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NOTE

The New Red River Rivalry: Oklahoma's Unconstitutional Attempt to Calm the Waters by Restricting the Sale of Water Across State Lines

I. Introduction

In recent years, the need for water has taken an increasingly important role in states' quests to meet the expanding drinking, industrial, agricultural, and recreational needs of their citizens, especially in drought-prone areas of the country such as north Texas.¹ To resolve both current and future water shortage concerns, many states have entered into congressionally approved water compacts to apportion certain water resources between neighboring states. However, cities and municipalities, such as Irving, Texas, are still in dire need of water to meet their burgeoning projected population growth and are forced to seek additional supply from areas with excess water supply.² This has resulted in a large-scale competition between various municipalities to acquire any and "all available water rights within a cost-effective distance."³ But states are beginning to fight back against their municipalities, and many are resorting to controversial and often discriminatory tactics to protect their precious water resources from being taken by, or even sold to, municipalities in thirsty neighboring states.

1. *E.g.*, J. Mark McPherson, Why Is Texas So Hot for Oklahoma Water? Because the Metroplex Is at the Water's Edge: Let the Wars Begin (article presented at Okla. Water Env't Ass'n, Am. Pub. Works Ass'n-Okla. Chapter Annual Meeting, Norman, Okla., Apr. 6-8, 2009), available at <http://www.texash2olaw.com/pdfs/Texas%20v%20OK%20for%20Water.pdf>.

2. *See* City of Irving, Texas's First Amended Complaint for Declaratory Judgment & Injunctive Relief at 2, *City of Hugo v. Nichols*, No. CIV-08-303-JTM, 2010 WL 1816345 (E.D. Okla. June 2, 2009), 2009 WL 2860901, *vacated*, 656 F.3d 1251 (10th Cir. 2011). Based on 2008 data, the City of Irving had a residential population of 210,150; the population is expected to reach 298,000 by the year 2100. *Id.* As a result, Irving's water demand is expected to increase from its current usage of approximately forty-three million gallons per day to over eighty million gallons per day by 2100. *Id.* However, Irving currently only has a reliable water supply of forty-six million gallons per day. *Id.*

3. Nicholas Andrew, Note, *Interstate Water Transfers and the Red River Shootout*, 41 TEX. ENVTL. L.J. 181, 181 (2011).

In *City of Hugo v. Nichols*, the City of Irving, Texas, entered into a contract with the City of Hugo, Oklahoma, to purchase large quantities of water to meet Irving's growing demand.⁴ However, the Oklahoma Water Resources Board (the Board) denied Hugo's appropriation applications and the State of Oklahoma, under the protection of the Red River Compact, subsequently passed a series of state statutes placing significant burdens on the sale of water for out-of-state use.⁵ Hugo and Irving brought suit against the members of the Board, seeking a declaration that the Oklahoma statutes governing the Board's water allocation decisions were "unconstitutional under the dormant Commerce Clause."⁶ In 2011, the Tenth Circuit Court of Appeals decided that political subdivisions, such as cities and municipalities, lack standing against their parent states to bring suit alleging a violation of rights under a substantive provision of the United States Constitution.⁷ The court upheld the Oklahoma statutes that placed additional and discriminatory burdens on applicants seeking water appropriation for out-of-state use (as compared to applicants seeking appropriation for in-state use) despite the fact that such statutes clearly seem to violate the dormant Commerce Clause. This ruling not only denied potential revenue, taxes, and investment capital to the State of Oklahoma, but also prohibited job creation from usage of the water in North Texas. Additionally, it effectively granted the state power to discriminate in interstate commerce and deprived an injured political subdivision of a federal court remedy.

This note explores the application of the political subdivision standing doctrine in *Hugo* and the court's reasoning for denying standing to a party that seems to be entitled to protection under the dormant Commerce Clause. Part II provides an overview of the Commerce Clause and the development of the political subdivision standing doctrine leading up to *Hugo*. Part III presents *Hugo*, including a statement of facts, the procedural history, an explanation of the majority opinion, and a discussion of the dissenting opinion. Part IV examines why the court should have found standing existed under the political subdivision standing doctrine and argues that Hugo would have prevailed on the merits had standing been found. Part V discusses the broad consequences of the court's finding.

4. *City of Hugo v. Nichols*, 656 F.3d 1251, 1253-54 (10th Cir. 2011).

5. *Id.* at 1254.

6. *Id.*

7. *Id.* at 1257-58.

II. Law Leading Up to Hugo

A. The Interstate Commerce Clause

1. An Overview of the Commerce Clause

The Interstate Commerce Clause contains an enumerated power that vests in Congress the power “[t]o regulate Commerce . . . among the several States.”⁸ This clause serves to impede state efforts to unfairly advance their own state interests at the expense of the national economy and out-of-state consumers.⁹ Implicit in this positive grant of authority is the negative, or dormant, Commerce Clause authority that voids state legislation unduly burdening interstate commerce, even if Congress has not affirmatively legislated in the area addressed by state law.¹⁰ In effect, the dormant Commerce Clause is a judicial creation designed to fill the void when Congress has failed to preserve constitutional limits of power. Thus, the clause is “dormant” because, although Congress has not legislated in the area, Supreme Court decisions have effectively created a protected interest and granted relief, even in the absence of congressional action.¹¹

The purpose of recognizing the dormant Commerce Clause is to prohibit “economic protectionism,” which the Supreme Court defined as “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹² There is a two-step analysis when a state law is challenged under the dormant Commerce Clause. First, a court determines whether the state regulation discriminates against interstate commerce either facially or as practically applied.¹³ If the discrimination is overt on its face, the state regulation is subject to strict scrutiny and will only be upheld if it is necessary to the satisfaction of a compelling state end.¹⁴ The burden rests on the state to justify the regulation in terms of the local benefits and lack of alternatives adequate to preserve the local interests at stake.¹⁵ A

8. U.S. CONST. art. I., § 8, cl. 3.

9. *E.g.*, *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 (1982).

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

11. *See generally* *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

12. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)) (internal quotation marks omitted).

13. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

14. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

15. *Id.*

state regulation that discriminates against interstate commerce is, therefore, “virtually *per se* invalid”¹⁶ unless the state can demonstrate the legislation is “the least discriminatory alternative” to advance a legitimate local interest.¹⁷ Second, if the state statute is nondiscriminatory on its face but is discriminatory as applied, the court will apply a balancing test called the “*Pike* Balancing Test.”¹⁸ The test weighs the rule’s local benefit against its burden on interstate commerce.¹⁹ If the burden on interstate commerce is greater than the local benefit, the state statute is unconstitutional.²⁰ Conversely, if the local benefit is greater than the burden on interstate commerce, the state statute is constitutional.²¹

State attempts at economic protectionism are generally unconstitutional unless they meet one of the exceptions to the Commerce Clause. These exceptions include discrimination in markets where the state itself is a participant²² and discriminatory state regulations authorized by Congress.²³ One potential method under the latter exception is for Congress to use its power under the Commerce Clause to “confer[] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.”²⁴

2. Using the Commerce Clause to Strike Down Restrictive State Laws

The United States Supreme Court and lower federal courts have used the dormant Commerce Clause to strike down state laws burdening interstate commerce despite state claims of authority through congressional intent. The dispositive question in these cases has been whether Congress

16. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

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

18. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

19. *Id.* The Court declared the general rule was as follows: “Where the statute regulates even-handedly 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.” *Id.* (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

20. *Id.*

21. *Id.* The Court went on to determine the limits of the rule by stating:

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.

Id.

22. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

23. *See New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982).

24. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980).

authorized the states to impose the specific restrictions at issue. To determine if the state action was in fact authorized, courts have determined a degree of congressional intent specificity necessary to survive a Commerce Clause attack.

Early Supreme Court cases recognized Congress's power to validate unconstitutional provisions of state laws as long as "Congress ha[d] expressly stated its intent and policy."²⁵ This standard of "expressly stated" was reaffirmed in *New England Power Co. v. New Hampshire* when the Court struck down a state statute and refused to "rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'"²⁶ In that case, the State of New Hampshire argued that the Federal Power Act passed by Congress granted the state authority to prohibit exportation of hydroelectric energy generated within its borders.²⁷ However, the Supreme Court determined that the provision at issue in the Federal Power Act was not an affirmative grant of authority for the state to violate the Commerce Clause by restricting the flow of electricity in interstate commerce.²⁸

In the seminal decision of *Sporhase v. Nebraska*, the United States Supreme Court invalidated a Nebraska statute that effectively banned the interstate sale or use of Nebraska groundwater to any states with which it did not have reciprocal water agreements.²⁹ On appeal, the Court determined that since water was an article of commerce, the state could restrict its transfer across state lines if the regulation "evenhandedly" advanced a legitimate local public interest with only an "incidental" effect on interstate commerce.³⁰ However, the state's restriction of groundwater exportation did not survive this "strictest scrutiny" test because there was insufficient evidence that the reciprocity requirement significantly advanced, and was not "narrowly tailored" to, the state's public interest of conservation and preservation.³¹ In response to Nebraska's claim that the

25. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946).

26. 455 U.S. at 343 (quoting *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring)).

27. *Id.* at 335-36.

28. *Id.* at 344.

29. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982).

30. *Id.* at 954 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

31. *Id.* at 957-58. *Sporhase* did recognize that "under certain circumstances each State may restrict water within its borders." *Id.* at 956. For instance, a state could favor its own citizens in a time of shortage or a "demonstrably arid" state could establish that a ban on exportation was necessary for the purpose of conservation and preservation. *Id.* at 957-58. In *City of El Paso v. Reynolds*, the legitimate public interest test from *Sporhase* was further limited to allow a state statute to discriminate against another state's citizens with respect to

thirty-seven statutes and interstate compacts deferring to state water law showed an implication that Congress intended to give permission to place a burden on interstate commerce, the Court concluded that the compact and statutory language did not show an intent to remove constitutional constraints on the pertinent state laws.³² To effectuate the required intent, the Court held that congressional consent “to the unilateral imposition of unreasonable burdens on commerce” must be “expressly stated.”³³

Just two years after *Sporhase*, the Court held that congressional intent was required to be “unmistakably clear” in order “for a state regulation to be removed from the reach of the dormant Commerce Clause.”³⁴ In *South-Central Timber Development, Inc. v. Wunnicke*, the State of Alaska imposed a statute that required timber taken from state owned lands to be processed in state prior to export.³⁵ The Alaska Legislature based its regulation on a federal statute that imposed the same requirement on timber from federal lands.³⁶ The Court found that Congress must have “affirmatively contemplate[d] otherwise invalid state legislation” before such legislation could violate the dormant Commerce Clause.³⁷ This requirement for “affirmative contemplation” suggested “the need for a particular issue to be directly in front of Congress,” thus precluding the necessary “affirmative contemplation” in the absence of specific language restricting interstate commerce in the compact.³⁸ By establishing a rule requiring the clear expression of congressional approval, the Court set out to protect unrepresented out-of-state interests from being adversely affected by restraints on commerce from state legislative action.³⁹ Further, the Court

groundwater allocation to the extent that the water in question was essential to human survival. 563 F. Supp. 379, 389 (D.N.M. 1983), *superseded by* 597 F. Supp. 694 (D.N.M. 1984); *see* Andrew, *supra* note 3, at 187.

32. *Sporhase*, 458 U.S. at 958-60.

33. *Id.* at 960. The Court reaffirmed *New England Power Co. v. New Hampshire* and *Prudential Ins. Co. v. Benjamin* in holding, “In the instances in which we have found such consent, Congress’ intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated.” *Id.* (quoting *New Eng. Power Co.*, 455 U.S. at 343) (internal quotation marks omitted).

34. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

35. *Id.* at 84.

36. *Id.* at 84, 88-89.

37. *Id.* at 91-92.

38. Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, and Marketing Water Across State Boundaries*, 46 NAT. RESOURCES J. 601, 624 (2006) (internal quotation marks omitted).

39. *Wunnicke*, 467 U.S. at 92. The Court’s policy in creating this rule was based on representation. If a state was allowed to burden commerce, “the brunt of regulations” would

refused to infer congressional intent from the fact that the Alaska state policy was consistent with or possibly even furthered Congress's goals in enacting the federal policy.⁴⁰

3. *Limiting the Commerce Clause Through Interstate Compacts*

Another potential method to limit the dormant Commerce Clause under the congressional authorization exception is through the states' use of interstate compacts. Interstate compacts are congressionally ratified agreements between states.⁴¹ These compacts are interpreted as federal law and, as such, are immune from dormant Commerce Clause attacks.⁴² Compacts can authorize states to act in ways that would otherwise conflict with the dormant Commerce Clause, such as by placing restrictions on interstate commerce.⁴³ However, Congress's consent to a compact "does not also operate as a kind of blanket approval for state actions under a compact which otherwise would violate Commerce Clause restrictions."⁴⁴ To determine whether a compact between states contains the requisite congressional intent to preempt constitutional rights, various courts have applied the "expressly stated,"⁴⁵ "unmistakably clear,"⁴⁶ and "affirmatively contemplate[d]"⁴⁷ standards to the compact language. Since an interstate compact becomes federal law upon congressional ratification, the power derived from an interstate compact by a state to restrict interstate commerce must also pass this dormant Commerce Clause analysis.⁴⁸

have a significant effect on citizens from other states not represented in that jurisdiction. *Id.* On the other hand, Congress's actions presented less danger that one state would exploit citizens of another state because all segments of the country were represented. *Id.*

40. *Id.* at 92-93.

41. Matthews & Pease, *supra* note 38, at 626.

42. Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 569-70 (9th Cir. 1985), *aff'g* 590 F. Supp. 293, 296 (D. Mont. 1983) (per curiam).

43. *Id.*

44. *Id.* at 570 (Tashima, J., concurring) (quoting Reply Brief for Appellant at 3).

45. New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982) (quoting Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427 (1946)) (internal quotation marks omitted).

46. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).

47. *Id.* at 91-92.

48. *Id.* ("[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying the dormant Commerce Clause doctrine."); *see also* Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003) ("Congress certainly has the power to authorize state

B. Development of the Political Subdivision Standing Doctrine

In order for a court to undertake this dormant Commerce Clause analysis, the city or municipality must have standing to bring suit in federal court against its parent state.⁴⁹ Political subdivisions, such as cities and municipalities, are created and delegated authority by their parent states.⁵⁰ Thus, states hold broad powers over their subdivisions. Subdivisions, however, do not always agree when states exercise this power over them in ways that conflict with the Constitution or federal law. As a result, the political subdivision standing doctrine has developed over time to determine when federal courts retain jurisdiction over controversies between political subdivisions and their parent states.

1. The Hunter Line of Cases

In an early series of cases at the beginning of the twentieth century, the Supreme Court held that political subdivisions could not sue their parent states for constitutional violations.⁵¹ In the Court's first political subdivision doctrine case, *Hunter v. City of Pittsburgh*, the Court upheld a Pennsylvania statute authorizing the annexation of the City of Allegheny into the City of Pittsburgh, despite Allegheny's claim that the statute violated its citizens' rights under the Contract Clause and Fourteenth Amendment.⁵² The Court concluded that political subdivisions are "created as convenient agencies" for exercising the powers entrusted to them by the state, so "the State is supreme, and its legislative body, conforming its action to the state

regulations that burden or discriminate against interstate commerce, but we will not assume that it has done so unless such an intent is clearly expressed." (internal citations omitted)).

49. *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("It is well established, however, that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue."); *see also* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) ("[T]his Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit.").

50. *See* *United Bldg. & Constr. Trades Council of Camden Cnty. v. City of Camden*, 465 U.S. 208, 215 (1984) (noting that a municipality derives its authority from the State); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("[Political subdivisions] have been traditionally regarded as subordinate governmental instrumentalities created by the State . . ."); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (stating that a municipality "remains the creature of the state exercising and holding powers and privileges subject to the sovereign will").

51. *See* *Williams v. Mayor of Balt.*, 289 U.S. 36 (1933); *Trenton*, 262 U.S. 182; *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

52. *Hunter*, 207 U.S. at 176-77.

constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.”⁵³

The Supreme Court expanded this rule in *City of Trenton v. New Jersey*.⁵⁴ In *Trenton*, the city challenged its parent state’s imposition of a fee for withdrawing water from the Delaware River as violating both the Contract Clause and the Fourteenth Amendment’s Due Process Clause.⁵⁵ The Court followed its reasoning from *Hunter*, holding that a municipal corporation was a “creature of the state” and the state could “withhold, grant or withdraw powers and privileges as it sees fit.”⁵⁶ The Court concluded that the State’s authority to grant a political subdivision its powers prevented the subdivision from bringing the suit:

The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for “governmental purposes” cannot be questioned. . . . This court has never held that these subdivisions may invoke such restraints [based on the Contract Clause or Fourteenth Amendment] upon the power of the state.⁵⁷

The Court later applied the *Trenton* rule to hold that a political subdivision lacked standing to bring an equal protection challenge under the Fourteenth Amendment against its parent state’s actions.⁵⁸ In *Williams v. Mayor of Baltimore*, the mayor and city council of Baltimore challenged the validity of a state statute exempting a railroad from local taxes.⁵⁹ In rejecting the challenge, the Court explained that “[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”⁶⁰

53. *Id.* at 178-79.

54. *See* 262 U.S. at 183-84.

55. *Id.*

56. *Id.* at 189-90.

57. *Id.* at 188.

58. *See Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933).

59. *Id.* at 39.

60. *Id.* at 40 (citing *R.R. Comm’n v. L.A. Ry. Corp.*, 280 U.S. 145 (1929); *Risty v. Chi., Rock Island & Pac. Ry. Co.*, 270 U.S. 378 (1926); *City of Newark v. New Jersey*, 262 U.S. 192 (1923); *Trenton*, 262 U.S. 182; *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919); *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539 (1905)).

2. Modern Courts' Interpretation of the Hunter Line of Cases

Despite the broad language in earlier cases, the Supreme Court and lower courts have shied away from erecting an absolute bar to political subdivisions challenging the actions of parent states in federal court.⁶¹ In *Gomillion v. Lightfoot*, the Supreme Court explained:

[A] correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.⁶²

While *Gomillion* was not a suit between a municipality and its parent state, its interpretation of the political subdivision doctrine definitively limited the application of *Hunter*, *Trenton*, and *Williams* to political subdivision challenges under the Contract Clause and Fourteenth Amendment.⁶³ The Court also refused to acknowledge a complete bar to all suits by political subdivisions against their parent states in finding that “[l]egislative control of municipalities . . . lies within the scope of relevant limitations imposed by the United States Constitution.”⁶⁴

More recently, in *Branson School District RE-82 v. Romer*, the Tenth Circuit found standing of a political subdivision in a preemption case and formulated a test that allows standing if: (1) the political subdivision asserts a challenge to a state action under a federal constitutional provision written to protect “collective” or “structural rights”⁶⁵ and (2) the political subdivision is “substantially independent” from the parent state.⁶⁶ The court read the authoritative line of cases as “stand[ing] only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed

61. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

62. *Id.* at 344.

63. See *id.*

64. *Id.* at 344-45. In *Gomillion*, the African American citizens of Alabama argued that a redistricting plan violated the Fifteenth Amendment. *Id.* at 340. The Court held that when “state power is used as an instrument for circumventing a federally protected right,” such as the Fifteenth Amendment, the state is not “insulated from federal judicial review.” *Id.* at 347.

65. See discussion *infra* Part IV.A.2.

66. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998).

to collective or structural rights.”⁶⁷ In *Branson*, three school districts brought a Supremacy Clause challenge against an amendment to the Colorado Constitution, alleging that the amendment violated a federal land trust established by Congress in the Colorado Enabling Act.⁶⁸ The court found the Supremacy Clause to be a structural protection and, therefore, held that the “political subdivision [had] standing to bring a constitutional claim against its creating state when the substance of its claim relie[d] on the Supremacy Clause and a putatively controlling federal law.”⁶⁹

The Tenth Circuit’s interpretation in *Branson* is but one example of how cases interpreting the rights of political subdivisions have caused confusion among modern courts and have ultimately led to a split among the circuits. The Ninth Circuit appears to be the only jurisdiction that follows a per se rule that political subdivisions cannot sue their parent states under any constitutional provision.⁷⁰ The Fifth and Eleventh Circuits have joined the Tenth Circuit in rejecting a per se rule against allowing suits by political subdivisions,⁷¹ while the Third, Fourth, and Sixth Circuits have avoided definitively resolving the issue.⁷² It is unclear whether the Second Circuit has adopted a per se rule.⁷³

67. *Id.* at 628.

68. *Id.* at 625-27.

69. *Id.* at 628.

70. *See* *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1108 (9th Cir. 1999) (ruling that the political subdivision “lacks standing to bring an action against the state in federal court—at least to the extent that its action challenges the validity of state regulations on due process and Supremacy Clause grounds”); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998) (reiterating its interpretation of the *Hunter* line of cases as a per se bar to municipal suits against their parent states).

71. *See* *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 567 n.6 (5th Cir. 2008) (“Although some circuits have followed a per se rule that political subdivisions may not sue their parent states under any constitutional provision, that is not the rule in this circuit.”); *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986) (“[N]o per se rule applies in this Circuit.”).

72. *See* *City of Charleston v. Pub. Serv. Comm’n of W. Va.*, 57 F.3d 385, 390 (4th Cir. 1995) (noting that the political subdivision standing doctrine is “unclear”); *Amato v. Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991) (“Judicial support for [a per se] rule may be waning with time.”); *S. Macomb Disposal Auth. v. Twp. of Washington*, 790 F.2d 500, 504 (6th Cir. 1986) (“There may be occasions in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state legislation.”).

73. *Compare* *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973) (holding that political subdivisions could not challenge a state statute under the Fourteenth Amendment), *with* *Aguayo v. Richardson*, 473 F.2d 1090, 1100-01 (2d Cir. 1973) (holding

III. City of Hugo v. Nichols: Tenth Circuit Denies Standing to a Political Subdivision Bringing a Commerce Clause Claim

In 2011 the Tenth Circuit heard another political subdivision standing doctrine case in *City of Hugo v. Nichols*.⁷⁴ This time, however, the dispute involved a dormant Commerce Clause challenge to various state statutes passed under the protection of an interstate compact.⁷⁵

A. Facts and Procedural History

In 1955 Congress granted Oklahoma, Texas, Arkansas, and Louisiana permission to negotiate an interstate compact to equitably apportion the stream waters of the Red River and its tributaries.⁷⁶ Twenty-three years later, the states approved the Red River Compact (the Compact) to divide the Red River and its tributaries for purposes of water apportionment between the four participating states.⁷⁷ Shortly thereafter, Congress gave its consent and the compact became federal law in 1980.⁷⁸

Accordingly, the Compact resulted in the Oklahoma Legislature enacting a series of statutes designed to prevent or restrict the exportation of Oklahoma stream water.⁷⁹ The initial legislation included a now expired moratorium on the sale of water outside of the state, as well as several antitrade statutes designed to prevent Oklahoma residents from selling Oklahoma stream water to nonresidents.⁸⁰ However, the statutes at issue in *Hugo* were enacted in 2009 and further prevented and burdened the transfer

that a city “had no standing to assert constitutional claims,” but noting that a political subdivision might have standing to assert a claim under the Fifth Amendment).

74. See 656 F.3d 1251 (10th Cir. 2011).

75. *Id.* at 1254.

76. *City of Hugo v. Nichols*, No. CIV-08-303-JTM, 2010 WL 1816345, at *2 (E.D. Okla. April 30, 2010), *vacated*, 656 F.3d 1251 (10th Cir. 2011).

77. *Id.*

78. *Id.* The Red River Compact was part of Public Law No. 96-564. *Id.*

79. *Id.*

80. *Id.* The Oklahoma Moratorium expired on November 1, 2009, five years from its effective date. *Id.* The antitrade provisions still in effect include: (1) 82 OKLA. STAT. § 105.16(B) (2011) (providing that surface water appropriations not fully utilized within seven years of authorization would be approved only if the proposed use would promote the beneficial use of water in Oklahoma), (2) 82 OKLA. STAT. § 1085.2(2) (prohibiting the Board from making a contract to convey title or use water outside of Oklahoma without authorization from the Oklahoma legislature), and (3) 82 OKLA. STAT. § 1085.22 (prohibiting the Board from permitting the sale or resale of any water for use outside the state). *Hugo*, 2010 WL 1816345, at *2; see also Joint Brief of All Appellants at 14-15, *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011) (Nos. 10-7043, 10-7044), 2010 WL 3736199, at *4.

of Oklahoma stream water for out-of-state use.⁸¹ These recent enactments (collectively, the Oklahoma statutes): (1) impose additional restrictions on permits to be issued by the Board for use of water outside of Oklahoma,⁸² (2) require legislative approval of permits for the out-of-state use of water apportioned to Oklahoma under an interstate compact,⁸³ (3) require the Board to determine whether water subject to a permit application for out-of-state use can be transported to alleviate shortages in the state,⁸⁴ and (4) subject permits granted by the Board for out-of-state use to a review by the Board every ten years to determine if there has been a change in the water needs and availability in Oklahoma.⁸⁵

Prior to the enactment of the recent statutes, the City of Hugo⁸⁶ and City of Irving⁸⁷ entered into a contract whereby Hugo would sell, and Irving would purchase, substantial quantities of Oklahoma stream water appropriated under the Compact to Hugo from the Kiamichi River.⁸⁸ At contract formation, Hugo held two stream water permits issued by the Board.⁸⁹ Hugo's 1954 permit provided an appropriation of 1700 acre-feet of stream water per year and its 1972 permit authorized the appropriation of 28,800 acre-feet of stream water per year.⁹⁰ A third application was filed with the Board in 2002 requesting appropriation of an additional 200,000 acre-feet of stream water from the Kiamichi River per year.⁹¹ The Board, however, did not rule on either the third application or on petitions filed in November 2008 "to change the place of use for the 1954 and 1972 permits," as rulings would require consideration of the Oklahoma statutes challenged by Hugo and Irving.⁹² Hugo and Irving thereafter brought suit against the members of the Board,⁹³ seeking a declaration that the relevant

81. *Hugo*, 2010 WL 1816345, at *5-6.

82. 82 OKLA. STAT. § 105.12A(B)(1) (2011).

83. *Id.* § 105.12A(D).

84. *Id.* § 105.12(A)(5).

85. *Id.* § 105.12(F).

86. The City of Hugo is an Oklahoma municipality located in Choctaw County, Oklahoma. *Hugo*, 2010 WL 1816345, at *1.

87. The City of Irving is a Texas municipality located in Dallas County, Texas. *Id.*

88. *Id.* at *2.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. The Oklahoma Water Resources Board is an Oklahoma state agency consisting of nine individual members responsible for enforcing the laws enacted by Oklahoma regarding the appropriation and use of the surface waters of Oklahoma. *City of Hugo v. Nichols*, 656 F.3d 1251, 1254 (10th Cir. 2011).

Oklahoma laws governing the Board's water allocation decisions were unconstitutional under the Commerce Clause and requesting an injunction prohibiting their enforcement.⁹⁴

On April 30, 2010, the United States District Court for the Eastern District of Oklahoma granted the Board's cross-motion for summary judgment in part, as to plaintiffs' Commerce Clause claims,⁹⁵ and denied it in part.⁹⁶ The district court held that Congress's approval of the Compact language was sufficient to protect the Oklahoma statutes from a dormant Commerce Clause challenge.⁹⁷ In doing so, the court determined that Congress's ratification of the Compact authorized Oklahoma to enact the contested statutes to control waters within its borders.⁹⁸

The case was subsequently appealed to the Tenth Circuit Court of Appeals on May 28, 2010.⁹⁹ On appeal, neither party raised the issue of whether the court had jurisdiction.¹⁰⁰ However, the "court ordered the parties to submit supplemental briefs addressing" the issue of standing for each appellant to bring suit against the Board.¹⁰¹

94. *Hugo*, 2010 WL 1816345, at *2.

95. *Id.* at *7.

96. *Id.* The district court denied defendants' summary judgment argument that the case should be dismissed "on grounds of mootness due to recent legislation or based on any need to defer to the Compact Commission, under the doctrine of primary jurisdiction." *Id.*

97. *Id.*

98. *Id.*

99. Notice of Appeal at 1, *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011) (Nos. 10-7043, 10-7044).

100. *Hugo*, 656 F.3d at 1255. Despite the fact that the district court exercised jurisdiction and neither party contested the standing issue on appeal, the court exercised its "obligation to assess its own jurisdiction" and determine if the appellants met the standing requirements of Article III of the United States Constitution. *Id.* (citing *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1158-59 (10th Cir. 2011)).

101. *Id.* In an order filed on June 14, 2011, the parties were ordered to file supplemental briefs to address two issues:

1. Whether City of Hugo has standing to sue the Oklahoma Water Resources Board under the political subdivision standing doctrine as described in *Branson School District [RE-82] v. Romer*, 161 F.3d 619 (10th Cir. 1998).
 2. If this court concludes City of Hugo does not have standing to sue, whether City of Hugo's lack of standing impacts City of Irving's standing.
- Order at 2, *Hugo*, 656 F.3d 1251 (Nos. 10-7043, 10-7044).

B. Majority Opinion

In a 2-1 decision,¹⁰² the Tenth Circuit held that Hugo, as “a political subdivision of Oklahoma, lack[ed] standing to sue the Board under the dormant Commerce Clause.”¹⁰³ As a result, Irving also lacked standing because “Irving’s standing [was] premised solely on its contract with Hugo” and therefore Irving’s alleged injury could not be redressed by the relief requested.¹⁰⁴ Thus, the Tenth Circuit vacated the district court’s order and remanded the case to the district court to be dismissed for lack of federal jurisdiction.¹⁰⁵

The Tenth Circuit began its discussion with a brief history of the political subdivision standing doctrine dating back to *Trenton* and the subsequent development of the doctrine in *Williams*, *Gomillion*, and *Branson*.¹⁰⁶ In acknowledging “the broad language in these earl[ier] cases,” the court noted that the Supreme Court and circuit courts “have shied away from erecting an absolute bar to political subdivisions asserting rights against their parent states in federal court.”¹⁰⁷ In support, the court pointed towards *Gomillion* as limiting the state’s unrestrained authority as against its political subdivisions only by the particular constitutional prohibitions considered in *Trenton* (Contract and Due Process Clauses) and *Williams* (Fourteenth Amendment).¹⁰⁸ The court agreed with *Gomillion* and was unwilling to “grant[] the states ‘plenary power to manipulate in every conceivable way . . . the affairs of municipal corporations.’”¹⁰⁹

Instead, the court shifted its focus to the holding in *Branson* that granted “federal jurisdiction over a political subdivision’s claim brought under a federal statute as a Supremacy Clause claim.”¹¹⁰ The court interpreted *Branson* as making the limited distinction that a political subdivision could not sue its parent state for a constitutional violation if the subject provision was written to protect “individual rights.”¹¹¹ Rather, *Branson* held that a

102. Judge Murphy authored the majority opinion, with Judge Gorsuch joining. *See Hugo*, 656 F.3d at 1253. Judge Matheson issued the dissenting opinion. *Id.* at 1265 (Matheson, J., dissenting).

103. *Id.* at 1254 (majority opinion).

104. *Id.* at 1254, 1265.

105. *Id.*

106. *Id.* at 1255-56.

107. *Id.* at 1256.

108. *Id.*

109. *Id.* (second alteration in original) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960)).

110. *Id.* (citing *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998)).

111. *Id.* (quoting *Branson*, 161 F.3d at 628) (internal quotation marks omitted).

political subdivision could only bring a constitutional challenge under a “constitutional provision[] designed to protect ‘collective or structural rights’ (i.e. the Supremacy Clause).”¹¹² The court therefore maintained that *Branson* should simply be read as ruling “that *Trenton* and *Williams* do not bar suits by municipalities against their parent states to enforce, via the Supremacy Clause, the provisions of federal statutes conferring rights on those very municipalities.”¹¹³

With the *Branson* rule in mind, the court subsequently examined the findings of standing in *Branson* and *Kaw Tribe* that claimed Supremacy Clause violations and compared them to the dormant Commerce Clause claim in the present case.¹¹⁴ In its analysis, the court determined that the states in both prior cases asserted a new state law or conducted actions in such a way as to conflict with a federal statute.¹¹⁵ In these cases, the Supremacy Clause was “not a source of any federal rights.”¹¹⁶ Instead, the sources of substantive rights originally given to the political subdivisions were congressionally enacted federal statutes “and the Supremacy Clause was invoked merely to guarantee, as a structural matter, that federal law predominate[d] over conflicting state law.”¹¹⁷ On the other hand, the court determined that “[t]he dormant Commerce Clause . . . itself provide[d] substantive rights” to a party in that it directly conferred power to the federal government and “limit[ed] the states’ ability to act in certain ways.”¹¹⁸ Therefore, claims brought under the Commerce Clause do not fit into the court’s interpretation of “collective or structural.”¹¹⁹

Ultimately, the court concluded that Hugo lacked standing under *Branson* because the dormant Commerce Clause claim was “based on a substantive provision of the Constitution, and . . . the Supreme Court ha[d] made clear that the Constitution [did] not contemplate the rights of political subdivisions as against their parent states.”¹²⁰ In doing so, the court affirmed the rule that a political subdivision could only sue its parent state

112. *Id.* (quoting *Branson*, 161 F.3d at 628).

113. *Id.* at 1260-61. *See generally* Hous. Auth. of Kaw Tribe of Indians v. City of Ponca City, 952 F.2d 1183 (10th Cir. 1991); *Rogers v. Brockett*, 588 F.2d 1057 (5th Cir. 1979).

114. *See Hugo*, 656 F.3d at 1256-58.

115. *Id.* at 1256-57.

116. *Id.* at 1256 (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979)) (internal quotation marks omitted).

117. *Id.* at 1257.

118. *Id.*

119. *See id.*

120. *Id.* at 1257-58.

“when Congress has enacted statutory law specifically providing rights to [political subdivisions].”¹²¹

C. Dissenting Opinion

In his dissent, Judge Matheson disagreed with the majority’s interpretation of *Branson* and its finding that Hugo lacked standing.¹²² Judge Matheson argued that “the dormant Commerce Clause protect[ed] a structural right and thereby support[ed] political subdivision standing.”¹²³ In his argument, Judge Matheson highlighted two problems with the majority’s analysis. First, the majority interpreted *Branson* as a narrow exception to the limited political subdivision standing doctrine of the early cases.¹²⁴ Judge Matheson, on the other hand, interpreted *Branson* as a broader exception and method to determine if a claim fit within the structural rights category.¹²⁵ Second, the majority’s holding effectively limited a structural rights claim under *Branson* to only include a preemption claim.¹²⁶ Judge Matheson argued that claims under the dormant Commerce Clause also fell into the structural rights category.¹²⁷

As a resolution to the first problem, Judge Matheson argued that while “*Branson* granted political subdivision standing on a federal preemption claim, [the Tenth Circuit did not declare] that a political subdivision could sue its parent state *only* for a preemption claim” as was maintained by the majority.¹²⁸ Rather, Judge Matheson read *Branson* to “recognize[] a broader exception that [allowed] future consideration of claims based on constitutional provisions written to protect structural rights.”¹²⁹ Instead of limiting the political subdivision standing doctrine to only the specific constitutional claims presented in cases from *Trenton* to *Branson*, the court was required to determine if “the constitutional provision that supplie[d] the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.”¹³⁰ Judge Matheson further reasoned that if the *Branson* court intended to limit its holding to only preemption claims,

121. *Id.* at 1257.

122. *Id.* (Matheson, J., dissenting).

123. *Id.* at 1266.

124. *Id.* at 1269-70.

125. *Id.*

126. *Id.* at 1270-73.

127. *Id.*

128. *Id.* at 1270.

129. *Id.*

130. *Id.* (quoting *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998)) (internal quotation marks omitted).

the court's "distinction between individual and structural rights would be superfluous."¹³¹

Based on this understanding of *Branson*, Judge Matheson next attacked the majority's determination that the dormant Commerce Clause was not based on a structural right.¹³² In contrast to the majority's comparison between a preemption claim and a dormant Commerce Clause claim, Judge Matheson argued that "[d]ormant Commerce Clause claims are more like preemption than individual rights claims because they concern the relative power of federal and state government."¹³³ Judge Matheson defined a preemption claim as one "alleg[ing] that a federal statute is supreme . . . to conflicting state law. [Thus it] is structural because it concerns the relative authority of federal and state government."¹³⁴ In contrast, Judge Matheson defined "[a]n individual right claim" as one "concern[ing] the limits of government authority over the individual."¹³⁵ Therefore, according to Judge Matheson, dormant Commerce Clause claims should be considered structural rights "because they concern the relative power of federal and state government" by asking whether a state law unconstitutionally inhibited interstate commerce, and thus, "was 'written to protect' the allocation of power between the federal government and states," not individual rights.¹³⁶

Judge Matheson further argued that Hugo also met the second requirement of the political subdivision doctrine in *Branson*—that "a political subdivision be 'substantially independent' from its parent state to have standing."¹³⁷ Similar to the school districts in *Branson*, Hugo was substantially independent of its parent state because it could "hold property in its own name, enter into contracts, and sue and be sued in its own name."¹³⁸ As a result, "[b]ecause Hugo raised a claim based on a constitutional provision that protect[ed] structural rights" and was independent of its parent state, Judge Matheson would have held that Hugo had standing and that the court should have reached a decision on the merits.¹³⁹

131. *Id.* at 1271.

132. *See id.* at 1270-75.

133. *Id.* at 1272.

134. *Id.*

135. *Id.*

136. *Id.* at 1272-73.

137. *Id.* at 1275.

138. *Id.*

139. *Id.* at 1265, 1275. It is important to note that Judge Matheson found Irving had standing even if Hugo did not because the political subdivision doctrine did not apply to

IV. Analysis

A. The Majority Misinterpreted Precedential Case Law and Should Have Found Standing Existed Under the Political Subdivision Doctrine

In *Hugo*, the majority and the dissent came to strikingly different opinions. While both opinions agreed that early political subdivision standing doctrine cases took a strict, absolutist view of a political subdivision's ability to sue its parent state, the judges parted ways when interpreting *Branson*.¹⁴⁰ The majority ignored the important *Branson* distinction between individual and structural rights, choosing instead to interpret *Branson* as creating a limited exception to the strict early views for claims brought under the Supremacy Clause.¹⁴¹ In contrast, Judge Matheson correctly interpreted *Branson* as recognizing a broader exception that establishe[d] a framework to "allow future consideration of claims [brought under] constitutional provisions written to protect structural rights."¹⁴² The issue therefore hinges on the application of the *Branson* framework to determine whether the dormant Commerce Clause protects individual or structural rights.

1. Interpretation of *Branson*

The *Hugo* majority read *Branson* as standing for the limited proposition that a political subdivision can sue its parent state *only* if suit was brought under a preemption claim.¹⁴³ In doing so, the court mistakenly held that the *Branson* court's use of the terms "collective" and "structural" referred only to a situation where a political subdivision brought suit against its parent state under a federal statute through the Supremacy Clause.¹⁴⁴ This understanding resulted in a political subdivision *only* having standing to sue its parent state when Congress had directly conferred upon the subdivision

Irving. *Id.* at 1265. Furthermore, "Irving . . . asserted a justiciable claim" against the Board because the Oklahoma water statutes interfered with its contract with Hugo and its only remedy would be "a favorable ruling on its dormant Commerce Clause challenge." *Id.* at 1265, 1275-76. For additional discussion on the "justiciable" requirement of a claim, see Alexander Willscher, *The Justiciability of Municipal Preemption Challenges to State Law*, 67 U. CHI. L. REV. 243 (2000).

140. Compare *Hugo*, 656 F.3d at 1256 (majority opinion), with *id.* at 1266 (Matheson, J., dissenting).

141. See *id.* at 1261 (majority opinion).

142. *Id.* at 1270 (Matheson, J., dissenting).

143. *Id.* at 1257 (majority opinion).

144. *Id.*

a specific right and the parent state had denied it the benefit of that right in violation of the federal law.

The majority reasoned that, in *Branson*, “[T]he source of substantive rights was a federal statute specifically directed at protecting political subdivisions, and the Supremacy Clause was” used to structurally guarantee that the federal law preempted the challenged state law.¹⁴⁵ In contrast, it held in *Hugo* that the dormant Commerce Clause, not a federal statute, directly provided substantive rights to the political subdivision.¹⁴⁶ Thus, the dormant Commerce Clause did not meet the limited exception from *Branson* that only allowed suits “when Congress [had] enacted statutory law specifically providing rights to” the political subdivision that contradicted state actions.¹⁴⁷

However, a more accurate reading of *Branson* recognizes a broader exception to the political subdivision standing doctrine that allows standing for claims based on constitutional provisions written to protect “structural” rights. Rather than specifically limiting political subdivision standing to certain preemption claims, the *Branson* court expanded on the early cases to block standing only when the “constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.”¹⁴⁸ Thus, a political subdivision has standing to sue its parent state in federal court if (1) the nature of its legal challenge to a state action was under a federal constitutional provision written to protect “collective” or “structural” rights, rather than individual rights; and (2) the political subdivision is “substantially independent” from its parent state.¹⁴⁹

As Judge Matheson argued, if, as the majority held, *Branson* intended to restrict political subdivision standing to preemption claims under the Supremacy Clause, the *Branson* court’s distinction between individual and structural rights would have been irrelevant.¹⁵⁰ Therefore, in order to determine if *Hugo* has standing we must first determine whether *Hugo*’s dormant Commerce Clause claim is based on a structural or individual right.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998).

149. *Id.* at 629.

150. *Hugo*, 656 F.3d at 1271 (Matheson, J., dissenting).

2. *Structural v. Individual Rights*

It is evident from the *Branson* court's interpretation of *Hunter*, *Trenton*, and *Williams* that the Contract Clause, Due Process Clause, and Equal Protection Clause all fall into the individual rights category of the *Branson* test.¹⁵¹ It is further made apparent that the Supremacy Clause protects a structural right.¹⁵² However, the *Branson* court did not provide much additional guidance for distinguishing between a constitutional provision "written to protect" an individual right and one "written to protect" a structural right.¹⁵³

The courts have described a structural right as one that "establishes a structure of government which defines the relative powers of the state and the federal government."¹⁵⁴ By contrast, an individual right claim concerns the limits of government authority over an individual or the relationship between the state and the private market.¹⁵⁵ Other courts have described individual rights as those that "confer fundamental rights on individual citizens" and "guarantee[] that all citizens enjoy equal protection of the laws and due process of law."¹⁵⁶

While *Branson* did not elaborate on its distinction between structural and individual rights, the *Branson* court did provide an example of a structural right by declaring that a preemption claim under the Supremacy Clause was structural in nature.¹⁵⁷ A preemption claim alleges that a federal statute is supreme to, or preempts, a conflicting state law.¹⁵⁸ This type of "claim is structural because it concerns the relative authority [between] federal and state government."¹⁵⁹

Dormant Commerce Clause claims also concern the relative powers of the federal and state governments by claiming that a state law unconstitutionally interferes with the federal regulation of interstate

151. See *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 176-77 (1907).

152. See *Branson*, 161 F.3d at 628-29.

153. *Id.* at 628.

154. *Branson Sch. Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1507-08 (D. Colo. 1997) (quoting *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283, 289-90 (S.D. Cal. 1978)), *aff'd*, 161 F.3d 619 (10th Cir. 1998).

155. *Hugo*, 656 F.3d at 1260 (majority opinion).

156. *Branson*, 958 F. Supp. at 1507 (quoting *Gianturco*, 457 F. Supp. at 289-90) (internal quotation marks omitted).

157. *Branson*, 161 F.3d at 629.

158. *Hugo*, 656 F.3d at 1272 (Matheson, J., dissenting).

159. *Id.*

commerce.¹⁶⁰ As an enumerated power of Article 1, Section 8 of the Constitution, the Commerce Clause, upon which the dormant Commerce Clause is based, was written to protect states' rights by authorizing and limiting the powers of Congress, and allocating power between the federal government and the states.¹⁶¹ The Supreme Court has described the Commerce Clause as "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."¹⁶² One leading commentator stated that "[t]he Fifth and Tenth Circuits . . . have limited cities' standing to cases that involve claims under the Supremacy Clause and other *structural* restrictions on state power, such as the Dormant Commerce Clause."¹⁶³ Accordingly, claims based on this provision, such as the one in *Hugo*, ask courts to resolve questions of relative federal and state power. Thus, the dormant Commerce Clause is a structural right that, similar to the Supremacy Clause, acts as a substantive limitation on the states' governmental power in relation to the federal government. Therefore, it meets the first part of the *Branson* test to determine if a political subdivision has standing to challenge unconstitutional state actions.

3. *Hugo's Independence*

According to *Branson*, in addition to making a claim based on a structural right, a political subdivision must also be "substantially independent" from its parent state in order to have standing.¹⁶⁴ This is necessary so that the suit does not amount to the state essentially suing itself. In this case, "The City of Hugo is substantially independent of [the State of] Oklahoma."¹⁶⁵ "Hugo can hold property in its own name, enter into contracts, . . . sue and be sued," obtain property by eminent domain, and engage in activity for the benefit of its citizens.¹⁶⁶ Therefore, Hugo also meets the second part of the political subdivision doctrine test.

160. *Id.* at 1273.

161. *Id.* at 1272-73 (citing AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 105-08 (2005)).

162. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).

163. David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 *YALE L.J.* 2218, 2250 (2006) (emphasis added).

164. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998).

165. *Hugo*, 656 F.3d at 1275 (Matheson, J., dissenting).

166. *Id.* (citing 11 OKLA. STAT. §§ 22-101, 22-104, 37-117 (2011)).

4. The Court Should Have Found Standing Existed

A political subdivision that is substantially independent of its parent state has standing under the political subdivision standing doctrine to challenge a statute passed by its parent state under a constitutional provision that was written to protect structural or collective rights.¹⁶⁷ As established above, Hugo is substantially independent of the State of Oklahoma and has challenged various Oklahoma statutes under the dormant Commerce Clause, which acts as a structural limitation on the state regulation of interstate commerce. Hugo, therefore, had standing to bring its dormant Commerce Clause challenge, and the court should have proceeded to reach a decision as to whether the Oklahoma statutes unconstitutionally violated the Commerce Clause.

B. Upon Finding Standing, the Court Should Strike Down Oklahoma's Statutes as Unconstitutional

The Commerce Clause vests Congress with the enumerated and exclusive power to regulate commerce between states.¹⁶⁸ Implicit in this grant of authority is the dormant Commerce Clause, which voids state attempts to unduly burden interstate commerce even if Congress has not affirmatively legislated in the area addressed by the state law.¹⁶⁹ States are therefore prohibited from unfairly advancing their own state interests at the expense of the national economy by giving their own citizens an advantage over out-of-state citizens.¹⁷⁰ However, congressional ratification of an interstate compact may authorize states to act in ways that would otherwise conflict with the dormant Commerce Clause, such as by placing undue burdens on out-of-state parties.¹⁷¹ Once Congress approves an interstate compact, the compact becomes federal law and the constitutionality of state action hinges on whether Congress's intent in approving the interstate compact is sufficiently clear.¹⁷²

The Supreme Court has determined the degree of specificity of congressional intent required for a state to have the authority to violate the Commerce Clause.¹⁷³ In *Sporhase*, the Supreme Court announced that the

167. *Branson*, 161 F.3d at 628-29; see also discussion *supra* Part IV.A.1.

168. U.S. CONST. art. I., § 8, cl. 3.

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

170. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994).

171. *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568, 569-70 (9th Cir. 1985).

172. See discussion *supra* Part II.A.3.

173. See discussion *supra* Part II.

standard for determining congressional intent to authorize state restrictions on interstate commerce is that such authorization must be “expressly stated.”¹⁷⁴ Subsequent decisions of the Court expanded the standard to also include congressional intent that is “unmistakably clear.”¹⁷⁵ This high level of specificity requires interstate compacts, such as the Red River Compact, to contain very specific language in order to meet the *Sporhase* standard and survive a dormant Commerce Clause challenge.¹⁷⁶

1. Applying Sporhase and Wunnicke to the Red River Compact

While there is no doubt that Congress approved the state-negotiated Red River Compact, the Compact does not explicitly prohibit the export of water or even make reference to the Commerce Clause.¹⁷⁷ Congressional consent to the Compact was simply limited to “an equitable apportionment among [the compacting states] of the waters of the Red River and its tributaries.”¹⁷⁸ *Sporhase* established that an equitable apportionment does not in itself demonstrate the required specificity of congressional intent to authorize a waiver of Commerce Clause restrictions.¹⁷⁹ The leading commentators reviewing *Sporhase* have also agreed, with one major treatise summarizing the holding by noting: “In other words, Congress’ mere consent to the water compacts was not an unmistakably clear expression of intent to authorize unreasonable state burdens on commerce.”¹⁸⁰ Thus, the congressional authorization to negotiate the Compact and congressional ratification of the Compact do not provide the requisite “expressly stated” or “unmistakably clear” expression of congressional intent necessary to authorize violations of the Commerce Clause.

Like the Compact, most interstate water compacts in the western United States remain silent on transfer rights of the signatory parties, but courts have found that some compacts satisfy the *Sporhase* standard in prohibiting

174. *Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941, 960 (1982) (quoting *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982)) (internal quotation marks omitted).

175. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

176. *See Sporhase*, 458 U.S. at 959.

177. *See Red River Compact*, Pub. L. No. 96-564, art. IV, § 4.02(b), 94 Stat. 3305 (1980).

178. *Id.*; *see H.R. REP. NO. 84-1444*, at 1 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2946, 1955 WL 3984.

179. *Sporhase*, 458 U.S. at 958.

180. Douglas L. Grant, *State Regulation of Interstate Water Export*, in 3 *WATERS AND WATER RIGHTS* § 48.03(c)(6) (Amy K. Kelley ed., 3d ed. 2012); *see Matthews & Pease, supra* note 38, at 635; Chris Seldin, Comment, *Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 CALIF. L. REV. 1545, 1555 (1999).

transfers. For instance, the Snake River Compact between Wyoming and Idaho states:

No water of the Snake River shall be diverted in Wyoming for use outside the drainage area of the Snake River except with the approval of Idaho; and no water of any tributary of the Salt River heading in Idaho shall be diverted in Idaho for use outside the drainage area of said tributary except with the approval of Wyoming.¹⁸¹

Similarly, the Oregon-California Goose Lake Interstate Compact declares: “Export of water from Goose Lake Basin for use outside the basin without prior consent of both State legislatures is prohibited.”¹⁸² The Kansas-Nebraska Big Blue River Compact includes the provision: “Neither State shall authorize the exportation from the Big Blue River of water originating within that basin without the approval of the [compact agency’s] administration.”¹⁸³ Finally, the Yellowstone River Compact provides: “No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States.”¹⁸⁴

The aforementioned interstate compact provisions go far beyond the simple allocation of stream water—they explicitly authorize states to restrict or forbid interstate water transfers. This type of express language constitutes “unmistakably clear” congressional approval of the signatory states’ ability to avoid the otherwise applicable Commerce Clause restrictions and therefore meets the *Sporhase* standard of specificity.

By contrast, the Red River Compact is merely an allocation of interstate waters and does not come close to authorizing the State of Oklahoma to forbid or burden the exportation of water by a political subdivision. In *Hugo*, the State of Oklahoma argued that the Compact language grants it “free and unrestricted use”¹⁸⁵ of the state’s allocated water and that nothing in the Compact shall “[i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and

181. Snake River Compact, ch. 73, art. IV, 64 Stat. 29, 31 (1950).

182. Goose Lake Basin Compact, Pub. L. No. 98-334, art. III(C), 98 Stat. 291, 292 (1984).

183. Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, art. V, § 5.4, 86 Stat. 193, 197 (1972).

184. Yellowstone River Compact, Pub. L. No. 231, art. X, 65 Stat. 663, 669 (1951).

185. Red River Compact, Pub. L. No. 96-564, art. IV, § 4.02(b), 94 Stat. 3305, 3309 (1980).

control of water.”¹⁸⁶ While this Compact language could refer to the use of water free from constitutional limitations, as the State would contend, it more likely refers to the use of water free from downstream delivery obligations. Regardless, the ambiguity of the Compact’s language is evidence that the Compact does not have “expressly stated” or “unmistakably clear” limitations on the exportation of water. By failing to meet this standard, Congress could not possibly have “affirmatively contemplated” a potential burden on interstate commerce when it ratified the Compact. The states are thus free and unrestricted in their use and regulation of the water appropriated under the Compact, so long as their actions are constitutional.

While Congress may authorize state-imposed restrictions on interstate commerce through its approval of interstate compacts, the Compact provides no such authorization. Without specific language in the compact banning the exportation of water, Congress has not consented to a state violation of the Commerce Clause. As a result, the State of Oklahoma does not have the authority to place undue burdens on the exportation of water and the court must determine if the challenged Oklahoma statutes can survive the applicable constitutional level of review.

2. *Oklahoma Statutes Fail Strict Scrutiny*

Since the Compact does not insulate the Oklahoma statutes from the dormant Commerce Clause, the court must apply Commerce Clause scrutiny to determine if the statutes are constitutional. The Oklahoma statutes at issue obviously do not regulate evenhandedly. While they do not strictly forbid water export, they do impose burdens on parties seeking to appropriate water for use outside of Oklahoma that are not imposed on parties seeking to appropriate water for in-state use. This facial discrimination means that the statutes are subject to strict scrutiny and will only be upheld as constitutional if they are deemed to be necessary to the satisfaction of a compelling state end.¹⁸⁷

The Court has thus far identified only one compelling end in its interstate water compact jurisprudence. In *Sporhase*, the Court held that a state could favor its own citizens in times of “severe shortage” if necessary for

186. *Id.* art. II, § 2.10(a), 94 Stat. at 3307. *See generally* Defendants’ Response to Supplemental Joint Motion of Plaintiffs City of Hugo and Hugo Municipal Authority, and Intervenor-Plaintiff City of Irving for Summary Judgment at 13, *City of Hugo v. Nichols*, No. CIV-08-303-JTM, 2010 WL 1816345 (E.D. Okla. June 2, 2009), 2008 WL 7328645, *vacated*, 656 F.3d 1251 (10th Cir. 2011).

187. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

conservation and preservation.¹⁸⁸ Studies published by the Board, however, showed that the State of Oklahoma only uses a small percentage of the available stream water of the Kiamichi River it has been appropriated under the Compact.¹⁸⁹ The Board also reported that “fourteen times more stream water flows out of Oklahoma during a given year (36 million acre-feet) than is actually allocated for annual use in the state (2.6 million acre-feet).”¹⁹⁰ In sum, Oklahoma has an abundant supply of stream water and is in no danger of a “severe shortage” in the foreseeable future. Instead, the Oklahoma statutes at issue in *Hugo* were enacted as a protectionist measure designed to further the state’s economic interest at the expense of the economic interest of neighboring states such as Texas.¹⁹¹ As a result of these blatantly economic protectionist motives and the lack of projected “severe shortage” of water supply, Oklahoma does not have a compelling end to justify its discriminatory behavior.

Even if Oklahoma was able to show a water shortage or convince the court that conservation and preservation of Oklahoma water is a compelling end, the Oklahoma statutes would still fail the strict scrutiny test because they are not narrowly tailored or even necessary to protect the compelling end. In order to qualify as “necessary” under strict scrutiny, the means taken to satisfy the compelling end must be the least discriminatory alternative.¹⁹² If, in fact, the true purpose of the Oklahoma statutes was to protect Oklahoma citizens from a water shortage, the Oklahoma statutes would apply with equal force to all permits to appropriate Oklahoma water, whether the end use was in state or out of state. This type of evenhanded regulation would be a far less discriminatory manner to accomplish a goal of conservation and preservation. As currently written, however, the Oklahoma statutes do not survive the strict scrutiny test and, therefore, the burden placed on interstate commerce by the statutes make them unconstitutional under the Commerce Clause.

188. *Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941, 957-58 (1982).

189. Joint Brief of All Appellants, *supra* note 80, at 4.

190. *Id.*

191. Supplemental Joint Motion of Plaintiffs City of Hugo and Hugo Municipal Authority, and Intervenor-Plaintiff City of Irving for Summary Judgment and Brief in Support at 24, *City of Hugo v. Nichols*, 2010 WL 1816345 (E.D. Okla. Sept. 10, 2009) (No. CIV-08-303-RAW), 2009 WL 5134334.

192. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994); *see also Hughes*, 441 U.S. at 337-38.

V. Broad Implications of the Majority Opinion

The Tenth Circuit's opinion in *Hugo* effectively provides states the ability to govern as they please under the protection of an interstate compact, without regard to constitutional limitations. Political subdivisions should be allowed to protect themselves against their parent states; but, by holding that a political subdivision lacks standing to bring suit against its parent state, the court has removed the only party able to hold the state accountable for its unconstitutional behavior. As a result, the State is essentially able to implement unconstitutional actions, such as excessively burdening the export of water, and then claim that its political subdivision does not have the right to challenge the state action under federal law.

Further, due to the court's avoidance of a decision on the merits in *Hugo*, the challenged Oklahoma statutes governing stream water remain in force under Oklahoma law. If these statutes continue unchanged, they will have a major effect on Oklahoma water law.¹⁹³ First, Oklahoma water is now effectively divided into two classes: groundwater, which is subject to Commerce Clause restrictions, and stream water, which is not.¹⁹⁴ This distinction means that a party can appropriate groundwater for sale across the state's border, but is precluded from appropriating stream water for the same purpose.¹⁹⁵

Additionally, the continued allowance of the Oklahoma statutes to place a discriminatory burden on out-of-state water transfers may spark neighboring states, or perhaps the entire western United States, to enact similar discriminatory laws designed to keep each state's stream water exclusively for use by its citizens.¹⁹⁶ Unrestrained by the dormant Commerce Clause, many more states would likely take action in order to gain considerable economic advantages by hoarding their water supplies for in-state use. This response could significantly hinder economic and population growth in water-poor states, encourage inefficient use of stream water in states with an abundance of water, and lead to catastrophic results for states experiencing a severe water shortage.

Finally, if future courts continue to disregard the "expressly stated" or "unmistakably clear" standard of congressional approval, virtually all

193. Dale E. Cottingham & Patrick R. Wyrick, *Changes to Oklahoma Water Law Perhaps on the Horizon*, GABLE GOTWALS (2010), http://www.gablelaw.com/news_resources/2010/changes_to_oklahoma_water_law.pdf.

194. *Id.*

195. *Id.*

196. *Id.*

existing interstate water compacts would effectively authorize states to impose otherwise unconstitutional restrictions on the export of water apportioned under those compacts. A conclusion of this magnitude is directly inapposite to the Supreme Court's holding in *Sporhase* and the public policy underlying it.¹⁹⁷

On the other hand, if the discriminatory Oklahoma statutes are rightfully struck down, all parties to the water export would benefit. The City of Hugo plans to use all of the proceeds from the sale of water for various municipal purposes that will favor the health, safety, and protection of its citizens.¹⁹⁸ The City of Irving will likewise benefit from the sale by ensuring that its water supply is sufficient to meet the projected water demand increase of its citizens over the next one hundred years in a fiscally responsible manner.¹⁹⁹ Furthermore, these benefits will be realized for both parties without adversely affecting the water supply or availability for the City of Hugo or the State of Oklahoma.

VI. Conclusion

While Oklahoma and Texas have been feuding on the college football gridiron for over one hundred years in the annual Red River Rivalry,²⁰⁰ the battle for water is just beginning. In addition to *Hugo*, the Tenth Circuit recently ruled that the Red River Compact insulated the Oklahoma statutes from a dormant Commerce Clause challenge in *Tarrant Regional Water District v. Herrmann*.²⁰¹ However, the *Tarrant* court did not address whether the Oklahoma statutes would be constitutional under the dormant Commerce Clause if not protected by the Compact.²⁰² The plaintiff parties in both *Tarrant* and *Hugo* continue to challenge these rulings in the court system and, alternatively, are hopeful to negotiate a water purchase

197. *See Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941, 960 (1982).

198. First Amended Complaint for Declaratory Judgment & Injunctive Relief at 3, *City of Hugo v. Nichols*, 2010 WL 1816345 (E.D. Okla. June 2, 2009) (No. 608CV00303), 2009 WL 2860900.

199. *City of Irving, Texas's First Amended Complaint for Declaratory Judgment & Injunctive Relief*, *supra* note 2, at 6.

200. J. BRENT CLARK, *SOONER CENTURY: 100 GLORIOUS YEARS OF OKLAHOMA FOOTBALL* 34 (1995).

201. 656 F.3d 1222, 1250 (10th Cir. 2011). In *Tarrant*, a Texas regional water district directly applied to the Board for three permits to appropriate water in Oklahoma for use in Texas. *Id.* at 1227. In addition, it simultaneously brought suit against the Board alleging that the Oklahoma statutes restricted interstate commerce and that Congress did not authorize Oklahoma in the Compact to enact such laws. *Id.*

202. *Id.* at 1239.

agreement with Oklahoma officials outside the courtroom.²⁰³ But if the State of Oklahoma remains unwilling to sell water across the border or the court system does not correct the Tenth Circuit's errors in *Hugo* and *Tarrant*, municipalities in Texas will be forced to incur the extraordinary cost of treating water in the Red River or transporting water over 250 miles from the State of Louisiana in order to avoid the catastrophic consequences of economic and population loss.²⁰⁴ This conclusion would cause harm and missed opportunities for growth on both sides of the Red River. Additionally, and even more broadly, these rulings could pave the way for other water rich states to continue to irrationally hoard their abundance of water at the expense of their thirsty neighboring states that are unable to meet rapidly increasing demand.

Unfortunately, the Supreme Court missed an opportunity to resolve the three-way circuit court split when it denied without comment Hugo's Petition for a Writ of Certiorari on March 19, 2012.²⁰⁵ The Court's ruling therefore upholds the 2-1 ruling by the Tenth Circuit to dismiss Hugo's lawsuit for lack of standing. However, the Court recently granted the Petition for a Writ of Certiorari in *Tarrant*.²⁰⁶ For the benefit of all parties, the Court should properly apply the rule in *Sporhase* to the Red River Compact and subsequently strike down the overly protectionist state water statutes that clearly discriminate in interstate commerce and, therefore, violate the Commerce Clause.

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203. Robert Boczkiewicz, *Appeals Court Rules Against Efforts to Require Oklahoma to Sell Water Rights to Texas*, OKLAHOMAN, Sept. 8, 2011, <http://newsok.com/article/3602046>.

204. Joint Brief of All Appellants, *supra* note 80, at 4; see *Texas Water District Continues Legal Battle for Oklahoma Water*, CIRCLE OF BLUE (Dec. 18, 2009, 2:15 PM), <http://www.circleofblue.org/waternews/2009/world/news-846-texas-water-district-continues-legal-battle-for-oklahoma-water/>.

205. See *City of Hugo v. Buchanan*, 132 S. Ct. 1744, 1745 (2012).

206. *Tarrant*, 656 F.3d 1222, *cert. granted*, 2013 WL 49810 (U.S. Jan. 4, 2013).