The Burger Court Opinion Writing Database

Baldwin v. Fish and Game Commission of Montana

436 U.S. 371 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

April 5, 1978

Re: No. 76-1150 Baldwin v. Fish & Game Comm'n

Dear Harry:

I am ready to join Parts I, II, III, and V of your opinion. I suspend as to Part IV because I have difficulty reconciling its rationale with the basic purpose of the Privileges and Immunities Clause, and because I question whether it gives sufficient emphasis to Montana's special interest in assuring that its own citizens have access to Montana's elk.

Part IV of your opinion appears to hold that the P & I Clause does not apply to Montana's restrictions on nonresident elk hunting because nonresident elk hunting is essentially a recreation, a sport and a luxury rather than the sort of fundamental right protected by the Clause. It might be read by some as meaning that the Clause leaves a state free to restrict nonresident access to any activity that falls within the description of "recreation". So read, it would be difficult to argue that the P & I Clause prevents a state with popular and increasingly crowded, privately owned ski slopes from imposing a tax designed to limit nonresident skiing, and ensure that its residents have ample access to the slopes. Nonresident skiing (which I can't afford) is often a costly activity available only to "the wealthy nonresident or to the one so taken with the sport that he sacrifices other values in order to indulge in it and to enjoy what it offers." Only a limited number of skiers can use the available ski slopes during the most desirable time of the year. And skiing is certainly not, in most cases, "a means to a livelihood for the nonresident." The same argument could be made regarding many recreational activities available in only a few states.

Reading the P & I Clause as not protecting access to recreational activities and other luxuries would overlook the basic purpose of the Clause. As you note, the precise contours of the Clause are not well-defined. But it seems clear that one basic function of the Clause is to assure

that each state permits citizens of other states to engage in trade and commerce on an equal basis with its own citizens. The Clause embodies the principles of the fourth article of the Articles of the Confederation, see Austin v. New Hampshire, 420 U.S. 656, 660-61 n. 6 (1975), which specifically provided that the "free inhabitants of each State" shall enjoy in any other state "all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." The Clause guarantees equality in "all privileges" of trade and commerce. It confers the same protection upon the buyer of a frivolous luxury item as upon the buyer of bread. No state can be permitted to deny citizens of another state the right to purchase goods, entertainment and recreational services from private resident parties on the same basis as its own citizens. Surely access to recreation generally is a basic right which should be equally available to all under the P & I Clause.

The critical point, that we acknowledge implicitly in applying the P & I Clause in this case, is Montana citizens' special interest in the elk, which is not present as to private ski slopes. It is well established that the citizens of a state have a "substantial proprietary interest - sometimes described as 'common ownership'" in wildlife within the state. Douglas v. Seacoast Products, 431 U.S. 265, 287 (1977) (Rehnquist, J., concurring in part and dissenting in part); Geer v. Connecticut, 161 U.S. 519, 529 (1896).

That interest does not permit a state complete freedom to regulate the taking of its wildlife. For example, the state's proprietary interest does not permit a state to regulate the killing of birds that migrate from other countries in a way that frustrates a valid treaty entered pursuant to the Art II § 2 treaty power, Missouri v. Holland, 252 U.S. 416, 434 (1920), or to regulate wild animals found on federal lands in a way that conflicts with a federal statute enacted under the Property Clause, Art IV § 3 cl. 2, Kleppe v. New Mexico, 426 U.S. 529, 546 (1976). Once wildlife becomes involved in interstate commerce, a state's special interest does not permit it to restrict the use of or access to its wildlife in a way that burdens interstate commerce. Douglas, supra, at 281-82; Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 12 (1928). And a state may not allocate access to its wildlife in a manner that offends the Fourteenth

Amendment. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (Where we held a state may not bar issuance of fishing licenses to "persons ineligible to citizenship.")

But the Court has never held that the P & I Clause prevents a state from giving its own citizens preferred access to wildlife found upon land fully subject to a state's control when it entered the union. As you have noted, Bushrod Washington's leading explication of the Clause as a Circuit Justice in Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (CCED Pa. 1825), concluded that the Clause did not prevent the state of New Jersey from denying nonresidents access to oyster beds which were "the common property" of the citizens of New Jersey. Washington said the Clause does not require a state "in regulating the use of the common property of [its] citizens . . . to extend to the citizens of all the other states the same advantages as are secured to [its] own citizens." Corfield, supra, at 552. The Court embraced Washington's interpretation of the Clause in McCready v. Virginia, 94 U.S. 391 (1876), rejecting a P & I Clause attack upon a Virginia statute prohibiting citizens of other states from planting oysters in tidelands within Virginia. The Court noted that the State owns the beds of tidewaters within its jurisdiction as representatives of its people. It held that the Virginia statute did not violate the P & I Clause because the Clause did not invest the citizens of one state "with any interest in the common property of the citizens of another state." Id. at 395. The right of Virginians to plant oysters in the state's tidelands was "a property right and not a mere privilege or immunity of citizenship." Id.

Toomer v. Witsell, 334 U.S. 385 (1948), limited the principle espoused in McCready but did not reject it. Toomer held that a South Carolina statute requiring nonresidents to pay a substantially higher fee for a commercial shrimping license violated the P & I Clause. The appellee argued that South Carolina held the shrimp in question as trustee for its citizens and under McCready the P & I Clause did not prevent the state from regulating the shrimp in the interests of its citizens. The Court rejected that argument because the shrimp involved were located in the three-mile belt of the marginal sea that was not owned by the original colonies like the lands under the tidal waters in McCready, and because the shrimp, unlike the oysters in McCready, did not remain in the waters of any one state but migrated regularly from

North Carolina waters to Florida waters. The Court spoke critically of the principle espoused in McCready when it 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 is 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. Id. at 402.

But it held only that the principle of McCready did not apply to the regulation of migratory shrimp in the marginal sea and did not overrule McCready.

We are holding that each citizen of Montana has a special interest in the elk in question. Unlike the shrimp involved in Toomer, the elk remain principally within Montana. In Toomer, South Carolina could not invoke the "ownership" doctrine to regulate shrimp in the marginal sea because it had not owned the land under the marginal sea as a colony. Toomer, supra, at 402; United States v. California, 332 U.S. 19, 31-34 (1947). But each of the original colonies is entitled to invoke the "ownership doctrine" regarding wildlife found within its borders and Montana is entitled to the same right regarding wildlife within its borders under the "equal footing" doctrine. See United States v. California, supra, at 30; Pollard's Lessee v. Hayes, 3 How. (44 U.S.) 212, 223 (1845).

I question the suggestion that nonresident access to luxury recreational activities generally is not protected by the P & I Clause. But I do not think that the Clause prevents Montana from giving its own residents preferred access to the elk because of their special proprietary interest. That special interest must yield to the extent, as I am sure you agree, that it interferes with Congresssional authority to regulate interstate commerce, to enact statutes effectuating valid treaties with foreign governments, or to regulate property belonging to the United States. But that interest is not affected by the P & I Clause and for that reason I agree with you that the

nonresident license fee in this case does not offend the P & I Clause.

I wanted to get these thoughts sorted out while we await other reactions, but this memo does not go to the Conference.

Regards,

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

5/6
sent 5:30 P.M.

May 6, 1978

PERSONAL

Dear Harry:

Re: 76-1150 Baldwin v. Fish & Game Commission of Montana

Your revision of the last three paragraphs of Part IV largely "eases my concern," but I am enclosing a concurrence which I hope "finesses" the property concept while rejecting Bill Brennan's approach.

If Bill persists in carrying his Baldwin dissenting views into Hicklin, he will probably lose my vote.

Regards,

WEB

Mr. Justice Blackmun

(Harry This should have your ahead of the other note in this case. WEB)

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1978

Dear Harry:

Re: 76-1150 Baldwin v. Fish and Game Commission of Montana

I join.

I have sent to the printer a brief concurrence which should be out early next week.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

To: Mr. Justice
Mr. Justice
Mr. Justice White
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice

From: The Chief Justice

Circulated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1150

Lester Baldwin et al., Appellants,
v.
Fish and Game Commission of Montana et al.

On Appeal from the United States District Court for the District of Montana.

[May —, 1978]

MR. CHIEF JUSTICE BURGER, concurring.

In joining the Court's opinion I write separately only to emphasize the significance of Montana's special interest in its elk population and to point out the limits of the Court's holding.

The doctrine that a State "owns" the wildlife within its borders as trustee for its citizens, see *Geer* v. *Connecticut*, 161 U. S. 519 (1896), is admittedly a legal anachronism of sorts. See *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 284 (1977). A State does not "own" wild birds and animals in the same way that it may own other natural resources such as land, oil, or timber. But, as noted in the Court's opinion, *ante*, at 15, and contrary to the implications of the dissent, the doctrine is not completely obsolete. It manifests the State's special interest in regulating and preserving wildlife for the benefit of its citizens. See *Douglas* v. *Seacoast Products, Inc.*, *supra*, at 284, 287. Whether we describe this interest as proprietary or otherwise is not significant.

We recognized in *Toomer* v. *Witsell*, 334 U. S. 385, 401–402 (1948), that the doctrine does not apply to migratory shrimp located in the three-mile belt of the marginal sea. But the elk involved in this case are found within Montana and remain primarily within the State. As such they are natural resources of the State and Montana citizens have a legitimate interest in preserving their access to them. The Court acknowledges this

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens
The Chief Justice

STYLISTIC CHANGES ONLY

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2nd DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 76–1150

Lester Baldwin et al., Appellants, *v.* Fish and Game Commission of Montana et al. } On Appeal from the United States District Court for the District of Montana.

[May —, 1978]

MR. CHIEF JUSTICE BURGER, concurring.

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We recognized in *Toomer* v. *Witsell*, 334 U. S. 385, 401–402 (1948), that the doctrine does not apply to migratory shrimp located in the three-mile belt of the marginal sea. But the elk involved in this case are found within Montana and remain primarily within the State. As such they are natural resources of the State and Montana citizens have a legitimate interest in preserving their access to them. The Court acknowledges this

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 13, 1978

RE: No. 76-1150 Baldwin v. Fish and Game Commission of Montana

Dear Harry:

I've been giving much thought to your opinion, and guess I've decided I should write separately. I'll make up my mind shortly and let you know.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 9, 1978

Re: No 76-1150, Baldwin v. Fish and Game Commission of Montana

Dear Harry:

I am sorry to have kept you waiting in this case, but I continue to find it very difficult. I now believe that what I have to say in Baldwin may well be informed by the way we decide and the approach we take in No. 77-324, Hicklin v. Orbeck, which presents a Privileges and Immunities Clause challenge to an Alaska statute that requires private employers involved in any oil and gas activity resulting from leases with the state to first hire and last fire Alaska residents in preference to the residents of other states. Hicklin, of course, is to be argued on Tuesday, March 21, 1978. I hope this further delay does not inconvenience you, but I find it difficult to address the issue in Baldwin without looking over my shoulder at Hicklin.

Sincerely,

Bill

Mr. Justice Blackmun

Copies to the Conference

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquis
Mr. Justice Stevens

From: Mr. Justice Brenna

Circulated: 5/1/78

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SUPREME COURT OF THE UNITED STATES

No. 76-1150

Lester Baldwin et al., Appellants	)	On Appeal from
	)	the United States
v.	)	District Court
Fish and Game Commission of Montana et al.	)	for the District of Montana

MR. JUSTICE BRENNAN, dissenting.

Far more troublesome than the Court's narrow holding--elk hunting in Montana is not a privilege or immunity entitled to protection under Art. IV, § 2, cl. 1 of the Constitution--is the rationale of the holding that Montana's elk hunting licensing scheme passes constitutional muster. The Court concludes that because elk hunting is not a "basic right[], interference with which would frustrate the purposes of the formation of the Union," ante at 16, the Privileges and Immunities Clause of Art. IV, § 2--"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"--does not prevent Montana from

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: MAY 3 1978

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1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1150

Lester Baldwin et al., Appellants, *v.* Fish and Game Commission of Montana et al. } On Appeal from the United States District Court for the District of Montana.

[May —, 1978]

MR. JUSTICE BRENNAN, dissenting.

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I

It is true that because the Clause has not often been the subject of litigation before this Court, the precise scope of the protection it affords the citizens of each State in their sister States remains to be defined. Much of the uncertainty is, no doubt, a product of Mr. Justice Washington's exposition of its

pp. 1, 3, 5, 7, 10, 11, 12

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/15/78

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1150

Lester Baldwin et al., Appellants,
v.
Fish and Game Commission of Montana et al.

On Appeal from the United States District Court for the District of Montana.

[May —, 1978]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

Far more troublesome than the Court's narrow holding—elk hunting in Montana is not a privilege or immunity entitled to protection under Art. IV, § 2, cl. 1, of the Constitution—is the rationale of the holding that Montana's elk hunting licensing scheme passes constitutional muster. The Court concludes that because elk hunting is not a "basic and essential activit[y], interference with which would frustrate the purposes of the formation of the Union," *ante*, at 16, the Privileges and Immunities Clause of Art. IV, § 2—"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"—does not prevent Montana from irrationally, wantonly, and even invidiously discriminating against nonresidents seeking to enjoy natural treasures she alone among the 50 States possesses. I cannot agree that the Privileges and Immunities Clause is so impotent a guaranty that such discrimination remains wholly beyond the purview of that provision.

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J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 8, 1978

No. 76-1150, Baldwin v. Montana Comm'n

Dear Harry,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.
1.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1978

Re: 76-1150 - Baldwin v. Fish and Game Commission of Montana

Dear Harry,

I shall await the other writings in this case.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 2, 1978

Re: 76-1150 - Lester Baldwin et al., v. Fish and Game Commission of Montana et al.

Dear Bill,

Please join me in your excellent dissent in this case.

Sincerely yours,

Byron
CWC

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 2, 1978

Re: No. 76-1150 - Baldwin v. Fish and Game Commission of Montana

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 2/8/78

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1150

Lester Baldwin et al., Appellants, *v.* Fish and Game Commission of Montana et al. | On Appeal from the United States District Court for the District of Montana.

[February —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents issues, under the Privileges and Immunities Clause of the Constitution's Art. IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment, as to the constitutional validity of disparities, as between residents and nonresidents, in a State's hunting license system.

I

Appellant Lester Baldwin is a Montana resident. He also is an outfitter holding a state license as a hunting guide. The majority of his customers are nonresidents who come to Montana to hunt elk and other big game. Appellants Carlson, Huseby, Lee, and Moris are residents of Minnesota.[1] They have hunted big game, particularly elk, in Montana in past years and wish to continue to do so.

In 1975, the five appellants, disturbed by the difference in the kinds of Montana elk hunting licenses available to non-

[1] Montana statutorily defines one's place of residence. Mont. Rev. Codes Ann. § 83-303 (1965 Repl. Vol. and Supp. 1977). It imposes a durational requirement of six months for eligibility to receive a resident's hunting or fishing license. § 26-202.3 (2) (Supp. 1975). Appellants, other than Baldwin, make no claim to Montana residence and do not challenge §§ 83-303 and 26-202.3 (2) in any way. Tr. of Oral Arg. 39-40.

February 9, 1978

Re: No. 76-1150 - Baldwin v. Fish & Game Commission

Dear Bill:

We certainly cannot afford to have you continue in a state of shock. I therefore shall be glad to make the change suggested for page 5. I might argue with you about the difference between the 100 meridian and the Missouri River, but that is a matter of only a few degrees, and I shall refrain. I must confess, also, that my acquiescence is in part due to a passing acquaintance with that community beautifully located in southwest Wisconsin by the name of Prairie DuChien.

The second change will also be made, despite the fact that one of my clerks is very grumpy about it. I am sure it will please Potter, who likes the word "invidious."

Sincerely,

HAB

Mr. Justice Rehnquist

pp 2, 5, 20

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

3rd DRAFT

Recirculated: 2/13/78

SUPREME COURT OF THE UNITED STATES

No. 76-1150

Lester Baldwin et al., Appellants, *v.* Fish and Game Commission of Montana et al. } On Appeal from the United States District Court for the District of Montana.

[February —, 1978]

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I

Appellant Lester Baldwin is a Montana resident. He also is an outfitter holding a state license as a hunting guide. The majority of his customers are nonresidents who come to Montana to hunt elk and other big game. Appellants Carlson, Huseby, Lee, and Moris are residents of Minnesota.[1] They have hunted big game, particularly elk, in Montana in past years and wish to continue to do so.

In 1975, the five appellants, disturbed by the difference in the kinds of Montana elk hunting licenses available to non-

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 4/4/78

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1150

Lester Baldwin et al., Appellants, *v.* Fish and Game Commission of Montana et al. | On Appeal from the United States District Court for the District of Montana.

[February —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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In 1975, the five appellants, disturbed by the difference in the kinds of Montana elk hunting licenses available to non-

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 7, 1978

Re: No. 76-1150 - Baldwin v. Fish and Game Commission of Montana

Dear Chief:

I have read with interest your letter of April 5. In response, I have the following comments:

1. After working on this case for some time, and after carefully reading and sleeping upon the earlier opinions, I have become more skittish of the ownership theory than, apparently, you are. It is not without significance, I think, that all three judges of the District Court were uncomfortable with it. The majority decided not to choose between the ownership theory pressed by the State and the plaintiffs' proposition that the ownership theory is nothing but a fiction expressive of the importance to the people that a State have power to preserve and regulate the exploitation of an important resource. The dissenting judge felt that the ownership theory was "denigrated" in recent pronouncements from here.

2. The ownership theory, I understand, is favored by some of this year's law clerks. But I see no reason to become directly involved with it.

3. I believe that all the cases cited on pages 2-4 of your letter are covered, and adequately so, in the opinion draft. The only distinction I have been able to discern between my approach and what I understand to be yours is that you are primarily concerned about the access of nonresidents to recreational activities in the State. Your emphasis on a privately-owned ski facility is illustrative. What if the facility were state-owned? I feel that the consequences of relying exclusively on state ownership, without considering the kind of interest claimed by the nonresident, are far more troubling than the possibility that the opinion will be read to exclude recreational interests completely from the protection of the Privileges and Immunities Clause.

Enclosed, however, is a possible revision of the last three paragraphs of Part IV. Part IV, of course, is the heart of the opinion. If the proposed revision of this material eases your concern, I shall be glad to use it. If not, then I prefer to allow the opinion to remain as it is. I say this because I feel that cutting back any further now will endanger the votes (which I deem to be firm) of a court that I have had for many weeks.

Sincerely,

HLB.

The Chief Justice

pp. 16, 17

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: MAY 10 1978

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1150

Lester Baldwin et al., Appellants, *v.* Fish and Game Commission of Montana et al. | On Appeal from the United States District Court for the District of Montana.

[February —, 1978]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1978

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 76-1150 - Baldwin v. Montana Fish and Game Commission

There are two holds for Baldwin:

1. No. 76-1606, Consumers Union v. Heimann, Superintendent. This appeal from the SDNY concerns § 268 of the New York Banking Law. The challenge is made on Commerce Clause grounds and also under the Privileges and Immunities Clause. The New York statute provides that "savings bank life insurance" may be sold only to persons who reside in New York or who regularly work in that State. Actuarial and like services are performed by the bank-financed Savings Bank Life Insurance Fund. The State, however, does not subsidize the Fund or the SBLI system; indeed, § 270 of the Banking Law forbids the use of public moneys for the SBLI system. Regulatory requirements are essentially the same as those imposed on other issuers of life insurance in New York.

I suspect that what the statute does is to create a disability to contract and to engage in certain aspects of the insurance business. Despite the fact that the States have great freedom in the regulation of the insurance business, see the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, whether the State may justify this discrimination is not a question that is easily answered. The fact that those who work in New York are given the same benefit as those who reside in the State does not, for me, provide the answer under the Privileges and Immunities Clause.

This case, I feel, is not answered by the ruling in Baldwin. I anticipate that the forthcoming opinion in No. 77-324, Hicklin v. Orbeck, will be helpful in our estimation of this case. Unless Bill Brennan feels otherwise, I am inclined, at the moment, to recommend that this case now be held for Hicklin.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Feburuary 9, 1978

76-1150 Baldwin v. Fish and Game

Dear Harry:

Please join me.

Sincerely,

Lewis

Mr. Justice Blackumn

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

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Harry - A fine opinion

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Supreme Court of the United States
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CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 9, 1978

Re: No. 76-1150 Baldwin v. Fish & Game Commission

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 9, 1978

Re: 76-1150 - Baldwin v. Fish & Game Comm'n

Dear Harry:

Please join me.

Respectfully,

Mr. Justice Blackmun

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