

Constitutional Law: Discrimination by State Against Non-Residents' Fishing and Hunting Privileges

Eugene F. Kobey

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Eugene F. Kobey, *Constitutional Law: Discrimination by State Against Non-Residents' Fishing and Hunting Privileges*, 33 Marq. L. Rev. 192 (1950).

Available at: <http://scholarship.law.marquette.edu/mulr/vol33/iss3/5>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

DISCRIMINATION BY STATES AGAINST NON-RESIDENTS' FISHING AND HUNTING PRIVILEGES

This problem is a very interesting one, though not a new one. States base their discriminatory legislation on the doctrine of "proprietary interest" and state ownership of the fish and game. This discrimination is attacked as being repugnant to the privileges and immunities clause of our Constitution.¹

The right to reduce animals *ferae naturae* to possession has been controlled from early European days. The common law of England subjected game and fish to governmental authority and it was treated as being owned in common. This authority was vested in the colonial governments and passed to the state governments.

The doctrine of state ownership was established in *Corfield v. Coryell*.² A New Jersey statute³ made it unlawful for any person who was not a resident to gather oysters in New Jersey waters and provided for forfeiture of fishing vessels and appurtenances. Plaintiff lived in Pennsylvania and rented his boat to another who went into New Jersey waters to collect oysters. Defendant Sheriff seized plaintiff's boat under this statute and plaintiff commenced an action of trespass for seizing and converting plaintiff's boat. The court stated that New Jersey had exclusive right to take oysters from its waters and never ceded this right. This right was held to be a vested property right for use of the citizens of New Jersey and the privileges and immunities clause did not extend to a cotenancy in the common property of another state.

The doctrine of state ownership was applied again in *McCready v. Virginia*.⁴ McCready, a citizen of Maryland, was convicted and fined under a Virginia Statute⁵ forbidding the planting of oysters by non-citizens. The Supreme Court said that Virginia owned the beds of all tidal waters within her jurisdiction. She represents her people and has ownership of fish in the water so far as they are capable of ownership. This right comes not from citizenship alone, but is combined with property rights and is not a mere privilege or immunity of citizenship. The Court there compared planting oysters in a river bed in Virginia to planting corn in state-owned land.

The source of police power as to fish and game flows from the duty of the state to preserve for its people a valuable food supply. The wild game within a state belongs to the people in their collective sover-

¹ Art. IV, sec. 2.

² 6 Fed. 546, (C.C.E.D. Penn. 1823).

³ Act of New Jersey, June 9, 1820.

⁴ 94 U.S. 391 (1877).

⁵ Sess. Acts of 1874, sec. 22, "If any person other than a citizen of this state shall take of catch oysters or any shell-fish in any manner or plant oysters in waters thereof or in rivers Potomac or Pocomoke, he shall forfeit \$500 and vessel, tackle, etc."

eign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so and they may, if they see fit, absolutely prohibit the taking of it, if deemed necessary for its protection, preservation, or for the public good.⁶

Each state owns the beds of all waters within its jurisdiction and may appropriate them to be used by its own citizens. Citizens acquire a property right and not a mere privilege or immunity of citizenship. State law by which non-residents are prohibited from engaging in fishing activities is not a regulation of commerce nor a violation of the privileges and immunities clause of our Constitution.⁷

But in *Missouri v. Holland*,⁸ the State of Missouri founded its claim of exclusive authority upon assertion of title of migratory birds. Justice Holmes said,

"To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone and possession is the beginning of ownership. The whole foundation of the State's rights 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."

Speaking of animals *ferae naturae*, Blackstone put it neatly when he said,

"A man can have no absolute permanent property in these as he may in the earth and land; Since these are of a vague and fugitive nature, and therefore can only admit of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer."⁹

The doctrine of proprietary interest and state ownership has been weakened somewhat in *Toomer v. Witsell*.¹⁰ South Carolina charged non-residents who fished in South Carolina waters a license fee for each fishing boat that was one-hundred times the fee charged residents for the same privileges. The Court held that imposition of discriminatory license fees for non-residents was without reasonable basis and was a violation of the privileges and immunities clause which was to outlaw classifications based on the fact of non-citizenship unless that non-citizen constitutes a peculiar source of evil at which the state statute is aimed. The Court said:

"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

⁶ *Geer v. Connecticut*, 161 U.S. 519 (1896).

⁷ *Anderson v. State*, 213 Ark. 871, 213 S.W. (2d) 615 (1948).

⁸ 252 U.S. 416, 434 (1920).

⁹ 2 Bl. Comm. 395.

¹⁰ 334 U.S. 385, 396, 402, (1947).

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.

"The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource."

The *McCready* case can be distinguished from the *Toomer* case in that the *McCready* case related to fish which would remain in Virginia until removed by man and the latter case involved free-swimming fish that migrated through the waters of several states and remained in South Carolina waters only temporarily. The free-swimming fish should not be the property of any state and should come within the purview of the privileges and immunities clause.

At present there is pending in the courts a case where a Stevens Point, Wisconsin business man and some of the Chamberlain, South Dakota businessmen are testing the South Dakota "favorite son" hunting law by which non-residents are barred from hunting ducks and geese in South Dakota. The Wisconsin man was denied a hunting license and then his arrest was prearranged.¹¹ Can a state bar non-residents from hunting waterfowl that is controlled by federal regulation?

Congress has incidental power to make necessary regulations concerning fish and game. States can regulate in so far as they do not conflict with federal regulation. The purpose of federal regulation is to protect game and fish and not to interfere with local game laws.¹²

The privileges and immunities clause refers to natural and basic rights. Is not the right to take possession of animals *ferae naturae* a natural right? Are animals *ferae naturae* property of anyone before they are possessed?

Can we say that animals, birds, or fish beyond reach or control of man are the property of anyone? It would seem that they are not property until possession is acquired. The common law expresses it by saying that which belongs to nobody is acquired by the natural law by the person who first possesses it. A right of property arises when the thing is brought under control and subject to use. It would seem that until fish or game are in possession and control of man and subject to his use they do not in a proper sense belong to anyone.

It is submitted that discriminatory legislation probably will be declared unconstitutional if independent reasons for it are found not to

¹¹ Mr. John F. Lindley, Attorney for the defendant, stated that some of the Chamberlain, South Dakota businessmen were interested because many had friends and relatives from out of state hunting on their lands and this discriminatory legislation seemed very unfair to them.

¹² Title 16, U.S.C.A.

exist. The evil that is alleged by the state must be related to the discrimination against the non-residents through their being the cause of the evil. To be valid the discriminatory statute should be directed at that particular evil that the non-residents cause. For example, a good conservation measure would probably support such discrimination.

The Supreme Court has spoken regarding free-swimming fish and inland water fish, but what about migratory birds and animals? It would seem that migratory birds and animals that move through different states are within the rule of the *Toomer* case; they are not the property of any one state, and come within the purview of the privileges and immunities clause of our Constitution. If it can be shown that the birds or animals do not remain in the state and so are not the property of that state, then the state should not discriminate regarding the hunting of these birds and animals.

EUGENE F. KOBAY