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Comment

RESERVING WILDLIFE FOR RESIDENT CONSUMPTION: Is the Dormant Commerce Clause the Outfitters' White Knight?¹

INTRODUCTION

Proper management of big game animals² requires that Wyoming annually issue a limited number of big game hunting licenses. Wyoming issues two types of licenses: general and limited quota licenses.³ The Wyoming Game and Fish Commission (Commission)⁴ determines how many limited quota licenses will be available in each limited quota hunting area based upon animal population and conservation goals.⁵ Of these licenses, the Commission allocates eighty-four percent of limited quota elk licenses and eighty percent of limited quota deer, antelope, and wild turkey licenses to Wyoming residents,⁶ with the corresponding sixteen and

1. The author owns partial interests in a Wyoming game-bird farm and a Wyoming deer and antelope outfitting business.

2. In Wyoming, "Big game animal[s]" include antelope, bighorn sheep, deer, elk, moose and mountain goat. WYO. STAT. ANN. § 23-1-101(a)(i) (Michie 1977).

3. Wyoming defines a general license as "a big or trophy game license valid in any hunt area which is not limited by quota. General licenses are valid only under species, sex, age class and harvest limitations which are in effect for each hunt area." Game & Fish Commission, WYO. REG. CH. XLIV, § 2(c) (1996). Wyoming defines a limited quota license as "a license limited in number and valid only in a specified area or a portion of an area, for a specified sex or species of big or trophy game or wild turkey during specified season dates." *Id.* § 2(h).

4. The Commission consists of seven appointed commissioners; the governor serves as an *ex officio* member. WYO. STAT. ANN. § 23-1-201 (Michie 1977). Only four of the seven appointed commissioners may be of the same political party. *Id.* Commissioners are appointed by the governor with the advice and consent of the Wyoming Senate for terms of six years. *Id.* The governor has the power to remove a commissioner. *Id.* § 202.

5. WYO. STAT. ANN. § 23-1-103 (Michie 1977). The Wyoming Legislature delegated rule-making authority to the Wyoming Game and Fish Commission to issue and regulate the licensing of wildlife in the State of Wyoming. WYO. STAT. ANN. §§ 23-1-302(a) (xiv),(xxii) (Michie Supp. 1996). Wyoming statute also explicitly provides that the Commission may limit the number of resident or nonresident big or trophy game animal licenses. WYO. STAT. ANN. § 23-1-703(a) (Michie Supp. 1996).

6. Game & Fish Commission, WYO. REG. CH. XLIV, § 6 (1996).

twenty percent to nonresidents.⁷ Individuals wishing to hunt in a limited quota area in Wyoming choose a hunting area and submit their application to the Wyoming Game and Fish Department (Department).⁸ If the number of applications for a limited quota area exceeds the number of available licenses for that area, a competitive drawing randomly selects successful applicants who are then issued a license.⁹

Hunters who are unfamiliar with a hunting area often procure the services of an outfitter or guide¹⁰ to increase their chances for a successful hunt.¹¹ Nonresidents are less likely than residents to be familiar with a hunting area and generally, for economic reasons, have a shorter period of time to hunt.¹² Thus, hunters who hire a professional guide are usually nonresidents.¹³

7. Game & Fish Commission, WYO. REG. CH. XLIV, § 6 (1995). In the 1996 REGULATIONS FOR ISSUANCE OF LICENSES, the Commission has omitted the paragraph that allocates sixteen and twenty percent of licenses to nonresidents. Game & Fish Commission, WYO. REG. CH. XLIV, § 7 (1996). However, Section 6 of the 1996 regulations continues to provide the same allocation percentage to residents, and thus, the allocation percentages to nonresidents also remains at sixteen and twenty percent.

Nonresident limited quota licenses are further divided into regular and special license types. Game & Fish Commission, WYO. REG. CH. XLIV, § 7(c) (1996). Special licenses are defined as "those licenses having a fee greater than that of a regular nonresident elk, deer or antelope license as defined in [WYO. STAT. ANN. § 23-2-101 (f)(i),(ii),(iii) (Michie Supp. 1996)]." *Id.* § 2(r). Forty percent of the nonresident allocation are special licenses. *Id.* § 7(c). The remaining sixty percent are regular licenses. *Id.* The purpose of this higher-priced license is to decrease demand, thereby increasing a nonresident's chance to draw a license. Game & Fish Department, BIG GAME LICENSE ALLOCATION - SITUATION ANALYSIS (hereinafter, "SITUATION ANALYSIS"), at 2 (1995).

When the Commission began analyzing Wyoming's licensing system in mid-1995, the Game and Fish Department presented a summary of the license allocation issues to the Commission on July 10, 1995. *Id.* at 6. This SITUATION ANALYSIS acknowledged the sources of controversy surrounding license allocation and need for resolution. *Id.* at 4-5.

8. Game & Fish Commission, WYO. REG. CH. XLIV, §§ 2(b), 5, 7 (1996).

9. *Id.* §§ 5(a), 7(a) (1996).

10. For the purposes of this work, the terms "outfitters" and "guides" will be used interchangeably.

11. In addition to employing an outfitter because of a lack of familiarity with the hunting area, hunters often employ an outfitter because of the services, other than guiding, that an outfitter provides. Interview with Steve Sheaffer, Licensed Wyoming Outfitter and President of Professional Recreational Outfitters of Wyoming, in Arlington, Wyo., (Mar. 12, 1996) (hereinafter, "Sheaffer Interview, (Mar. 12, 1996)"). These outfitting services include providing lodging, transportation, food, hunting equipment and other supplies. *Id.*

12. *Id.* Wyoming law also prohibits nonresidents from hunting big game on "any designated wilderness area . . . unless accompanied by a licensed professional guide or a resident guide" and provides that the "commission may also specify other areas of the state . . . for which a licensed professional or resident guide is required for nonresidents, for purposes of proper game management, protection of hunter welfare and safety, or better enforcement of game fish laws." WYO. STAT. ANN. § 23-2-401(a) (Michie Supp. 1996).

13. Sheaffer Interview, (Mar. 12, 1996). This pattern of nonresident guide use seems to be consistent throughout the United States. Telephone Interview with George Taulman, United States Outfitters, Inc., Taos, N.M. (Sept. 7, 1996); Telephone Interview with Ken Church, Blindfold Guide

Wyoming's allocation system necessarily creates uncertainty about whether a hunting applicant will draw a license,¹⁴ and which area the applicant will draw.¹⁵ Even though outfitting produces a significant amount of revenue for Wyoming,¹⁶ outfitters find it difficult to engage in business under this system because of these uncertainties.¹⁷ Wyoming's system is so unpredictable that at least one outfitter, who does business throughout the United States, has simply chosen to forego Wyoming's relatively impenetrable market.¹⁸

The uncertainty of the allocation system compounded by the small number of limited quota licenses allocated to nonresidents means that an outfitter has practically no opportunity to establish a client base.¹⁹ An outfitter cannot establish a clientele because potential clients may not draw hunting licenses. As a result, prior to each hunting season, the outfitter must seek out new clients because the outfitter cannot rely on an established clientele.²⁰ After finding prospective clients, an outfitter must inform them that although the hunting is great, a nonresident's chance of drawing a license is not.²¹ All this makes the Wyoming outfitter and

Service, Kanab, Utah (Sept. 7, 1996); Telephone Interview with John Cole, Hunters Rendezvous, Monument, Or. (Sept. 7, 1996); Telephone Interview with Lori Ginn, International Outdoor Consultants, Hamilton, Mont. (Sept. 7, 1996).

14. SITUATION ANALYSIS, *supra* note 7, at 1.

15. An applicant may list as many areas as space is provided for on the application. Game & Fish Commission, WYO. REG. CH. XLIV, §§ 5, 6 (1995).

16. Taking into account only the sales of outfitting services in Wyoming, the economic impact from outfitting clients hunting in Wyoming exceeds forty-five million dollars. DAVID T. TAYLOR & ROBERT R. FLETCHER, *THE ECONOMIC IMPACT OF THE WYOMING OUTFITTING INDUSTRY: AN UPDATE - 1993*, at 4-6, (Jan. 1995).

17. Steve Sheaffer remarked that, in 1996, of his sixty potential elk hunting clients, only six drew licenses; of his thirty-eight potential deer hunting clients, five drew licenses; and of his forty-four potential antelope hunting clients, four drew licenses. Telephone Interview with Steve Sheaffer, (July 10, 1996). See *supra* note 11 for qualifications.

18. A Montana outfitter and booking agent remarked that her company has no outfitter representatives in Wyoming because it is "impossible to draw tags." Telephone Interview with Lori Ginn, Outfitter and Booking Agent, International Outdoor Consultants, Hamilton, Mont. (Sept. 7, 1996).

19. A recent article reported that Dick Sadler, a former Wyoming state legislator and an outspoken proponent of resident hunting interests, believes that the outfitting industry in Wyoming is growing. David Boyd, *Outfitter's Business Rests On Luck Of The Draw*, CASPER STAR TRIB., Oct. 24, 1996, at E1. Sadler contends that, based upon figures obtained from the Wyoming State Board of Outfitters and Professional Guides, "the number of outfitters in Wyoming stayed about the same during the early '90s, but the number of elk hunters who use outfitters increased by about a third." *Id.* at E5. However, Jane Flagg, Administrator of the Board of Outfitters and Professional Guides, remarked that the number of hunters who use an outfitter has remained constant at around 10,000 over the last five years. Telephone Interview with Jane Flagg, Administrator, Wyoming State Board of Outfitters and Professional Guides, Cheyenne, Wyo. (Nov. 1, 1996). The exact number of hunters who use an outfitter for the years prior to 1995 was not available. *Id.*

20. See *supra* note 11.

21. In 1995, a total of 40,417 limited quota licenses were available to resident elk hunters. Wyoming Game & Fish Department, RESIDENT ELK DEMAND INDEX, Mar. 3, 1996. Only 32,414

hunting in Wyoming less attractive when the nonresident hunter can be assured a license in states surrounding Wyoming.²²

Wyoming outfitters have long advocated changing the license allocation system so that drawing a nonresident license would be more certain.²³ Proposals include modifying the method of nonresident license draws²⁴ and placing some of the resident licenses in the nonresident pool,²⁵ but neither proposal has been popular with resident hunters.²⁶ Suggestions which would diminish the number of resident licenses have polarized the resident hunters and outfitters.²⁷

Recent lawsuits challenging the constitutionality of Wyoming's hunting laws²⁸ and the threat of future litigation have made resolving the differences between outfitters and resident hunters an increasingly important objective for the Commission.²⁹ One attempt to resolve these differences was the creation of the License Allocation Task Force (Task Force), which was composed of various hunting inter-

applications were received. *Id.* Thus, a license was available for every applicant. In contrast, the 1995 figures show that 1,878 regular limited quota licenses were available to nonresident elk hunters, while 6,093 applications were received. Wyoming Game & Fish Department, NONRESIDENT ELK DEMAND INDEX, Mar. 3, 1996. With respect to special limited quota licenses, 2013 licenses were available for 3,233 applicants. *Id.* Nonresidents, therefore, have only a 30.8 percent chance of drawing a regular limited quota license and a 62.2 percent chance of drawing a special limited quota license.

22. For example, Montana and Idaho both provide licenses to nonresidents who contract to hunt with an outfitter. IDAHO CODE § 36-408(c)(Supp. 1996); MONT. CODE ANN. § 87-2-511 (1995). See Appendix, State Licensing Systems.

23. In 1989, the outfitting industry successfully lobbied the Wyoming legislature for nonresident license fee increases, intending that demand would decrease, thus improving the success rate. SITUATION ANALYSIS, *supra* note 7, at 2. The results of this fee increase have been mixed. *Id.* While the revenue for the Game & Fish Department has increased, there is still no assurance of drawing a license and every year the Department receives numerous complaints from hunters because of price differentials. *Id.*

24. See *infra* notes 166-172 and accompanying text.

25. See *infra* note 163.

26. See *infra* notes 164, 172 and accompanying text.

27. Dick Sadler remarked that the plaintiffs in *Clajon Production Corp. v. Petera*, 854 F.Supp. 843 (D. Wyo. 1994), who challenged Wyoming's licensing allocation system, "had better be careful about raising the ire of the state's sportsmen." Tom Bishop, *Suit Over Wildlife 'Dangerous'*, CASPER STAR TRIB., Aug. 29, 1993, at B1. Sadler stated that "[t]his could very well lead to punitive legislation this next session." *Id.*

28. SITUATION ANALYSIS, *supra* note 7, at 3. Since 1992, there have been three legal challenges to Wyoming's wildlife laws. *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992) (challenging the constitutionality of Wyoming's ban on the private ownership and import of big game and trophy animals); *Clajon Prod. Corp. v. Petera*, 854 F.Supp. 843 (D. Wyo. 1994) (challenging the constitutionality of Wyoming's license allocation system); *Wyoming Coalition v. Wyoming Game & Fish Comm'n*, 875 P.2d 729 (Wyo. 1994) (challenging the constitutionality of the Commission's authority to set hunting season dates).

29. Letter from Jim Geringer, Governor, Wyoming, to the Wyoming Game and Fish Commission, (Apr. 26, 1995) (requesting cooperation to find creative licensing allocation alternatives) (on file with the *Land and Water Law Review*).

ests.³⁰ For approximately six months, the Task Force considered licensing alternatives and sought a solution to recommend to the Commission.³¹ This attempt failed; the Task Force could not reach a consensus on an alternative to the current big-game license allocation system to recommend to the Commission.³²

Unless Wyoming adopts an alternative to its license allocation system,³³ outfitters may once again resort to litigation.³⁴ This comment will discuss how the dormant Commerce Clause might serve as a basis for a legal challenge to the Wyoming license allocation system. First, United States Supreme Court dormant Commerce Clause cases and the tests that apply to Wyoming's allocation system will be reviewed. Second, it will consider the ramifications of the *Clajon Production Corp. v. Petera*³⁵ litigation on a future plaintiff. Third, it will analyze how Wyoming's system fares against a dormant Commerce Clause challenge, including a discussion of alternative licensing schemes. Finally, it will briefly address the Wyoming Legislature's role in resolving the controversial hunting license allocation issues.

BACKGROUND

Dormant Commerce Clause

Through the Commerce Clause the United States Constitution³⁶ grants Congress far-reaching regulatory power over interstate Com-

30. The Department appointed a task force to study license allocation issues. Game & Fish Department, BIG GAME LICENSE ALLOCATION TASK FORCE - A REPORT TO THE WYOMING GAME AND FISH COMMISSION (hereinafter, "TASK FORCE REPORT"), at 6. The Task Force consisted of sixteen individuals: four landowners, four outfitters, four sportsmen, two conservationists, and two non-voting Game and Fish liaisons. *Id.* The Task Force's first meeting took place in January 1996. *Id.*

31. *Id.* at 6-14.

32. *Id.* at 14.

33. The Game and Fish Commission is hearing public comment on six proposals to improve access and certainty in the allocation system, including a raffle system and a competitive bid or auction system. Dan Neal, *G&F Looks At Paying For Private Access*, CASPER STAR TRIB., Oct. 30, 1996, at A1. See *infra* notes 166-72 and accompanying text.

34. In 1993, outfitters and landowners brought a lawsuit against the Wyoming Game & Fish Department challenging the constitutionality of the license allocation system. The Federal District Court for the District of Wyoming granted summary judgment to the Department. *Clajon Prod. Corp. v. Petera*, 854 F.Supp. 843 (D. Wyo. 1994). In 1995, the Tenth Circuit Court of Appeals dismissed the plaintiffs' dormant Commerce Clause claim for a lack of standing. 70 F.3d 1566 (10th Cir. 1995). See *infra* text accompanying notes 82-104. The plaintiffs' attorney, Jim Scarantino, stated that another lawsuit would be brought to challenge the constitutionality of Wyoming's license allocation system. Dan Neal, *New Hunt License Suit On Horizon*, CASPER STAR TRIB., Nov. 29, 1995, at A1.

35. 70 F.3d 1566 (10th Cir. 1995).

36. The United States Constitution provides that "the Congress shall have Power . . . to regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

merce.³⁷ Even in the absence of congressional regulation, the Supreme Court has, under the auspices of a “dormant” Commerce Clause, interpreted the Commerce Clause to prohibit state action³⁸ that adversely affects interstate commerce.³⁹ States, however, may enact laws to protect the health and safety of their citizens, even if these laws incidentally burden interstate commerce.⁴⁰

37. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

38. Any law will be subject to the dormant Commerce Clause, regardless of whether the enacting legislative body is the state legislature, an administrative agency or a local government. E.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (state statute prohibiting the export of minnows); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S. Ct. 1677 (1994) (municipal ordinance requiring that all waste be deposited at designated waste station).

39. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

Commentators Rotunda and Nowak describe the dormant Commerce Clause power exercised by the Court:

Whether or not the [federal] commerce power is exclusive or to what extent concurrent state regulation may coexist in the absence of an articulated Congressional judgment is not textually demonstrable. Moreover, the text of the commerce clause provides no overt restraint of state impingement of interstate commerce in the absence of Congressional legislation. It has been left to the Court to interpret, as inherent in that affirmative grant of power, self-executing limitations on the scope of permissible state regulation.

When the Court seeks to decide the extent of permissible state regulation in light of a “dormant” commerce clause power, it is in effect attempting to interpret the meaning of Congressional silence; the Court intervenes in an area where the primary power is that of Congress.

RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE*, § 11.1, at 2 (2d 1992).

40. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978) (holding that New Jersey’s statute, which prohibited the import of waste material into the state, violated the dormant Commerce Clause). In addition to “health and safety” laws, two other situations may limit the reach of the dormant Commerce Clause. First, when Congress “expressly state[s]” with “unmistakably clear” intent to limit the applicability of the dormant Commerce Clause, the application of the dormant Commerce Clause may be limited. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). In a second situation, a state may regulate an area of commerce if it participates in that area of commerce. *Id.* at 97. The Supreme Court limits this “market-participant” doctrine to the extent that a state may “impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions . . . that have a substantial regulatory effect outside of that particular market.” *Id.* Neither exception applies with respect to Wyoming’s license allocation system.

Congress has not expressly stated an intent to limit the applicability of the dormant Commerce Clause to Wyoming’s wildlife hunting laws. The U.S. Supreme Court has considered this exception as applied to the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3378 (1981), and a state’s right to regulate wildlife. *Maine v. Taylor*, 477 U.S. 131 (1986). (The purposes of the Lacey Act are “to strengthen and supplement state wildlife conservation laws [and] to promote the interests of agriculture and horticulture by prohibiting the importation of certain types of wildlife determined to be injurious to those interests.” MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 105 (1983).) In *Maine*, the state argued that Congress, when it passed the Lacey Act Amendments of 1981, intended to lower the scrutiny applied to a discriminatory wildlife law under the dormant Commerce Clause. 477 U.S. at 139. The Supreme Court rejected Maine’s argument. *Id.*

The market exception does not apply to Wyoming’s license allocation system because Wyoming, in managing wildlife and allocating licenses, is not participating as an economic actor in the outfitting market. See generally Dan T. Coenen, *Untangling the Market Participation Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 441 (1989).

The Supreme Court has developed tests for the two most commonly challenged types of state laws: discriminatory laws and nondiscriminatory laws.⁴¹ If the Court concludes that a law is discriminatory, the law must survive a heightened scrutiny analysis.⁴² If the Court concludes that a law is nondiscriminatory, it will apply a less rigorous "balancing" test.⁴³

Discriminatory Regulations

A regulation discriminates against interstate commerce when it treats in-state and out-of-state economic interests differently, benefitting residents and burdening nonresidents.⁴⁴ Discriminatory regulations are "virtually *per se* invalid,"⁴⁵ unless the enacting jurisdiction shows a legitimate interest supporting the regulation and a lack of any nondiscriminatory alternatives.⁴⁶ Courts should use the "strictest scrutiny" when determining the legitimacy of a discriminatory regulation.⁴⁷

The Supreme Court recognizes two types of discriminatory regulations: those which "facially" discriminate and those which discriminate "in effect."⁴⁸ Facially discriminatory regulations overtly impede interstate commerce at the enacting jurisdiction's border.⁴⁹ In *Hughes v. Oklahoma*, the Supreme Court held unconstitutional an Oklahoma wildlife regulation because it facially discriminated against interstate commerce.⁵⁰ The regulation prohibited the export of minnows for sale from Oklahoma.⁵¹ Because the regulation explicitly prohibited the sale in other states of Okla-

41. *City of Philadelphia*, 437 U.S. at 624. The Supreme Court defines discrimination as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Oregon*, 114 S. Ct. 1345, 1350 (1994) (holding that Oregon's solid waste dumping surcharge was facially invalid under the dormant Commerce Clause because it favored in-state economic interests while burdening their out-of-state counterparts).

42. Rotunda and Nowak explain the heightened scrutiny analysis:

If a state law discriminates against interstate commerce because of its interstate nature, the state law should be held to be a *per se* violation of the dormant commerce clause. Because the purpose of the state law is illegitimate, there is no real need for the Court to engage in any balancing test.

ROTUNDA & NOWACK, *supra* note 39, § 11.8, at 31.

43. *Id.* at 24 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). See *infra* text accompanying note 73.

44. *Oregon Waste Systems, Inc.*, 114 S. Ct. at 1350.

45. *Id.*

46. *Id.* at 1351.

47. *Id.*

48. *Hughes*, 441 U.S. at 336.

49. *Id.* at 337.

50. *Id.* at 336-37.

51. *Id.* at 323. Oklahoma's regulation provided that "[n]o person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state." Okla. Stat. tit. 29, § 4-115(B) (1974), amended by Okla. Stat. tit. 29, § 4-115 (1981).

homa goods⁵² and allowed the same sales within Oklahoma, Oklahoma discriminated against commerce occurring across state lines.⁵³ Under the applicable dormant Commerce Clause test,⁵⁴ Oklahoma attempted to show that its regulation served the legitimate purpose of conservation, and that it could not achieve this goal through nondiscriminatory alternatives.⁵⁵ The Court rejected Oklahoma's argument, holding that those outside Oklahoma should not be required to bear the full burden of conserving wildlife within Oklahoma "when equally effective nondiscriminatory conservation measures are available."⁵⁶

A regulation discriminates "in effect" if it has the practical effect of burdening interstate commerce.⁵⁷ For example, in *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*,⁵⁸ the town of Clarkstown commissioned the building of a solid waste transfer station to separate recyclable material

52. Central to the Court's reasoning was the decision that wildlife regulations are subject to the same Commerce Clause standards as other natural resources. *Hughes*, 441 U.S. at 335.

53. *Id.* at 336-37.

54. See *supra* notes 45-46 and accompanying text.

55. *Hughes*, 441 U.S. at 337-38.

56. *Id.* at 337. The Court noted that Oklahoma did not take alternative conservation measures such as limiting the numbers of minnows that could be captured in Oklahoma or regulating the method of disposal or sale within Oklahoma. *Id.* at 338.

In many Supreme Court cases, the Court has stricken discriminatory laws when there are existing alternatives. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951), the Court held that Madison's ordinance, which prohibited the sale of milk labeled as pasteurized unless it had been pasteurized within a radius of five miles from the central square of Madison, violated the dormant Commerce Clause. The Court remarked that "even in the exercise of its unquestioned power to protect the health and safety of its people," a state may not discriminate against interstate commerce "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Id.* at 354. See also, *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977). In *Hunt*, the Court held unconstitutional North Carolina's apple grading system. *Id.* at 353-54. Instead of banning the Washington State grade system, the Court stated that North Carolina could have required all boxes of apples be marked with the USDA grade system or could have banned all grading systems that could not be shown to be equal or superior to the USDA grade system. *Id.* at 354.

But see *Maine v. Taylor*, 477 U.S. 131 (1986). In *Maine v. Taylor*, the Court upheld a facially discriminatory law against a dormant Commerce Clause challenge. *Id.* at 151. Maine's law banned the import of live baitfish. *Id.* The purpose behind the law was to protect a Maine fish species from a parasite feared to be living inside baitfish. *Id.* Maine's discriminatory practice was justified because Maine showed that its law advanced a legitimate local purpose unrelated to economic protectionism and could not be served adequately by "available nondiscriminatory alternatives." *Id.* at 151. The Court rejected alternatives to Maine's law, noting that proposed alternatives were only "abstract possibilities." *Id.* at 147 (quoting *U.S. v. Taylor*, 585 F.Supp. 393, 398 (D. Me. 1984)). *But see* *Government Suppliers Consolidating Serv., Inc. v. Bayh*, 753 F. Supp. 739, 771 (S.D. Ind. 1990) (holding that an Indiana statute, which regulated the import and disposal of trash, violated the dormant Commerce Clause and that the nondiscriminatory alternatives available to Indiana were reasonable).

57. See, e.g., *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 350-51 (holding that the practical effect of the state regulation discriminated against interstate commerce).

58. 114 S. Ct. at 1680.

from nonrecyclable material, and send the separated material to a recycling center or a landfill.⁵⁹ The town's station was built and operated by a local private contractor.⁶⁰ After the station was built, the town adopted a waste flow control ordinance requiring that all waste generated in town and all imported waste be deposited at the transfer station.⁶¹ The ordinance forbade local processors to ship waste out of Clarkstown.⁶² Instead, they had to pay a fee to the designated transfer station to separate trash that the local processors had already separated.⁶³ The town sued the petitioner, a local processor, for attempting to ship waste outside Clarkstown without paying the designated transfer station fee.⁶⁴

The Supreme Court ruled that the ordinance affected interstate commerce in its practical effect and design.⁶⁵ All processors, except the town's transfer station, were denied access to Clarkstown's solid-waste market.⁶⁶ In addition, out-of-state interests who chose to dispose of their waste through the petitioner and other local processors would have to pay more for waste disposal because these processors would add the town's transfer station fee to their disposal price.⁶⁷ The town claimed that the ordinance essentially imposed a quarantine that ensured safe garbage.⁶⁸ Notwithstanding this argument, the Court found that the ordinance discriminated against interstate commerce because the ordinance "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility."⁶⁹ The Court held that the town could have

59. *Id.* at 1680.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1681.

64. *Id.*

65. *Id.* at 1684.

66. *Id.* at 1681.

67. *Id.*

68. *Id.* at 1681.

69. *Id.* at 1683. Justice O'Connor, concurring in the judgment, believed Clarkstown's ordinance violated the dormant Commerce Clause not because it discriminated against interstate commerce, but because it imposed an excessive burden on interstate commerce. *Id.* at 1687 (O'Connor, J., concurring). Noting that the ordinance did not give an economic preference to local interests, O'Connor found that all competitors, local and non-local, suffered as a result of the ordinance. *Id.* at 1688. For this reason, the law discriminated evenhandedly instead of against non-local competitors. *Id.*

Analyzing the State's interest, O'Connor stated that while the central purpose behind the ordinance was financial, to the extent the town's purpose was to address health and environmental concerns, the town could have used existing, less burdensome alternatives. *Id.* at 1690-91. Finally, Justice O'Connor considered the Clarkstown ordinance's interaction with similar waste-disposal regimes existing in other jurisdictions and the potential effect if other jurisdictions enacted legislation similar to Clarkstown's. *Id.* She determined that if other jurisdictions had similar laws, interstate commerce would be severely burdened. *Id.* The cost to dispose waste would escalate and processors would be in compliance with some waste-disposal laws and in violation of other laws at the same time. *Id.*

enacted nondiscriminatory uniform safety regulations.⁷⁰ Such safety regulations would adequately serve the town's health and environmental problems.⁷¹

Non-discriminatory Laws

If the law at issue does not discriminate against interstate commerce, a court will determine whether the law is invalid under the balancing test of *Pike v. Bruce Church, Inc.*⁷²

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.⁷³

The test for non-discriminatory regulations is less rigorous than the test for discriminatory regulations.⁷⁴ But under certain circumstances, even a nondiscriminatory regulation's burden on interstate commerce may be too severe.⁷⁵ In *Pike*, the State of Arizona required that all cantaloupes raised in Arizona be packaged in Arizona.⁷⁶ The regulation only indirectly affected the interstate transportation of cantaloupes.⁷⁷ To comply with the regulation, the petitioner would have been required to build a \$200,000 packaging plant in Arizona, instead of shipping the produce thirty-one miles to its packaging plant in California.⁷⁸

70. *Id.* at 1683.

71. *Id.*

72. 397 U.S. 137 (1970). The *Pike* case's "contribution to understanding of the Supreme Court's recent Commerce Clause analysis cannot be understated. Indeed, the *Pike* case and the doctrines it embodies are probably the most influential forces in the Court's Commerce Clause analysis today." Matthew C. Urie, *Share and Share Alike? Natural Resources and Hazardous Waste Under the Commerce Clause*, 35 NAT. RESOURCES. J. 309, 348 (1995).

73. 397 U.S. at 142 (citation omitted).

74. The Supreme Court has stated that the balancing test is "much more flexible" than the strict scrutiny test. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

75. *Pike*, 397 U.S. at 146; see *supra* note 69.

76. 397 U.S. at 138.

77. *Id.*

78. *Id.* at 139, 144.

The Supreme Court noted the legitimacy of Arizona's interest in protecting and enhancing the reputation of Arizona growers.⁷⁹ The Court, however, distinguished the interest of Arizona's law from laws enacted in the interest of safety or consumer protection.⁸⁰ Remarking that the result might be different if a more compelling interest were involved, the Court held that the financial hardship on the petitioner was clearly excessive in relation to Arizona's interest in enhancing the reputation of Arizona cantaloupe producers.⁸¹

The three cases described above, *Hughes v. Oklahoma, C & A Carbone v. Town of Clarkstown, N.Y.*, and *Pike v. Bruce Church, Inc.*, set forth the various methods of analysis that apply to challenges under the dormant Commerce Clause. The theories underlying these cases illustrate the problems with Wyoming's license allocation system, and with challenging the regulations under the dormant Commerce Clause.

The Clajon Litigation

In 1993, three landowner guides (plaintiffs) brought suit against the Wyoming Game and Fish Commission, the Wyoming Game and Fish Department and certain individual members of the Commission and Department in the Federal District Court for the District of Wyoming.⁸² The plaintiffs' arguments included constitutional challenges to Wyoming laws regulating landowners, outfitters and guides.⁸³ One of these claims alleged that Wyoming's percentage allocation regulations violated the dormant Commerce Clause.⁸⁴ Claiming that the allocation system restricted their opportunity to sell their hunting services to nonresidents, the plaintiffs argued that the regulation facially discriminates against interstate commerce because it expressly allocates far fewer licenses to nonresidents.⁸⁵

79. *Id.* at 143.

80. *Id.*

81. *Id.* at 146.

82. *Clajon Prod. Corp. v. Petera*, 854 F.Supp. 843 (D. Wyo. 1994).

83. The plaintiffs argued that WYO. STAT. ANN. § 23-1-103 (Michie 1977) violated the Takings Clause and the dormant Commerce Clause of the U.S. Constitution. 854 F.Supp. 843. Section 23-1-103, in pertinent part, states that "all wildlife in Wyoming is the property of the state." *Id.* In addition, the plaintiffs challenged the landowner licenses regulation, WYO. REG. CH. XLIV, § 3, on the grounds that the regulation violated the Equal Protection Clause and the Takings Clause. 854 F.Supp. 843. This regulation provides that qualified landowners, because of their ownership, may receive two hunting licenses without having to enter a competitive drawing. WYO. REG. CH. XLIV, § 3 (1996).

84. 854 F.Supp. at 849. The plaintiffs' land includes areas designated as limited quota areas by the Wyoming Game and Fish Department for hunting purposes. *Id.* Therefore, the number of licenses allocated for those limited quota areas favors resident over nonresident hunters.

85. *Id.*

The district court⁸⁶ held that the regulations did not discriminate against interstate commerce.⁸⁷ The court concluded that “[t]he regulations simply do not, on their face or in effect, establish any barriers to the plaintiffs’ ability to sell their services and the corollary goods . . . to non-residents.”⁸⁸ In support, the court noted that the plaintiffs did not offer evidence required to substantiate their dormant Commerce Clause discrimination claim.⁸⁹ Additionally, the court ruled that the plaintiffs erroneously equated residency discrimination with discrimination against commerce because there was no “nexus” between the regulations and commerce.⁹⁰ Finally, the court opined that Wyoming plaintiffs should challenge Wyoming’s regulations legislatively rather than judicially.⁹¹

The court noted that the plaintiffs did not argue or present evidence that the regulations excessively burdened interstate commerce.⁹² For this reason, the court could not analyze the regulations under the *Pike v. Bruce Church* balancing test,⁹³ and decided that it would be impossible to conduct a meaningful discussion of whether less burdensome alternatives exist.⁹⁴

On appeal, the United States Court of Appeals for the Tenth Circuit dismissed the plaintiffs’ dormant Commerce Clause claim.⁹⁵ The court held that the plaintiffs lacked standing to sue under the dormant Commerce Clause because they did not “establish[] that the regulations interfere[d] with their ability to provide commercial hunting services to out-of-state residents.”⁹⁶ While the plaintiffs established that “nonresidents spend more than residents for the use of hunting services,” they did not show that the regulations cause fewer nonresidents to hunt in Wyoming.⁹⁷

86. Judge Brimmer presiding. *Id.* at 846.

87. *Id.* at 860.

88. *Id.*

89. The plaintiffs’ alleged that the regulations decreased their ability to sell their services to nonresidents. *Id.* at 860. The court stated that a necessary premise to this argument included a showing that nonresidents are more likely to purchase the plaintiffs’ services than resident hunters, but found that the plaintiffs did not support the premise with evidence. *Id.* A future plaintiff can show that nonresidents are more likely to purchase outfitting services than are residents. *See supra* note 13 and accompanying text.

90. *Id.* at 860-61.

91. *Id.* at 861.

92. *Id.* at 861-62, 862 n.34.

93. *See supra* text accompanying note 73.

94. 854 F.Supp. at 862.

95. *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1569 (10th Cir. 1995).

96. *Id.* at 1571.

97. *Id.* at 1573. The court stated that the injury suffered by the plaintiff must be “fairly traceable to the defendant’s allegedly unlawful conduct.” *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 757 (1984)). The “Plaintiffs must demonstrate that [the regulations] disproportionately disadvantage[] nonresidents by failing adequately to approximate the ratio of demand between in-state and out-of-

With respect to the dormant Commerce Clause claim, the *Clajon* litigation has no preclusive effect on any future plaintiff. The issue of whether the regulations violated the dormant Commerce Clause because they imposed a clearly excessive burden on interstate commerce was not raised by the *Clajon* plaintiffs,⁹⁸ and, therefore, was not decided by the district court or the court of appeals. The district court decided the claim that the regulations discriminated against commerce.⁹⁹ However, because the court of appeals dismissed the claim for lack of Article III justiciability,¹⁰⁰ a future plaintiff may again challenge the regulations on the ground that the regulations discriminate against interstate commerce.

The only barrier to a dormant Commerce Clause claim created by the *Clajon* litigation may be one of standing. The court of appeals, however, outlined the evidence a future plaintiff will need to proffer in order to establish standing.¹⁰¹ The court recognized that outfitters are injured-in-fact because Wyoming's system limits opportunity for an economic benefit.¹⁰² In addition, the court stated that the outfitter's injury would be fairly traceable to Wyoming's system if nonresident license demand is greater than the number of licenses allocated to nonresidents.¹⁰³ The injury to outfitters, however, is also fairly traceable to the regulations because of the burden on the outfitter's commerce caused by the uncertainty of the system.¹⁰⁴ For these reasons, an outfitter can demonstrate standing to challenge the licencing allocation system.

DISCUSSION

Preliminary Dormant Commerce Clause Obstacles

The first hurdle that any new plaintiff must clear is to show that the dormant Commerce Clause applies to these license regulations.¹⁰⁵ Second, if a plaintiff is a Wyoming outfitter, the outfitter must show that a Wyoming

state hunters." *Id.* The court further noted that some of the plaintiffs' affidavits offered conclusory allegations that the regulations deter some nonresidents from entering Wyoming to hunt. *Id.* at 1573-74. However, this was not sufficient, because the court felt that some applicants will be deterred from applying when demand outstrips supply, regardless of a hunter's residency. *Id.*

98. 854 F.Supp. at 861-62.

99. 854 F.Supp. at 860.

100. 70 F.3d at 1572. The court stated that "[t]he requirement that a litigant have 'standing' to invoke the power of a federal court is perhaps the most important of the Article III justiciability doctrines." *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

101. *Id.* at 1572-74.

102. *Id.* at 1573.

103. *Id.*

104. See *supra* text accompanying notes 14-22.

105. *Clajon Prod. Corp. v. Petera*, 854 F.Supp. 843, 860 (1994).

resident can challenge regulations enacted by Wyoming under the dormant Commerce Clause.¹⁰⁶ Both of these obstacles are easily overcome.

The U.S. Supreme Court in *Baldwin v. Montana*¹⁰⁷ held that Montana could prefer its residents to nonresidents in requiring nonresidents to pay substantially higher big game license fees.¹⁰⁸ This holding might appear to doom any attack on Wyoming's existing license allocation scheme by Wyoming outfitters. *Baldwin*, however, does not govern a dormant Commerce Clause challenge to Wyoming's license allocation system. *Baldwin* involved a Privileges and Immunities challenge¹⁰⁹ and an Equal Protection challenge,¹¹⁰ not a dormant Commerce Clause challenge.¹¹¹ The Court held that hunting was a recreational sport, and thus not the type of activity the Privileges and Immunities Clause protected.¹¹² The Court also held that the license fees were rationally related to Montana's goals under the Equal Protection Clause.¹¹³ Because the *Baldwin* Court addressed neither outfitting services nor the dormant Commerce Clause, both issues remain to be decided.¹¹⁴

The *Clajon* district court remarked that the dormant Commerce Clause "requires a nexus to commerce before it applies."¹¹⁵ Although

106. *Id.* at 861.

107. 436 U.S. 371 (1978).

108. *Id.* at 388. See *infra* text accompanying notes 112-24.

109. The U.S. Constitution provides: "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." U.S. CONST. art. IV, § 2.

110. U.S. CONST. amend. XIV, § 1.

111. 436 U.S. 371. While *Baldwin* did not involve a dormant Commerce Clause challenge, such a challenge was brought against Colorado's hunting allocation preference. *Terk v. Ruch*, 655 F.Supp. 205 (D. Colo. 1987). The Federal District Court for the District of Colorado addressed a license preference law that allocated ninety percent of mountain goat and bighorn sheep hunting permits to residents. *Id.* The plaintiff was a nonresident, recreational hunter. The plaintiff claimed, in part, that the law violated the dormant Commerce Clause, under *Hughes v. Oklahoma*, 441 U.S. 322 (1979). *Terk*, 655 F.Supp. at 215. The *Terk* court distinguished *Hughes*, noting that in *Hughes*, minnows were the article of commerce, whereas Colorado made it illegal to sell mountain goat and bighorn sheep. *Id.* The court further remarked that the "commercial livelihood" at stake in *Hughes* was not a concern of the plaintiff because the plaintiff was merely a recreational hunter. *Id.* Had the plaintiff been an outfitter, the court may have addressed the question of whether outfitting constitutes a commercial livelihood.

112. 436 U.S. at 388. Because the Privileges and Immunities Clause protects only fundamental rights, the dormant Commerce Clause protects at times when the Privileges and Immunities Clause would not. Jenna Bednar & William Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1488 (1995).

113. 436 U.S. at 391.

114. State regulation of wildlife is subject to the same Commerce Clause standards as any other type of state regulation if the regulation affects interstate commerce. *Hughes*, 441 U.S. at 335. *Baldwin* also recognized that a state may not "hoard" wildlife if the state impedes interstate commerce. *Baldwin*, 436 U.S. 385-86. The Supreme Court has also held that the Lacey Act Amendments do not direct federal courts to treat state wildlife laws more leniently, with respect to Commerce Clause scrutiny. *Maine*, 477 U.S. 138-40. See *supra* note 40.

115. 854 F. Supp. at 860.

Wyoming's license allocation regulations do not govern outfitter services, U.S. Supreme Court precedent shows that the dormant Commerce Clause protects commerce in a secondary market such as outfitting services.¹¹⁶ In *City of Philadelphia v. New Jersey*, the State's statute prohibited the import of garbage that came from beyond New Jersey's border.¹¹⁷ The plaintiffs, among whom were New Jersey operators of private landfills, successfully argued that New Jersey's law affected not only those doing business in transporting garbage, but also those providing services (landfill disposal) to those transporting garbage.¹¹⁸ In other words, the commerce burdened by the statute, the sale of landfill space, was different from the commerce regulated by the statute, the interstate shipment of waste. The Supreme Court held that the law violated the dormant Commerce Clause even though the negative effects were felt in a secondary market.¹¹⁹ The Court made clear that if the law discriminates against or excessively burdens interstate commerce, the dormant Commerce Clause will protect interstate commerce, regardless of whether that commerce is directly or secondarily related to the law.¹²⁰ Thus, even if outfitters' commerce is secondarily related to Wyoming's allocation system, the dormant Commerce Clause will protect their commerce.

Arguably, Wyoming's political process should suffice to protect residents from the sort of alleged discrimination at work in the license allocation scheme.¹²¹ Wyoming outfitters can indeed complain to their elected representatives about the impact of the scheme. But the Supreme Court has clearly indicated that the residency of the plaintiff is not dispositive, as the protection of the dormant Commerce Clause reaches residents as well as nonresidents.¹²² The dormant Commerce Clause equally protects nonresident interests and Wyoming outfitters from a Wyoming regulation that discriminates against or excessively burdens interstate commerce.¹²³

116. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

117. *Id.* at 618-19.

118. *Id.* at 619.

119. *Id.* at 629.

120. *Id.*

121. The *Clajon* district court indicated that the plaintiffs' more appropriate avenue of redress was the political process. *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 861 (D. Wyo. 1994).

122. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey residents challenging a New Jersey law). *See also Clajon*, 70 F.3d 1566, 1571 n.11 (10th Cir. 1995) (noting that the "[d]efendants are mistaken that the Commerce Clause protects only nonresidents from state regulations that excessively burden commerce. In-state residents may also assert a Commerce Clause challenge.").

123. 70 F.3d 1566, 1571 n.11.

Wyoming's License Allocation System Probably Does Not Discriminate Against Interstate Commerce

The Wyoming license allocation system gives more licenses to resident hunters than to nonresidents. However, the language of the regulations does not facially discriminate in an economic manner, nor does it overtly regulate commerce.¹²⁴ Unlike the discriminatory law in *Hughes*,¹²⁵ the Wyoming license allocation regulations do not explicitly address the article of commerce—outfitting services—that is allegedly burdened.¹²⁶ Unlike a regulation that distinguishes between resident outfitters and nonresident outfitters (or their services), Wyoming's regulations do not facially discriminate against interstate commerce.¹²⁷

Although the regulations directly determine only the question of who has hunting access to wildlife, the regulations do have interstate economic effects.¹²⁸ Wyoming's license allocation system limits the numbers of non-

124. *Clajon*, 854 F.Supp. at 860.

125. *See supra* note 51.

126. *See supra* notes 50-53 and accompanying text.

127. An example of a facially discriminatory law is Wyoming's ban on the import of wildlife. WYO. STAT. ANN. § 23-3-301(a) (Michie 1977). This statute was challenged under the dormant Commerce Clause and found to facially discriminate against interstate commerce. *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992). The Tenth Circuit reversed the district court's order granting Wyoming's motion for summary judgment. *Id.* at 761. The Tenth Circuit held that the ban on the private ownership of big game does not discriminate against interstate commerce. *Id.* at 763. Because it operates evenhandedly, the court determined that the *Pike* balancing test applied to the ownership ban. *Id.* The court did not determine the validity of the private ownership ban under the *Pike* test, but found that summary judgment was inappropriate because the district court failed to consider evidence of the burden on interstate commerce and the existence of alternatives. *Id.* at 763, 765. Noting the existence of an extensive interstate market in big game animals, the Tenth Circuit held that Wyoming's ban on the import of big game animals "discriminates against interstate commerce on its face" because the import ban prevented the plaintiff from importing big game animals. *Id.* at 765.

But see *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994). In *Pacific*, the court "respectfully disagree[d]" with the *Dorrance* decision and found that an import ban on certain animal species was not discriminatory *per se*. The court remarked that the practical effect of the import ban:

adds nothing to the prohibitions that apply equally to in-state and out-of-state interests, because animals could not be imported if they are not allowed to be [possessed or sold] once inside the State. An import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items.

Id.

128. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S. Ct. 1677, 1681 (1994) (concluding that, although the immediate effect of Clarkstown's ordinance only directed the local transport of waste to a designated facility within the local jurisdiction, the economic effects of the ordinance were interstate in reach). In *Clajon*, the district court held, without elaborating, that Wyoming's regulations did not discriminate in-effect. 854 F.Supp. at 860. After discussing facial discrimination, the court remarked only that the "regulation is not a facially discriminatory enactment . . . [Even if] these regulations place an incidental burden on commerce, they do not discrimi-

residents who may take wildlife. This limitation impacts the outfitting industry because the system creates a barrier between outfitters and the market beyond Wyoming's borders.¹²⁹ The overall effect of the regulations on both local and interstate activity is critical to the analysis of whether Wyoming's regulations discriminate in effect.¹³⁰

Wyoming's regulations hoard wildlife for the benefit of a preferred group. In this sense, the regulations are similar in purpose and effect to the ordinance held unconstitutional in *C & A Carbone*.¹³¹ However, the ordinance in *C & A Carbone* regulated the processing of waste, the very commercial activity in which C & A Carbone sought to engage.¹³² With respect to Wyoming's regulations, providing outfitting services is a commercial activity not regulated by the license allocation scheme. Moreover, the preferred group, resident hunters, does not gain any sort of economic advantage over outfitters.

Outfitters must demonstrate that a local group receives an economic advantage. If the regulations confer an economic benefit to Wyoming interests and place an economic burden on out-of-state interests, a court may find that Wyoming's license allocation system discriminates "in effect" against interstate commerce.¹³³ For example, local outfitters who cater exclusively or primarily to Wyoming hunters would benefit from the eighty and eighty-four percent allocation, while outfitters who cater to nonresidents would be discriminated against by the corresponding twenty and sixteen percent allocation.¹³⁴ If this were the case, Wyoming's statute

nate against commerce. The regulations simply do not, on their face or in effect, establish any barriers to the plaintiffs' ability to sell their services . . . to nonresidents." *Id.*

129. The *Clajon* district court remarked that the regulations may indirectly place an incidental burden on commerce, and that "[t]aken to its extreme, it is hard to imagine any regulation that does not, to some extent, affect commerce." 854 F.Supp. at 860 n.33 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)). See also *supra* text accompanying note 88.

130. See, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). In *Brown-Forman Distillers Corporation*, New York's liquor law required that a distiller's prices for liquor sold in New York not be higher than the lowest prices the distiller charged anywhere else in the United States. *Id.* at 576. While New York's law only addressed sales of liquor in New York, the law's practical effect essentially attempted to control liquor prices in other states. *Id.* at 583. The Court held that this effect violated the dormant Commerce Clause. *Id.* at 585.

131. 114 S. Ct. 1677. See *supra* text accompanying note 69.

132. See *supra* text accompanying notes 61-64.

133. *Oregon Waste Systems, Inc. v. Oregon*, 114 S. Ct. 1345, 1350 (1994).

134. Because some outfitters are able to sell a portion of their services to nonresidents, not all interstate commerce ceases as a result of the regulations. However, the dormant Commerce Clause cases have established that it is not required that the interstate commerce at issue completely cease. *C & A Carbone*, 114 S. Ct. 1677, 1681 (transporting waste was not prohibited under the ordinance as long as the petitioner paid the tipping-fee to the favored transfer station); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (conferring only a preference to residents rather than sole access to the article of commerce may still violate the dormant Commerce

would be similar to Clarkstown's ordinance in *C & A Carbone* in that the enacting jurisdiction confers an economic benefit on a local group and places a burden on other groups who engage in interstate business.¹³⁵ The regulations would impact outfitters differently based upon whether their commerce with clients crossed state lines.¹³⁶ Unlike the Clarkstown ordinance that Justice O'Connor found equally burdensome on both in-town waste processors and out-of-town waste processors,¹³⁷ Wyoming's regulations would not operate evenhandedly.

Wyoming prefers to protect its resources for the benefit of its citizens. Wyoming's license allocation system may be protectionist, but the type of protectionism differs from that found to violate the dormant Commerce Clause because Wyoming's system is not founded upon *economic* protectionism.¹³⁸ Wyoming's system does more to promote a political preference for Wyoming hunters than it does to protect Wyoming's economy. Unless there were evidence that the Wyoming Game and Fish Commission enacted the regulations with an intent to protect Wyoming's economy, the regulations would not likely trigger the heightened scrutiny analysis.¹³⁹

Wyoming's License Allocation System May Impose A "Clearly Excessive Burden" On Interstate Commerce

A regulation may violate the dormant Commerce Clause if the regulation's burden on interstate commerce is clearly excessive in relation

Clause). *See also*, *Chambers Medical Tech. of S.C. v. Bryant*, 52 F.3d 1252, 1264 (4th Cir. 1995) (requiring that infectious waste could not be kept at ambient temperature for more than twenty-four hours while being transported, the State's regulations burdened interstate commerce even though some interstate destinations could be reached within twenty-four hours).

135. *See supra* text accompanying notes 66-67.

136. The situational needs of the hunters who purchase outfitting services mean that outfitting clients are more likely to be nonresidents than residents. Sheaffer Interview, (Mar. 12, 1996). This probably means that there are not a large number of outfitters who cater exclusively or predominately to residents. *Id.* While these outfitters would benefit from the regulations, their nonexistence may indicate that the regulations confer no benefit to a local group at the expense of interstate commerce.

137. *See supra* note 69.

138. In *City of Philadelphia v. New Jersey*, the Court discussed the relationship between protectionism and the Commerce Clause, and the kind of protectionism on which the Court concentrates: "The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism [W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." 437 U.S. 617, 623-24.

139. *Id. See, e.g., Maine v. Taylor*, where Maine's Department of Inland Fisheries and Wildlife justified its regulation on the grounds that Maine's import-ban regulation injected money into Maine's economy, and that the regulation might facilitate the growth of lucrative export industries. The Court decided that this language was insufficient to convert the statute into an economic protectionist law because the statements were made long after the law was enacted and thus did not show economic protectionist intent. 477 U.S. 131, 149-50.

to the putative state interest.¹⁴⁰ Outfitting is almost always an interstate business.¹⁴¹ While an extensive interstate market lies just beyond Wyoming's border,¹⁴² Wyoming's regulations appear to erect a barrier by withholding at least eighty percent of limited quota big game licenses from nonresidents.¹⁴³ In addition, the licenses that are allocated to nonresidents are distributed with such uncertainty that the regulations burden interstate commerce. The burdens that these two features of the license allocation system impose on outfitters can be illustrated by a hypothetical outfitter.

"A", a Wyoming resident outfitter, provides outfitting services for hunts in Wyoming. "A" leases exclusive elk hunting rights on private land designated by the Game and Fish Department as a limited quota area. "A" attends an outfitting convention and meets potential nonresident clients. Ten potential clients agree to come to Wyoming to hunt with "A". Each submits a completed application to the Wyoming Game & Fish Department to hunt on the limited quota area.

Wyoming's licensing scheme automatically denies nonresident access to eighty-four percent of the elk licenses available on "A's" leased land.¹⁴⁴ "A's" ten potential nonresident clients have access to sixteen percent of the licenses available on "A's" leased land. If, for example, a total of ten elk licenses are available on "A's" leased property, less than two licenses will be available to nonresident hunt-

140. See *supra* text accompanying note 73.

141. See *supra* notes 11-13 and accompanying text.

142. This market is similar to the extensive interstate market in big game animals recognized by the *Dorrance* court. See *supra* note 127. The August-October 1996 edition of BUGLE magazine illustrates the extent of the interstate market in outfitting services, in which outfitters located in fourteen states represent hunting in all fifty states and many foreign nations. *Outfitters Camp*, BUGLE, Aug.-Oct. 1996, at 177-93. This magazine also contains separate sections for booking agents, who match hunters and outfitters, and state outfitter associations. *Id.* Outfitter conventions also illustrate the interstate market. At these conventions, outfitting services and information about outfitters are exchanged. The North American Hunting Expo sends information about its convention to outfitters and invites them to rent booths to market outfitting services. The information states: "We are uniting thousand [sic] of hunters and have booked only a handful of outfitters so far. If I was an outfitter looking to sell out, this is where I would want to be." Letter From Thomas Erikson, CEO, North American Hunting Expo, Inc (on file with author).

143. See, e.g., *Dorrance*, 957 F.2d at 764 (finding that "the extensive interstate market in big game animals . . . was shut out of Wyoming because of the ban"). In all probability, future plaintiffs will need to show that the percentages allocated by Wyoming do not adequately reflect nonresident demand for elk and other big game hunting licenses. See *supra* note 97 and accompanying text. The eighty percent allocation only creates a barrier if nonresident demand exceeds the number of licenses allocated to nonresidents. Statistics showing resident and nonresident demand and success rates by hunting area are available from the Wyoming Game and Fish Department.

144. Similarly, in *C & A Carbone*, one of the problems with Clarkstown's ordinance was that it denied nonresidents access to Clarkstown's market. *C & A Carbone*, 114 S. Ct. at 1681.

ers. Statistically, only one of "A's" potential clients will be able to draw a license. Against "A's" other potential clients, each potential client will have a ten percent chance of drawing the single license. Were these ten applicants the only nonresidents applying for this area, one would draw. However, Wyoming's system allows nonresident hunters to apply for any nonresident area. If even one nonresident elk hunter, who did not contract with "A", applied for this area, the odds of "A's" potential clients drawing a license become even more remote and uncertain.¹⁴⁵ Quite probably, none of A's clients draws a license. Thus, denying access to "A's" potential nonresident clients prohibits "A" from providing services across state lines.

The burdens Wyoming's percentage allocation system imposes on outfitters essentially require outfitters to carry out Wyoming's preference and sell their services to Wyoming residents.¹⁴⁶ If "A" wants access to the remaining eighty-four percent of the available licenses, "A" will have to provide outfitting services to residents. This would not be problematic, but for the lack of resident demand for outfitter services.¹⁴⁷ The lack of demand results in lower income and a lost opportunity for a profitable market.¹⁴⁸ The regulations may force "A" out of business because money derived from resident clients is insufficient to operate "A's" outfitting business and "A's" nonresident clients cannot draw licenses.¹⁴⁹ If the regulations force "A" out of business, the burdens on interstate commerce would be severe. The extent of the burden on outfitters may surpass that found to be excessively burdensome in *Pike*.¹⁵⁰

145. Wyoming's license allocation system imposes a further burden on outfitters because Wyoming's system discourages potential clients who do not draw licenses from applying to hunt in Wyoming in future years because the outfitter cannot express any certainty to prospective clients that they will draw a license. Telephone Interview with Steve Sheaffer, (Sept. 24, 1996). *Supra* note 11, for qualifications.

146. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

147. *See supra* note 11.

148. *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1573 (10th Cir. 1995).

149. Since 1992, the number of licensed big game outfitters in Wyoming has annually declined. Personal Communication. Wyoming State Board of Outfitters & Professional Guides, (Oct. 1, 1996). During the last five years, there has been an 8.8 percent reduction in the number of big game outfitters. *Id.* The Board of Outfitters and Professional Guides does not retain information that explains the reasons for increases or decreases in the number of outfitters. Telephone interview with Jane Flagg, Administrator, Wyoming State Board of Outfitters & Professional Guides, Cheyenne, Wyo. (Oct. 14, 1996).

150. *See supra* text accompanying notes 78-81.

Wyoming's Interest

The state interest must be balanced against the burdens on interstate commerce.¹⁵¹ The declared purpose of Wyoming's license allocation system is to maintain a lasting wildlife resource.¹⁵² This purpose is legitimate.¹⁵³ The regulations, however, do not closely serve this purpose, as a license allocation system preferring residents does not better protect wildlife than a nonpreferential license allocation system.¹⁵⁴ Because of their greater familiarity with hunting areas and their more regular access to Wyoming wildlife and habitat, Wyoming residents are in a better position to take more animals than nonresidents. In actuality, the current percentage allocation system serves Wyoming's interest in conserving wildlife less effectively than an allocation that would give more licenses to nonresidents because of nonresidents' lower hunting success rate.¹⁵⁵

A more plausible explanation might be that the Game and Fish Commission desires to confer a non-economic reward on Wyoming residents.¹⁵⁶ In times of shortage, states may give residents a limited

151. See *supra* text accompanying note 73.

152. "It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of all Wyoming wildlife." WYO. STAT. ANN. § 23-1-103 (Michie 1977). Similarly, in *Clajon Prod. Corp. v. Petera*, 854 F.Supp. 843 (D. Wyo. 1994), Wyoming argued that the "purpose of . . . [the] regulation [is] to protect the state's production and supply of game." *Brief in Support of Motion for Summary Judgment*, at 13, *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843 (D. Wyo. 1994) (No. 93 CV 223B) (on file with the *Land and Water Law Review*).

153. The Supreme Court has noted that this interest is similar to a state's interest in protecting the health and welfare of its citizens. See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

154. Other Wyoming game laws illustrate a more direct connection to Wyoming's conservation purpose. For example, Wyoming's ban on the import of wildlife into Wyoming from any source arguably protects the integrity of native species from disease and ensures genetic purity. WYO STAT. ANN. § 23-3-301 (Michie 1977). See also, *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992). In *Dorrance*, Wyoming argued that the import ban on the private ownership of big game animals advanced Wyoming's purposes to "preserve a free-ranging wildlife resource, to prevent the spread of disease and genetic alteration, and to facilitate enforcement of game laws." *Id.* at 763. The District Court for the District of Wyoming held that these purposes were legitimate. *Id.*

155. An illustration of a law that does nothing toward achieving the purposes for which it was enacted is *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977). The declared purpose of North Carolina's statute was to protect consumers from deception and fraud in the marketplace. *Id.* at 353. The Supreme Court recognized the unquestioned validity of that goal, but found that the statute did "remarkably little to further that laudable goal." *Id.* at 353. The Court held that the statute actually magnified the problems of deception and confusion by depriving consumers of all information concerning the quality of the contents of closed apple containers. *Id.* The Court also held that although the statute was a consumer protection measure, it did "nothing at all to purify the flow of information at the retail level, [and thus did] little to protect consumers against the problems it was designed to eliminate." *Id.* See *supra* note 56.

156. The *Clajon* district court implied that the regulations merely attempt to reward residents, noting that "[t]he plaintiffs' claim erroneously equates residency discrimination with discrimination

preference to a natural resource.¹⁵⁷ However, for the purposes of dormant Commerce Clause analysis, Wyoming's interest in conferring a reward on the basis of residency might not carry as much weight as would Wyoming's interest in protecting wildlife.¹⁵⁸ Notwithstanding the less rigorous scrutiny under the balancing test,¹⁵⁹ a court might not defer to Wyoming's purpose of rewarding residents if outfitters could show that the regulations cause them to go out of business.¹⁶⁰

Alternatives to Wyoming's License Allocation System

Many alternatives to Wyoming's license allocation system exist. From January to July 1996, the License Allocation Task Force discussed alternative systems of license allocation, but could not reach a consensus on any proposed alternative system.¹⁶¹ This failure is another indication of the controversial nature of license allocation in Wyoming, but does not determine that alternative systems would burden interstate commerce to a lesser degree and adequately serve Wyoming's interests.¹⁶²

against commerce." *Clajon*, 854 F.Supp. at 860.

In addition, Wyoming, in its interrogatory answers, admitted that the "unequal allocation of licenses which favors residents helps maintain resident support for continued sacrifice and the maintenance of big game populations." *Defendants' Answers to Plaintiffs' First Interrogatories and Requests for Production of Documents, Answer to Interrogatory 12*, *Clajon Prod. Co. v. Petera*, 853 F. Supp. (D. Wyo. 1994) (No. 93 CV 223B) (on file with the *Land and Water Law Review*).

157. *Sporhase v. Nebraska*, 458 U.S. 941 (1982). In *Sporhase*, the Court noted that the importance a state may place in preserving its water resources may justify a limited preference to its citizens. *Id.* at 956-57. *But see Oregon Waste Systems v. Oregon*, 114 S. Ct. 1345, 1354 (1994). The Court in *Oregon Waste Systems* rejected Oregon's claim that it was merely protecting its resources rather than its economy. *Id.* In its discussion of *Sporhase* and resource protectionism, the *Oregon* Court stated that "[h]owever serious the shortage in landfill space may be . . . [n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Id.* (quoting *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 339-40 (1992)). The *Oregon* Court noted that water was unlike other natural resources. *Id.* (citing *Sporhase*, 458 U.S. at 952). These two cases appear to show that, while the dormant Commerce Clause applies to laws regulating natural resources, the parameters of the exception enunciated in *Sporhase* appear narrow, albeit somewhat undefined.

158. "[S]tates may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce." *Baldwin v. Montana*, 436 U.S. 371, 385-86 (1978). *See also*, Thomas K. Anson and P.M. Schenkkan, *Federalism, the Dormant Commerce Clause and State-Owned Resources*. 59 TEX. L. REV. 71, 96-97 (1980) (arguing that "when a state's unique access to [fictionally state-owned] resources is a matter of mere happenstance, its decision to discriminate does not involve redistribution of wealth generated by the collective foresight, risk and industry of its citizens.").

159. *See supra* note 74 and accompanying text.

160. In *Pike*, the Court distinguished other cases where the state interest was to prevent fraudulent practices in the marketplace or promote safe produce and Arizona's interest in enhancing the reputation of Arizona's cantaloupe growers. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970), *see supra* note 79 and accompanying text.

161. TASK FORCE REPORT, *supra* note 30, at 6-15.

162. Alternatives are also important when a law discriminates against interstate commerce. If

Some Wyoming organizations have proposed variations of a set-aside license.¹⁶³ Set-aside systems would provide licensed outfitters preferential or exclusive access to a pool of licenses. The burden on interstate commerce would be less because the set-aside would provide certainty to the outfitter that at least some percentage of its clients would predictably receive licenses. A set-aside system would serve Wyoming's interest in protecting wildlife as well as the current system.

A set-aside system might also serve Wyoming's interest in maintaining resident support for Wyoming's hunting program. Although resident hunters would not be supportive of Wyoming's hunting program if they perceived a reduction in the number of licenses allocated to them under the current system,¹⁶⁴ a set-aside system does not have to detrimentally affect resident hunters. First, if the set-aside licenses came from those currently allocated to nonresidents, the number of licenses allocated to

the plaintiff demonstrates that the law is discriminatory, the enacting jurisdiction must show that its interest underlying the law cannot be served by less-discriminatory alternatives. *See supra* text accompanying notes 55-56, 70-71.

The *Clajon* district court determined that it could not inquire into whether less burdensome alternatives exist because the condition precedent—a showing of the nature and extent of the burden—was not presented. *Clajon Prod. Corp. v. Petera*, 854 F.Supp. 843, 862 (D. Wyo. 1994). *But see, Pacific Northwest Venison Producers v. Smith*, 20 F.3d 1008, 1015-17 (9th Cir. 1994). In *Pacific Northwest Venison Producers*, the court chose to analyze the plaintiffs' proposed alternatives irrespective of the fact that the burden on interstate commerce was not clearly shown. *Id.* at 1016. The court stated:

While the lack of evidence as to what the extent of the burden is makes the determination of "the extent of the burden that will be tolerated" problematic, we proceed on the assumption that overwhelming evidence that the regulations are unnecessary could add enough force to the mere existence of burdens on interstate commerce to overcome the presumption that the regulations are valid.

Id.

163. Three variants of a set-aside system have been proposed by outfitting organizations. First, the Professional Recreation Outfitters proposed that thirty-five percent of the total available nonresident big game licenses be placed in an "Outfitter Only Drawing." PROFESSIONAL RECREATION OUTFITTERS OF WYOMING, CHALLENGE F, PART 1, at 8, (June 1995). In the "Outfitter Only Drawing," these licenses would only be available to nonresident hunters who intend to hunt with an outfitter. Second, the Commercial Recreation Coalition proposed that the total number of available licenses be divided into three groups: resident, commercial, and nonresident. The allocation to each group would vary "according to outfitter capacity, resident hunters, and number of licenses available in each area, among other factors." COMMERCIAL RECREATION COALITION PROPOSAL, at 2-3, (June 23, 1995). The commercial group licenses would be available to hunters who have an outfitting contract with a licensed outfitter or landowner licensed as an outfitter. *Id.* Finally, the Wyoming Outfitters and Guides Association proposed an "Outfitter / Landowner License Pool," under which thirty percent of elk licenses and forty percent of deer licenses from the total number available would be set-aside for outfitter and landowner use. WYOMING OUTFITTERS AND GUIDES ASSOCIATION, REPORT TO THE BOARD OF DIRECTORS, LICENSE ALLOCATION PROPOSALS, (June 18, 1995) (on file with the *Land and Water Law Review*).

164. Jason Marsden, *Anti-Outfitter Grassroots Effort Threatened*, CASPER STAR. TRIB., Aug. 28, 1996, at A1.

residents would remain unchanged. Second, if some set-aside licenses came from those currently allocated to residents, a system under which the set-aside licenses would be available to resident clients as well as nonresident clients would still allow resident hunters access to the licenses. Moreover, if any of the set-aside licenses came from those currently allotted to nonresidents, residents would have access to a greater number of licenses than they do currently. In any event, a court considering this alternative could look at set-aside systems operating in states surrounding Wyoming to determine a set-aside allocation's burden on interstate commerce and whether a set-aside system would meet Wyoming's interest.¹⁶⁵

A second alternative is a "market-driven license."¹⁶⁶ Under this system, a small number of licenses from the total number available would be set-aside, but unlike other set-asides, no particular hunting interest would have preferential access to the licenses.¹⁶⁷ The price of a license would be adjusted each year to account for increased or decreased demand.¹⁶⁸ The goals of the system are to approximate the market value of big game licenses, increase revenue to the Game and Fish Department,¹⁶⁹ and gain more public hunting access.¹⁷⁰ A market-driven system would not discriminate against interstate commerce. This system would reduce burdens on interstate commerce because nonresidents who wish to hunt with an outfitter but do not draw a limited quota license would still have an opportunity to purchase a market-driven license.¹⁷¹ Again, this alternative would adequately serve Wyoming's interest in protecting wildlife but not its interest in maintaining resident support if these licenses were taken from those currently allocated to resident hunters.¹⁷²

Private ownership of big game animals is a third alternative to Wyoming's license allocation system.¹⁷³ Private ownership would allow

165. See Appendix, State Licensing Systems.

166. The Task Force considered a market-driven license allocation system, but could not recommend it to the Commission because one Task Force member, Dick Sadler, could not endorse it. TASK FORCE REPORT, *supra* note 30, at 12-13, app. IX. The Game and Fish Commission is taking public comment on a raffle and a competitive bid or auction system. Dan Neal, *G&F Looks At Paying For Private Access*, CASPER STAR TRIB., Oct. 30, 1996, at A1.

167. TASK FORCE REPORT, *supra* note 30, at 12-13.

168. *Id.*

169. Dan Neal, *G&F Wants To Explore 'Market-Driven' Licenses*, CASPER STAR TRIB., Aug. 27, 1996, at A1.

170. Revenues from this license could be used to purchase or lease additional public hunting lands. *Id.*

171. One variation on the market-driven system operates like an auction, where the highest bidder receives the license. The State of Oregon has adopted such a license auction system. See Appendix, State Licensing Systems.

172. Dick Sadler, *Stakes Went Up In Rich-Hunt-First*, CASPER STAR TRIB., Aug. 28, 1996, at A9.

173. Currently WYO. STAT. ANN. § 23-1-103 (Michie 1977) prohibits the private ownership of big game animals. The dormant Commerce Clause issue has been addressed in *Dorrance*, where the

individuals to raise and harvest domesticated big game animals on game farms. These game farms could operate and be regulated much like game-bird farms.¹⁷⁴ Game farms would create separate sources of elk, deer and other animals, thereby decreasing the competition for the limited number of wild big game animals.

Nonresident hunters would be assured the opportunity to hunt, and consequently outfitters could sell their services to any number of hunters they chose. Compared to Wyoming's current license allocation system, game farms would burden interstate commerce to a lesser degree, if at all. Wyoming probably would argue that private ownership of big game animals would threaten native big game animals.¹⁷⁵ If scientific uncertainty exists as to the risks to native big game species, a court might show considerable deference to Wyoming's chosen method of regulation.¹⁷⁶ On the other hand, disease testing procedures, random game farm inspection, and import inspection are not "abstract" procedures¹⁷⁷ and would meet Wyoming's conservation and protection interests.¹⁷⁸

Given the many alternatives enacted by other states,¹⁷⁹ challengers to the current regulations probably can show that less burdensome means could achieve Wyoming's goals. The burdens on interstate commerce are likely to be clearly excessive in relation to Wyoming's purpose, if Wyoming's purpose is to confer a non-economic benefit on resident hunters. On the other hand, if a court determines that Wyoming's purpose is to conserve and protect wildlife, as Wyoming alleges, it might be more difficult to persuade a court that the burdens on interstate commerce are "clearly excessive" in relation to Wyoming's interest.

Resolution by the Legislature

The *Clajon* litigation did not answer the question of whether Wyoming's license allocation system discriminates against or places excessive burdens upon interstate commerce.¹⁸⁰ Future litigation to determine the constitutionality of Wyoming's system would also fail to resolve

Tenth Circuit has held that this ban on private ownership operates evenhandedly. *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992). See *supra* note 127.

174. WYO. STAT. ANN. §§ 23-5-101-201 (Michie 1977 & Supp. 1996).

175. See *supra* note 154.

176. See *Maine v. Taylor*, where the Court held that Maine had "a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." 477 U.S. 131, 148.

177. *Id.* at 147.

178. See *Dorrance*, 957 F.2d at 764.

179. See Appendix, State Licensing Systems.

180. See *supra* notes 98-100 and accompanying text.

the licensing controversy, regardless of the outcome. If outfitters prevailed, the court's decision would force Wyoming to change its system but would not dictate the details of a lawful system. If unsuccessful, outfitters would remain dissatisfied with Wyoming's current system and would continue to lobby for legislative changes.¹⁸¹

In response to the on-going controversy, the Wyoming Legislature should confront the problems with the current licensing system and consider the constitutional validity of alternative approaches under the dormant Commerce Clause. First, the legislature must avoid creating a system that discriminates against interstate commerce, triggering a heightened scrutiny analysis by the courts.¹⁸² As long as Wyoming does not favor a local economic interest, this should be an easy task. Second, the legislature must be mindful of the extent of the burdens imposed on interstate commerce balanced against Wyoming's interest in promoting its big game management policies.¹⁸³ The goal should be, and must be under a dormant Commerce Clause analysis, a system that lessens the burdens on interstate commerce and still effectively meets Wyoming's interests.

A market-driven system achieves this goal.¹⁸⁴ The small number of licenses that Wyoming allocates to nonresidents would no longer determine interstate commerce in outfitting services across Wyoming's border. A market-driven system would encourage interstate commerce because it would provide the outfitting industry with some certainty. At the same time, this system would meet Wyoming's interests. Conservation of big game animals would be unaffected. Also, this system would reward resident hunters. Licenses formerly allocated only to nonresidents potentially would be available to residents, thereby increasing the number of total licenses available to residents.¹⁸⁵ In addition, all hunters, including residents, would benefit from the additional license revenue received by the Department because this money could then be used to improve existing programs and create new ones.

Many western states have license allocation schemes, including variations on the market-driven system.¹⁸⁶ While those schemes may or

181. Were this the outcome, the *Clajon* district court's statement that outfitters views may be vindicated through the political process would be somewhat prophetic. 854 F.Supp. at 861. While the dormant Commerce Clause can protect outfitters' interstate commerce, it does not protect outfitters' commerce from Wyoming's allocation system, and outfitters must seek their answer in the political arena.

182. See *supra* text accompanying notes 44-47.

183. See *supra* text accompanying notes 75-81.

184. See *supra* notes 166-72 and accompanying text.

185. A potential downside of a market-driven system that implements an auction system is that hunters with the most money could out-bid other hunters.

186. See Appendix, State Licensing Systems.

may not work for Wyoming, many illustrate alternative licensing systems that are less susceptible to a dormant Commerce Clause challenge than is Wyoming's current system. A market-driven system in Wyoming would reduce the burdens on interstate commerce and substantially decrease the number of less-burdensome alternatives. Adopting such a system would reduce the possibility of a future dormant Commerce Clause challenge brought by outfitters.

CONCLUSION

Wyoming's current license allocation system imposes more than an incidental burden on interstate commerce. At best, Wyoming's goals are only indirectly served by the regulations. The existence of numerous alternatives that would equally serve Wyoming's interests weighs against proponents of Wyoming's current licensing system. For these reasons, a future dormant Commerce Clause challenge presents a threat to the constitutionality of Wyoming's system. The legislature should attempt to avoid another challenge to Wyoming's hunting licensing system by implementing a license allocation alternative.

PETER C. NICOLAYSEN

APPENDIX

STATE LICENSING SYSTEMS

Wyoming's hunting license system allocates eighty-four percent of its limited quota elk licenses and eighty percent of its limited quota deer, antelope and wild turkey licenses to resident hunters. Other states allocate big game licenses in a manner that may be less burdensome on the outfitting industry than is Wyoming's system.

LESS BURDENSOME:

Colorado. Colorado's licensing system does not differentiate between residents and nonresidents. General licenses are sold over-the-counter on a first-come, first-served basis, regardless of the hunter's residency. Special licenses (i.e. limited quota licenses) are allocated on a preference point system. A hunter-applicant gains a preference point each year he or she applies for a license but does not draw his or her first-choice. All applicants, resident and nonresident, have access to all available licenses. Telephone Interview with Corrie Davis, Department of Natural Resources, Fort Collins, Colo., (Sept. 23, 1996).

Idaho. Idaho's licensing system provides for an outfitter set-aside license, allocating a maximum of twenty-five percent of the total number of nonresident deer licenses and elk licenses available. These licenses are "sold on a first-come, first-served basis, only to persons that have entered into an agreement for that year to utilize the services of a [licensed outfitter]." IDAHO CODE § 36-408(c) (1994 & Supp. 1996).

Montana. Montana provides for an "Outfitter-sponsored License." Under Montana's system, a pool of licenses are reserved for hunters who contract to hunt with a licensed outfitter. MONT. CODE ANN. § 87-2-511 (1995).

Nevada. Nevada allocates sixteen percent of its nonresident deer licenses to nonresident hunters who employ a guide. NEV. REV. STAT. ANN. §§ 502.146-.149 (Michie 1995).

New Mexico. New Mexico allocates seventeen percent of "special drawing" (i.e., limited quota) licenses to nonresidents who contract for outfitting services with a New Mexico registered outfitter. Three percent of the special licenses are allocated to groups comprised of New Mexico residents and nonresidents. Eighty percent of the special licenses are allocated

to residents. N.M. STAT. ANN. § 17-3-16(B)(1)(2)(3) (Michie Supp. 1996).

Oregon. Oregon allocates to nonresidents a maximum of five percent of the total number of "controlled" (i.e., limited quota) deer and elk licenses available. Oregon Department of Fish and Wildlife, *1996 Oregon Big Game Regulations*, at 13. Oregon also allocates licenses to landowners based upon the acreage controlled by the landowner. *Id.* at 10. These licenses may be transferred to anyone, but are valid only on the property for which they were issued. *Id.* Additionally, Oregon has an auction sale and raffle for deer and elk licenses open to residents and nonresidents. *Id.* at 46-47.

MORE BURDENSOME:

Arizona. Arizona allocates one-hundred percent of its big game licenses to residents, of which up to ten percent may be allocated to nonresidents if residents do not apply for them. Telephone Interview with George Taulman, United States Outfitters, Inc., Taos, N.M., (Sept. 7, 1996).