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SYMPOSIUM ARTICLES

THE PIONEER SPIRIT AND THE PUBLIC TRUST: THE AMERICAN RULE OF CAPTURE AND STATE OWNERSHIP OF WILDLIFE

BY

MICHAEL C. BLUMM* & LUCUS RITCHIE**

The law of capture, a central feature in Anglo-American property law, has deep historical roots, running at least to Rome, where capturers could create private property in res nullius *resources like wildlife (*ferae naturae*) if they did so consistent with Roman law (*imperium*). When transferred to English common law, capture doctrine became laden with pervasive restrictions imposed by royal prerogatives, as the English king was said to own, and therefore control, all wildlife that had been unowned in Rome. Thus, the English concepts of royal forests and hunting franchises imposed substantial limits on the capture of wildlife animals.*

In early America, colonial rejection of royal prerogatives seemed for a time to sanction a free-wheeling rule of wildlife capture unknown in England. For example, the English rule allowing landowners to exclude capturers was largely discarded, at least with respect to unfenced lands. But as the overharvesting consequences of expansive capture rules became apparent, American courts rediscovered and "republicanized" the royal prerogatives into the concept of state ownership of wildlife. This 19th-century development was grounded on both sovereign power and public ownership principles, or "sovereign ownership"—a concept endorsed by the Supreme Court in 1896. Although during the 20th Century the Supreme Court repeatedly limited

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the state ownership of wildlife where it conflicted with federal law—and finally overturned the case that endorsed the doctrine in 1979—today nearly every state claims ownership of wildlife within its borders. This Article examines that phenomenon and explains both the limits and utility of the state ownership doctrine in the 21st Century. We claim that although modern notions of the police power justify expansive state regulation of wildlife, the state ownership doctrine retains vitality because it may bolster or enlarge police power regulation by 1) imposing affirmative duties to protect wildlife, 2) empowering states to collect damages for the destruction of wild animals, and 3) offering an affirmative defense against landowner claims of constitutional takings based on restrictive habitat protections.

I. INTRODUCTION

It is fitting that as part of the Lewis and Clark Bicentennial, *Environmental Law* should publish a symposium on the rule of capture[1] because during the expedition, in 1805, the New York Supreme Court decided *Pierson v. Post*,[2] the famous fox case that firmly established the rule of capture on American soil. Capture principles subsequently became a central feature of American natural resources law, especially in allocating private rights to public resources like water, minerals, and wildlife. Law students are often taught the importance of the rule of capture at the outset of their first-year courses in property,[3] and the leading texts on natural resources law feature the rule of capture.[4] Capture is, in short, a central feature of the American law of natural resources allocation.

Capture achieved this prominence largely through pedigree. The origins of the capture doctrine run deep, traceable in Western law at least to Rome, where the concept of *res nullius* (unowned property) enabled capturers to create private property in communal resources.[5] Capture doctrine was transformed in English law to accommodate a strong dose of royal prerogative, under which the king owned wildlife and capturers required royal permission or acquiescence to obtain private rights in wildlife.[6]

Transported across the Atlantic, the capture doctrine was altered substantially by the American experience. In the early nineteenth century, America embraced a freewheeling rule of capture unknown in England.[7] Before long, however, American courts and legislatures used the precedent of the royal prerogative to articulate a doctrine of state ownership of wildlife, equipping regulators with plenary authority to control harvests.[8] That public ownership concept was successfully challenged by federal

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1 The Rule of Capture symposium, held in April 2005, was the second of a planned trilogy of symposia commemorating the Lewis and Clark Bicentenary. The first, on the Discovery Doctrine, took place in 2004. *See, e.g.*, Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resource Policy in Indian Country*, 28 VT. L. REV. 713 (2004). The final symposium, with a working title of *Western In-Stream Flows: Fifty Years of Progress and Setbacks*, is scheduled for 2006.

2 3 Cai. 175 (N.Y. Sup. Ct. 1805); *see infra* notes 24, 86–87 and accompanying text.

3 *See, e.g.*, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 19–59 (5th ed. 2002); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 50–82 (2d ed. 1997); SHELDON. F. KURTZ & HERBERT HOVENCAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 8–19 (4th ed. 2003); JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 23–31 (2000).

4 *See, e.g.*, GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 510–13, 583–614 (5th ed. 2002); JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 746–60, 1033–56 (2004); CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 440–59, 843–62 (2005); DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 98–200 (2002) [hereinafter GOBLE & FREYFOGLE, WILDLIFE LAW].

5 *See infra* note 23 and accompanying text.

6 *See infra* Part II.B.

7 *See infra* Part III.A.

8 *See infra* Part IV.

authority,[9] but absent federal-state conflict, it continues to endure today, as virtually all states claim ownership of wildlife in trust for their citizens.[10]

Throughout its long history, capture doctrine has been modified to fit the felt necessities of the times. Roman law subjected capture to the regulatory power of the state.[11] Medieval English law recognized royal ownership of wildlife and the plenary proprietary power of the king.[12] Later English law granted landowners constructive possession of wildlife inhabiting their lands.[13] Early American law observed an expansive rule of capture. But by the mid-nineteenth century, American law subjected capturers' rights to the states, who "owned" the wildlife within their borders.[14] Capture doctrine, in short, has never been static: it has always evolved. Moreover, this study shows that capture doctrine has never been fully separated from the concept of state regulation or state ownership. Indeed, the latter is an integral element of the former. This Article examines the evolution of capture doctrine from Roman to English to American law. Part II outlines the Roman and English capture rules, emphasizing the restrictions on capture imposed by the king's creation of royal forests and hunting franchises—manifestations of royal prerogative. Part III examines the role of capture in early America, in which a free-take rule seemed to dominate for a time, but whose consequences quickly led to adoption of state-imposed restrictions. Section IV explains that these restrictions were the consequence of the rise of state ownership—a descendant of the royal prerogative. As section IV suggests, American law distinguished state ownership from royal prerogative by articulating that ownership was in trust for the benefit of the public, the so-called "wildlife trust."

The Supreme Court originally interpreted the plenary power of this doctrine to enable states to exclude wildlife harvests from interstate transport,[15] but as described in Part V, the Court eventually ruled that the state ownership doctrine was subject to federal constitutional restrictions. Nevertheless, part VI demonstrates that state ownership of wildlife in trust for the people remains a dominant force in American law, equipping states with broad powers to conserve wildlife. Part VII explains why recognizing the proprietary powers of the wildlife ownership doctrine is important, quite apart from any police powers states may possess to regulate wildlife. These reasons include that the wildlife trust may impose affirmative duties on states to protect wildlife, may empower states to collect damages from those injuring wildlife, and may insulate states from takings claims when they act pursuant to the wildlife trust. The Article concludes that, properly understood, the rule of capture of wildlife and state ownership of wildlife are not separable concepts but inextricably connected parts of the American law of wildlife regulation.

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9 *See infra* Part V.

10 *See infra* Parts VI.B & C.

11 *See infra* note 27 and accompanying text.

12 *See infra* notes 34–65 and accompanying text.

13 *See infra* note 64 and accompanying text.

14 *See infra* notes 131–33 and accompanying text.

15 *See infra* Part IV.C.

II. ORIGINS OF THE RULE OF CAPTURE: WILDLIFE APPROPRIATION IN ROMAN AND ENGLISH LAW

Wildlife capture principles are traceable to Roman law, but Roman law recognized the authority of the state to regulate capture. When English law inherited capture doctrine from the Romans, it too subjected capturers of wildlife to the authority of the state to control capture, although it did so by introducing the concept of royal ownership of wildlife—a doctrine that would later influence American law.

A. Roman Roots

Like much of modern Western property law, the rule of capture of wildlife originated in Roman law.[16] Roman jurists accepted without argument that animals *ferae naturae* were capable of qualified private ownership.[17] Indeed, Romans believed that private ownership was natural.[18]

Romans classified property as belonging to one of two broad categories: *res extra patrimonium* (things owned by no individual in particular) and *res in patrimonium* (things owned by someone).[19] There were three categories of *res extra patrimonium*: 1) *res publicae* (things owned by the state), 2) *res communes* (things owned in common), and 3) *res nullius* (things owned by no one).[20] *Res publicae* included roads, ports, rivers, and public buildings.[21] *Res communes*—things belonging to the people in common—included air, running water, and the sea and its shores.[22] Along with unoccupied lands, precious stones, and the property of an enemy captured in battle, wild animals were labeled as *res nullius*—things capable of individual appropriation, but which belonged to no one until a human took possession by *occupatio* (the natural method of

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16 For commentary discussing the effect of Roman property law on Anglo-American jurisprudence generally, see ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993); DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION (1990).

17 *See generally* J. INST. 2.1.12; G. INST. 2.66–.67; ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC (1968) [hereinafter WATSON, THE LAW OF PROPERTY].

18 *See* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 110 (1954) (arguing that Roman jurists "conceived that most things were destined by nature to be controlled by man. Such control expressed their natural purpose."); KELLEY, *supra* note 16, at 49 ("In the most fundamental way . . . Roman jurisprudence was anthropocentric.").

19 W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 182 (3d ed. 1963); Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 503 (1996).

20 BUCKLAND, *supra* note 19, at 182–83. These distinctions were not always firm in Roman law. For example, Marcian and Justinian classified seashores as *res communes*, while Celcius classified them as *res publicae*, and Neratius treated them as *res nullius*. *Id.* at 184–85. *See also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970) (noting that the categories of common properties under Roman law were often confused).

21 J. INST. 2.1.2; DIG. 1.8.5 (Gaius, Everyday Matters or Golden Words 2); RUDOLPH SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 303 (James C. Ledlie trans., 3d ed. 1907).

22 J. INST. 2.1.1; DIG. 1.8.2 (Marcian, Institutes 3); SOHM, *supra* note 21, at 303.

occupation).[23] In the case of wildlife, occupation occurred when an animal was physically captured.[24]

According to Justinian, "wild animals, birds and fish, *i.e.*, all animals born on land or in the sea or air, as soon as they are caught by anyone, forthwith fall into his ownership by the law of nations; for what previously belonged to no one is, by natural reason, awarded to its captor."[25] Despite this broad statement of capture principles, however, Roman citizens' right to take wildlife was not absolute.[26] While rarely employed, the Roman state maintained the sovereign power (*imperium*) to control the harvest of animals *ferae naturae*.[27] In addition, Roman law recognized land ownership as a restriction on capture. Although trespassing hunters could lawfully take wild animals on another's land,[28] landowners had the authority to physically exclude hunters from their land pre-capture.[29] The Roman rule of capture,

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23 Wise, *supra* note 19, at 508; SOHM, *supra* note 21, at 304. *See also* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 130–31 (1962) ("[T]he only *res nullius* which are commonly encountered in everyday life are wild animals and it is in regard to them that *occupatio* is mainly discussed.").

24 Early Roman jurists disagreed as to the degree of control necessary before an animal lost its natural liberty. One jurist determined that the wounding of a wild animal was sufficient to establish ownership so long as the chase continued unabated. DIG. 41.1.5 (Gaius, Common Matters or Golden Words 2) (describing an opinion authored by Trebatius). Another claimed, however, that physical capture was required for property rights to attach to the pursued game. DIG. 41.1.55 (Proculus, Letters 2). Justinian and Gaius each adopted the latter view, thereby establishing the prevailing rule for the Roman period: capture was required before a wild animal could be reduced to private property. J. INST. 2.1.13; DIG. 41.1.5 (Gaius, Common Matters or Golden Things 2); WATSON, THE LAW OF PROPERTY, *supra* note 17, at 47.

The debate concerning the degree of individual control required to "own" a wild animal persisted throughout English and early American common law. *See, e.g.*, Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (a majority opinion ruling that physical capture or mortal wounding was required for possession, and a dissent arguing that pursuit was enough to acquire individual ownership).

25 J. INST. 2.1.12; *see also* G. INST. 2.67 ("[W]ild beasts, birds, and fishes, as soon as they are captured, become, by natural law, the property of the captor, but only continue such so long as they continue in his power . . . .").

26 In addition, the property rights gained through capture were defeasible. The natural freedom of wild animals could be lost to human occupation and then regained by escape. *See* J. INST. 2.1.12 ("[O]nce [a wild animal] escapes from your custody and resumes its natural state, it ceases to be yours and again becomes open to the next taker. It is regarded as reassuming its natural state when either it disappears from your sight or, though you can still see it, pursuit of it is difficult."). Gaius, too, acknowledged that the possibility of escape qualified a capturer's property right in an occupied animal. DIG. 41.1.5 (Gaius, Everyday Matters or Golden Words 2). Occupied animals that wandered off private property or were snatched by persons or other wild animals remained the property of the original capturer so long as they could be retrieved, or, in the case of animals like bees, doves, or pigeons, demonstrated the habit of leaving and returning to captivity. J. INST. 2.1.14 to 2.1.16; DIG. 41.1.5 (Gaius, Everyday Matters or Golden Words 2).

27 *See* Wise, *supra* note 19, at 503 (explaining that "the Roman state asserted the power to regulate (*imperium*) the exploitation of wild nonhuman animals," but rarely did so); POUND, *supra* note 18, at 111 (observing that the Roman state had sovereign authority to regulate taking of wildlife); Geer v. Connecticut, 161 U.S. 519, 523 (1896) (acknowledging that the Roman state possessed the right to regulate wildlife harvest).

28 *See* J. INST. 2.1.12 (acknowledging that under Roman law, trespassers acquired title to the animals they poached).

29 *See* J. INST. 2.1.12 ("[A]nyone entering another's land to hunt or for fowling can be stopped by the owner."); DIG. 41.1.3 (Gaius, Everyday Matters or Golden Words 2) ("[O]f corse,

while granting freedom to take animals in most circumstances, never permitted an unrestricted harvest.

B. Capture in Common Law England: Royal Restrictions on the Rule

The rule of capture prevailed throughout common law England.[30] However, the authority employed by the English Crown over wild animals and their habitat produced a different and much more restrictive permutation of the rule than in Roman law.[31] Blackstone wrote that humanity received from the Creator a "right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, [except] where it is restrained by the civil laws of the country."[32] Under the laws of England, limitations on wildlife appropriation by private individuals were pervasive.[33]

English law did not recognize modern distinctions between proprietary and sovereign powers. The king not only exercised the lawmaking powers of a sovereign; as the head of the feudal landholding system, he also maintained extensive proprietary rights.[34] Property owners generally possessed only those rights granted to them by their superiors in the feudal hierarchy, and those superiors—most notably the king—could withdraw and reassign rights under many circumstances.[35] Concerning animals *ferae naturae*, the king employed his sovereign and proprietary powers to diminish his subjects' right to take wildlife by creating an elaborate land-classification system, including royal forests, and by limiting hunting to royal grantees.

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a person entering another's land for the purpose of hunting or fowling can, if the latter becomes aware of it, lawfully be forbidden entry by the landowner.").

30 *See* Wise, *supra* note 19, at 516–29 (tracing the law of capture through several centuries of English history).

31 *See* George Cameron Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 WASH. L. REV. 295, 305 (1980) (recognizing that English capture doctrine was far more complex and restrictive than the Roman law); David S. Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 ENVTL. L. 241, 245 (1979) ("English law first reflected the Roman's concept of free access to all animals without state interference but was later modified on behalf of the Crown to permit the taking of a game animal only with royal permission.").

32 WILLIAM BLACKSTONE, 2 COMMENTARIES *403.

33 *See generally* Thomas A. Lund, *British Wildlife Law Before the American Revolution*, 74 MICH. L. REV. 49 (1975) (analyzing British wildlife regulation until the time of the American Revolution) [hereinafter Lund, *British Wildlife Law*].

34 *See* GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 203 (recognizing the king's dual role as sovereign and head of feudal society); *see also* Dale D. Goble, *Three Cases / Four Tales: Commons, Capture, Property, and the Public Trust*, 35 ENVTL. L. 807, 822 (2005) [hereinafter Goble, *Three Cases / Four Tales*] (arguing that "'sovereignty'—governmental and regulatory power—generally began as 'property' or property-like tenures").

35 GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 203; MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 8 (3d ed. 1997).

1. Royal Forests

In 1066, William the Conqueror invaded England and declared Norman rule.[36] King William asserted his authority over large swaths of the English countryside and established a system of royal forests policed by special courts and administrators, who managed the land and its game for the benefit of the king and his favored subjects.[37] Although the king maintained administrative authority over royal forests, he was not necessarily seized of all the lands within these designated areas.[38] Indeed, a royal forest might include villages or cultivated fields owned by individuals, in addition to expanses of timber.[39] Within a forest, however, the ability of inholders to exploit their land was regulated severely to protect certain game species and their habitat.[40] According to John Manwood—author of a sixteenth-century treatise on England's forest jurisdiction—the laws of the forest provided that "no man may cut downe his woods, nor destroy any coverts, within the Forest, without the view of the Forester, and license of the Lord chiefe Justice in Eyre of the Forest, although that the soile, wherein those woods do grow, be a mans owne freehold."[41]

The forest laws protected both the "venison"—the forest's most valuable game species—and the "vert"—the green plants on which those species fed.[42] Violators of the laws were punished, sometimes severely. Impermissibly entering or damaging the forest, or illegally planting crops on designated lands, resulted in monetary fines for the wrongdoer.[43] Poaching food in the forest, meanwhile, was punishable by castration, banishment, and even death.[44] Perhaps because of the occasionally, draconian punishment, the creation and management of royal forests largely prevented overharvests of England's game animals.

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36 BEAN & ROWLAND, *supra* note 35, at 9.

37 For a description of the growth of royal forests under Norman rule, see *id.* Lund, *British Wildlife Law*, *supra* note 33, at 60–61; and GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 208–09. *See also* George Cameron Coggins & Deborah Lyndall Smith, *The Emerging Law of Wildlife: A Narrative Bibliography*, 6 ENVTL. L. 583, 594 (1976) ("The exclusive right of the sovereign to hunt in certain areas was such an important prerogative to the Norman kings that much of farmed Saxon England reverted to forest by royal order."). As colorfully explained by Blackstone: "[I]t will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy, as gave birth to the feudal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of Europe, on the ruins of the western empire." BLACKSTONE, *supra* note 32, at *413. For a detailed commentary on England's forest laws, see JOHN D. MANWOOD, A TREATISE ON THE LAWES OF THE FOREST (William S. Hein & Co. 2003) (1598).

38 Dale D. Goble & Eric T. Freyfogle, *Wildlife Law: A Coming of Age*, 33 ENVTL. L. REP. 10,132, 10,133 (2003) [hereinafter Goble & Freyfogle, *A Coming of Age*].

39 *Id.* at 10,133 n.4.

40 Lund, *British Wildlife Law*, *supra* note 33, at 60–62; GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 209; BEAN & ROWLAND, *supra* note 35, at 9.

41 MANWOOD, *supra* note 37, at 60.

42 GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 208.

43 *Id.* at 209.

44 *See* Coggins & Smith, *supra* note 37, at 594.

2. Hunting Franchises

The expansion of forest jurisdiction was not the only way the English Crown restricted the taking of wild animals. The king's authority to create hunting franchises also narrowed how and when an animal could be reduced to individual possession. Under Roman law, wild animals were *res nullius*—owned by no one.[45] In contrast, English courts treated animals as belonging to the king as an incident of his royal power. In 1592, the King's Bench determined, in *The Case of the Swans*,[46] that unmarked swans, as well as whales and sturgeons, "belong to the King by his prerogative."[47]

Later decisions extended the king's prerogative to include ownership of all of England's fisheries[48] and all animals *ferae naturae*.[49] England's most esteemed legal commentators—Bracton and Blackstone—opined that the king's prerogative included ownership of all wildlife within his realm.[50] This idea was strongly contested by Edward Christian, author of an 1817 treatise on England's game laws.[51] Christian took the position that the king, as determined by the *Case of the Swans*, owned only whales, sturgeons, and swans, while all other wild animals belonged to the owner of the land on which the animals were found.[52]

Whether or not the royal prerogative legitimately provided for ownership of all wildlife, the king claimed the sole right to control the take of fish and game within England.[53] The king not only reserved game and fish for himself, he asserted exclusive power to grant hunting franchises to his favored nobility.[54] The most extensive hunting franchise was the "chase,"

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45 *See supra* note 23 and accompanying text.

46 (1592) 77 Eng. Rep. 435 (K.B.).

47 *Id.* at 436. "Prerogative," a hard-to-define term, generally meant the king's power over something simply because he was king. According to Blackstone, "[b]y the word prerogative we usually understand that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his real dignity." WILLIAM BLACKSTONE, 1 COMMENTARIES *239.

48 *See, e.g.*, The Case of the Royal Fishery of Banne, (1611) 80 Eng. Rep. 540, 543 (K.B.) (declaring that every river "is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative").

49 *See, e.g.*, Bowlston v. Hardy, (1597) 78 Eng. Rep. 794, 794 (K.B.) (determining that no landowner owns unconfined game animals "unless by grant from the King, or by prescription . . . for the Queen hath the royalty in such things whereof none can have any property").

50 *See* 1 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 65 (Sir Travers Twiss ed., William S. Hein & Co. 1990) (1569) (instructing that wild beasts "now belong to the king by civil right"); BLACKSTONE, *supra* note 32, at *415 (Animals *ferae naturae* are "*bona vacantia* [unclaimed goods], and, having no other owner, belong to the king by his prerogative.").

51 EDWARD CHRISTIAN, A TREATISE ON GAME LAWS (1817).

52 *Id.* at 23–27. *See also* Lund, *British Wildlife Law*, *supra* note 33, at 70–71; Goble, *Three Cases/Four Tales*, *supra* note 34, at 829–30 (both contrasting the views of Christian and Blackstone).

53 *See* BEAN & ROWLAND, *supra* note 35, at 9 (observing that the king claimed the sole right to control wildlife harvest).

54 Professors Goble and Freyfogle refer to the crown's

> ownership right [regarding wildlife as] more than simply a power to regulate private

which provided the grantee an exclusive right to hunt deer, foxes, martins, and certain other animals on specified land, including land owned by another.[55] A privilege of "park" was more limited, amounting to an "enclosed chase, extending only over a man's own grounds."[56] The privilege of "warren" awarded the grantee an exclusive right to take small animals such as hares, quail, and partridges within a defined area.[57] Although there is no evidence that the king bestowed a right of warren to anyone other than the landholder, a warren granted in one's own land was independent of title to that land, making it possible for the grantee to maintain the franchise even when the burdened land was transferred.[58]

Royal franchises did not award the grantee an absolute property right in the wild animals themselves.[59] Instead, they provided the franchise holder an exclusive right to harvest certain game in designated areas. Royal grantees held a constructive right in wildlife that served to defeat the competing claims of a trespassing capturer, or even a landowner. For example, if A killed a deer in B's chase, ownership of the deer was in B. Or, if A started pursuing a hare in B's warren and chased it onto C's land, where he killed it, B still owned the hare.[60]

Due to grantees' superior interests in game over landowners, and due to the royal power over wildlife generally, England's growing numbers of landed gentry began to pressure Parliament and the courts to reduce the role of hunting franchises.[61] The shift in power from royal grantees to

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activities by landowners and hunters. When the creators of English law—be it King, Parliament, or court—decided who could hunt and where, they were making a positive allocation of property rather than simply regulating private conduct.

Goble & Freyfogle, *A Coming of Age*, *supra* note 38, at 10,133.

55 BLACKSTONE, *supra* note 32, at *38.

56 *Id.*

57 *Id.* at *38–39.

58 GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 212; *see also* Sutton v. Moody, (1693) 91 Eng. Rep. 1063, 1063 (K.B.) (acknowledging that "a man may have a warren in his own land, and he may alien the land, and retain the privilege of warren").

59 *See, e.g.*, Blades v. Higgs, (1865) 11 Eng. Rep. 1474, 1481 (H.L.) (determining that a royal grantee's "qualified or special right of property in game . . . can mean no more than the exclusive right to catch, kill, and appropriate such animals"); Sutton v. Moody, (1698) 91 Eng. Rep. 1063, 1063–64 (K.B.) (distinguishing a privilege from actual possession and maintaining that a warren "gives no greater property in [beasts of warren] to the warrener, for the property arises to the party from possession"). *See also* BLACKSTONE, *supra* note 32, at *419 ("[S]uch persons as may thus lawfully hunt [game pursuant to a royal grant] . . . have (as has been said) only a qualified property in these animals.").

Note also the important distinction between killing game, which gives an individual absolute ownership, and capturing game, which grants only defeasible ownership to the capturer. *See* Usher v. Bushnel, (1693) 83 Eng. Rep. 9, 9 (K.B.) (absolute property right in wild animal obtained only when killed). The English law of wildlife appropriation, like the law of Rome, allowed captured animals to regain their natural liberty through escape. BLACKSTONE, *supra* note 32, at *403; *see also supra* note 26 (explaining Roman law concerning animals that escaped capturers).

60 In *Sutton* at 1064, Lord Holt described in detail the competing property interests in wildlife held by a landowner, a franchise holder, and a trespassing hunter. The two examples in the text derive from Holt's examples.

61 GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 211.

landowners was gradual,[62] but by the end of the seventeenth century the stature of royal grants to wildlife withered, replaced by a system favoring rights associated with land ownership rather than hunting freeholds.[63] Among the advances for property owners were the expansion of common law trespass and the reemergence of the concept of *ratione soli*, whereby a landowner held constructive possession to all animals on his property.[64] Although royal grants to wildlife had not completely disappeared at the time of the American Revolution, landowners in late eighteenth-century England were able to exclude capturers—save for those lawfully pursuing vermin—from taking game on their property.[65]

Unfortunately for England's peasantry, the decline of the royal franchise did not signal any great democratization of the rights to wildlife. As the king's power waned, Parliament grabbed it, enacting a series of statutes prohibiting the taking of game by anyone not "qualified."[66] If an English citizen did not possess the requisite money or land specified by these qualification statutes, he was effectively prohibited from hunting, even on his own land.[67] Consequently, despite diminishment of the royal prerogative, the core of England's wildlife law on the eve of the American Revolution remained the complete authority of the English sovereign to determine what rights others might have to the taking of wildlife.[68]

England's policies restricting harvest of wildlife reflected the rule of capture's ability to adapt in order to meet the needs of the society employing it. English game laws were aimed not at species protection or even at maintaining a sustainable yield of food for its citizenry. Instead, they promoted feudal ideology.[69] By limiting the right to take game to the elite,

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62 Michael Bean and Melanie Rowland suggest that the first blow to royal power came with the signing of the Magna Carta in 1215, which "directed removal of the weirs throughout England, a directive that was later 'judicially expanded to bar the king from granting private fisheries in tidal waters.'" BEAN & ROWLAND, *supra* note 35, at 9–10.

63 *Id.* at 10.

64 As recounted by Blackstone, "if a man starts game on another's private grounds and kill it there, the property belongs to him in whose ground it was killed, because it was also started there, the property arising *ratione soli*." BLACKSTONE, *supra* note 32, at *419; *see also Blades*, 11 Eng. Rep. at 1481–82 (determining that ownership of a fatally wounded animal vested in the landowner by constructive possession, not the trespasser who dealt the lethal blow). Unlike the possessory interest that a grantee held pursuant to a royal franchise, which continued when an animal was chased off the land burdened by the franchise, the right that the landowner held *ratione soli* vanished when the animal left his land. BLACKSTONE, *supra* note 32, at *419.

65 GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 219.

66 "Hunting rights were limited to lay persons who owned lands valued at 40 shillings or more and clerics who received an annual allowance of at least 10 pounds. Inflation later raised the required land value to 100 pounds." Michael E. Field, *The Evolution of the Wildlife Taking Concept from Its Beginning to Its Culmination in the Endangered Species Act*, 21 HOUS. L. REV. 457, 462 n.32 (1984) (citing British hunting laws). *See also* Lund, *British Wildlife Law*, *supra* note 33, at 55–60 (examining the qualification statutes and other legislation that regulated wildlife on the basis of social class).

67 *See* R v. Chipp, (1726) 93 Eng. Rep. 800, 801 (K.B.) (determining that "the [qualification] statutes forbid such persons as the defendant to hunt at all" and noting that the fact that the defendant owned the land was immaterial). This decision serves as another reminder that hunting rights did not spring from land ownership.

68 BEAN & ROWLAND, *supra* note 35, at 10.

69 *See* Lund, *British Wildlife Law*, *supra* note 33, at 52–60 (documenting how England's

the king reaffirmed distinctions in class and societal power and further endeared himself to the nobility.[70] Limits on capture also kept weapons out of the hands of the peasantry.[71] Restricting hunting to royal grantees discouraged England's poor from purchasing weapons and narrowed the opportunities for those who did own guns to sharpen their skills.[72] Thus, English game laws helped insulate England's established rulers from revolt by the people that England's political and social institutions oppressed.[73] The social context of feudal England clearly shaped its understanding and use of the rule of capture.

III. WILDLIFE APPROPRIATION IN EARLY AMERICA

The American colonies, and later the foundling United States, welcomed the rule of capture with open arms. James Kent wrote, in his *Commentaries on American Law*, that occupancy remained "the natural and original method of acquiring [first title to animals *ferae naturae*]; and upon the principles of universal law, that title continues so long as occupancy continues."[74] Justice Stephen Field similarly embraced a strong rule of capture as the proper method to obtain possession over wildlife, writing:

> The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. . . . So the trapper on the plains and the hunter in the north have a property in the furs they have gathered, though the animals from which they were taken roamed at large and belonged to no one.[75]

Thus, early American law concerning capture, although based on English common law, differed greatly from those of England. As described above, English restrictions on an individual's right to take wild animals—specifically the creation of royal forests and granting of hunting franchises—sought to segregate wildlife for the enjoyment of the king and his nobles, as

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game laws secured unequal distribution of the right to use wildlife, thereby promoting distinctions in class).

70 *See id.* at 58 (arguing that the king allocated wildlife to nobility "to shore-up their power and allegiance"); GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 212 (recounting the discriminatory nature of the qualification statutes).

71 *See* BEAN & ROWLAND, *supra* note 35, at 10 (recognizing that English game laws "perpetuated a pervasive system of class discrimination and at the same time kept weapons out of the hands of those considered unfriendly, or potentially so, to those in power").

72 *See* BLACKSTONE, *supra* note 32, at *413 (commenting that the king reserved hunting and other sporting activities to himself and selected nobility in order to keep the peasantry "in as low a condition as possible, and especially to prohibit them the use of arms"); Lund, *British Wildlife Law*, *supra* note 33, at 55 (observing that the "caste-like overtones of the scheme were emphasized by enforcement provisions that authorized the qualified to disarm the unqualified").

73 As Professor Lund observed, "The security of the established rule will therefore be increased if government supporters are encouraged to hunt and potential dissidents are prohibited from hunting." Lund, *British Wildlife Law*, *supra* note 33, at 52.

74 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 256 (1st ed., 1826).

75 Spring Valley Waterworks v. Schottler, 110 U.S. 347, 374 (1884) (Field, J., dissenting).

well as disarm the peasantry.[76] America's early settlers promptly rejected their mother country's legacy of conditioning the right to take game on wealth and birthright.[77] Indeed, they almost had to do so. As Professor Lund explained, "In the New World, game was no sporting matter, but rather a source of food and clothing."[78] But Americans' decision to deviate from English policy concerning game regulation was not simply a reactionary response to England's feudal history or a choice directed by settlers' subsistence needs; the geographical and ecological characteristics of the New World were also influential.

To the common settler, the United States at the dawn of the nineteenth century was a seemingly endless landmass with an equally infinite wealth of wildlife and other natural resources.[79] And the American populace was determined to forge a prosperous nation through settling those lands and exploiting those resources.[80] English land-use laws and game regulation

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[76] *See supra* notes 69–73 and accompanying text.

[77] For commentary asserting that early American citizens and courts rejected class-based restrictions on arms and hunting, see JAMES A. TOBER, WHO OWNS THE WILDLIFE?: THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA 17–18 (1981); Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 704 (1976) [hereinafter Lund, *Early American Wildlife Law*]; and Coggins, *supra* note 31, at 305. *See also* THOMAS A. LUND, AMERICAN WILDLIFE LAW 23 (1980) [hereinafter LUND, AMERICAN WILDLIFE LAW] (citing State v. Campell, 1 T.U.P. Charlt. 166, 168 (Ga. Super. Ct. 1808), which rejected a claim to wildlife ownership based on English privilege and referring to British forest and game laws as "productive of tyranny"); *id.* at 128 (citing Hallock v. Dominy, 7 Hun. 52, 55 (N.Y. Sup. Ct. 1876), which decried British hunting franchises as "contrary to the spirit of our institutions"); Johnson v. Patterson, 14 Conn. 1, 5 (1840) (attacking qualification statutes as an "anomaly" in the otherwise admirable British jurisprudence); New Eng. Trout & Salmon Club v. Mather, 35 A. 323, 328 (Vt. 1896) (Thompson, J., dissenting) (condemning "the iniquitous fish and game laws of England, enacted by the ruling class for their own enjoyment, and which led to a system under which the catching of a fish or the killing of a rabbit was deemed of more consequence than the happiness, liberty, or life of a human being").

[78] Lund, *Early American Wildlife Law*, *supra* note 77, at 704. *See also* Herbert E. Locke, *Right of Access to Great Ponds by the Colonial Ordinance*, 12 MAINE L. REV. 148, 150 (1919) ("[The colonists'] survival and existence demanded the use of every means of obtaining food.").

[79] Wildlife historian William Hornaday, writing in 1913, described the wealth of early America's animal population:

> "Abundance" is the word with which to describe the original animal life that stocked our country, and all North America, [in the nineteenth century]. Throughout every state, on every shore-line, in all the millions of fresh water lakes, ponds and rivers, on every mountain range, in every forest, *and even on every desert*, the wild flocks and herds held sway. It was impossible to go beyond the settled haunts of civilized man and escape them.

WILLIAM T. HORNADAY, OUR VANISHING WILDLIFE: ITS EXTERMINATION AND PRESERVATION 1 (Arno Press, Inc. 1970) (1913) (emphasis in original). *See also* Thomas L. Kimball & Raymond E. Johnson, *The Richness of American Wildlife*, *in* WILDLIFE AND AMERICA: CONTRIBUTIONS TO AN UNDERSTANDING OF AMERICAN WILDLIFE AND ITS CONSERVATION 3, 4 (Howard P. Brokaw ed., 1978) (commenting that early explorers spoke of the New World as "Eden sprung from the ocean"); TOBER, *supra* note 77, at 3–4 (providing several accounts expressing early settlers' wonder regarding the variety and abundance of animals in North America).

[80] *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 131–32 (1986) (explaining the importance of settlers' determination to expand the American West in the growth of the United States economy); FREDERICK MERK, HISTORY OF THE WESTWARD MOVEMENT 263–64 (1978) (recognizing the role of the Oregon and California trails as "paths of empire" in

were, however, poor tools for encouraging development, however.[81] England's own wilderness had vanished long before the discovery of America, leaving, in Professor Sprankling's words, "a semipreservationist property law system attuned to a postwilderness nation."[82] English law focused on preserving previously established productive uses of land, not on carving a viable economy from a rugged, virgin land.[83] Aware that English hunting laws were at odds with the basic ideology of their new country,[84] American courts and legislators began to formulate a new policy concerning personal appropriation of wildlife—the "free take" imperative. The rule of capture was set to evolve once again.

A. The Free Take Imperative

America's pioneers viewed their country's wild lands and the animals that inhabited them with disdain. According to this view, wilderness impeded progress and slowed the nation's economic growth.[85] In the famous 1805 case of *Pierson v. Post*,[86] which laid down the rule that ownership of wild animals required physical capture or mortal wounding, the New York Supreme Court referred to a pursued fox as "a wild and noxious beast," "cunning and ruthless," and a "pirate," whose death benefited society.[87] The *Pierson* court's view concerning animals *ferae naturae* was typical. To both American citizens and the judiciary, wilderness and its vast animal life were hardly cherished resources to be protected, but instead an "enemy to be conquered and tamed."[88] Settlers firmly believed that wild animals best

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America's formative years, opening channels for settlers to prosper by extracting natural resources such as gold and timber); ROBERT SOBEL & DAVID B. SICILIA, THE ENTREPRENEURS: AN AMERICAN ADVENTURE 49–94 (1986) (recounting the fortunes amassed through resource exploitation in the early American West). *See generally* ROBERT V. HINE & JOHN MACK FARACHER, THE AMERICAN WEST: A NEW INTERPRETIVE HISTORY (2000) (discussing the effects of westward expansion and resource exploitation on developing American culture); JON KUKLA, A WILDERNESS SO IMMENSE: THE LOUISIANA PURCHASE AND THE DESTINY OF AMERICA (2003) (recounting American history leading up to the Louisiana Purchase and the effects of suddenly doubling the size of the young nation).

81 *See* Field, *supra* note 66, at 464–65 ("Because of its immense size, its seemingly endless supply of wildlife, and the frontier spirit of its early settlers, the American continent did not lend itself to the English class system of controlling wildlife.").

82 John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 524 (1996). *See also* TOBER, *supra* note 77, at 5 (observing that the wealth of natural resources in North America was "striking in comparison to the resources of Europe, which had been settled for centuries").

83 *See* Sprankling, *supra* note 82, at 525 ("Stability, not innovation, was the heart of English property law."); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 31 (1977) (referring to the English view of property as a "static agrarian conception").

84 *See, e.g.*, LUND, AMERICAN WILDLIFE LAW, *supra* note 77, at 122 (citing Georgia v. Campbell, 1 T.U.P. Charlt. 166, 166–67 (Ga. Super. Ct. 1808), which rhetorically asked how English game laws could apply to "a country which was but one extended forest").

85 *See* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 40 (3d ed. 1982) ("Insofar as the westward expansion of civilization was thought good, wilderness was bad. It was construed as much as a barrier to progress, prosperity, and power as it was to godliness.").

86 3 Cai. 175 (N.Y. Sup. Ct. 1805).

87 *Id.* at 180–81 (Livingston, J., dissenting).

88 Thomas A. Campbell, *The Public Trust, What's It Worth?*, 34 NAT. RESOURCES J. 73, 74

served them in the market—as a choice dinner course or tailored into a coat or hat—rather than roaming the frontier.[89] Any policy that restricted hunting to a specified group or for a limited term would have impeded the harvest of wildlife, thereby allowing a substantial natural resource to go unused.[90] Consequently, the obvious capture rule for America was a rule of free taking, recognizing everyone's right to hunt and take game.[91] But in order to effectuate a free take policy, courts and legislatures had several obstacles to overcome.[92] Most prominent among these legal hurdles was the right of landowners to exclude trespassing hunters.[93]

(1994). *See also* Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are? Of Beavers, Bob-O-Links and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849, 877 (2000) (noting that nineteenth-century courts, "reflecting commonly held beliefs, viewed wilderness harshly, as an impediment to progress").

89 *See* JAMES B. TREFETHEAN, AN AMERICAN CRUSADE FOR WILDLIFE 29 (1975) ("Deer, turkeys and other products of the chase provided a ready supply of fresh meat until the colonists could develop their own domesticated flocks and herds. The wild birds and mammals also became an important source of income. Furs, deer hides, and the down and plume of birds brought high process in European markets."); TOBER, *supra* note 77, at 6 (recognizing that hunting and fishing were vitally important to establishing an early American economy).

90 *See* Lund, *Early American Wildlife Law*, *supra* note 77, at 705 (arguing that limiting hunting to an elite group would have slowed America's economic progress); Field, *supra* note 66, at 465 (claiming that "[t]he sheer press of human numbers on the new continent made regulated taking impractical").

91 *See* Lund, *Early American Wildlife Law*, *supra* note 77, at 705 (recognizing "free taking" as the "logical policy" for America); Favre, *supra* note 31, at 247 (observing that attempts to adopt English laws regarding wildlife appropriation were "frustrated by the vastness of the American continent, and the 'free taking' of wildlife ultimately became the acceptable practice").

92 *See* Field, *supra* note 66, at 465 ("For this free taking concept to prevail, American lawmakers had to vault several legal hurdles.").

93 Courts also had to overcome claims of monopoly rights to wildlife based on an express grant from the English Crown. For example, in *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. Sup. Ct. 1821), successors in title to New Jersey's proprietors claimed that they held an exclusive privilege to take oysters within that state, based on a grant from the king. *Id.* at 2–3. The New Jersey Supreme Court of Judicature, conceding that the king had granted authority over New Jersey's submerged lands to certain individuals, determined that unlike proprietary rights that could be sold for profit, incidents of a sovereign's prerogative, when transferred, inhered indefeasibly in the powers of state government. *Id.* at 49–50. Consequently, the king's conveyance to the proprietors conferred on them only the power to govern New Jersey's submerged lands—and the oysters found therein—for the benefit of the state's citizens, not for potential private gain. *Id.*

Under the rationale of *Arnold* and similar cases, royal grants to exclusive hunting or fishing rights were not sufficient to defeat the interests of the state. As described below, in the early nineteenth century, state governments did little to shield the game within their borders from America's vigorous capture principles. *See also* Lund, *Early American Wildlife Law*, *supra* note 77, at 714 (analyzing claims to wildlife based on royal grants and commenting: "Since the proprietors did not have the power to alienate that which they had received in trust, courts could find that authority over wildlife remained vested in government despite proprietors' improvident attempts to sell exclusive rights to private purchasers."); Field, *supra* note 66, at 465–66 ("Courts held that express sovereign grants to exclusive hunting rights were distinct from property rights and as such could not be used for private gain."). *See infra* notes 134–36 and accompanying text (explaining *Arnold v. Mundy's* role in developing the state ownership doctrine).

In 1829, Justice Joseph Story observed in *Van Ness v. Pacard*,[94] that "[t]he common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright, but they brought with them and adopted only that portion which was applicable to their situation."[95] Nowhere do Story's words ring more true than in the context of the evolving property law of early nineteenth-century America. During just a few decades, in an attempt to meet the new challenges of a frontier nation, American jurists and legislatures revised England's common law concerning trespass to land. These changes elevated wilderness entrepreneurs' right to take freely wild game over the landowners' long-established right to exclude trespassing capturers.[96]

On the eve of the American Revolution, English common law granted landowners a constructive right *ratione soli* to all wild animals on their property that was superior to that of a trespasser.[97] English landowners also had the right to exclude all potential capturers except for those lawfully pursuing noxious vermin.[98] As Blackstone expressed it, "[e]very unwarrantable entry on another's soil" was a trespass because "every man's land is in the eye of the law enclosed and set apart from his neighbour's . . . either by a visible and material fence . . . or, by an ideal invisible boundary."[99] In America, these English rules gave way to a vigorous law of capture, at least as applied to unenclosed lands.[100] Champions of

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94 27 U.S. (2 Pet.) 137 (1829).

95 *Id.* at 144 (Story, J.). Oliver Wendell Holmes conveyed a similar statement in *The Common Law:*

> A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive society establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. . . . The old form receives a new content, and in time even the form modifies itself to fit the [new] meaning which it has received.

OLIVER WENDELL HOLMES, THE COMMON LAW 5 (1881). For thorough explanations of the evolution of the common law of property in early America, see HORWITZ, *supra* note 83, at 31–62; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 202–27 (1973); and WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 159–75 (1975).

96 *See* Babcock, *supra* note 88, at 877 ("During the nineteenth century, courts made significant changes in English common law property doctrines . . . . These changes favored the industrious landowner who altered the landscape, and not the ones who sought to preserve the status quo. The modified doctrines reflected a hostile attitude toward dormant, wild lands (wilderness), and the animals that inhabited them . . . ."); Sprankling, *supra* note 82, at 526 (arguing that "early American courts constructed a new property law system with an inherent antiwilderness bias. All other things being equal, the reformulated common law of property tended to resolve use and title disputes in favor of the wilderness exploiter and against the wilderness nonuser.").

97 *See supra* notes 64–65 and accompanying text (explaining landowners' rights concerning wildlife in common law England).

98 *Id.* Roman law also maintained that a landowner could prohibit a trespasser from hunting on his property. *See supra* note 29 and accompanying text.

99 WILLIAM BLACKSTONE, 3 COMMENTARIES *209.

100 *See* Lund, *Early American Wildlife Law*, *supra* note 77, at 712 (noting that early American

unrestricted taking argued for and won constitutional protection in some states for an individual's right to capture game free of landowner interference.[101] State courts also supported the hunter's privilege to take game, even when a landowner requested that the hunter leave.[102] But the most effective method of transforming the English rule of trespass in America involved the statutory and customary expansion of the doctrine of implied license.

In an effort to encourage the unrestricted taking of wildlife, some early American legislatures created a statutory presumption against trespass for hunters entering unenclosed lands.[103] Over time, this presumption grew by way of "cordial customs between neighbors," resulting in a de facto rule that owners who had not posted notice of their opposition welcomed wanderers onto their wild lands to hunt.[104] As explained by Justice Oliver Wendell Holmes:

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law often precluded access to developed lands because domestic agriculture was favored over hunting or fishing).

101 For example, the Vermont Constitution of 1793 provided that "the inhabitants of this State shall have liberty, in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed." VT. CONST. of 1793 ch. 6, § 40, *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 514 (William F. Swindler ed., 1979). *See also* PA. CONST. of 1776, art. II, § 43, *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 284 (William F. Swindler ed. 1979) (granting Pennsylvanians the right to hunt on "the lands they hold, and on all other lands therein not inclosed").

Interestingly, constitutional protection for the right to take wild animals was also debated at the national level. Professor Lund noted that, "[t]he minority at the Constitutional Convention of Pennsylvania argued that the United States Constitution should include a guarantee of the right to hunt on unenclosed lands." Lund, *Early American Wildlife Law*, *supra* note 77, at 712 n.76 (citations omitted).

102 *See, e.g.*, McConico v. Singleton, 9 S.C.L. (2 Mill.) 244, 244 (S.C. 1818) (rejecting plaintiff's trespass claim and determining that "the right to hunt on unenclosed and uncultivated lands has never been disputed, and it is well known that is has been universally exercised from the first settlement of the country up to the present time"); Broughton v. Singleton, 11 S.C.L. (2 Nott & McC.) 338, 340 (S.C. 1820) (denying trespass claim and commenting that protecting unenclosed lands under trespass laws "would overwhelm us in a sea of petty litigation, destructive of the interests and peace of the community"); Bizzell v. Booker, 16 Ark. 308, 320 (1855) (determining that hunting on private land was not trespass, and noting that "drafts upon the forest game, are also often required to supply the wants of the pioneer, under the contingencies and inconveniences of a sparsely inhabited country.").

103 PA. ACTS ch. XXIV (1749), *reprinted in* Evans Microprint No. 8706 (requiring landowner permission to enter and hunt on enclosed lands, thereby implying that such permission was not required for open lands); 1 HENING'S STAT. AT LARGE 437, act XIII (Va. 1657–58) (requiring permission to hunt on planted or enclosed lands, but not on open, privately-owned land). *See also* Babcock, *supra* note 88, at 883 (recognizing that early trespass laws fostered "the legal presumption that landowners welcomed hunters and fishers, and withheld from landowners the most basic of the prerequisites of ownership, the right to exclude."); Field, *supra* note 66, at 465 ("Lawmakers skirted the law of trespass by opening undeveloped private lands to wildlife takers, allowing egress across private lands to lakes, and establishing presumptions that landowners welcomed hunters and fishermen.").

104 *See* Lund, *Early American Wildlife Law*, *supra* note 77, at 713 (noting that early colonial landowners "who had not post notices of their opposition welcomed wanderers to hunt on their wild lands").

> The strict rule of English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot, and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.[105]

Because posting was costly in wild areas, and owners achieved little protection from the undertaking, the presumption against trespass effectively became a "conclusive invitation" for American hunters to take wildlife on private lands in nineteenth-century America.[106]

B. The Consequences of a Pure Rule of Capture

By awarding the first taker the exclusive rights to the resource, an unrestricted rule of capture encouraged resource exploitation. When first in right became first in time, speed and efficiency of capture became paramount. The classic American illustration was the California gold rush of the 1840s and '50s.[107] A less familiar example was the destruction of wild fowl and big game species by nineteenth-century market hunters. By rewarding efficient capture, America's freewheeling wildlife harvest policies promoted investment in capture technology, encouraging hunters to purchase bigger nets, better guns, and more ammunition.[108] Moreover, because taking game in moderation meant compromising revenue, market hunters often reduced populations to below carrying capacity.[109] Nineteenth-century state legislatures, viewing nature as inexhaustibly bountiful,[110] allowed this unrestricted harvest by failing to regulate the taking of wildlife.[111]

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105 McKee v. Gratz, 260 U.S. 127, 136 (1922).

106 Lund, *Early American Wildlife Law*, *supra* note 77, at 714.

107 *See generally* H.W. BRANDS, THE AGE OF GOLD: THE CALIFORNIA GOLD RUSH AND THE NEW AMERICAN DREAM (2003); MALCOLM J. ROHRBOUGH, DAYS OF GOLD: THE CALIFORNIA GOLD RUSH AND THE AMERICAN NATION (1997). *See also* Goble, *Three Cases/Four Tales*, *supra* note 34, at 814–19 (describing nineteenth-century American resource rushes for timber, gold, and animal pelts).

108 *See* TOBER, *supra* note 77, at 74–75 (describing development of new types of weapons by market hunters).

109 *See* Coggins & Smith, *supra* note 37, at 595 (observing that "the democratic spirit as applied to hunting was eventually disastrous to the sport itself . . . the anti-regulation mentality in early nineteenth-century America was responsible for the extinction of many species, and the severe depletion of the populations of many more"); *see also* TOBER, *supra* note 77, at 35 n.6 (listing several species exterminated by market hunting); HORNADAY, *supra* note 79 (chronicling, at the turn of the twentieth century, all extinct species and species threatened by extinction).

110 For example, a select committee of the Ohio Senate made these negative comments concerning legislation proposed to protect the passenger pigeon in 1857:

> The passenger pigeon needs no protection. Wonderfully prolific, having the vast forests of the North as its breeding grounds, traveling hundreds of miles in search of food, it is here today and elsewhere tomorrow, and no ordinary destruction can lessen them.

Quoted in F. Wayne King, *The Wildlife Trade*, *in* WILDLIFE AND AMERICA: CONTRIBUTIONS TO AN UNDERSTANDING OF AMERICAN WILDLIFE AND ITS CONSERVATION 253, 254 (Howard P. Brokaw ed., 1978) (citations omitted).

111 As explained by Professors Goble and Freyfogle, under nineteenth-century game laws,

The fate of the passenger pigeon vividly illustrates how early non-regulation of market hunting played out. At the time of America's discovery, passenger pigeons ranged from the Atlantic Coast westward to the Rocky Mountains; their numbers were estimated in the billions.[112] The species was so abundant that it became a chief staple in metropolitan meat markets.[113] Passenger pigeons were most often caught *en masse* by large spring-loaded nets,[114] but sometimes they were shot for the market.[115] The number of birds that could be caught in a single day by an expert netter was staggering: "A fair average is sixty to ninety dozen birds per day per net . . . . A double net has been known to catch 2,500 birds per day."[116] Although hunters exploited passenger pigeons throughout the eastern states, the greatest slaughter occurred in Michigan, Ohio, and Pennsylvania.[117] In one forty-day period in 1869, nearly twelve million pigeons were sent to market from Hartford, Michigan.[118] Another Michigan town marketed over fifteen million pigeons in a two-year span.[119]

"[b]ison could be slaughtered for their tongues and left to rot; passenger pigeons could be left where they fell when picking them up became too onerous." GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 125.

112 Although a definitive count will never be confirmed, scientific studies estimate the population of passenger pigeons at the time of the discovery of America at three billion, with a possibility of as many as five trillion. A.W. SCHORGER, THE PASSENGER PIGEON: ITS NATURAL HISTORY AND EXTINCTION 204 (1973). Other studies suggest that passenger pigeons historically formed 25–40% of the total bird population in North America. *Id.* at 205.

In his novel, *The Pioneers*, James Fenimore Cooper vividly described the throngs of passenger pigeons that American settlers encountered during their early westward advances: "Here is a flock that the eye cannot see the end of. There is food enough in it to keep the army of Xeres for a month, and feathers enough to make beds for the whole country." JAMES FENIMORE COOPER, THE PIONEERS, OR, THE SOURCES OF SUSQUEHANNA: A DESCRIPTIVE TALE 250 (1896).

113 *See generally* H.B. Roney, *Efforts to Check the Slaughter*, AMERICAN FIELD, Jan. 11, 1879, *reprinted in* THE PASSENGER PIGEON 77, 81 (W.B. Mershon ed., 1907) (detailing the prices of passenger pigeons in city markets and fashionable restaurants); W.B. MERSHON, *Notes of a Vanished Industry*, *in* THE PASSENGER PIGEON 105, 105–18 (1907) (describing the decline of the pigeon market).

114 Hunters would clear a marshy area of all grass and debris, bait the ground with salt, and allow a flock of birds to congregate. When a sufficient number of birds occupied the baited area, the hunters ensnared the entire flock with a large—typically six feet wide by thirty feet long—spring-loaded net. Roney, *supra* note 113, at 77.

115 Dr. Schorger observed that when "firing from the proper angle, a hunter could kill eight or ten [passenger pigeons] at a shot." SCHORGER, *supra* note 112, at 187. In fact, passenger pigeons were so easily shot, many nineteenth-century hunters refused to label it a "game" bird. *Id.* at 186.

116 Roney, *supra* note 113, at 80–81.

117 HORNADAY, *supra* note 79, at 13.

118 Sullivan Cook, *What Became of the Pigeon?*, FOREST AND STREAM, Mar. 14, 1903, *reprinted in* THE PASSENGER PIGEON 163, 171 (W.B. Mershon ed., 1907).

119 *Id.; see also* Chief Pokagon, *The Wild Pigeon of North America*, 22 THE CHATAUQUAN No. 20, Nov. 1895, *reprinted in* THE PASSENGER PIGEON 48, 54–55 (W.B. MERSHON ED., 1907) (estimating that not less than 300 tons of pigeons were shipped from Michigan in 1878). The pioneer American ornithologist Alexander Wilson described the scene: "Wagon loads of them are poured into market, where they sell from fifty to twenty-five and even twelve cents per dozen." ALEXANDER WILSON, AMERICAN ORNITHOLOGY 206 (1814).

By the mid-1800s, this excessive hunting resulted in a marked reduction of passenger pigeons.[120] But most Americans refused to believe that the once bountiful species was in danger of extinction.[121] Instead, people commonly believed that the birds had taken refuge in South America or Mexico, or had simply "gone out to sea."[122] To early twentieth-century wildlife observer William Hornaday, however, it was clear what had happened to the vast numbers of passenger pigeons: "They went down and out by systematic, wholesale slaughter for the market and the pot, before the shotguns, clubs, and nets of the earliest American pot-hunters. Wherever [passenger pigeons] nested, they were slaughtered."[123] A victim of America's pro-capture mindset, the last wild passenger pigeon was shot in September of 1908, and the last captive bird died in a Cincinnati zoo on September 1, 1914.[124]

Passenger pigeons were not the only species affected by the country's unrestricted rule of capture; many populations of North American fowl disappeared before the guns of commercial hunters. Extinction of the Great Auk—a sea-going diving bird about the size of a domestic goose—occurred by 1844,[125] and the Labrador Duck was wiped out around 1875, "before the scientific world even knew its existence was threatened."[126] Mammal populations, too, dwindled during this time period, especially big game species like deer, elk, bighorn sheep, and bison.[127] By the late 1800s, it was evident that trade in wild meats and wildlife products had to be brought under control.[128] A radical change in American laws concerning animals *ferae naturae* was on the horizon. This change would see the free take principle soon dislodged by states' claims to superior rights to wildlife in trust for their citizens.

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120 King, *supra* note 110, at 253–54.

121 In fact, in 1848—a date by which eastern states knew the populations of pigeons were dwindling—Massachusetts passed a bill protecting netters of passenger pigeons from outside interference. Under this law, any individual that damaged a hunter's nets or frightened pigeons away from their pursuer was subject to a $10 fine. HORNADAY, *supra* note 79, at 13.

122 *Id.*

123 *Id.* at 11.

124 King, *supra* note 110, at 254.

125 Kimball & Johnson, *supra* note 79, at 10.

126 HORNADAY, *supra* note 79, at 11.

127 For general commentary on the decline of North America's big game species due to commercial hunting, see TREFETHEAN, *supra* note 89; and PETER MATTHIESSEN, WILDLIFE IN AMERICA (1959). For in-depth discussions on the destruction of bison in the western United States, see E. DOUGLAS BRANCH, THE HUNTING OF THE BUFFALO 148–84 (1929); and TOM MCHUGH, THE TIME OF THE BUFFALO 271–90 (1972).

128 Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23, 37 (2000) (commenting that "[i]t was not until the late Nineteenth Century, when the full impacts of the Industrial Revolution on our natural resources were beginning to be felt, that the questions of property rights in animals began to have a substantially different form in our jurisprudence").

The first stirrings of opposition to unrestricted wildlife taking came from nineteenth-century intellectual luminaries such as Henry David Thoreau—in *Walden* (1854)—and Ralph Waldo Emerson—in *Nature* (1836)—as well as sportsmen, who believed that without regulation, market hunters would severely infringe on sport hunting. In 1844, 80 influential sportsmen founded America's first conservation-oriented group, the New York Sportsman's Club. Several similar groups followed in the ensuing years, culminating with the formation of the Sierra Club (1892) and Audubon Society (1905). Favre, *supra* note 31, at 250.

IV. THE RISE OF STATE OWNERSHIP OF WILDLIFE: LIMITING CAPTURE VIA PUBLIC TRUST PRINCIPLES

The vigorous capture rules fostered by early America's pioneer spirit resulted in the extinction of many species in the New World and the depletion of populations of many more. State legislators sought to maintain a sustainable food supply for their citizens,[129] but their power to curb the rule of capture remained questionable. To ensure that capturers did not exploit North American wildlife to extinction, several state courts upheld legislation to stop overharvesting by looking to English law. Although American courts rejected the English class-based restrictions on arms and hunting,[130] they did not erase all remnants of the king's sovereign prerogative. Instead, American courts transformed the English concept of prerogative ownership and fashioned a uniquely American justification for regulation: the state "ownership" doctrine, also known as the wildlife trust.[131] Professor Goble has aptly referred to this transition as "republicanizing" the royal prerogative.[132] By the late 1800s, many states had employed a sovereign ownership theory to regulate the use of fishing grounds, restrict hunting by seasons or outright prohibitions, and terminate certain commerce in wildlife altogether.[133]

A. The Foundation of the American Wildlife Trust

The foundation for nineteenth-century wildlife regulation was laid by several state and U.S. Supreme Court decisions supporting state ownership of public resources in trust for all citizens. Development of an American public trust doctrine began with the 1821 New Jersey Supreme Court decision *Arnold v. Mundy*.[134] In *Arnold*, Chief Justice Kilpatrick ruled that

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129 Professor Coggins has observed that early state wildlife regulation "was directed at [the] preservation of a food source; neither recreational, ethical, nor aesthetic values were prominent in legislation until well into [the twentieth] century." Coggins, *supra* note 31, at 305.

130 *See supra* note 77 and accompanying text.

131 The Washington Supreme Court explained the transfer of the crown's wildlife prerogative to the several states in the 1914 case of *Cawsey v. Brickey*:

> Under the common law of England all property right in animals *ferae naturae* was in the sovereign for the use and benefit of the people. The killing, taking, and use of game was subject to absolute governmental control for the common good. This absolute power to control and regulate was vested in the colonial governments as a part of the common law. It passed with the title to game to the several states as an incident of their sovereignty, and was retained by the states for the use and benefit of the people of the states, subject only to any applicable provisions of the federal Constitution.

Cawsey v. Brickey, 144 P. 938, 939 (Wash. 1914).

132 Goble, *Three Cases / Four Tales*, *supra* note 34, at 831–33.

133 *See, e.g.*, TOBER, *supra* note 77, at 139–77 (providing a broad history of game laws in nineteenth-century America); GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 762–68 (analyzing early American regulation of the taking of wildlife); HORNADAY, *supra* note 79, at 265–303 (presenting a state-by-state status report on wildlife legislation just after the turn of the twentieth century).

134 6 N.J.L. 1 (N.J. Sup. Ct. 1821). *See* Goble, *Three Cases / Four Tales*, *supra* note 34, at 831–33 (providing analysis on the *Arnold v. Mundy* decision).

under English common law, New Jersey's navigable waters and the lands submerged beneath them were "common to all the citizens, and... the property is... vested in the sovereign... not for his own use, but for the use of the citizens."[135] The court explained that this ownership interest, once the English king's prerogative, transferred to New Jersey as a result of the revolution and provided the state inherent authority to regulate the resource for the benefit of its citizenry.[136]

Although recent scholarship has questioned Justice Kilpatrick's interpretation of English precedent,[137] the Supreme Court adopted the New

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135 *Arnold*, 6 N.J.L. at 52 (Kilpatrick, C.J.).

136 *Id.* at 53.

137 *See, e.g.*, Michael J. Bean, *Federal Wildlife Law*, *in* WILDLIFE AND AMERICA: CONTRIBUTIONS TO AN UNDERSTANDING OF AMERICAN WILDLIFE AND ITS CONSERVATION 280 (Howard P. Brokaw ed., 1978) (noting that *Arnold* and its progeny are noteworthy because they gave birth to the public trust doctrine, "which apparently had not even existed in England... at the time of the American Revolution"); Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 367 (1996) (explaining that *Arnold v. Mundy* "extended the public trust doctrine further than the English courts, which had been limited by the fact that ownership was vested in the King rather than in the people"); Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FL. ST. U. L. REV. 513, 590 (1975) (arguing that "at the time the public trust doctrine was supposedly vesting the Crown title to submerged beds and the foreshore in the newly sovereign American states, there was virtually no support for such a doctrine in English common law"; rather, under English common law "the beds and shores of virtually all navigable waters, tidal and nontidal, were privately owned"). *But see* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 200 (1980) (arguing that although the *Arnold* court's research has been criticized, the public trust doctrine "has taken firm root in this country and is not likely to be dislodged").

Commenting on a draft of this article, Eric Freyfogle wrote:

> [Y]ou question the judicial precedent for the public trust doctrine. This is fair enough, but it seems to me that the rise of the public trust cannot be separated from the demise of the crown and thus the need to divide up the various powers that the crown possessed. In my rather simplistic understanding of it, it seems that lawmakers in America necessarily had to decide what the king owned personally and what property he held in a sovereign capacity (since the king's counselors largely used the term property to cover everything). That was the issue in *Arnold*, of course. In England, the general practice was the navigable waterways were owned by the king in a sovereign capacity (though the term was not used) which meant, critically, that the public had rights to fish. (This, after all, was what it all came down to.) If the king had owned the waterways in a proprietary capacity, then the public would not have had rights to fish. One further missing piece: did the king have the right to transfer navigable waterways into private hands, thereby ending the public's rights? No clear answer, I think—or rather there were two answers, yes and no. The king did this, of course, but it was ardently resisted and his power to do it denied. This was where things stood when U.S. judges enter the picture, and they had to translate all this into a legal system without a king. Their sensible answer was to say that the state owned the waterways (they were held by the king as sovereign, not as proprietor) and the sovereign had only limited powers to alienate the waterways (hence the public trust doctrine). This was very much in keeping with a major strand of English legal writing—the strand written by those who opposed the king and sought to resist his power, which is to say the Whiggish strand of writing that most appealed to American revolutionaries. My bottom line is that the public trust doctrine did build upon a solid body of English legal materials; the only thing new was the phrasing of the idea.

E-mail from Eric Freyfogle, Max L. Rowe Professor of Law, University of Illinois College of Law,

Jersey approach in the 1842 case of *Martin v. Waddell*.[138] Citing no discernable authority, Chief Justice Roger Taney declared in *Martin* that under English common law the "dominion and property in navigable waters, and in the lands under them, [were] held by the king as a public trust."[139] The Court proceeded to hold that "when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use."[140] *Arnold* and *Martin* became the cornerstones of the public trust in navigable waters and submerged lands, and they also figured prominently in the evolution of another line of cases concluding that public trust principles extended beyond the beds and banks of navigable waterways to wildlife.[141]

In 1855, in *Smith v. Maryland*, the Supreme Court ruled that Maryland's proprietary interest in submerged lands conferred upon the state the authority to regulate the taking of oysters embedded within its tidelands.[142] As explained by Justice Curtis: "This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from the duty to preserve unimpaired those public uses for which the soil is held."[143] Also in 1855, the Supreme Judicial Court of Massachusetts upheld a statute prohibiting the use of purse seines within a mile of the Nantucket shore, declaring that swimming fish, as well as shellfish, belonged to the state in trust for its citizens.[144] Similarly, the U.S. Supreme Court, in the 1891 case of *Manchester v.* Massachusetts,[145] validated a Massachusetts regulation restricting the lawful methods for catching menhaden—a bait fish that served as the primary food source for larger, commercially valuable fish—under the theory that the state had a proprietary interest in all fish within the state's inland and coastal waters.[146] Following English common law, which treated fish the same as terrestrial animals,[147] the public trust doctrine

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to Michael C. Blumm, Professor of Law, Lewis & Clark Law School (Oct. 12, 2005).

138 41 U.S. (16 Pet.) 367 (1842).

139 *Id.* at 411.

140 *Id.* at 410. While the reasoning of *Martin v. Waddell* applied only to the thirteen original colonies, in *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), the Supreme Court extended the same principle to all subsequently admitted states under the equal footing doctrine. *See* BEAN & ROWLAND, *supra* note 35, at 12 n.16 (commenting on the equal footing doctrine).

141 For analyses noting the importance of *Arnold* and *Martin* in the development of the wildlife trust, see Coggins, *supra* note 31, at 305; Goble & Freyfogle, *A Coming of Age*, *supra* note 38, at 10,135; Caspersen, *supra* note 137, at 366–67; Bean, *supra* note 137, at 280; and Horner, *supra* note 128, at 38.

142 59 U.S. (18 How.) 71, 75 (1855). In 1876, the Court reached a similar result, employing a public trust rationale to uphold a Virginia statute forbidding citizens of other states from planting oysters in Virginia tidewaters. McCready v. Virginia, 94 U.S. 391, 397 (1876).

143 *Smith*, 59 U.S. at 76.

144 Dunham v. Lamphere, 69 Mass. (3 Gray) 268 (1855).

145 139 U.S. 240 (1891).

146 *Id.* at 266. The Court observed that preservation of menhaden benefited the public because the fish served as "food for other fish which are so used . . . for the common benefit." *Id.* at 265. Michael Bean and Melanie Rowland commented that the quoted language is significant because it "reflects a fundamental nineteenth-century conception of the purpose of wildlife law, the preservation of a food supply." BEAN & ROWLAND, *supra* note 35, at 13.

147 *See* BLACKSTONE, *supra* note 32, at *392 (explaining that the capture laws pertaining to

announced by the Supreme Court in *Martin* and broadened in *Smith* and *Manchester* eventually became amphibious, ultimately extending to all animals *ferae naturae.*

B. Early Wildlife Cases: Correcting the Market Hunting Problem

In the latter half of the nineteenth century, state legislatures began to regulate wildlife taking in order to preserve a food supply decimated by market hunters.[148] The earliest regulations imposed bag limits and shortened or closed hunting seasons in an attempt to prevent excessive slaughter of fowl and other game.[149] Although market hunters challenged limits that restricted their right to capture wildlife, courts routinely upheld the laws using public trust principles. Just as the king owned all wildlife at common law,[150] so the states, by the transfer of royal authority, maintained a proprietary interest in the wild animals within their borders, which provided them authority to limit the taking of game.[151] As explained by the Supreme Court of Illinois in 1881:

> The ownership being in the people of the State—the repository of the sovereign authority—and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best serve the public welfare.[152]

Despite such judicial endorsements of state ownership of wildlife, enforcement of early taking restrictions proved difficult because hunters could easily discard, conceal, or consume animals taken in violation of law.[153] Recognizing the inadequacy of temporal restrictions and bag limits, states increasingly began to use marketing laws to impose workable restrictions on taking. As Professor Lund observed, "By identifying the criminal act as the sale rather than the taking, the offense could be moved

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fish apply equally to terrestrial game species such as deer and rabbits).

148 *See supra* note 133 and accompanying text.

149 For example, by 1878, Massachusetts imposed bag limits on oysters, eels, and certain game birds. *See* Lund, *Early American Wildlife Law*, *supra* note 77, at 724 n.164. Similarly, an 1872 Maryland law prohibited the use of cannon-like punt and swivel guns and restricted the hunting of waterfowl to the daylight hours of Mondays, Wednesdays, and Fridays. *See* TOBER, *supra* note 77, at 141. *See also id.* at 140–44 (providing more examples of American game laws in the 1870s).

150 *See supra* notes 46–53 and accompanying text.

151 *See* Coggins & Smith, *supra* note 37, at 595 n.19 (observing that the king's prerogative was "transferred, at first only in theory, and later in fact, to the sovereign people as a whole in the person or entity of the state. Eventually it came to be accepted that 'title' to wildlife rested in the state in trust, more or less, for the people.").

152 Magner v. Illinois, 97 Ill. 320, 333–34 (1881).

153 Lund, *Early American Wildlife Law*, *supra* note 77, at 724. *See also* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 73 (1962) ("Distances were too great, the time lag too long, and the difficulties of arranging for witnesses too serious to provide an effective deterrent or remedy for [the problems associated with market hunting].").

out of the wilderness and into the marketplace, where controls could be effectively enforced."[154]

Nineteenth-century courts employed state ownership of animals *ferae naturae* to justify limiting the taking of wildlife because the enactment of market restrictions occurred at a time when courts held a narrow view of the scope of the state police power.[155] In the late nineteenth and early twentieth centuries, the U.S. Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to impose significant limits on state economic regulation.[156] During this era, the Court basically elevated freedom of contract to a fundamental right with which the state could interfere only to control significant public health, safety, or moral problems.[157]

State game laws completely withholding the right to sell certain species may have foundered under this turn-of-the-century judicial view of the police power.[158] To avoid due process-imposed limits on economic regulation, courts viewed marketing laws not as a regulation enforced on a hunter's property after capture, but instead as a restriction on the property right the

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154 *See* Lund, *Early American Wildlife Law*, *supra* note 77, at 724. *See also* TOBER, *supra* note 77, at 150 (explaining that nineteenth-century game laws were considerably easier to enforce in the marketplace than in the field).

155 *See* GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 387 (suggesting that late nineteenth-century marketing limits may have been hard to uphold under a police power analysis); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 665 (1986) ("The trust doctrine arose at a time . . . when sovereign power depended on ownership . . . and courts interpreted the scope of governmental police powers quite narrowly.").

156 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 587–96 (2d ed. 2002) (documenting the Supreme Court's embrace of economic substantive due process from 1870 through 1937).

157 *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905) (declaring unconstitutional a New York law that set the maximum hours a baker could work, and articulating that liberty under the Fourteenth Amendment includes the "general right to make a contract in relation to [a person's] business"), *overruled by* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963); Mugler v. Kansas, 123 U.S. 623, 661 (1887) (upholding as constitutional a state law prohibiting the sale of alcohol under a police power analysis, but strongly indicating that similar laws would be invalidated as violating due process if they did not have a "real or substantial relation" to the purpose of protecting public morals).

158 While some late nineteenth-century courts employed the police power as authority to regulate possession and sale of wildlife, most—perhaps all—of these courts blended language regarding sovereignty and property. For example, the Supreme Court of Minnesota upheld a law prohibiting possession and sale of certain game because "the regulation is one which reasonably tends to prevent the taking or killing of game in the closed or forbidden season, and is therefore a legitimate exercise of the police power." State v. Rodman, 59 N.W. 1098, 1099 (Minn. 1894). The court then went on to endorse the ownership theory of regulation, stating: "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common." *Id.* Similarly, the Supreme Court of California endorsed a statute limiting the sale of deer meat because the act was "not in excess of the police power," but then noted that "[t]he wild game within [California] belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good." Ex parte Maier, 37 P. 402, 404 (Cal. 1894).

hunter could obtain in wild animals in the first instance.[159] As owner of all *ferae naturae* within its borders, the state had the power to determine which rights were included in the private ownership of wildlife. The state ownership doctrine thus enabled courts to avoid difficult inquiries into the limits of the state's sovereign authority to regulate trade in wild animals.

Legislation restricting the possession and sale of wildlife and wildlife products within particular states dramatically reduced hunters' exploitation of certain game, especially fowl.[160] Often, however, if a state set rigorous restrictions on selling game species, market hunters would simply poach game in the regulated state and transport the carcasses into a neighboring, less-regulated state for sale.[161] This development was encouraged by the new technology of efficient cold storage in the 1870s and 1880s, allowing eastern markets to be regularly supplied animals taken in the West.[162] Some cities, like Boston and Washington, D.C.—because of their extended sale periods—became known as "dumping grounds" for game killed in other states.[163] The Massachusetts Fish and Game Protective Association estimated in 1896 that ninety to ninety-five percent of the game sold in Boston originated outside Massachusetts.[164] To close such loopholes, states began to enact legislation prohibiting the shipment of game out-of-state, even where the game had been lawfully harvested.[165] Hunters resisted the new regulations, filing suits in which they argued that these protectionist laws violated the federal Commerce Clause prohibition against disrupting interstate commerce.[166]

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159 *See, e.g., Rodman*, 59 N.W. at 1099 (ruling that restrictions on the sale of game "deprive no person of his property, because he who takes or kills game had no previous right or property in it, and, when he acquires such a right by reducing it to possession, he does so subject to such conditions and limitations as the legislature has seen fit to impose").

160 Professors Goble and Freyfogle maintain that marketing laws, which limited and often prohibited the right to sell certain game species within a state, "benefit[ted] wildlife as much or more than any other legal act." GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 387.

161 King, *supra* note 110, at 254.

162 TOBER, *supra* note 77, at 199.

163 *Id.* at 238 n.84.

164 *Id.* A similar claim was made for the New York City market in 1885. *Id.*

165 *See id.* at 156 (observing that, by 1901, all but five states prohibited the export of at least one species, and many states prohibited the sale and/or export of a wide range of legally captured animals). Some states also prohibited the import of game legally acquired elsewhere, so that the inflow of game taken outside the state did not provide a cover under which local hunting might continue. *See* State v. Randolph, 1 Mo. Ct. App. 15, 17 (1876) (upholding the application of a law prohibiting the possession and sale of imported game, and stating: "The game law would be nugatory if, during the prohibited season, game could be imported from the neighboring States."); Roth v. State, 37 N.E. 259, 260 (Ohio 1894) (upholding a statute preventing import of fowl because the statute offered more protection to "birds and game in this state than one preventing the sale of such only as should be killed here").

166 *See, e.g.*, Am. Express Co. v. People, 24 N.E. 758 (Ill. 1890) (upholding an Illinois statute that prohibited all transport of game killed in state for subsequent sale out-of-state); Organ v. State, 19 S.W. 840 (Ark. 1892) (upholding the constitutionality of an Arkansas statute prohibiting the exportation of fish and game from the state).

C. Geer v. Connecticut: *The Polestar of the State Ownership Doctrine*

In 1896, in *Geer v. Connecticut*,[167] in what became a landmark opinion, the Supreme Court addressed the wildlife ownership theory that had developed in state courts over the previous two decades. At issue in *Geer* was whether the state of Connecticut could forbid game that had been lawfully taken within the state from being transported out-of-state for sale without violating the Commerce Clause.[168] Before the Court addressed the constitutional issue, however, Justice Edward White embarked on a thorough examination of the nature of the property right in wildlife and the states' authority over it.[169]

Justice White first embraced the traditional rule of capture, noting that under natural law, any person could reduce wildlife to individual possession through the method of occupation.[170] But he was quick to note that an individual's right to acquire wild animals had always been subject to governmental regulation: "From the earliest traditions, the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power."[171] Drawing heavily on the Court's earlier decisions recognizing a public trust in fish and shellfish,[172] Justice White described how this venerable tradition of regulating the taking of wildlife had been incorporated into American law:

> Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from the common ownership [of wild animals], is to be exercised . . . as a trust for the benefit of the people and not as a prerogative for the advantage of the government.[173]

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167 161 U.S. 519 (1896).

168 The Commerce Clause provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8. No constitutional provision expressly declares that states may not burden interstate commerce, but the Supreme Court has inferred this prohibition from the express grant of federal power, in Article I, section 8, to regulate commerce among the states. As explained by Felix Frankfurter, "[T]he doctrine [is] that the commerce clause, by its own force and without national legislation, puts it into the power of the Court to place limits on state authority." FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 18 (1937).

169 *Geer*, 161 U.S. at 522–30. The Court cut a broad swath, tracing the development of property rights in wildlife from Athenian and Roman law through French civil law and English common law to American colonial and state law. *Id.*

170 *Id.* at 523.

171 *Id.* at 522.

172 Justice White cited both *McCready v. Virginia*, 94 U.S. 391 (1876) (oysters) and *Manchester v. Massachusetts*, 139 U.S. 240 (1891) (menhaden) for the proposition that states have the authority to control and regulate game in a proprietary fashion. *Id.* at 528. *See supra* notes 142–147 and accompanying text (discussing *McCready* and *Manchester* in the context of developing a public trust in wildlife).

173 *Geer*, 161 U.S. at 529.

After explicitly adopting the theory that states own all wildlife in trust for their citizens, the Court described the state's responsibilities in managing the trust corpus: "[O]wnership of the sovereign authority [in wildlife] is in trust for all the people of the state; and hence, by implication, *it is the duty of the legislature* to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state."[174] This rationale led the Court to conclude that the state, as part of its ownership, had the authority—perhaps even an obligation—to impose limitations on the property interests individuals could acquire in wildlife to benefit the citizens of the state.[175] The Court thus upheld the challenged statute, concluding that Connecticut could exclude game birds from interstate commerce, even while permitting them to lawfully remain in commerce within the state, because its export restriction preserved "a valuable food supply" for the state's owners-in-common.[176]

Although the *Geer* majority made clear that a state's power over wild animals extended only "in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution,"[177] in the years following the decision, states' rights advocates routinely ignored this limiting language, adopting *Geer*'s most expansive interpretation and maintaining that, as owners of wildlife, states were entirely beyond the reach of federal authority. Indeed, many states employed *Geer* to argue that their proprietary interest in animals *ferae naturae* preempted both federal legislation and the limitations imposed by the U.S. Constitution.[178] In response to these state attempts to erect *Geer* and its state ownership rationale as a barrier to federal legislation and regulations

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174 *Id.* at 534 (emphasis added).

175 *Id.* at 530–34.

176 *Id.* at 534. The Court raised, without deciding, the issue of whether "commerce" was in fact created by the killing and sale of wildlife within a state:

> [I]t may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state.... The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce.

Id. at 530. In a prescient dissent, Justice Field rejected the ownership rationale, arguing that wild game was not actually the property of the state, and that since a lawfully killed animal "becomes an article of commerce, its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Id.* at 538 (Field, J., dissenting).

177 *Id.* at 528.

178 *See, e.g.*, Coggins, *supra* note 31, at 306 (asserting that *Geer* "gave rise to the widespread, frequently ardent belief that because a state owned its resident wildlife, its actions with respect to its property were subject to no constraints, not even constitutional restrictions"); Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 60 (2000) (noting that after *Geer* "states attempted to argue that, as a result of their property-based interest in wildlife, they could properly condition the taking of wildlife within their borders" without having to comply with federal legislation or the Constitution); BEAN & ROWLAND, *supra* note 35, at 15 (commenting that *Geer* allowed some to argue that the state ownership doctrine "render[ed] impossible the development of a body of federal wildlife law").

aimed at preventing species decline, the Supreme Court slowly narrowed *Geer*'s holding, eventually overruling state ownership of wildlife as violative of the Commerce Clause in *Hughes v. Oklahoma* in 1979.[179]

V. *GEER* IS DEAD: OR SO IT SEEMED

After the Supreme Court decided *Geer* in 1896, the Court invoked the theory of state ownership of wildlife to uphold state game regulations in a variety of circumstances.[180] But it never endorsed state ownership as providing exclusive and unlimited state regulatory authority over wildlife. To the contrary, the Court progressively weakened the state ownership rationale announced by *Geer* until it finally overruled *Geer* in 1979.[181] The analysis below recounts the apparent demise of the state ownership doctrine through two parallel lines of cases: one focusing on the federal power to regulate animals *ferae naturae*, and the other considering the U.S. Constitution as a restriction on state game regulation.[182]

A. The Federal Power to Regulate Wildlife

The first blow to *Geer's* state ownership rationale came in the Supreme Court's 1920 decision in *Missouri v. Holland*.[183] The *Holland* Court had to decide whether the recently enacted Migratory Bird Treaty Act of 1918 (MBTA)[184] impermissibly infringed on state rights guaranteed by the Tenth Amendment or, alternatively, divested states of their property right in wild birds.[185] Justice Holmes, writing for a 7-2 majority,[186] determined that the treaty and its implementing legislation took precedence over any conflicting power of regulation by virtue of the Supremacy Clause.[187] Holmes

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179 441 U.S. 322 (1979).

180 *See, e.g.*, Ward v. Race Horse, 163 U.S. 504 (1896) (state hunting regulations held constitutional as applied to Indians on reservation despite claim of preemption by federal treaty); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (state prohibition against hunting by resident aliens upheld over due process and equal protection challenges); Lacoste v. Dep't of Conservation, 263 U.S. 545 (1924) (state severance tax on skins taken from wild animals upheld under commerce clause attack); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (upholding higher non-resident license fees for hunting elk against privileges and immunities and equal protection attacks).

181 *See infra* notes 183–219 (documenting *Geer*'s decline).

182 This Article does not address all Supreme Court cases interpreting state/federal conflicts concerning wildlife regulation and the state ownership doctrine. For a complete discussion of Supreme Court jurisprudence on this topic, see Coggins, *supra* note 31; and BEAN & ROWLAND, *supra* note 35, at 15–38.

183 252 U.S. 416 (1920).

184 Ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–711 (2000)).

185 *Holland*, 252 U.S. at 434.

186 Justices Van Davanter and Pitney dissented without opinion. *Id.* at 435.

187 The Supremacy Clause includes an express affirmation of the federal treaty-making power: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." U.S. CONST. art. VI. The *Holland* majority implied that the MBTA was probably a valid exercise of the Congress's commerce power as well. *See Holland*, 252 U.S. at 433. Later circuit court opinions employed this dicta to uphold the MBTA as

downplayed state ownership as a prohibition on federal regulation of wildlife:

> The State . . . founds its claim of exclusive authority upon an assertion of title . . . No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, *but it does not follow that its authority is exclusive of paramount powers.* To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.[188]

Holland thus established the federal treaty-making power as superior to states' property interest in animals *ferae naturae.* Two later cases, *Hunt v. United States*[189] and *Kleppe v. New Mexico*,[190] ruled that the federal power over public lands under the Property Clause[191] also trumped state ownership of wildlife.

In *Hunt*, the Court upheld the federal government's removal of excess deer from the Kaibab National Forest to protect the forest from damage caused by overgrazing, despite objections from the state that the deer kill was contrary to state law.[192] The Court, with Justice Sutherland writing, rejected the state's *Geer*-based argument that it maintained exclusive authority to regulate the taking of wildlife, ruling: "[T]he power of the United States to thus protect its lands and property does not admit of doubt . . . the game laws or any other statute of the state . . . notwithstanding."[193] A half-century later, in 1976, the *Kleppe* Court extended *Hunt's* Property Clause rationale to validate the federal government's claim that the Wild Free-Roaming Horses and Burros Act[194] preempted state game laws regulating horses and burros on federal public lands.[195] The state argued that the federal act was unconstitutional because, unlike the deer kill in *Hunt*, it aimed to protect the animals, not federal lands themselves.[196] A unanimous Court found this distinction unpersuasive, concluding that the federal authority over its lands "necessarily includes the power to regulate and

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valid legislation under the Commerce Clause. *See, e.g.*, Cochrane v. United States, 92 F.2d 623 (7th Cir. 1937); Cerritos Gun Club v. Hall, 96 F.2d 620 (9th Cir. 1938).

188 *Holland*, 252 U.S. at 434 (emphasis added).

189 278 U.S. 96 (1928).

190 426 U.S. 529 (1976).

191 "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3.

192 *Hunt*, 278 U.S. at 100.

193 *Id. See also* Chalk v. United States, 114 F.2d 207 (4th Cir. 1940) (extending *Hunt's* rationale to acquired national forest lands); New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir. 1969) (upholding the Secretary of the Interior's decision to kill certain deer in the Carlsbad Caverns National Park for research purposes, without compliance with state game laws and absent a showing of damage to federal property), *cert. denied sub nom.*, New Mexico State Game Comm'n v. Hickel, 396 U.S. 961 (1969).

194 16 U.S.C. §§ 1331–1340 (2000). The Act declared wild horses and burros to be "an integral part of the natural system of public lands" and directed federal public land managers "to protect and manage [them] as components of the public lands . . . ." *Id.* §§ 1331, 1333(a).

195 *Kleppe*, 426 U.S. at 541.

196 *Id.* at 536–37.

protect wildlife living there."[197] Collectively, *Holland*, *Hunt*, and *Kleppe* destroyed the argument that state ownership of wildlife superseded federal species legislation.[198]

B. Constitutional Limitations on State Wildlife Regulation

Geer's progeny not only validated federal wildlife laws, they also curtailed states' ability to regulate game in ways inconsistent with the United States Constitution. In 1948, the Supreme Court decided the companion cases of *Toomer v. Witsell*[199] and *Takahashi v. Fish and Game Commissioner*,[200] determining that the Privileges and Immunities and the Equal Protection Clauses of the Fourteenth Amendment impose limitations on wildlife regulation. In *Takahashi*, the Court ruled that California could not, consistent with the Equal Protection Clause,[201] deny a commercial fishing license to a residential alien on the ground that he was ineligible for U.S. citizenship.[202] In so deciding, the Court, with Justice Black writing for a 7-2 majority,[203] undercut *Geer*'s state ownership theory, proclaiming: "To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting others to do so."[204] Thus, state ownership did not justify harvest regulations that discriminated against aliens.

In *Toomer*, the Court examined a South Carolina statute that imposed a shrimp fishery license fee for non-residents one hundred times greater than the fee charged residents.[205] The Court struck down the fee differential because it was "so great that its practical effect is virtually exclusionary," and thus in violation of the Privileges and Immunities Clause.[206] After distinguishing several cases relying on the theory of state ownership of wildlife, the Court observed that:

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197 *Id.* at 541. The Court reached this conclusion "despite an unbroken history of state wildlife management on public grazing lands, and despite the strong economic interest of grazing rights holders for whom wild horses and burros were major competitors for forage." Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 313 (1995).

198 *See* BEAN & ROWLAND, *supra* note 35, at 17–22 (analyzing *Holland*, *Hunt*, and *Kleppe*).

199 334 U.S. 385 (1948).

200 334 U.S. 410 (1948).

201 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

202 *Takahashi*, 334 U.S. at 421.

203 Justices Reed and Jackson dissented, arguing that state ownership of wildlife allowed state regulation to prevent wildlife exploitation by aliens. *Id.* at 427–31.

204 *Id.* at 421.

205 334 U.S. 385 at 389.

206 *Id.* at 396–97. The Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." U.S. CONST. art IV, § 2. The Court has stated that "[this] section, in effect, prevents a State from discrimination against citizens of other States in favor of its own." Hague v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939).

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power... so as not to discriminate without reason against citizens of other States.[207]

Together, *Takahashi* and *Toomer* made explicit that states' proprietary interests in wildlife did not immunize state wildlife regulations from the checks on state power imposed by the Equal Protection and the Privileges and Immunities Clauses of the United States Constitution. However, neither case expressly overruled *Geer*'s Commerce Clause holding, thus paving the way for *Hughes v. Oklahoma*.

C. Overruling Geer

By 1979, *Geer* was ripe for reversal. Not only had the Supreme Court narrowed the significance of *Geer*'s state ownership theory in the eighty years since the case was decided,[208] the Court had also shifted its understanding of what activities constituted "commerce," and were thus subject to federal regulation. The restrictive Commerce Clause jurisprudence from the *Geer* era became increasingly anachronistic as the national economy evolved in the twentieth century.[209] As a consequence of the New Deal's attempts to combat the Great Depression, the Court expanded its definition of commerce after 1937, eventually adopting the view that Congress could regulate any activity that, when considered cumulatively with other similarly situated activities, had an effect on interstate commerce.[210] This shift was evident in the context of wildlife regulation in the 1977 decision *Douglas v. Seacoast Products, Inc.*[211]

In *Douglas*, the Court used a Commerce Clause analysis to rule that federal legislation licensing foreign fishing vessels in Virginia's coastal waters preempted a Virginia law restricting out-of-state vessels from

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207 *Toomer*, 334 U.S. at 402.

208 *See supra* notes 183–207 and accompanying text.

209 *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (concluding that manufacturing could not be regulated under the Commerce Clause because production did not directly effect interstate commerce); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (explaining that there is a "necessary and well-established distinction between direct and indirect effects [under the Commerce Clause]", and where "the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power").

210 *See, e.g.*, United States v. Darby, 312 U.S. 100, 113 (1941) (adopting a flexible approach to the Commerce Clause inquiry and extending Congress's power to include regulation of manufacturing); Wickard v. Fillburn, 317 U.S. 111, 127–28 (1942) (upholding the application of federal law to home grown wheat under the Commerce Clause because of the cumulative effect of that wheat on the national market); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964) (upholding the constitutionality of parts of the Civil Rights Act that prohibited discrimination in places of public accommodation under Commerce Clause analysis because of "overwhelming evidence that discrimination by hotels and motels impedes interstate travel").

211 431 U.S. 265 (1977).

obtaining commercial fishing licenses.[212] Rejecting the state's argument that the federal licensing scheme exceeded congressional authority, the Court explained that while "at earlier times in our history there was some doubt as to whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce."[213] The Court thus upheld the federal statute, ruling that "the movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce." [214] *Douglas* confirmed that the Commerce Clause gave Congress sufficient authority to regulate wildlife.

Two years after *Douglas*, in 1979, the Court once again interpreted the Commerce Clause in the context of wildlife regulation, this time considering whether the Commerce Clause imposed limits on state wildlife legislation, even in the absence of federal regulation. The facts of *Hughes v. Oklahoma*[215] were nearly identical to *Geer*. At issue was an Oklahoma statute prohibiting the export of naturally-occurring minnows from the state but allowing out-of-state transport and sale of minnows raised in a commercial minnow hatchery. An Oklahoma appellate court had upheld the statute against an argument that it unreasonably interfered with interstate commerce, citing the legislation's conservation purpose and also relying on the state ownership principles set forth in *Geer*.[216] But the Supreme Court, with Justice Brennan writing for a 7-2 majority, concluded that the *Geer* ownership analysis had "been eroded to the point of virtual extinction" by previous cases such as *Holland*, *Toomer*, and *Douglas*.[217] Consequently, the Court finally overruled *Geer*, determining that "challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulation of other natural resources."[218] The Court therefore invalidated the Oklahoma statute, acknowledging that conservation of minnows might have been a legitimate reason to justify some discrimination, but citing the availability of less

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212 *Id.* at 282.

213 *Id.* at 281–82. The Court explained the state ownership doctrine in the following terms:

> A State does not stand in the same position as the owner of a private game preserve, and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter has title to these creatures until they are reduced to possession by skillful capture.... The 'ownership' language [in the case law] must be understood as no more than a ... legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'

Id. at 284.

214 *Id.* at 282.

215 441 U.S. 322 (1979).

216 Hughes v. State, 572 P.2d 573, 575 (Okla. Crim. App. 1978), *rev'd sub nom.*, Hughes v. Oklahoma, 441 U.S. 322 (1970).

217 *Hughes*, 441 U.S. at 331.

218 *Id.* at 335.

discriminatory means for achieving that purpose.[219] The era of state claims to ownership of wildlife, epitomized by the *Geer* decision, seemed over.

VI. LONG LIVE *GEER*: THE SURVIVAL OF THE STATE OWNERSHIP DOCTRINE

Just as reports of Mark Twain's demise proved premature, so too was the demise of the state ownership doctrine in the wake of the *Hughes* decision. State statutes and constitutional provisions continued to assert state ownership of wildlife post-*Hughes*, and state courts consistently interpreted *Hughes* to be limited to situations involving federal-state conflicts. Thus, the state ownership doctrine lives on in the twenty-first century in virtually all states, affording states ample authority to regulate the taking of wildlife and to protect their habitat.

A. The Limits of Hughes v. Oklahoma

Although *Hughes* overruled state ownership as a vehicle to deny that wildlife was immune from Commerce Clause restrictions, the case did not dislodge the states' trustee relationship with wildlife that had been confirmed in *Geer*. The *Hughes* majority took care to explain that "the overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders."[220] In fact, the Court emphasized that "the general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals."[221]

In his dissenting opinion in *Hughes*, then Associate Justice Rehnquist, while acknowledging that "a State does not 'own' the wild creatures within its borders in any conventional sense of the word," argued that the "concept expressed by the 'ownership' doctrine is not obsolete."[222] Rehnquist maintained that the ownership theory espoused in *Geer* recognized

> a State's substantial interest in preserving and regulating the exploitation of the fish and game . . . within its boundaries for the benefit of its citizens, [which should prevail unless the challenged regulation] conflicts with a federal statute or treaty; . . . allocates access in a manner that that violates the Fourteenth Amendment; . . . or represents a naked attempt to discriminate against out-of-state enterprises in favor of in-state businesses unrelated to any purpose of conservation.[223]

Fairly read, the thrust of *Hughes* was simply that the state may not exercise its ownership of wildlife in a manner that conflicts with federal prerogatives

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219 *Id.* at 336–38. Most troubling to the Court was the fact that the Oklahoma statute did not attempt to directly limit the number of naturally-occurring minnows taken or to regulate their disposition within the state. *Id.*

220 *Id.* at 338.

221 *Id.* at 335–36.

222 *Id.* at 341 (Rehnquist, J., dissenting).

223 *Id.* at 342.

protected by the Constitution. Recent scholarly commentary overwhelmingly confirms this interpretation of *Hughes*.[224] More importantly, so do the judicial and legislative actions of the states since 1979.

B. State Courts: Confining Hughes *to Federal-State Conflicts*

Despite *Hughes*' overruling of the *Geer* ownership doctrine on the issue of the ability of states to insulate themselves from Commerce Clause limits, state courts continue to rely on the rationale that the state "owns" wildlife in trust for its citizens as justification to regulate animals *ferae naturae*.[225] Some courts have explicitly distinguished *Hughes* to endorse state ownership as a basis for regulation when no federal constitutional issue exists. For example, in *Montana v. Fertterer*,[226] the Montana Supreme Court upheld a felony criminal mischief conviction for illegally killing elk, deer, and antelope under the theory that wild animals were "public property" under the Montana criminal mischief statute because the state continues to have an "ownership interest in wild game held by it in its sovereign capacity for the use and benefit of the people."[227] The court acknowledged that *Hughes* "expressly abandoned the title ownership theory as promulgated in *Geer*," but concluded that *Hughes* was controlling absent "federal constitutional questions of interstate commerce, equal protection, or privileges and immunities."[228] Similarly, in *Pullen v. Ulmer*,[229] the Alaska Supreme Court rejected a citizen initiative application to regulate allocation of salmon fisheries because "salmon are public assets of the state which may not be appropriated by initiative."[230] The *Pullen* court ruled that while *Hughes*

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224 *See, e.g.*, Houck, *supra* note 197, at 311 n.77 ("The trust analogy was not overruled in *Hughes* and remains the most accurate expression of this state interest: Wildlife belongs to everyone and the state has a special authority, and obligation, to ensure its perpetuation."); Coggins, *supra* note 31, at 321 (noting that the *Geer* principles "have continuing relevance" even after *Hughes* and concluding that "the State remains the trustee for the people even if it is not a technical owner [of wildlife]"); Deborah G. Musiker et al., *The Public Trust and* Parens Patriae *Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 93–94 (1995). ("While overruling *Geer* as to the constitutionality of state prohibitions against interstate wildlife shipping, *Hughes* preserved the sovereign ownership analysis set forth in *Geer*."); Horner, *supra* note 128, at 40 ("In *Hughes v. Oklahoma*, the Court overruled *Geer* to the extent *Geer* held that state 'ownership' in wildlife allowed it the right to interfere with interstate commerce. However, in so doing, *Hughes* did not disturb the public trust in wildlife."); Wood, *supra* note 178, at 62 (arguing that *Hughes* "neither overruled the sovereign trusteeship underlying the doctrine nor precluded its use in other contexts of sovereign wildlife ownership which do not conflict with the Constitution").

225 *See* Horner, *supra* note 128, at 40 (writing in the year 2000 and noting that "[i]n the century that has passed since *Geer*, the courts have not backed off from the recognition of [the] trust relationship"); Wood, *supra* note 178, at 64 (arguing that "while the state ownership doctrine has fallen sway to greater constitutional interests, the core property-based principles of sovereign trusteeship over *ferae naturae* underlying the doctrine endure to add a critical dimension to modern wildlife issues").

226 841 P.2d 467 (Mont. 1992), *overruled on other grounds*, State v. Gatts, 928 P.2d 114 (Mont. 1996).

227 *Id.* at 470–71.

228 *Id.*

229 923 P.2d 54 (Alaska 1996).

230 *Id.* at 60–61.

"struck down [the contested statute] as violative of the commerce clause, . . . [n]othing in the opinion . . . indicated any retreat from the state's public trust duty discussed in *Geer*."[231] Other courts have agreed, explicitly distinguishing *Hughes* in the absence of a federal question or conflict.[232]

Many post-*Hughes* courts have simply embraced state sovereign ownership of wildlife without mentioning the 1979 Supreme Court decision. For instance, in 1995, in *State v. Bartee*,[233] a Texas appellate court observed that "[Texas] courts have consistently referred to ownership of wild animals as being in 'the state' or belonging to 'the state,'" determining that the state may be the "owner" of wildlife in theft cases.[234] Similarly, the Alaska Supreme Court upheld a state regulation that gave preference for taking of moose, deer, elk, and caribou by residents for personal or family use over taking by nonresidents because "the state acts as 'trustee' of the naturally occurring fish and wildlife in the state for the benefit of its citizens."[235] Several other states have judicially endorsed state ownership and wildlife trust principles without distinguishing, or even citing *Hughes*.[236]

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231 *Id.* at 60.

232 *See, e.g.*, Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 851 (D. Wyo. 1994) (analyzing *Hughes* and determining that a Wyoming statute providing that all wildlife in the state is the property of the state did not violate the federal commerce power); Attorney Gen. v. Hermes, 339 N.W.2d 545, 550 (Mich. Ct. App. 1983) (determining state could maintain a civil action for damages resulting from unlawful taking of perch and whitefish from public waters pursuant to a "trusteeship" analysis; acknowledging *Hughes*, but noting that "[i]n the wake of *Geer*'s decline a new legal fiction has solidified, i.e., that the state is 'public trustee' of [wildlife] resources, which are held in trust for all the people of the state in their collective capacity").

233 894 S.W.2d 34 (Tex. App. 1995).

234 *Id.* at 42 (citations omitted).

235 Shepard v. Alaska Dep't of Fish & Game, 897 P.2d 33, 40 (Alaska 1995).

236 State v. Couch, 103 P.3d 671, 677 (Or. Ct. App. 2004) (noting that in Oregon "'[i]t is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens'") (quoting State v. Hume, 95 P. 808, 810 (1908)); People v. Brady, 286 Cal. Rptr. 19, 22 (Cal. Dist. Ct. App. 1991) ("We conclude that like other wild game, the abalone caught in the state's coastal waters belong to the people of the State of California in their collective, sovereign capacity. No individual property right exists in these shellfish. Rather, the state acts as trustee to protect and regulate them for the common good."); Glave v. Mich. Terminix Co., 407 N.W.2d 36, 37 (Mich. Ct. App. 1987) (determining that "'wild game' belongs to the state and is subject to the state's power of regulation and control, [and] an individual acquires in such game only the qualified property interest which the state permits") (citing Aikens v. Mich. Dep't of Conservation, 198 N.W.2d 304, 307 (Mich. 1972)); Ridenour v. Furness, 504 N.E.2d 336, 340 (Ind. Ct. App. 1987) ("Title to wild game and fish is in the state in its sovereign capacity as the trustee of all the citizens in common. No individual has a property right in fish or game while in its natural state.") (citing Smith v. State, 58 N.E. 1044, 1045 (Ind. 1900)); Rogers v. State, 491 So. 2d 987, 990 (Ala. Crim. App. 1985) (declaring "ownership of wild animals is vested in the state"); O'Brien v. State, 711 P.2d 1144, 1148–49 (Wyo. 1986) ("[W]ildlife within the borders of a state are owned by the state in its sovereign capacity for the common benefits of all its people. . . . [T]he enlightened concept of this ownership is one of a trustee with the power and duty to protect, preserve and nurture the wild game."); Collopy v. Wildlife Comm'n, 625 P.2d 994, 999 (Colo. 1981) (denying plaintiff's claim that withholding his right to hunt on his own land worked a constitutional taking because "'[t]he ownership of wild game is in the state for the benefit of all the people'") (quoting Maitland v. People, 23 P.2d 116, 117 (Colo. 1933)).

C. State Legislatures: Continuing to Endorse State Ownership of Wildlife

Like state courts, state legislatures have not interpreted *Hughes* to disturb claims of state ownership of wildlife. In fact, the overwhelming majority of states have codified some articulation of the state ownership doctrine in their statutes.[237] The statutory declarations of state ownership are straightforward and direct. For example, Georgia law provides that: "The ownership of, jurisdiction over, and control of all wildlife, . . . are declared to be in the State . . . ."[238] The West Virginia Code grants "ownership of and title to all wild animals, wild birds, both migratory and resident, and all fish, amphibians, and all forms of aquatic life in the State of West Virginia" to "the State, as trustee for the people."[239] Oregon provides simply that: "Wildlife is the property of the state."[240] In all, more than thirty states have codified some version of the state ownership doctrine in their wildlife statues.[241]

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237 *See* Houck, *supra* note 197, at 309 n.76 (commenting that the majority of states claim title to or ownership of their resident fish and wildlife in their statutes); GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 426 ("By late in the twentieth century, the overwhelming majority of states had embraced [the state ownership doctrine]—typically by statute . . . ."). *See also* RUTH S. MUSGRAVE & MARY ANNE STEIN, STATE WILDLIFE LAWS HANDBOOK (1993) (summarizing state wildlife laws).

238 GA. CODE ANN. § 27-1-3(b) (2002).

239 W. VA. CODE § 20-2-3 (2002).

240 OR. REV. STAT. § 498.002(1) (2004).

241 *See, e.g.*, ALA. CODE §§ 9-11-81, 9-11-230 (2004) (declaring that the state of Alabama has vested title to freshwater fish and "to all wild birds and wild animals"); ARIZ. REV. STAT. ANN. § 17-102 (2004) ("Wildlife, both resident and migratory, native or introduced, found in this state . . . are property of the state . . . ."); ARK. CODE ANN. § 15-43-104 (2004) ("All game and fish except fish in private ponds, found in the limits of this state, are declared to be the property of this state."); COLO. REV. STAT. § 33-1-101 (2004) ("All wildlife in this state not lawfully acquired and held by private ownership is declared to be the property of the state."); DEL. CODE ANN. tit. 7, § 201 (2004) ("Rare and endangered species are a public trust . . . ."); IDAHO CODE ANN. § 36-103(a) (2004) ("All wildlife, including all wild animals, wild birds and fish, within the state of Idaho, is hereby declared to be the property of the state . . . ."); 515 ILL. COMP. STAT. 5/5-5, 520 ILL. COMP. STAT 5/2.1 (2004) (declaring that the title to all wild birds and wild mammals, and all aquatic life within the state, is in the state); IND. CODE § 14-22-1-1 (2004) ("All wild animals . . . are the property of the people of Indiana"); IOWA CODE § 481A.2 (2004) ("The title and ownership of all fish . . . and of all wild game, animals, and birds . . . are hereby declared to be in the state . . . ."); KAN. STAT. ANN. § 32-703 (2004) ("The ownership of and title to all wildlife, both resident and migratory, in the state . . . are hereby declared to be in the state."); MINN. STAT. § 97A.025 (2004) ("The ownership of wild animals of the state is in the state, in its sovereign capacity for the benefit of all the people . . . ."); MO. REV. STAT. § 252.030 (2004) ("The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri."); NEV. REV. STAT. § 501.100(1) (2004) ("Wildlife in this state not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada."); N.Y. ENVTL. CONSERV. LAW § 11-0105 (McKinney 2004) ("The State of New York owns all fish, game, wildlife, shellfish, crustacea, and protected insects in the state . . . ."); N.C. GEN. STAT. § 113-131(a) (2004) ("The marine and esturine and wildlife resources of the State belong to the people of the State as a whole . . . ."); N.D. CENT. CODE § 20.1-01-03 (2004) ("The ownership of and title to all wildlife within this state is in the state . . . ."); OHIO REV. CODE ANN. § 1531-02 (West 2004) ("The ownership of and the title to all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state, which holds such title in trust for the benefit of all the people."); OKLA. STAT. tit. 29, § 7-204 (2004) ("All wildlife found in this state is the property of the state."); 34 PA. STAT. ANN. § 2161(a) (West 2004) ("The proprietary ownership, jurisdiction and control of game

A handful of states have included wildlife trust provisions in their state constitutions. The constitutional provisions are also clear, or have been made clear by the judiciary. Article VIII, section 3 of the Alaska Constitution, for example, declares that, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[242] And the Hawaii Constitution similarly provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[243]

Pennsylvania and Louisiana have also included wildlife trust provisions in their constitutions, and have not felt the need to alter or delete them in a post-*Hughes* world.[244]

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or wildlife . . . is vested in the Commonwealth . . . ."); S.C. CODE ANN. § 50-1-10 (Law. Co-op. 2004) ("All wild birds, wild game, and fish . . . are the property of the state."); S.D. CODIFIED LAWS ANN. § 41-1-2 (2004) ("[A]ny game bird, game animal, or game fish, or any part thereof . . . shall always and under all circumstances be and remain the property of the state . . . ."); TENN. CODE ANN. § 70-4-101(a) (2004) ("The ownership of and title to all forms of wildlife within the jurisdiction of the state . . . are hereby declared to be in the state . . . ."); TEX. PARKS & WILD. CODE ANN. § 1.011(a) (Vernon 2004) ("All wild animals . . . are the property of the people of this state."); UTAH CODE ANN. § 23-13-3 (2004) ("All wildlife existing within this state, not held by private ownership and legally acquired, is the property of the state."); VA. CODE ANN. § 29.1-557 (2004) ("Wild birds, wild animals and fish are the property of the Commonwealth . . . ."); WASH. REV. CODE § 77.04.012 (2004) ("Wildlife, fish, and shellfish are the property of the state."); WYO. STAT. ANN. § 23-1-103 (2004) ("For the purposes of this act, all wildlife in Wyoming is the property of the state.").

242 ALASKA CONST. art. VIII, § 3. *See also id.* § 4 ("Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.").

243 HAW. CONST. art. XI, § 1.

244 *See* PA. CONST. art. I, § 27:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

See also LA. CONST. art IX, § 1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety and welfare of the people. The legislature shall enact laws to implement this policy."). The Supreme Court of Louisiana has determined that the Louisiana Constitution "establishes a public trust doctrine requiring the state to protect, conserve and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people." State v. McHugh, 630 So. 2d 1259, 1265 (La. 1994) (citing LA. CONST. art. IX, § 1). *See also* Horner, *supra* note 128, at 58–72 (providing analysis of cases interpreting the constitutional codification of the wildlife trust in Louisiana, Pennsylvania, California, and Alaska).

D. Current Limitations on State Species Regulation under the State Ownership/Wildlife Trust Theory

The state ownership doctrine—an odd mixture of sovereign and proprietary powers—has survived judicial attacks and remains vitally relevant to wildlife regulation in the twenty-first century. Nothing indicates that the doctrine's role will diminish any time soon, especially considering Congress's continued deference to state sensibilities in the matter of wildlife regulation,[245] and the current Supreme Court's preference for protecting state legislative authority.[246] That said, state power under a wildlife ownership or public trust theory is not boundless. The discussion below sketches the few situations where states are barred from regulating wildlife pursuant to their proprietary interest in animals *ferae naturae*.[247]

States clearly have broad powers and discretion to conserve their wildlife. State regulation, however, must be consistent with constitutional limits and guarantees. Therefore, the Supreme Court has expressly ruled, state wildlife regulation cannot 1) unduly burden interstate commerce,[248] 2) abridge the privileges and immunities of non-residents in pursuing their livelihood,[249] or 3) deny equal protection to resident aliens.[250]

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245 As explained by Professor Coggins:

> Federal law does not directly affect the great majority of non-avian wildlife in America (mammals, fishes, crustaceans, insects, amphibians, and so forth); it directly protects only a small . . . number of endangered or threatened species plus, of course, the dozen or so species of marine mammals and two 'species' of feral ungulates.

Coggins, *supra* note 31, at 321 n.230.

246 *Younger v. Harris* introduced the current Court's understanding of "Our Federalism," instructing that the concept represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . always endeavors to [act] in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. 37, 44 (1971). For further discussion of the Rehnquist Court's use of the term, see *Alden v. Maine*, 527 U.S. 706, 748 (1999) ("Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."); *Printz v. United States*, 521 U.S. 898, 921 (1997) (arguing that separation between state and national government "is one of the Constitution's structural protections of liberty"); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[O]ur federalism" allows the states, independent from federal direction, "to devise various solutions where the best solution is far from clear."); *Ankenbrant v. Richards*, 504 U.S. 689, 705 (1992) (declining to extend the concept of comity, which the Court found "critical to *Younger's* 'Our Federalism,'" when there was no pending state proceeding); and *Deakins v. Monaghan*, 484 U.S. 193, 208–09 (1988) (White, J., concurring) (opining that "Our Federalism" precludes federal courts from adjudicating damage claims when a state criminal case dealing with the same issue is pending).

247 Note that this discussion is not exhaustive. A more complete accounting of the state/federal balance regarding wildlife regulation can be found in BEAN & ROWLAND, *supra* note 35, at 15–38.

248 *See* Hughes v. Oklahoma, 441 U.S. 322 (1979), discussed *supra* at notes 215–223 and accompanying text. *But see* Maine v. Taylor, 477 U.S. 131 (1986) (determining, in a case substantially similar to *Hughes*, that a Maine law that prohibited the importation of bait fish into the state did not violate the dormant commerce clause because it had a valid local purpose, which could not be achieved through means less restrictive of interstate commerce).

249 *See* Toomer v. Witsell, 334 U.S. 385 (1948), discussed *supra* at notes 205–207 and accompanying text. Note, however, that the Supreme Court has interpreted the Privileges and

In addition to having to comply with constitutional restraints, states cannot forbid what the federal government has expressly permitted or legislate in ways that defeat the intent of a federal statute.[251] State wildlife laws, therefore, may be preempted by legislation enacted pursuant to Congress's treaty-making power,[252] the Commerce Clause,[253] or the Property Clause.[254] The Property Clause also provides federal agencies authority to regulate wildlife on federal lands, even in contravention of state law.[255] Additionally, Indian treaties, agreements, executive orders, and statutes may override state law and establish Native American rights to take fish and game without a state license, free of state regulation.[256]

Immunities Clause to protect only "livelihoods" and not recreational pursuits. *See* Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 388 (1978) (upholding a Montana statute that permitted the state to charge nonresident hunters higher fees than resident hunters because recreational hunting is not a "fundamental" right, and therefore not protected by the Privileges and Immunities Clause).

250 *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), discussed *supra* notes 201–204 and accompanying text.

251 *See* CHEMERINSKY, *supra* note 156, at 376–98 (discussing Supreme Court jurisprudence concerning express and implied preemption).

252 U.S. CONST. art. II, § 2, cl. 2. *See* Missouri v. Holland, 252 U.S. 416 (1920), discussed *supra* at notes 183–188 and accompanying text.

253 U.S. CONST. art. I, § 8, cl. 3; *See* Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977), discussed *supra* at notes 211–214 and accompanying text. Examples of statutory wildlife protections promulgated pursuant to the commerce power include: the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000); the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371–3378 (2000); the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421h (2000); and the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1883 (2000).

254 U.S. CONST. art. IV, § 3, cl. 2; *See* Kleppe v. New Mexico, 426 U.S. 529 (1976), discussed *supra* at notes 190, 194–197 and accompanying text.

255 Hunt v. United States, 278 U.S. 96 (1928), discussed *supra* at notes 189, 192–193 and accompanying text. In addition, the Supreme Court has recognized the authority of the President and Congress to set aside lands for the protection of wildlife, and the withdrawal of water necessary to serve that purpose overrides conflicting junior state-created water rights. Cappaert v. United States, 426 U.S. 128, 138–39 (1976).

256 *See* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 432–37 (4th ed. 1998) (summarizing preemption doctrine in the Indian law context). As a general proposition, Indian tribes maintain exclusive jurisdiction over hunting and fishing on reservation lands. *See, e.g.*, New Mexico v. Mescelaro Apache Tribe, 462 U.S. 324, 338-44 (1983) (ruling that state of New Mexico was preempted from regulating hunting and fishing on Mescelaro reservation). This authority, however, is weakened when tribes assert control over non-Indian hunting and fishing on reservation land that is not Indian-owned. *See, e.g.*, Montana v. United States, 450 U.S. 544, 557–68 (1981) (determining that the Crow Tribe had no tribal authority to regulate hunting and fishing by non-Indians on lands within Crow reservation owned in fee by non-Indians). While Indians and Indian tribes are usually subject to state authority for off-reservation activities, the state may be precluded from interfering with off-reservation hunting and fishing conducted pursuant to treaty-reserved rights. *See* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 508–42 (2002) (analyzing the scope and extent of Indian treaty-reserved rights to hunt and fish); Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 435–45 (1998) (explaining treaty hunting and fishing rights as property rights).

VII. OWNERSHIP IN TRUST: BEYOND REGULATORY AUTHORITY

As detailed above, state ownership of wildlife remains the basis for much of the wildlife regulation adopted by the several states.[257] In the past century, however, the police power—the sovereign's power to enact regulations for citizens' health and welfare—has become an alternative, and arguably primary, source of governmental authority to protect natural resources, including wildlife.[258] At least one commentator has argued that due to the power granted state legislatures under the modern police power, "there currently is little room or need for the public trust doctrine to play a meaningful role in promoting sovereign authority" over wildlife and other natural resources.[259] But that argument assumes that wildlife trust principles do no more than mirror state police powers. While strong judicial acceptance of the police power as authority to regulate wildlife may represent a viable and important way for states to protect wild animals within their borders, it hardly makes the trust principles announced in *Geer* obsolete. As another commentator observed

> The public trust doctrine protects natural resources, and therefore the public, from the failure of legislatures, state agencies, and administrative personnel to recognize the state's duty to protect the corpus of the wildlife trust for future generations. . . .
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> . . . .
>
> Under the police power alone, courts do not enforce a state's affirmative duty to protect its wildlife. In contrast, under the public trust doctrine, states must protect the corpus of their wildlife trust.[260]

Thus, the state ownership—or wildlife trust—theory not only provides authority to states to regulate wildlife separate and distinct from the police power, it also imposes a duty on the state to safeguard its wild animals for coming generations. The *Geer* majority opinion clearly endorsed this view:

> [T]he ownership of the sovereign authority [in wildlife] is in trust for all the people of the state, and hence, by implication, *it is the duty of the legislature* to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.[261]

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257 *See supra* notes 225–44 and accompanying text.

258 *See* GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 396–425 (chronicling the transition from "ownership" to "police power" as the dominant metaphor for sovereign authority to regulate natural resources). *See also* State v. Jack, 539 P.2d 726, 728 (Mont. 1975) ("[A] state has the power to preserve and regulate its wildlife. In the nineteenth century, it was commonly held that this power derived from the common law concept of 'sovereign ownership'. . . . Under more modern theory, the power has been held to lie within the purview of a state's police powers.").

259 Lazarus, *supra* note 155, at 665.

260 Musiker et al., *supra* note 224, at 109, 112.

261 Geer v. Connecticut, 161 U.S. 519, 534 (1896) (emphasis added).

Unfortunately, few cases directly address the duties and obligations of a state under the common ownership theory affirmed by *Geer*.[262] However, because the sovereign trusteeship over wildlife is part of a larger body of law concerning "public trust" principles that developed outside the context of wildlife regulation, public trust law remains directly relevant to states' wildlife trust responsibilities.[263]

A. Affirmative Duties to Consider Potential Adverse Impacts and Prevent Substantial Impairment

Illinois Central Railroad Co. v. Illinois,[264] the Supreme Court's famous 1892 decision embracing the public trust doctrine in the context of submerged lands, provides some guidance concerning the state's responsibilities to protect the public trust. In *Illinois Central*, Justice Field, who four years later dissented in *Geer*,[265] employed trust concepts to declare invalid the state's grant of a 1,000-acre portion of Lake Michigan's bed to the railroad, ruling that "[s]uch abdication is not consistent with the exercise of that trust which requires the government of the State to preserve [navigable waters and the lands under them] for the use of the public."[266] In reaching this decision,[267] the Court declared that states may not take actions causing "substantial impairment" to the corpus of a public trust.[268]

In 1983, in *National Audubon Society v. Superior Court of Alpine County* (*Mono Lake*),[269] the California Supreme Court expanded the duties

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262 *But see* Gilbert v. State, 803 P.2d 391, 399 (Alaska 1990) (observing that "'migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the *obligation* and authority to equitably and wisely regulate the harvest is that of the state'") (quoting Metlakatla Indian Cmty. v. Egan, 362 P.2d 901, 915 (Alaska 1961)) (emphasis added); *see also infra* notes 277–295 and accompanying text (recognizing that several state courts have ruled that the state has a duty to bring suit to collect damages when its wildlife trust has been damaged).

263 *See* Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 728–29 (1989) (arguing that "the common interest in wildlife is sufficiently like the common interest in water to justify similar public trust doctrine protection"); John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331, 355 (2003) ("In keeping with the leading public trust decisions involving water resources or tidelands, [state ownership] language could be interpreted to mean that the doctrine of public ownership of wildlife supports imposing affirmative obligations on government officials to protect wildlife."); Musiker et al., *supra* note 224, at 95–99 (advocating for application of cases concerning the public trust in navigable waters and submerged lands to wildlife). *See also supra* notes 134–141 (arguing that state ownership of wildlife evolved from early public trust cases such as *Arnold v. Mundy* and *Martin v. Waddell*).

264 146 U.S. 387 (1892).

265 Justice Field dissented in *Geer* on the grounds that wild game was not the property of the state and that a lawfully killed animal was an article of commerce subject to federal control. *Geer*, 161 U.S. at 535–42 (Field, J., dissenting).

266 *Illinois Central*, 146 U.S. at 453.

267 It has never been clear whether the Court ruled that the legislature's grant to the railroad was void or merely upheld the 1873 Illinois legislature's repeal of the 1869 legislature's grant to Illinois Central.

268 *Illinois Central*, 146 U.S. at 453.

269 658 P.2d 709 (Cal. 1983).

articulated by the *Illinois Central* Court more than a century earlier. In *Mono Lake*, several environmental groups sought an injunction to prevent the diversion of water from nonnavigable streams in the Mono Lake watershed based on the theory that the waters were protected by the public trust.[270] Among other things, the contested diversions had caused rapid depletion of the water level at Mono Lake, transforming Negit Island—a major breeding ground for California gulls—into a peninsula and exposing the birds to coyote predation.[271]

Assuming that the public trust required states to protectively manage trust resources, the court ordered California authorities to reconsider the diversions it had authorized. In doing so, the court ruled that the state must: 1) undertake advance consideration of public trust values before approving actions affecting trust resources,[272] 2) act to preserve trust values where feasible to do so,[273] and 3) continually supervise actions that affect trust resources.[274] While *Mono Lake* did not hold that wildlife is subject to the public trust, it did rule that conservation of the lake "for nesting and feeding by birds" fell under the protection afforded by the public trust doctrine in navigable waters.[275] Indeed, the primary beneficiaries of the altered water flows required as a result of the *Mono Lake* decision were birds on the Pacific flyway.[276]

Although few wildlife cases have fleshed out the fiduciary obligations of the states under the ownership concept articulated in *Geer*, the duties imposed by the *Illinois Central* and *Mono Lake* courts seem applicable to the wildlife context. To fulfill the duty announced by these two cases, states must consider the potential adverse effects of an action affecting trust resources, in order to avoid actions that could cause substantial impairment. In addition, they must take steps to prevent harm to the wildlife trust where feasible to do so, as well as commit resources to continually supervise actions that may imperil animals *ferae naturae*.

B. The Power to Collect Damages for Injuries to the Trust Corpus

One area of the states' trusteeship over wildlife that has been frequently addressed by courts is the state power to seek compensation for injury to wild animals. With the exception of two early rulings,[277] courts have

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270 *Id.* at 712.

271 *Id.* at 711.

272 *Id.* at 712.

273 *Id.* at 728.

274 *Id.* In addition, the *Mono Lake* court recognized the right of state citizens to enforce the duties required by the public trust doctrine in state courts. *See* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 712–13 (1995) (commenting on the importance of the *Mono Lake* court's affirmation of citizens' right to enforce trust duties).

275 *Mono Lake*, 658 P.2d at 719.

276 *See* Blumm & Schwartz, *supra* note 274, at 718 (documenting that increased lake levels restored critical nesting habitat for California gulls and other migratory birds).

277 *See* State v. Dickinson Cheese Co., 200 N.W.2d 59, 61 (N.D. 1972) (recognizing state ownership of wildlife, but concluding that state did not have sufficient property interest in fish killed as a result of cheese company's effluent discharge to support a civil action for damages);

uniformly upheld a common law right for the state to sue for damages to the corpus of its wildlife trust.[278] In fact, most courts have concluded that the state not only has the ability, but also the obligation to bring suit when its wildlife resources are imperiled.

In *State v. City of Bowling Green*,[279] the Ohio Supreme Court concluded that the state "ha[d] the obligation to bring suit" for fish killed by negligent operation of a municipal sewage treatment plant because "the state is deemed to be the trustee of [wildlife] for the benefit of the public."[280] Similarly, a Virginia federal district court ruled that the state of Virginia, under its "duty to protect and preserve the public's interest in natural wildlife resources," was obligated to file suit to obtain damages for pollution-killed waterfowl.[281] And in *New Jersey Department of Environmental Protection v. Jersey Central Power and Light Company (Jersey Central)*,[282] a New Jersey appellate court upheld a lower court's determination that the state was justified in seeking monetary damages for the death of more than 500,000 fish, which resulted from a sudden drop in water temperature caused by an unscheduled shutdown at Jersey Central Power's nuclear power plant. The court observed: [t]he State has not only the right but also the *affirmative fiduciary obligation* to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus.[283] Courts in Washington, Maine, and Maryland have also supported common law damages claims based on state ownership and wildlife trust principles.[284] Most recoveries have involved fish and wildlife killed by pollution or habitat destruction, but at least one court has awarded monetary damages for the illegal taking of fish.[285]

Although courts have consistently awarded damages for injury to the wildlife trust corpus, they have had difficulty determining the measure of

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Commonwealth v. Agway, Inc., 232 A.2d 69, 71 (Pa. Super. Ct. 1967) (determining that state was "not the owner [of more than 70,000 fish killed as a result of pollution] as it is of its lands and buildings so as to support a civil action for damages").

278 *See* GOBLE & FREYFOGLE, WILDLIFE LAW, *supra* note 4, at 444 (listing cases upholding power of state to seek compensation for injury to wildlife).

279 313 N.E.2d 409 (Ohio 1974).

280 *Id.* at 411.

281 *In re* Steuart Transp. Co., 495 F. Supp 38, 40 (E.D. Va. 1980).

282 336 A.2d 750 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976).

283 *Id.* at 759 (emphasis added).

284 *See, e.g.*, Wash. Dep't of Fisheries v. Gillette, 621 P.2d 764, 766–67 (Wash. Ct. App. 1980) (holding that state has right and "fiduciary obligation" to bring action to recover losses from pollution damage to fishery because fish are the "property" of the people) (quoting State *ex rel.* Bacich v. Huse, 59 P.2d 1101, 1103 (Wash. 1936)); Maine v. M/V Tamano, 357 F. Supp. 1097, 1099–1100 (Me. 1973) (determining that state's sovereign ownership of its waters and marine life allowed for damages claim to recover for harm resulting from 100,000 gallons of bunker oil spilled into Hussey Sound); Maryland v. Amerada Hess, 350 F. Supp. 1060, 1067 (D. Md. 1972) (determining that state had standing to sue for harm caused by oil spill in Baltimore Harbor because of public trust relationship to its waters and wildlife therein).

285 *See* Attorney Gen. v. Hermes, 339 N.W.2d 545, 551 (Mich. Ct. App. 1983) (damages recovered for fish taken by commercial fisher in violation of fishing laws under wildlife trust claim).

damages warranted.[286] Some courts have employed a market-value approach, while others have used restoration value as the appropriate measure of damages. In *Jersey Central*, for instance, the court refused to "speculate" as to the monetary value of fish killed by the drop in water temperature and awarded the state only the wholesale value of the dead fish.[287] In contrast, in *Puerto Rico v. S.S. Zoe Colocotroni*,[288] a Puerto Rico federal district court awarded more than $6 million to the Puerto Rican government for replacement of its marine flora and fauna destroyed as a result of a massive crude oil spill in the Caribbean Sea.[289] On appeal, the First Circuit dismissed the defendant's argument that damages should be based on diminution in market value, noting that market methodologies often fail to account for harm to "unspoiled natural areas of considerable ecological value, [which] have little or no commercial value."[290]

In recent years, legislatures have addressed how to assess damages resulting from destruction of wildlife. For example, Congress included natural resource damages provisions in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,[291] the Clean Water Act,[292] and the Oil Pollution Act of 1990.[293] Several state legislatures have also passed laws permitting and guiding the recovery of natural resources damages.[294] Significantly, many of these statutes expressly favor restoration, rehabilitation, and replacement costs over a market-value approach.[295]

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286 Courts' struggles with natural resource valuation are well documented. *See generally* Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L REV. 269 (1989); Judith Robinson, Note, *The Role of Nonuse Values in Natural Resources Damages: Past, Present, and Future*, 75 TEX. L. REV. 189 (1996); Faith Halter & Joel T. Thomas, *Recovery of Damages by States for Fish and Wildlife Losses Caused by Pollution*, 10 ECOLOGY L.Q. 5 (1982).

287 *Jersey Central*, 336 A.2d at 760. Amazingly, the court awarded only $935 for the death of more than 500,000 menhaden killed by thermal shock. *Id.*

288 456 F. Supp. 1327 (D.P.R. 1978), *aff'd in part and vacated in part*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

289 *Id.* at 1344–45.

290 Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652, 673 (1st Cir. 1980).

291 42 U.S.C. §§ 9601–9675, 9607(a)(4)(C) (2000).

292 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387, 1321(f)(4) (2000).

293 33 U.S.C. §§ 2701–2761, 2706.

294 *See, e.g.*, 34 PA. STAT. ANN. § 2161 (West 2005) (declaring that "[t]he Commonwealth has sufficient interest in game or wildlife living in a free state to give it standing, through its authorized agents, to recover compensatory and punitive damages in a civil action against any person who kills any game or wildlife or who damages any game or wildlife habitat"); CAL. HARB. & NAV. CODE § 293 (West 2005) (establishing liability for "any damage or injury to the natural resources of the state, including, but not limited to, marine and wildlife resources, caused by the discharge or leakage of petroleum, fuel oil, or hazardous substances"); MINN. STAT. ANN. § 115B.04(1)(3) (2005) (making persons who release hazardous substances liable for "[a]ll damages for any injury, to, destruction of, or loss of natural resources").

295 *See, e.g.*, 33 U.S.C. § 1321(f)(5) (expressly providing that the measure of damages caused by oil or other hazardous substances under the CWA is the cost "of replacing or restorating such resources"); 33 U.S.C. § 2706(d)(1) (specifying measure of damages under OPA as the cost of restoring the natural resources plus the interim losses of both use and certain nonuse values). CERCLA's natural resource damages provisions are not as specific as those in the CWA and the OPA concerning how damages should be measured. The D.C. Circuit, however, has ruled that CERCLA "evinces a clear congressional intent to make restoration costs the basic measure of damages." Ohio v. U.S. Dep't of Interior, 880 F.2d 432, 448 (1989) (citing

Although detailed analysis of state and federal natural resource damages statutes is beyond the scope of this article, existing statutory provisions may prove persuasive in courts' damages valuations for claims brought under a common law, public trust theory of liability.

C. The Wildlife Trust As An Affirmative Takings Defense

State ownership of wildlife may also serve as an affirmative defense to takings claims. The 1992 Supreme Court decision *Lucas v. South Carolina Coastal Council*[296] declared that the government could defeat a takings claim at the threshold stage if it proved that an owner's use of land was restricted by a background principle of property law inherent in the owner's title at purchase.[297] As explained above, courts have recognized states' proprietary interests in wildlife since at least the 1880s.[298] Under this time-honored tenet of state property law, takings claims based on statutes and regulations protecting endangered and other species should be denied at the threshold level.[299]

At least two post-*Lucas* courts have endorsed state ownership of wildlife as a defense to takings challenges. In *New York v. Sour Mountain Realty, Inc.*,[300] New York's intermediate appellate court addressed a takings claim based on a county court injunction ordering removal of landowner's fence, which precluded threatened snakes from reaching important forage habitat.[301] The court affirmed the lower court's injunction and also denied the landowner's takings claim, determining that "[t]he State's interest in protecting its wild animals is a venerable principle that can properly serve as a legitimate basis" for denying a takings claim.[302]

The California Court of Appeals also employed the wildlife trust as a *Lucas* background principle to reject a takings challenge concerning the denial of a timber harvest permit to prevent threats to endangered species,

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Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(c)(2) (2000), which provides that all damages recovered under CERCLA "shall be retained . . . for use only to restore, replace, or acquire the equivalent of such natural resources").

Oregon attempted to simplify determining restoration costs for fish and wildlife loss by establishing a valuation table. Under this scheme, destruction of individual members of various species results in varying amounts of liability—for example, $750 for elk; $3,500 for mountain sheep; $50 for wild turkey; and $125 for salmon or steelhead trout. OR. REV. STAT. § 466.992(2) (2003).

296 505 U.S. 1003 (1992).

297 Specifically, Justice Scalia, author of the *Lucas* majority opinion, announced a defense to a constitutional taking if a regulation was merely forbidding uses that would be prohibited by "background principles of the state's law of property and nuisance." *Id.* at 1029.

298 *See supra* notes 148–66 and accompanying text.

299 For in-depth analysis of the state ownership/wildlife trust argument as a defense to takings claims, see Echeverria & Lurman, *supra* note 263, at 354–56; Babcock, *supra* note 88, at 883–98; Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 341–54 (2005).

300 714 N.Y.S.2d 78 (2000).

301 *Id.* at 84.

302 *Id.*

including the marbled murrelet.[303] The California court observed that "wildlife regulation of some sort has been historically a part of the preexisting law of property."[304]

These courts' observations that state wildlife protection can be a background principle of property law appear to be a reasonable application of the Supreme Court's *Lucas* decision.[305] The full extent of this defense to takings liability, however, will be determined as more courts encounter the issue.

VIII. CONCLUSION

The rule of capture originated in Roman wildlife law, but even in Rome capture was not unfettered, as the government possessed the authority to control harvests.[306] In medieval England, capture was subject to royal authority to create forests and dispense hunting franchises.[307] That precedent was employed by American states to create the state ownership doctrine, under which they could curtail the overharvesting that occurred in the nineteenth century. State ownership was ratified by the Supreme Court in 1896,[308] but reduced to a legal fiction by the Court eighty years later.[309] Despite that dismissive characterization by the Court, virtually all states continue to claim ownership of wildlife within their borders.[310]

State ownership of wildlife is not merely a quaint anachronism with marginal relevance in an era of plenary police power regulation. The doctrine, hardly static in the past, offers fertile opportunities for growth in the future. Its concept of ownership in trust may impose duties as well as authority on states and may equip citizens with the ability to enforce those duties.[311] States may also invoke the wildlife trust to collect damages for injuries to wildlife and their habitats.[312] And state regulation of wildlife harvests and wildlife habitat may be insulated from takings claims due to the state ownership doctrine.[313] If the state ownership doctrine is to embrace these principles, state attorneys general and wildlife advocates need to

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303 Sierra Club v. Dep't of Forestry & Fire Prot., 26 Cal. Rptr. 2d 338, 347 (Cal. Dist. Ct. App. 1993). The California Supreme Court denied review of this case without opinion on March 18, 1994, thereby upholding the appellate court's decision. However, the Supreme Court also determined, pursuant to California Court Rules 976, 977, and 979, that the lower court decision would not be officially published (even though it had been previously published). Consequently, the *Sierra Club* decision cannot be cited in documents submitted to California courts. CAL. CT. R. 976, 977, 979.

304 *Id.*

305 *See* Babcock, *supra* note 88, at 889 (noting that "the continued vitality of [the state wildlife "ownership" theory] and supportive common law maxims would appear to make them background principles of state common law that arguably inhere in the title to property").

306 *See supra* note 27 and accompanying text.

307 *See supra* notes 36–79 and accompanying text.

308 *See supra* notes 167–77 and accompanying text.

309 *See supra* note 213.

310 *See supra* notes 237–44 and accompanying text.

311 *See supra* Part VII.A.

312 *See supra* Part VII.B.

313 *See supra* Part VII.C.

understand the possibilities explored in this article and urge state courts to adopt them.

The American rule of wildlife capture has deep historic roots. An exploration of those roots reveals that capture doctrine, far from being absolutist in nature, has always been fitted to meet the felt necessities of societies that employed it. Beginning with Roman law, capture has always been restrained by state authority.[314] In American jurisprudence, that authority has been buttressed by the state ownership doctrine, under which states own wildlife in trust for their citizens. The truth is that the rule of capture and the wildlife trust are inextricably tied, and they have been—in one form or another—for centuries.

314 *See supra* note 27 and accompanying text.