North Dakota Law Review

Volume 26 | Number 3 Article 4

1950

# Game - Power to Protect and Regulate Validity of South Dakota Statute Barring Nonresident Hunters of Migratory Waterfowl

# COMMENT

## GAME — POWER TO PROTECT AND REGULATE VALIDITY OF SOUTH DAKOTA STATUTE BARRING NONRESIDENT HUNTERS OF MIGRATORY WATERFOWL

IN A legal maneuver apparently without precise precedent, the legislature of South Dakota in 1947 enacted a statute completely prohibiting all nonresidents from hunting migratory waterfowl within the state.[1] Challenged in a test suit by a resident of Wisconsin, the act was recently upheld by the circuit court of South Dakota on the theory that the state owns all the wildlife within its borders and has a right to determine who may hunt them.[2] Since migratory waterfowl passed under the control of the Federal Government as early as 1916 through a method which has caused considerable controversy among legal writers,[3] problems of fundamental importance concerning the relationship of the state and Federal Governments in this field have arisen, particularly as relates to the power of the state to enact such discriminatory legislation as would amount to a breach of privileges and immunities.

A decade ago, it has been pointed out, the problems presented by nonresident hunting was not at all disturbing in view of the fact that only one sportsman out of 130 could be classified as a nonresident hunter.[4] By 1946 the ratio had increased to one out of thirty, and indications are that with a growing national consciousness of the sports of hunting and fishing the ratio would have gone higher but for the fact that many states embarked upon legislative programs which tended to discourage nonresident hunting by setting up discriminatory hunting and fishing license fees in order to preserve to the citizens of their own respective states exclusive hunting privileges within those states.[5] It may be argued that

---

[1] Session Laws S.D. (1947), c. 109, §2.

[2] Grand Forks, N.D., Herald, Feb. 21, 1950, p. 4, col. 1.

[3] See, *e.g.*, Black, *Missouri v. Holland — A Judicial Milepost on the Road to Absolutism*, 25 Ill. L. Rev. 911 (1931); Corwin, *Game Protection and the Constitution*, 14 Mich. L. Rev. 613 (1916); 25 Yale L. J. 445 (1920); U. of Pa.L.Rev. 160 (1920).

[4] *What the States Charge You to Hunt*, Outdoor Life, September, 1949, p. 21.

[5] For example, Indiana charges its residents $1.50 for a hunting and fishing license, but charges nonresidents $15.50, ten times as much. Louisiana permits cost $2.00 when purchased by residents, $25 when bought by out-of-state visitors. North Dakota charges residents $1.50 for a small game license and $5.00 for a big game permit, but nonresidents pay $25 and $50 for the same privilege. Most of these fees are fixed by executive proclamation, pursuant to legislative authority. *Id.* at 23.

this was intended, in many cases, to compensate for the growing cost of game conservation programs; yet as early as 1820 the State of New Jersey enacted a statute which declared it to be unlawful ". . . for any person who is not at the time an actual inhabitant and resident in this state, to rake or gather clams, oysters, or shells, in any of the rivers, bays, or waters in this state, on board of any canoe, flat, scow, boat, or other vessel, not wholly owned by some person, inhabitant of, and actually residing in this state . . ."

Vigorously attacked in the early case of *Corfield v. Coryell*,[6] on the ground that it abridged one of the privileges and immunities of a citizen of the United States, the statute was nevertheless sustained on the ground that the people of New Jersey held title to the fishing rights in their state as tenants in common and could exclude nonresidents at their pleasure. Discrimination this certainly was, and it serves to illustrate how early in American law the subject of fishing and hunting became controversial.

At an early date it was well-established law that the states owned the wildlife within their borders.[7] The Federal Government took little interest in the conservation of fish and game until 1913. In that year, alarmed at the rapid depletion of migratory waterfowl, Congress passed an appropriations act for the Department of Agriculture which provided for the protection of migratory waterfowl by fixing a penalty upon anyone taking such waterfowl illegally.[8] Several district and state court decisions held this act unconstitutional as an infringement of the sovereign right of the states to control their wildlife.[9] Blocked in this approach, the Federal Government turned to the treaty power to do by indirection that which it could not do directly. In 1916 the United States and Great Britain entered into a treaty for the mutual protection of

---

[6] 6 Fed. Cas. 546, No. 3,230 (E.D.Pa. 1823).

[7] Geer v. Connecticut, 161 U.S. 519 (1896); Corfield v. Coryell, 6 Fed Cas. 546, No. 3,230 (E.D.Pa. 1823); Dapson v. Daly, 257 Mass. 195, 153 N.E. 454 (1926); People v. Soule, 238 Mich. 130, 213 N.W. 195 (1927); Herrin v. Sutherland, 74 Mont. 587, 241 Pac. 328 (1925).

[8] 37 Stat. 847 (1913).

[9] United States v. Shauver, 214 Fed. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594 (1919); United States v. McCullagh, 221 Fed. 288 (D. Kan. 1915); State v. McCullagh, 96 Kan 786, 153 Pac. 557 (1915); State v. Sawyer, 113 Me. 458, 94 Atl. 886 (1915).

[10] 39 Stat. 1702 (1916). This treaty was followed by a convention between the United States and Mexico for the protection of migratory game birds and game mammals concluded February 7, 1936. 49 Stat. 1555 (1936).

waterfowl,[10] which provided that both the United States and Canada would regulate the hunting of migratory waterfowl.

This method succeeded. In *Missouri v. Holland*,[11] the Supreme Court of the United States held that the State of Missouri could not enjoin the treaty's enforcement upon the ground that such treaty infringed upon the state's right to its own property. "The whole foundation of the State's rights," said Mr. Justice Holmes, who delivered the opinion, "is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state, and in a week a thousand miles away."[12]

"To put the claim of the State upon title," he added, "is to lean upon a slender reed."[13]

The power of Congress to establish standards as to the taking of migratory waterfowl, as well as the power of the Secretary of the Interior to permit the hunting of migratory birds under the terms of the treaty, depending upon distribution, abundance, economic value, migrations, and breeding habits is now well recognized.[14] This fact, it would appear, is clearly inconsistent with the contention that ownership of migratory waterfowl remains in the states themselves,[15] or is in the citizens of the various states respectively.[16]

There are, however, other aspects of the problem. With respect to non-migratory waterfowl and other animals *ferae naturae*, it remains undisputed that ownership is in the several states.[17] In *Geer v. Connecticut*,[18] a leading case on the point, Mr. Justice White traced the evolution of the concept of state ownership of wild game from the early law of the Greeks and Romans to the present. Under the Roman law concept of "imperium" (control), as distinguished from "dominium" (ownership),[19] it has been said that the state may protect the property right of the individual, not in wildfowl *per se*,

---

[11] 252 U.S. 416 (1920). *Accord*: United States v. Thompson, 258 Fed. 257 (E.D.Ark. 1919).

[12] *Id.* at 434.

[13] *Ibid.*

[14] *See* United States v. Griffin, 12 F. Supp. 135, 138 (S.D.Ga. 1935).

[15] Lacoste v. Department of Conservation of the State of Louisiana, 263 U.S. 545 (1924); Geer v. Connecticut, 161 U.S. 519 (1896).

[16] Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912); Smith v. Maryland, 18 How. 71 (U.S. 1855).

[17] See cases cited note 15 *supra*.

[18] 161 U.S. 519 (1896).

[19] 14 Corn. L. Q. 245 (1929).

but in the hunting of these wildfowl for food.[20] Under the police power, it has been universally held that the state may regulate the methods used to take game and the seasons for their taking,[21] so long as the use of such power does not conflict with the treaty.[22] Since the privilege of hunting or fishing is either expressly or impliedly granted by the state and may not, therefore, be considered to be an inherent right of the individual, it may well be argued that to take that privilege away from the individual through the use of the police power would not be an abuse of that power.[23] Indeed, a wide range of authorities supports the view that the states may, without breach of the privileges and immunities clause of the Constitution, limit or regulate the enjoyment of hunting privileges by nonresident hunters since that clause does not include within its scope special privileges secured to citizens in their own states.[24]

The difficulty in this type of case, however, arises when the

---

[20] Winslow v. Fleischner, 112 Ore. 23, 228 Pac. 101 (1924). *Cf.* Lacoste v. Department of Conservation of the State of Louisiana, 263 U.S. 545 (1924); Silz v. Hesterberg, 211 U.S. 31 (1908). In Ward v. Race Horse, 163 U.S. 504 (1896), it was held that ownership of game in territory acquired by the Federal Government after the adoption of the Constitution was in the Federal Government for the use and benefit of its people. When a new state was formed from the territory, however, it acquired the rights of the Federal Government upon admission into the union. In view of the exclusive control which the Federal Government has now assumed with respect to migratory waterfowl, it may be argued that so far as these birds are concerned the Federal Government has now reassumed ownership. If this is so, then South Dakota has passed a statute concerning something which does not belong to it.

[21] Manchester v. Massachusetts, 139 U.S. 240 (1891); Dobie v. State, 120 Tex. Crim. App. 72, 48 S.W.2d 289 (1932); *Ex parte* Blardone, 55 Tex. Crim. App. 189, 115 S.W. 838 (1909). *Cf. Ex parte* Prindle, 7 Cal. Unrep. 223, 94 Pac. 871 (1905).

[22] *See* Missouri v. Holland, 252 U.S. 416, 434 (1919). As between the state and its own inhabitants, under present precedents, the state may control the taking and possession of migratory waterfowl. But neither the state nor the individual may claim ownership until possession actually can be had, since possession is the basis of ownership. *See* United States v. 2,271.29 Acres, 31 F.2d 617, 621 (W.D.Wis. 1928), where it was said that, ". . . it is clear, also, that the right to regulate the taking and use of game and fish is, generally speaking, in the state as an attribute of its sovereignty, subject only to valid exercise of authority under provisions of the Fededral Constitution."

[23] *See* Magner v People, 97 Ill. 320, 334 (1881): "To hunt and kill game is a boon or a privilege granted either expressly or impliedly by the sovereign authority — not a right inherent in each individual, and consequently nothing is taken away from the individual when he is denied the privilege at stated seasons of hunting and killing game."

[24] Patsone v. Pennsylvania, 232 U.S. 138 (1913); McCready v. Virginia, 94 U.S. 391 (1876); Corfield v. Coryell, 6 Fed. Cas. 546, No. 3,230 (E.D. Pa. 1823). *See* Truax v. Raich, 239 U.S. 33, 39 (1915); Paul v. Virginia, 8 Wall. 168, 180 (U.S. 1868).

animals in question are migratory. So far as migratory animals are concerned, as Mr. Justice Holmes indicated in *Missouri v. Holland,* the states appear to stand in a different position. The recent case of *Toomer v. Witsell,*[25] involving an attempt on the part of South Carolina to charge nonresident commercial fishermen a license fee one hundred times greater than those charged resident fishermen for the taking of migratory shrimp, illustrates the difficulty.

Aimed at securing the residents of South Carolina a monopoly of shrimp fishing in South Carolina waters, the discriminatory license schedule was held a violation of the privileges and immunities clause, despite the claim of South Carolina that the state's ownership of the shrimp made such discrimination legally justifiable. "The whole ownership theory," said the court, "in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State has power to preserve and regulate the exploitation of an important resource." [26]

Although presenting a situation clearly analogous to the development in South Dakota, *Toomer v. Witsell* can be distinguished from the South Dakota decision upholding the exclusionary statute on the ground that what was involved in *Toomer v. Witsell* was a commercial enterprise. It has long been settled law that the privileges and immunities clause protects the rights of nonresidents to enter into any state of the Union to do business.[27] Yet the court's statement concerning state ownership of migratory animals appears to expose the weakness of the position taken in South Dakota. If the South Dakota statute is to be upheld, it will have to be on some basis other than the "slender reed" of the title theory.[28]

It seems obvious that the distinction between the taking of

---

[25] 334 U.S. 385 (1948). The majority opinion in the case stated: "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." *Id.* at 396. See also Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), involving a California statute which banned Japanese aliens from commercial fishing inside the California three mile limit

[26] Toomer v. Witsell, 334 U.S. 385, 402 (1948).

[27] Ward v. Maryland, 12 Wall. 418 (U.S. 1870). *See* Shaffer v. Carter, 252 U.S. 37, 52-53 (1920).

[28] *Cf.* Pavel v. Pattison, 24 F. Supp. 915 (D. La. 1939).

wild animals for sport and the taking of wild animals as a commercial enterprise is, however, a substantial one. Thus, a Louisiana statute which denied nonresident land owners the right to trap alligators on lands within the State was declared unconstitutional in 1939 by a federal court on the ground that it violated the equal protection clause of the Fourteenth Amendment as well as the property rights guaranteed thereunder.[29] Involved in the case was a commercial trapping right.

A relationship may be found, undoubtedly, between the statutes discriminating against out-of-state hunters and the tax statutes which have been declared unconstitutional because they discriminate unlawfully, especially in view of the fact that a hunting license fee is in the nature of a tax.[30] Reasonable discrimination or classification is recognized as being both lawful and desirable where a particular evil is sought to be prevented or mitigated,[31] but the class discriminated against must be a fairly well-defined group in order that the evil-doers may be uniformly treated. It is not enough to punish them as a class if the same thing may be done by others who may go unpunished.[32]

Thus, a statute which would give to minors the right to hunt without paying license fees therefor has been declared unconstitutional on the ground that it discriminates through arbitrary classification.[33] So too, a statute which requires that the applicant for a hunting license be a qualified voter in order for him to be eligible for a hunting license was declared discriminatory against a particular class.[34] However, a state may enact a statute which provides that a citizen need not obtain a hunting license to enable him to hunt within his own county.[35] The state may charge nonresident hunters a hunting license fee although it does not charge residents a hunting license fee.[36] And it has been held that the state may completely ban nonresident non-landholding hunters from hunting within the state [37] although it could not ban nonresident

---

[29] Pavel v. Pattison, *supra* note 28.

[30] Healy v. Ratta, 292 U.S. 263 (1934); Travis v. Yale Towne Mfg. Co., 252 U.S. 60 (1920).

[31] *See* Rosenthal v. New York, 226 U.S. 260, 270 (1912).

[32] *See* Patsone v. Pennsylvania, 232 U.S. 138, 144 (1913).

[33] State v. Erickson, 159 Minn. 287, 198 N.W. 1000 (1924). *But see* Central Lumber Co. v. South Dakota, 226 U.S. 157, 160 (1912).

[34] State v. Johnson, 172 Ark. 866, 291 S.W. 89 (1927).

[35] State v. Koock, 202 Mo. 223, 100 S.W. 630 (1907).

[36] *In re* Eberle, 98 Fed. 295 (N.D. Ill. 1899).

[37] State v. Stokes, 117 Ark. 192, 174 S.W. 1156 (1915).

landholders from hunting on their own lands if otherwise qualified to hunt.[38] Likewise, it has been held that a state may completely bar nonresident salmon fishing,[39] but in light of *Toomer v. Witsell, supra,* it is very likely these holdings are no longer to be accepted without serious qualification, since the statutes on which the cases rested are completely exclusionary.[40]

It would appear quite probable that should the South Dakota statute be taken before a higher court, it could not be held unconstitutional on the ground that it infringes the privileges and immunities clause,[41] although in the case of out-of-state residents who own land in the state, it might be construed as a taking of private property without due process.[42] It should be remembered, however, that the Federal Government's interest in migratory waterfowl is not based on its interest in preserving hunting alone.[43] It has been pointed out by at least one court that the well-being of the nation is founded upon a favorable balance between insects and the wildfowl which control them.[44] This fact furnishes a potent reason for suggesting that in the case of migratory waterfowl, the old theory of exclusive ownership of the states — already repudiated in *Missouri v. Holland* — should not be used to allow state interference with the federal control of migratory wildlife.

In light of previous decisions by the high court it is doubtful that the Federal Government could rely solely upon the commerce clause of the Constitution [45] to regulate the taking

---

[38] State v. Mallory, 73 Ark. 236, 83 S.W. 955 (1904). This case and State v. Stokes, *supra* note 37, suggest some very important qualifications to the South Dakota statute. Thus, under State v. Mallory, *supra*, it is clear that a resident of Minnesota owning land in South Dakota could not be prohibited from hunting in South Dakota upon his own land. State v. Stokes, *supra*, held, however, that nonresidents of Arkansas who merely purchased hunting rights on land could not thereby evade the Arkansas exclusionary statute. *But cf.* Pavel v. Pattison, 24 F. Supp. 915 (D.La. 1939).

[39] McCready v. Virginia, 94 U.S. 391 (1876); State v. Tower, 84 Me. 444, 24 Atl. 898 (1892); State v. Catholic, 75 Ore. 367, 147 Pac. 372 (1915); State v. Medbury, 3 R.I. 138 (1855).

[40] *See* Toomer v. Witsell, 334 U.S. 385, 396-97 (1948).

[41] U.S. Const., Amendment XIV.

[42] State v. Mallory, 73 Ark. 236, 83 S.W. 955 (1904).

[43] Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942).

[44] *See* Shouse v. Moore, 11 F. Supp. 784, 787 (E.D.Ky. 1935).

[45] U.S. Const. Art. I, §8.

of migratory waterfowl.[46] But it has been suggested that the Federal Government could again gain the cooperation of the states in respect to fair resident and nonresident hunting privilege laws by denying to noncooperating states the right to share in the distribution of Pittman-Robertson funds,[47] much as the Federal Government administers federal grants for the construction of state highways. Since Pittman-Robertson funds are derived from the sale of federal migratory waterfowl hunting stamps and from excise taxes on hunting arms and ammunition, the Federal Government may justifiably feel that to deny to nonresident hunters the right to shoot waterfowl in those states particularly fortunate in being located in favorable flyways would be unjust and therefore a reason to withhold distribution of such funds.

## MUNICIPAL CORPORATIONS — IMPLIED CONTRACTS — LIABILITY OF THE MUNICIPALITY THEREON

THE EXTENT to which a public corporation may be held on an improperly executed contract was recently considered by the North Dakota Supreme Court in *Northwestern Sheet & Iron Works v. Sioux County*,[1] which placed squarely before

---

[46] See, *e.g.*, Carey v. South Dakota, 250 U.S. 118 (1918); Geer v. Connecticut, 161 U.S. 519 (1896). *Contra*: State of Kansas v. Saunders, 19 Kan. 127 (1877). See Corwin, *Game Protection and the Constitution*, 14 Mich. L. Rev. 613, 619 (1916): "Suppose, therefore, we concede the proprietorship of the state in its wild game to the fullest extent, what then is the legal character of the migration of game from one state to another, considered in their aspect of successive proprietors of such game? Obviously it is that of transfer of property across state lines from one legal person to another, that is, 'Commerce.' True, the transfer is not by contract between the legal persons involved, but rather by the operation of a kind of legal prescription; yet it is none the less a legal transfer, and it is 'among states.' Nor is it a mere casual occurence, as for instance where a dog might elect to change masters, but it is a regularly recurrent, seasonal and predictable process, which, even though not susceptible of 'regulation' in many senses of the word, certainly ought to be capable of being protected by the government of the larger community which is benefitted by it."

[47] 50 Stat. 917 (1937), 16 U.S.C. §§669-669J (1940).

[1] 36 N.W. 2d 605 (N.D. 1949). The county contended that it was not bound by orders of the county commissioners made in their individual capacity before the advertisements were even made. They further contended that notice for bids was not published the required length of time, nor was there compliance with the lowest bid statute. The plaintiff pleaded estoppel and ratification, commingling two theories of recovery, and claimed the "agreed and reasonable value," but the defendant made no motion for election of theories. The county unsuccessfully tried to distinguish between the case of Stark County v. City of Dickinson, 56 N.D. 371, 217 N.W. 525 (1928), which allowed assumpsit, and Backhaus v. Lee, 49 N.D. 821, 194 N.W. 887 (1923), a case in equity.