H 79-36

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Honorable David S. Paul
9 Park Street
Sanford, Maine 04073

Dear Representative Paul:

You have asked whether the State of Maine may constitutionally establish a moose hunting season for residents of the State only. Our answer is that while the question is not free from doubt, we cannot say that such a proposal would be unconstitutional.

In general, the courts have reviewed the constitutionality of statutory provisions discriminating against non-residents under two clauses of the United States Constitution: the first sentence of Article IV, Section 2 (the "Privileges and Immunities" Clause);[1/] and the third clause of the second sentence of Section 1 of the Fourteenth Amendment (the "Equal Protection Clause"). This opinion will discuss in turn the applicability of each of these clauses to the proposed legislation.

I. Privileges and Immunities

The Privileges and Immunities Clause of Article IV states:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"

The United States Supreme Court has had recent occasion to interpret this clause in factual circumstances remarkably similar to the case

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1/ Upon the effectiveness of the Fourteenth Amendment in 1868, a second "Privileges and Immunities" clause was added to the Constitution. However, since the courts appear to continue to analyze Privileges and Immunities questions employing doctrines originally enunciated under Article IV, Section 2, Clause 1, this opinion will not address the question of whether the proposed legislation is independently threatened by the Fourteenth Amendment Privileges and Immunities Clause. See Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 385, n. 21 (1978)

at hand. In Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978), the Court found that the establishment of a nonresident license fee to hunt elk and other big game which was as much as twenty-five times that of the fee for residents did not violate the clause because the plaintiffs' interest in hunting big game was not sufficiently "fundamental" to warrant protection under the clause. Id. at 388. In reaching this conclusion, the Court distinguished other situations in which it had employed the clause to strike down state barriers to non-resident hunting and fishing, most notably Toomer v. Witsell, 334 U.S. 385 (1948), on the ground that in Baldwin the plaintiffs were not pursuing a livelihood, but were merely engaging in sport. This the Court found to be an insufficiently serious interest to be worthy of Privileges and Immunities protection.

Applying this principle to the case at hand, it would appear very likely that the Court would reach the same result. If hunting elk or moose for sport is an activity not entitled to protection under the Privileges and Immunities Clause, then it would appear to make no difference under the Clause whether a state imposed a license fee on non-residents twenty-five times that imposed on residents, or simply excluded non-residents altogether. This was the result reached in the only case which has been found in which a flat exclusion of non-residents from hunting has been reviewed under the Privileges and Immunities Clause. In State v. Kemp, 44 N.W. 2d 214 (S.D. 1950), cited with approval in Baldwin, supra, at 386-87, the South Dakota Supreme Court upheld a ban on nonresident hunting of waterfowl. It should be noted that the court's rationale hinged less on the nature of the nonresidents' interest than on the purpose of the statute: nonresidents had posed a special threat to the conservation of pheasants and even if the hours of pheasant hunting were restricted, the presence of nonresident hunters in substantial numbers would likewise endanger breeding grounds and nurseries for ducks and geese. Nonetheless, the Supreme Court's recent approval of this case gives greater reason to believe it would sustain a prohibition of nonresident moose hunting in Maine.2/

2/ The only hint in the Court's discussion of the Privileges and Immunities Clause in Baldwin that it might view a flat prohibition differently is a single sentence which appears in the middle of the discussion of the plaintiffs' interest:

> "The mastery of the animal and the trophy are the ends that are sought; [plaintiffs] are not totally excluded from these." Baldwin, supra at 388."

However, in view of the general theory which it adopts in the case, as well as its specific approval of State v. Kemp, the implication of this observation would appear to have little force.

II. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment states:

> ". . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

In applying this clause to state statutes discriminating between classes of persons, the Court's procedure is first to determine whether some "fundamental" right is involved or whether an "invidious classification" is present, in which case the state must show a "substantial governmental interest" to sustain its action, or, if not, whether there is simply a "rational basis" for the discrimination. It is clear from the Court's discussion of the interest of sportsmen in Baldwin, described above, that it does not regard persons in that category as meriting special constitutional protection. Thus, the Equal Protection question raised by the proposed legislation here is simply whether there is a rational basis for discriminating between resident and nonresident moose hunters.

The Court's analysis of the Montana statute in Baldwin under the Equal Protection Clause is not directly in point here. Since Baldwin dealt with a license fee differential, rather than a prohibition, the Court was able to sustain the statute on the ground that the higher nonresident fee was rationally justified as a means of making nonresidents bear their fair share of the cost of managing the resource, to which the residents of the state were contributing, in various ways, through their taxes. Baldwin, supra at 388-90. But this justification is obviously unavailable for a prohibition. Another rational basis must be found to survive equal protection scrutiny.

The only justification which would appear to have a chance of succeeding is that of conservation. Moose, like any other species of wildlife, is a "finite resource," and access to it must therefore be limited. If the Legislature determines that such limitation must be accomplished not only by fixing a limited season but also by restricting the number of hunters, it must find some way of achieving the latter. Prohibition of nonresidents is one such method.

The United States Supreme Court has never squarely determined whether a prohibition of nonresidents for conservation purposes violates the Equal Protection Clause. It may be, however, that the Maine Supreme Judicial Court has. In State v. Norton, 335 A.2d 607, 614-615 (Me. 1975), the Court sustained a statute which made it possible for municipalities to exclude nonresidents from digging clams within their borders. Moreover, although the Court's opinion did not make it clear which clause of the constitution it was applying, it did appear to be employing an Equal Protection, rather than

Privileges Immunities, analysis. On the other hand, the only case which can be found which deals squarely with the use of the conservation justification to restrict non-resident hunting did not find such an argument persuasive. In Schakel v. State, 513 P. 2d 412 (Wyo. 1973), the Supreme Court of Wyoming invalidated a state statute requiring nonresident hunters to have guides as violative of the Equal Protection Clause, expressly finding that the record before it was insufficient to establish any connection between the requirement and the conservation of deer. Id. at 415. In this connection, it is also worth noting that the lower court holding in Baldwin treated the case as an Equal Protection problem and sustained the license scheme on the broad ground that it was a rationally conceived conservation measure.[3/] Montana Outfitters Action Group v. Fish and Game Comm'n, 417 F. Supp. 1005, 1009-10 (D. Mont. 1976). The Supreme Court, however, saw fit to shift the focus of its analysis to the Privileges and Immunities Clause, and to restrict its Equal Protection discussion, as we have seen, to the fee differential question. Baldwin, supra. Whether this means the Court did not find the lower court's broader equal protection analysis persuasive is, of course, impossible to tell.

In short, it is difficult to assess how the United States Supreme Court would now react to a restriction of nonresident hunters for conservation purposes. In view of this uncertainty, therefore, we cannot say that the Legislature is clearly foreclosed from adopting this course.

I hope this answers your question.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC:CH:jg
cc: Senator Andrew Redmond
Representative Charles Dow
Senator Ronald E. Usher
Senator Roland Martin
Senator Harold Silverman
Representative Richard E. McKean
Representative Edward L. Dexter
Representative Paul F. Jacques
Representative Robert A. MacEachern
Commissioner Maynard Marsh

3/ One of the grounds of rationality asserted by the lower court was that the Legislature might have concluded that to use a lottery system "might destroy the political motivation to Montana citizens to underwrite the elk management program." Montana Outfitters, supra at 1010. This particular justification was expressly disapproved by the Supreme Court. Baldwin, supra at 391, n. 24.