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Constitutional Law—Power of State to Designate Game Preserves

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RECENT NATURAL RESOURCES CASE

Constitutional Law—Power of State To Designate Game Preserves*

In *Allen v. McClellan*[1] the Supreme Court of New Mexico held that the State Game Commission could not enforce its inclusion of the plaintiff's privately owned twelve-acre plot in a game management area; the commission had no statutory authority for such an action. Furthermore, the court held that the taking was a violation of the due process and equal protection clauses of the state constitution. The court stated that the right to hunt is a property right, subject to the uniform application of hunting regulations; therefore, the state could not constitutionally take the property for a game preserve without compensation of the owner. The court followed the reasoning and authority of *Alford v. Finch*,[2] a recent Florida decision holding a similar taking unconstitutional:

> The appellant has confused the ownership of the game in its wild state with the ownership of the right to pursue the game. The landowner is not the owner of the game, ferae naturae, but he does own, as private property, the right to pursue game upon his own lands. That right is property, just as are the trees on the land and the ore in the ground, and is subject to lease, purchase and sale in like manner. . . . The predominant feature in the instant case is the taking, with neither consent nor compensation, by the appellant from the appellees, of a property right—the right to pursue the game on their land.[3]

The state's authority to regulate the hunting of wild game has

* Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965).
1. 75 N.M. 400, 405 P.2d 405 (1965).
2. 155 So. 2d 790 (Fla. 1963).
3. *Id.* at 793.

been well established on the theory of state ownership of game.[4] Until *Allen v. McClellan* and *Alford v. Finch,* the taking of hunting rights on private lands without compensation or consent had been held constitutional. The federal courts have held that the right to hunt is not a property right, but a privilege granted by the government; as long as the game refuge corresponds to biological or geographic zones, the taking does not violate the equal protection clause of the Constitution.[5]

A leading federal case in this area is *Bailey v. Holland,*[6] in which the Secretary of the Interior designated certain private property as part of a game refuge under the Migratory Bird Treaty Act.[7] In reaching a decision favorable to the Secretary, the court held that while such a designation may not single out a special tract of land and place all similar adjacent lands in an opposite class, in this case the act required the Secretary to consider the distribution, abundance, economic value, and breeding habits of the migratory birds in designating a refuge. The court found that the property was situated, in fact, on a migratory route and resting place of ducks and geese and was surrounded by a government owned refuge. The taking was held not to be a violation of due process because private landowners hold no property rights in wild game; wild animals are the exclusive property of the state.

In *Lansden v. Hart,*[8] a similar federal case, the question of property rights in hunting was squarely presented:

> The fact that plaintiffs have devoted real estate to, and developed other valuable facilities for, the hunting of migratory wild fowl has no bearing upon the point now under discussion. Under Sections 703 and 704 of the Migratory Bird Treaty Act, no hunting of migratory wild fowl whatsoever is legal except as permitted under the regulations to be issued pursuant to said act. The larger purpose of saving geese from slaughter in the very limited area where they concentrate each year in such great numbers should prevail over the fact that the plaintiffs might enjoy profits if such hunting were permitted. At least regulations to that end are reasonable, rather than arbitrary.[9]

4. Geer v. Connecticut, 161 U.S. 519 (1896); 38 C.J.S. *Game* § 7 (1943), and cases cited. For historical precedent, see 2 Blackstone, Commentaries 14 (1827).
5. *E.g.*, Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942).
6. *Ibid.*
7. 49 Stat. 1555 (1936), 16 U.S.C. §§ 703-11 (1964).
8. 180 F.2d 679 (7th Cir. 1950), *cert. denied,* 340 U.S. 824 (1950).
9. 180 F.2d 679, 684 (7th Cir. 1950).

Courts in California,[10] Colorado,[11] Maine,[12] Nebraska,[13] and Washington[14] have reached the same result. The state holds title to animals and birds in trust for all its citizens, and the legislature may pass such laws as are necessary to protect certain species from destruction. Most of the state decisions, however, hold that it is not necessary that the area protected be unique, but only that the game commission or the legislature make a thorough investigation and careful selection of the preserve.[15] Some cases state that such a designation is not a "local law" nor a denial of equal protection, because the privilege to hunt is withdrawn from everyone by the state for that particular area.[16] The Maine court has stated some of the reasoning behind the rule allowing the taking of private property for a preserve:

> The law . . . does not take from him [the private owner] any title, dominion of ownership or essential use. . . . The act does nothing more than prohibit hunting and possession of firearms within the preserve without taking any of the essentials of ownership.[17]

In *Alford v. Finch,*[18] it is clear that similar adjacent lands were placed in the opposite class. The commission designated the area as a preserve while a nearby privately owned tract was to be opened to limited hunting by the public and that land owner. Thus, the commission's designation was unconstitutional by the standards enunciated in *Bailey v. Holland.*[19]

The New Mexico court in *McClellan,* however, did not have to reach the constitutional issue. The case could have been decided on the issue of the commission having exceeded its statutory powers. The statute is not without ambiguity. Section 53-1-8 of the New Mexico statutes gives the commission power to establish game refuges, to purchase and lease land for the game refuges where suitable public lands do not exist, and to designate certain areas as rest grounds for migratory birds where hunting shall be forbidden.

10. Platt v. Philbrick, 8 Cal. App. 2d 27, 47 P.2d 302 (1935).
11. Maitland v. People, 93 Colo. 59, 23 P.2d 116 (1933).
12. State v. McKinnon, 153 Me. 15, 133 A.2d 885 (1957).
13. Bauer v. Game, Forestation & Parks Comm'n, 138 Neb. 436, 293 N.W. 282 (1940).
14. Cook v. State, 192 Wash. 602, 74 P.2d 199 (1937).
15. *E.g.,* Maitland v. People, 93 Colo. 59, 23 P.2d 116 (1933).
16. *Ibid.*
17. State v. McKinnon, 153 Me. 15, 133 A.2d 885, 887 (1957).
18. 155 So. 2d 790 (Fla. 1963).
19. 126 F.2d 317 (4th Cir. 1942).

Sections 53-4-1 and 33-4-2 authorize the commission to acquire land for public purposes by eminent domain, purchase, bequest, or lease. In *McClellan* the court construed the above statutes to preclude the commission's designation of migratory rest areas on private land.[20] The rest areas could only be designated on public land acquired by the methods provided by statute.[21] It is interesting to note, however, that the California case of *Platt v. Philbrick*[22] has interpreted a statute similar to New Mexico's as allowing the designation on the ground that the power of eminent domain is given so that the commission may have the greater control of ownership for some game preserves. There is no necessary contradiction between the designation and purchase of game preserves. Designation only prohibits the landowner from hunting and does not, or should not, prevent the landowner from developing his land within reasonable zoning restrictions.[23]

Alford v. Finch[24] and *Allen v. McClellan*[25] both insist that the right to hunt is a property right, subject to uniform regulation, which cannot be taken without compensation. The right to hunt has been regarded by the courts as a profit a prendre or property right that may be conveyed in fee simple and is inheritable and assignable.[26] The due process clauses of state and federal constitutions provide that private property may not be taken for public purposes without just compensation. However, in general terms, the due process clause is simply a declaration that private property shall not be converted to public property such as a public road, a railroad, a public park, or public hunting grounds without compensation.

The equal protection clause provides that individuals are entitled to equal protection under the laws of a state. Its operation often overlaps with due process. Equal protection does not require that all individuals be treated equally; it requires only that any classification be reasonable and nondiscriminatory.[27]

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20. 405 P.2d at 407.
21. N.M. Stat. Ann. §§ 53-4-1 to -2 (Repl. 1962).
22. 8 Cal. App. 2d 27, 47 P.2d 302 (1935).
23. Mass. Gen. Laws Ann. ch. 130, § 27(A) (1965).
24. 155 So. 2d 790 (Fla. 1963).
25. 405 P.2d 405 (N.M. 1965).
26. Hanson v. Fergus Falls Nat'l Bank, 242 Minn. 498, 65 N.W.2d 857 (1954); see 38 C.J.S. *Game* § 4 (1943). For historical precedent, see 2 Blackstone, Commentaries 418, 419 (1827), and the discussion in State v. Mallory, 73 Ark. 236, 83 S.W. 955, 957 (1904).
27. New York Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938).

The generalization that a state owns game has led the state courts[28] to disregard the possible denial of equal protection. Clearly, it is unfair to designate one farmer's land a game preserve and allow his neighbor to sell hunting privileges. None of the state cases, with the exception of the Nebraska case upholding the Platte River preserve,[29] have required a showing that the preserve coincide with biological or geographical zones. The federal cases, however, hold that the government may not single out a tract of land for a game preserve and place similar adjacent lands in an opposite class.[30]

Two recent Supreme Court cases have questioned the theory that the state owns the game within its borders. In *Toomer v. Witsell*[31] it was held that South Carolina's attempt to keep Georgia shrimp boats from her coastal waters violated the privileges and immunities clause of the Constitution. The court reasoned that the classification of Georgia shrimp boats bore no relationship to any proper purpose of the statute, such as conserving shrimp. South Carolina argued that the state owned the shrimp within three miles of her shore. After stating that shrimp are migratory and hence do not belong to the state, the Court commented on the ownership theory, advocating that more accurate language be used to describe the state's power to regulate game: "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.[32] In *Takahashi v. Fish & Game Comm'n*[33] the Court decided that California could not exclude aliens from fishing in her coastal waters. Again the Court was unconvinced by the ownership argument, quoting Mr. Justice Holmes in *Missouri v. Holland*,[34] the case which upheld the federal government's supremacy in regulating the hunting of migratory birds under the Migratory Bird Treaty Act: "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."[35]

28. *E.g.*, Cook v. State, 192 Wash. 602, 74 P.2d 199 (1937).
29. Bauer v. Game, Forestation & Parks Comm'n, 138 Neb. 436, 293 N.W. 282 (1940).
30. *E.g.*, Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942).
31. 334 U.S. 385 (1948).
32. *Id.* at 402.
33. 334 U.S. 410 (1948).
34. 252 U.S. 416 (1920).
35. *Id.* at 434.

Generally, courts have granted legislatures wide discretion in their use of the police power—the government's power to make regulations not only for the protection, health, and safety of the public, but also to promote its general welfare. An important Supreme Court decision described the Court's role in reviewing police regulations as follows:

> The legislature is primarily the judge of the necessity of such an enactment [police power], that every possible presumption is in favor of its validity, and that, though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.[36]

Examples of police regulations upheld by federal and state courts include: statute requiring destruction of red cedars that host apple rust;[37] legislation restricting the cutting of small trees on wild or uncultivated land by private owners to prevent erosion, conserve water, and the like;[38] regulations limiting the right of landowners to take oysters from private oyster beds;[39] statutes regulating the method of drilling and the removal of natural gas to prevent waste;[40] authorization of dams for the purpose of reclaiming swamp lands where the effect was to oblige landowners to construct and maintain dikes;[41] a requirement that a railroad build a new bridge to allow greater drainage from a swamp;[42] regulations limiting the quantity of land one may cultivate inside city limits;[43] statutes permitting a municipality to zone property;[44] prohibition against removing stones and gravel from private beaches to protect the harbor;[45] a statute limiting the right to graze sheep on public lands,[46] and regulations limiting fishing rights.[47] The recent Massa-

36. Nebbia v. New York, 291 U.S. 502, 537-38 (1934).
37. Miller v. Schoene, 276 U.S. 272 (1928).
38. *In re* Opinion of the Justices, 103 Me. 506, 69 Atl. 627 (1908).
39. Windsor v. State, 103 Me. 611, 64 Atl. 288 (1906).
40. Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N.E. 912 (1900); 58 C.J.S. *Mines and Minerals* § 229 (1948).
41. Manigault v. Springs, 199 U.S. 473 (1905).
42. Chicago, B. & Q. Ry. v. State *ex rel.* Drainage Comm'rs, 200 U.S. 561 (1906).
43. Town of Summerville v. Pressley, 33 S.C. 56, 11 S.E. 545 (1890).
44. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
45. Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1896).
46. Bacon v. Walker, 204 U.S. 311 (1907).
47. People v. Diekmann, 285 Ill. 97, 120 N.E. 490 (1918); see 36A C.J.S. *Fish* § 26 (1961).

chusetts legislation preserving the state's coastal wetlands is based on the state's police power.[48]

The principle to be drawn from these cases is that the government may regulate the use of property where the purpose is to promote the general welfare of the public; the regulations need not be uniform as long as the classification bears a direct relationship to the purpose of the statute and is not arbitrary. For instance, the Supreme Court held that legislation regulating money order establishments may not exempt the American Express Company from the regulations.[49] The *Toomer*[50] and *Takahashi*[51] cases are other examples of unlawful classification.

The necessity for government regulation of game is obvious and long acknowledged. Since the scarcity and abundance of game will vary throughout a state, and migratory birds, for instance, may rest in diverse areas of a state, different regulations for biologically varied sections of a state clearly bear a relationship to the purpose of the regulations—conservation of game. The wisdom, and to a certain extent, the fairness of legislation creating or authorizing the creation of game preserves on private lands by designation without consent or compensation may be questionable. But the broad language in *Allen v. McClellan*[52] and *Alford v. Finch*[53] that any such taking is unconstitutional, except on a uniform basis, is untenable.

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48. Mass. Gen. Laws Ann. ch. 130, § 27(A) (1965).
49. Morey v. Doud, 354 U.S. 457 (1957).
50. Toomer v. Witsell, 334 U.S. 385 (1948).
51. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).
52. 75 N.M. 400, 405 P.2d 405 (1965).
53. 155 So. 2d 790 (Fla. 1963).

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