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In the

Supreme Court of the United States

Commonwealth Of Massachusetts, Petitioner,	)	
V.	)	No. 75-1775
Jack B. Westcott, Respondent	)	

Washington, D. C.
January 17, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF MASSACHUSETTS, Petitioner,	:	
v.	:	No. 75-1775
JACK B. WESTCOTT, Respondent	:	

Washington, D. C.

Monday, January 17, 1977

The above-entitled matter came on for argument at 1:22 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HOWARD WHITEHEAD, ESQ, Assistant Attorney General of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108
Attorney for Petitioner

GEORGE M. VETTER, JR., ESQ., 2200 Industrial Bank Building, Providence, Rhode Island 02903
Attorney for Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-1775, Massachusetts against Jack B. Westcott.

Mr. Whitehead, you may proceed whenever you are ready.

ORAL ARGUMENT OF HOWARD WHITEHEAD, ESQ.

ON BEHALF OF PETITIONER

MR. WHITEHEAD: Mr. Chief Justice and may it please the Court:

This case is here on a writ of certiorari to the Supreme Judicial Court of Massachusetts. It involves a criminal action brought by Massachusetts against Jack B. Westcott for violation of Chapter 35 of the Acts and Resolves of the General Court of Massachusetts for the Year 1923.

Chapter 35 makes it unlawful during the months of July, August and September for any person who has not been a legal resident of Massachusetts during the preceding year to use beam or otter trawls to drag for fish in certain of the waters of Vineyard Sound.

Vineyard Sound is a body of water lying between the Island of Martha's Vineyard and the Elizabeth Islands off the Coast of Massachusetts.

The sole issue before the Court today is whether Chapter 35, insofar as it differentiates between residents and nonresidents of Massachusetts, violates the privileges and

immunities clause contained in Article IV, Section 2 of the Constitution.

The facts may be briefly stated.

Mr. Westcott is a resident of Rhode Island. On September 5th, 1973 he undertook to drag by means of an otter trawl for scup and fluke, which are migratory fish, in the waters described by Chapter 35.

He was thereupon arrested by an officer of the Massachusetts Department of Natural Resources and charged with violating the statute.

On April 24th, 1974, he was tried and found guilty of this violation by the District Court of Massachusetts.

Upon his conviction in the District Court, he pursued his rights under Massachusetts law to de novo review in the Superior Court. However, in lieu of a trial in the Superior Court, the parties filed an agreed statement of facts.

Westcott then presented a motion to dismiss the action based upon two grounds. First, that Chapter 35 violates the privileges and immunities clause contained in Article IV, Section 2 and second, that it violates the Equal Protection Clause of the 14th Amendment.

The Superior Court reserved decision on the motion to dismiss and reported the constitutional questions to the Appeals Court of Massachusetts. Shortly thereafter the Supreme Judicial Court granted direct appellate review and on

March 12th, 1976, without ruling on the Equal Protection claim, the Supreme Judicial Court declared that Chapter 35 does violate the privileges and immunities clause and ordered that the motion to dismiss be allowed.

It is our position that the Supreme Judicial Court erred in finding Chapter 35 unconstitutional.

I would like to begin my argument by discussing the relationship between the fisheries of Massachusetts and the State. I will then proceed to the constitutional doctrine by which we believe this Court has given recognition to that kind of interest.

The fisheries of Massachusetts are one of the most important natural resources of the state. In economic terms, they provide the basis for one of the state's most significant industries.

Equally as important as economics, though, they furnish the basis for a unique way of life for many of the state's citizens. That way of life is exemplified in such well-known seaports as Nantucket and New Bedford and gives the state a quality distinct from that which other states have.

QUESTION: Could you make the same statement about a Rhode Island citizen?

MR. WHITEHEAD: What statement is that? I'm sorry. I don't understand the question.

QUESTION: Well, that fishery is a unique and

important aspect of the economic life of the CommonWealth or the state, et cetera, et cetera, et cetera.

MR. WHITEHEAD: I think it is more likely that the fisheries of Rhode Island would be of greater interest to Rhode Island residents than would be the fisheries of Massachusetts although, of course, Mr. Westcott contends that he is also interested in the fisheries of Massachusetts.

However, the fisheries of Massachusetts, I think, account for a way of life in Massachusetts which is somewhat unique from that of Rhode Island or New Hampshire or any of the other coastal states.

They serve as a major reason why many people come to live within Massachusetts and why many others who were born there remain. In short, they constitute a primary factor underlying the state's continuing vitality.

However, just as they are an important resource, the fisheries of Massachusetts are a fragile one. They are therefore worthy of special protection by the state.

It is our position that this Court has set forth a framework which gives recognition to the unique interest which a state possesses in its natural resources.

In the past, it has used that framework to answer challenges brought under the privileges and immunities clause.

Specifically, in cases such as McCready versus Virginia, Geer versus Connecticut and Patsone versus

Pennsylvania, the Court has ruled that the citizens of a state possess in their collective capacity, a property interest in the state's resources.

The Court has further ruled that accordingly, the right of those citizens to use the state's resources is not a right derived from their citizenship per se but rather, a right derived from their citizenship and their property combined.

It is therefore, not a privilege or immunity of citizenship guaranteed to the citizens of other states under the privileges of immunities clause.

On only one occasion has the Court departed from this analysis. That was in Toomer versus Witsell, decided in 1948.

In Toomer, the Court held that the right of the citizens of South Carolina to take migratory shrimp from the three-mile marginal belt located off of that state's coastline was not a property right but rather, was a privilege or immunity of citizenship.

As such, it was not a right which was to be denied to the citizens of the state.

Massachusetts concedes that if Toomer controls here, Chapter 35 must be held unconstitutional.

However, we contend that Toomer no longer serves as valid precedent.

The Court in Toomer declared that South Carolina

did not possess an ownership interest in the shrimp for two reasons. First, it was the Court's view that migatory animals are, by their nature, inherently incapable of being owned.

Second, a prior decision of the Court had held that the Federal Government possesses paramount control of the resources of the marginal sea such that none of those resources is susceptible of state ownership.

The second basis of the Court's decision in Toomer, namely, that the resources of the three-mile belt are under the paramount control of the Federal Government, has been completely undermined by the passage of the Submerged Lands Act in 1953. By that legislation, Congress expressly conveyed to the states, both title to and ownership in all the resources of the marginal sea.

Accordingly, the states now possess the same rights of ownership in those resources as this Court had held them to possess with respect to inland resources.

Thus, if Toomer is to control at all in this case, it must be on the first ground articulated by the Court, namely, that migratory animals are, by their nature, inherently incapable of being owned.

That ground finds no support in prior Supreme Court adjudication. This Court had never before held that a state's ownership in migratory animals differs from its ownership in

stationary animals.

Even more significantly, Congress, when it passed the Submerged Lands Act, drew no such distinctions. In its conveyance, it conveyed title and ownership to all the resources of the marginal sea, specifically all fish.

We submit that the relative mobility of a given species is an elusive concept. That being true, the appropriateness of a distinction based upon that concept is a matter best left for Congressional analysis.

In this instance, Congress has determined that mobility is not the criterion upon which important rights should turn and that being the case, this Court should respect its judgment.

We submit that the Court should now find that migratory fish located in the three-mile belt are, in fact, owned by the respective states.

QUESTION: And therefore?

MR. WHITEHEAD: And therefore, the right to take those fish is a property right and not a privilege or immunity of citizenship.

QUESTION: And that the taking of them may be reserved for citizens of the state.

MR. WHITEHEAD: That is right.

QUESTION: So that that state could simply say, no nonresidents may, or no noncitizens may fish in our waters.

MR. WHITEHEAD: That is correct, under the privileges and immunities clause.

QUESTION: And when the fish swim out of Massachusetts waters into Rhode Island waters, who owns them?

MR. WHITEHEAD: Well, scup and fluke do not have that kind of migratory characteristics.

QUESTION: Well, suppose they had a migratory characteristic.

MR. WHITEHEAD: At that time -- at that point, when the fish are in Rhode Island, it is Rhode Island that has the special interest in those fish.

QUESTION: I know. We are talking about ownership.

MR. WHITEHEAD: And the proprietary interest in those fish.

QUESTION: Oh, ownership shifts as the fish migrate up and down the seaboard states.

MR. WHITEHEAD: That would be true of fish that migrate up and down the coast. However, we submit that our case is --

QUESTION: Well, Toomer seemed to think that that ownership language was nothing but shorthand for regulatory power, didn't it?

MR. WHITEHEAD: But that statement in Toomer flies directly in the face of several decisions decided by this Court prior to that time, the most significant of which is

McCready versus Virginia.

QUESTION: Well, what about a state whose law simply says nonresidents, noncitizens may not own land in the state?

MR. WHITEHEAD: All we are talking about here is public property. If it bars noncitizens from acquiring private property --

QUESTION: Well, if the state put out the bids, the foresting of the state-owned forests.

MR. WHITEHEAD: That is correct.

QUESTION: If they called for bids, proposals to cut timber. They could reserve that for the citizens.

MR. WHITEHEAD: That is correct. I think that is --

QUESTION: What about the sale of tax-forfeited property? Could that be limited to citizens of the state? Residents?

MR. WHITEHEAD: If that were deemed public property of the state and --

QUESTION: Well, it is owned by them. Of course it is.

MR. WHITEHEAD: -- I think it would be, I believe the state could restrict the --

QUESTION: And what about oil and gas on state-owned lands?

MR. WHITEHEAD: It would be particularly true with respect to oil and gas.

QUESTION: And so that the leasing of oil in the three-mile belt could be limited to citizens?

MR. WHITEHEAD: That is correct. But we are not saying --

QUESTION: Do you have some support for that?

MR. WHITEHEAD: I think McCready versus Virginia is the primary support.

QUESTION: Anything else?

MR. WHITEHEAD: Geer versus Connecticut which said that the state owned wild birds in the state; Patsone versus Pennsylvania which said that the state --

QUESTION: Well, it said it owned it so then, what could they do about it?

MR. WHITEHEAD: In Geer versus Connecticut, which was the commerce clause case, they could prevent the killing of game, of those birds, for the purpose of taking them out of state.

QUESTION: Yes, everybody. They could prevent anybody from killing them for the purpose of taking them out of state.

MR. WHITEHEAD: That is correct. In McCready versus Virginia --

QUESTION: But they didn't attempt to keep nonresidents from killing them.

MR. WHITEHEAD: No. No, the statute prohibited

killing of game for the purposes of taking them out of state.

However, in McCready versus Virginia, Virginia prohibited nonresidents from taking oysters within the state's waters. The Court held that the state owned those oysters, that the right of the citizens to take them was a property right and not a privilege or immunity of citizenship.

QUESTION: So you feel that McCready and Toomer are reconcilable completely.

MR. WHITEHEAD: I think, even at the time the cases were decided, they were irreconcilable in this respect. Toomer found a distinction between migratory and stationary animals which the McCready Court did not find. Although the animals involved in McCready were stationary, the Court there used language which clearly indicated that the Court viewed that free-swimming fish were also capable of ownership by the state.

Of course, they are not able to be reduced by possession but the ownership is similar to the ownership which a person who holds private property has in the animals found on that property. He can exclude others from coming onto the property to take the animals.

QUESTION: Well, the state-owned parks may be restricted to citizen users.

MR. WHITEHEAD: You are talking about use in terms of just going on to the par. I am not sure that we are arguing that the law goes that far.

QUESTION: Well, why wouldn't you? Why wouldn't you, for Heaven's sakes?

MR. WHITEHEAD: Because it does not impinge upon the proprietary interest which the state holds in --

QUESTION: Well, it wears them out.

MR. WHITEHEAD: Pardon me?

QUESTION: It wears them out. The facilities on them have to be replaced more often if they are used twice as much.

MR. WHITEHEAD: There is some difficult line-drawing there. We would say --

QUESTION: Well, what if the state couldn't do it? What would you say the constitutional reason would be?

MR. WHITEHEAD: If the state could not prohibit? It would have to come under the equal protection clause and the privileges and immunities clause.

QUESTION: Why is that?

MR. WHITEHEAD: Because the privileges and immunities clause does not protect proprietary rights, merely privileges or immunities of citizenship.

The equal protection clause is not concerned with simply proprietary -- with privileges and immunities of citizenship. It extends to all kinds of rights.

We would therefore submit that neither of the premises underlying Toomer has current strength. Accordingly, Toomer

itself should not be deemed controlling in this case

On the basis of its prior decisions, the Court should rule that Chapter 35 is constitutional.

QUESTION: Mr. Whitehead, could I just ask you a question about your basic theory? As I understand you, the fish are owned by the Commonwealth of Massachusetts before they are reduced to possession and some individuals but not others have the right to reduce them to possession.

MR. WHITEHEAD: That is correct.

QUESTION: Which individuals may reduce fish to possession?

MR. WHITEHEAD: It would be the citizens of Massachusetts.

QUESTION: And what gives them that right? Their citizenship? Is it a privilege of their citizenship that gives them that right?

MR. WHITEHEAD: No, it is the fact that as citizens and therefore residents of Massachusetts, they --

QUESTION: Well, do they have to be resident citizens?

MR. WHITEHEAD: Well, they wouldn't be citizens if they weren't residents.

QUESTION: Well, is that always true? A citizen of Massachusetts couldn't reside temporarily across the border?

MR. WHITEHEAD: Oh, temporarily he could reside across the border, but his legal residence would have to be in

Massachusetts.

QUESTION: But it is the citizenship which gives him the privilege of taking this fish for himself.

MR. WHITEHEAD: Well, it is both his citizenship and the fact that as a citizen, he possesses a property interest along with all the other citizens in the resource. I am saying that --

QUESTION: Yes, but say, one fish is swimming along. He has only a very fractional interest in it and then if he catches it he has got the whole fish.

MR. WHITEHEAD: That is correct.

QUESTION: Now, what gives him the privilege to do that? It is a privilege of his citizenship, I take it.

MR. WHITEHEAD: There is one step in between. As a citizen, he is the owner of the fish and therefore --

QUESTION: He is the owner of a piece of the fish.

MR. WHITEHEAD: That is correct.

QUESTION: He is not the owner of the whole fish, is he?

MR. WHITEHEAD: That is correct. But he --

QUESTION: What gives him the right to take the whole fish? Is it not a privilege of his citizenship?

MR. WHITEHEAD: I think now, your Honor. I think that it is a fact that all the citizens of Massachusetts all possess an equal ownership interest in the right to take all

of the fish.

QUESTION: You mean, the state couldn't open it up to noncitizens?

MR. WHITEHEAD: It could open it up to noncitizens.

QUESTION: Well, it would be taking the citizens' property.

MR. WHITEHEAD: But the state has to exercise the property right or holds the property right in trust for the citizen.

QUESTION: So it legislates and for whom does it reserve the fishery?

MR. WHITEHEAD: It reserves it for the benefit of the citizens.

QUESTION: And so it is, as Brother Stevens says, an incident to his citizenship. Right under the statute it is an incident to his citizenship.

MR. WHITEHEAD: Citizens because they are owners of the property.

QUESTION: Well, it is because they are under the -- the fishery is reserved to them by the statute. That is the class that is defined who are privileged to fish, citizens and hence it is a function of his citizenship.

MR. WHITEHEAD: I think now, your Honor. It is a function of their property coincidental to those who have the property interest. They are also citizens. Therefore, they

have the property.

QUESTION: And yet the state could give it away.

MR. WHITEHEAD: It could give it away if it found it was in the interest of those citizens in their collective capacity to, in fact, give the fish away.

QUESTION: But the citizen loses his interest once the fish is out of the water.

MR. WHITEHEAD: That is correct. It is reduced to private property in the collective ownership of the state. My thesis is that at that point all the state has is a police power over the fish.

QUESTION: And he is free to take it out of the state.

MR. WHITEHEAD: That is correct.

QUESTION: In commerce.

MR. WHITEHEAD: That is correct. We are not saying here that Massachusetts has attempted to restrict the use of the resource once it has been taken to the borders of the state but rather it has restricted to the resident the right to take that resource in the first instance.

QUESTION: You only get the property providing the fish is in there. If the fish is over in Rhode Island, he is not your property.

MR. WHITEHEAD: That is correct.

QUESTION: So he is only your property when he is

visiting you.

MR. WHITEHEAD: That is correct.

QUESTION: That is a visiting property.

MR. WHITEHEAD: It could be characterized so.

QUESTION: Now you see it. Now you don't.

MR. WHITEHEAD: That is correct. That principle has its roots in the common law and the rights of a private property owner to the animals found on his property. It has been called a qualified property interest.

QUESTION: Mr. Whitehead, does your position depend on the Submerged Lands Act?

MR. WHITEHEAD: It does in part. We need the Submerged Lands Act to obviate one of the two grounds on which Toomer was based.

QUESTION: As I read Judge Reardon's dissent, he relied almost exclusively on that.

MR. WHITEHEAD: That is correct. He, as we, felt that the fact that -- aside from the fact that Congress had conveyed the resources of the marginal sea to the states and therefore obviated the marginal sea/tidewater distinction, the fact that Congress had drawn no distinction between migratory and stationary animals was a strong indication that no such distinction should, in fact, be drawn.

QUESTION: But if that Act had not been passed, do you still think Chapter 35 would be valid?

MR. WHITEHEAD: Chapter 35 would be unconstitutional, then, because the state --

QUESTION: How would you avoid Toomer, then?

MR. WHITEHEAD: Pardon me?

QUESTION: How would you get around Toomer?

MR. WHITEHEAD: We could not avoid Toomer in that case because the state would have no proprietary interest in the three-mile belt.

QUESTION: So absent the federal act we would have to overrule Toomer to support your position?

MR. WHITEHEAD: I think absent the federal act we would have not only to overrule Toomer, but the cases on which Toomer was based, primarily United States versus California, which was the initial case which held that the states -- that the Federal Government possesses paramount control of the resources of the marginal sea.

You have to go one step back.

QUESTION: Yes.

MR. WHITEHEAD: In other words --

QUESTION: The Submerged Lands Act did, in fact, overrule United States against California so far as land within a three-mile limit.

MR. WHITEHEAD: I am not sure I would characterize it as overruling U.S. versus California. Congress, in the Submerged Lands Act, exercised the rightswhich the United

States versus California had confirmed that it possessed.

QUESTION: To alter the ownership relationship.

MR. WHITEHEAD: That is correct. Accordingly --

QUESTION: And of course, what did Toomer say? Toomer said "No one owns the fish"?

MR. WHITEHEAD: Toomer criticized the ownership theory but in fact did not overrule McCready versus Virginia, which was the primary case articulating the ownership.

QUESTION: And I don't suppose that the Congress could grant something it didn't have.

MR. WHITEHEAD: That is correct.

QUESTION: So you must say that Congress owned the fish or that the United States owned the fish?

MR. WHITEHEAD: That is correct. And there is language in Toomer which is inconsistent with that language which says that migratory animals are inherently incapable of being owned but I would assert that that language contradicts earlier decisions of the Court and that fact, coupled with the fact that Congress itself, after careful inquiry, determined that there should be no distinction between migratory and stationary animals.

QUESTION: So you think that Congress essentially in the Submerged Lands Act was asserting its claim of ownership that Toomer said it didn't have?

MR. WHITEHEAD: That Toomer called into question

but McCready versus Virginia and other cases confirmed that it did have.

QUESTION: Older cases.

MR. WHITEHEAD: That is correct.

QUESTION: Do you think that Toomer would stand for the proposition that neither the state nor the Federal Government together possessed ownership?

MR. WHITEHEAD: On the basis of the migratory and nonmigratory distinctions it, I suppose, could be argued that the Federal Government could not possess ownership of the migratory fish in the marginal sea.

QUESTION: Do you think if the Toomer Court would have said that the Federal Government and the state government had gotten together and banned foreign fishing within the three-mile limit, that law would be bad?

MR. WHITEHEAD: That kind of statute could be enacted under powers;apart from the rights derived from property it could be enacted by the states under the police power or by Congress under a variety of powers, particularly the commerce treaty clause, property clause.

Accordingly, because, we submit, Toomer is no longer a good law, we ask that Chapter 35 be held constitutional and that the decision of the Supreme Judicial Court be vacated and the case be remanded for further consideration of the other claims raised by Mr. Westcott.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Whitehead.

Mr. Vetter.

ORAL ARGUMENT OF GEORGE M. VETTER, ESQ.

ON BEHALF OF RESPONDENT

MR. VETTER: Mr. Chief Justice and may it please the Court:

I represent Mr. Westcott in this case who, is, as you already know, a Rhode Island fisherman fishing out of Point Judith.

The gist of my argument is that Toomer v. Witsell is still good law, that the principles underlying Toomer and Witsell are still valid principles, that to resurrect the special public interest doctrine that my brother has argued about would be a giant step backward and that the states can achieve anything that they legitimately should be able to achieve under the police power.

I should emphasize that the fish that we are dealing with in this case are migratory fish. That was stipulated in the record below.

The privileges and immunities clause, the gist of it as we see it, is that/to bar a state from discriminating against a citizen of another state solely or substantially on the basis of noncitizenship. It does not bar it absolutely but when there is a discrimination, this Court has said that

the aliens or the noncitizens must be the peculiar source of the evil at which the statute is aimed and the purpose of the privileges and immunities clause, I think, can be summed up by saying that it is to protect, among other things, common callings and in one of the earlier cases, Ward versus Maryland, this Court said that one of the purposes is to allow a citizen of State A to do business in State B on substantially the same grounds as a citizen of state B.

Now, as we see Massachusetts' position here --

QUESTION: Mr. Vetter, do you think that includes doing business with the property of the state?

Now, let's just assume for the moment that a state does put out bids for timber cutting. Do you think it may confine those invitations to state citizens?

MR. VETTER: No, sir, I do not think they could. And I think that --

QUESTION: So that is included in your statement?

MR. VETTER: Yes, it is.

As we view Massachusetts' position, they don't really argue that the statute discriminates against non-citizenship.

QUESTION: Mr. Vetter, can I go back to Mr. Justice White's question of a moment ago? Didn't our Alexandria Scrap decision last spring indicate that the State of Maryland was free in a purely proprietary capacity to favor

Maryland scrap over nonMaryland scrap people?

MR. VETTER: Your Honor, I confess that I am not acquainted with that case but I would submit that the principles that we are dealing with here, the principle based on property, it is not the basis for exercising a discrimination.

The problem as we see it with the special public interest doctrine is that at least all sorts of consequences which I think, or we submit would be untoward consequences -- for example, in July of last year this Court decided Kleppe versus New Mexico involving the Wild Free-Roaming Horses and Burros Act. That statute was passed by the government to protect those animals on federal lands.

New Mexico then seized some of those animals. The Federal Government agency asked that they be returned. The State of New Mexico commenced an action in the Federal District Court and that Court held, on the basis of the McCready case, that the federal statute was unconstitutional, the special public interest doctrine. They said that the State of New Mexico had an ownership interest in these beasts.

Well, the Court reversed and in its reversal it pointed out that the state has power over wild game and its wild resources based upon the police power but that those powers have to be subject to the paramount powers of the Federal Constitution and it cited several cases, Missouri versus Holland, which is a very important case in this field,

Hunt versus -- the Hunt case [Hunt v. United States] and also Toomer v. Witsell which, of course, involves the privileges and immunities clause.

QUESTION: But those burros were on federal land, weren't they?

MR. VETTER: Yes, sir, they were. But the point that I am making here is that -- and while it may be deemed dictum -- the Court included within the litany of cases of paramount federal powers, Toomer v. Witsell, which is the key case which we are dealing with on this argument today.

In Toomer v. Witsell, it dealt with the privileges and immunities clause and did not deal with federal lands. It did not deal with the property clause of the United States Constitution.

In other words, we cite that in our brief as indicative that Toomer v. Witsell is still an alive and vital case and that the --

QUESTION: The suit against Holland involved the Federal Migratory Birds Act and the treaty power of the United States, didn't it?

MR. VETTER: Yes, it did.

QUESTION: As I remember.

QUESTION: You can take Toomer out of Kleppe and it would not affect it at all.

MR. VETTER: Yes, sir, I admit that it was dictum.

But nonetheless it was included within the thinking of this Court, we submit, as an example of the paramount federal power to which the state must exercise its power.

In any event, as we see Massachusetts' position, they don't point to aliens as a particular source of evil and frankly, as we see it, they don't even try to justify the statute as a conservation statute and as you have heard in their argument, they merely say that the statute -- they, in effect, say that the clause is inapplicable because of the special interest doctrine of McReady versus Virginia, as we see the structure of their argument.

Now, that doctrine, as my brother pointed out, bases -- that doctrine states that the citizens own the wildlife of the state in common, that the state government exercises that ownership as sort of a trustee and that the state government in the exercise of that ownership can discriminate against noncitizens, mainly those who do not have that beneficial interest.

And then it goes on to say that the right to hunt and fish of a state citizen derives from ownership and not citizenship and so, consequently, that is not a privilege of citizenship guaranteed to citizens of other states.

I believe, Mr. Justice White, you were getting at a point which seems germane to me and that is that in the McCready case, the Court points out that the ownership

derives, really, from two sources. It derives from the citizenship of the state as a state citizen and it gets its ownership by virtue of being a citizen so, consequently, I would be so bold as to say that there may be a fallacy in the McCready reading because if that is true, obviously, then, the privileges and immunities clause would apply even in the McCready situation.

The problem, of course, with relying on the McCready case is that Toomer v. Witsell stands in the way like a huge roadblock.

Now, I think it is important to know the factual situation which confronted the Court when that case was decided.

The shrimp fishery, which was off the southern coast, was not a shrimp fishery that was restricted within the territorial waters of any state. It was a giant fish shrimpery and the shrimp would migrate south and the commercial shrimp fishermen would start up at the northern part of their shrimp fishery and follow them right down to Florida.

South Carolina passed a statute which restricted fishing to residents of South Carolina within the territorial seas of South Carolina.

The consequence was that you had the shrimp fishery partitioned along these state lines and what, in effect, you had, as I describe in our brief, is a feudal situation and so

that was the situation that the Court faced.

Now, the Court was well-aware of the McCready case, of course, because South Carolina relied upon it exclusively and the Court characterized the McCready case as the sole case using the Special Public Interest Doctrine to justify discrimination against commercial hunting and fishing by non-citizens absent persuasive independent reasons to support that discrimination.

It then distinguished McCready on the two grounds already mentioned; McCready dealt with stationary fish in tidal waters and Toomer dealt with migratory fish in the marginal sea. It characterized McCready as the sole exception to the general rule and Toomer as a case that did not on its facts fall within that exception.

And then it said that the very facts distinguishing Toomer made the McCready case a very weak prop for South Carolina to rely upon because -- and then it gets to the crucial point that it is very doubtful whether migratory fish can be owned, citing the illustrious case of Missouri v. Holland, where the Court said, that was the treaty case involving the migratory birds, "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."

And so consequently, on that basis and also on the

basis that the state did not own the three-mile belt, although the Court recognized that it could regulate within the three-mile belt, the Court said that the McCready case did not apply and then it came to some other very seminal language which I should like to quote:

They said, the Court said, "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"and there was no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states. And that consequently --

QUESTION: Mr. Vetter, would your analysis carry over to wild animals on land?

MR. VETTER: Yes, sir, I believe it would and as a matter of fact, there are a number of state cases which are cited in our brief where state courts have adopted that analysis.

In a nutshell, nowadays, the modern management tool is the police power. The states can do everything that they need to control their resources under the police power and the police power is exercised consonant with --

QUESTION: Well, but the police power is subject to the privileges and immunities clause, too.

MR. VETTER: Yes, so it is and that is the very point, that --

QUESTION: Well, so how does the modern management tool of the police power solve any of the problems that the states see as confronting them?

MR. VETTER: The police power, your Honor, gives the state -- as we submit -- all the power it needs to conserve its natural resources. However, the police power is obviously subject to the equal protection clause and the privileges and immunities clause and our position is that they can only conserve their resources consummate with the commands of those clauses.

In other words, they cannot invidiously discriminate against those citizens of other states, resident aliens or whathaveyou.

QUESTION: What if a state wants a $500 license from a nonresident to hunt antelope and a $10 license from residents to hunt antelope? Any constitutional objection to that?

MR. VETTER: Yes, there would be. I think that that statute would be unconstitutional or, put it this way; I think the Court would subject that statute to close scrutiny unless it could be shown that there is some justification

for the added expense. It might be much more expensive, for example, to monitor or to police out-state residents from hunting and that point is made clear in the Toomer case, that it doesn't absolutely bar discrimination.

For example, the Toomer case -- the Court in the Toomer case explicitly said, "It is possible, for example, that if South Carolina could show that it was more expensive to watch over the fishing boats of nonresidents, that they could have a higher fee for nonresidents.

QUESTION: That puts it just on the reasoning, then, of the inspection fee cases, that you can charge if it costs more.

MR. VETTER: Essentially, that is the type of reasoning that I think underlies the discrimination which would be allowable in this area.

QUESTION: Well, what if the State of Massachusetts determined that it could only issue 50 fishing licenses for this particular kind of fish because there just were not many running and only 50 fishermen had much of a chance of catching them. Now, do you think it could reserve, say, 40 of those for residents of Massachusetts?

MR. VETTER: I would submit not. I would submit it would have to do it on a lottery basis or some such basis whereby residents of Rhode Island and New Hampshire, which are discontiquous states, would have --

QUESTION: Well, and presumably under your theory residents of Oregon or Nevada or Minnesota, too.

MR. VETTER: I would think that they could, yes, sir. I think that is the purport of the privileges and immunities clause.

QUESTION: And so if all 50 licenses ended up in the hands of nonresidents, there is nothing Massachusetts can do about it.

MR. VETTER: I think the logic of my position carries me that far. But I think what the point of the matter is, though, is that we may be mixing apples and oranges again because I think it is fair to say -- or at least I think it is fair to say that this is not a conservation statute. It is a statute which is really designed to monopolize that resource for Massachusetts residents and I am not so sure that they can do that under the Constitution.

QUESTION: As a matter of fact, you are sure they cannot.

MR. VETTER: I am sure that they cannot. That is right, Mr. Justice.

QUESTION: Does your case turn primarily on the fact that you were dealing with migratory fish? Suppose you had fish in an inland pond, say, bass or trout and that they exacted a much higher license fee for nonresidents to fish in the lakes or ponds. That would be a conservation move,

perhaps. How would you view that?

MR. VETTER: It is a much more difficult case. I can say that the states -- the Schakel case which is cited in my brief --it is a state court case out of Oregon -- out of Wyoming -- adopted the reasoning that I am adopting here, that they cannot invidiously discriminate and I think that the logic of my reasoning takes me to say that they would not be able to discriminate against nonresidents unless there was some reason for the discrimination.

In other words, they could not merely say that nonresidents couldn't come in or said something -- set a prohibitory license fee merely on the basis of nonresidency or lack of state citizenship.

QUESTION: But you are not limiting this concept to the migratory propensities of wildlife, are you?

MR. VETTER: I am not limiting my --

QUESTION: In other words, in a state like Minnesota or Wisconsin, you have nothing -- practically nothing except domestic, indigenous fish. They don't migrate anywhere, but they charge a great deal more for an out-of-state license.

You say as long as that license is not so great a disparity as to be obviously discriminatory or penalizing in its nature that that is all right to have a difference.

MR. VETTER: Yes, sir.

QUESTION: I misunderstood you. I thought you said that a differential in, we'll call it the price of a license, could be constitutionally justified only if you could show that it would cost that much more to administer and to enforce the licensing.

MR. VETTER: I used that as an example of the type of discrimination which would be allowable because it seems if you don't have some sort of independent reason such as that, as the Toomer case says, you are thrown automatically back on the fact of the discrimination hinging entirely on noncitizenship which I believe, not only Toomer v. Witsell but any number of other cases said, is not supported by the Constitution.

QUESTION: Mr. Vetter, suppose we have a big lake in Massachusetts with a whole lot of bass, as my brother Powell was talking about and the state says, "We are going to get out of the bass business and therefore, all of the citizens of the state can go and take all of those fish they want, but no nonresidents." Is that all right?

MR. VETTER: I think that --

QUESTION: Because I warn you, if you don't agree that is all right, then if the state says, "I am going to give all of my citizens a hundred bucks," then all the foreigners could come in and get a hundred bucks and you are not going that far.

MR. VETTER: That is the -- I think it is fair to say that there is a certain area, a grey area that you like to call it. Part of the -- certainly the thinking of Toomer v. Witsell and Missouri v. Holland and McKee v. Gratz and so on and so forth, these other cases, is that you can't own something which is migratory and flying or swimming in the marginal sea.

Now, I think it is possible -- I think it is possible that a court could, if it wanted to, drawn a distinction because you really don't face the same sort of overriding problems with bass in an inland lake as you do with commercial fisheries in the marginal sea. I think there would be inconsistencies, though, because that would have to be pitched -- well, let me put it this way. I think that if that were pitched, if that were pitched on a property right such as Massachusetts arques for in this case, I think it would be difficult to justify it.

I think if it were pitched on the police power or some other power and there were adequate grounds for the discrimination, I think it would be all right.

QUESTION: Skiriotes case involved, what? Sponge fishing.

MR. VETTER: Yes, sir.

QUESTION: And the effort of Florida to control that within its territorial waters, based upon its police

power.

MR. VETTER: Yes, sir. I believe I cite that in my brief.

QUESTION: Did you?

MR. VETTER: Yes. The police power was looked to as the source of the power.

QUESTION: And upheld, wasn't it?

MR. VETTER: And upheld, yes, your Honor.

QUESTION: Well, what is so magic about calling something a police power? A state, in the exercise of any of its powers, is limited by the Federal Constitution.

MR. VETTER: Yes, sir.

QUESTION: And it does not change the matter to call it the state's police power.

MR. VETTER: No, I don't. I think the reason, as I see the reason for it, is simply this, that when you put it on a property right, you have, bringing with it all sorts of old running through the centuries of the common law --

QUESTION: An absolute right to deal with it as well.

MR. VETTER: It is an absolutist point of view and I think the McCready case in the argument of my brother here is an indication of where that leads you and that is one of the points that I should like to make here and that is that we don't really contend -- obviously we don't contend that

the state should not have power to regulate its fish and game. We do.

QUESTION: You do concede its power.

MR. VETTER: We do concede that power. But that power has to be exercised in an evenhanded manner and the problem is that when you pitch that power on an ownership, you end up with the problems that we have here today because of the type of thinking, the absolutist's type of thinking that the old land law carries with it.

QUESTION: On the other hand, the problem with your submission is, how evenhanded must it be? Your submission leads logically to the conclusion, I suppose, that a state simply could not charge a differential in price between a resident and a nonresident fishing license, for example, in its inland waters unless it could show that it cost, somehow, more to enforce its fish laws against nonresidents than it does against residents.

MR. VETTER: Well, the answer to that is yes but I want to go on to say one other thing and that is that there can be other bases for the discrimination because --

QUESTION: Well, what?

MR. VETTER: -- speaking the language of Toomer, that the aliens are the peculiar source of the evil at which the statute is aimed and, you know, if one could -- I imagine imagine situations where there might be a huge influx of --

QUESTION: Out-of-staters.

MR. VETTER: -- out-of-staters up in Vermont to --

QUESTION: Depleting the resource.

MR. VETTER: -- deplete the resource and they might then be able to base it on that.

QUESTION: That might be the case, from what I have heard, with respect to pheasants in -- where it it, the Dakotas? I am not a pheasant hunter but I understand there are only two or three states in the Union that have an abundance of pheasants and that nonresidents are charged very substantial fees, otherwise, there would be tens of thousands of people in there and shoot the pheasants out.

MR. VETTER: That is the type of thinking which I think I would permit or sustain the discrimination.

QUESTION: Mr. Vetter, did I understand you to draw a distinction between possibly inland lakes a little while ago? I take it you would make the same argument with respect to boundary river waters and certainly the Great Lakes, would you not?

MR. VETTER: Yes, sir, I would.

QUESTION: Sometimes the East Coast forgets those things.

MR. VETTER: I think it would be the same argument.

There is one point which I would just like to touch upon and that is the effect of the Submerged Lands Act. Our

view of that Act is that it merely confirms in the states whatever rights the states had before and this, essentially, was a management power and that in any event, if migratory fish, wild animals cannot be owned, the Federal Government by an act, could not say or give title to those animals and so, consequently, we don't think that the Submerged Lands Act has any bearing whatsoever on Toomer v. Witsell and so that the language in the Submerged Lands Act, referring to ownership of fish, is really, again, the language of Toomer v. Witsell. It is a legal shorthand for the power to manage.

QUESTION: Well, except the Toomer opinion -- and correct me if I am mistaken -- did rely on the California case, didn't it?

MR. VETTER: Yes, sir, it did.

QUESTION: And the California case was turned around 180 degrees by the Submerged Lands Act. And to that extent, one of the foundations for the Toomer opinion was removed. Isn't that right?

MR. VETTER: This Court in the Maine case, a recent decision cited in my brief, points out that the Submerged Lands Act did not overrule the California case.

QUESTION: No, but it did turn it around.

MR. VETTER: It did turn it around, yes, sir.

QUESTION: And what was held in the California case to belong to the Federal Government under the Submerged

Lands Act now belongs to the states, i.e., the three-mile belt.

MR. VETTER: At the very most, it would cut out that one segment of Toomer, the three-mile belt ownership.

QUESTION: Right.

MR. VETTER: It would not cut out the other argument, that you can't own wild birds and fish.

One further point on that. In the addendum to our brief we cite certain legislative history to indicate that Congress was well-aware of Toomer v. Witsell when it passed the Submerged Lands Act and as a matter of fact, said an amendment which would be the gist of the argument that we are making now was entirely superfluous in light of that Act.

QUESTION: Mr. Vetter, do you rely at all on the distinction between two kinds of ownership that are discussed in the Toomer case? There is a footnote on the case between dominium and imperium. Do you rely on that at all?

MR. VETTER: I cite it in my brief and it seems to me what was meant by that, by that footnote, was very simply that very early in the game there was a confusion and the gist of the footnote is that way back in the old days, Roman days, perhaps, control of wild game was based upon imperium, which was state power, rather than dominium, which is ownership and to that extent I would certainly say that we do rely on it because if it is imperium, I think it goes into

the police power and not into the ownership concept and that is, really, what I have been arguing this morning -- or this afternoon.

QUESTION: I suppose one might argue that if that footnote is read to mean that ownership in the McCready case is in the imperium or regulatory sense, one could also construe ownership in the statute changing the California result in the same sense.

MR. VETTER: Yes, sir.

QUESTION: That you have.

MR. VETTER: Finally, on policy grounds, to reinstate McCready, we submit would reinstate the feudal situation that we have in the marginal sea or they had in the marginal sea in that case.

Migratory fish don't know any boundaries. It would be difficult for commercial fishermen to carry on their calling if all of a sudden they had to stop and turn away when they were dragging for fish because they were reaching a boundary.

States with small boundaries like New Hampshire, for example, up where I live, would have a very limited area in which to fish because they just obviously would not own as much of the marginal sea.

The special public interest doctrine would also be a step backwards because it would lead to such situations as

we had in the Kleppe case which I talked about earlier and, quite frankly, it seems to me that this document Massachusetts would argue for could really lead to the depletion of natural resources because what is really to say that a state is necessarily going to conserve its resources.

And certainly, as we see, a lot of our problems in the marginal sea and out to the 200-mile limit right now, we are beginning to realize there has to be a broader control.

If, within the three-mile limit the states had these exclusive powers, we really can't say what might happen.

And so in conclusion, we submit that the Court should affirm the decision of the Supreme Judicial Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Vetter.

You have -- no, I guess we are all used up here.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:12 o'clock p.m., the case was submitted.]