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Constitutional Law - Wyoming's Guide Law: Nonresident Hunters on Public Lands and Collateral Issues - Schakel v. State

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CASE NOTE

CONSTITUTIONAL LAW—Wyoming's Guide Law: Nonresident Hunters on Public Lands and Collateral Issues. Schakel v. State, 513 P.2d 412, (Wyo. 1973).

Appellant Karl Schakel was found guilty of violating WYO. STAT. § 23-54 (1957) because he was a nonresident hunting in a national forest without a guide.¹ Though Schakel owned substantial property interests within the state of Wyoming, he was a resident of Colorado. Except for the fact that appellant was unaccompanied by a guide thus violating the statute, he was in full compliance with the other requirements of the hunting laws. The Wyoming Supreme Court reversed Schakel's conviction, finding unconstitutional the statute under which he was convicted.² The court held the statute void because it created a discriminatory classification and did not reasonably tend to accomplish or have a substantial connection with a valid state objective.

Legal theory respecting regulation of the harvest of fish and wildlife in the United States has its foundation in Athenian and Roman law. Under Roman law, *ferae naturae* were considered to be *res nullis*, i.e., not subject to claims of ownership unless reduced to possession. The common law held ownership of such wildlife to be in the sovereign in trust for the people. This "sovereign ownership," or "proprietary interest" doctrine, passed from England to the colonies and was adopted by the states.³ The United States Supreme Court, explaining the "sovereign ownership" theory in *McCready v. Virginia*,⁴ observed that the right which the people of the state acquire in "their" wildlife issues not from their citizen-

1. WYO. STAT. § 23-54 (repealed 1973).

It shall be unlawful for any person who is not the owner of a resident license or permit lawfully authorizing the same to hunt, pursue or kill, or attempt to hunt, pursue or kill any elk, deer, bear, moose, or mountain sheep on any land within any national forest, national park or national game refuge within the boundaries of the State of Wyoming, any part of which is open to the hunting of deer, elk, moose or mountain sheep at any time during the calendar year in which said hunting is done, unless accompanied by a licensed guide; [emphasis added]. . . .

2. Schakel v. State, 513 P.2d 412 (Wyo. 1973).

3. Comment, *Regulation of Wildlife in National Park System: Federal or State?*, 12 NATURAL RESOURCES J. 627 (1972). [hereinafter cited as *Regulation of Wildlife*.]

4. *McCready v. Virginia*, 94 U.S. 391 (1877).

ship alone, but from their citizenship and property combined. The Virginia statute prohibited nonresidents from planting oysters in the tidal waters of the state and provided a criminal penalty for its violation. In sustaining the nonresident's conviction, the Court concluded that the ability to regulate wildlife within a state is a "property right, not a mere privilege or immunity of citizenship."⁵

In another case, *Corfield v. Coryell*,⁶ the court sustained a New Jersey statute that denied nonresidents the right to collect oysters, while allowing citizens of New Jersey to do so. The law was justified by considering the citizens of the state as cotenants in the property of the wildlife therein.⁷ There the court disposed of the constitutional argument proffered by the nonresident by asserting, "[I]t would . . . be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other States."⁸

Toward the end of the nineteenth century the "sovereign ownership" doctrine still remained a viable theory upon which rested the state's power over its wildlife population.⁹ The leading case of *Geer v. Connecticut*¹⁰ reiterated the position that common ownership of wildlife was held by the people of a state.

It [wild game] 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, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.¹¹

Though *McCready* and *Geer* have not been expressly overruled, the authority upon which they sustained state power to regulate wildlife has been diminished by later decisions. In *Missouri v. Holland*,¹² the state of Missouri sought to enjoin enforcement by a Federal Marshall of a treaty with

5. *Id.* at 391.

6. *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

7. *Id.* at 552.

8. *Id.* at 552.

9. *In re Eberle*, 98 F. 295, (N.D. Ill. 1899).

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

11. *Id.* at 529.

12. *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

Great Britain regulating the killing of migratory birds. Mr. Justice Holmes delivered the opinion, indicating what would become the eventual position of the "sovereign ownership" doctrine.

No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. 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.¹³

The Supreme Court in *Toomer v. Witsell*¹⁴ distinguished and declined to expand the doctrine of *McCready* and *Geer*. The *Toomer* Court, while overturning a statute that discriminated against nonresident commercial shrimpers, said of the whole ownership theory, "[I]t 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."¹⁵

This state power to preserve and regulate its wildlife population has been held subject to examination under the limitations of the state police power.¹⁶ The Supreme Court indicated approval of this basis of state power when it sustained a New York statute regulating the seasons during which certain animals could be hunted, declaring, "The acts in question were passed in the exercise of the police power of the state with a clear view to protect the game supply for the use of the inhabitants of the state."¹⁷ Thus even without the doctrine of state ownership the states may still attempt to regulate wildlife as an exercise of their police power—the general power to pass laws for the welfare of the people of the state.¹⁸ Modern theory, while noting that the state ownership doctrine has lost its vitality, predicates state control upon the police power. Thus the court in *Organized Village*

13. *Id.* at 434.

14. *Toomer v. Witsell*, 334 U.S. 385 (1948).

15. *Id.* at 399.

16. *Schakel v. State*, 513 P.2d 412 (Wyo. 1973); *Cross v. State*, 370 P.2d 371 (Wyo. 1962).

17. *Silz v. Hesterberg*, 211 U.S. 31, 39 (1908).

18. *Regulation of Wildlife*, *supra* note 3, at 629.

of *Kake v. Egan*¹⁹ said that the modern concept reasons that state control is founded upon the power to protect and regulate these resources for all the people.

Inasmuch as state control depends upon the proper exercise of the state police power, certain precautions must be observed to guard against misuse of that power. The Wyoming court, in describing the nature of the state's police power, said that a recognition of the limits of the police power means a recognition that "natural and inherent rights are not absolute, but relative."²⁰ Thus a federal court in *Edwards v. Leaver*²¹ invalidated a statute limiting commercial fishing rights to residents or corporations that were at least 51% owned by residents.

That a discrimination is being made against nonresidents is clear from a mere reading of the statute. The magnitude of the discrimination is disclosed by the evidence. It virtually excludes all nonresidents. . . . No such prohibition exists as to residents of this State. This disparity of treatment between residents and nonresidents requires an adequate explanation if the statute is to be sustained as a proper exercise of the State's police power.²²

The Wyoming court, in *Cross v. State*,²³ concluded that game and fish laws were based on the state's police power, and therefore subject to the limits of the valid exercise of that power. Chief Justice Blume set down the guidelines by which to analyze the exercise of this power in *State v. Langley*.²⁴

In order that a statute be valid, the purpose, or aim, or end thereof must be within the scope or purview of the police power, and in furtherance thereof; the means adopted must be reasonable and not arbitrary, and must be appropriate for the accomplishment of the end in view; in other words, there must be a substantial connection between the purpose in view and the actual provisions of the law.²⁵

19. *Organized Village of Kake v. Egan*, 174 F. Supp. 500, 504 (D. Alas. 1959).

20. *State v. Langley*, 84 P.2d 767, 770 (Wyo. 1938).

21. *Edwards v. Leaver*, 102 F. Supp. 698, (D. R.I. 1952).

22. *Id.* at 702.

23. *Cross v. State*, *supra* note 16.

24. *State v. Langley*, *supra* note 20.

25. *Id.* at 771.

The court in *Schakel*, employing these criteria, buttressed its position by citing the same kind of construction given the equal protection clause²⁶ in *McLaughlin v. Florida*.²⁷ There the Supreme Court, though dealing with racial discrimination, said that judicial inquiry under the equal protection clause does not end with a showing of equal applications among the members of the class defined by the legislation. Thus courts have voided statutes that required all nonresidents to obtain licenses in order to engage in commercial ventures, because the statute unreasonably discriminated in favor of residents.²⁸ Taxing schemes, when discriminating equally against all nonresidents, have been held unconstitutional as violative of the privileges and immunities clause²⁹ if there is no reasonable grounds for the disparity of treatment.³⁰

The *Toomer* court designated a general guideline by which to gauge discriminatory laws of this nature:

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 to 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 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.³¹

Thus in analyzing an exercise of the police power it has been held that the law must be a reasonable cure for the evil mentioned.³² It must be noted, however, that the Court's deference to the judgment of the states concerning wildlife leads to the conclusion that the state would have to be patently amiss in assessing the magnitude of the evil and the appropriateness of the cure before the judiciary would intervene. In *Toomer* the Court said, "The inquiry must . . . be conducted

26. U.S. CONST. AMEND. XIV, § 1.

27. *McLaughlin v. Florida*, 279 U.S. 184 (1964).

28. *Toomer v. Witsell*, *supra* note 14; *see also* 17 R.C.L. 488.

29. U.S. CONST. art. IV, § 2.

30. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).

31. *Toomer v. Witsell*, *supra* note 14, at 396.

32. *State v. Langley*, *supra* note 20, at 774.

with due regard for the principle that the States should have considerable leeway in analyzing the local evils and in prescribing appropriate cures.’³³ In another case concerning a statute making it unlawful for unnaturalized aliens to hunt game, the Court pointed out, “[T]his Court ought to be very slow to declare that State legislation was wrong in its facts.’³⁴

While there may be a presumption that the state has correctly perceived a local evil resulting from nonresident hunting on certain lands, the validity of game and fish laws must be viewed in light of the limits of state police power. There first must be a problem that the state legislature sought to remedy. In *Schakel* the state argued that safety of the hunter was a sufficiently valid concern to justify the guide law.³⁵ The court, however, found this argument suffering numerous infirmities, *inter alia*, that there was little if any relationship of the guide law to the safety of the hunter.³⁶ Indeed it is an anomaly that a nonresident could hunt on state or privately owned lands without a guide, but while hunting on nearby national forest lands a licensed guide would have to accompany him.

The *Schakel* court disposed of the contention that the guide law was designed to protect, preserve and nurture wild game by pointing out that the evidence indicated the converse to be true.³⁷ The evidence referred to by the *Schakel* court was testimony that the guide law had effected overhunting on areas adjacent to national forests, parks and game refuges, while the areas in which guides were required for nonresidents suffered from underharvesting.³⁸ Thus the court concluded that the guide law failed the test recognized in connection with police power “that the means adopted be reasonable and designed to accomplish the end in view and be appropriate for the accomplishment of this duty to protect and nurture the game.’³⁹

33. *Toomer v. Witsell*, *supra* note 14, at 396.

34. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914).

35. *Schakel v. State*, *supra* note 2.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

WYOMING'S PRESENT GUIDE LAW CONSIDERED:

The 1973 Wyoming Legislature repealed and replaced WYO. STAT. § 23-54 (1957), under which *Schakel* was originally convicted.⁴⁰ The new enactment is substantially the same as the one the court in *Schakel* struck down.⁴¹ Two changes were made. First, the legislature included "wilderness areas" within the purview of the guide statute, which had heretofore only been applicable to national forests, national parks, and national game refuges. Secondly, the term "big or trophy game animals" was substituted in lieu of the old language which enumerated various species. The definition of "big or trophy game animals" is found in WYO. STAT. § 23.1-1(b)(c) (Supp. 1973), bringing antelope within the scope of the legislation.

Thus the sweep of the guide law is now broader than before. Wilderness areas are included among those areas within which a guide is needed and antelope are included among the animals hunted. The statute remains discriminatory against nonresident hunters. If the state could not present a convincing argument for the voided statute in the name of safety,⁴² it scarcely appears that the new law would provide any new arguments. The detrimental effects experienced as a result of the statute will still remain. Over-harvesting of areas which do not require nonresident hunters to be accompanied by a guide and underharvesting in some areas where guides are required is a fact of which the *Schakel* court took judicial notice.⁴³ It must be noted, however, that the *Schakel* trial provided a rather incomplete investigation of the problems the state sought to alleviate with the guide law. Therefore one would be mistaken to assume that the state could not, at a later trial, adequately demonstrate the reasonableness of the guide law.

40. WYO. STAT. § 23-1 to 23-147 (1957). *Repeal by* ch. 249, § 3, [1973] Wyo. SESS. LAWS 575.

41. WYO. STAT. § 23.1-49 (1973).

No nonresident shall hunt big or trophy game animals on any national forest, wilderness area, national game refuge, or national park in this state *unless accompanied by a licensed professional guide* [emphasis added] or a resident guide except as otherwise provided.

42. *Schakel v. State*, *supra* note 2.

43. *Id.*

Although the *Schakel* decision does not disclose any valid state arguments, there may well be valid state interests served by the guide law. Without a law requiring nonresident hunters to obtain the services of a guide, there could be overharvesting of game on the areas now included within the ambit of the guide law. It may be noted that the removal of snowbound or injured hunters is a burden falling on local governments. If the incidence of lost or stranded hunters is substantially higher in the nonresident class, then the legislature may well have chosen a reasonable cure to alleviate a substantial problem.

It would seem that the state would have to justify the requirement that nonresident hunters obtain the services of a guide while hunting on federal lands (*i.e.*, national forests, national parks, national game refuges and wilderness areas), but not requiring that the nonresident be accompanied by a guide while hunting on state or privately owned lands. Indeed no tenable reason comes to mind for requiring the nonresident to be accompanied by a guide in one area but not in another. In fact, such arbitrary classifications that have no clear relationship to the accomplishment of a valid state objective merely invite federal intervention in the matter.⁴⁴

Schakel's trial did not result in testimony concerning these issues. However it seems clear that if the present guide law is challenged the state will have to adequately demonstrate the reasonableness of the law in relation to whatever evil the legislature had in mind when it recodified the game and fish statutes. If, however, the state is unable to sufficiently demonstrate the need for the kind of discrimination inherent in the guide law, it appears that this form of legislated prosperity for professional guides and outfitters will be struck as was its predecessor.

44. See *Regulation of Wildlife*, *supra* note 3; see also, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION, (June 20, 1970) at 174-5, noting Wyoming's guide law as patently discriminatory and suggesting federal intervention to eliminate such practices.

COLLATERALLY:
DISCRIMINATION AGAINST NONRESIDENT HUNTERS—
LICENSE FEES

An issue collaterally related to the problem the court faced in *Schakel v. State*⁴⁵ is the discrimination between resident and nonresident license fees.⁴⁶ The *Schakel* court cited *Toomer* for the broad proposition that states may not discriminate against citizens of other states merely because of their different citizenship.⁴⁷ In *Toomer* the Supreme Court struck down as violative of the privileges and immunities clause⁴⁸ a state statute requiring a license fee from nonresidents 100 times the amount demanded of residents engaged in commercial shrimping. In describing the privileges and immunities clause⁴⁹ the Court said, "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizen of State B enjoys."⁵⁰

The Court, in *Mullaney v. Anderson*,⁵¹ attacked a statute requiring a \$5 fee from residents and a \$50 fee from nonresidents to engage in commercial fishing. The Court there cited *Toomer* for the rule that states may graduate license fees according to the size of boats, or to compensate the state for added enforcement burden or for conservation expenditures from taxes which only residents pay.⁵² Inasmuch as the discrimination did not come within one of these, or a like exception, the Court held that the fee differential was invalid. The cases in which the Court has invalidated unreasonable license fee discrimination have primarily dealt with license fees required to engage in a commercial enterprise.⁵³

45. *Schakel v. State*, *supra* note 2.

46. WYO. STAT. § 23.1-33 (Supp. 1973).

For example: deer, resident \$10, nonresident \$50; elk and black bear, resident \$15, nonresident \$125; big horn sheep, resident \$30, nonresident \$150; moose, resident \$25, nonresident \$125; antelope, resident \$10, nonresident \$50.

WYO. STAT. § 21.1-38 (Supp. 1973), provides for resident fishing license fee of \$5 and nonresident fishing license fee of \$25.

47. *Schakel v. State*, *supra* note 2.

48. U.S. CONST. art. IV, § 2.

49. U.S. CONST. art. IV, § 2.

50. *Toomer v. Witsell*, *supra* note 14, at 395.

51. *Mullaney v. Anderson*, 342 U.S. 415 (1952); see also *Freeman v. Smith*, 62 F.2d 291 (9th Cir. 1932), invalidating Alaska license fee of \$250 for nonresidents and \$1 for residents engaged in commercial salmon fishing.

52. *Mullaney v. Anderson*, *supra* note 51, at 417.

53. Annot., 60 A.L.R. 337 (1929); see also *Toomer v. Witsell*, *supra* note 10 (commercial shrimping); *Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1870)

This factual distinction (*i.e.*, commercial enterprise as opposed to hunting and fishing for sport) may well be a point on which the cases turn. The importance of the economic or commercial aspects of these state regulations are not to be lightly dismissed. States in the past have sought to regulate commercial enterprise within the state only to have the law struck down because the scope of the law reached outside the territorial limits of the state. Thus in *Baldwin v. G.A.F. Seelig, Inc.*, the Court held that the New York Milk Control Act, which established minimum milk prices to be paid by dealers to producers, was invalid because it effected an extra-territorial burden on commerce and was, in effect, a trade barrier.⁵⁵ The commercial aspects of the case weighed heaviest with the Court as it concluded, "What is ultimate is the principle that one State in its dealings with another may not place itself in a position of economic isolation."⁵⁶ The Court, in *Dean Milk Co. v. City of Madison*,⁵⁷ reaffirmed its position in *Baldwin* saying that erecting an economic barrier to protect a local industry from competition from without the state plainly discriminates against interstate commerce.⁵⁸ *Baldwin* and *Dean* are indicative of the view taken with respect to states seeking to prevent economic competition from nonresidents by erecting barriers to enhance the commercial position of resident business.

While the *Baldwin* Court struck down a law having the potential effect of causing economic warfare between the states, the Court was clear in saying that the same reasoning was not necessarily applicable to game and fish laws. The Court cited leading cases⁵⁹ dealing with state control of wildlife, distinguishing them from *Baldwin* because of a "recognition of the special and restricted nature of rights of property in game" and because none of the game laws approached

(traders); *ex parte* H. P. Irish, 121 Kan. 72, 250 P. 1056 (1926) (merchants selling bread).

54. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

55. *Id.* at 521.

56. *Id.* at 527.

57. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

58. *Id.* at 354.

59. *Baldwin v. G.A.F. Seelig, Inc.*, *supra* note 54 at 525; citing *Geer v. Conn.*, *supra* note 10, (statute prohibited carrying of certain game birds out of the state); *Foster Packing Co. v. Haydel*, 278 U.S. 1 (1928) (shrimp had to be processed within the state); *Silz v. Hesterberg*, *supra* note 17, (game and fish seasons).

the drastic quality of the statute involved in *Baldwin* "which would neutralize the economic consequences of free trade among the States."⁶⁰ As *Baldwin* indicates, game and fish laws occupy a somewhat different position from other statutes. In more recent times, however, it appears that the logic behind *Baldwin* has been applied to game and fish laws impinging on commercial enterprise.⁶¹ It is probably because of the "special and restricted nature of property rights in game" that sportsman's hunting and fishing license fees have been higher for nonresident sportsmen than for their resident counterparts. It is submitted that license fee differentials for residents and nonresident sportsmen do not have the serious economic consequences found in cases dealing with commercial licenses and other discriminatory practices preventing nonresident businessmen from engaging in commercial enterprise on the same footing as citizens of the state.

The case of *Ward v. Maryland*,⁶² dealing with license fee discrimination between resident and nonresident traders, might provide a basis for concluding that the reasoning applicable to commercial situations could be extended to cover the nonresident sportsman. Though the Court declined to specify the rights that the privileges and immunities clause⁶³ was intended to secure and protect, it did point out that

the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire *personal property* [emphasis added] . . . and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.⁶⁴

If indeed the right to acquire personal property is a right to which each citizen is equally entitled and the reducing to possession of wild animals is the means of acquiring title to that property, then the *Ward* case may well dictate that li-

60. *Baldwin v. G.A.F. Seelig, Inc.*, *supra* note 54, at 525.

61. *See e.g.*, *Toomer v. Witsell*, *supra* note 14; *Mullaney v. Anderson*, *supra* note 51.

62. *Ward v. Maryland*, *supra* note 53.

63. U.S. CONST. art. IV, § 2.

64. *Ward v. Maryland*, *supra* note 53 at 430.

cense fee differentials are repugnant to the privileges and immunities clause.⁶⁵

This was not, however, the reasoning pursued by a federal court in *Edwards v. Leaver*.⁶⁶ There the court held as violative of Article IV, Section 2 and the Fourteenth Amendment of the United States Constitution a statute limiting commercial fishing rights to residents. In disclosing the reason for its decision the court said that "disparity of treatment between residents and nonresidents requires an adequate explanation if the statute is to be sustained as a proper exercise of the State's police power."⁶⁷ This reasoning indicates that if the factual situation demonstrates arbitrary and unreasonable discrimination against nonresidents the statute will fall. It does not support the absolute right to acquire personal property in wild game that a strained construction of *Ward v. Maryland*⁶⁸ might indicate. For the *Ward* case to be so construed would be to disregard the importance of commercial enterprise to the decisions of the Court. Indeed the thought consistently present in those cases where the Court has dealt with state laws making it more difficult for nonresident businessmen to compete with local citizens engaged in the same kind of enterprise is that the states may not erect economic barriers to the detriment of nonresidents.⁶⁹ None of these cases imply that the same privileges and immunities extend in fully the same manner to nonresident sportsmen.

The legal basis upon which the state may control and regulate the harvesting of wildlife within its borders is critical in determining the validity of license fee differentials. As has been indicated, the vitality of the "sovereign ownership" theory has been weakened. However a recent Supreme Court decision, *Metlakatla Indian Community v. Egan*,⁷⁰ cited the *Geer* case as delineating the "measure of administration and jurisdiction over fisheries and wildlife" possessed by the states.⁷¹ Thus the status of *Geer* appears to be incapable

65. U.S. CONST. art. IV, § 2.

66. *Edwards v. Leaver*, *supra* note 21.

67. *Id.* at 702.

68. *Ward v. Maryland*, *supra* note 53.

69. *See, e.g.*, *Baldwin v. G.A.F. Seelig, Inc.*, *supra* note 54; *Dean Milk Co. v. City of Madison*, *supra* note 57; *Toomer v. Witsell*, *supra* note 14.

70. *Metlakatla Indian Community v. Egan*, 396 U.S. 45, 57 (1962).

71. *See Pavel v. Pattison*, 24 F. Supp. 915 (W.D. La. 1938).

of exact determination. In the *Metlakatla*⁷² case Alaska forbade "trap fishing," which is more economical than other methods, but also allows a more rapid depletion of the natural resource. The Court upheld Alaska's power to pass the statute to conserve its natural resources by defining the measure of state power in terms of *Geer*. While it appeared that *Geer* had been stripped of its authority, it must be remembered that in *Missouri v. Holland*⁷³ the Court had to reconcile a treaty with state power over its wildlife, and in *Toomer v. Witsell*⁷⁴ the Court was faced with a statute patently discriminatory against nonresident business. The unique factual situations in these two cases purporting to limit *Geer* must be taken into account when assessing state power over its wildlife in entirely different situations. Thus in *Metlakatla*,⁷⁵ as there was an absence of the overriding national interests found in *Missouri* and *Toomer*, the Court was willing to extend to the state the broad authority found in *Geer*.

Currently the measure of state power appears to be couched in terms of reasonableness. The Court in *Haavick v. Alaska Packer's Association*⁷⁶ sustained a \$5 tax on nonresident fishermen because it was not wholly "arbitrary and unreasonable." The reasonableness of a statute, in turn, depends on the aim and purpose of the law. Enforcing wildlife conservation measures has been held a valid exercise of state police power.⁷⁷ Both *Toomer* and *Mullaney* recognize this justification for differentials in resident and nonresident license fees.

Recent Supreme Court decisions appear to lend support to the ability of states to pass legislation not wholly arbitrary and discriminatory toward nonresidents if a compelling state interest is served. In *Shapiro v. Thompson*,⁷⁸ invalidating statutes denying welfare benefits to those who had not met the residency requirements, the Court employed the compelling state interest test because the classification touched the

72. *Metlakatla Indian Community v. Egan*, *supra* note 70.

73. *Missouri v. Holland*, *supra* note 12.

74. *Toomer v. Witsell*, *supra* note 14.

75. *Metlakatla Indian Community v. Egan*, *supra* note 70.

76. *Haavick v. Alaska Packers Assn.*, 263 U.S. 510 (1923).

77. Comment, *The Constitution and State Control of Natural Resources*, 64 HARV.L.REV. 642, 643 (1950) and cases cited.

78. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

fundamental right of interstate movement. The extent to which the *Shapiro* holding will go in invalidating state statutes discriminating against nonresidents is not clear.⁷⁹ However the Court did say that the holding in *Shapiro* did not imply a view on the validity of residence requirements to hunt and fish, maintaining that such a requirement may promote a compelling state interest and might not be a penalty upon the exercise of the constitutional right of interstate travel.⁸⁰ In *Vlandis v. Kline*,⁸¹ while striking down the statutory definition of residency in Connecticut as applied to state college students, the Court did not consider the propriety of a state's power to charge different fees.⁸²

Thus it appears that discrimination against nonresidents will pass muster if the law promotes a valid and compelling state interest and is not wholly arbitrary or capricious. Thus the *Toomer* decision probably does not stand for the broad proposition that states may not discriminate against citizens of other states because of their different citizenship. Indeed the *Schakel* court said, in effect, that *Toomer* would condemn discriminatory classifications *only* if they were "merely because of their different citizenship."⁸³ [emphasis added]. Thus, to the extent that there are valid reasons for obligating nonresident hunters to pay a larger license fee, the law falls within the category of a reasonable exercise of the state's police power.

CONCLUSION

The state's power to regulate harvest of its wildlife is no longer soundly underpinned by the ownership theory.

79. See, Comment, *State Residence Requirements for Welfare Recipients*, 83 HARV.L.REV. 118, at 119. The author points out that a rational relation to a permissible purpose would not have saved the classification, as the Court employed the more demanding compelling state interest test. At 123 the author suggests factors to confine Shapiro's impact, *inter alia*, the relation of the case to the very means to subsist—food, shelter, and other necessities of life and the possibility that the classification sought to exclude needy persons from the jurisdiction. See also, Note, *Shapiro v. Thompson*, 21 S.C.L. REV. 796, where the author reads Shapiro as opening the Pandora's Box to similar litigation. For good comment on the future of residency requirements in areas other than welfare cases see Note, *Shapiro v. Thompson: Travel, Welfare & the Constitution*, 44 N.Y.U. L. REV. 989, at 1003 (1969).

80. *Shapiro v. Thompson*, *supra* note 78, at 631.

81. *Vlandis v. Kline*, — U.S. —, 93 S.Ct. 2230 (1973).

82. *Id.* at 2233.

83. *Schakel v. State*, *supra* note 2.

States still have a substantial measure of power in the area of wildlife regulation. Today state power to enact game and fish measures is based on its police power. The residuum of authority retained by the states under the police power concept may not be a great deal less than was that quantum of power held under the ownership theory.⁸⁴ The significant limitation imposed upon state use of its police power is couched in terms of reasonableness and absence of arbitrary or capricious discrimination. Therefore, attempts by a state to exercise its police power to effectuate a goal regarding regulation of wildlife will have to bear judicial scrutiny to insure that any discriminatory classification of residents and nonresidents tends to accomplish or has a substantial connection with a valid state purpose.

DAN RIGGS

84. See *Metlakatla Indian Community v. Egan*, *supra* note 70, citing *Geer v. Conn.*, *supra* note 10, as defining the quantum of power reserved to the states.