRED HETZELT

SALE OF ENDOWMENT POLICY TO AVOID ORDINARY INCOME TAX TREATMENT

Congress introduced capital gain provisions into the tax structure with the Revenue Act of 1918. The 1954 Code, as well as its predecessors, contained similar provisions. One of the primary purposes for the retention of these provisions is the elevation of burdensome taxation in certain transactions falling within their scope. The constitutionality of such a tax has never been seriously questioned since the Supreme Court decided the case of *Merchant's Loan and Trust Company v. Smietanka.*[1] There the Court decided that income, within the meaning of the Sixteenth Amendment to the Constitution, included profit gained through the sale or conversion of a capital asset. The constitutional issue had thus been laid to rest; but since that date the courts have continually been asked to determine whether certain transactions give rise to capital gains or ordinary income. The government is anxious to prevent any attempt to deplete its revenue intake, while the taxpayer, with equal diligence, is seeking to minimize or to avoid taxes altogether. The battle lines are thus drawn.

In order to take advantage of the capital gain provision certain basic requirements spelled out in the Internal Revenue Code must be met. The property dealt with must be a capital asset as defined by the Code.[2] Secondly, any gain or loss resulting to the taxpayer must be the result of a sale or

1. 255 U.S. 509 (1921).
2. Int. Rev. Code of 1954 § 1221.