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Constitutional Law: State Taxation for Police Protection of Ocean Pier

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In the *Dean Milk* case the Court held that a state cannot erect an economic barrier protecting a local industry from out-of-state competition, even in the exercise of its unquestioned power to protect the health and safety of its people, unless there are no reasonable alternatives. The Court reasoned in the instant case that the clause as to alternatives did not apply to the problem at hand because interstate commerce itself "knocks on the local door," and only by regulating that knock can the interest of the home be protected. Virtual prohibition, however, is not the only means of regulating door-to-door merchandising. A more equitable solution would be to have householders post "no soliciting" notices and provide that trespass in violation of the signs be punishable as a misdemeanor.[16] This solution would come nearer to giving each group, local merchants, householders, and direct sellers, the protection to which it is entitled.

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CONSTITUTIONAL LAW: STATE TAXATION FOR POLICE PROTECTION OF OCEAN PIER

Carnasion v. Paul, 53 So.2d 304 (Fla. 1951)

Appellants contested the authority of the coastal county of Volusia to levy and collect a tax upon a steel and concrete pier extending from the mainland to a point well beyond the low water mark of the Atlantic Ocean. Basing their case upon *United States v. California,*[1] they contended that it had in practical effect shifted the ownership dominion of the tidelands to the Federal Government exclusively. The lower court held the pier subject to county taxation and dismissed the bill. On appeal, HELD, the county has authority to exercise "police control" over the area and can accordingly tax it in return, so long as the action taken does not contravene the paramount authority of the United States.

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[16]See Jensen, *supra* note 8, at 280.

[1]332 U.S. 19 (1947).

Numerous comments[2] have been written on the probable import of the *Tidelands* decision, but to date only two cases involving similar circumstances have been litigated.[3] In the *Tidelands* decision the Court utilized the ambiguous phraseology, ". . . the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil";[4] and this concept was followed substantially in *United States v. Texas* and *United States v. Louisiana*.[5] It has been suggested[6] that the Court in the *Tidelands* case has created an entirely new concept of property ownership advanced in circumventing what were assumed to be well established legal principles. Prior to the *Tidelands* decision it was apparently settled that if land on the coast be reclaimed from the sea, or if piers or wharves be extended into the sea, such land and structures are a part of the territory of the state whose shores they adjoin.[7] Each state was said to own the beds of all tidewaters within its jurisdiction, unless they had been granted away.[8] The appellant pier-owners in the instant case were of the opinion that the *Tidelands* decision overruled these and other related property law principles, but such an inference cannot with any certainty be drawn from the context of the case when carefully analyzed.

In the *Tidelands* decision the Court subordinated the question of ownership of bare legal title to the fact that the controverted areas were, of necessity, subject to federal control and paramount right because of its function as a national sovereignty and for purposes of national defense. These bases are subject to severe criticism, par-

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[2]*E.g.*, Parker, *Problems in Florida and Other Coastal States Caused by the California Tidelands Decision*, 1 U. OF FLA. L. REV. 44 (1948); Sullivan, *The Tidelands Question*, 3 WYO. L.J. 10 (1948); Note, 8 LA. L. REV. 578 (1948); 26 TEXAS L. REV. 304 (1948); 36 VA. L. REV. 806 (1950); 5 WASH. & LEE L. REV. 85 (1948).

[3]United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950).

[4]332 U.S. at 38.

[5]*See* United States v. Texas, 339 U.S. 707, 712 (1950); United States v. Louisiana, 339 U.S. 699, 704 (1950).

[6]Sullivan, *supra* note 2, at 10.

[7]Weber v. Board of Harbor Comm'rs, 18 Wall. 57 (U.S. 1873); Pollard v. Hagan, 3 How. 212 (U.S. 1845); Commonwealth v. Roxbury, 75 Mass. (9 Gray) 451 (1857); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851).

[8]Weber v. Board of Harbor Comm'rs, 18 Wall. 57 (U.S. 1873); Mumford v. Wardell, 6 Wall. 423 (U.S. 1867); Smith v. Maryland, 18 How. 71 (U.S. 1855).

ticularly in view of the federal powers in time of war and by eminent domain, as well as the constant cooperation of the states individually in past emergencies; but it nevertheless clearly emphasizes the doubt that existed in the minds of the justices regarding the existence of title in the Federal Government to the fee in the controverted area. It should also be noted that the Government alleged in its original action against California, and likewise in the Texas and Louisiana tidelands cases, that it was the "owner in fee simple" of the tidelands.[9] The reluctance of the United States Supreme Court to meet this issue squarely gives further proof of the existence of that doubt.

The Florida Supreme Court's holding in the instant case can be further substantiated by the manner adopted in the *Tidelands* decision of distinguishing *The Abby Dodge*[10] and *Skiriotes v. Florida*.[11] In *The Abby Dodge,* the Court held that a federal statute regulating the landing of sponges at ports of the United States related to only those sponges taken outside Florida territory, thus narrowing the scope of the statute and impliedly admitting that limits to the exercise of federal power do exist. In the *Skiriotes* case a Florida statute, in the absence of conflicting federal legislation, was held constitutional as applied to sponge fisheries within the territorial waters of Florida. Appellant was charged with using the forbidden apparatus approximately two marine leagues from the mean low water mark on the west shore of Florida. The Florida Supreme Court held that this western boundary was fixed by the Florida Constitution at three marine leagues from the shore;[12] and that this was the same boundary defined by the Constitution of 1868, to which Congress had by statute referred in admitting Florida to representation.[13] The *Tidelands* Court distinguished the *Abby Dodge* case on the basis that it pertained to the state's right to regulate and conserve, and not to its right to use and deplete resources of national and international importance.[14] In recognizing the *Skiriotes* case, the Court stated that the statute, so far as applied to conduct within the territorial waters

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[9]*See* United States v. California, 332 U.S. 19, 22 (1947); United States v. Texas, 339 U.S. 707, 709 (1950); United States v. Louisiana, 339 U.S. 699, 701 (1950).

[10]223 U.S. 166 (1912).

[11]313 U.S. 69 (1941).

[12]Skiriotes v. State, 144 Fla. 220, 197 So. 736 (1940).

[13]15 STAT. 70 (1868).

[14]332 U.S. at 37.

of Florida and in the absence of conflicting federal legislation, is within the police power of the state.[15]

Immediately following the *Tidelands* decision some writers took the position that continued state regulation, at least to the extent previously permissible, would be difficult to reconcile with complete federal dominion.[16] Certainly the police power remaining to the states had to be reestablished. *Toomer v. Witsell*,[17] however, reaffirmed to the individual states their rights to continue the regulation and conservation of salt water fish and shellfish. Appellants had urged that South Carolina had no jurisdiction over coastal waters beyond the low water mark, basing their contention, as did appellants in the instant case, on the *Tidelands* decision. The Court, adopting *Skiriotes v. Florida* as analogous under such circumstances, denied that *United States v. California* precludes all activity by the states in the marginal sea, and held that in the absence of positive conflict between state and federal regulation the states can continue to exercise police power functions in the area, provided that they observe the requirements of due process and do not place a burden on interstate commerce.

Traditional property concepts support the contention that the pier in question, being permanently affixed to the submerged soil, is at law a part of it; and the argument then runs that the *Tidelands* decision in practical effect has vested ownership of the soil in the Federal Government.[18] The fact remains, however, that the Supreme Court has not as yet so held; indeed, any such argument would establish in the Federal Government a substantial portion of Florida's Overseas Highway to Key West. Furthermore *Toomer v. Witsell*[19] upheld a state tax the proceeds of which were devoted to shrimp conservation, definitely a police function. Similarly, Volusia County was in the instant case furnishing protection under this same power. Such protection is not furnished free to other property owners, as a rule, and to the Supreme Court of Florida pier-owners are no exception.

The instant decision represents in all probability the attitude that the courts of every state having an interest in the tidelands area

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[15]*Id.* at 38.

[16]Woodley, *Constitutional Law—Federal Rights to Tidelands*, 8 LA. L. REV. 578 (1948).

[17]334 U.S. 385 (1948).

[18]*See* United States v. California, 332 U.S. 19, 31 (1947).

[19]334 U.S. 385 (1948).