2-1-1983

Tangier Sound Waterman's Association v. Douglas: Chesapeake Bay Blue Crab Residency Restrictions Held Unconstitutional

Alison Rieser
Virginia Institute of Marine Science

Nancy Ziegler
Virginia Institute of Marine Science

Marine Resource Advisory
A Sea Grant Advisory Service

ADVISORY NO. 24 Virginia Sea Grant Marine Advisory Service, VIMS/College of William and Mary FEBRUARY 1983

Tangier Sound Waterman's Association v. Douglas:
Chesapeake Bay Blue Crab Residency Restrictions Held Unconstitutional

By Alison Rieser and Nancy Ziegler *

A recent federal district court decision, *Tangier Sound Waterman's Association v. Douglas,*[1] reopened the debate on a fundamental issue of marine resource management: under what circumstances will a state have the authority to limit access by nonresidents to fisheries found within its boundaries?

The Tangier Sound Waterman's Association brought suit in March, 1981 against the Commonwealth of Virginia, its marine resources commission and the Commissioner, James E. Douglas, Jr., challenging state licensing laws which denied nonresidents the right to commercially harvest blue crab in Virginia waters of the Chesapeake Bay.[2] The plaintiffs were commercial crab fishermen who reside on an island within the Bay which is bisected by the boundary between Virginia and Maryland.[3] Because of Virginia's residency restrictions, these fishermen were unable to pursue their migratory catch across the state border into Virginia waters. This prohibition shortened the fishing season for Maryland crabbers, since the crabs are plentiful in Maryland waters only during summer months.[4] The Maryland Department of Natural Resources intervened as a party defendant on the grounds that it was responsible for upholding a similar statutory scheme in Maryland and that it would be adversely affected by a decision striking down the Virginia residency laws.[5]

On June 25, 1982, Judge D. Dortch Warriner of the United States District Court for the Eastern District of Virginia held that the state statutes excluding nonresidents from catching crabs in Virginia waters violated the privileges and immunities clause of the United States Constitution.[6] This ruling, in view of Virginia's decision not to appeal, opens the Chesapeake Bay blue crab fishery to all fishermen with valid licenses, regardless of state residency.

The *Tangier Sound* ruling could have a profound impact on state licensing laws limiting access to commercial fisheries found within state boundaries to residents of the state. This follows recent court decisions applying the privileges and immunities clause and the commerce clause to highly discriminatory state resource management laws.[7]

The law recognizes that a state has a substantial interest in the fish and wildlife resources found within its borders. Traditionally, this interest was described in terms of "ownership" of the resource.[8] Under the state ownership theory, discriminatory state wildlife management practices, such as the total exclusion of nonresidents from any access to the resources, or the imposition of exorbitant licensing fees on nonresidents, were considered immune from constitutional attack.[9] The *Tangier Sound* decision signals the emergence of the privileges and immunities clause as a legal basis for challenging residency restrictions for commercial fisheries. This article analyzes the *Tangier Sound* case in light of the traditional legal framework for state resource management and the evolution of the privileges and immunities clause as a constitutional limitation on discriminatory state fish and wildlife laws.

---

* *Reprinted from The Territorial Sea, Vol. II, No. 2 (1982), courtesy of The Marine Law Institute, University of Southern Maine, 246 Deering Ave., Portland, ME 04102.*

[1] 541 F. Supp. 1287 (E.D. Va. 1982).

[2] The plaintiffs brought a civil action seeking declarative and injunctive relief from the following Virginia laws: Va. Code § 28.1-165 (1979) provides that residents of Virginia must obtain licenses from the Virginia Marine Resources Commission to commercially harvest blue crabs. There is no limit on the number of such licenses which may be granted to residents of the state. Under Va. Code § 28.1-57 (1979), it is a misdemeanor for a nonresident of the state to take or catch fish in tidal waters of that state other than by "line, rod or pole held in hand." Crabs are fish within the meaning of the statute. *See* Va. Code § 28.1-2 (1979). Va. Code § 28.1-122 (1979) makes it a misdemeanor for any person other than a resident of Virginia to take or catch fish or shellfish from Virginia waters for market or profit. Finally, it is a misdemeanor under Va. Code § 1-123 (1979) for a Virginia resident who, for market or profit, is "concerned or interested" with any nonresident in taking or catching fish or shellfish in Virginia waters, or who knowingly permits a nonresident to engage in any such business.

[3] The Tangier Sound Waterman's Association is an unincorporated association of about 120 commercial fishermen, all residing in Maryland on Smith Island or in the vicinity of Crisfield on the eastern shore of the Bay. The Association members are either full or part-time commercial crab fishermen. The three named plaintiffs were Elmer W. Evans, President of the Association and owner of a fishing vessel federally licensed for the "mackerel" fishery under the Enrollment and Licensing statutes, *see* 46 U.S.C. § 251 et seq. (1952 and Cum. Supp. 1982); Edwin C. Smith, III, also federally licensed; and David D. Laird, whose crabbing skiff did not qualify for federal licensing. Tangier Sound, 541 F. Supp. at 1289.

[4] W. Warner, Beautiful Swimmers: Watermen, Crabs and the Chesapeake Bay 6 (1976).

[5] Tangier Sound, 541 F. Supp. at 1290.

[6] *Id.* at 1301.

[7] Hughes v. Oklahoma, 441 U.S. 322 (1979); Hicklin v. Orbeck, U.S. 518 (1978); Baldwin v. Fish and Game Comm'n, 436 U.S. 3. (1978); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).

[8] *E.g.,* Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979); McCready v. Virginia, 94 U.S. 391 (1876); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842).

[9] McCready v. Virginia, 94 U.S. 391, 396 (1876). *See also* Corfield v. Coryell, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1825).

Tangier Sound Fishermen and Their Quarry, the Blue Crab

The controversy in *Tangier Sound* centered around a crustacean known for its agility in the water, hence its name, *Callinectes sapidus* Rathbun, which literally means "beautiful swimmer".[10] Because of its mobility, the blue crab is capable of migrating great distances within its habitat, the waters of the Chesapeake Bay and the Atlantic Ocean along the eastern seaboard. This migratory pattern distinguishes the blue crab from sedentary species of shellfish, which adhere to the rocks of the Bay floor, and from free-swimming finfish, which can range from internal state waters of the Bay far out into the fishery conservation zone.[11]

The typical yearly migratory cycle for the blue crab begins and ends in the shallow waters fed by fresh tributaries in the northern reaches of the Bay in Maryland and Virginia, where the crabs spawn, hatch larvae and feed on eelgrass and marsh vegetation. In the fall, the male crabs move to the deep channel in the central and southern portions of the Bay, primarily in Virginia waters, where they sit out the winter buried in the mud on the Bay floor. The females also migrate south, to areas near the mouth of the Bay, to hibernate.[12] Since Maryland and Virginia have traditionally prohibited the harvesting of crabs by nonresidents in their respective waters,[13] commercial fishing activity by Chesapeake Bay crabbers has been dictated by these seasonal migrations and the more erratic changes in crab concentrations brought on by changes in salinity levels in parts of the Bay.[14] Marylanders harvest crabs only in the summer months when the crabs are concentrated in their waters. Unlike Virginia, which allows virtually year-round harvesting,[15] Maryland prohibits winter dredging of hibernating crabs from the Bay floor.[16]

Virginia's residency restrictions make it illegal for those fishermen who live on the Maryland portion of Smith Island to follow their quarry around to the Virginia side. The state line substantially diminishes the range that larger Maryland boats would normally have for fishing. While both states prohibit out-of-staters from harvesting crabs within their waters, there is no corollary prohibition against marketing the catch in either state, or elsewhere along the eastern seaboard and around the country.[17]

Despite the mounting frustration for the fishermen and repeated violations of the residency laws,[18] neither Maryland nor Virginia seriously considered opening their waters to out-of-staters to harvest blue crabs. Residency laws were an integral component of management of the resources, both for conservation efforts and for law enforcement on the Chesapeake Bay. The states never agreed on any form of reciprocity in their crab laws, which would have allowed all crabbers to harvest the resource throughout the Bay.[19]

The failure of the state legislature to act cooperatively, plus the continued frustrations of the Maryland crabbers, led to the suit by the Tangier Sound Waterman's Association following the unsuccessful attempts by several members of the Association to obtain Virginia crab licenses. In addition, two of the named plaintiffs possessed federal fishing licenses, yet were still denied the right to harvest crabs in Virginia waters on the basis of nonresidency.[20]

The Parties' Arguments

The plaintiffs challenged the Virginia residency laws on the grounds that these statutes violated the commerce clause, the privileges and immunities clause, and the equal protection clause of the United States Constitution. They also argued that the Virginia laws were preempted by federal law under the supremacy clause. The Association asked for declaratory and injunctive relief to the defendants from enforcing the Virginia laws and from enforcing those laws as they applied to federally licensed vessels.[21]

Virginia claimed in defense that the crab laws were an extension of the state's ownership rights in the subaqueous bottomlands from which the crabs were harvested. As part of her property right in these lands, Virginia could prohibit nonresidents from fishing in her waters. In the alternative, Virginia argued that it had a compelling interest in its nonresidency laws since they were necessary for effective enforcement of the regulations needed to protect and conserve the resource, and for preservation of the peace on the crabbing grounds.[22]

Judge Warriner granted the plaintiffs' request for a permanent injunction against enforcement of the residency laws, holding that the Virginia statutes, "impermissibly foreclose Marylanders from pursuing their calling as commercial crabbers in such a way that is repugnant to the Privileges and Immunities

---

[10]*Callinectes* is Greek for beautiful swimmer; *sapidus* means tasty or savory in Latin; the late Dr. Mary J. Rathbun first named the blue crab. W. WARNER, BEAUTIFUL SWIMMERS: WATERMEN, CRABS AND THE CHESAPEAKE BAY 90 (1976).

[11]*Id.* at 6.

[12]*Id.* at 34, 100.

[13]Maryland has a residency requirement for commercial crabbing licenses similar to Virginia's. M.D. ANN CODE art. 4, § 805 (1974).

[14]Tangier Sound, 541 F. Supp. at 1290.

[15]VA. CODE § 28.1-170 & 172 (1979).

[16]MD. ANN. CODE art. 4, § 803 (1974 & Cum. Supp. 1981).

[17]Tangier Sound, 541 F. Supp. at 1289.

[18]The frustration created by the state residency restrictions occasionally spilled over into violence when fishermen challenged the laws and strayed over the state boundary. The most shocking episode occurred in 1949, when a leader of the Maryland crabbers crossed the border to fish for crabs on the Virginia side. When Virginian law enforcement officers sought to detain his boat, the fisherman attempted to flee to Maryland waters and was killed by the Virginian authorities. W. WARNER, BEAUTIFUL SWIMMERS: WATERMEN, CRABS AND THE CHESAPEAKE BAY 221 (1976).

[19]Tangier Sound, 541 F. Supp. at 1291.

[20]*Id.* at 1289. *See supra* note 3.

[21]The plaintiffs argued: 1) that the Virginia residency laws created an unreasonable burden on interstate commerce in violation of the commerce clause, U.S. CONST. art. I, § 8, cl. 3, since the catching, selling, processing, and transporting of crabs and crab products were actions in the stream of commerce; 2) that the laws denied the plaintiffs their right to pursue their livelihood in the commercial harvesting of crabs on the basis of their nonresidency in violation of the privileges and immunities clause, U.S. CONST. art. IV, § 2, cl. 1; 3) that these residency restrictions infringed on the plaintiffs' right to travel in violation of the equal protection clause, U.S. CONST. amend. XIV, § 1; and 4) that the Virginia laws were preempted by federal law under the supremacy clause, U.S. CONST. art. VI, § 2, to the extent that the state laws operated to exclude federally licensed fishing vessels from Virginia waters. Brief for Plaintiff at 5, 13, 22, 28, Tangier Sound Waterman's Assoc. v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982).

[22]Tangier Sound, 541 F. Supp. at 1292.

Clause of the Constitution."[23] He further ordered Virginia to open its portion of the Chesapeake Bay to nonresident blue crab fishermen as of October 1, 1982.[24]

Virginia's Ownership Claim

Five years ago, the Supreme Court in *Douglas v. Seacoast Products, Inc.*[25] held that Virginia statutes limiting the right of nonresidents and aliens to harvest menhaden in its territorial waters and the Virginia portion of the Chesapeake Bay were preempted by the federal enrollment and licensing statutes. While it would seem that this ruling would be dispositive of the issue presented in *Tangier Sound,* the Court in *Douglas* decided the case on statutory grounds, thereby avoiding examination of the constitutional challenge to Virginia's residency laws.[26] Because some of the *Tangier Sound* plaintiffs did not operate federally enrolled and licensed fishing vessels, the court was required to determine the constitutionality of the state laws.

Douglas v. Seacoast Products, Inc. was important, however, because it questioned the validity of the concept of state ownership of natural resources as a justification for discriminatory state management practices. Residency restrictions were frequently upheld in cases decided during the 19th century on the theory that the natural resources found within the borders of a state were the common property of its citizens to be controlled and regulated by the state for their benefit.[27] The state, in its sovereign capacity, had the right to exercise this "ownership", to regulate the taking of fish and wildlife by excluding nonresidents from any interest in these common state resources.[28]

The state ownership concept was a critical component of Virginia's Defense in *Tangier Sound,* although ownership of the exploited resource, the blue crab, was not claimed. Virginia argued instead that it owned the subaqueous bottomlands beneath the navigable waters within its jurisdiction, with all attendant property rights, subject only to the right of navigation in the water above the lands. The commercial harvesting of the crabs involved a physical invasion of the bottom tantamount to a trespass. As part of the state's property right in these submerged lands, Virginia claimed that it could permit or prohibit anyone from entering or using its property. In sum, since the crab licensing statutes were merely an extension of Virginia's property rights and were not an exercise of its police power, the state could act free of federal or constitutional restraint.[29]

The primary case in support of Virginia's ownership claim is *McCready v. Virginia,*[30] an 1876 Supreme Court decision upholding a Virginia statute which prohibited citizens of other states from planting oysters in Virginia's tidal beds. The Court ruled in favor of the state, against a constitutional challenge under the privileges and immunities clause, on the ground that Virginia "owned" the beds, the tidewaters and even the fish, "so far as they are capable of ownership while running."[31] Accordingly, access to fisheries remained within the sole control of the state acting on behalf of its citizens. The state could "appropriate" the tidal beds for the exclusive use of its citizens because such action was "in effect nothing more than a regulation of the use by the people of their common property."[32]

By basing this right on ownership, rather than citizenship, the Supreme Court in *McCready* upheld a discriminatory state law despite the protection provided by the privileges and immunities clause of "fundamental" interests or rights: use of the oyster beds of the state was not a privilege or immunity or citizenship.[33]

The principle of law articulated in *McCready,* and relied upon by Virginia here are justification for its restrictive blue crab laws, was narrowed by subsequent Supreme Court decisions defining the scope of the commerce clause and the privileges and immunities clause as applied to state regulation of natural

---

[23] *Id.* at 1301. In response to the other three grounds for suit, the court ruled as follows: 1) The holding on the privileges and immunities clause made it unnecessary for the court to definitively rule on the commerce clause challenge. The court, in an extensive discussion of the issue, commented that the plaintiffs did not establish that unharvested crabs were articles of commerce and that there was little convincing support for the plaintiffs' claim that their interest "in traversing the state boundary to harvest crabs (was) within the purview of the commerce clause, either as an article of commerce or as one engaged in the associated intercourse thereof." *Id.* at 1306. Only dictum cited from Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) supported the plaintiffs' claim that discriminatory regulation of the taking of a migratory fish species affected commerce in such a way as to be a burden on interstate commerce. *Id.* at 1303-1306. For a different interpretation of the "affecting commerce" issue, as applied to regulation of commercially harvested fish and shellfish species, see T. Lewis & I. Strand, Jr., *Douglas v. Seacoast Products, Inc.: The Legal and Economic Consequences for the Maryland Oystery,* 38 Md. L. Rev. 1 (1978); 2) The court's holding on the privileges and immunities clause encompassed federally licensed plaintiffs as well as non-licensed fishermen, nevertheless, the plaintiffs prevailed under their federal preemption challenge. Tangier Sound, 541 F. Supp. at 1306; 3) The court held that "a residency requirement uniformly applied does not violate the [equal protection] clause in and of itself." *Id.*

[24] Tangier Sound Waterman's Assoc. v. Douglas, No. 81-0229-R, slip op. at 2 (E.D. Va. Jul. 29, 1982).

[25] 431 U.S. 265 (1977).

[26] *Id.* at 272.

[27] For a thorough examination of the general theory of state "ownership" of fish and wildlife, see Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979), in which the Supreme Court upheld a Connecticut statute prohibiting the exportation of wild game birds killed within the state against a challenge under the commerce clause. The Court ruled that the birds were a common property resource and that the state could regulate their taking and sale to the point of excluding them from interstate commerce, *Id.* at 534. In reaching its decision, the Court traced the evaluation of the ownership theory from its origins in Roman and Athenian law through its civil and common law antecedents: animals *ferae naturae* were considered to be the common property of the citizens of the state. The right to control and regulate this common property in game was subject to the sovereign's authority to be exercised as a trust for the benefit of the people. *Id.* at 529. For further discussion of the state ownership theory, see COUNCIL ON ENVIRONMENTAL QUALITY, THE EVOLUTION OF NATIONAL WILDLIFE LAW ch. II (1977).

[28] *See, e.g.,* Corfield v. Coryell, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1825), the first significant interpretation of a privileges and immunities clause challenge to state natural resource laws. In *Corfield,* a New Jersey law prohibiting nonresidents from access to oyster beds in the state's waters was upheld under the privileges and immunities clause and the commerce clause on the ground that the citizens of the state had a proprietary right in their fisheries and that New Jersey could validly use its police power to ban noncitizens from the use of this "common property." *Id.* at 552.

[29] Tangier Sound, 541 F. Supp. at 1292.

[30] 94 U.S. 391 (1876).

[31] *Id.* at 394.

[32] *Id.* at 395.

[33] *Id.* Virginia used this argument to justify the exclusion of nonresidents from its waters:

> The right of using Virginia's subaqueous lands for crabbing is not a right of a person or of a citizen as such. It is a part of the property right in the Commonwealth's real property which is below navigable waters. As the Commonwealth's property right, it is not, under any constitutional theory, required to be made available to all residents of the United States.

Brief for Defendant at 9, Tangier Sound Waterman's Assoc. v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982). For discussion of the range of "fundamental" rights asserted to be protected by the privileges and immunities clause, see *infra* notes 45-48 and accompanying test.

resources. Indeed, it appeared for a time that the ownership theory would be entirely discredited as nothing more than a "19th century legal fiction expressing 'the importance to its people that a State have the power to preserve and regulate the exploitation of an important resource'."[34] In *Douglas v. Seacoast Products, Inc.*, for example, Virginia argued that because the states had a title or ownership interest in the fish swimming in their territorial waters, they could exclude federal licensees. The Supreme Court dismissed this claim, stating that:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture . . . Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.[35]

Virginia claimed in *Tangier Sound* that its property right in the subaqueous bottomlands where blue crabs were harvested was distinct from the property right in the fish and wildlife at issue in *Douglas*. Unlike fish and wildlife, which *Douglas* held were "owned" by no one until reduced to possession, the lands beneath the internal state waters of the Chesapeake Bay were clearly owned by Virginia. The state argued that, based on ownership, it had a legitimate right to control access to its waters since commercial harvesting of blue crabs involved defacement of these submerged lands; scraping for "peeler" crabs uprooted eelgrass found on the bottom and winter dredging dug up the soil.[36]

Rather than distinguishing the case, Judge Warriner applied the *Douglas* dictum on ownership to Virginia's claim.[37] Critical to his analysis were two recent Supreme Court cases reevaluating the role of the ownership principle in state resource regulation. The decisions suggested that the ownership theory was not entirely devoid of meaning or force, but in narrowly defined circumstances could be used as a justification for privileges and immunities clause challenges to discriminatory state licensing schemes.

In 1978, the Supreme Court in *Baldwin v. Montana Fish and Game Commission*[38] upheld a Montana statutory elk-hunting licensing scheme, which imposed substantially higher license fees on nonresidents of the state than on residents, on the ground that elk hunting was a recreational activity and not a "fundamental" right protected by the privileges and immunities clause. Basic to its holding was the Court's reaffirmation that the state's "ownership" of, or substantial interest in, the disputed resource was an important consideration in the constitutional analysis. Although conflicting federal interests would circumscribe that state right, "[t]he fact that the state's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence."[39]

While rejecting the "ownership" label, *Baldwin* suggested that a state, acting as a kind of "trustee" on behalf of its citizens, retained broad authority to manage the exploitation of the fish and wildlife resources found within its jurisdiction. That the policy of federalism diminished the force of the ownership concept did not undermine the significance of its role in the exercise of the police power of a state to conserve and protect the resource.[40]

Hicklin v. Orbeck,[41] argued one month after *Baldwin*, presented a unique set of facts within which to further define the role that the state ownership theory would play when faced with a constitutional challenge. In *Hicklin*, the "Alaska Hire" Act, requiring all holders of state oil and gas leases, pipeline easements or right-of-way permits to give employment preference to Alaska residents, was held to violate the privileges and immunities clause. The fact that Alaska owned the oil and gas—the subject matter of the statute—did not shelter the Act from constitutional review, and was not a justification for the state's economic discrimination in favor of residents. Instead, the state's ownership of the resource was "a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause."[42]

Baldwin and *Hicklin* established that an ownership interest in the resource, standing alone, would not exempt discriminatory state resource regulation from constitutional scrutiny under the privileges and immunities clause. However, when state control of a natural resource conflicted with a federally protected right, ownership of the resource would be a significant component of the analysis, particularly where, as in *Baldwin*, the state demonstrated a strong conservation need.[43]

---

[34]Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977), *citing* Toomer v. Witsell, 334 U.S. 385, 402 (1948).

[35]*Id.* at 284-285.

[36]Brief for Defendant at 9-10, Tangier Sound Waterman's Assoc. v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982). A "peeler" is a recently molted crab.

[37]Tangier Sound, 541 F. Supp. at 1294.

[38]436 U.S. 371 (1978).

[39][T]he States' interest in regulating and controlling those things they claim to "own" including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce. Nor does a State's control over its resources preclude the proper exercise of federal power. . . . And a State's interest in its wildlife and other resources must yield, when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause. *Id.* at 385-386.

[40]*Id.* at 384-386. *See also* Hughes v. Oklahoma, 441 U.S. 322, 341 (1978) (Rehnquist, J., dissenting); Note, *State Authority to Protect Wildlife Preserved As Supreme Court Finally Overturns Geer v. Connecticut*, 9 ENVIRON. L. Rep. 10106 (1978).

[41]437 U.S. 518 (1978).

[42]Ownership of the oil and gas resources of the state was not a key factor in Hicklin because the Court found that Alaska had little or no proprietary interest in much of the activity regulated by the Alaska Hire Act. *Id.* at 529.

[43]The Baldwin Court emphasized that preservation of the elk depended upon the state's conservation efforts: "The elk supply, which has been entrusted to the care of the state by the people of Montana, is finite and must be carefully tended in order to be preserved." Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 388 (1978). To this end, "[a]ppellants' interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause." *Id.* Baldwin and Hicklin looked to commerce clause cases for analysis of the ownership doctrine as applied to state regulation of natural resources. As noted in Baldwin, the privileges and immunities clause and the commerce clause both have their source in the Articles of Confederation, art. 4. *Id.* at 379. The ownership doctrine was virtually discredited in commerce clause analysis by Hughes v. Oklahoma, 441 U.S. 332 (1979) which overruled Geer v. Connecticut, 161 U.S. 519 (1896) on the ground that "challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources." *Id.* at 335. In so ruling, the Hughes Court emphasized the importance of a state's conservation efforts in stating that due consideration would continue to be given to "legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." *Id.* at 336. For a thorough analysis of Hughes and Baldwin, see Note, *Hughes v. Oklahoma and Baldwin v. Fish and Game Comm'n: The Commerce Clause and State Control of Natural Resources*, 66 VA. REV. 1145 (1980) which suggests that the Supreme Court has not satisfactorily developed a unified theory governing state resource regulation.

In light of these decisions, Judge Warriner ruled in *Tangier Sound* that "in the Court's analysis of a statutory scheme, 'ownership' of a natural resource is but one factor that the Court must consider in determining whether a state has exercised its police power in conformity with federal laws and the Constitution."[44] Although the court did not explicitly weigh this factor against competing interests in the case, the opinion clearly indicates that Virginia could not use its ownership of the subaqueous bottomlands of the Bay to insulate its discriminatory statutory scheme from constitutional review. As in *Hicklin,* where ownership was used as a screen to justify regulation that went far beyond the state's proprietary interest in the resource, Virginia's exclusion of nonresidents from harvesting crabs in state waters was too broad a response to its legitimate right to control the use of lands that it owned.

Validity of Virginia's Residency Restrictions Under the Privileges and Immunities Clause

In *Tangier Sound,* the exclusion of nonresidents from access to crabs in Virginia waters was an integral part of the state's regulatory scheme. Since the plaintiffs were prevented from harvesting the resource solely because of their nonresidency, the privileges and immunities clause, article IV, section 2, clause 1 of the United States Constitution, presented the strongest constitutional challenge to the state laws.[45]

The privileges and immunities clause provides that, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." The clause was enacted to guarantee some degree of equality of treatment for citizens of different states under a federalist system.[46] As interpreted by the courts, the primary purpose of the clause was to "help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[47] Although the range of privileges and immunities protected by the clause is the subject of considerable legal debate, it has been utilized by the courts to protect residents of one state from unjustifiable discrimination when they entered another state to engage in an essential activity, such as the pursuit of a trade, or to exercise a basic right, such as the institution of a court action.[48]

In *Tangier Sound,* the plaintiffs argued that the crab licensing laws violated the privileges and immunities clause because the laws denied them the right to travel freely from state to state to pursue their livelihood. In bringing suit, the Marylanders claimed the right to harvest crabs on the same terms as Virginia residents, subject only to reasonable state regulation of the resource.[49]

Whether state regulation violates the privileges and immunities clause depends, first, on the kind of activity that is being regulated. *Baldwin* established that before a state statute will be subject to review under the privileges and immunities clause, the asserted right involved must be "fundamental." The right of a nonresident to earn a livelihood without being restricted by unjustified state discrimination was determined by the *Baldwin* Court to be such a fundamental right. Therefore, where the activity was commercial in nature, like the harvesting of blue crabs for commercial marketing, state discrimination against nonresidents pursuing that activity would be scrutinized under the standard of review established for privileges and immunities analysis. However, if the regulated activity was not basic to the nonresident's livelihood, but was rather recreation or sport, then its regulation would not fall within the purview of the privileges and immunities clause.[50]

Since state action in *Tangier Sound* involved regulation of the commercial taking of blue crabs, as opposed to regulation of recreational fishing, Virginia's statutory scheme was subject to constitutional scrutiny under the privileges and immunities clause. The standard of review for determining whether a state statute violated the privileges and immunities clause was established in the 1948 case of *Toomer v. Witsell,*[51] in which the Supreme Court held unconstitutional a South Carolina statute requiring nonresidents to pay license fees for shrimping in the three-mile maritime belt off the state coast that were 100 times greater than those paid by residents. The Court found that South Carolina's rationale for the unequal licensing system, conservation of its shrimp supply, did not justify the severe discrimination practiced upon noncitizens. To pass scrutiny under the privileges and immunities clause, the state must establish a 'substantial' reason for the discrimination against nonresidents beyond the fact that they are citizens of other states, and the degree of discrimination must bear a 'close relation' to 'valid independent reasons' for the disparity of treatment. In *Toomer,* the purpose and effect of the statute were not to conserve shrimp, as the state claimed, but impermissibly to exclude nonresidents.[52]

---

[44]Tangier Sound, 541 F. Supp. at 1294. Virginia also claimed that blue crabs were neither fixed resources, like oysters, nor free-swimming fish, like menhaden, thereby distinguishing the case from McCready v. Virginia, 94 U.S. 391 (1876) and Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977). Judge Warriner rejected this argument, holding that McCready and Douglas would control, as refined by this recent line of Supreme Court cases reevaluating the ownership concept.

[45]*See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978); Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371 (1978); and Toomer v. Witsell, 334 U.S. 385 (1948), all involving privileges and immunities clause challenges to state regulation of the taking of fish and wildlife which discriminated against nonresidents.

[46]Austin v. New Hampshire, 420 U.S. 656, 660-661 (1975). While the privileges and immunities clause specifically covers state "citizenship," the clause also encompasses "residency" within its protection.

[47]Toomer v. Witsell, 334 U.S. 385, 395 (1948).

[48]*See* Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371, 383 (1978):

> When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State, *Ward v. Maryland,* 12 Wall. 418 (1871); in the ownership and disposition of privately held property within the State, *Blake v. McClung,* 172 U.S. 239 (1898); and in access to the courts of the State, *Canadian Northern R. Co. U. Eggen,* 252 U.S. 553 (1920).

There has been substantial disagreement on the proper focus of the privileges and immunities clause, i.e., whether it was designed to insure positive or "substantive natural" rights against all government interference, *e.g.,* Corfield v. Coryell, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1825); or whether it was intended to have the proscriptive effect of protecting nonresidents from unjustifiable state discrimination, *see* Hague v. CIO, 307 U.S. 496, 511 (1939). A more recent interpretation, Austin v. New Hampshire, 420 U.S. 656, 660-651 (1975) suggested that the clause established a "norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." Because of the confusion over the scope of the privileges and immunities clause, it has been, and will continue to be, applied on a case-by-case basis. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-32, 6-33 (1978).

[49]Brief for Plaintiff at 13, Tangier Sound Waterman's Assoc. v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982).

[50]Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 387 (1978): "With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions." *But see* Justice Brennan's dissent in Baldwin in which he argues that the issue of whether a given right is "fundamental" should not be an element of the analysis under the privileges and immunities clause. *Id.* at 402 (Brennan, J. dissenting).

[51]334 U.S. 385, 395 (1948).

[52]*Id.* at 396, 397.

The Court in *Toomer* held that discrimination against nonresidents could only be justified if nonresidents were demonstrably interfering with legitimate state objectives that could not be remedied in less discriminatory ways. In each case, the inquiry under the privileges and immunities clause would focus on whether there was reasonable relationship between the danger presented by noncitizens as a class and the discrimination practiced against them. The Court concluded that South Carolina's highly disproportionate fee system was contrary to the primary purpose of the clause "to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed."[53]

Aware of the standard of review articulated in *Toomer*, Virginia argued that it had a "compelling interest" in its residency laws for effective enforcement of regulations necessary to protect and conserve the resource, and to preserve the peace over the crabbing grounds. The state claimed that allowing nonresidents to fish in its waters would lead to depletion of the crab stocks through increased harvesting efforts and would require the state to impose substantially higher licensing fees to limit the number of crabbers.[54]

Judge Warriner held that, contrary to the state's claim, the severe discrimination against Maryland crabbers in excluding them entirely from Virginia waters did not bear a close relation to the stated conservation objectives of the statutory scheme. The evidence did not support the claim that the exclusion of Maryland residents *per se* was necessary for the conservation of Virginia crabs, since any harm to the fishery would be the result of too many harvesters, regardless of their state of residence. The fact that the state placed no licensing limit upon the number of Virginians in its waters was further evidence that the state's conservation claim was spurious. Using the complete exclusion of nonresidents as its primary conservation method placed an impermissible discriminatory burden on the Maryland crabbers.

> Virginia has endeavored through its statutes to place almost the entire burden of conservation on nonresidents, with no showing that they are the source of the evil. This Virginia cannot do. A crabber, whether from Maryland or Virginia, must be free to engage in his livelihood of pursuing his peripatetic quarry subject only to reasonable, nondiscriminatory rules related to those Virginia imposes on its citizenry.[55]

Virginia also argued that an open fishery would create law enforcement problems by increasing the number of open water inspections, the degree of nonresident violators who failed to appear in its courts and the incidence of disputes among crabbers over the fishing grounds.[56] The Judge accepted Virginia's argument that law enforcement would be difficult to execute if its waters were opened up to nonresidents: "[T]he evil anticipated with respect to the problem of law enforcement does appear to lie in the fact of nonresidency itself." However, likening enforcement efforts on the water to those on the state's highways, "where commercial traffic from all States are required to obey Virginia traffic laws," Judge Warriner concluded that enforcement of the fishery laws on open water would be "tolerable."[57]

In light of the unconstitutionality of its current laws, Judge Warriner charged Virginia with the responsibility of enacting new regulations for the crabbing industry which would be of uniform application. He noted, however, that Virginia could charge nonresidents a "reasonable and appropriately higher" fee for their licenses. Finally, the parties were invited to submit memoranda to the court establishing guidelines for the transition to an open fishery on the Chesapeake this fall.[58]

Conclusion

Tangier Sound is a classic example of the conflict between state action and federally protected rights. The outcome in this case, open access to the Chesapeake Bay to harvest blue crabs, is yet another step taken by the courts in shifting the balance away from unfettered state authority over natural resources towards the recognition that a state has some limited responsibility for noncitizens who wish to exploit fish and wildlife found within its borders.

The *Tangier Sound* case demonstrates that outright discrimination against nonresidents in the issuance of commercial licensing fees and permits will be suspect, regardless of the ownership interests of the state. Commercial fishermen must be allowed to pursue their livelihood across state boundaries, subject only to reasonable, nondiscriminatory state regulation. A state will, however, continue to exercise substantial authority in utilizing its police power to regulate and preserve the exploitation of its natural resources, including commercial fisheries, so long as the methods used are reasonably related to the stated management objectives. Still unanswered by this case is the extent to which the need to conserve the resources owned by the state can be used to impose differential management schemes on noncitizens.

Judge Warriner's decision will have implications for other migratory fisheries, which are regulated on a state-by-state basis. Like the Virginia and Maryland regulation of the blue crab fishery, states often enforce discriminatory management practices which favor their own citizens against nonresidents. To avoid a repetition of *Tangier Sound,* the states which employ these practices should explore methods of cooperative regulation of their fisheries. ■

---

[53] *Id.* at 398.

[54] Brief for Defendant at 12-14, Tangier Sound Waterman's Assoc. v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982).

[55] Tangier Sound, 541 F. Supp. at 1301. Judge Warriner noted that the optimum sustainable yield for blue crab had not yet been determined for the fishery. Blue crab landings increased from the 1880's to the mid 1960's when landings peaked at 45,000 metric tons in 1966. In general, landings fluctuated near the mean between 1952 and 1979. *Id.* at 1290. *See* B. J. Rothschild, P. W. Jones, J. S. Wilson, *Trends in Chesapeake Bay Fisheries,* contribution No. 1133, Center for Environmental and Estuarine Studies of the University of Maryland.

[56] Brief for Defendant at 10-11, Tangier Sound Waterman's Assoc. v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982).

[57] Tangier Sound, 541 F. Supp. at 1301.

[58] Tangier Sound Waterman's Assoc. v. Douglas, No. 81-0229-R, slip op. at 2 (E.D. Va. Jul. 29, 1982).

Marine Resource Advisory

ADVISORY NO. 24 FEBRUARY 1983

Dick Cook . . . . . .Editor

Marine Resource Advisories are produced by the Virginia Sea Grant Program at Virginia Institute of Marine Science, College of William and Mary, as a Sea Grant marine advisory service. Copies are available without charge upon written request to the editor.

Dr. Frank O. Perkins . . . . . .Dean/Director, Virginia Institute of Marine Science
Dr. William Rickards . . . . . Director, Virginia Sea Grant Program
Dr. William DuPaul . . . . . .Head, Advisory Services