Hunter v. Hunter: The Case For Discriminatory Nonresident Hunting Regulations

Jodi A. Janecek

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
HUNTER V. HUNTER: THE CASE FOR DISCRIMINATORY NONRESIDENT HUNTING REGULATIONS

I. INTRODUCTION

Prior to the nineteenth century, hunting regulations were few or nonexistent in the United States. This lack of regulation is attributed to the colonists’ reaction to European rules that permitted only the land-owning gentry to hunt, and it was furthered by the abundance of wildlife, which provided the food necessary for survival on the frontier. By the mid-nineteenth century, human dependence on hunting had declined with the advent of the transportation and industrial revolutions. At this time, hunting took on two different forms: (1) commercial hunting and (2) recreational hunting. Concern for declining wildlife populations prompted states to enact hunting regulations. To control and protect the wildlife populations, states (1) prohibited commercial hunting of particular species and (2) limited recreational hunting by requiring hunters to purchase licenses, by imposing limits on the number of wildlife killed, and by restricting nonresident hunters through limiting permits and imposing higher fees. Courts and commentators characterize such nonresident hunting restrictions as “discriminatory” nonresident hunting regulations.


3. See Johnston, supra note 1, at 555–56.

4. See id.; Constitutionality of State Laws, supra note 1, at 826.

5. Johnston, supra note 1, at 562. The Supreme Court in Geer v. Connecticut held that the states have the power to regulate hunting. 161 U.S. 519 (1896).

6. The federal government did not fully begin to regulate hunting until the twentieth century. Johnston, supra note 1, at 557–58.

7. See id. at 555–56; Constitutionality of State Laws, supra note 1, at 826.

8. The use of “discriminatory” in this Comment does not reflect the negative connotation that is often attributed to the word. Instead, the word discriminatory is simply used to characterize a state’s practice of differentiating between resident and nonresident
Since the mid-nineteenth century, nonresident hunters have challenged state restrictions on nonresident hunters. These challenges have been based on the Privileges and Immunities Clause, the Dormant Commerce Clause, the Equal Protection Clause, and the Supremacy Clause of the Constitution. Historically, courts have held that states may enact discriminatory nonresident hunting regulations if the type of hunting being regulated is typically a recreational activity, such as elk, deer, or bird hunting; but in some instances, courts have held that a state cannot discriminate when the hunting is typically a commercial activity, such as shrimping. In 2002, advocates against discriminatory nonresident hunting regulations challenged Arizona’s regulations based on the Dormant Commerce Clause, and the Ninth Circuit held that Arizona’s discriminatory nonresident hunting regulations that regulated typical recreational hunting violated the Dormant Commerce Clause. As a consequence, other states’ nonresident hunting regulations were challenged, and in 2005, Congress enacted Public Law Number 109-13, section 6036 (“section 6036”), which reaffirmed a state’s right to regulate hunting. The purpose of section 6036 was to prohibit courts from declaring nonresident hunting regulations unconstitutional based on the Dormant Commerce Clause. Despite the passage of section 6036, nonresident hunters continued to challenge the discriminatory nonresident hunting regulations. The Tenth and Eighth Circuits held that these challenges based on the Privileges and Immunities Clause were insufficient and that because of section 6036, challenges based on the Dormant Commerce Clause were moot.

This Comment theorizes in Part V that despite the passage of section 6036 and the Tenth and Eighth Circuits’ opinions, nonresident hunters will continue to challenge discriminatory nonresident hunting regulations. This Comment argues that there are benefits and logical reasons for discriminatory nonresident hunting regulations, and that challenges to the constitutionality of nonresident hunting regulations impair nonresident and resident hunters’ opportunities to hunt. This

---

9. See generally McCready v. Virginia, 94 U.S. 391 (1877) (upholding a state law that prohibited nonresidents from farming oysters).
10. See discussion infra Part II.B.
11. See discussion infra Part III.
12. See discussion infra Part IV.A.
13. See discussion infra Part IV.B.3.
14. See discussion infra Part IV.C.

hunters. Furthermore, the use of hunter in this Comment is synonymous with terms angler and trapper.
Comment proposes that to enhance and protect hunting for both resident and nonresident hunters, challenges to discriminatory nonresident hunting regulations need to be minimized or eliminated. This objective can be accomplished partially by modifying certain state regulations and by improving awareness among hunters that these types of challenges will diminish hunting opportunities.

To provide context for this Comment's proposal in Part V, Part II provides background on the types of regulations that states impose on nonresident hunters and an overview of the common constitutional provisions used to attack nonresident regulations. Part III provides a brief synopsis of the case law on nonresident regulations prior to the Ninth Circuit's decision in 2002. Part IV provides an overview of the Ninth Circuit's decision and the various reactions that followed, including cases and Congressional action on nonresident regulations.

II. BACKGROUND

A. Types of Nonresident Hunting Regulations

States use six types of regulations to restrict nonresident hunters. (1) The quota regulation: a state reserves a percentage of the tags for nonresident hunters.\(^\text{15}\) (2) The fee regulation: a state increases the fee for a nonresident permit.\(^\text{16}\) (3) The guide regulation: a state conditions the release of a hunting permit to a nonresident hunter on the condition that the nonresident hunter obtains the services of a state-licensed guide or outfitter.\(^\text{17}\) (4) The season regulation: a state shortens the hunting season for nonresident hunters.\(^\text{18}\) (5) The license regulation: a state requires nonresident hunters but not resident hunters to purchase a license.\(^\text{19}\) (6) The weapon regulation: a state requires nonresident hunters to hunt with a particular type of weapon.\(^\text{20}\) States can use a combination of the six methods depending on the season and the specific game.

\(^{15}\) See, e.g., Schutz v. Thorne, 415 F.3d 1128, 1131–32 (10th Cir. 2005). For example, assuming there are 500 bull moose permits, and assuming there is a 10% quota for nonresident hunters, then nonresident hunters will receive 50 bull moose permits.

\(^{16}\) See, e.g., id.

\(^{17}\) See, e.g., id.

\(^{18}\) See, e.g., Minnesota v. Hoeven, 456 F.3d 826, 828 (8th Cir. 2006).


\(^{20}\) See, e.g., id. at *8; see generally KAN. ADMIN. REGS. § 115 (2006).
B. Constitutional Provisions Used to Challenge Nonresident Hunting Regulations

Challenges to nonresident hunting regulations commonly are based on the United States Constitution’s Fourteenth Amendment’s Equal Protection Clause, Article IV’s Privileges and Immunities Clause, and the Dormant Commerce Clause.\(^2\) This Part provides a brief overview of these constitutional provisions that are commonly used to challenge discriminatory nonresident hunting regulations and describes a general application of how a discriminatory nonresident hunting regulation would be challenged under each of the provisions.

1. Fourteenth Amendment’s Equal Protection Clause

The Fourteenth Amendment states in part, “[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.”\(^2\) In analyzing an alleged equal protection violation, the focus is on whether the state has a sufficient purpose or objective to justify the discrimination.\(^2\) To determine whether a state has a sufficient purpose or objective, the court asks three questions.\(^2\)

The first question is whether the challenged law is facially discriminatory or facially neutral. If the law is facially neutral, then it is only considered discriminatory if it has a discriminatory purpose and impact.\(^2\) The second question is what level of scrutiny the court will apply to the discriminatory law.\(^2\) A court uses strict scrutiny when the law discriminates based on race, national origin, or sometimes alienage,\(^2\) and when a fundamental right is at issue.\(^2\) A court uses intermediate scrutiny when the law discriminates based on gender or

---

21. Cf. *Constitutionality of State Laws*, supra note 1, at 826–27 (indicating that the most commonly used constitutional provision is the Privileges and Immunities Clause, but the Equal Protection Clause, the Commerce Clause, and the Supremacy Clause have been used as well).
24. *Id.* at 644–48.
25. *Id.* at 644.
26. *Id.* at 645.
27. Alienage or alien in this context simply refers to individuals who are not United States citizens or who are foreign nationals.
28. CHEMERINSKY, *supra* note 23, at 645, 649. Under strict scrutiny, the court upholds the law if the state proves the law is necessary to achieve a compelling state purpose and there is no less discriminatory method to achieve the purpose. *Id.* at 645.
A court uses rational basis scrutiny for all laws not falling under the strict or intermediate scrutiny analysis. The third question is whether the state law withstands the level of scrutiny applied. In the case of strict scrutiny, the state law almost never withstands the scrutiny. Conversely, under rational basis scrutiny, the state law typically withstands the scrutiny, and it is uncertain as to whether the state law will withstand intermediate scrutiny.

Applying the three-question analysis to nonresident hunting regulations, addressing the first question, nonresident hunting regulations are typically facially discriminatory rather than facially neutral because the regulations explicitly delineate separate requirements for nonresidents. Addressing the second question, the level of scrutiny applied to nonresident hunting regulations is the rational basis test. A court might apply strict scrutiny if the law singled out aliens or if the court recognized hunting as a fundamental right. Usually, aliens are treated the same as nonresidents, so the level of scrutiny most likely would remain at rational basis. Hunting might be considered a fundamental right under some state constitutions, but currently hunting is not considered a fundamental right, such as voting, under the federal Constitution. Therefore, in addressing the third question, because a court would most likely use rational basis scrutiny, the court would most likely uphold discriminatory nonresident hunting regulations under an equal protection challenge.

References:

29. Id. Under intermediate scrutiny, the court upholds the law if the state proves the law is substantially related to an important state purpose. Id.

30. Id. at 645–46. Under rational basis scrutiny, the court upholds the law if the non-state entity cannot disprove that the law is rationally related to a legitimate state purpose. Id. at 646.

31. Id. at 647.

32. Id. at 645.

33. Id. at 646.

34. See id. at 645.

35. See Baldwin v. Fish & Game Comm’n, 436 U.S. 371, 390–91 (1978); discussion infra Part III.B.

36. See Constitutionality of State Laws, supra note 1, at 826.


38. Baldwin, 436 U.S. at 390–91 n.23 (finding that elk hunting is not a fundamental right under the Constitution). See generally Reynolds v. Sims, 377 U.S. 533 (1964) (discussing the constitutional right of voting).
2. Article IV’s Privileges and Immunities Clause

Article IV states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” In general, privileges and immunities are constitutional rights and important economic activities. Courts have recognized an important economic activity to mean the right to a job or the right to one’s livelihood. However, a state can discriminate against nonresidents concerning a constitutional right or an important economic activity if the state has a substantial reason for discriminating and the substantial reason closely relates to the law.

Analyzing discriminatory nonresident hunting regulations under the Privileges and Immunities Clause begins with asking whether hunting is a constitutional right or an important economic activity. Hunting has yet to be recognized as a constitutional right. Whether hunting is an important economic activity would depend on who challenged the law. A nonresident hunter would have a difficult time establishing that hunting was a job or a means to the hunter’s livelihood because, in most contexts, commercial hunting has been banned. If a guide or outfitter, whose livelihood depended on nonresident hunters hiring the guide or outfitter, challenged the regulation, then a court may consider hunting to be an important economic activity, but this conclusion seems contrary to a previous Supreme Court decision that upheld discriminatory nonresident hunting regulations that were challenged by an outfitter. If a court held that hunting is an important economic activity under the Privileges and Immunities Clause, then the state would need to have a substantial reason to discriminate that closely relates to the law. Substantial reasons for the discriminatory regulations depend on what type of regulation is at issue. A substantial reason for a fee regulation is that residents pay income or property state taxes and that nonresidents do not pay income or property state taxes. For a guide regulation, a

40. CHEMERINSKY, supra note 23, at 449–52.
41. See Baldwin, 436 U.S. at 386.
42. CHEMERINSKY, supra note 23, at 452–53.
43. See generally Constitutionality of State Laws, supra note 1.
44. Johnston, supra note 1, at 556.
45. See Baldwin, 436 U.S. at 388, 390; discussion infra Part III.B.
46. See Baldwin, 436 U.S. at 389.
substantial reason is that nonresidents are less familiar with the terrain, and for a quota regulation, a substantial reason is a need for conservation. As long as the substantial reason closely related to the regulation, the court would most likely uphold discriminatory nonresident hunting regulations under a privileges and immunities challenge.

3. Dormant Commerce Clause

The Dormant or Negative Commerce Clause, which prohibits a state from burdening interstate commerce, is not directly found in any constitutional provision. Instead, courts have inferred the Dormant Commerce Clause from Article I, Section 8, which states in part, “Congress shall have Power . . . [t]o regulate Commerce . . . among the several states.” Under a Dormant Commerce Clause analysis, the first question is whether the law affects interstate commerce. If the law does not affect interstate commerce, then there is no Dormant Commerce Clause violation, but if the law does affect interstate commerce, then the court must determine whether the law is facially discriminatory. The modern approach is that if a law is not facially discriminatory, then the law is constitutional unless the benefits are outweighed by the burden on interstate commerce. Conversely, if the law is facially discriminatory, the law is constitutional only if it is necessary to achieve an important purpose. There are two exceptions for discriminatory laws that otherwise would violate the Dormant Commerce Clause. The first exception is if Congress authorizes the state to regulate a specific instance of interstate commerce, and the second exception is that a state can favor its residents for state benefits.

48. Schutz, 415 F.3d at 1135.
49. CHEMERINSKY, supra note 23, at 401.
50. See id.; U.S. CONST. art. 1, § 8, cl. 1, 3.
51. CHEMERINSKY, supra note 23, at 412.
52. See id.
53. Id. at 418.
54. Id. at 412.
55. Id. at 429.
56. Id. at 429, 431.
Applying the Dormant Commerce Clause analysis to discriminatory nonresident hunting regulations begins by establishing whether hunting is interstate commerce. It could be argued that hunting is interstate commerce because nonresident hunters are traveling to and from states or because the harvested animals become articles of commerce. Because discriminatory nonresident hunting regulations are generally facially discriminatory, the law needs to be necessary to achieve an important purpose. An important purpose could be conservation, but the law would still need to be necessary. Regardless of the law's necessity, if Congress authorizes states to regulate hunting, then a court most likely would uphold discriminatory nonresident hunting regulations under the exception to the Dormant Commerce Clause.

III. THE CONSTITUTIONALITY OF DISCRIMINATORY NONRESIDENT HUNTING REGULATIONS PRIOR TO 2002

Cases prior to the Ninth Circuit's decision in 2002 held that some discriminatory nonresident regulations were unconstitutional while others were constitutional. Scholars have noted that while the cases do not explicitly outline a distinction, there are three possible ways to distinguish the cases: (1) free-swimming sea animals versus non-free-swimming sea animals, (2) hunting for sport versus hunting for a livelihood, and (3) waters wholly within a state versus waters not wholly within a state. The following two cases, Toomer v. Witsell and...
Baldwin v. Fish & Game Commission,\textsuperscript{60} illustrate the distinction. In Toomer, an example of hunting for free-swimming sea animals, hunting for a livelihood, and waters not wholly within a state, the regulations were unconstitutional.\textsuperscript{61} In Baldwin, an example of hunting for sport, the regulations were constitutional.\textsuperscript{62}

\textbf{A. Toomer v. Witsell}

In Toomer, five Georgian shrimpers sued South Carolina arguing that South Carolina's shrimping regulations violated the Dormant Commerce Clause and the Privileges and Immunities Clause.\textsuperscript{63} In the 1940s, South Carolina regulated shrimping three miles off the South Carolina coast.\textsuperscript{64} South Carolina required all nonresident and resident shrimpers to pay one-eighth of a cent per pound of shrimp, to pay all income taxes on any profit from the shrimp, to dock in South Carolina, and to stamp the shrimp before selling the shrimp to another state.\textsuperscript{65} However, South Carolina required resident shrimpers to pay only $25 per shrimp boat while nonresident shrimpers were required to pay $2500 per shrimp boat.\textsuperscript{66} In essence, South Carolina's regulations were an example of a fee regulation in which nonresident shrimpers paid one hundred times more than resident shrimpers.

The Court held that the tax of one-eighth of a cent per pound of shrimp was not a violation of the Dormant Commerce Clause because the law did not discriminate against nonresident shrimpers.\textsuperscript{67} On the other hand, the Court held that charging nonresident shrimpers one hundred times more for a shrimping boat license was a violation of the Privileges and Immunities Clause because the fee regulation in effect

\textsuperscript{59} 334 U.S. 385, 387, 394–99 (1948).
\textsuperscript{60} 436 U.S. 371, 373 (1978).
\textsuperscript{61} 334 U.S. at 387, 394–99.
\textsuperscript{62} 436 U.S. at 388.
\textsuperscript{63} 334 U.S. at 387, 394–95.
\textsuperscript{64} Id. at 389.
\textsuperscript{65} Id. at 389–91.
\textsuperscript{66} Id. at 389.
\textsuperscript{67} Id. at 394–95.
excluded resident shrimpers, and the state did not provide any justification for the exclusion.68

B. Baldwin v. Fish & Game Commission

In *Baldwin*, an outfitter licensed as a hunting guide in Montana and four customers of the outfitter sued the Fish and Game Commission of Montana asserting that Montana’s hunting regulations violated the Privileges and Immunities Clause and the Equal Protection Clause.69 In 1975, Montana required resident elk hunters to purchase a $4 license and required nonresident elk hunters to purchase a $151 combination license for one elk and two deer.70 In 1976, Montana required resident elk hunters to purchase a $9 license and required nonresident elk hunters to purchase a $225 combination license for one elk, one deer, one black bear, game birds, and fish.71 Based on the 1976 fees, if a resident hunter purchased a combination license, then the nonresident hunter paid seven and one-half times more than the resident, but if the resident hunter purchased only an elk license and the nonresident hunter wants to hunt only elk, then the nonresident hunter pays twenty-five times more.72 In essence, the Montana regulations were a type of fee regulation.

The Court held that there was no violation of the Equal Protection Clause because the state had a legitimate state interest in protecting the wildlife, and charging nonresident hunters a higher fee was rationally related to that legitimate state interest.73 Furthermore, the Court held that there was no violation of the Privileges and Immunities Clause because elk hunting is a recreational sport and is not a “means to the nonresident’s livelihood.”74

---

68. *Id.* at 395–400.
70. *Id.* at 373.
71. *Id.*
72. *Id.* at 374.
73. *Id.* at 389.
74. *Id.* at 388.
IV. DISCRIMINATORY NONRESIDENT HUNTING REGULATIONS POST-2002

A. Conservation Force, Inc. v. Manning

In 2002, Conservation Force, Inc. and three employees of United States Outfitters ("USO") sued the state of Arizona because Arizona had a ten percent cap on nonresident bull elk and antlered deer hunting permits. This type of regulation is an example of a quota regulation.

The Ninth Circuit held that the Dormant Commerce Clause applied to the discriminatory nonresident hunting regulations because the regulation has a "substantial effect on interstate commerce such that Congress could regulate the activity." The court reasoned that interstate commerce was substantially affected because "hunting in Arizona promotes interstate travel," and Arizona permitted the sale of nonedible portions of the wildlife, and therefore, hunting affects the "interstate flow of goods."

After determining that hunting substantially affects interstate commerce, the Ninth Circuit began to apply the Dormant Commerce Clause test by stating "the regulation is subject to strict scrutiny under which it is the state's burden to show that the discrimination is narrowly tailored to further a legitimate state interest." The Ninth Circuit concluded that Arizona does have a legitimate state interest, but it remanded to the district court to determine whether there are other non-discriminatory means to advance the state interest. The district court held that there were other non-discriminatory means, and Arizona was required to issue new regulations that would be in accordance with the court's opinion.

77. Conservation Force, Inc. v. Manning, 301 F.3d 985, 988-89 (9th Cir. 2002).
78. Id. at 993 (internal quotations omitted).
79. Id. at 993-94.
80. Id. at 995.
81. Id. at 1000.
B. Reactions to Conservation Force, Inc. v. Manning

Because a majority of states have discriminatory nonresident hunting regulations, the potential ramifications of Conservation Force, Inc. v. Manning were significant. As a result, legal commentators, courts, hunters, states, and Congress all had various reactions to the decision in Conservation Force, Inc. This Part provides an overview of the different reactions and attempts to provide justifications or reasons for the different reactions.

1. The Law: Courts and Commentators

The legal commentary on Conservation Force, Inc. was sparse, but the legal commentary available both praised and criticized the Ninth Circuit. Commentators criticized the Ninth Circuit's decision because the Ninth Circuit failed to understand the implications of limiting a state's ability to regulate commerce in light of the Supreme Court's decisions that limited the federal government's power to regulate commerce. As a result, the Ninth Circuit was pushing commerce into an area that could not be regulated by the state or federal government; a vacuum of power was created. The Ninth Circuit's decision was praised for its reasoning that found that the Arizona statute, which allowed the sale of non-edible parts of the game, affected the interstate flow of goods.

In Schutz v. Wyoming, the District Court of Wyoming criticized the Ninth Circuit and did not adopt its reasoning. Wyoming used a combination of the guide, fee, and quota regulations for nonresident

---

83. See Minnesota v. Hoeven, 456 F.3d 826, 829 n.6 (8th Cir. 2006).
85. See United States v. Lopez, 514 U.S. 549 (1995) (holding that Congress did not have the authority under the Commerce Clause to prohibit firearm possession in local school zones because firearm possession in local school zones was not an economic activity that substantially affected interstate commerce); United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress did not have the authority under the Commerce Clause to provide a civil remedy for gender-motivated violence victims because gender-motivated violence was not an economic activity that substantially affected interstate commerce).
86. See Bish, supra note 84.
The court denied the outfitter’s summary judgment motion claiming that Wyoming hunting statutes are unconstitutional and granted the State of Wyoming’s summary judgment motion. The court concluded that the Wyoming statutes, which permitted the sale of non-edible parts, were very similar to the Arizona statutes at issue in Conservation Force, Inc. However, the court concluded that the Dormant Commerce Clause did not apply to the Wyoming statutes. Additionally, the court said that the practice of hunting in other states and then selling the trophies on eBay was shocking and disgraceful. The court went on to criticize the Ninth Circuit for misapplying the Dormant Commerce Clause, especially in light of the Supreme Court’s decision in United States v. Morrison, which limited Congress’s power to regulate commerce.

2. Hunters and States

Hunters also criticized and praised the Ninth Circuit’s decision. The different reactions among hunters can be partially attributed to a hunter’s financial status and geographic location. Nonresident hunting is an expensive recreational activity; a five-day elk hunt can cost $8000, which does not include a hunter’s personal gear and travel expenses. Therefore, many hunters felt that the decision in Conservation Force, Inc. would benefit only those who could afford the nonresident hunting trips. Furthermore, resident hunters that reside in the western states and benefit from the discriminatory nonresident hunting regulations viewed Conservation Force, Inc. as a hindrance on their hunting opportunities.

Similarly, state governments both praised and criticized the decision in Conservation Force, Inc. Possible explanations for the praise and criticism can partially be attributed to a state’s geographic location, the current nonresident hunting regulations, and whether the state is a

89. Id. at *2.
90. Id. at *29–30.
91. Id. at *20.
92. Id.
93. See id. at *21 n.5.
94. 529 U.S. 598 (2000); see supra note 85.
96. See 2006 Brochure, supra note 76, at 17.
popular place to hunt for nonresident hunters. For example, the Nevada and North Dakota governments were opposed to the decision in Conservation Force, Inc., and neither government wanted to change its current nonresident hunting regulations. Both Nevada and North Dakota are popular states for nonresident hunters to hunt. Conversely, Minnesota embraced the decision in Conservation Force, Inc. Minnesota's governor, its attorney general, and U.S. Congressman Colin Peterson, "an avid duck hunter," sued North Dakota because North Dakota's nonresident hunting regulations hindered Minnesota duck hunters.

3. Congress

Congress reacted quickly to and in disfavor of the decision in Conservation Force, Inc. On February 9, 2005, Senator Harry Reid of Nevada introduced Senate Bill 399, "A Bill To reaffirm the authority of States to regulate certain hunting and fishing activities." Fourteen Senators from Arizona, Arkansas, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Utah, Wisconsin, and Wyoming cosponsored the bill. This bill was a rider amendment to an appropriations bill, the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005." On May 11, 2005, Congress passed the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of

---

98. See infra Part IV.B.3; Brief for the States of South Dakota, Alaska, Colorado, Kansas, Montana, Nebraska, Nevada, Utah, and Wyoming as Amicus Curiae Supporting Appellees, Minnesota v. Hoeven, 456 F.3d 826 (8th Cir. 2006) (No. 05-3012) (stating that the states that are amicus curiae support discriminatory nonresident hunting regulations).


100. See generally 2006 Brochure, supra note 76, at 7; Minnesota v. Hoeven, 370 F. Supp. 2d 960 (D.N.D. 2005), aff'd in part, aff'd in part on other grounds, 456 F.3d 826 (8th Cir. 2006).

101. See Jim Lee, Duck Hunter Sues N.D. over Nonresident Rules, CENT. WIS. SUNDAY, May 2, 2004, at 7B.


104. See id.

"2005" in Public Law Number 109-13, section 6036.106 As evidenced in the legislative history, the bill passed very quickly with support from the International Association of Fish and Wildlife Agencies, whose members include all fifty state government fish and wildlife agencies.107 The bill asserts that states have the authority to regulate fish and wildlife in any manner the state deems appropriate and the Dormant Commerce


SEC. 6036. STATE REGULATION OF RESIDENT AND NONRESIDENT HUNTING AND FISHING. (a) SHORT TITLE.—This section may be cited as the 'Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005'.

(b) DECLARATION OF POLICY AND CONSTRUCTION OF CONGRESSIONAL SILENCE.—

(1) IN GENERAL.—It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries, including by means of laws or regulations that differentiate between residents and nonresidents of such State with respect to the availability of licenses or permits for taking of particular species of fish or wildlife, the kind and numbers of fish and wildlife that may be taken, or the fees charged in connection with issuance of licenses or permits for hunting or fishing.

(2) CONSTRUCTION OF CONGRESSIONAL SILENCE.—Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of Section 8 of Article I of the Constitution (commonly referred to as the 'commerce clause') to the regulation of hunting or fishing by a State or Indian tribe.

(c) LIMITATIONS.—Nothing in this section shall be construed—

(1) to limit the applicability or effect of any Federal law related to the protection or management of fish or wildlife or to the regulation of commerce;

(2) to limit the authority of the United States to prohibit hunting or fishing on any portion of the lands owned by the United States; or

(3) to abrogate, abridge, affect, modify, supersede or alter any treaty-reserved right or other right of any Indian tribe as recognized by any other means, including, but not limited to, agreements with the United States, Executive Orders, statutes, and judicial decrees, and by Federal law.

(d) STATE DEFINED.—For purposes of this section, the term 'State' includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Clause does not prohibit such regulation.\textsuperscript{108} The purpose of the bill is to reverse the Ninth Circuit's decision in Conservation Force, Inc. and to stop courts from finding discriminatory nonresident hunting regulations unconstitutional based on the Dormant Commerce Clause.\textsuperscript{109}

C. Post Public Law Number 109-13, Section 6036

As a result of section 6036, cases pending in Illinois and Nevada were dismissed because the cases depended exclusively on the Dormant Commerce Clause.\textsuperscript{110} Both the Tenth and the Eighth Circuits held that claims based on the Dormant Commerce Clause were moot.

1. Tenth Circuit

Two months after section 6036 was enacted, the Tenth Circuit affirmed the District Court of Wyoming's decision to grant summary judgment for Wyoming by upholding the state's discriminatory nonresident hunting regulations.\textsuperscript{111} The challenge in this case was based on the Equal Protection Clause and the Dormant Commerce Clause.\textsuperscript{112} The Tenth Circuit determined that there was not an equal protection violation.\textsuperscript{113} In analyzing the equal protection claim, the court concluded that hunters are not a suspect class, and hunting is not a fundamental right.\textsuperscript{114} Therefore, the regulation receives rational basis review, and the state has a legitimate interest; the regulation is rationally related to that legitimate state interest.\textsuperscript{115} Furthermore, the Tenth Circuit held that, in light of section 6036, the Dormant Commerce Clause challenge is moot, a point that the plaintiff conceded.\textsuperscript{116}

\textsuperscript{108} § 6036.
\textsuperscript{109} 14 CONG. REC. E202, E203 (2005); 151 CONG. REC. H2997-02, 3023 (2005); see also discussion supra Part II.B.3.
\textsuperscript{111} Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005).
\textsuperscript{112} Id.; see generally Peter C. Nicolaysen, Comment, Reserving Wildlife for Resident Consumption: Is the Dormant Commerce Clause the Outfitters' White Knight?, 32 LAND & WATER L. REV. 125 (1997) (discussing the possibility of a future Dormant Commerce Clause challenge to Wyoming's regulations).
\textsuperscript{113} Schutz, 415 F.3d at 1131.
\textsuperscript{114} Id. at 1135.
\textsuperscript{115} Id. at 1135–36.
\textsuperscript{116} Id. at 1131.
court based its decision on the fact that “a successful dormant Commerce Clause claim is congressional inaction, so when Congress does act, the dormancy ends, thus leaving the courts obliged to follow congressional will.”

2. Eighth Circuit

Within one month of section 6036 becoming law, the District Court of North Dakota published its decision regarding Minnesota’s challenge to the constitutionality of North Dakota’s waterfowl regulation based on the Dormant Commerce Clause and the Privileges and Immunities Clause. The court granted North Dakota’s motion for summary judgment, upholding the state’s discriminatory nonresident hunting regulations, but not based on section 6036. The court found that North Dakota’s waterfowl law did not violate the Privileges and Immunities Clause because a state may charge more for nonresidents to hunt just like a state may charge more for nonresidents to attend the state’s universities. The court found that virtually all states require nonresidents to pay more for hunting or fishing licenses. In regard to the Dormant Commerce Clause, the district court concluded, “Congressional interpretation of what is and is not interstate commerce is not controlling on the judicial branch.” In other words, the district court dismissed the section 6036 argument. However, the court found no violation of the Dormant Commerce Clause and went on to say, the Ninth Circuit’s decision in Conservation Force, Inc. “is flawed in its reasoning and [is] unprecedented.” Before concluding, the court noted that the new North Dakota hunting regulations may have retaliatory effects for North Dakota fishers in Minnesota, and North Dakota may want to rethink the legislation.

On appeal, Minnesota challenged the North Dakota regulations based on a violation of the Privileges and Immunities Clause and the

117. Id. at 1138.
118. Minnesota v. Hoeven, 370 F. Supp. 2d 960 (D.N.D. 2005), aff’d in part, aff’d in part on other grounds, 456 F.3d 826 (8th Cir. 2006); see discussion supra Part IV.B.2.
120. Id. at 965–66.
121. Id. at 973. Contra discussion supra Part II.B.3 (noting an exception for laws that violate the Dormant Commerce Clause is if Congress authorizes the state to regulate the area of commerce).
123. See id. at 973.
Dormant Commerce Clause. Minnesota argued that the regulations violated the Privileges and Immunities Clause because the regulations permitted residents to hunt on land owned by the residents without getting a hunting license but required nonresidents to purchase a license to hunt on land owned by the nonresident. Minnesota claimed this interfered with a "stick in the bundle of property rights accompanying land ownership." The Eighth Circuit held that although the Privileges and Immunities Clause protects property rights, hunting is not considered a part of the bundle of rights. Additionally, Minnesota argued that the regulations violated the Dormant Commerce Clause, section 6036 did not apply to migratory waterfowl, and section 6036 was invalid because it was passed in an appropriations bill. The Eighth Circuit declined to address the merits of the Dormant Commerce Clause challenge and instead concluded the challenge was moot because of section 6036. The court reasoned that section 6036's status as a rider on an appropriations bill did not affect the bill's validity and that in looking at legislative history, it was Congress's intent to preclude this type of challenge. Despite this seemingly conclusive opinion, the Eighth Circuit seemed to leave open the possibility for future litigation based on the Dormant Commerce Clause by stating "we need not decide today whether Section 6036 will forever preclude challenges to restrictions on nonresident hunting under the dormant Commerce Clause," and "[t]he application of the 'safe harbor' [section 6036] for the future . . . has not been reached. In light of the uncertainties, the state officials in Minnesota and North Dakota may well consider discussing the issue and seeking a satisfactory resolution, rather than litigating further."

124. Minnesota v. Hoeven, 456 F.3d 826, 828–29 (8th Cir. 2006). It is interesting to note that Minnesota also has discriminatory nonresident hunting regulations. MINN. STAT. § 97A.475(1)–(3) (2006). Minnesota not only discriminates, but Minnesota prohibits nonresidents from hunting moose, elk, and prairie chickens. See id.
125. See Hoeven, 456 F.3d at 833–34.
126. Id. at 835.
128. Hoeven, 456 F.3d at 832–33.
129. Id. at 832.
130. Id. at 833.
131. Id. at 833, 836 n.9 (emphasis removed).
V. THE PROPOSAL FOR DISCRIMINATORY NONRESIDENT HUNTING REGULATIONS

This Comment theorizes that interest groups and hunters will continue to litigate the constitutionality of discriminatory nonresident hunting regulations, especially in light of the Eighth Circuit's decision, which seemed to encourage or predict future lawsuits. This Comment argues that there are benefits to discriminatory nonresident hunting regulations and that continued challenges harm both resident and nonresident hunters. This Comment proposes that challenges to nonresident hunting regulations need to be minimized and that this can partially be accomplished through state modification of certain regulations and awareness among hunters that pitting hunter against hunter only hurts hunting opportunities for both nonresident and resident hunters.

A. The Future Lawsuits

Nonresident hunters have challenged discriminatory nonresident hunting regulations since the nineteenth century, and it is likely that challenges to the constitutionality of nonresident hunting regulations will continue for the following reasons.

Since the mid-nineteenth century, recreational hunting has become a very large business; hunting has become a multi-billion dollar industry. Annually, hunters spend an estimated $24.7 billion at the retail level and $746 million for licenses and fees. If one views hunting as an industry, then the decision in Baldwin, where the Supreme Court held that elk hunting is a sport and not a livelihood, would seem ill-advised. If one wants to protect hunting as a family tradition and a recreational sport, then the idea that states are limiting nonresident hunting, which is primarily a business operation, would seem to be the best solution. Additionally, as the population grows and habitat for wildlife decreases, there will be more hunters but less wildlife to hunt. Therefore, because of the amount of money involved in hunting and the likelihood

134. See Amrhein, supra note 133.
136. See generally Jackson, supra note 107.
that the population will increase while wildlife populations will decrease, it is unlikely that litigation will cease.

Furthermore, wildlife is viewed as a national resource, and the residents of the United States, whether they are nonresidents or residents of a particular state, should be allowed to enjoy the natural resources of a particular state. Some argue this means that nonresidents should have access to federal lands to hunt. Opponents of discriminatory nonresident regulations have confused the issues. Access to federal lands is not the same as free access to hunting. A nonresident has access to federal lands, and discriminatory nonresident hunting regulations do not limit that access; they only limit hunting.

Finally, according to its website and monthly newsletter, Conservation Force, Inc., the plaintiff in the Arizona and Nevada lawsuits, will continue to challenge discriminatory nonresident hunting regulations. In Conservation Force’s June 2005 newsletter, the group asserts this issue is not resolved, and there are plans for more litigation. The group has started a litigation fund, entitled the Nonresident Rights Defense Fund. Conservation Force, Inc. identifies two legal strategies of the group.

The first strategy is to challenge section 6036. A claim based on a violation of the Dormant Commerce Clause would seem to be unsuccessful in light of section 6036, unless Congress repealed the law. If Congress repealed section 6036, then there might be a successful claim under the Dormant Commerce Clause. In light of the Eighth Circuit’s opinion, there likely could be a challenge based on the constitutionality of section 6036 because section 6036 has never been codified. An uncodified law is still a valid law, and this type of challenge would have


139. See generally Jackson, supra note 107.

140. See id. at 4.

141. See id.

142. See id.

143. See id.

144. See generally Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005).
to establish that there was a due process violation due to a lack of notice.\textsuperscript{145} It is highly unlikely that this challenge would be successful because a successful challenge would include a nonresident hunter receiving a fine for violating section 6036, and section 6036 does not create penalties.\textsuperscript{146}

The second strategy is to frame a lawsuit that has a plaintiff who is an outfitter, who wants to or does operate in two or more states.\textsuperscript{147} Most likely, this lawsuit would challenge state laws based on the Privileges and Immunities Clause that limit a nonresident outfitter's ability to operate in a particular state. The goal of the lawsuit would be to challenge the decision in Baldwin\textsuperscript{148} that held that hunting was not a "means to the nonresident's livelihood."

\textbf{B. The Benefits of Discriminatory Nonresident Hunting Regulation}

1. Taxes & Support

Discriminatory nonresident hunting regulations provide nonresident hunters the opportunity to contribute to the state funds used to protect and manage wildlife. Resident hunters pay local and state taxes to support the wildlife and the wildlife management in their areas.\textsuperscript{149} The higher fees for nonresidents are to compensate for the taxes that residents pay.\textsuperscript{150} Therefore, fee and license regulations provide the state with funds to manage the wildlife, which in turn benefits both resident and nonresident hunters.\textsuperscript{151}

2. Tragedy of the Commons

Discriminatory nonresident hunting regulations are necessary to prevent state wildlife populations from being subject to a classic...
example of the tragedy of the commons. By charging higher fees, states internalize the national benefits of wildlife preservation. If states charged higher fees or allotted fewer licenses for residents, then local residents would have less of an incentive to conserve and preserve the local resources because nonresident hunters would push out resident hunters. Thus, to preserve wildlife, states must internalize the national benefits, and states can internalize through higher fees for nonresident hunters.

3. State Constitutions

Many state constitutions have guaranteed the right of their citizens to enjoy the states' resources, which in some states implicitly or explicitly means hunting. If states gave equal access to nonresidents and residents for hunting licenses, and the probability of residents drawing a tag diminished to a very small percentage or the fee became too high for resident hunters, then some states would be denying their residents their state constitutionally protected hunting rights.

4. Equality

In most states, any resident, provided the resident meets age and hunter's education requirements, can hunt within the state every year, with some limitations based on the type of permit. Nonresident hunters can also hunt in their own state, making them resident hunters. Additionally, if nonresident hunters are willing to pay for travel and outfitting costs, then the nonresident hunter can conceivably hunt in more than one state. Thus, a resident hunter who cannot afford to hunt as a nonresident hunter in another state limits her or his hunt to one state, while a nonresident hunter who can afford to hunt in multiple states has the potential to hunt in numerous states. If nonresident hunters were granted a larger portion of the permits, then this would mean that resident hunters, who are unable to pay the costs of traveling

152. See Johnston, supra note 1, at 592-611.
153. See id. at 592.
155. See Johnston, supra note 1, at 592-611.
156. See generally Adams et al., supra note 37.
158. A five-day elk hunt can cost about $8000 dollars, which does not include travel. See 2006 Brochure, supra note 76, at 17.
and outfitting services to hunt as nonresidents, have a substantially decreased opportunity to hunt. Currently, the Census Bureau ranks six western states in the bottom ten states for the lowest average annual income. Those six western states are popular places to hunt, have discriminatory nonresident hunting regulations, and have regulations that are likely to be challenged by nonresident hunters; therefore, many of the resident hunters in the western states would not get the opportunity to hunt because they would not get permits in their resident state and could not afford to hunt elsewhere. Finally, if nonresident hunters won the litigation, the result would be fewer hunting opportunities for the common resident, especially in the poorer states, and more opportunities for those who can afford nonresident hunting. Nonresident hunting regulations help protect hunting as a recreation that can be enjoyed by the common person rather than simply those who can afford the expenses of nonresident hunting.

C. Continued Litigation Hurts Nonresident and Resident Hunters

Continuing the litigation over discriminatory nonresident hunting regulations hurts hunters for three reasons: (1) it pits hunters against hunters; (2) it limits a state’s ability to protect wildlife; and (3) it provides incentives for states to retaliate.

1. Hunter v. Hunter

The first reason that litigation hurts nonresident and resident hunters is that it pits hunters against hunters. By continuing litigation, nonresident hunters are forcing states to defend their practices by diverting funds from wildlife management to litigation costs. This means less money for state biologists to research game populations, game wardens to patrol and respond to suspected poaching activities, and conservation efforts. Furthermore, by diverting attention and funds to the nonresident debate, nonresident hunters are providing the

---

159. U.S. CENSUS BUREAU, STATE RANKINGS: AVERAGE ANNUAL PAY, 2004, http://www.census.gov/statab/ranks/rank27.html. New Mexico ranked 41 ($31,411), Wyoming ranked 42 ($31,210), Idaho ranked 46 ($29,871), North Dakota ranked 47 ($28,987), South Dakota ranked 49 ($28,281), and Montana ranked 50 ($27,830). Id. For comparison, the top ten states for average annual pay are the following: Connecticut ranked 1 ($51,007), New York ranked 2 ($49,941), Massachusetts ranked 3 ($48,916), New Jersey ranked 4 ($48,065), California ranked 5 ($44,641), Maryland ranked 6 ($42,579), Delaware ranked 7 ($42,487), Illinois ranked 8 ($42,277), Virginia ranked 9 ($40,534), and Minnesota ranked 10 ($40,398).


161. See generally id.
opportunity for anti-hunting groups to attack hunting. It is important for hunters to work together as a coalition, not as factions, to support and encourage the sport and tradition of hunting.

2. State’s Ability to Protect Wildlife

By continuing litigation, nonresident hunting groups are consistently calling into question a state’s ability to maintain and regulate its natural resources. If the courts declare nonresident hunting regulations unconstitutional, then a state’s power to regulate wildlife will erode. By eroding a state’s power, these groups are paving the way for federal control over wildlife management. It is important to keep wildlife management at a local and not a federal level. The government entity that manages wildlife needs to be capable on a seasonal basis to change hunting and fishing regulations for the next year. The state and local systems are best equipped for changing regulations on a regular basis. Furthermore, regulations within a state will vary from location to location. Again, local wildlife management has the best information to address the needs of local wildlife populations. If wildlife management was federalized, regulations could not as easily be adapted to meet local needs. The Attorney General for North Dakota, Wayne Stenehjem, summed up the sentiment associated with federalizing hunting regulations: “[i]f you like what the Corps of Engineers has done with the Missouri River, you will be thrilled with what the federal government does with game and fish in North Dakota.”

3. States’ Retaliation

If the litigation continues, states could retaliate against nonresident hunters and outfitters in two ways.

First, a state could retaliate by repealing the guide regulations. It is common in western states to have guide regulations. In general, there are two types of guide regulations. The first type of regulation

162. See generally Amrhein, supra note 133.
164. See id.
168. See discussion supra Part II.A.
169. See generally Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005).
requires nonresidents to hire an outfitter. The second type of regulation limits the number of outfitters and makes it illegal to hire a non-state-licensed outfitter. Thus, states help to guarantee outfitters' business with the current regulations. One of the plaintiffs, an outfitter, involved in the lawsuits in Nevada, Arizona, and Kansas has challenged the regulations in the hope that outfitters and specifically USO could gain more business. If states began taking a retaliatory approach and eliminated the guide regulations, then the retaliation could financially harm outfitters.

Second, a state could retaliate by not cooperating with the nonresident groups challenging the hunting regulations. In the past, states wanting to avoid the cost of litigation changed their discriminatory nonresident hunting regulations. It is possible that states will either rethink their past cooperation or limit their cooperation in the future.

D. How to Minimize the Litigation over Nonresident Hunting Regulations

Because of the benefits of discriminatory nonresident hunting regulations and the harm that future lawsuits will bring to nonresident and resident hunters, it is important to minimize challenges to nonresident hunting regulations. This Comment proposes that states evaluate their regulations to limit exposure to suits and that hunters play an active role in minimizing litigation.

1. States' Role

There are a number of ways that a state can change its regulations to limit challenges to the regulations while balancing the needs and interests of the state's resident hunters. This Comment suggests that there are different ways to adjust a state's regulations, but the proposals that this Comment makes should not be read as a proposition that a state should enact all proposals, but rather a state should consider one or two of these proposals to limit challenges. While these proposals are not ideal, and resident hunters may resist many of them, the purpose of

170. See id.


172. See generally Conservation Force, Inc. v. Manning, 301 F.3d 985 (9th Cir. 2002).

these proposals is to limit challenges in court so that a state does not have to use funds that could be used for wildlife management to defend its practice in court.

First, if a state does not want to have its discriminatory regulations challenged, then that state should not challenge other states' discriminatory nonresident regulations. In Minnesota v. Hoeven, Minnesota challenged North Dakota's discriminatory nonresident hunting regulations\(^{174}\) even though Minnesota had its own discriminatory nonresident hunting regulations that prohibited nonresident hunters from hunting moose, elk, and prairie chickens.\(^{175}\) By not challenging other state's regulations, a state is less likely to provoke legal attacks on that state's own hunting regulations.

Second, a state could create a reciprocity agreement with another state in which the two states agree to reserve a certain number of licenses or to charge a lower fee for the other state's residents. This type of agreement would be similar to the agreements that state universities make with one another. While this type of agreement could be challenging to administer, it could have the possibility of creating constructive relationships with resident and nonresident hunters.

Third, states should consider getting rid of weapons regulations that prohibit nonresidents from using certain types of weapons. There seems to be very little justification for this type of regulation, except the unfounded assumption that nonresident hunters are careless with certain types of weapons. Furthermore, a weapons regulation does not provide any direct benefit to resident hunters, except that the regulation might deter some nonresident hunters from attempting to hunt because hunting with a muzzleloader might seem more challenging than hunting with a rifle.

Fourth, states should consider getting rid of regulations that completely ban all nonresidents from hunting certain species. A complete ban only makes the nonresident want to challenge the regulation. By permitting a few nonresidents to hunt, the nonresidents' energy is refocused from "I will never be able to hunt" to "I hope I get a license this year."

Fifth, states should consider getting rid of regulations that require nonresident landowners to purchase a license to hunt on their own land when resident landowners are not required to purchase a license to hunt on their own land. Either a state could require both resident and

---

175. See MINN. STAT. § 97A.475(1)–(3) (2006).
nonresident hunters to purchase a license, or it could require neither one to purchase a license. If nonresident landowners are paying taxes, then the state is already benefiting from the property taxes, and there is less justification for requiring the license.

2. Hunters' Role

Finally, one of the most powerful ways to minimize challenges to nonresident regulations is for hunters to realize that fighting among themselves will not advance nonresident and resident hunters' interest. State wildlife and fish agencies along with local chapters of conservation groups are in the best position for disseminating information to hunters. When hunters realize that challenges to discriminatory nonresident hunting regulations only hurt hunting by diverting resources away from wildlife management, then hunters will put pressure on hunting groups such as Conservation Force, Inc. and USO to stop challenging the regulations and start uniting as one front.176

VI. CONCLUSION

Because the Ninth Circuit's decision in Conservation Force, Inc. limited a state's ability to regulate hunting, Congress took action to affirm a state's right to regulate hunting by enacting section 6036. Congress's action has not fully remedied the issue. Consequently, as nonresidents continue to challenge the hunting regulations, nonresident and resident hunters' interest in preserving hunting will be damaged. Resident and nonresident hunters will not be benefited by pitting resident hunters against nonresident hunters and limiting valuable funds that once were used to protect wildlife and are now used to defend hunting regulations. Thus, states should review their current regulations to limit liability while keeping in mind the needs and interests of their resident hunters, and hunters must take action by putting pressure on interest groups, outfitters, and hunters who continue to challenge the discriminatory nonresident regulations.

JODI A. JANECEK
