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Constitutional Law - Commerce Clause and Privileges and Immunities Clause: Eighth Circuit Court of Appeals Upholds North Dakota's Nonresident Hunting Regulations, Reaffirming States' Rights to Regulate Wildlife Resources Within Their Borders

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CONSTITUTIONAL LAW—COMMERCE CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE: EIGHTH CIRCUIT COURT OF APPEALS UPHOLDS NORTH DAKOTA'S NONRESIDENT HUNTING REGULATIONS, REAFFIRMING STATES' RIGHTS TO REGULATE WILDLIFE RESOURCES WITHIN THEIR BORDERS

Minnesota v. Hoeven, 456 F.3d 826 (8th Cir. 2006)

I. FACTS

In 2001, the North Dakota Legislative Assembly directed the Legislative Council to study the conflict between resident hunters and nonresident hunters.[1] The committee reported an increase in the number of nonresident hunters in North Dakota from about 5500 in 1990, to about 30,000 in 2001.[2] The growth of nonresident hunters upset resident hunters because they were forced to compete for optimal hunting locations.[3] Residents claimed that the better hunting locations often determined the success of the hunt.[4]

On the other hand, the influx of additional hunters provided economic growth for many small North Dakota towns.[5] Nonresident waterfowl hunters spent nearly twenty-one million dollars in direct expenditures, created an estimated 1300 jobs, two million dollars in tax collections, and forty-five million dollars in secondary economic effects.[6] The business sector opposed restricting nonresident hunting because of the increased profits generated by the hunters.[7]

As a result of these findings, the North Dakota Legislature raised license fees for nonresident hunters from $10 to $85 for waterfowl, and $75 to $85 for small game.[8] Residents, on the other hand, had to purchase only

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1. Minnesota v. Hoeven, 456 F.3d 826, 828 (8th Cir. 2006) [hereinafter *Hoeven II*]; *see* H.R. 1269, 57th Leg. (N.D. 2001) (studying the conflict between resident hunters and nonresident hunters).

2. *Hoeven II*, 456 F.3d at 828.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*; *see* N.D. CENT. CODE § 20.1-01-02(45) (2007) (indicating that the term "small game" includes "all game birds and tree squirrels"); N.D. CENT. CODE § 20.1-01-02(16) (2003) (noting that the term "game birds" includes "all varieties of geese, brant, swans, ducks, plovers, snipes, woodcocks, grouse, sagehens, pheasants, Hungarian partridges, quails, partridges, cranes, rails, coots, wild turkeys, morning doves, and crows").

one small game license for $6, rather than purchasing another license to hunt waterfowl together with pheasants and grouse, as nonresidents were required to do.[9] North Dakota also excluded nonresidents from hunting during the opening week of waterfowl season.[10] Additionally, North Dakota restricted access for nonresidents by prohibiting nonresidents from hunting on land owned and regulated by the Game and Fish Department during the first week of pheasant season.[11]

Minnesota's Attorney General responded by filing a civil suit against North Dakota's Governor, seeking a declaratory judgment to enjoin hunting restrictions to the extent that they favored North Dakota residents.[12] The Attorney General's office based its theories on both the Commerce Clause[13] and the Privileges and Immunities Clause[14] of the United States Constitution.[15] The district court denied Minnesota's subsequent motion for summary judgment on its Commerce Clause claims, and granted North Dakota's cross-motion for summary judgment, finding that North Dakota's regulation did not affect "persons in commerce" or activity "substantially affecting interstate commerce."[16] The court did not consider North Dakota's motion to dismiss, noting, "Congressional interpretation of what is and is not interstate commerce is not controlling on the judicial branch."[17] Finally, the district court dismissed Minnesota's Privileges and Immunities Clause claim, finding the case of *Baldwin v. Fish & Game Commission of Montana*[18] controlling.[19]

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9. *Hoeven II*, 456 F.3d at 828 (citing N.D. CENT. CODE §§ 20.1-03-03, 20.1-03-12 (2003)).

10. *Id.*

11. *Id.* (citing N.D. CENT. CODE § 20.1-08-04.9 (2003)).

12. Minnesota v. Hoeven, 370 F. Supp. 2d 960, 962 (D.N.D. 2005) [hereinafter Hoeven I].

13. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* The purpose of the Commerce Clause "was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain." Veazie v. Moor, 55 U.S. (1 How.) 568, 574 (1853).

14. U.S. CONST. art. IV, § 2, cl. 1. The Privileges and Immunities Clause states, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.* The secured privileges and immunities are those that "are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. . . . It was not intended by the provision to give to the laws of one State any operation in other States." Paul v. Virginia, 75 U.S. (1 Wall.) 168, 180 (1869).

15. *Hoeven I*, 370 F. Supp. 2d at 969, 971.

16. *Id.*

17. *Id.* at 973 (citing United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

18. 436 U.S. 371 (1978).

19. *See Hoeven II*, 456 F.3d 826, 834-35 (8th Cir. 2006) (finding Baldwin controlling because it previously resolved a Privileges and Immunities challenge to nonresident hunting restrictions).

Minnesota appealed the district court's denial of its summary judgment motion.[20] Specifically, Minnesota argued that the nonresident hunting restrictions violated the dormant Commerce Clause[21] and certain property rights inherent under the Privileges and Immunities Clause.[22] The Eighth Circuit Court of Appeals held the dormant Commerce Clause issue moot and the Privileges and Immunities Clause claim incapable of providing relief to Minnesota.[23] The court reasoned that the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005"[24] provided the necessary congressional action to preempt Minnesota's dormant Commerce Clause claim.[25] The Privileges and Immunities Clause did not provide relief, according to the court, because the Clause does not protect hunting in the same way that other property rights are protected.[26]

II. LEGAL BACKGROUND

The Commerce Clause and the Privileges and Immunities Clause historically share a "mutually reinforcing relationship."[27] This relationship "stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism."[28] Both clauses

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20. *Id*. at 829; *see id*. at 829-30 n.6 (referencing the amicus curiae brief supporting North Dakota, filed jointly by South Dakota, Alaska, Colorado, Kansas, Montana, Nebraska, Nevada, Utah, and Wyoming, which are among the states providing residents with preferred access to hunting and fishing opportunities).

21. *Id*. at 831. The court can invalidate state laws discriminating against interstate commerce, which Minnesota claims to be the effect of the nonresident hunting restrictions. *Id*.

22. *Id*. at 830.

23. *Id*.

24. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, H.R. 1268, 109th Cong. § 6036 (2005).

25. *Hoeven II*, 456 F.3d at 832.

26. *Id*. at 836.

27. Hicklin v. Orbeck, 437 U.S. 518, 531 (1978).

28. *Id*. at 531-32. In *Hicklin*, the United States Supreme Court explained:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided, also that no imposition, duties or restriction, shall be laid by any State on the property of the United States, or either of them.

Id. at 532 n.16 (citing 9 JOURNAL OF THE CONTINENTAL CONGRESS 908-09 (1777) (Library of Congress ed., 1907)).

recognize the states' need to be free from federal control, while at the same time avoiding arbitrary distinctions forced upon nonresidents that may hinder interstate commerce.[29] However, while the two clauses share a similar focus, the analytical framework from which claims are evaluated varies for each clause.[30]

A. DORMANT COMMERCE CLAUSE

The Commerce Clause provides that "Congress shall have power [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[31] A "positive" Commerce Clause challenge asks whether Congress has exceeded its authority in regulating certain activities.[32] The United States Supreme Court has also read a "negative" or "dormant" element into this affirmative language that allows courts to invalidate state laws that are discriminatory to interstate commerce.[33] The purpose of invalidating discriminatory state statutes is to protect against the economic isolationism that hindered the early formation of the states.[34] Instead of retaliating against other states by taking protectionist measures, states form a more solid union with each other through enforcement of the dormant Commerce Clause.[35]

While remaining vigilant against economic isolationism, courts struggled to protect a state's ability to benefit its own citizens.[36] The test used by courts for Commerce Clause challenges is two-fold: first, it must be determined whether the challenged law discriminates against interstate commerce.[37] Discrimination, in this context, is equivalent to differential treatment benefiting in-state economic interests over out-of-state economic interests.[38] In the second part of the test, if a state law does discriminate

29. Schutz v. Wyoming, No. 02-CV-165-D, 2003 U.S. Dist. LEXIS 26518, at *25-26 (D. Wyo. May 28, 2003), *aff'd*, Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005).

30. Conservation Force, Inc. v. Manning, 301 F.3d 985, 993 (9th Cir. 2002).

31. U.S. CONST. art. I., § 8, cl. 3.

32. United States v. Lopez, 514 U.S. 549, 551 (1995).

33. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571-72 (1997) ("In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.") (citation omitted); W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652 (1981) ("Even in the absence of congressional action, the courts may decide whether state regulations challenged under the Commerce Clause impermissibly burden interstate commerce.") (citation omitted).

34. Hughes v. Oklahoma, 441 U.S. 322, 335 (1979); *see Camps*, 520 U.S. at 578 ("By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent.").

35. *Hughes*, 441 U.S. at 335.

36. *Conservation Force*, 301 F.3d at 991.

37. Smithfield Foods, Inc. v. Miller, 367 F.3d 1061, 1065 (8th Cir. 2004).

38. *Id.* (quoting S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003)).

against interstate commerce, strict scrutiny is applied to assess whether the state's discrimination is narrowly tailored to further a legitimate state interest.[39] If the law does not discriminate, but only incidentally affects interstate commerce, the law will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[40]

Historically, Commerce Clause challenges in wildlife regulation cases have centered on whether interstate commerce is implicated.[41] In *Geer v. Connecticut*,[42] a Connecticut statute prohibited the out-of-state transfer of game birds that were lawfully killed within the state.[43] The United States Supreme Court held that the people of a state own wildlife collectively, and thus, the state, as the representative for the people, could affix conditions in association with the ownership of wild game.[44] Following this principle, the Court then distinguished interstate commerce from internal commerce, finding the former not applicable because of the state's right to affix conditions relative to ownership and taking of wild game within its borders.[45] One of these conditions of common ownership related to the challenged statute itself, because Connecticut had a right to keep the property within its jurisdiction by forbidding the removal of wild game from state borders.[46]

Over several decades, the United States Supreme Court gradually retreated from the ownership view taken in *Geer*.[47] In *Douglas v. Seacoast Products, Inc.*,[48] the Supreme Court definitively rejected the theory.[49] In

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39. *Id.*

40. *Id.* (citation omitted).

41. *See* Geer v. Connecticut, 161 U.S. 519, 532 (1896) (finding no relation to interstate commerce in the state's control of wildlife within its borders); State v. McCullagh, 153 P. 557, 558 (Kan. 1915) ("The natural flight of wild fowl from one point to another does not constitute 'commerce,' unless that word be expanded beyond any significance heretofore given it."). *But see Conservation Force, Inc.*, 301 F.3d at 995 (concluding the hunting of bull elk and antlered deer substantially affects interstate commerce).

42. 161 U.S. 519 (1896).

43. *Geer*, 161 U.S. at 519.

44. *Id.* at 529.

45. *Id.* at 530-31.

46. *Id.* at 529-30; *see also McCullagh*, 153 P. at 559 (recognizing the ability of states to grant hunting privileges to residents and to the exclusion of nonresidents based on the state's control over wild animals).

47. *See* Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 11-13 (1928) (distinguishing *Geer* to find an act that prohibited the exportation of shrimp to be in violation of the Commerce Clause); Missouri v. Holland, 252 U.S. 416, 434 (1920) ("Wild birds are not in the possession of anyone; and possession is the beginning of ownership"); West v. Kan. Natural Gas Co., 221 U.S. 229, 262 (1911) (finding an Oklahoma statute prohibiting the transportation of gas out of the state to be an unjustified restraint upon interstate commerce).

48. 431 U.S. 265 (1977).

49. *Douglas*, 431 U.S. at 284 ("[I]t is pure fantasy to talk of 'owning' wild fish, birds, or animals.").

Douglas, a Virginia statute restricted the ability of nonresidents to obtain licenses for certain kinds of fish in selected areas.[50] The Court called the *Geer* sense of ownership "a nineteenth-century legal fiction" and instead asked whether the state exceeded its boundaries under its police power.[51] The Court held that Virginia surpassed its afforded police power by granting residents, but not nonresidents, the right to destroy a natural resource, which did not square with any asserted conservation interest.[52]

The United States Supreme Court reinforced the *Douglas* holding just two years later in *Hughes v. Oklahoma*,[53] which involved a Commerce Clause challenge to an Oklahoma statute prohibiting the sale or transfer of minnows outside of the state.[54] The Court expressly overruled *Geer*, presenting the issue as:

> (1) [W]hether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;
>
> (2) whether the statute serves a legitimate local purpose; and, if so,
>
> (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.[55]

Following this analytical framework, the Court found that the statute intruded upon interstate commerce.[56] While the statute served a legitimate purpose, the Court ultimately held that Oklahoma did not choose the least discriminatory alternative for conservation because no limits were imposed intrastate, and instead limits were only imposed on the out-of-state transfer.[57] After *Hughes*, states may still regulate and conserve wildlife within their borders, but the state must have a legitimate purpose that is not contrary to interstate commerce.[58]

By finding this required legitimate purpose, the Ninth Circuit, in *Conservation Force v. Manning*,[59] upheld Arizona's ten-percent cap on nonresident hunting of bull elk and antlered deer.[60] First, the Ninth Circuit

50. *Id.* at 269.
51. *Id.* at 284-85.
52. *Id.* at 285 & n.21.
53. 441 U.S. 322 (1979).
54. *Hughes*, 441 U.S. at 323.
55. *Id.* at 325, 335-36.
56. *Id.* at 336-37.
57. *Id.* at 337-38.
58. *Id.* at 338-39.
59. 301 F.3d 985 (9th Cir. 2002).
60. *Conservation Force, Inc.*, 301 F.3d at 988.

tested whether the regulation affected interstate commerce.[61] The court discussed the non-recreational aspects of hunting, such as selling portions of the wildlife in interstate and international markets.[62] By excluding nonresidents from these markets, the court concluded that the regulation "burdens interstate commerce at its point of supply."[63]

The Ninth Circuit next addressed Arizona's interests in conserving wildlife and preserving hunting opportunities for residents.[64] The court first agreed with Arizona that these interests were legitimate, because it recognized the solid history of upholding states' rights to protect wildlife and provide recreation to their people.[65] However, the court questioned whether Arizona's regulation was narrowly tailored, because a state must show more to discriminate than political demand or pressure from other states.[66] This political pressure provided a speculative basis for the regulation, rather than any actual need for more hunting opportunities by Arizona residents, because the residents received more than eighty percent of the hunting tags issued and experienced little nonresident pressure.[67] Thus, the court remanded the case to determine whether Arizona met its burden.[68]

In *Schutz v. Wyoming*[69] the district court of Wyoming reached a directly conflicting result with *Conservation Force*.[70] *Schutz* involved a challenge to three game statutes that provided benefits to residents over nonresidents.[71] First, the court refused to apply a dormant Commerce Clause analysis because *Toomer v. Witsell*[72] and *Hughes* decided that an animal is not an article of interstate commerce until it has been captured or killed.[73] The court also relied on *Baldwin*,[74] which, although decided in a Privileges and Immunities Clause context, held a very similar quota statute

61. *Id.* at 993.
62. *Id.* at 994.
63. *Id.*
64. *Id.* at 996.
65. *Id.*
66. *Id.* at 999.
67. *Id.*
68. *Id.* at 1000.
69. No. 02-CV-165-D, 2003 U.S. Dist. LEXIS 26518 (D. Wyo. May 29, 2003), *aff'd*, Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005).
70. *Schutz*, 2003 U.S. Dist. LEXIS 26518, at *29.
71. *Id.* at *2.
72. 334 U.S. 385 (1948). The United States Supreme Court in *Toomer* found commercial shrimping to be protected by the Privileges and Immunities Clause, in part because migratory shrimp traveled between different waters. *Toomer*, 334 U.S. at 401-03.
73. *Schutz*, 2003 U.S. Dist. LEXIS 26518, at *22-23.
74. *Baldwin* found that elk hunting was not protected by the Privileges and Immunities Clause. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 388 (1978).

constitutional.[75] *Conservation Force*, according to the *Schutz* court, made "a curious jump in logic" when it ignored the Supreme Court's holding in *Baldwin* in favor of a "substantial effects on interstate commerce" analysis.[76] The state did not regulate economic activity, but merely controlled the activity of hunting, according to the court.[77] Thus, the court found the dormant Commerce Clause inapplicable to the statutes.[78]

At the appellate level, the Tenth Circuit found it unnecessary to reach the dormant Commerce Clause analysis because congressional action made the claim moot.[79] The Tenth Circuit noted that a constitutional claim must be alive at all stages, including during appellate review.[80] Additionally, when Congress acts, it terminates any dormant Commerce Clause claim because the dormant Commerce Clause is based on congressional silence.[81] Congress provided this action when it passed the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005."[82] This Act explicitly stated that it is in the public interest for states to distinguish between residents and nonresidents in regulating the taking of wildlife.[83] Thus, the Tenth Circuit found the dormant Commerce Clause claim moot when this Act was signed into law.[84] The Tenth Circuit's holding appears to be more consistent with previous case law, rather than the Ninth Circuit's "unprecedented" ruling.[85]

B. PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[86] The purpose of the Privileges and Immunities Clause, like the Commerce Clause, is to "help fuse into one Nation a collection of

75. *Schutz*, 2003 U.S. Dist. LEXIS 26518, at *26.

76. *Id*. at *25.

77. *Id*. at *29.

78. *Id*.

79. Schutz v. Thorne, 415 F.3d 1128, 1138 (10th Cir. 2005).

80. *Id*. *Schutz* cited *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997), which held that the case and controversy "must be extant at all stages of review, not merely at the time the complaint is filed." *Id*.

81. *Id*. *Schutz* found that Congress "unmistakably foreclosed dormant Commerce Clause petitions challenging state hunting and fishing statutes that treat nonresidents differently than residents." *Id*.

82. *Id*. (referring to H.R. 1268, Section 6063).

83. *Id*. (citing Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, H.R. 1268, 108th Cong. § 6036 (2005)).

84. *Id*.

85. *Hoeven I*, 370 F. Supp. 2d 960, 972 (D.N.D. 2005).

86. U.S. CONST. art. IV, § 2, cl. 1.

independent, sovereign States."[87] However, this does not mean a nonresident is entitled to every privilege as a resident of a state.[88] Rather, the privileges and immunities protected are those common to citizens among the states.[89]

Like the Commerce Clause analysis, a court must undergo a two-part inquiry to assess whether the differential treatment of nonresidents violates the Privileges and Immunities Clause.[90] The first part of the inquiry addresses whether a privilege or immunity protected by the Clause is implicated in the discrimination.[91] Some distinctions are permitted because the courts recognize that certain inherent differences will arise among the several states.[92] The second prong of the test seeks to determine if there is a privilege or immunity implicated, and whether sufficient justification exists for the differential treatment.[93] When assessing the sufficient justification prong, courts hearing challenges under the Clause should recognize "the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[94]

The two prongs are not clearly defined guidelines in application due to a lackluster case law history.[95] Like the Commerce Clause, early cases established that the state had complete control over wildlife within its borders.[96] In *Corfield v. Coryell*,[97] the Circuit Court in the Eastern District of Pennsylvania analyzed whether a state act regulating oyster control implicated fundamental privileges and immunities.[98] While the court declined to enumerate every fundamental privilege and immunity, the court specified certain general categories: "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject

87. Toomer v. Witsell, 334 U.S. 385, 395 (1948) (footnote omitted).

88. *See* Blake v. McClung, 172 U.S. 239, 256 (1898) ("There are privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State.").

89. Paul v. Virginia, 75 U.S. (1 Wall.) 168, 180 (1869).

90. United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 218 (1984).

91. *Id.*

92. *See id.* ("Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.").

93. *Id.* at 222.

94. *Id.* at 222-23 (citation omitted).

95. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 380 (1978).

96. *Id.* at 384.

97. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). The Court described *Corfield* as "the first, and long the leading, explication of the [Privileges and Immunities] Clause." *Baldwin*, 436 U.S. at 384 (quoting Austin v. New Hampshire, 420 U.S. 656, 661 (1975)).

98. *Corfield*, 6 F. Cas. at 551.

nevertheless to such restraints as the government may justly prescribe for the general good of the whole."[99] The court in *Corfield* concluded the state could restrict access to the oyster beds because the oyster beds might be completely destroyed if the state was unable to regulate their use and exclude nonresidents.[100]

In *Paul v. Virginia*,[101] the United States Supreme Court again stressed the freedom enjoyed by citizens in the "acquisition and enjoyment of property and in the pursuit of happiness."[102] The Court stated that these enjoyed privileges are those that are enjoyed in one's own state.[103] The specific holding in *Paul* turned largely on an analysis of a corporation's status as a citizen of the state.[104] The Court ultimately held that the Privileges and Immunities Clause did not protect a New York insurance company doing business in Virginia.[105]

The United States Supreme Court in *McCready v. Virginia*[106] reiterated the *Corfield* analysis of protecting only fundamental privileges and immunities.[107] *McCready*, like *Corfield*, involved a statute excluding nonresidents, but not residents, from planting oysters.[108] The United States Supreme Court again refused to establish specific categories of fundamental privileges and immunities, opting instead for a case-by-case determination.[109] The particular right of a nonresident to plant oysters that was asserted in *McCready* was not fundamental, and thus did not trigger protection by the Clause.[110] Rather, it was a common property right held by the citizens of Virginia.[111]

The United States Supreme Court decided another corporate privileges matter in *Blake v. McClung*,[112] where a Tennessee statute gave creditors in that state priority over out-of-state creditors.[113] The Court held that this statute offended the Privileges and Immunities Clause because creditors should not be discriminated against merely because they do not reside in the

99. *Id.* at 551-52.
100. *Id.* at 552.
101. 75 U.S. 168 (1869).
102. *Paul*, 75 U.S. at 180.
103. *Id.* at 180-81.
104. *Id.* at 182.
105. *Id.*
106. 94 U.S. 391 (1876).
107. *McCready*, 94 U.S. at 395.
108. *Id.* at 394.
109. *Id.* at 395.
110. *Id.* at 395-96.
111. *Id.*
112. 172 U.S. 239 (1898).
113. *Blake*, 172 U.S. at 247.

state.[114] The Court again reaffirmed that not all Privileges are protected, rather, "[t]he Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State."[115]

While supporting ownership rights in some cases, the United States Supreme Court refused to establish any absolute ownership rights.[116] In *Toomer*, a South Carolina statute restricted nonresidents from trawling for migratory shrimp in certain waters.[117] The nonresidents specifically challenged the imposed license fees, which South Carolina set at a price one hundred times greater than the residents' license fees.[118] According to the *Toomer* Court, these license fees clearly discriminated against nonresidents, thus meeting the first prong of the analysis.[119] Under the second prong, South Carolina justified the license fee discrepancy by claiming underlying conservation purposes.[120] The Court rejected this argument, however, because the conservation aims could have been achieved through less severe methods than the one chosen, which effectively excluded all nonresidents.[121] The facts in *Toomer* were also distinguished from *McCready*, because the former involved migratory fish in different waters.[122] This distinction compelled the United States Supreme Court to reject an extension to *McCready*, and instead to find commercial shrimping protected by the Privileges and Immunities Clause.[123]

Despite the law's evolution away from the ownership theory in *Geer*, courts have continued to reaffirm the states' power to regulate wildlife within its borders.[124] For example, in *State v. Kemp*,[125] the South Dakota Supreme Court upheld a statute that completely excluded nonresidents from hunting migratory wildfowl.[126] The South Dakota Supreme Court conceded

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114. *Id.* at 258.
115. *Id.* at 256.
116. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 385 (1978).
117. *Toomer*, 334 U.S. at 389.
118. *Id.* at 395.
119. *Id.* at 396-97.
120. *Id.* at 397.
121. *Id.* at 398-99.
122. *Id.* at 401.
123. *Id.* at 403.
124. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 386 (1978). The Court stated in *Baldwin* that "[t]he fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence." *Id.*
125. 44 N.W.2d 214 (S.D. 1950).
126. *Kemp*, 44 N.W.2d at 219.

the diminished effect of the complete ownership theory and held the state's police power was an adequate basis for enacting the statute.[127] The court deferred to the state's ability to cure local problems and its holding recognized the dangers of destruction posed from exhaustive nonresident hunting.[128] The *Kemp* court also reinforced the difference acknowledged in *Toomer* between the right of an individual to make a living through commercial hunting, and hunting for sport or enjoyment with no regard to making a livelihood.[129] The Clause affords no protection to the latter.[130]

The modern seminal case in hunting rights analysis is *Baldwin*, which found that elk hunting was not within the fundamental rights protected by the Clause.[131] In *Baldwin*, a nonresident was charged seven and a half times more than a resident for a combination license, or twenty-five times more than a resident if he wished to only hunt elk.[132] In its analysis, the United States Supreme Court first insisted on the continuing vitality of its earlier decisions concerning the pursuit of a common calling and other basic activities.[133] The Court refused to recognize elk hunting as one of these protected rights, however, and, instead, determined it was recreation and sport.[134] It was not a means to one's livelihood or basic to the "well-being of the Union."[135] As in its earlier decisions, the Supreme Court again refused to define specific protected privileges and immunities; it sufficed to determine that elk hunting was not one of them.[136] The Eighth Circuit Court of Appeals in *Hoeven* analogized waterfowl hunting to the unprotected elk hunting in *Baldwin*, and thus upheld the nonresident hunting restrictions as constitutional under the Clause.[137]

III. ANALYSIS

In *Hoeven*, the Eighth Circuit Court of Appeals unanimously upheld North Dakota's restrictions on nonresident waterfowl hunting within the state.[138] The court sought to determine whether the hunting restrictions

127. *Id.* at 217.
128. *Id.*
129. *Id.* at 218.
130. *Id.*
131. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978).
132. *Id.* at 374.
133. *Id.* at 387.
134. *Id.* at 388.
135. *Id.*
136. *Id.*
137. *Hoeven II*, 456 F.3d at 834.
138. *Id.* at 827.

violated the Commerce Clause.[139] The merits of this issue were never reached, however, because the enactment of the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005" rendered the Commerce Clause claim moot.[140]

Next, the court analyzed whether the nonresident hunting restrictions violated the Privileges and Immunities Clause.[141] The court foreclosed the issue on the first prong of the analytical framework because recreational hunting is not a fundamental right protected by the Clause.[142] Furthermore, while the Privileges and Immunities Clause protects property rights, these property rights do not include hunting, according to the court, and thus hunting rights garner no protection under the Clause.[143]

A. DORMANT COMMERCE CLAUSE

Minnesota claimed that North Dakota's nonresident hunting restrictions violated the dormant Commerce Clause because the restrictions bar thousands of nonresidents from traveling to North Dakota to hunt waterfowl.[144] These nonresidents, according to Minnesota, are persons in commerce that engage in activities substantially affecting interstate commerce.[145] Minnesota primarily relied on *Conservation Force*, where Arizona placed a ten percent cap on the number of nonresident tags for bull elk and antlered deer.[146] *Conservation Force* found the dormant Commerce Clause applicable because, according to the court, the hunting of bull elk and antlered deer substantially affects interstate commerce.[147]

While the court acknowledged the economic growth generated by nonresident hunting in North Dakota, it declined to address the merits of the Commerce Clause claim because Section 6063 of H.R. 1268, the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005," rendered the claim moot.[148] President George W. Bush signed this Act into law on May 10, 2005, while this case was

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139. *Id*. at 831.

140. *Id*. at 831-32.

141. *Id*. at 833-34.

142. *Id*. at 834.

143. *Id*. at 836.

144. *Id*. at 831 (citing Brief of Petitioner-Appellant at 39, Hoeven v. Minnesota, No. 05-3012 (8th Cir. Aug. 31, 2005)).

145. *Id*.

146. *Id*. at 833 (citing Conservation Force v. Manning, 301 F.3d 985, 989 (9th Cir. 2002)).

147. *Id*. at 832 n.7 (citing *Conservation Force*, 301 F.3d at 995).

148. *Id*. at 831. Though the larger scope of H.R. 1268 (the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief") was not germane to the present case, Section 6063 (the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005") applied directly to the issue before the court. *Id*.

pending appeal.[149] The Act stated that it was in the public interest for states to regulate fish and wildlife within its boundaries.[150] These regulations include distinguishing between residents and nonresidents in licenses or permits, in the type of wildlife that may be taken, or in the fees the state charges to issue hunting licenses.[151] Finally, the Act stated that congressional silence is not a barrier to states' regulation of hunting or fishing.[152]

In construing the Act, the Eighth Circuit discussed *Schutz v. Thorne*,[153] a Tenth Circuit case involving a dormant Commerce Clause challenge to Wyoming's nonresident hunting license fee scheme.[154] *Schutz* stated that "[t]he essential element of a dormant Commerce Clause claim is congressional inaction, so when Congress does act, the dormancy ends, thus leaving the courts obliged to follow congressional will."[155] *Schutz* found that H.R. 1268 provided for this congressional action, ending the dormancy and rendering the claim moot.[156]

The Eighth Circuit agreed with the Tenth Circuit by finding H.R. 1268 sufficient to end Minnesota's dormant Commerce Clause claim.[157] First, the Eighth Circuit overruled the district court's analysis that "[c]ongressional interpretation of what is and is not commerce is not controlling on the judicial branch."[158] This premise was based on *United States v. Lopez*,[159] which involved a "positive" Commerce Clause challenge to

149. *Id.* The test for mootness applies at all stages of the judicial process, including during appellate review. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (citation omitted); County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) ("A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (citation omitted); Republican Party v. Klobuchar, 381 F.3d 785, 790 (8th Cir. 2004) (reinforcing that federal courts cannot give opinions on abstract questions of law that are not materially before the court).

150. *Hoeven II*, 456 F.3d at 831 (citing Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, H.R. 1268, 109th Cong. § 6036 (2005)).

151. *Id.*

152. *Id.*

153. 415 F.3d 1128 (10th Cir. 2005).

154. *Id.*

155. *Id.* at 832 (quoting Schutz v. Thorne, 415 F.3d 1128, 1138 (10th Cir. 2005)).

156. *Id.*

157. *Id.*; *see* Arizonans for Official English v. Arizona, 520 U.S. 43, 72 (1997) (finding the claim moot when the plaintiff took up private sector employment, where her speech was not governed by the article at issue); W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 655 (1981) (rejecting a dormant Commerce Clause challenge to California's retaliatory tax because the McCarran-Ferguson Act removed any Commerce Clause limitations on the states to regulate insurance); Republican Party v. Klobuchar, 381 F.3d 785, 790 (8th Cir. 2004) (holding claims moot when the criminal charges, which were a necessary element to the claims, were dismissed).

158. *Hoeven II*, 456 F.3d 826, 832 (8th Cir. 2006).

159. 514 U.S. 549 (1995).

congressional action in passing the Gun-Free School Zones Act of 1990.[160] The present case, on the other hand, arose out of a dormant Commerce Clause challenge.[161] In a dormant Commerce Clause challenge, the court determines "whether the state's law discriminates against interstate commerce and whether sufficient justification exists for the burden imposed."[162] The distinction is imperative because, with regard to dormant Commerce Clause claims, the Supreme Court has held that, "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to a Commerce Clause challenge."[163] Consequently, H.R. 1268 permitted North Dakota to restrict nonresident hunting in a manner consistent with the scope of the congressional action.[164]

Minnesota countered that H.R. 1268 was part of an appropriations bill, and thus the Congressional action was only a temporary measure.[165] While appropriations acts generally operate for only one fiscal year, the language of the provision at issue may indicate it is intended to be permanent.[166] For example, an indicia of permanence exists when the provision has no appropriation attached to it.[167] However, the critical element is the existence of words that intend to make the provision apply in the future, because Congress will use these words when it intends to make a provision permanent in nature.[168]

The Eighth Circuit interpreted section 6036 to contain these necessary words of futurity.[169] Section 6036(b)(1) provides, "*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

160. *Hoeven II*, 456 F.3d at 832 (citing *Lopez*, 514 U.S. at 551). The Supreme Court in *Lopez* said that Congress "could not decide the outer limits of its power to regulate interstate commerce." *Id*. (citing *Lopez*, 514 U.S. at 556-58).

161. *Id*. at 830.

162. *Id*. at 831 (citing Smithfield Foods, Inc. v. Miller, 367 F.3d 1061, 1065 (8th Cir. 2004)).

163. *Id*. at 832 (quoting W. & S. Life Ins. Co., 451 U.S. at 652-53).

164. *Id*. at 831.

165. *Id*. at 833.

166. *Id*. (citing Bldg. & Constr. Trades Dep't v. Martin, 961 F.2d 269, 273-74 (D.C. Cir. 1992)).

167. *Id*. (citing United States v. Int'l Bus. Mach. Corp., 892 F.2d 1006, 1008-09 (Fed. Cir. 1989)); *see Bldg. & Constr. Trades Dep't*, 961 F.2d at 274 (noting that the absence of an appropriation is an indication of permanence).

168. *Hoeven II*, 456 F.3d 826, 833 (8th Cir. 2006); *see Int'l Bus. Mach. Corp*., 892 F.2d at 1009 ("Had Congress intended to make the exception permanent, it knew how: it could and we believe would have used words of futurity, like 'hereafter, notwithstanding any other provisions of law[.]'").

169. *Hoeven II*, 456 F.3d at 833.

nonresidents of such State."[170] The language necessarily implies the words of futurity, as states could not "continue" to regulate hunting consistent with congressional policy if Congress intended the Act to apply only temporarily.[171] Section 6036(b)(2) continues, "[s]ilence on the part of Congress *shall not be construed* to impose any barrier" to regulation under the Commerce Clause.[172] If Congress intended only temporary action, it would not give silence the effect of approving continued state regulation.[173]

Aside from a plain reading of section 6036, the court also considered the context within which the legislation was passed.[174] The court had "no doubt" that the Act arose in response to the Ninth Circuit's ruling in *Conservation Force*, which found that Arizona's cap on nonresident hunting was discriminatory to interstate commerce.[175] The Ninth Circuit in *Conservation Force* distinguished the facts from *Baldwin* because the cap was not limited to recreational hunting.[176] Minnesota relied heavily on this unusual ruling in *Conservation Force* in constructing its dormant Commerce Clause claim.[177] But the Eighth Circuit, while declining to reach the merits of the dormant Commerce Clause claim, followed the permitted distinctions between nonresidents and residents contained in Congress's enactment of the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005."[178]

B. PRIVILEGES AND IMMUNITIES CLAUSE

Minnesota's second claim alleged that North Dakota's nonresident hunting restrictions violated the Privileges and Immunities Clause.[179] The two-pronged Privileges and Immunities Clause framework considers: (1) whether the law discriminates against a protected privilege or immunity;

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170. *Id.* (quoting H.R. 1268 § 6036(b)(1) (2005)) (emphasis added).

171. *Id.*

172. *Id.* (quoting H.R. 1268 § 6036(b)(2) (2005)).

173. *Id.*

174. *Id.*

175. *See id.* ("The committee report expressed concern that the Ninth Circuit's decision 'could have an effect on the thinking of Federal courts across the country.'") (quoting 151 CONG. REC. H2997-02, at 3023 (2005)).

176. *Id.* at 832 n.7; *see* Conservation Force, Inc. v. Manning, 301 F.3d 985, 994 (9th Cir. 2002) (noting that Arizona's hunting regulations substantially affect the interstate market of nonedible portions of bull elk and antlered deer that are sold).

177. *Hoeven II*, 456 F.3d at 833 (citing Minnesota v. Hoeven, 370 F. Supp. 2d 960, 971 (D.N.D. 2005)); *see* Schutz v. Wyoming, No. 02-CV-165-D, 2003 U.S. Dist. LEXIS 26518, at *18-19 (D. Wyo. May 28, 2003), *aff'd*, Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005) (finding *Conservation Force* to be unprecedented in its Commerce Clause analysis because it is inconsistent with Supreme Court precedent).

178. *Hoeven II*, 456 F.3d at 833.

179. *Id.*

and (2) whether sufficient justification exists for the discrimination.[180] However, after considering *Baldwin*, the Eighth Circuit found it unnecessary to reach the second prong of the analysis.[181]

1. *Fundamental Rights Analysis*

The Eighth Circuit turned to the United States Supreme Court's decision in *Baldwin* to determine whether hunting constituted a fundamental right.[182] The Supreme Court recognized that only those privileges and immunities deemed to be fundamental are protected by the Clause.[183] In *Baldwin*, the United States Supreme Court encountered a Privileges and Immunities Clause claim based on Montana's licensing scheme for elk hunting, which charged nonresidents significantly higher rates than residents.[184] The *Baldwin* Court determined that elk hunting is a recreational activity.[185] Nonresidents are not excluded from elk hunting, *Baldwin* maintained, and in fact, many nonresidents sacrifice to participate in the sport.[186] Thus, because it is only recreation, the *Baldwin* Court held elk hunting was not a fundamental right under the Clause.[187] The Eighth Circuit found waterfowl hunting to be like the elk hunting analyzed in *Baldwin*; both are recreation.[188] Furthermore, livelihood and the basic right to the well being of the Union are not implicated in waterfowl hunting.[189]

2. *Hunting Is Not a Property Right*

Minnesota recognized *Baldwin*'s authority, but distinguished the present facts through a property rights analysis, which was not addressed in *Baldwin*.[190] According to this argument, North Dakota discriminated against nonresidents who owned or leased property in North Dakota, because

180. *Id.* at 834 (citing United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 218, 221-23 (1984)).

181. *Id.*

182. *Id.*

183. *Id.* (citing Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978)).

184. *Hoeven II*, 456 F.3d 826, 834 (citing *Baldwin*, 436 U.S. at 378-79).

185. *Id.* (citing *Baldwin*, 436 U.S. at 388).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 834-35. *Baldwin* recognized that the Privileges and Immunities Clause prevents a state from imposing unreasonable burdens "in the ownership and disposition of privately held property within the State." *Baldwin*, 436 U.S. at 383 (citing Blake v. McClung, 172 U.S. 239, 258 (1898)).

they were not able to hunt on their own property in a manner consistent with resident owners and lessees.[191]

The Eighth Circuit considered North Dakota law to see whether there is a property right to hunt associated with the purchase or lease of land.[192] At common law, a landowner did have the right to hunt wildlife on his land.[193] However, the North Dakota Constitution provides that hunting "will be forever preserved for the people and managed by law and regulation for the public good."[194] Additionally, the North Dakota Century Code reaffirms the state's control over wildlife.[195] The state owns all wildlife "for the purpose of regulating the enjoyment, use, possession, disposition, and conservation thereof."[196] Furthermore, North Dakota reserves the right to prescribe the manner, number, place, and time in which wildlife may be taken.[197] Finally, except under certain exceptions, residents and nonresidents may not hunt or take game without a license.[198] The Eighth Circuit also recognized the North Dakota Supreme Court's approval of these statutory schemes.[199]

The Eighth Circuit acknowledged that North Dakota permitted residents to hunt small game, fish, or trap during the open season without a license on their own land.[200] However, the court distinguished the type of discrimination apparent in this statute—the discrimination is against nonresident recreational hunting, which is not protected under the Privileges and Immunities Clause.[201] Furthermore, this provision is only a limited exception to the general prohibition against hunting without a license.[202]

Finally, Minnesota analogized *Paul v. Virginia*,[203] *Corfield*, and *Blake*, three historical cases dealing with property rights.[204] The Eight Circuit

191. *Hoeven II*, 456 F.3d at 835.

192. *Id.*

193. *Id.* (quoting Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1575 (10th Cir. 1995)).

194. *Id.* (citing N.D. CONST. art. XI, § 27).

195. *Id.* (citing N.D. CENT. CODE § 20.1-01-03 (2003)).

196. *Id.* (citing N.D. CENT. CODE § 20.1-01-03 (2003)).

197. *Id.* (citing N.D. CENT. CODE § 20.1-08-04 (2003)).

198. *Id.* (citing N.D. CENT. CODE §§ 20.1-03-03, -07 (2003)).

199. *See id.* at 835 (citing State *ex rel.* Stuart v. Dickinson Cheese Co., 200 N.W.2d 59, 61 (1972) (holding that the state has the power to set conditions for reducing wildlife to ownership); State v. Hastings, 41 N.W.2d 305, 308 (N.D. 1950) (following the statutory scheme for acquiring title to or the right to sell muskrat pelts).

200. *Hoeven II*, 456 F.3d at 835 (citing N.D. CENT. CODE § 20.1-03-04 (2003)).

201. *Id.*

202. *Id.* (citing N.D. CENT. CODE § 20.1-03-03 (2003)).

203. 75 U.S. 168 (1869).

204. *Hoeven II*, 456 F.3d at 836. *Paul* discussed citizens' freedom in acquiring property, and the recognition of this right in other states. Paul v. Virginia, 75 U.S. 168, 180-81 (1869). In *Corfield*, the Circuit Court of Pennsylvania categorically recognized the right to acquire and

recognized the authority of these cases, to the extent they are consistent with *Baldwin* in protecting property rights.[205] However, the court reasoned that nothing in these cases or any others establishes hunting as part of the bundle of property rights associated with the ownership or leasing of land.[206] Therefore, the Privileges and Immunities Clause claim failed because North Dakota's nonresident hunting regulations did not implicate a fundamental right.[207]

IV. IMPACT

Hoeven represents a significant reaffirmation of states' rights to regulate wildlife within their borders.[208] North Dakota officials and residents praised the publicized ruling, while Minnesota officials criticized it as protectionism.[209] With the court battle likely over, both sides are contemplating how to best manage wildlife in the future to serve the competing interests of residents and nonresidents.[210]

A. STATES' POWER TO FAVOR RESIDENTS

As a result of *Hoeven*, states will continue to grant preferred access to residents over nonresidents in hunting and fishing opportunities.[211] This is evident already in the Kansas district court case *Taulman v. Hayden*,[212] which involved a Privileges and Immunities Clause challenge by a nonresident hunter who owned land in Kansas, similar to *Hoeven*.[213] The district court conducted an analysis that was nearly identical to *Hoeven*.[214] First,

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possess property. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). In *Blake*, the Supreme Court while reaffirming that not all Privileges are protected, held that a state could not discriminate against a creditor merely because of its out-of-state status. Blake v. McClung, 172 U.S. 239, 258 (1898).

205. *Id.*

206. *Id.* These cases only concern the proposition that the Privileges and Immunities Clause protects property rights in general. Hunting rights are not held to be part of these protected rights, however, in any of the cases. *Id.*

207. *See id.* (dismissing the Privileges and Immunities Clause claim after finding hunting not a protected fundamental right).

208. Press Release, N.D. Att'y Gen., North Dakota's Nonresident Hunting Laws Upheld, (Aug. 3, 2006), *available at* http://www.ag.state.nd.us/documents/08-03-06.pdf.

209. Doug Smith, *New Bill Won't Affect State's Lawsuit*, STAR TRIB. (M.N.), May 15, 2005, at 15C.

210. Tom Rafferty, *North Dakota Wins Hunting Case*, BISMARCK TRIB. (N.D.), Aug. 4, 2006, at 1.

211. *See Hoeven II*, 456 F.3d at 829 n.6 (providing laws of South Dakota, Alaska, Colorado, Kansas, Montana, Nebraska, Nevada, Utah, Wyoming, and other states that give preference to residents over nonresidents in hunting and fishing opportunities).

212. No. 05-1118, 2006 U.S. Dist. LEXIS 65493 (D. Kan. Sept. 13, 2006).

213. *Taulman*, 2006 U.S. Dist. LEXIS 65493, at *1.

214. *Id.* at *12.

the court recognized that only fundamental rights are protected.[215] Next, the district court analogized the facts of the case to *Baldwin*.[216] The plaintiff in *Taulman* distinguished this case from *Baldwin*, however, because he did not hunt for recreation, but rather "to teach his children about hunting traditions, use the animals for food, use the animal hides and antlers, strengthen family bonds, and instill an appreciation of nature."[217] The district court found that these motivations, although valid, were still not basic to the well-being of the Union, and thus not fundamental and deserving of protection.[218]

The district court in *Taulman* then directly followed *Hoeven* in its determination of a landowner's right to hunt.[219] Like the Eighth Circuit, the Kansas district court looked to state law to determine the nature of the landowner's right to hunt.[220] While the statutory scheme differed slightly between Kansas and North Dakota, the district court arrived at the same conclusion, finding that the right of a nonresident landowner to access his land in the same manner as residents was not fundamental.[221] The district court thus declined to reach the second prong of the analysis and upheld the nonresident hunting restrictions.[222]

States may now use *Hoeven* to extend nonresident restrictions even further than those now in effect.[223] Furthermore, states could attempt to extend *Hoeven* to other areas of law when granting residents preferred benefits over nonresidents.[224] Previous case law, in some respects, encourages this extension because the fundamental rights protected by the Privileges and Immunities Clause are not enumerated.[225]

But states also realize the immense economic benefits generated from nonresident hunting.[226] In Missouri, for example, hunting generates revenue of over $853 million annually, and at least $148 million of this comes

215. *Id*.
216. *Id*. at *12-13.
217. *Id*. at *14.
218. *Id*. at *15.
219. *Id*.
220. *Id*.
221. *Id*. at *19.
222. *Id*.
223. Smith, *supra* note 209, at 15C.
224. *See* 35A AM. JUR. 2D *Fish, Game, and Wildlife Conservation* § 41 (2006) ("The inquiry in each case must be concerned with the question as to whether reasons for differentiation between residents and nonresidents exist and whether the degree of discrimination bears a close relation to them.").
225. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978).
226. Ken Newton, *"Big-Game Bucks": Out-of-State Hunters Funnel Money Into the Region*, ST. JOSEPH NEWS-PRESS (Mo.), Nov. 19, 2006, at State & Regional News.

from nonresident hunters.[227] This is not an isolated occurrence, as communities nationwide benefit from the economic surplus brought by nonresident hunters.[228] According to the United States Fish and Wildlife Service, hunting expenditures accounted for a total of $20.6 billion in 2001, including approximately $5.3 billion in trip-related expenses alone.[229] Migratory bird hunters alone spent $1.4 billion for hunting trips and equipment in 2001.[230]

Such statistics are impressive when considering the ripple effects throughout the economy.[231] For example, waterfowl hunting expenditures in 2001 created 21,415 jobs, over $129.5 million in state tax revenue, and $201.8 million in federal tax revenue.[232] The Eighth Circuit's decision in *Hoeven* may impact some of the $2.3 billion in total economic output generated by waterfowl hunters if nonresident hunters reduce their expenditures or stop hunting out-of-state due to increased restrictions like those upheld in *Hoeven*.[233]

B. NORTH DAKOTA

The impact on North Dakota is more readily apparent as the balancing of resident and nonresident interests continues to be one of the biggest challenges faced by the North Dakota Game and Fish Department, the North Dakota Legislature, and local communities.[234] North Dakota officials are satisfied with *Hoeven*'s "implications on future wildlife-management decisions."[235] But it is not yet known whether the present restrictions will satisfy North Dakota residents' concerns over competition for prime hunting spots, although other circumstances, such as environmental conditions, factor into this equation.[236]

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227. *Id*.

228. *Id*.

229. U.S. FISH & WILDLIFE SERV., 2001 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 32 (2001), *available at* http://www.census.gov/prod/2002pubs/FHW01.pdf.

230. *Id*. at 34.

231. U.S. FISH & WILDLIFE SERV., ECONOMIC IMPACT OF WATERFOWL HUNTING IN THE UNITED STATES: ADDENDUM TO THE 2001 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 10 (2005), *available at* http://library.fws.gov/nat_survey2001_waterfowlhunting.pdf.

232. *Id*. at 10.

233. *Id*.

234. Richard Hinton, *Hanging Up His Hat: Dean Hildebrand to Retire by Year's End*, BISMARCK TRIB. (N.D.), June 18, 2005, at 1A.

235. Rafferty, *supra* note 210, at Bus. & Financial News.

236. *See Residents Only on PLOTS Oct. 14-20*, BISMARCK TRIB. (N.D.), Oct. 4, 2006, at 1C-4C (discussing the increased difficulty in finding prime hunting spots due to the decrease in wetlands).

The Legislative Council's report, which was the basis of the restrictions in *Hoeven*, recognized that time restrictions on nonresident hunters might not solve the residents' calls for greater hunting opportunity.[237] This is because waterfowl hunting depends largely on the timing of migration, which, in turn, depends on the weather.[238] In a recent national duck hunter survey, North Dakota hunters responded that over the past five years, the habitats where they hunt were neither better nor worse, and the overall quality of their hunts was about the same.[239]

While hunting quality assessments are tougher to make, the quantitative data shows increased growth in both resident and nonresident hunters in 2005.[240] In 2005, North Dakota set a state record for resident hunters, with approximately 26,000 more hunting licenses purchased than in 1990, despite virtually no change in the state's population.[241] These record numbers will likely increase North Dakota's $17.5 million total economic output generated in 2001 from waterfowl hunting.[242] North Dakota may also see the creation of more jobs because of the increase in hunters; in 2001, waterfowl hunting created an estimated 236 jobs in the state.[243] The figures demonstrate why small town businesses opposed the nonresident hunting restrictions at issue in *Hoeven*.[244] With nonresident hunters making seventy-eight percent of their expenditures in rural areas, it is clear that even a minor decrease in the number of hunters due to the upheld restrictions could drastically impact rural businesses that depend on the influx of out-of-state customers.[245]

Despite the economic concerns, North Dakota officials have pledged to continue to place residents first in addressing future wildlife regulations.[246] However, North Dakota residents may feel the negative effects of *Hoeven* in other states in the form of retaliatory legislation.[247] Particularly in

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237. STAFF OF S. COMM. ON THE JUDICIARY B, 57TH LEGISLATIVE ASSEMBLY, RESIDENT AND NONRESIDENT ISSUES STUDY BACKGROUND MEMORANDUM 4 (N.D. 2001), *available at* http://www.legis.nd.gov/ assembly/57-2001/docs/pdf/39029.pdf.

238. *Id*.

239. Richard Hinton, *North Dakota Duck Hunters Seem Satisfied*, BISMARCK TRIB. (N.D.), Mar. 22, 2006, at 1C.

240. Richard Hinton, *Year End Review: Part II*, BISMARCK TRIB. (N.D.), Jan. 3, 2007, at 1C-3C.

241. Doug Leier, *Outdoors*, BISMARCK TRIB. (N.D.), Jan. 17, 2007, at 1C.

242. U.S. FISH & WILDLIFE SERV., *supra* note 224, at 11.

243. *Id*. at 10.

244. STAFF OF S. COMM. ON THE JUDICIARY B, *supra* note 237, at 4.

245. *Id*. at 5.

246. Richard Hinton, *Steinwand Has Full Agenda as New Game and Fish Director*, BISMARCK TRIB. (N.D.), Mar. 5, 2006, at 1A.

247. Rafferty, *supra* note 210, at Bus. & Financial News.

Minnesota, retaliatory legislation is more than a possibility because a proposed bill would restrict nonresidents from fishing during the first two weeks of the season.[248] However, state officials from Minnesota and North Dakota cautioned against strong reactions.[249]

As for further state regulations, the 2007 North Dakota legislative session will not have the contentious atmosphere of two years ago when the original restrictions were put in place.[250] Indeed, the legislature seemed to make a policy reversal by relaxing certain zoning restrictions against nonresident waterfowl hunting.[251] At the same time, certain bills that have been introduced implicate other wildlife management areas by calling for an increase in nonresident fees for a fishing license.[252] Despite any increase in nonresident restrictions, state officials remain determined to attract nonresidents to continue growing the state's tourism industry and to support local communities that thrive on the incoming business.[253]

V. CONCLUSION

In *Minnesota v. Hoeven*, the Eighth Circuit Court of Appeals upheld North Dakota's restrictions on nonresident hunters, reaffirming states' rights to manage wildlife resources within their borders.[254] The court neglected to reach the merits of the dormant Commerce Clause claim, instead holding the claim moot due to the passage of the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005."[255] The court also rejected Minnesota's Privileges and Immunities Clause claim because hunting is recreation and sport, which is not recognized as part of the bundle of property rights associated with the ownership or lease of land.[256]

Andrew Cook[*]

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248. *Id.*

249. *Id.*

250. Hinton, *supra* note 246, at 1A.

251. Doug Smith, *Waterfowl Hunters Sound Off*, STAR TRIB. (M.N.), May 1, 2005, at 7C.

252. S. 2332, 60th Leg. (N.D. 2007). S. 2332 would raise fishing license fees to a fixed dollar amount, or the amount charged to a North Dakota resident by the nonresident's home state. The bill failed to pass, however. *Id.*

253. *New North Dakota Blue Book Features State's Eco-Tourism*, U.S. ST. NEWS, Nov. 21, 2005.

254. Minnesota v. Hoeven, 456 F.3d 826, 836 (8th Cir. 2006).

255. *Id.* at 832.

256. *Id.* at 836.

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