Michigan Law Review

Volume 46 | Issue 4

1948

CONSTITUTIONAL LAW-INTERSTATE PRIVILEGES AND IMMUNITIES-STATE'S PROPRIETARY INTEREST IN ITS NATURAL RESOURCES

Daniel W. Reddin, III
University of Michigan Law School

CONSTITUTIONAL LAW—INTERSTATE PRIVILEGES AND IMMUNITIES—STATE'S PROPRIETARY INTEREST IN ITS NATURAL RESOURCES—Plaintiffs, non-residents of South Carolina, brought action to enjoin enforcement of the South Carolina statutes regulating fishing within the three mile maritime belt. The statutes imposed an annual license fee on boats engaged in shrimp fishing of $25.00, if owned by residents, and of $2500.00, if owned by non-residents; it exacted a tax of 1/8 cent per pound on green shrimp taken or "canned, shucked or shipped for market," and it required all licensed boats to unload, pack and properly stamp their catch in South Carolina before shipment to another state. Plaintiffs who fish within and beyond the three-mile limit contended that the statutes were void on the ground, among others, that they make an arbitrary discrimination between residents and non-residents in violation of the privileges and immunities clause, Article IV, section 2 of the United States Constitution, and that they impose a burden on interstate commerce in violation of sections 8 and 10 of Article I. *Held*, injunction denied and case dismissed. The South Carolina statutes do not go beyond the power of a state to regulate the taking of fish or animals *ferae naturae*, the ownership of which is in the state for the benefit of its inhabitants. *Toomer v. Witsell*, (D.C. S.C. 1947) 73 F. Supp. 371.

A state has an almost absolute power to regulate the taking and disposition of the wildlife within its borders.[1] It may prohibit the taking altogether,[2] or limit it to its citizens.[3] It may permit the taking, but prevent the exportation.[4] It may tax the taking or the possession of wildlife by anyone,[5] or it may tax only taking or possession by non-residents.[6] In order to make its regulations effective, it may prohibit the possession of game whether taken within its borders or not.[7] This power over wildlife has been justified upon the ground that animals and fish *ferae naturae* are the common property of the citizens of a state and the state can conserve them for its citizens; [8] this power has survived attacks on the ground that it violated either the commerce clause or the privileges and immunities clause of Article IV, or both.[9] In *Foster Fountain Packing Co. v.*

[1] Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600 (1896); McCready v. Virginia, 94 U.S. 391 (1876).

[2] Rupert v. United States, (C.C.A. 8th, 1910) 181 F. 87.

[3] McCready v. Virginia, 94 U.S. 391 (1876); Patsone v. Pennsylvania, 232 U.S. 138, 34 S.Ct. 281 (1914).

[4] Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600 (1896); McDonald & Johnson v. Southern Express Co., (C.C. S.C. 1904) 134 F. 282.

[5] La Coste v. Dept. of Conservation of Louisiana, 263 U.S. 545, 44 S.Ct. 186 (1924).

[6] In re Eberle, (C.C. Ill. 1899) 98 F. 295.

[7] Silz v. Hesterberg, 211 U.S. 31, 29 S.Ct. 10 (1908).

[8] Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600 (1896).

[9] Ibid; Rupert v. United States, (C.C.A. 8th, 1910) 181 F. 87; La Coste v. Dept. of Conservation of Louisiana, 263 U.S. 545, 44 S.Ct. 186 (1924) (Commerce Clause); Corfield v. Coryell, 6 Fed. Cas. No. 3230 (1823); In re Eberle, (C.C. Ill. 1899) 98 F. 295 (Privileges and Immunities, Art. IV, sec. 2); McCready v. Virginia, 94 U.S. 391 (1876) (both).

Haydel,[10] the Supreme Court was confronted with a Louisiana statute which authorized the taking of raw shrimp, its manufacture and sale in interstate commerce, but which forbade the exportation of uncleaned shrimp. The court, in holding the statute invalid, declared that although it was passed ostensibly for conservation, its real purpose was to force canning industries using Louisiana shrimp to move into the state; and that, although a state may retain its wildlife within its borders for conservation and use, once it permits interstate sale the product becomes subject to the commerce clause. In *Bayside Fish Co. v. Gentry*,[11] the court upheld a California statute which regulated the manufacture of fish products within the state and in distinguishing the *Foster* case, pointed out that there was nothing in the California statute which suggested a purpose to interfere with interstate commerce and that it plainly appeared to be a conservation measure. This power over game has also been recognized to a limited extent over other natural resources, but in such cases it seems to rest upon a police power basis and is much more limited.[12] Thus, a state can prevent the waste of its mineral resources,[13] and tax their extraction or manufacture,[14] but it cannot prevent or discourage their exportation.[15] The statute in the principal

[10] 278 U.S. 1, 49 S.Ct. 1 (1928). The reasoning used by the court in allowing a state to prohibit exportation of its shrimp, but in not allowing it to permit exportation subject to the condition that the shrimp be manufactured in the state, appears to be similar to that used in allowing a state to exclude foreign corporations, but in not allowing it to admit them subject to the condition that they agree not to remove suits to federal courts. Home Insurance Co. v. Morse, 20 Wall. (87 U.S.) 445 (1874). For a discussion of unconstitutional conditions, see Merrill, "Unconstitutional Conditions," 77 UNIV. PA. L. REV. 879 (1929); Hale, "Unconstitutional Conditions and Constitutional Rights," 35 COL. L. REV. 321 (1935).

[11] 297 U.S. 422, 56 S.Ct. 513 (1936).

[12] In Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600 (1896), the Court based the power of a state over its wildlife on two grounds: its property interest as trustee for its inhabitants, and its police power. Most decisions accept the former ground for the wildlife and the latter for other natural resources. West v. Kansas Natural Gas Co., 221 U.S. 229, 31 S.Ct. 564 (1911); Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658 (1923). Justice Holmes felt that authority over both game and other natural resources was based upon police power. Hudson Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529 (1908). He believed that a state could make reasonable provisions for its local needs and could regulate all natural resources before they went into interstate commerce irrespective of their effect upon it. This was the basis of his dissent in Wells v. Kansas Natural Gas Co., and in Pennsylvania v. West Virginia. For an exhaustive annotation of cases dealing with natural resources, see 32 A.L.R. 331 (1924).

[13] Walls v. Midland, 254 U.S. 300, 41 S.Ct. 118 (1920); Ohio Oil Co. v. Indiana, 177 U.S. 190, 20 S.Ct. 576 (1900); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337 (1911).

[14] Heisler v. Thomas Colliery, 260 U.S. 245, 43 S.Ct. 83 (1922) (coal); Oliver Iron Co. v. Lord, 262 U.S. 172, 43 S.Ct. 526 (1923) (iron); Ohio Oil Co. v. Conway, 281 U.S. 146, 50 S.Ct. 310 (1930) (oil); Hope Natural Gas Co. v. Hall, 274 U.S. 284, 47 S.Ct. 639 (1927) (gas); South Carolina Power Co. v. South Carolina Tax Commission, (D.C. S.C. 1931) 52 F. (2d) 515 (electricity).

[15] Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229, 31 S.Ct. 564 (1911). But see Hudson Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529 (1908).

case clearly discriminates against non-residents, but it is submitted that the state has not exceeded its power and that the case if appealed should be affirmed.

Daniel W. Reddin, III