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Jim Ramlow

MONTANA OUTFITTERS V. FISH AND GAME COMMISSION: OF ELK AND EQUAL PROTECTION

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I. INTRODUCTION

On February 22, 1977, the United States Supreme Court announced it would hear an appeal from the decision of the United States District Court for Montana in *Montana Outfitters Action Group v. Fish & Game Commission.*[1] The three-judge district court's decision affirmed the constitutionality of Montana's nonresident hunting license statute,[2] which requires a nonresident elk hunter to purchase a "big game combination license" to hunt deer, elk, black bear, and birds and to fish, at a cost of two hundred twenty five dollars.[3] A nonresident must purchase the combination license, even if elk hunting is his only interest. A resident elk hunter, on the other hand, can obtain a license for elk alone, at a cost of nine dollars.[4] This results in a twenty-five to one fee differential between resident and nonresident elk hunters.[5]

Four nonresident hunters from Minnesota and an association of several Montana outfitters and dude ranchers challenged the law's constitutionality under the privileges and immunities clause[6] and the due process and equal protection clauses of the fourteenth amendment[7] of the United States Constitution.[8] In a divided opinion, the district court upheld the law.[9] As the United States Supreme Court's decision on the appeal could affect long standing fish and game management policies of many States,[10] this note will ex-

1. 417 F. Supp. 1005 (D. Mont. 1976), *prob. juris. noted sub nom.* Baldwin v. Fish & Game Comm'n, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-1150).

2. *Id.* at 1010.

3. REVISED CODES OF MONTANA (1947), § 26-202.1(12) (Supp. 1975).

4. *Id.* §§ 26-202.1(1),(2),(4), 26-230.

5. This differential is ameliorated if the cost to a resident of the black bear, deer, and other licenses are taken into account. A resident's total cost for deer, black bear, elk, bird, and fishing licenses is $30. The cost differential thus calculated is 7.5 to 1 against the nonresident.

6. U.S. CONST. art. IV, § 2.

7. *Id.* amend. XIV, § 1.

8. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1007 (D. Mont. 1976). Based on Sierra Club v. Morton, 405 U.S. 727 (1972), the court found standing for two of the nonresident plaintiffs, who asserted that the license law had an adverse effect on their "economic interests." 417 F. Supp. at 1008. Because these two nonresidents presented all the issues, the court did not rule upon standing for the other plaintiffs.

9. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D. Mont. 1976). (Smith and Jameson, JJ., constituted the majority; Browning, Circuit Judge, dissented).

10. *See generally* Report to the Western Association of State Game and Fish Commis-

amine the basis of the district court's holding and the dissenting judge's opinion, and will suggest specific issues that the Supreme Court should resolve.

II. THE DISTRICT COURT'S HOLDING

The district court's per curiam decision dealt with the issues briefly. Because the State's "power to manage and conserve" the elk was conceded by the plaintiffs, the court found it unnecessary to discuss the State's contention that it owned the elk within its boundaries.[11] It dismissed the plaintiff's privileges and immunities claim because the right they asserted was not a commercial right, but merely "a chance to engage temporarily in a recreational activity in a sister state."[12]

Finally the court considered the equal protection claim. It determined that the challenged statute did not infringe upon any of the plaintiffs' fundamental interests because "the asserted right [to hunt for sport] does not have a constitutional basis . . . ."[13] Thus, the court employed the least strict standard of judicial scrutiny: "whether the [classification] bears some rational relationship to legitimate state purposes."[14]

The purpose of Montana's licensing statute is the conservation of elk by means of restricting the number of hunters.[15] The question for the court was whether a statute which discriminates against

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sioners on Nonresident Hunting and Angling by the Wildlife Management Institute (July 1971). Tables IV and V of the Report indicate the extent of state hunting and fishing license fee differentials in the western United States.

11. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1008-09 (D. Mont. 1976). State ownership of game has been advanced as a justification for discrimination. The Supreme Court has critized the concept: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource." Toomer v. Witsell, 334 U.S. 385, 402 (1948). *See also* Missouri v. Holland, 252 U.S. 416, 434 (1920).

12. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1009 (D. Mont. 1976). The privileges and immunities clause guarantees to the citizens of one State the right to do business in another State on terms of substantial equality with the citizens of the latter State. Toomer v. Witsell, 334 U.S. 385, 396 (1948). Because commercial fishing involves "doing business", the Supreme Court has invalidated statutes which do not allow nonresident commercial fishermen this substantial equality. *Id.* at 395-403.

The *Montana Outfitters* court distinguished the facts before it from the commercial fishing cases, on the basis that "[t]he elk is not and never will be hunted commercially." 417 F. Supp. at 1007.

The district court did not decide the plaintiffs' due process claim, nor did the plaintiffs raise this issue in their appeal. *See* 45 U.S.L.W. 3592 (U.S. Mar. 1, 1977).

13. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1009 (D. Mont. 1976).

14. *Id.* at 1010.

15. *Id.*

nonresident hunters by imposing a licensing fee that is twenty-five times the fee imposed on resident hunters, is rationally related to that purpose. The court pointed out that any hunting regulations involving license fees are bound to favor some and disadvantage others. "Any regulatory system which imposes a license fee in some sense discriminates against those who can't afford to pay it."[16] Further, if the State issued a fixed number of permits based upon an open lottery, the result would be free of discrimination, but politically untenable. "A legislature might with some rationality conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species would disappear."[17] Based upon this finding that the discrimination against nonresidents is rationally related to the maintenance of necessary political support for the elk management program, the majority concluded:

> [W]here the opportunity to enjoy a recreational activity is created or supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit.[18]

III. The Dissent

Circuit Judge Browning strongly dissented from the court's reasoning and conclusion on the equal protection claim. Like the majority, he analyzed the claim under the rational relationship test. But he rejected the idea that the maintenance of continued political support is a sound basis for concluding that the discrimination is rationally related to a legitimate state purpose:

> [T]he principle appears to be that . . . a state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefitted by the discrimination is necessary in order to continue the program that benefits them.
>
> I do not believe discrimination for such a purpose is permitted by the Equal Protection Clause.[19]

Political support, Judge Browning pointed out, was not suggested

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1011 (Browning, J., dissenting).

by the State as a possible justification for the discrimination. It was, he said, "a novel theory not . . . supported by any authority."[20]

The rationale that discrimination was necessary for local political support of a state program was rejected by the United States Supreme Court in 1974 in *Memorial Hospital v. Maricopa County*.[21] *Maricopa* involved an Arizona statute which prevented indigents of less than one year's residence in a county from receiving free, nonemergency medical care. The defendant county argued that "the requirement was necessary for public support of that medical facility."[22] The Supreme Court answered the county's contention directly: "A state may not employ an invidious discrimination to sustain the political viability of its programs."[23] Similarly, the First Circuit Court of Appeals rejected the same rationale in *Cole v. Housing Authority*.[24] The circuit court invalidated a New Hampshire requirement which conditioned eligibility for low cost public housing on two year's duration of residence.[25]

> The objective of achieving political support by discriminatory means . . . is not one which the Constitution recognizes. Nor do we believe the goal of promoting provincial prejudices toward long time residents is cognizable under a Constitution which was written partly for the purposes of eradicating such provincialism.[26]

Both the *Maricopa* and the *Cole* cases involved state infringements of fundamental rights and were thus subjected to strict judicial scrutiny, requiring the State to show that the discriminatory classification was necessary to promote a compelling governmental interest.[27] Yet Judge Browning contended that the principle which they articulated was no less applicable to this case although it involved no fundamental right.[28] The idea that discrimination might be justified by the need for political cooperation was itself illegitimate: "These cases rejected justification of discrimination on political grounds because justification on such a basis is inherently inappropriate, not because the right infringed was fundamental."[29]

The majority's reasoning, in Browning's opinion, was "at odds

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20. *Id.*
21. 415 U.S. 250 (1974).
22. *Id.* at 266.
23. *Id.*
24. 435 F.2d 807, 813 (1st Cir. 1970). The Supreme Court cited *Cole* with approval in its *Maricopa* decision. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267 (1974).
25. Cole v. Housing Authority, 435 F.2d 807, 813 (1st Cir. 1970).
26. *Id.*
27. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
28. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1012 (D. Mont. 1976) (Browning, J., dissenting).
29. *Id.*

with the principle that constitutional rights are not subject to abrogation by majority will."[30] He concluded that a rule allowing a state to "condition the enjoyment of the nonresident upon such terms as it sees fit"[31] because of the State's need for local political support of its programs is "impossible to limit."[32] "It would immunize even the most arbitrary discrimination from constitutional attack whenever it could be contended reasonably that the discrimination was necessary to obtain political support for the state activity."[33]

IV. The Unresolved Issues

A. *Degree of Discrimination*

The plaintiff nonresidents did not challenge the State's power to charge them a greater amount for their hunting licenses than it charges a resident hunter.[34] They alleged that by requiring a nonresident to purchase a combination license, covering several species of game, and by imposing a "significantly higher"[35] fee, the State deprived them of their right to equal protection of its laws. It was not the classification itself that the plaintiffs complained of; it was rather the "magnitude and type"[36] of differential that they alleged had "no rational basis."[37]

The question underlying this contention is whether a State must relate any differential charge it assesses a nonresident to actual costs the State incurs by permitting him to enjoy a state resource. The plaintiffs introduced testimony of an economist to show that on a cost allocation basis, Montana could justify a license fee ratio of no more than 2.5 to 1.[38] Assuming this testimony to be accurate, does this mean that Montana could not charge a nonresident hunter any more than two and one-half times as much as it charges a resident? A similar problem faced the United States Su-

30. *Id.* Judge Browning cited language from West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1942): "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." The Judge also cited Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736 (1963).

31. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1010 (D. Mont. 1976).

32. *Id.* at 1012 (Browning, J., dissenting).

33. *Id.*

34. *Id.* at 1007-08.

35. Complaint for Plaintiffs at 7, Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D. Mont. 1976).

36. *Id.*

37. *Id.*

38. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1008 (D. Mont. 1976).

preme Court in *Toomer v. Witsell,*[39] in which the Court invalidated a state law which charged nonresident commercial fishermen at a rate one hundred times greater than residents.[40] The Court stated its test in terms of "close relation:" "[T]he inquiry in each case must be concerned with whether such reasons [justifying the discrimination] do exist and whether the *degree* of discrimination bears a *close relation* to them."[41] "We would be closing our eyes to reality," the Court observed, "if we concluded that there was a *reasonable relationship* between the danger represented by noncitizens, as a class, and the *severe* discrimination practiced upon them."[42] In *Mullaney v. Anderson,*[43] also involving a discrimination against nonresident commercial fishermen, the Court struck down an Alaska license law which employed a 10 to 1 differential against the nonresidents.[44] Once again, the Court conceded that in establishing the amount of a nonresident fee, a state legislature[45] could take into account *its own costs,* but determined that the particular law in issue could not be justified on that basis: "[T]here is no warrant for the assumption that the differential in fees bears any relation to this difference in cost, nothing to indicate that it would '*merely compensate' for the added enforcement burden.*"[46] The *Mullaney* Court cautioned that "[c]onstitutional issues affecting taxation do not turn on or even approximate mathematical determinations. . . . [S]omething more is required than bald assertion to establish a *reasonable relation* between the higher fees and the higher cost to the Territory."[47]

The *Toomer* and *Mullaney* cases were not, however, decided under the equal protection clause. Because they involved the right to carry on a business, the laws in each were held violative of the privileges and immunities clause.[48] So the matter to be resolved is whether the reasonable relationship test articulated in these decisions has any bearing on the *Montana Outfitters* situation, which involves no commercial interests and no fundamental interests.

Federal decisions concerning the level of nonresident tuition

39. 334 U.S. 385 (1948).

40. *Id.* at 403.

41. *Id.* at 396 (emphasis added).

42. *Id.* at 399 (emphasis added).

43. 342 U.S. 415 (1952).

44. *Id.* at 418. A nonresident license cost $50, a resident license only $5.

45. For purposes of legislative power over nonresidents, the Court held that it made no difference that at that time Alaska was a territory and not a State. *Id.* at 420.

46. *Id.* at 418 (emphasis added).

47. *Id.*

48. Mullaney v. Anderson, 342 U.S. 415, 418 (1952); Toomer v. Witsell, 334 U.S. 385, 396, 403 (1948).

charged by state universities may provide guidance on this issue.[49] In *Johns v. Redeker*[50] the Eighth Circuit Court of Appeals stated the test for determining whether the rate of tuition charged to a nonresident student violated the student's right to equal protection of the law as a test of reasonableness: "A *reasonable* additional tuition charge against nonresident students which tends to make the tuition charged more *nearly approximate* the cost per pupil of the operation of the schools does not constitute an unreasonable and arbitrary classification violative of equal protection."[51] The *Johns* principle was echoed in a more recent case, *Sturgis v. Washington,*[52] involving an attack on a nonresident tuition statute in the State of Washington. The case actually dealt with the State's classification procedures, but, in dicta, the federal district court noted its reasons for concluding that the higher rate of tuition was itself within the State's power to enact:

> The record before us is devoid of evidence, or even a suggestion, that this tuition residency requirement was intended for any reason other than to *cover the bare costs* of providing for the students' costs of education. In fact, the only evidence before this Court which relates to the actual cost of higher education in the State of Washington shows that the fees for a non-resident student are *directly related* to the cost of educating that student.[53]

The "directly related" observation is, of course, not stated as a requirement in *Sturgis,* but the *Johns* decision comes closer to saying that the "reasonable" or "nearly approximate" standards are required by the equal protection clause.

If these tests are accepted as controlling nonresident hunting legislation, then how close to actual costs do "reasonable" or "nearly approximate" require the State to come? In a 1971 report, the Wildlife Management Institute in Washington, D.C. concluded that most States would be justified, on a cost basis, in charging nonresidents a fee five times greater than the resident's fee.[54] Among the factors cited by the Institute to justify this differential rate were extra license publicity, direction, publications, correspondence and overhead for administering nonresident hunting; excess enforce-

49. Because the right to an education is not a constitutional right, such tuition policies do not affect any fundamental interests of nonresident students, nor do they affect a right to do business. Sturgis v. Washington, 368 F. Supp. 38, 41 (W.D. Wash.), *aff'd mem.*, 414 U.S. 1057, 1058 (1973); Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

50. 406 F.2d 878 (8th Cir.), *cert. denied,* 396 U.S. 853 (1969).

51. *Id.* at 883 (emphasis added).

52. 368 F. Supp. 38 (W.D. Wash.), *aff'd mem.*, 414 U.S. 1057, 1058 (1973).

53. *Id.* at 40-41 (emphasis added).

54. Wildlife Management Institute Report, *supra* note 10, at 10.

ment costs; administration of packers and guides; and winter game range acquisition and development to maintain larger big game herds.[55]

Under the equal protection standards set forth by *Johns,* however, it may be inappropriate to speak in terms of uniformly acceptable ratios or differentials. The percentage of nonresident hunters varies greatly from State to State.[56] Thus no uniform differential could meaningfully approximate the additional costs any particular State actually incurs by permitting nonresidents to hunt. If States are required, under the equal protection clause, to establish differential fee requirements that do not go beyond "nearly approximating" additional state costs, each State will have the task of determining an appropriate ratio. In any case, the *Montana Outfitters* opinion makes it clear that Montana cannot justify the present rate of discrimination against nonresidents on cost factors alone.[57]

B. Political Support as Justification for a Discrimination

The Montana Fish and Game Commission did not suggest the need for local political support for conservation of wildlife as a rational link between the discrimination against nonresidents and the State's conservation policy.[58] The dissenting judge concluded that this idea was "inherently inappropriate" and "impossible to limit."[59] The United States Supreme Court also rejected it, in the context of a state infringement of fundamental rights.[60] Yet the district court relied on the need for local political support as a rational basis upon which to justify the discrimination. The second unresolved issue, therefore, is whether a state may justify a discrimination involving no fundamental rights based upon its need for local political support for conservation. Or is political support in fact "inherently inappropriate" under any circumstances, as Judge Browning contended?

As Browning's dissenting opinion conceded, the cases in which the political support rationale was rejected involved infringements of fundamental rights. *Maricopa*[61] and *Cole v. Housing Authority*[62]

55. *Id.* at 9.

56. The Wildlife Management Institute Report indicates that in 1970 the percentage of nonresident hunters in California was 0.3%, while in Wyoming in the same year, 52.8% of the hunters were from out of State. Montana's 1970 figure is reported as 8.1% (238,517 residents to 20,850 nonresidents). *Id.* Table I.

57. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1008 (D. Mont. 1976).

58. *Id.* at 1011 (Browning, J., dissenting).

59. *Id.* at 1012 (Browning, J. dissenting).

60. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 266 (1974).

61. *Id.* at 256-62. The right to travel was extensively discussed in *Maricopa.* The Su-

both involved penalties on the constitutionally protected right to travel. Two other cases upon which Judge Browning relied held that constitutional rights were beyond abrogation by majority will, but those cases also involved fundamental rights.[63]

The court in *Cole* suggested that the political support rationale could not survive even the "rationally related" test of equal protection scrutiny. The court concluded this not because political support was never rationally related to a state end, but because "[t]he objective of achieving political support by discriminatory means . . . is not one which the Constitution recognizes."[64] Such an argument, however, is inconsistent with the often repeated "rationally related" standard of scrutiny that courts apply to state legislation alleged to violate the equal protection clause. As Chief Justice Warren stated in *McGowan v. Maryland,* "[a] statutory discrimination will not be set aside if *any* state of facts reasonably may be conceived to justify it."[65]

Elk are a fragile resource. The preservation of a livable habitat for elk as well as many other wild game species in Montana and other States is no small task. The State must carefully plan and manage its resources, because the amount of natural range is steadily dwindling. If Montana's big game species—a resource of immeasurable value to many Montanans—are to survive, they need protection from the encroachment of "civilization". Such protection is costly and time consuming, and involves innumerable decisions of local policy makers. The State's wildlife conservation programs could well lose local support if increasing numbers of nonresidents squeezed out all but a small percentage of Montana hunters. The elk would indeed be in danger of disappearing.[66] Thus, it cannot be contended that local political support is not rationally related to the States' legitimate interest in preserving the elk herds. Under the deferential standard of equal protection scrutiny applicable to this

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preme Court uses that term in the limited sense of the right of "migration with intent to settle and abide." *Id.* at 255. For that reason it seems unlikely that the nonresident hunter's right to travel is penalized by high license fees.

62. 435 F.2d 807, 811 (1st Cir. 1970).

63. Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736 (1963) (free exercise of religion); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1942) (right to cast an equal vote). In *West Virginia Board of Education v. Barnette,* the State had penalized the free exercise of religion by school children, in violation of the first amendment. In *Lucas v. Colorado General Assembly,* it was "[a]n individual's constitutionally protected right to cast an equally weighted vote" that was threatened.

64. Cole v. Housing Authority, 435 F.2d 807, 813 (1st Cir. 1970).

65. McGowan v. Maryland 366 U.S. 420, 426 (1961). *See also* Hughes v. Alexandria Scrap Corp., 96 S.Ct. 2488, 2499 (1976).

66. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1010 & n. 19 (D. Mont. 1976).

case, the analysis should end here. For a court to continue its inquiry into the inherent appropriateness of the justification would be to apply a level of scrutiny beyond the court's legitimate scope of review under the *McGowan* standard.[67]

Judge Browning observed that the State did not suggest the need for local political support of its conservation program as a justification for the discriminatory fees. When a court applies the "rationally related" level of judicial scrutiny to an equal protection claim, however, its analysis is not limited to the justifications which the States provides: "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."[68]

V. CONCLUSION

The problems raised by the nonresident hunters' claim to equal protection of the laws are complex and will require sensitive attention to the interests at stake if they are to be successfully resolved. Equal protection is a strongly held popular, as well as constitutional, value. As Archibald Cox commented, "Once loosed, the idea of Equality is not easily cabined."[69] On the other hand, strict adher-

67. McGowan v. Maryland, 366 U.S. 420, 426 (1961). In recent years, two members of the Supreme Court, Justices Marshall and White, have argued that the Court in fact applies a multi-tiered analysis to equal protection claims. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring). The varying degrees of scrutiny, these justices argue, depend upon the type of interests asserted by the State and by the individual. As Justice Marshall explained, the Court balances "*the character of the classification* in question, the relative *importance to individuals* in the class discriminated against of the governmental benefits that they do not receive, and the *asserted state interests* in support of the classification" to determine whether the statute is constitutional. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) (Justice Marshall quoted his dissenting opinion in Dandridge v. Williams, 397 U.S. 471, 520-21 (1970)) (emphasis added).

Even under this mode of analysis, the challenged statute is constitutional. Because the classification does not discriminate against a "discrete and insular" group which needs "extraordinary protection from the majoritarian political process," the character of the classification is not one to evoke an exacting scrutiny. *See* Massachusetts Bd. of Retirement v. Murgia, 96 S.Ct. 2562, 2567 (1976); United States v. Carolene Products Co., 304 U.S. 144, 152-53 n. 4 (1938). Similarly, the importance of the nonresidents' interest in hunting for sport does not approach being fundamental, especially when compared to the courts' classification of nonresident students' interest in higher education. *See* Sturgia v. Washington, 368 F. Supp. 38, 41 (W.D. Wash.), *aff'd mem.*, 414 U.S. 1057-58 (1973); Starus v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). Finally, the State's interest is extremely weighty: political support for the State's conservation programs is essential to the preservation of much of Montana's wildlife.

68. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).

69. A. COX, THE WARREN COURT 6 (1968).

ence to equality may not go hand in hand with a viable wildlife management program. One of Montana's unique characteristics is that it contains some of the few remaining areas where wild elk can thrive. The continued existence of that quality habitat, and thus, the continued existence of Montana's elk are factors that must be taken into account in weighing the relative interests that are now before the Supreme Court.

However inapplicable the political support justification is to cases involving fundamental rights,[70] there is good reason to consider it seriously here. Although a State may decide at any time to subsidize health care or housing, it is only limited by the will of its people in such social welfare decisions. Wild elk, on the other hand, are not so adaptable to changes in the social or political attitudes toward conservation. Once range management and controlled harvest are no longer carefully regulated by an interested public, the elk's drastic reduction or even disappearance is virtually inevitable. Many other species of wildlife have disappeared due to public apathy, and there is no reason to suppose the elk are somehow immune to extinction.

Beyond the need for general support of conservation programs, the State must also have the individual resident's willingness to cooperate. Montanans have a long-standing tradition of relatively open access to hunting privileges. If they are denied such access because of increased nonresident competition for licenses, many may simply ignore the license regulations altogether. In a large, sparsely populated area, the opportunity to poach big game is all too obvious. It is, in turn, all too obvious what effect any widespread unlicensed hunting would have on the elk population.

Thus, while the need for local political support is not an adequate justification for discriminatory state laws which infringe fundamental interests, such local support is crucial to the continued existence of Montana's wildlife. If the elk are once lost, it may be exceedingly difficult to bring them back. Conservation needs often directly bring our attention to the fact that we live in an imperfect world of imperfect choices: "As is so often the case in human affairs, different sets of desiderata are in competition."[71] Perhaps the real choice is simple: Elk *or* equal protection.

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70. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970).

71. Note, *The Right to Travel and Community Growth Controls*, 12 HARV.J.LEGIS. 244, 280 (1975).