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## Constitutional Law - Montana's Discriminatory Licensing Structure for Nonresidents: Commerce Clause Analysis - Baldwin v. Fish and Game Commission of Montana

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**CONSTITUTIONAL LAW—Montana's Discriminatory Licensing Structure for Nonresidents: Commerce Clause Analysis. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978).**

In 1976 the State of Montana implemented a new rate structure for the distribution of hunting licenses. It was ostensibly a measure of conservation in response to the increased popularity in big game hunting. Under the amended statute a Montana resident could purchase a license solely for elk for \$9. The nonresident, in order to hunt elk, was required to purchase a combination license at a cost of \$225.<sup>1</sup> This combination license entitled the taking of one elk, one deer, one black bear, game birds and fish. A resident was not required to purchase the combination license. Therefore, if the nonresident wished to hunt only elk, he paid 25 times as much as the resident. If the nonresident wished to hunt all the wildlife under the multiple license, he paid 7-½ times as much as the resident. Montana also imposed a statutory ceiling limiting the number of nonresident licenses to 17,000 in any one year.<sup>2</sup>

Disturbed by the substantial fee differential between residents and nonresidents, appellant Baldwin and others brought suit for declaratory and injunctive relief for reimbursement of hunting fees already paid. The complaint challenged the rate structure as being violative of the privileges and immunities clause of Article IV Section 2 and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The Supreme Court in a 6 to 3 decision affirmed the three judge District Court's split decision which held that recreational hunting was not a fundamental right and therefore was not within the purview of the privileges and immunities clause. The court held further that the equal protection clause of the fourteenth amendment was not violated. They perceived a rational basis for the discrimination against nonresidents.<sup>3</sup> In effect, the *Baldwin* decision has severely limited the constitutional protection afforded nonresidents. By defining privileges and immunities protection on the basis of fundamental rights, the court was able to

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1. MONT. REV. CODES ANN. § 26-202.1(4) and (12) (Supp. 1977).

2. MONT. REV. CODES ANN. § 26-202.1(16)(f) (Supp. 1977).

3. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). [Hereinafter cited as: *Baldwin*.]

circumvent the strict scrutiny test required by *Toomer v. Witsell*.<sup>4</sup> Moreover, under traditional equal protection analysis, legitimate state interests invariably survive even if discriminatorily applied because, "rationality is sufficient."<sup>5</sup>

The narrow effect of *Baldwin* is that State recreational fee differentials for nonresidents are not constitutionally repugnant under either the privileges and immunities clause or the equal protection clause. The decision, however, does not preclude other relevant constitutional inquiries such as the validity of such rate structures under the commerce clause.

Historically the equal protection clause, the privileges and immunities clause and the commerce clause all have a "common origin in the Articles of the Confederation and their shared vision of federalism."<sup>6</sup> The recent case of *Hicklin v. Orbeck* recognized this relationship.<sup>7</sup> Moreover, the concerns of the equal protection clause, the privileges and immunities clause and the commerce clause are remarkably similar in that they all address the problems that occur when state governments inflict injury on geographical and political outsiders.<sup>8</sup>

### THE COMMERCE CLAUSE

It is well settled that even in the absence of a Congressional exercise of power, the negative implications of the Commerce Clause prevent the states from erecting barriers to the free flow of interstate trade.<sup>9</sup> Justice Burger's concurring opinion in *Baldwin* recognized that a state's right under its police power to pass laws regulating game is not absolute

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4. *Toomer v. Witsell*, 334 U.S. 385 (1948); (commercial fishing). *Toomer* involved a South Carolina law that limited commercial access to migratory shrimp within a three mile belt off the state's coast by imposing an enormous fee differential (100 to 1) on nonresidents. The court struck down the state statute by devising a substantial reason test for the privileges and immunities clause. This substantial reason test required:

1. a determination of whether the nonresident constituted a peculiar source of the evil at which the statute was designed to remedy. *Id.* at 398.
2. a sufficiently demonstrated connection between the ends sought and the discrimination practiced. *Id.* at 396.
3. an inquiry into the impracticability of apparent and less intrusive alternatives. *Id.* at 398.

5. *Baldwin*, *supra* note 3, at 391.

6. *Hicklin v. Orbeck*, 98 S. Ct. 2482, 2491 (1978).

7. *Id.*

8. *TRIBE: AMERICAN CONSTITUTIONAL LAW* § 6-33 (1978).

9. *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 370 (1976).

in the face of prevailing federal interests.<sup>10</sup> Arguably, under a factual situation similar to *Baldwin* a strong federal interest is the protection of interstate commerce. To date, there has been no Supreme Court decision fully defining the scope of federal wildlife regulatory power conferred by the commerce clause.<sup>11</sup> However, the exertion of federal power need not await the disruption of commerce.<sup>12</sup>

The commerce clause is one of the most prolific sources of national power and an equally prolific source of conflict with state legislation.<sup>13</sup> With the aid of judicial construction, the commerce clause has greatly expanded over the years to reflect changing perceptions of the scope of its powers.<sup>14</sup> The judicial inquiry under the commerce clause focuses on one of three main categories:

1. The use of channels of interstate or foreign commerce which Congress believes are being misused.
2. The protection of the instrumentalities of interstate commerce.
3. Those activities affecting commerce.<sup>15</sup>

The *Baldwin* court focused on an extremely restricted interpretation of the commerce clause when it acknowledged that, "[o]nce wildlife becomes involved in interstate commerce, a state may not restrict the use or access to that wildlife in a way that burdens interstate commerce."<sup>16</sup> To be sure once the game is reduced to possession, the possession creates an absolute property in the possessor thereby entitling him to the full rights of ownership and protection under the commerce clause.<sup>17</sup> In *Foster Fountain Packing v. Haydel* the court held that after game was reduced to possession (in this case, shrimp), the states overriding special interest in the regulation of game ceased to be paramount to the commerce rights thereby vested in hunter.<sup>18</sup> *Foster* was

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10. *Baldwin*, *supra* note 3, at 1865; (concurring opinion).  
 11. COUNCIL ON ENVIRONMENTAL QUALITY, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 32 (1977).  
 12. *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 222 (1938).  
 13. *Hood & Sons v. DuMond*, 336 U.S. 525, 534 (1949).  
 14. 15A AM.JUR.2D *Commerce* § 1 (1976).  
 15. *Id.* at 319.  
 16. *Baldwin*, *supra* note 3, at 393; (concurring opinion).  
 17. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).  
 18. *Id.* at 13.

the first significant erosion of the state-ownership theory. The state-ownership theory, first articulated in *Geer v. Connecticut*, allowed any and all forms of state regulation both before and after reducing the game to possession and also to the point of excluding nonresidents altogether.<sup>19</sup> But this concept of objects “involved or moving” in commerce fails to consider the modern analysis of the commerce clause that activities or regulations need only affect interstate commerce.<sup>20</sup> When using contemporary analysis, one need not be concerned about game “moving” in interstate commerce.

Under the modern commerce clause, no state would seriously contend that the clause is impotent in the face of wholly intrastate activities that incidentally affect interstate commerce. To be sure this was the dispositive factor of earlier fish and game cases such as *Silz v. Hesterberg* where the court held that interference with commerce was only incidental and not the direct purpose of the regulation.<sup>21</sup> The essential inquiry under the modern analysis is whether such regulations and activities are commerce or affect commerce even though local in nature and purpose. There is overwhelming authority to support this contention.<sup>22</sup> One of the greatest expansions of commerce power over intrastate activities was upheld in *Wickard v. Filburn*.<sup>23</sup> In *Wickard* the court held that even violations trivial in themselves were insufficient cause from removing it from the scope of the commerce clause. Taken together with others similarly situated the result was far from trivial.<sup>24</sup>

By only considering a state's special interest in the regulation of game, a court fails to recognize the actual burden placed on constitutionally protected activities. This burden occurs long before the wildlife is reduced to possession.

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

20. *Heart of Atlanta Motel v. U.S.*; 379 U.S. 241, 258 (1964).

21. *Silz v. Hesterberg*, 211 U.S. 31 (1908). In *Silz* the court said that state regulation of game is unlawful if it interfered directly with commerce. The court determined that the police regulation need only be reasonable.

22. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Hughes v. Alexandria Scap. Corp.*, 426 U.S. 794 (1976).

23. *Wickard v. Filburn*, 317 U.S. 111 (1942).

24. *Id.* at 128. The court held that the power to regulate wheat included the power to regulate practices affecting wheat prices.

## HUNTING SERVICES ARE COMMERCE

Admittedly, big game hunting is a recreation and a sport.<sup>25</sup> It is also big business in most western states.<sup>26</sup> In 1975 sportsmen in Wyoming alone contributed over 80 million dollars to the state economy.<sup>27</sup> Sportsmen have also made similar contributions to the economies of Colorado, Utah, Idaho, and Montana.<sup>28</sup> It is apparent that the hunting services industry is an integral component of state economies in western states.

In 1975 nonresident hunters accounted for 75% of the 40 million dollars that big game hunting generated for Wyoming's economy.<sup>29</sup> In the same year nonresident hunters spent over 6.5 million dollars solely on the outfitter and guide services.<sup>30</sup> And this figure does not even include the multiplier effect that the hunting services generate for the total economy. In one recent study the multiplier effect was estimated at 2.6.<sup>31</sup> Multiplying this variable times the money generated by the outfitters reveals that the cumulative contribution credited to the state economy is over 20 million dollars. In *Baldwin* it was recognized that Montana is the state most frequently visited by nonresident hunters.<sup>32</sup> Therefore, the overall contribution to Montana's economy generated by its outfitters should be significantly higher.

Thus one can argue that the hunting industry is commerce on the basis of the sheer dollar volume it contributes to the state economy. As a result the outfitters and guides should at least be entitled to judicial determination of whether the state regulation impermissibly burdens interstate commerce. It is apparent the majority in *Baldwin* failed to address this important question.

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25. *Id.*

26. UNITED STATES DEPARTMENT OF THE INTERIOR, NATURAL RESOURCES OF WYOMING 45 (1966).

27. WATER RESOURCES RESEARCH INSTITUTE, UNIVERSITY OF WYOMING, HUNTING AND FISHING EXPENDITURE VALUES AND PARTICIPATION PREFERENCE IN WYOMING IN 1975 55 (1977).

28. UNITED STATES DEPARTMENT OF THE INTERIOR, NATURAL RESOURCES OF COLORADO, UTAH, AND MONTANA (1966). (Separate publications), in *Colorado* at 23 the 1960 figure was 90 million dollars.

29. WATER RESOURCES INSTITUTE, UNIVERSITY OF WYOMING, *supra* note 28 at 31.

30. *Id.*

31. Preliminary study conducted by the Agricultural Extension Service, University of Wyoming, Garnet Premer, Distributive effect on Park County, Table 3 (Nov. 1977).

32. *Baldwin*, *supra* note 3, at 374, 375 n. 9.

In addition, case law would seem to support the proposition that the hunting services are commerce. However, whether outfitters and professional guides are within the ambit of commerce is a question of first impression. Because some commerce activities (including hunting) escape federal attention as a result of their local character, number and diversity,<sup>33</sup> does not mean that state regulation of such activity will escape circumspection under the commerce clause.<sup>34</sup>

The sport of baseball is the sole exception to an otherwise universal rule that all sports are within the province of the commerce clause.<sup>35</sup> In *Flood v. Kuhn* the issue was whether baseball's reserve system was within the reach of the Sherman Act. The Supreme Court admitted that baseball is commerce yet refused to invoke its protection. The court of *Flood* said that baseball was an established aberration that had survived the courts expanding concept of interstate commerce only because of its established precedent.<sup>36</sup> At first glance one could distinguish *Flood* on the basis that in *Flood* the subject of commerce (the team) itself moved across state lines whereas in *Baldwin* the activity was local in nature. Other cases such as *U. S. V. International Boxing Club of N. Y.* have held that entirely local sporting affairs were subjects of interstate commerce.<sup>37</sup>

Recreational activities and entertainment also have generally been subject to the commerce clause. In *Haviland v. Butz* the court said that traveling dog and pony shows are subject to regulation by Congress in the exercise of the commerce clause.<sup>38</sup> As in *International Boxing*, totally local activities within a single state such as amusement parks have also been subject to the commerce clause.<sup>39</sup> Again, one might try to distinguish recreational hunting on the basis that not only was it a purely local activity but it was also a patron-participant sport rather than spectator oriented. In

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33. *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938).

34. *Consolidated Edison Co. v. Labor Board*, *supra* note 12.

35. *Flood v. Kuhn*, 407 U.S. 258 (1972).

36. *Id.* at 282.

37. *U.S. v. International Boxing Club of N.Y.*, 348 U.S. 236, 241 (1955).

38. *Haviland v. Butz*, 543 F.2d 169 (A.D.C. 1976).

39. *Miller v. Amusement Enterprises*, 394 F.2d 342, 352 (5th Cir. 1968).

*Miller v. Amusement Enterprises Inc.* the court found no distinction between the two.<sup>40</sup>

To substantiate the claim that hunting services are interstate commerce we need not look past the facts presented in *Baldwin*. For the license year of 1974-1975, Montana licensed approximately 43,500 nonresidents to hunt elk and deer.<sup>41</sup> It was submitted that as many as half the nonresidents who hunt elk utilized the outfitters service.<sup>42</sup> For a typical seven-day elk hunt a nonresident spends approximately \$1250, exclusive of outfitters fee and hunting licenses.<sup>43</sup> Simple mathematics reveals that if half the nonresidents (21,500) use the service spend over \$1000 (rounding off) per person, revenue of more than 20 million dollars is generated by the nonresident alone. And this is exclusive of the \$225 state license fee and the outfitter's fee.

Finally, the outfitter service is directed primarily towards the nonresident; hence, across state lines. Incidental to this, hunting reservations for nonresidents are made through use of interstate communications (mail or teleservices). This factor alone has been determinative in many commerce cases.<sup>44</sup> And of course the outfitters utilize sports magazines, newspapers, and other interstate communications to advertise their business. Also, the outfitters may be able to prove that much of their supplies (i.e. food, camping equipment, guns) moved in interstate traffic. This also has been critical in some commerce cases.<sup>45</sup> In the aggregate, these factors clearly point to the conclusion that hunting services are substantially involved in interstate commerce.

### DELICATE ADJUSTMENT TEST

The *Baldwin* court tested the constitutional validity of the state regulation under the aegis of the equal protection clause. Central to the equal protection analysis for nonfun-

40. *Id.* at 425.

41. *Baldwin*, *supra* note 3, at 374, 375 n. 9.

42. *Id.* at 374, 375.

43. *Id.* at 374, 375 n. 9.

44. *Haviland v. Butz*, *supra* note 39.

45. *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1973); In this case the court held that the overall chain of events from the shipment of dried milk and other ingredients into one state from other states constituted a single flow of commerce.

damental rights is the proposition that the legislature has a wide range of discretion in classifying persons for different treatment.<sup>46</sup> In other words, a state may constitutionally discriminate against nonresidents simply because judicial review of economic and social interests on equal protection grounds is severely limited.<sup>47</sup> Upon proving an assertion of a rational basis between the legitimate state purposes and the means utilized, the judicial inquiry ends because, "rationality is sufficient."<sup>48</sup>

Stricter judicial scrutiny is necessarily a critical element in every commerce clause analysis. The case of *Raymond Motor Transportation v. Rice* is an example of this greater scrutiny.<sup>49</sup> In *Raymond*, the court roundly rejected the contention that the inquiry ends once a rational relation to a legitimate state purpose is established.

Thus we cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce.<sup>50</sup>

In the absence of Congressional guidance, when the exercise of local power simultaneously burdens interstate commerce the court is called upon to make "delicate adjustments" of the conflicting claims.<sup>51</sup> The relevant inquiries in this delicate adjustment are:

1. Does the state have a legitimate interest in regulating the subject matter?
2. Is the burden imposed on commerce clearly excessive in relation to the putative benefit?
3. Can the legitimate interest be promoted with a lesser impact on interstate activities?<sup>52</sup>

Without question the states have a legitimate interest in preserving wildlife and regulating their exploitation.<sup>53</sup> But

46. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 19 (1973).

47. *Gray, Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1968).

48. *Baldwin*, *supra* note 3, at 391.

49. *Raymond Motor Transportation v. Rice*, 434 U.S. 429 (1978).

50. *Id.* at 443.

51. *A. & P. Tea Co. v. Cottrell*, *supra* note 9, at 371.

52. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

53. *Baldwin*, *supra* note 3, at 390.

this interest is neither absolute nor does it end the inquiry. Legitimate state purposes are often frustrated by illegitimate means.<sup>54</sup> Nor does the mere assertion of legitimate state interest end the matter because there exists an "infinite variety of cases where regulation of local matters may operate as regulations of commerce."<sup>55</sup> In *Hughes v. Alexandria Scrap Corp.* the court held that the mere assertion of legitimate state interests was insufficient because the court needed an adequate record containing the relevant factual material which would afford a sure basis for an informed judgment.<sup>56</sup>

In this delicate adjustment the court utilizes greater circumspection of the means employed to achieve the asserted state interest. The court must weigh all the relevant factors that bear on a particular case.<sup>57</sup> Of course any evidence supporting the asserted state interest may be rebutted by contrary evidence. Many so-called legitimate state regulations have fallen because contrary evidence proved the regulations only marginally protected the legitimate interest while at the same time burdened interstate commerce.<sup>58</sup>

The importance of the national interest in maintaining free flowing interstate commerce cannot be underestimated in the adjustment test. In the recent case of *A & P Tea Co. v. Cottrell* the Supreme Court acknowledged that Mississippi had a legitimate state interest in the sanitary regulation of milk.<sup>59</sup> Nevertheless, the Supreme Court reversed the district court on the basis of impermissible interference with the commerce clause.

The fallacy in the District Court's reasoning is that it attached insignificance to the interference effected by the Clause upon the national interest in freedom for the national commerce, and too great a significance to the state interests purported to be served by the clause.<sup>60</sup>

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54. Baldwin v. G.A.F. Seelig, *supra* note 22.

55. Hughes v. Alexandria Scrap Corp., *supra* note 22, at 830.

56. *Id.* at 830.

57. Raymond Motor Transportation, *supra* note 53, at 441.

58. A. & P. Tea Co. v. Cottrell, *supra* note 9.

59. *Id.* at 375.

60. *Id.*

## APPLICATION OF THE TEST

When there is conflict of state and federal interest the judicial inquiry necessarily involves a sensitive consideration and balancing of the state and national concerns.<sup>61</sup> Clearly the national interest is the protection of interstate trade whereas the state interest in this matter is the conservation of wildlife.

During Montana's 1975 hunting season, 43,500 nonresident deer and elk licenses were sold.<sup>62</sup> In 1976 Montana imposed the statutory ceiling on nonresident hunting licenses.<sup>63</sup> Since the implementation of the multiple license, the number of nonresident licenses sold has not reached the statutory limit of 17,000.<sup>64</sup> This alone has substantially impacted interstate commerce. It is possible the *Baldwin* decision will act to encourage future legislative proposals for the substantial increase in nonresident fees for all state-provided recreational activities. Under the pretext of conservation, and using *Baldwin* as a shield, it would not be unreasonable to speculate that states might shift the burden of their conservation programs on the nonresident through grossly disproportionate license schemes.

As other states opt for their constitutional right under *Baldwin* to price-gouge nonresidents or severely restrict their access to game, the cumulative effect on interstate commerce would rise proportionally. It is academic that once a state drastically raises the price of nonresident fees, as Montana has, the nonresident will either forgo hunting in the state altogether or he will have to tighten his budget while visiting the state. Not only do the guide services' lose business but in addition all businesses reasonably related to hunting including the entire tourist related industry. When business in general suffers from over-regulation this factor is also considered in the total effect on interstate commerce.<sup>65</sup> Yet the court need not await total disruption of commerce before acting to protect the national interest.<sup>66</sup>

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61. *Baldwin v. G.A.F. Seelig*, *supra* note 22 at 514.

62. *Baldwin*, *supra* note 3, at 374, 375 n. 9.

63. MONT. REV. CODES ANN. § 26-202.1(16)(f) (Supp. 1977).

64. *Baldwin*, *supra* note 3, at 375 n. 10.

65. *Katzenbaugh v. McClung*, 379 U.S. 294 (1964).

66. *Consolidated Edison Co. v. Labor Board*, *supra* note 12.

The states manifest interest is in wildlife preservation. In *Baldwin* the court held the licensing scheme was a legislative choice not unreasonably related to wildlife preservation.<sup>67</sup> However, the state program may fall under stricter scrutiny.

First, for reasons stated above, a reasonable relation is insufficient under the commerce clause. Secondly, it would be difficult for the state to prove that the multiple license scheme achieved conservation. The net effect of the multiple license is actually to discourage conservation because it conceivably encourages nonresidents to destroy other scarce resources. Instead of merely hunting elk as under a single license, the multiple license encourages the hunter to also harvest bear, deer, and game birds. All of which are scarce finite resources. Finally, the discriminatorily high multiple license fails as a conservation measure because the state fails to similarly regulate its citizens.<sup>68</sup> "A statute that leaves a State's residents' free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all."<sup>69</sup> Montana had previously achieved its goal of conservation by statutorily limiting the number of licenses issued to nonresidents. To this end the multiple license becomes legislative overkill.

Incidental to this general scheme of conservation the state defended the extreme fee differential on the basis of the extra cost of enforcement created by the presence of the nonresident.<sup>70</sup> However, the justification on the basis of cost also fails. At this juncture it is noteworthy to mention that the appellants never contested the state's right to charge nonresidents a higher fee. The appellants merely objected to the grossly disproportionate license fees imposed upon them.<sup>71</sup> In the District Court evidence was offered by an economist to the effect that no more than 2.5 to 1 ratio could be justified cost-wise.<sup>72</sup> The majority agreed but held that since the fee differential could not be justified on the basis of

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67. *Baldwin*, *supra* note 3, at 389.

68. *Id.* at 1870. (Dissenting opinion).

69. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 285 n. 21 (1977).

70. *Baldwin*, *supra* note 3, at 404.

71. *Id.* at 404. (Dissenting opinion).

72. *Montana Outfitters Action Group v. Fish and Game Commission*, 417 F.Supp. 1005, 1008 (1976).

cost they would approach the issue without resorting to the cost theory. Nevertheless it does appear that a state could justify a cost differential structure by producing convincing evidence to support its claims that the nonresident's presence created extra enforcement problems.

The final argument forwarded by Montana was the assertion that the state could charge nonresidents, who were not subject to the state's general taxing power, more than residents because the residents had contributed to the program making elk hunting possible.<sup>73</sup> Incidental to this assertion was the fact that general taxes among other things provided maintenance for state parks and roads allowing access to the hunting areas.<sup>74</sup> However, closer scrutiny reveals flaws in this argument.

To begin with it was noted in *Baldwin* that 75% of the elk were killed not on private or state land but on federal land.<sup>75</sup> Secondly, the nonresident does contribute to wildlife conservation within the state. The nonresident is obligated to pay state sales tax on every dollar he spends within the state the same as residents. Moreover, the nonresident contributes his fair share to Montana's wildlife conservation through the purchase of hunting licenses. Finally, although *Baldwin* upheld the licensing scheme on the basis of rationality, the majority agreed that the State's desire to engender political support for its program by shifting the cost of conservation to the powerless nonresident could not justify an otherwise invidious discrimination.<sup>76</sup>

The final inquiry under the delicate adjustment test involves the consideration of viable alternatives to achieve the state's legitimate ends.<sup>77</sup> This inquiry into whether adequate and less burdensome alternatives exist is important in discharging the court's task of accommodation of conflicting local and national interests.<sup>78</sup> In the case of *Dean Milk Co. v. City of Madison* the Court held that even in the exercise of the city's unquestionable power to protect the public health

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73. *Id.* at 1008 n. 7.

74. *Baldwin*, *supra* note 3, at 389.

75. *Id.* at 377.

76. *Id.* at 391 n. 24.

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

78. *A. & P. Tea v. Cottrell*, *supra* note 9 at 373.

and safety, if reasonable nondiscriminatory alternatives adequate to preserve the legitimate local interests are available, the regulation must fall.<sup>79</sup> In other words, to protect the legitimate state interest from being constitutionally overridden by the commerce clause, the means employed must be closely tailored to the ends sought.<sup>80</sup> The court should realize that there are many less offensive methods of both preserving game and ensuring that the resident has a preferred claim to the game within the state. To this end it would appear that Montana had previously achieved these goals by the statutory ceiling on nonresident licenses.

#### CONCLUSION

The *Baldwin* court's interpretation has given the states constitutional protection to charge substantially higher license fees for nonresidents in recreational activities. There is no privileges and immunities protection whatsoever and under equal protection, rationality is sufficient to enable the legislation to survive. It would not be unreasonable to assume that many states including Wyoming will follow *Baldwin's* prerogative. However, this extreme deference provided under the equal protection clause does not preclude a commerce clause inquiry. Upon proof that the discriminatory regulation does in fact affect commerce, the Supreme Court is obligated to use a balancing of interests approach. It is clear that under this stricter scrutiny, the state of Montana would have a much more difficult time justifying the discriminatory legislation.

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79. *Dean Milk Co. v. Madison*, *supra* note 82 at 354.

80. *Montana Outfitters Action Group v. Fish and Game Commission*, *supra* note 77 at 1010; the dissent denied that the means were closely tailored stating, "each such justification is shown to be either logically and factually unsupported. *Id.* at 1010, 1011.