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**NINETEENTH CENTURY WILDLIFE LAW:
A Case Study of Elite Influence**

by

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NINETEENTH CENTURY WILDLIFE LAW: A Case Study of Elite Influence

Thomas Lund*

I. INTRODUCTION

Late in the nineteenth century sport won a monopoly of fish and game¹ (now worth thirty-five billion dollars annually),² a victory so complete that it changed the way Americans think. Today no one expects to buy game in a grocery store, and no one plans to live off wild-caught animals. But in the mid-nineteenth century no one could have dreamed that a game monopoly for those who sought fun would exclude those who sought food.

This article explains how sport came to dominate American thinking at the end of the nineteenth century—how sport took all the game, despite the competing claims of subsistence and market interests. To achieve this monopoly, sport waged war throughout the late nineteenth century and won total victory. The vanquished included subsistence hunters “hanging about the skirts of our forests,”³ market hunters, farmers supplementing their table fare with “pot shot” game, and Indians who relied in vain upon crystal clear treaty guarantees.⁴

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1. Such terms as “game” and “hunters” may at times implicitly comprehend parallel concepts such as “fish” and “fishers,” and sexist terms such as “sportsmen” may be used either to reflect nineteenth century gender roles, or to facilitate the flow of language.

2. Valerius Geist combines three interests—hunting, fishing, and wildlife viewing—as the basis for his estimate that in 1985 “some \$55.5 billion was spent by the public in the United States on hunting, fishing, and wildlife viewing. This amounts to about \$15,200 per square mile of the United States.” Valerius Geist, *Great Achievements, Great Expectations: Successes of North American Wildlife Management*, in *COMMERCIALIZATION AND WILDLIFE MANAGEMENT* 47, 54 (Alex W.L. Hawley ed., 1993). The subtraction from his estimate of one third for “wildlife viewing” is meant not to yield a precise dollar value for fishing and hunting, but rather to convey the accurate impression that sport has a very large economic impact.

3. *Game Protection for the People*, 17 *FOREST AND STREAM*, at 504 (1882) (letter characterizing those given to “the vagabond business of hunting and fishing”).

4. See, e.g., *Ward v. Race Horse*, 163 U.S. 504 (1896).

When the European settlers landed on the New World, wildlife appeared inexhaustible, and an American rule of free taking was established.⁵ But as with many “free goods,” wildlife could not withstand unlimited exploitation, and the development of American wildlife law then followed an old world pattern. First, a single group ousts its competitors and thereby diminishes pressure on the resource it controls.⁶ Second, the dominant group so expands its own harvest that it finds itself obliged to limit its own take.⁷ Nineteenth century sport policy focused primarily on the task of first stage monopoly behavior: the exclusion of competitors.

“The Tragedy of the Commons”⁸ is the modern description of the ancient problem American wildlife law addressed late in the nineteenth century: if all are free to exploit a renewable resource, no one has an incentive to manage the resource for long-term productivity.⁹ As a consequence, the resource will be overexploited and ruined. At the end of the nineteenth century, American wildlife provided a textbook example of the tragedy of the commons. The century had opened with staggering abundance, but it closed with a distressed remnant.¹⁰

Nineteenth century sportsmen understood that the tragedy of the commons was the root of the problem.¹¹ Game policy was praised as simply a parallel version of farm management practice.

5. See THOMAS A. LUND, *AMERICAN WILDLIFE LAW* 20 (1980) [hereinafter *AMERICAN WILDLIFE*].

6. See Thomas A. Lund, *British Wildlife Law Before the American Revolution: Lessons From The Past*, 74 MICH. L. REV. 49, 53-55 (1975) [hereinafter *British Wildlife*].

7. See Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 719 (1976) [hereinafter *Early American Wildlife*].

8. The phrase became common among academics after the appearance of Garrett Harding’s article “The Tragedy of the Commons.” 162 SCIENCE 1243-48 (1968).

9. In contrast, a group in control of a subject population will manage the population for sustained yield even if paid to eliminate the animals. Thus, bounty policy often failed because “the chief aim of the hunters was not to eradicate the evil but to continue it so as to have a source of financial return.” ROBERT H. CONNERY, *GOVERNMENTAL PROBLEMS IN WILD LIFE CONSERVATION* 97 (1935).

10. *AMERICAN WILDLIFE*, *supra* note 5, at 57-60.

11. Early in the nineteenth century, many denied that over-exploitation could be a problem. “That the fisheries resources of the nation were inexhaustible, no one in this country doubted until the middle of the last century.” CONNERY, *supra* note 9, at 116. “[N]umerous foolish theories were advanced to avoid an admission of bleak human guilt.” PETER MATTHIESSEN, *WILDLIFE IN AMERICA* 162-63 (Viking Penguin, rev. ed. 1987). The effect of habitat destruction, however, was not well understood until the twentieth century. JAMES A. TOBER, *WHO OWNS THE WILDLIFE?* at xviii (1981).

In later years, the “tragedy of the commons” became a dominant theme in American analysis. When a letter writer speculated that God would avenge sportsmen’s efforts to reduce the take at a cost to the poor, a sport magazine observed:

Such laws seek . . . to exercise in trust for the general weal that wise economy in fish and game killing which a prudent farmer does in regard to domestic animals; so apportioning the killing to propagation as to ensure for the coming crop enough of breeding stock to fill the measure of the land's feeding capacity.¹²

"[O]ur fish and game are rapidly disappearing. . . . What belongs to everybody belongs to nobody, and hence our streams and forests . . . are as barren and unproductive as a stagnant pool, or the Desert of Siberia."¹³ This 1875 letter writer to a sport magazine concluded, "If it was the common law that hens, chickens, turkeys and geese belonged to nobody; that anybody might kill and eat them at pleasure, it would not be long before the race of domestic fowl would become extinct."¹⁴

The professional participants in the mighty slaughter were equally aware that without restraint, "their occupation will soon be gone."¹⁵ But they could not heed their own counsel, for the system denied them an incentive to desist.¹⁶ How could the fishermen of the river reduce their catch when "it

We do not at all impugn the good faith and honest conviction of the "Poor Fisherman," Arise then, kill and eat. He does not see that if not only he himself but all his fellow men do this thing, the curse which he so unknowingly invokes will surely come to pass, without need of special interposition, but by the common-place familiar working of cause and effect. . . . [I]t is for the good of the fisherman and the pot-hunter, that not only they two but all others shall be put under restraint and not be allowed to waste next week's rations on this week's feasts and excesses.

A "Poor Fisherman" Protests, THE ROD AND THE GUN, Apr. 10, 1875, at 24. Game policy was praised as simply a parallel version of farm management practice.

Such laws seek . . . to exercise in trust for the general weal that wise economy in fish and game killing which a prudent farmer does in regard to domestic animals; so apportioning the killing to propagation as to ensure for the coming crop enough of breeding stock to fill the measure of the land's feeding capacity.

THE ROD AND THE GUN, Nov. 2, 1876, at 136 (letter from M. Goldsmith).

12. THE ROD AND THE GUN, Nov. 2, 1876, at 136 (letter from M. Goldsmith).

13. *Property in Fish and Game*, THE ROD AND THE GUN, Nov. 27, 1875, at 137.

14. *Id.*

15. 16 FOREST AND STREAM, at 349 (1881) (letter).

I believe that all reputable guides in the Adirondacks would sign a paper requesting that all visiting sportsmen not to ask them to paddle them up to a deer, and not to run their hounds till after the middle of August under any circumstances. As they know and all say, that unless this summer hunting is stopped their "occupation will soon be gone."

Id.

16. RICHARD A. COOLEY, *POLITICS AND CONSERVATION* 12-13 (1963). "[A] policy of restraint pursued by the individual merely permits his competitors to take his place and catch a larger share of the legally free but practically limited resource." *Id.* at 12.

would benefit no one but the Lake men, who have their [nets] set from one end of the Lake to the other?"¹⁷ Nineteenth century analysts agreed:

Self interest in this matter would, it would seem, regulate the evil if each individual could get the benefit of his own exertions. But A does not care to plant fry or fertilize spawn at his own expense, which when mature, may be caught in B's meshes; but if B would reciprocate by planting fry to be caught in A's meshes, then, as a matter of course, self-interest would prompt both A and B to engage in propagation, which would be mutually beneficial. But with a thousand A's and a thousand B's this common agreement cannot be made¹⁸

As with fish, so was it with large mammals. In 1875, a deer hunter reported, "To give an idea of the number of deer hunters in Minnesota, I would say that the whole wooded portions of the State are so full of them that it is a difficult matter to find a place where shots are not heard from every side."¹⁹ But his subsequent hospitable invitation was at tragic variance with his complaint: "If one is willing to hunt industriously here, he can kill from two to six deer a week, and that ought to satisfy any reasonable sportsman or collector."²⁰

As this stark drama reached its denouement, sport averted one tragedy by seizing wildlife for its own exclusive use, but inflicted another, as those men dispossessed lost their sustenance and support. By sport's proclamation, no longer could men live at society's fringe, surviving on the moose they could kill; no longer could farmers rely on quail to supplement their families' diets; no longer could city marketmen derive an income from venison; no longer could Indians subsist on the wildlife which had defined their lives for eons: all would be changed. The wild wealth of the continent would be consigned to amusement, to sport, for those who sought renewal from their urban labor, for those whose leisure led them to seek the outdoor adventures that had formerly been a concomitant of the task of survival. America had achieved happy prosperity and a once essential resource had become the province of pleasant amusement.

Sport's victory over its enemies was not easily won. But sport's campaign was waged by the most powerful men in America: "a small

17. *Game Protection*, 12 FOREST AND STREAM, at 231 (1879) (letter).

18. *Report of the Committee on Fish Laws*, 16 FOREST AND STREAM, at 112 (1880).

19. *Id.*

20. *Winter Collecting in Minnesota*, THE AMERICAN SPORTSMAN, June 23, 1875, at 262. Another Minnesota grouse hunter commented in 1875, "A fair shot, with a good brace of dogs, ought to average fifty per day." *Chicken in Minnesota*, THE ROD AND THE GUN, Oct. 9, 1875 at 18.

North American elite”²¹ with an unlimited war chest to fund its program, a network of magazines to broadcast its propaganda, and a collection of friends in high places that ascended to the Presidency.

The sport program had to overcome American disdain for an English legal legacy which had made “gentlemen’s game” a rich man’s monopoly.²² A Georgia court observed in 1808 that early American law had gloried in abrogating the English system which could not possibly apply to “a country which was but one extended forest, in which the liberty of killing a deer, or cutting down a tree, was as unrestrained as the natural rights of the deer to rove, or the tree to grow; and where was the aristocracy whose privilege were to be secured?”²³

Sport’s campaign was won by banning subsistence and commercial use of wildlife. The new rules spoke in neutral terms: the law allowed one and all to devote their vacations to camaraderie and recreation; the law prohibited one and all from subsisting on fish and birds, and from eking out a few dollars by peddling moose meat. A well-known quip had mocked such bogus neutrality.²⁴ The French author Anatole France had condemned the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, and to beg for bread in the streets.²⁵ American game law in its impact was anything but even-handed.

Sport’s exclusion of subsistence and market hunters was no mere accident, no regrettable concomitant of a policy that sought not to exclude them, but simply to enlarge the opportunities for good sport. From the first coalescence of American sportsmen into a powerful interest group, they trumpeted, gloried in ousting subsistence and market competitors. For sport this lowly breed of grubbers for subsistence and small profit (like the Indians who joined in their purposes) was a morally bankrupt lot, a dying transitional breed that deserved to disappear as wildlife was appropriated to sport’s higher purpose.

After a discussion of the English and early American background, this article will examine the political forces behind the sport juggernaut, then

21. Geist, *supra* note 2, at 50.

It is in *response* to this true “tragedy of the commons” that North America’s system of wildlife management took its shape at the beginning of this century. In an epic battle stretching over sixty years, a small North American elite placed effective controls over the exploitation of public resources, terminating the commons and reversing the tragedy.”

Id.

22. *British Wildlife*, *supra* note 6, at 55-60.

23. *State v. Campbell*, 1 T.U.P. Charlt. 167-68 (Ga. Super. Ct. 1808).

24. *See* ANATOLE FRANCE, *THE RED LILY* 87 (Wilfred Stephens trans. 1925).

25. *Id.*

display the different strategies which sport marshaled against its competitors, and finally close with an analysis of the judicial decisions which validated sport's strategy.

II. THE EARLY AMERICAN EXPERIENCE

Until the late nineteenth century, American wildlife law was a law of little restriction; men and women were free to exploit the resource at liberty.²⁶ Near the cities a different regimen might technically apply, but no one put much effort into enforcing the rules. This hands-off system did not arise from a lack of interest; on the contrary, it was an affirmative policy to repudiate the English system that barred the poor from eating game, or protecting their farms from damage. The detested English system was an ever-present specter²⁷ that dominated early American thought about proper game law.

England had solved the "tragedy of the commons" by two methods.²⁸ First, her law allowed only rich people to take (and ultimately to eat) game. This technique limited access to wildlife, and thereby diminished pressure on the resource. Second, her law gave ownership of game to those who owned the land where the game was found. Landowners therefore had an incentive to manage game as a resource that they could sell by leased shooting rights.

The English wildlife law bias against the poor had been manifest from the fourteenth century, when the first game statute referred to "gentleman's game."²⁹ In its mature form, the English system insured that only the rich could hunt game, that only the rich could eat game.³⁰ Not only did English law deprive the poor of food, but it even denied tenant farmers the rights to kill game that consumed their crops. Civil unrest infected England³¹ as

26. See generally *Early American Wildlife*, *supra* note 7.

27. "Ours is a reactive policy, reactive to the European aristocratic tradition. . . ." Robert J. Hudson, *Origins of Wildlife Management in the Western World*, in *COMMERCIALIZATION AND WILDLIFE MANAGEMENT*, *supra* note 2, at 5, 5.

28. The following discussion compresses the fuller study in *British Wildlife*, *supra* note 6.

29. 13 Rich. 2, c.13, §1 (1389).

30. See *AMERICAN WILDLIFE*, *supra* note 5, at 8-10. Only the rich could take game, but nonetheless game could be sold. In the early eighteenth century, however, a presumption was established that those who possessed game did so for the purpose of sale. Since sale by an unqualified person was criminal, the unqualified thereafter could not possess game even for the purpose of eating it themselves. *Id.*

31. In 1816, for example, landowners near Bath received an anonymous warning: [T]he first of our company that this law [involving transportation to America as a penalty] is inflicted on . . . there shall not one gentleman's seat in our

severe penalties were imposed in order to implement the system. Those poachers who were not killed by a landlord's spring guns³² were fined, jailed, and transported to America. Blackstone showered contempt on the game laws that held that "fifty times the property [is required] to enable a man to kill a partridge, as to vote for a knight of the shire."³³ The common person's thoughts were expressed in a little ditty:

Therefore of Partridge, Pheasant, Hare,
 You must not eat—of this beware!
 For Gentlemen—who're men of might
 Have just laid down what they think right;
 But right or wrong—'tis all the same,
 They will, and must have all the Game.³⁴

Most Americans shared this contempt for the English system.³⁵ They had no intention either to preserve game for the diversion of gentlemen swells or to create a food with social prestige. Besides loathing the English class bias, Americans believed that the English system would compromise the nation's economic health. At the American frontier, wildlife could feed and clothe the masses, and even create great fortunes.³⁶ American conditions demanded that the resource be applied to survival and to the production of wealth, not to the amusement of gentlemen.

As a consequence, American law, by its silence, affirmatively implemented a policy of free taking. The English "qualification laws" were

country escape the rage of fire. . . . The Game Laws were too severe before. The Lord of all men sent these animals for the peasant as well as the prince.

EDWARD CHRISTIAN, *A TREATISE ON THE GAME LAWS* 292-94 (1817).

32. A renowned speech in Parliament addressed the problem:

If a man be not mad, he must be presumed to foresee common consequences if he puts a bullet in a spring gun—he must be supposed to foresee that it will kill any poacher who touches the wire—and to that consequence he must stand. We do not suppose all preservers of game to be so bloodily inclined that they would prefer the death of a poacher to his staying away. Their object is to preserve game; they have no objection to preserve the lives of their fellow-creatures also; if both can exist at the same time: if not, the least worthy of God's creatures must fall—the rustic without a soul—not the Christian partridge—not the immortal pheasant—not the rational woodcock, or the accountable hare.

THE SELECTED WRITINGS OF SIDNEY SMITH 230-31 (1956).

33. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *175.

34. AMERICAN WILDLIFE, *supra* note 5, at 10 (quoting E. THOMAS, *AN ABSTRACT OF ALL THE GAME LAWS* 4 (10th ed. 1784)).

35. See generally *Early American Wildlife*, *supra* note 7 (discussing early American game law.)

36. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 66 (1962) (talking about the "great fur mogul" John Jacob Astor).

simply rejected as inapplicable to the new American conditions.³⁷ The English system of landowner rights was also repudiated by an American presumption that wilderness lands—unenclosed, undeveloped, unposted—were zones free for hunting, unlike the English system which drew an invisible fence around all private property, no matter the description.³⁸

Free taking first bore its deadly fruit near the population centers.³⁹ Once railroads and refrigeration reached formerly remote areas, free taking decimated wildlife even to the Pacific. The “tragedy of the commons” cast a pall across the continent.

III. SPORT’S POLITICAL POWER BASE

The contest to control the wildlife agenda was a lop-sided match, with the inevitable outcome, as a poor man exclaimed, “like the handle of a jug—always on one side.”⁴⁰ The losers were subsistence and market hunters, Indians, and farmers. Except for the farmers, a portrait of the Great Lakes working fishermen describes them pretty well: “They lacked political finesse and had no way to bring their interests before the public. And they lacked money [They] had neither the money nor the know-how necessary to influence the . . . state legislature.”⁴¹

So dependent were the market hunters, Indians and farmers upon wildlife harvest that to them, game was literally a matter of life and death, but to sport they were invisible people. Their complaints about the diminished wildlife populations were unheard. In 1881, the President of the Wisconsin Sportsmen’s Association observed:

[T]he apathy, the rather want of interest in [the extermination of game] which characterizes a large majority of our people, may well be a subject of astonishment. This lack of interest on the part of our people generally has become so universally understood and recognized that every person who has given the subject the slightest consideration has reached the conclusion that the final

37. *E.g.*, *State v. Campbell*, 1 T.U.P. Charlt. 167 (Ga. Super. Ct. 1808); see I JAMES KENT, COMMENTARIES ON AMERICAN LAW 471-73 (1826) (Lecture XXI).

38. See THOMAS LUND, *The 1837 and 1855 Chippewa Treaties in the Context of Early American Wildlife Law*, in JAMES M. MCCLURKEN ET AL., FISH IN THE LAKES, WILD RICE, AND GAME IN ABUNDANCE 486, 498 (2000).

39. As early as 1741 New York found it necessary to protect “deer near the Christian settlements.” 3 THE COLONIAL LAWS OF NEW YORK 196 (1894).

40. *Times and Seasons*, THE ROD AND THE GUN, May 15, 1875, at 106 (letter from a market hunter).

41. ROBERT DOHERTY, DISPUTED WATERS 65 (1990).

hope for the preservation of game rests with the fraternity of sportsmen.⁴²

Unsophisticated in the legislative process, these unschooled men had never before needed to watch their interests at the statehouse. Their kind had survived many decades of legislative silence on wildlife matters. The little law extant typically derived from the momentary eruption of some legislator's concern, followed in short order by a long period of non-enforcement. As the Minnesota Fish Commissioner admitted in 1874:

Our laws upon the subject of game and fish, seem to be a heterogeneous mass of special enactments, passed at the suggestion of various members of past legislatures. They are empirical, and seem to have no coherence or general design; and if carried out, it would be difficult to say whether they would be a benefit or harm to the game and fish of the State.⁴³

Given the situation, even novices could have dominated the legislative process. The "fraternity of sportsmen" who in fact took control were anything but inexperienced. They were led by very rich men,⁴⁴ primarily from the east coast, who had the habit of government bred in their bones and who were adept at harnessing the law to serve their interests. In contrast to the grubbers for wildlife,⁴⁵ these men were urban animals with the levers of power at their fingertips. This was no secret to society at large: "the game-law movement . . . was viewed by rural populations as

42. *Wisconsin Sportsmen's Association*, 15 *FOREST AND STREAM*, at 488 (1881). "Except for sportsmen, only a tiny number of Americans had any real interest in conservation before the turn of the century." JOHN F. REIGER, *AMERICAN SPORTSMEN AND THE ORIGINS OF CONSERVATION* 40 (Univ. of Okla. Press ed. 1986) (1975).

43. James A. Tober, *The Allocation of Wildlife Resources in the United States, 1850-1900*, at 276 (1973) (unpublished Ph.D. thesis, Yale Univ.) (on file with Yale Univ. Microfilms) [hereinafter Tober Thesis] (quoting *Report of the Minnesota Fish Commissioner*, 1874).

44. Sport boasted about the elevated social standing of its most influential members: Comprising, as it does, nearly one hundred of the leading citizens of New York (its maximum membership,) . . . [the New York State Association for the Protection of Game's] meetings are scanned with interest . . . by the law makers themselves who accept its suggestions as bases of legislative action. . . . It may be premised here, that this Society has no club room. Its meetings are held at the private residences of its members, and no applicant is admissible to its ranks who is not eligible from a social status also.

Game Protection, 17 *FOREST AND STREAM*, at 297 (1876).

45. In rare instances market takers could organize. It was thought in 1935, in Minnesota, that "fur poachers and traders have a definite organization which employs a skilled attorney to defend any of its members who may run afoul of the law. This much is certain—the same attorney appears for all the fur poachers or traders who happen to be arrested." CONNERY, *supra* note 9, at 221.

class legislation for the benefit of the urban elite."⁴⁶ Many viewed "all laws for the protection of game [as] a species of monopoly in favor of city sportsmen."⁴⁷

Unlike the dwellers in the woods at the back of beyond, these rich men—literate and influential—knew how to organize⁴⁸ and how to communicate. They also were willing—maybe even eager—to pay the necessary costs required by "the old and approved principle that those who dance must pay the fiddler."⁴⁹ In the 1870's, they began publication of three national sporting magazines to provide themselves a public forum and a means to communicate among each other.⁵⁰ *Forest and Stream*, created in 1873,⁵¹ was the vehicle by which Eastern sportsmen spread "the party line."⁵² And they were quick to hire lawyers to further their interests: "The first duty of a game protective society," they counseled, "is to employ a lawyer of good standing Let him then, under the directions of the society, frame the game laws which they intend to present to the Legislature."⁵³

These were clubable men⁵⁴ who magnified their power by joining together in small elite groups.⁵⁵ The most important of all these clubs,⁵⁶ the

46. TOBER, *supra* note 11 at 119.

47. *New Hampshire Fish and Game League*, 4 FOREST AND STREAM, at 148 (1875).

48. REIGER, *supra* note 42, at 31. *Forest and Stream's* first issue announced, "It is the aim of this paper to become a medium of useful and reliable information between gentlemen sportsmen from one end of the country to the other. . . ." *Id.*

49. *Fish Food as a Poison*, 13 FOREST AND STREAM, at 1010 (1880). A more direct statement of the maxim would have been indiscrete: "He who pays the piper calls the tune."

50. GARY G. GRAY, WILDLIFE AND PEOPLE 37 (1993). "*American Sportsmen* (1871) was the first of these publications, followed by *Forest and Stream* (1873), and *Field and Stream* (1874)." *Id.*

51. *Id.*

52. Theodore Whaley Cart, *The Struggle for Wildlife Protection in the United States, 1870-1900 Attitudes and Events Leading to the Lacey Act*, at 108 (1971) (unpublished Ph.D. dissertation, Univ. of N.C.) (on file with author).

53. 15 FOREST AND STREAM, at 347 (1880).

54. Some clubs were open to almost everyone. Thus membership in the League of American Sportsman was available at the cost of \$1 to "any white man of good character" Cart, *supra* note 52, at 103.

55. In a characteristic observation, George Bird Grinnell says:

The idea of a National Recreational Policy originated with members of the Boone and Crockett Club, and the subject was brought to the attention of Mr. Coolidge and clearly explained to him through the works of Theodore Roosevelt. This action by the Club and its support by the President of the United States is a long forward step for conservation in this country. . . . Members of the Boone and Crockett Club feel satisfaction that in this case, as so often before during its many years of service, the Club has stepped to the front to lead public opinion by offering a plan so obviously for the general good as to receive prompt acceptance.

Boone and Crockett Club of New York City, was devoted to propounding the agenda of the sport shooter.⁵⁷ No larger than one hundred regular members,⁵⁸ the club created and implemented a sporting man's game law throughout the country. Among its members were all the leaders of Congress who were committed to sport hunting, and all the heads of the federal agencies that were responsible for the administration of public lands, forests and wildlife.⁵⁹ Its standard bearers were George Bird Grinnell, "one of America's greatest and least appreciated pioneer conservationists";⁶⁰ Gifford Pinchot, the first person to apply the term "conservation" to American resource policy;⁶¹ and Teddy Roosevelt.⁶² "When Theodore Roosevelt became President," Stewart Udall has pointed out, "the Boone and Crockett wildlife creed . . . became national policy."⁶³

National clubs were complemented by local clubs, closer in touch with each state's legislature. Newspapers approved; in 1882, the *St. Paul Pioneer Press* proclaimed: "It is absolutely of paramount interest not only for every sportsman, but for every man who wishes to attract strangers to our midst to join [the Minnesota State Sportsmen's Association] at once."⁶⁴

Sportsmen drafted legislation and expected legislatures to enact these drafts into law without discussion or modification. *Forest and Stream* boldly called for a convention of sportsmen, naturalists, and fish culturists which would

prepare a suitable draft of a law to be pressed for passage upon the legislatures of the respective States, this reference to be final. the legislature to sit as a committee of the whole, and the bill to be either rejected or accepted unconditionally. Legislators who have the interests of the country at heart would not be jealous of their prerogatives in such cases; indeed, they should be gratified to be

HUNTING AND CONSERVATION at xiii-xiv (George Bird Grinnell & Charles Sheldon eds., Arno Press 1970) (1925). See also DOHERTY, *supra* note 41, at 49.

56. JAMES B. TREFETHEN, *CRUSADE FOR WILDLIFE* 282 (Boone and Crockett Club 1961).

57. "The object of the Club shall be—1. To promote manly sport with the rifle." Constitution of the Boone and Crockett Club (as adopted in 1888). Quoted in *id.* at 356.

58. TREFETHEN, *supra* note 56, at 356, 358.

59. The influence of the Boone and Crockett Club is displayed throughout James B. Trefethen's book, particularly at pages 110-11. See *generally id.*

60. *Id.* at 116, plate IV.

61. *Id.* at 111.

62. "The influence of the Roosevelt-Pinchot team on the progress of American forestry was almost fantastic." *Id.* at 125.

63. REIGER, *supra* note 42, at 121 (quoting STEWART L. UDALL, *THE QUIET CRISIS* 161 (1967)).

64. 18 *FOREST AND STREAM*, at 109 (1882) (quoting *ST. PAUL PIONEER PRESS*).

relieved of the arduous labor and responsibility of so important a measure.⁶⁵

Sportsmen saw their views as axiomatic, as not admitting of doubt. *Forest and Stream* announced as a “basic principle” that “the game of this country belongs to the sportsman. . . . It is his, and he shall have it.”⁶⁶ From sport’s perspective, this was no plot to steal the crown jewels of the wilderness; rather, it was sport in service to the community at large. According to *Forest and Stream*, “Game laws can benefit the community only as, and in such degree as, they are in the interest of sportsmen.”⁶⁷ A basic sporting text of the era repeated the theme:

The only legitimate method of hunting game mammals and birds is by use of the gun or rifle; the only legitimate way to catch game fish is with the hook, rod, and line. That is also elementary. Real sportsmen scorn any other means, and those who are not “real sportsmen” should be compelled by law to conform to these methods.⁶⁸

But despite this loud affirmation of the righteousness of their cause, a slight crisis of conscience appears within the lines of the sport magazines. All knew that fish and game had fed the poor, and that fish and game would now no longer feed the poor, but rather amuse the rich. Such a home truth was made more palatable by the discovery of a new rationale for the game laws: they sought not to provide amusement, but rather to afford therapy. As the *American Sportsman* observed in condemning an inconvenient proposal:

[S]uch a law will be detrimental to the physical condition of the country It has always been urged by the most eminent medical practitioners that, as a people, we pay too little attention to exercise and physical culture. We are a great, striving struggling nation . . . enduring a life of confinement in offices and counting houses, entirely opposed to the laws of health and the requirements of nature.⁶⁹

Pursuing this theme, the Cuvier Sporting Club of Ohio observed in 1883:

65. 3 FOREST AND STREAM, at 41 (1875).

66. TOBER, *supra* note 11, at 53 (quoting FOREST AND STREAM, Nov. 23, 1901, at 53).

67. *Id.* at 182 (quoting 44 FOREST AND STREAM, at 121 (1895)). So too in 1875, *Forest and Stream* asserted, “it is a known fact that all the best measures for the protection of game, the most judicious, not only for the sportsmen, but for those who gain their subsistence by shooting and fishing, must always emanate from those who shoot and fish for their pleasure.” 3 FOREST AND STREAM, at 41 (1875) (quoting English authority).

68. HENRY CHASE, GAME PROTECTION AND PROPAGATION IN AMERICA 89 (1913).

69. AMERICAN SPORTSMAN, Mar. 9, 1874, at 88.

The need of outdoor relaxations and pastimes is becoming recognized in all our business circles, and among these pastimes none stand in higher repute as a health-giving occupation than field sports. So that in addition to the question of the food supply we have now the question of health supply.⁷⁰

Sportsmen understood these new lessons: one correspondent argued in favor of an August gunning season for deer by solemnly asserting:

Now, August is the only month I can get away from business, and I believe I speak for a large class of persons that are situated in a like manner. I also believe that if I had not taken just such a vacation, that my health as well as my friend's would have broken down, so that we could not have followed our usual avocations the remainder of the year.⁷¹

Not content to rely upon the health rationale alone, sport combined with political allies who found the dollar rationale more persuasive. As a sport spokesman observed, "to be efficient—to secure the support of the public—game laws should be based on economic rather than on sentimental reasons."⁷² Sport's foremost economic allies were the industries that benefited from tourism. In the hunting and fishing press, sportsmen wrote

70. 19 FOREST AND STREAM, at 488 (1883). The President of the National Sportsmen's Convention in 1875 equally adhered to the sentiment:

Relaxation for the professional man and for the artisan in every vocation is a positive necessity. No man can tax his brain, or follow the treadmill of business routine unceasingly with impunity. Recreation restores the equilibrium of body and mind, and we are painful and not unfrequent witnesses of the violation of this law of nature. The prolongation of life, the maintenance of health, the preservation of mental and physical vigor render a resort to an entire change of thought, feeling and action, an imperative duty, and it is only to the uninitiated I need say that this can scarcely be found more effectually than with gun or rod in hand

THE ROD AND THE GUN, June 19, 1875, at 178.

71. 20 FOREST AND STREAM, at 27 (1883). The Boone and Crockett Club observed:

In the state of Minnesota over half a million ruffed grouse were shot during the open season of 1920 and about the same number in Pennsylvania. If we go beyond their actual food value, and try to conceive the number of miles of hard walking in rough country which the sportsmen of these states must have covered to bag those grouse, we begin to arrive at a true appreciation of their actual value in health maintenance. Basing my calculation on an average of five miles for every bird, and I really believe this is too low, we have a distance of five million miles covered, which is no small accomplishment in these gasoline-mad times.

J.C. Phillips, *Conservation of Our Mammals and Birds*, in HUNTING AND CONSERVATION, *supra* note 55, at 29, 59.

72. George Bird Grinnell, *American Game Protection—A Sketch*, in HUNTING AND CONSERVATION, *supra* note 55, at 201, 251.

the stories and tourism paid for the advertisements. In late nineteenth century Maine, "Protection of game is here not a matter of sentiment, but of business."⁷³ A sporting man described Iowa's game as "worth more than twice as much as all her sheep."⁷⁴ *Forest and Stream* concluded, "The citizens of these states [with big game] should look at this matter purely from a business point of view, from the standpoint of dollars and cents. No people in the world are keener business men than the citizens of these communities or quicker to see a business point."⁷⁵

Sportsmen were confident they could enlist political support from the titans of the railroad industry, for "they are dependent upon public patronage for support, and naturally prefer to please the majority or more respectable portion of the community" rather than the disreputable market and subsistence hunters.⁷⁶ Besides enjoying the income from transporting sportsmen, sometimes in luxury cars purposely built for the trade,⁷⁷ railroads constructed hotels for sportsmen.⁷⁸ Railroads also advertised widely in sporting periodicals, producing pamphlets "written as if each railroad had been routed with particular care to pass through famous and well-stocked game haunts."⁷⁹ So lucrative was the sport business that the railroads themselves paid to have fish stocked along their routes.⁸⁰

73. *The Maine Game Wardens*, 17 *FOREST AND STREAM*, at 283 (1881).

[T]here is one fact staring us in the face—that these [market hunters] bring nothing into the State of value, and that every pound of trout is five dollars taken from the State. We do not believe that there is a pound of trout taken at Moosehead or Rangely by visiting sportsmen at a less cost than five dollars per pound.

Maine Sportsmen's Convention, 18 *FOREST AND STREAM*, at 69 (1882) (quoting the Annual Report of the Maine Commissioner of Fisheries).

74. 7 *FOREST AND STREAM*, at 56 (1876) (remarks of the president of the national sportsmen's convention).

75. TOBER, *supra* note 11, at 224-25 (quoting 41 *FOREST AND STREAM*, at 93 (1893)).

76. *AMERICAN SPORTSMAN*, Jan. 10, 1874, at 232. *Forest and Stream* acknowledged the railroads' cooperation in pursuing sport goals. See, e.g., *Railroads and Game Laws*, 9 *FOREST AND STREAM*, at 170 (1877); 10 *FOREST AND STREAM*, at 387 (1878).

77. In describing a palatial private railroad car "fitted up with special reference to shooting expeditions," *Forest and Stream* observed that the first regular trip "was with a shooting party to Minnesota and Dakota, of seventy-eight days." 13 *FOREST AND STREAM*, at 1030 (1880).

78. *Forest and Stream* reported that a railroad in Iowa had:

purchased a tract of land, and will erect in time for next season's business an immense hotel for the accommodation of sportsmen, fishermen and pleasure-seekers. Measures are also being taken to preserve the fish of the lakes from wholesale slaughter by sieves in the summer and fishing through the ice in winter.

17 *FOREST AND STREAM*, at 186 (1881).

79. TOBER, *supra* note 11, at 71.

80. See 10 *FOREST AND STREAM*, at 34 (1878).

The sporting gear manufacturers also lined up behind the gunners.⁸¹ Grinnell wrote:

It is no doubt partly true that the (arms and ammunition) manufacturers are striving to protect the game in order to furnish targets for the persons who purchase their arms, but so long as the game is protected and increased, the use to which it is put is of no great importance.⁸²

The arms manufacturers concurred, as they organized “game protection” conventions,⁸³ which staged glorious trapped pigeon shoots. Under the guise of furthering sport, the arms manufacturers even proposed laws that required the use of manufactured rather than homemade ammunition.⁸⁴

That sport and tourism have dominated state wildlife policy has become an accepted axiom of American wildlife law.⁸⁵ Some have applauded this influence, others have questioned the propriety of such an allocation of the resource, but none has denied that sport (and tourism) have achieved complete domination.⁸⁶

81. The American Game Protective and Propagation Association “was established in 1911 with some of its financial backing from the sporting arms and ammunition manufacturers. . . .” TREFETHEN, *supra* note 56 at 176-77.

82. *Id.* at 177.

83. So the *New York Times* characterized the convention. See TOBER, *supra* note 11. at 186.

84. THE ROD AND THE GUN, June 12, 1875, at 163 (letter) stated:
Section 10 [of a proposed statute] is another “killer” to the rude plebeians, such as are in the habit of using paper, leather, or “any other wadding than the manufactured wad of commerce.” The great benefits accruing from such wise laws to deserving wad manufacturers can hardly be over estimated; but wouldn’t it be fair and proper to add a clause modifying, in a slight degree, the offence in the case of such as never saw or heard of a manufactured wad (there are many such persons in the sparsely settled sections of our country.)

Id.

85. *E.g.*, Geist, *supra* note 2, at 52.

86. In 1935 a prominent wildlife analyst argued against a proposal to consolidate federal wildlife policy under a commission composed of sport organizations by referring to the levers of state wildlife policy:

The question might well be raised whether the nation is ready to hand over control of federal conservation agencies “lock, stock, and barrel” . . . to the sportsmen’s organizations. Should the American people abdicate control over wild-life resources in favor of the professional sportsman? This proposal means little else in view of the way in which the same system has worked out in the states.

CONNERY, *supra* note 9, at 173. Discussing the practice of funding state fish and game departments by the proceeds of license sales, and sales taxes on sporting gear, Connery observes:

[T]he separate fund system is fundamentally unsound. In the first place, conservation is not a matter wholly the concern of sportsmen. The citizens at

Two modern wildlife managers and scholars explain:

[T]he origins of conservation . . . long considered as “crusades” or “triumphs” of enlightened thinking, either by early sportsmen’s organizations . . . or by government elites in search of “efficiency” . . . may have murkier and more socially driven beginnings than we have thought. . . . [M]anagement that at first glance seemed to reflect a triumph of modern scientific thinking toward wildlife actually may have contained the seeds of class or social conflict.

In North American history, for example, colonial and even 19th-century laws protecting wildlife were in fact always strategies aimed at regulating people, and oftentimes specific groups of local people who used wildlife in ways that other groups deemed either undemocratic, unsporting or not scientifically grounded. Rural, local, Native, or ethnic Americans usually lost these battles to more politically astute urban elites who had science and/or government on their side⁸⁷

IV. SPORT’S STRATEGY

The dominant political force, sport chose a variety of means to dispatch its competitors, as the following section discloses, before concluding with a discussion of the law enforcement problems which inevitably follow an elite’s attempt to impose its will upon a resistant majority.

V. MARKET HUNTERS

Condemning their mercenary goals and disreputable lifestyle, sport declared a “state of war”⁸⁸ against market hunters. Although bans on sale spoke to all wildlife takers, the bans were at no cost to sport, because no sportsman would deign to consider the economic value of the carcass of his

large in the state own the wild game found within its borders and certainly the interests of the whole should be paramount to those of any one class.

Id. at 188.

87. Dan L. Flores & Eric G. Bolen, *Gazing Across the Gulf: Environmental History and American Wildlife Ecology*, Special Symposium—Wildlife and American Wildlife History: Insights from the Past, in *TRANSACTIONS OF THE FIFTY-SEVENTH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE* 701, 703-04 (1992) [hereinafter *FIFTY-SEVENTH WILDLIFE CONFERENCE*].

88. REIGER, *supra* note 42, at 28. For an account of a party of illegal market fishermen shooting at sportsmen who they believed had cut their nets, see 6 *FOREST AND STREAM*, at 323 (1876).

quarry.⁸⁹ No theme within nineteenth century sport literature was more emphatic than the distinction between the use of game for pleasure and the use of game for profit. As an 1875 analyst concluded, "When sport is enjoyed for its own sake therein is the pleasure, and its tendencies are elevating; but, on the contrary, let profit be connected with our pleasures and how soon they degenerate."⁹⁰

As it marshaled its forces for war, sport softened up its target by a barrage leveled against the morals of the marketman. Sport broadcast the news that he was "persistent, reckless, and morally depraved,"⁹¹ a "despicable wretch who has neither manhood nor money to render him worthy of any consideration";⁹² in winter hunting, he committed "simply a species of murder";⁹³ indeed, "no right-minded man or woman can regard the abominable butchers with any other sentiments than those of loathing and execration."⁹⁴

The marketman's claim to wildlife had to yield to sport.⁹⁵

The interest which must give way which is of least advantage to the community, and that one must be preserved which is of paramount public importance. This is to say that the game must be saved for the enjoyment and benefit of those who pursue it for the sake of the pursuit. A grouse which gives a man a holiday afield is worth more to the community than a grouse snared or shot for the market stalls.⁹⁶

89. In 1878 one could still locate an American sportsman bold enough to express the cost counting thoughts which the nabobs of sport condemned. In addressing the expense of hunting, a sportsman admitted that the sale of game (a practice indulged in by English gentlemen) could defray the cost of leased shooting rights. But the sportsman added, "[o]f course the debit and credit account no one is so mercenary as to wish to have exactly balanced." 11 FOREST AND STREAM, at 119 (1878).

90. *Sportsman or Pet-Hunter*, THE ROD AND THE GUN, Nov. 20, 1875, at 114.

91. AMERICAN SPORTSMAN, Feb. 6, 1875, at 299 (letter).

92. *Illegal Transportation of Game*, AMERICAN SPORTSMAN, Jan. 10, 1874, at 232.

93. 7 FOREST AND STREAM, at 88 (1876) (letter).

94. 16 FOREST AND STREAM, at 205 (1881) (quoting the Long Prairie, Mn., ARGUS). For sport the difference between a market hunter and a sportsman was summed up as follows: "The former kills his birds as he would butcher a hog, while to the latter the killing is only one episode of the day's delights." 20 FOREST AND STREAM, at 44 (1882) (letter).

95. A striking example of sport's appropriation of the marketman's occupation comes from Minnesota: "At the turn of the century, when market hunting was prohibited, many of [Minnesota's] Heron Lake's hunters became guides for the wealthy sportsmen from Minneapolis, St. Paul and Chicago." DAVID AND JIM KIMBALL, THE MARKET HUNTER 51 (1969).

96. Tober Thesis, *supra* note 43, at 382-83 (quoting 42 FOREST AND STREAM, at 111 (1894)).

Although sport enjoyed a righteous certainty about the justice of its cause, sport vacillated for some years before reaching its final solution for the marketman, the absolute prohibition of the sale of game. The gradual development of sport's policy displays sport's incremental understanding that it "must have all the Game."⁹⁷

Sport's opening foray was an oblique assault hidden under the guise of a call for generally applicable fish and game laws. Sport secured a ban on efficient techniques,⁹⁸ establishing policies that "ensured that the killing of wildlife was economically a liability."⁹⁹ Thus, for example, netters would have to be replaced by rod and reel fishermen; and netters by another name were marketmen.¹⁰⁰

When pound nets are used in rivers or bays the animal has no chance; it must go in and it can't get out. Thus we lose the excitement of the chase and we bring sporting down to a mere mechanical certainty in which any fool is as good as the most painstaking sportsman or accomplished naturalist.¹⁰¹

While sport condemned effective methods, it sanctioned its own preferred measures despite the competing claims of less damaging alternatives. In the late nineteenth century an archery craze swept the nation;¹⁰² bow hunters boasted they "did not, of course, adopt the bow as a weapon superior, or equal in destructive powers, to the cheapest and poorest guns, but solely for the greater pleasure of its use in pursuit of game."¹⁰³ Articles in *Harper's* and *Scribner's* voiced the praise of the Indian instrument.¹⁰⁴ But during all these years not a single hunter argued to ban his weapon of choice, the gun, in favor of that conservative substitute, the bow.

97. The ironic conclusion of the ditty about the English system which also gave all the game to sportsmen. AMERICAN WILDLIFE, *supra* note 5, at 10 (quoting E. THOMAS, AN ABSTRACT OF ALL THE GAME LAWS 4 (10th ed. 1784) (copy in the Bodleian Law Library, Oxford, England)).

98. "Many of the hunting methods opposed by sportsmen were opposed because they were efficient techniques for market hunters." TOBER, *supra* note 11, at 191.

99. Geist, *supra* note 2, at 53.

100. Thus nine hundred fishermen petitioned the New Jersey legislature to repeal a law against seine hauling, arguing it "was passed for the benefit of a few persons living in Middleton township who wished to use the rivers for their own pleasure and profit, and for the pleasure of sportsmen and non-residents of the State." *Asking a Change in Fish Laws*, 20 FOREST AND STREAM, at 31 (1883).

101. *The Ethics of Sport*, THE ROD AND THE GUN, July 17, 1875, at 248.

102. "The archery fever is indeed upon us." 13 FOREST AND STREAM, at 708 (1879).

103. *Hunting with the Bow*, 13 FOREST AND STREAM, at 837 (1879).

104. *The Long Bow as a Sporting Weapon*, 8 FOREST AND STREAM, at 371 (1877).

Closed seasons were another technique to exclude the marketman. "The true sportsman hunts during a very few days only each year. The market gunners shoot early and late, six days a week, month after month."¹⁰⁵ Before refrigeration, marketers favored winter taking¹⁰⁶ for preservation of their stock in trade;¹⁰⁷ and therefore the sport ban on that season had a happy exclusionary effect.

That sport intended itself to eat the share of its fallen rivals¹⁰⁸ appears not only in the rules sport enacted, but also in the rules it chose not to implement.¹⁰⁹ Bag limits, in particular, were an obvious way to end market hunting, but sport pursued no unseemly haste in that direction¹¹⁰ because sport hungered for the enormous bags on offer¹¹¹ after its competitors were

105. WILLIAM T. HORNADAY, *OUR VANISHING WILDLIFE* 65 (1913).

106. Other seasons had their use also, and discriminatory laws focused upon those periods as well. A closed California summer season for shrimp was passed "ostensibly because immature fish were then most abundant in San Francisco Bay. Conveniently, the summer months were the only ones in which the Chinese could air-dry their catches." ARTHUR F. MCEVOY, *THE FISHERMAN'S PROBLEM* 113 (1986).

107. Cart, *supra* note 52, at 27.

Experience has demonstrated that [the greatest demand for game] comes at a time known under the present laws as the close season. It comes during the summer, because watering places are doing their largest business. being filled with a class of customers who at other season are at home. It comes also during the winter, because game will keep for a much longer time. either for home consumption or shipment.

AMERICAN SPORTSMAN, Mar. 9, 1874, at 88.

108. Once the marketmen were excluded, sport had the opportunity to take larger numbers of animals. Accounts of nineteenth century slaughter are intimidating, but the total take including market hunting did not always exceed the sustainable yield. Tober explains. "Although these spectacular hunts may seem necessarily detrimental to the populations in question, no clear judgment can be made in absence of information on population size and condition." TOBER, *supra* note 11, at 78. Nineteenth century takers certainly devastated migratory wild fowl, but a contemporary scholar asserts that devastation was due to ignorance of the birds' ecological requirements. "In spite of the spectacular individual kills [of ducks at the end of the nineteenth century], it is a question whether the total annual drain on the waterfowl in point of numbers was much greater than it is today under tightly restricted hunting seasons." TREFETHEN, *supra* note 56, at 162.

109. In 1913 Hornaday said of Minnesota, "This state should at once enact a bag-limit law that will do some good, instead of the statutory farce now on the books. Make it fifteen birds per day of waterfowl, all species combined, and no grouse or quail." HORNADAY, *supra* note 105, at 285. Early bag limits were both generous and unenforced. *E.g.*, 1878 Iowa Acts ch. 156 § 3 (making it unlawful to kill more than twenty-five of the birds specified by the act).

110. Contemporaries mocked the bag limits on migratory birds as liberal to the point of uselessness. TREFETHEN, *supra* note 56, at 156.

111. A letter writer to *Forest and Stream* condemned sport's gluttonous appetite for slaughter, "the 'gentleman or true sportsman,' after he has shot enough for himself, and a few friends, keeps on shooting to throw away." Quoting the sporting guru Frank Forester, the letter writer continues, "The fiat of wanton destruction has gone forth against all the wild inhabitants

gone.¹¹² As late as 1890 *Forest and Stream* still asserted, “[W]e may feel a certain kindly regard for the man who shoots a few birds and then stops for fear of ruining the chances of later arrivals; but we should regard the act rather as a virtue of supererogation than as of ethical obligation.”¹¹³ When some sport fishermen finally banned their rival netters, their joy was reported in *Forest and Stream*: “As an evidence of the wisdom of this legislation, the removal of the [fish traps has] resulted in the finest fishing known in the bay for many years; 280 bluefish having been taken by a single boat, and from thirty to fifty kingfish in a day’s fishing last summer.”¹¹⁴

Despite the success of these expedients, sport chose to mount an even more direct attack on the marketers. An early shot in this direction was a national campaign¹¹⁵ to ban the export of game from the state where it was killed. The sportsmen who condemned these laws as “rank injustice” to non-resident sportsmen¹¹⁶ simply misunderstood their purpose: the exclusion of the market hunter. While the stricture seemed to impact equally sportsmen and marketmen, in fact the rules favored sport over commerce. To be sure a sportsman preferred to take his grand bags home; but after all, his main goal was the chase, not the carcass. But the anti-shipment rule would utterly confound the marketman, who particularly after the perfection of refrigeration lived by shipping from the western habitats to the eastern markets.¹¹⁷ In 1900 the shipment prohibitions developed real

of the woods, the fields, the marshes, and the waters, as irrevocable as that against the red Indians . . .” *Another Heterodox Screeed*, 20 FOREST AND STREAM, at 169 (1880).

112. In 1878 a sportsman concluded that the Kansas ban on sale had created quail shooting “beyond all comparison, the finest we have ever known.” *Game Notes from Kansas*, 11 FOREST AND STREAM, at 290.

113. TOBER, *supra* note 11, at 105 (quoting 35 FOREST AND STREAM, at 225 (1890)). As late as 1913, the enforced bag limit remained, but with a hope for the future: “We trust that the days when man was permitted to kill game for the mere pleasure of slaughter are about at an end. Each sportsman should be allowed only such a bag as the conditions warrant and the interest and welfare of others may sanction as a reasonable amount.” CHASE, *supra* note 68, at 93.

114. 11 FOREST AND STREAM, at 359 (1878).

115. Under the heading “The Minnesota Movement,” a *Forest and Stream* article observed that the sportsmen of Minnesota had secured the enactment of a non-export law:

All right-minded sportsmen, whether residents or non-residents, will indorse the present movement. There has been in certain quarters a tendency to decry non-export game laws as wholly unconstitutional, but this criticism has come from a source which is not altogether above suspicion of being hampered by entangling alliances with the game dealers . . .

The Minnesota Movement, 20 FOREST AND STREAM, at 162 (1883).

116. CHASE, *supra* note 68, at 95.

117. KIMBALL, *supra* note 95, at 77. *Forest and Stream* was squarely behind the non-export laws:

teeth when the federal Lacey Act banned the interstate shipment of game taken in violation of state law.¹¹⁸

Although these policies cut down the American markets, some still persisted. After all, wildlife was a basic staple in the American diet.¹¹⁹ Therefore not every state outlawed the industry. Some found the market closures too exclusive, since by implication they would reestablish the English system that had denied the poor even a taste of game. If sale were banned, non-hunting Americans could no more eat game than the English poor who by law were “not qualified” to purchase wild-caught meat.¹²⁰ In 1894 a Michigan game warden argued that the policy was simply too elitist: “such a provision would limit access to game to those with the time and money to hunt, whereas the resource belonged to all in common.”¹²¹

In resisting sport policy, the marketmen, although typically¹²² a politically impotent lot,¹²³ could enjoy the influence wielded by allies

There is a great satisfaction in sending home the tangible evidences of one's prowess. . . . But while depriving the gentleman sportsman of this gratification the non-exportation of game strikes at the very root of the pot-hunting difficulty. . . . such laws, by their very stringency, afford the only remedy for the abuse of former freedom.

Game Protection, 12 FOREST AND STREAM, at 251 (1879). A letter writer from Wisconsin observed that “while many [out of state sportsmen] would have enjoyed carrying out a saddle of venison of their own dressing, they freely admitted that the sports of the forest were sufficiently enhanced by the conspicuous absence of the meat hunters to make the restriction preferable” 18 FOREST AND STREAM, at 8 (1882).

118. TREFETHEN, *supra* note 56, at 121-22.

119. “The importance of wildlife in the American diet during the nineteenth century is difficult to imagine for a twentieth century urban dweller.” Tober Thesis, *supra* note 43, at 162.

120. “One would almost be tempted to think, from the peculiar attention the legislature hath in all ages paid to the preservation of the Game, that there was some sovereign medicinal quality in the blood and juices of these animals.” AMERICAN WILDLIFE, *supra* note 5, at 9 (quoting S. PURLEWENT, A DIALOGUE BETWEEN A LAWYER AND A COUNTRY GENTLEMAN UPON THE SUBJECT OF THE GAME LAWS, at x (3d ed. 1771)).

121. Tober Thesis, *supra* note 43, at 382 (referring to 1893-1894 MICH., REP. OF THE STATE GAME AND FISH WARDEN, at 10).

122. Commercial fishermen might have considerable political clout. A correspondent to *Forest and Stream* complained:

In the South Bay [of Long Island, New York] it was found by investigation that there were not over thirty owners of pound nets among a population of 30,000, all of them more or less interested in protecting and saving the fisheries. But those thirty men set the 30,000 at defiance, and the county of Suffolk was twice turned over politically—once from Republican to Democratic and then back to Republican on the question. Finally the act was passed forbidding pound nets. . . .

11 FOREST AND STREAM, at 359 (1878).

123. “Market hunters were never a political force with which to be reckoned. Their very lifestyles militated against the collective action required to influence the course of political events. Few had or preserved conduits to centers of power. . . .” TOBER, *supra* note 11, at 55.

higher up the food chain—the big city game dealers.¹²⁴ Some market interests sought an accommodation with sport that would allow both to survive. The New York City men asserted, “all reputable dealers in game desire its preservation as much as conscientious sportsmen. It is against their interest to destroy any line of goods handled by them.”¹²⁵ They would favor sensible regulation, but oppose rules that discriminated against them.¹²⁶ Almost until the end of the nineteenth century, sport was willing to talk. As late as 1889 *Forest and Stream* still asserted that “sale would continue as long as there was game to sell, and that any talk of prohibition was but a waste of ink.”¹²⁷

But in an historic about face, five years later, *Forest and Stream* astonished the country by demanding a total ban on the markets. Sport decided the time was right to deliver the deathblow to its detested rivals. The day was February 3, 1894. *Forest and Stream* announced:

The day of wild game as an economic factor in the food supply of the country has gone by. In these four hundred years we have so reduced the game and so improved and developed the other resources of the country that we can now supply food with the plow and reaper and cattle ranges cheaper than it can be furnished with the rifle and the shotgun. In short, as a civilized people we are no longer in any degree dependent for our sustenance upon the resources and the methods of primitive man. . . .

Why should we not adopt as a plank in the sportsman's platform a declaration to this end—*That the sale of game should be forbidden at all seasons?*¹²⁸

At first *Forest and Stream's* position was considered “sheer madness.”¹²⁹ Within six years, however, the ban on sale was nation wide.¹³⁰ Sport had

124. “Market hunting, in short, was an accepted part of the economy of the 19th Century America—a legitimate business that was supplying a popular demand. As such it could enlist strong political support in Congress and in state legislatures.” TREFETHEN, *supra* note 56, at 78-79. “They had a significant impact [upon] game legislation in a number of states.” TOBER, *supra* note 11, at 57.

125. Tober Thesis, *supra* note 43, at 378 (quoting 35 FOREST AND STREAM, at 476 (1891)).

126. Game dealers asserted they “supported sound game laws, and opposed only those that were ‘needless, tyrannical, and oppressive.’” *Id.* (quoting 23 FOREST AND STREAM, at 506 (1885)).

127. *Id.* at 382.

128. REIGER, *supra* note 42, at 71 (quoting George B. Grinnell & Charles B. Reynolds, *A Plank*, 42 FOREST AND STREAM, at 89 (1894)).

129. “At first the no-sale-of-game bill looked like sheer madness, but no sooner was it fairly launched than supporters came flocking in from every side. . . . The real sportsmen of the state quickly realized that the no-sale bill was *directly in the interest of legitimate sport*” HORNADAY, *supra* note 105, at 308.

done in its greatest competitor, the marketman. The politics of the victory are now clear:

Grinnell's editorial came at a propitious time. Due largely to the decline of wildlife, commercial hunting was on the downgrade while sport hunting was increasing by bounds. The railroads were finding it more profitable to transport eastern sportsmen to the game fields than to haul dead game to market. Hotel proprietors now could realize greater profits from catering to deer hunters than they could from selling venison in their dining rooms.¹³¹

The premise behind the ban was explained by *Forest and Stream's* editor: "It is now generally recognized that the commercialization of game means its extinction."¹³² This view was also propounded by the publicist and protector William T. Hornaday, who announced, "[A]n inexorable law of Nature, to which there are no exceptions: *No wild species of bird, mammal, reptile or fish can withstand exploitation for commercial purposes.*"¹³³ As a rallying cry this view had much to achieve, although as a statement of fact it was preposterous: the European system of hunting and fishing had allowed (and would continue to allow) the commercial exploitation of wildlife¹³⁴ with results which sport, when suitable to its purpose, would refer to with envy.¹³⁵ Furthermore within America itself fur bearers and food fishes confounded the proposition. The essential truth of the position was not that wildlife could not withstand commercial exploitation; rather it was that wildlife could not withstand unregulated commercial exploitation.¹³⁶ But rather than attempting to regulate the markets, sport seized its moment, and took not partial, but total victory.

A modern analyst describes their triumph:

130. TREFETHEN, *supra* note 56, at 80.

131. *Id.* at 79-80.

132. Grinnell, *supra* note 72, at 230.

133. HORNADAY, *supra* note 105, at 63. So too the Code of Ethics of the Camp-Fire Club of America included the following provision: "The sale of game is incompatible with the perpetual preservation of a proper stock of game; therefore it should be prohibited by laws and by public sentiment." *Id.* at 384.

134. See WILLIAM F. SIGLER, WILDLIFE LAW ENFORCEMENT 7 (2d ed. 1972) (discussing three categories of contemporary European systems of game administration).

135. In 1875 *Forest and Stream* observed, "Americans resident abroad watch our movements here with thoughtful interest, and by comparing our laws with those of England and the Continent, where the game laws are much more perfect and in thorough operation, can readily detect defects here, and offer suggestions that are valuable." *Our Game Laws—Defects and Violations*, 4 FOREST AND STREAM, at 362 (1875).

136. Proposals to allow the sale of game in Alaska during World War I suggested that a tagging system be implemented to reduce fraud. TREFETHEN, *supra* note 56, at 209-10.

Sportsmen claimed that anti-market-hunting laws were in the public interest, but that hardly seems the case. Habitat protection and seasonal restrictions served a general purpose, but elimination of commercial hunting merely allocated wildlife from one social group to another. Sportsmen simply made their interest and the public interest appear to be the same, and state regulation of wildlife served that part of the public interest represented by upper-class hunters.¹³⁷

VI. SUBSISTENCE HUNTERS

During the early years of settlement, the American dream included a poor man's right to avoid the cities, immerse himself in the wilderness, and live on the land's natural products. As settlement spread this freedom for many was reduced simply to the right to supplement the family diet with wild-caught fish and game. But this residual right was fixed within the sportsman's sights; and sport consigned the subsistence taker's privilege to oblivion.

Although today the subsistence taker's desire to eat might appear a claim no less meritorious than the sportsman's desire to relax,¹³⁸ many nineteenth-century thinkers found the survival hunter unworthy. In 1840 a Massachusetts legislative report observed:

So far as game and hunting are concerned, the sooner our wild animals are extinct the better, for they serve to support a few individuals just on the borders of a savage state, whose labors in the family of man are more injurious than beneficial. It is not, therefore, so much to be regretted that our larger animals of the chase have disappeared. What comforts their fur and their skins have provided, can be abundantly supplied by animals already domesticated, at far less expense, both of time and money, and are not subject to that drawback, the deterioration of morals.¹³⁹

Later descriptions within the sporting press¹⁴⁰ echoed these views. The "pot-hunter"¹⁴¹ (and the game dealer) were "men who bear the same

137. DOHERTY, *supra* note 41, at 49.

138. "Those who wasted game and did not look primarily to its utilitarian qualities were surely due less respect than those who insured its use as human sustenance." TOBER, *supra* note 11, at 54.

139. TOBER, *supra* note 11, at 9, n.25 (quoting a report by Ebenezer Emmons to the Massachusetts legislature).

140. Sport had to walk a tightrope in formulating the moral vigor of its position, since sportsmen themselves had been condemned by society not as subsistence hunters who refused to do conventional work, but rather as wealthy idlers who contributed nothing to social progress

relation to sport that the burglar and the fence do to legitimate trade”;¹⁴² these pot hunters were a “class of persons living in the vicinity of, or hanging about the skirts of our forests, whose acres—when they possess any—are abandoned to thistles in the indolence of lives demoralized for manly industry by years given to the vagabond business of hunting and fishing”;¹⁴³ skin hunters were “vagabonds of the most worthless description . . . a miserable set, and many of them do not kill more than enough to keep themselves in provisions and ammunition from month to month.”¹⁴⁴ As a government official observed, these men were “a class of vagabonds too lazy to work, too cowardly to steal, who will spear and net the fish upon their spawning beds . . . so long as they can realize the price of a glass of whiskey from their spoil.”¹⁴⁵ At times these idle vagabonds would camp themselves on some frozen acres: “This is the Ice City. Few persons realize the stupendous undertaking, wherein some 2,000 men live in temporary shanties on the ice [of Lake Michigan], engaged in fishing, from December to the latter end of March, subject to all the vicissitudes of such a life.”¹⁴⁶

The Maine Commissioner of Fisheries provided a legalistic basis to institutionalize policies against such rabble: “No one should be allowed to

Sport argued that the material progress achieved by the end of the nineteenth century meant that such single-minded devotion to productive labor was no longer necessary, and the wealthy within society now needed—deserved—refreshing recreation:

The day has gone by when [sportsmen] are liable to the sweeping denunciations formerly hurled at them. When it required a man’s entire time and every possible effort to gain a hard earned living, men might be excused for regarding the disciples of rod and gun with the severity of judgment they entertained for mere pleasure seekers. . . .

There is no nation in the world that is so over worked as our own. The constant whirl of excitement incident upon our great mercantile enterprises has had a direct tendency to impair the health and shorten the lives of our business men. Within the last two decades the work of national depreciation has been arrested by the development of a taste for out of door sports. . . .

This is a view that all sensible men must accept.

Land Owners vs. Sportsmen, 17 AMERICAN SPORTSMAN, May 1873, at 121.

141. The hunter whose chief purpose was to cook his quarry in a pot, and, by extension, those who hunted to provide food to others.

142. 12 FOREST AND STREAM, at 190 (1879). “It is preposterous that the unseasonable pot-hunter and the dealer in his wretched spoils—men who bear the same relation to sport that the burglar and the fence do to legitimate trade—that these men should be factors in an opposition to a legislative boon to the commonwealth.” *Id.*

143. *Game Protection for the People*, 17 FOREST AND STREAM, at 504 (1882).

144. *Protection of Large Game*, 18 FOREST AND STREAM, at 63 (1882).

145. Richard W. Judd, *Searching for the Roots of the Conservation Movement: Fish Protection in New England 1865-1900*, in FIFTY-SEVENTH WILDLIFE CONFERENCE, *supra* note 87, at 717, 721 (quoting the Maine Fish Commissioner).

146. *Winter Fishing in Lake Michigan*, 8 FOREST AND STREAM, at 152 (1877).

give up work as a citizen, and make a living by killing and selling what belongs equally to all, and what is intended and should be protected as a healthful recreation and holiday pastime for all.”¹⁴⁷

On occasion a literate voice for the indigent would protest, questioning:

Why . . . should sportsmen’s clubs, consisting of a few elegant gentlemen of wealth and leisure, go to [the state capitol] and secure the enactment of a law which shuts up the lake to a large number of people who had always been accustomed to get a considerable fraction of their daily food in this manner?¹⁴⁸

Subsistence users even enjoyed some victories. An 1879 Florida correspondent asserted that their efforts had defeated a sport measure:

The game law of this state [which set closed season for deer] is dead—repealed last session of the Legislature

I suppose the most potent reason for the repeal was that many settlers depend altogether upon game for fresh meat, and felt it a hardship to be deprived by law of necessary sustenance.¹⁴⁹

Some argued it was only politic to exempt subsistence takers from general bans because they consumed relatively little fish and game.¹⁵⁰ A Canadian Committee contended that “very little harm can be done during the close season, if the law strictly defines such shooting to be done solely for consumption by the settler’s family and prohibits the sale of such game or the skins of the animals so shot.”¹⁵¹ *Forest and Stream* counseled against a futile ban on subsistence taking by game guides:

A just law, a wise law, that will give to the man who, living in the woods must live by the woods, a right to do what he now does and will do in spite of the law, would make game constables, and good

147. *Maine Game*, 19 *FOREST AND STREAM*, at 447 (1883) (quoting Report of the Maine Commissioner of Fisheries and Game (1882)).

148. *Fishing in Cayuga Lake*, 9 *FOREST AND STREAM*, at 233 (1877).

149. 12 *FOREST AND STREAM*, at 271 (1879) (letter from Florida).

150. With the poacher eliminated, sport might take a generous posture towards the subsistence hunter:

We believe in closing the market, and the poacher’s occupation is gone. The few trout or deer killed out of season by persons living in the woods amount to nothing beside those slaughtered by the market shooter who forestalls the season, if indeed it is desirable to prosecute the guide or woodsman who kills merely for his own wants.

Game and Fish Protectors of New York, 15 *FOREST AND STREAM*, at 163 (1880).

151. *Game Protections*, 7 *FOREST AND STREAM*, at 328 (1877).

ones, of nineteen out of the twenty of the men who are now criminals.¹⁵²

These moderate voices found no favor. Instead legislators were persuaded that game laws helped the poor by preventing them from improvidently consuming the seed stock of their sustenance.¹⁵³ But sport's appeal to this charitable rationale could not last long, as the imposition of seasons and inefficient methods made subsistence on game impossible. Sport therefore turned to the "health supply" theory, which preferred the recreational needs of businessmen to the dietary demands of the poor.

The techniques that sport used to eliminate subsistence takers might appear on their face not to disclose a discriminatory intent, but the nineteenth century literature shows that sport sought to exclude the subsistence taker. The history of sport agitation to create a gun tax is on point. In 1877, a sportsman conceded that the measure "would of course be very unpopular," but he maintained "it is the only efficient way I can see of saving our stock game."¹⁵⁴ As for the amount (in 1881 fishing guides worked for seventy-five cents a day),¹⁵⁵ an 1877 correspondent suggested "[a] tax of say \$15 annually would be willingly paid by sportsmen for the satisfaction of knowing that so many guns in the country would be suppressed."¹⁵⁶ *Recreation Magazine* presented a thoughtful analogy: "[I]t is well known that a dog license of \$1 rids any town or city of many of its worthless curs, as soon as enacted and enforced. So a low gun license would rid every city of many of its irresponsible shooters."¹⁵⁷ Some maintained that the tax protected the indigent: "the man who is too poor to pay \$10 a year for the right to shoot and fish, had better leave it alone. He is in my judgment too poor to lose a day's time from his work."¹⁵⁸ In

152. *Game Protection: Guides as Game Protectors*, 7 FOREST AND STREAM, at 8 (1876).

153. See A "Poor Fisherman" Protests, *supra* note 11. Although subsistence hunters were tarred with the same brush used against the market men, the actual pressure of hunting or fishing purely for subsistence was typically modest. "If the killing of game for meat had been confined to meeting the basic needs of the settlers, the history of the wildlife of the western plains and mountains might have been somewhat different." TREFETHEN, *supra* note 56, at 9.

154. *Taxation of Guns*, 8 FOREST AND STREAM, at 183 (1877) (letter).

155. 16 FOREST AND STREAM, at 165 (1881).

156. *Pot Hunting*, 8 FOREST AND STREAM, at 117 (1877).

157. TOBER, *supra* note 11, at 209 (quoting 8 RECREATION MAGAZINE 401 (May 1898)). For others, discretion had to be exercised to target the proper group to exclude: a ten dollar tax "would give the exclusive right of hunting to the aristocratic members of opulent gun clubs"; men of moderate means would lose out. Far better, the writer maintained, to set the fee a bit lower: "If it be fixed at \$2 or \$3 it will prevent 'fledglings' of from fourteen to eighteen years of age from setting out on 'scouting' expeditions from the cities of New York and Brooklyn. . . ." *The Gun Tax on Long Island*, 15 FOREST AND STREAM, at 470 (1881).

158. Tober Thesis, *supra* note 43 (quoting 8 FOREST AND STREAM, at 37 (1877)).

contrast, others saw the tax as both immoral and impolitic: "To especially tax his gun would be to burden many a poor man too heavily for him to bear, and if it did not make a poacher of him it would at least make him utterly indifferent to the protection of game of which he could have no share."¹⁵⁹

The poor were ousted by the imposition of fees they could not pay, and by methods restrictions they could not tolerate. Sport's fundamental tenet was that the cost of taking game had to exceed the value of its carcass.¹⁶⁰ Hence a ban was imposed on bird snares, the poor man's method of choice. As a sportsman observed:

According to my best thinking the colored brother is much more destructive to game now with his traps and blinds than with his guns. These implements don't need to be fed with ammunition, which costs money, and they do their work while the freedman is also at his work in the cotton or cornfield.¹⁶¹

Others dissented: "[T]he poor boy who is not able to purchase a gun has as good a right to capture game in his way as a wealthy sportsman has to slaughter his."¹⁶²

As for the sport policy that closed seasons, subsistence takers were also inconvenienced, since they found it necessary to eat year round. Compounding the insult, sport often calculated seasons not for biological goals, but for sport convenience.¹⁶³ A sportsman's argument for a ban on summer shooting contended:

159. 14 FOREST AND STREAM, at 111 (1880) (letter). If sportsmen were free to set the charges as they wished, many feared they would return to the English rich man's monopoly scheme. Proponents of a gun tax, a letter writer observed:

[W]ould find the shores of Albion a more congenial clime for carrying his proposition into effect; but in free America it will never do, and I think it time to get up a counter current, or very soon the "gentleman sportsmen" will have laws enacted which will exclude any person from enjoying this glorious sport who does not own a three hundred dollar gun and a setter worth as much more.

8 FOREST AND STREAM, at 86 (1877) (letter).

160. The fundamental policy of sport "ensured that the killing of wildlife was economically a liability." Geist, *supra* note 2, at 53.

161. *The Freedman and the Quail*, 20 FOREST AND STREAM, at 87 (1883). Others simply identified the poor as the cause of the diminution of game. "Game is getting scarce where it was once plenty, because every vagabond negro that can get a three-dollar gun and the pot-hunting crackers are killing everything that flies." Old Sport, *Muskets, Darkies, and Game*, 16 FOREST AND STREAM, at 208 (1881).

162. J.H. Griffith, 15 FOREST AND STREAM, at 408 (1880). "[T]he really-poor man rarely had the gun and ammunition." HORNADAY, *supra* note 105, at 3.

163. Sportsmen also fought among themselves:

There are many true and good sportsmen in the present Minnesota Legislature. . . . They all know that they would not go cock shooting on a hot July day for \$20. What sport is there, with the thermometer eighty-five degrees in the shade, down in a willowy bottom, without a breeze stirring to cool the fevered brow, the noble army of mosquitoes buzzing around and thirsting for blood, and twigs switching you in the [face], every now and then, as a stimulant. Only the pot-hunter . . . will risk these discomforts, for to him it is dollars and cents. Why, then, for the sake of nobody should this be allowed to continue?¹⁶⁴

A Massachusetts hunter took an opposing view:

I cannot see as it makes woodcock any more scarce if they are killed in July and August, than if killed in September [W]oodcock never lays but one litter [The wealthy] do not want to go shooting in the summer for it is pleasure alone they go for, and to perform any kind of labor that makes them sweat kills all the pleasure. This class wants to stop everybody from shooting until the fall months, and could they have their own way no poor man should ever shoot at all.¹⁶⁵

The ban on Sunday taking, a form of “mini-season,” was at the expense of the working poor, who often had only that day free for the chase. Sport commentators saw other happy consequences to the rule, since “heathens” were kept at bay, as the following 1875 comment concerning a California

Now our present law was, I believe, passed in the interest of a few sportsmen who shoot nearer the sound than we poor chaps up here in the hills—men who want to take, say, a week’s vacation in the fall for shooting and who want to bag all the birds possible in that time, and, of course, October in that locality is the best month. With us the last of September is better usually

W.H. Williams, *Dissatisfied Connecticut Sportsmen*, 13 *FOREST AND STREAM*, at 571 (1879).

164. 19 *FOREST AND STREAM*, at 387 (1882) (quoting an article in the *ST. PAUL PIONEER-PRESS*). In point of pleasure, the winter was even less desirable. A Wisconsin letter writer argued against eliminating October from the deer season: “Few hunters, and especially those of the ‘nabob’ type, will care to face the cold days and nights of November . . . and everyone will sorely miss the month of October, the most pleasant month in the whole year for camping.” *The Wisconsin Deer Law*, 20 *FOREST AND STREAM*, at 306 (1883). In New York, some argued against eliminating the summer season on woodcock because it would be better to “shorten [the season] at the end and not at the beginning. Let the open season be when it will best suit the public, and not when only the wealthy and the market shooters can enjoy the sport.” 20 *FOREST AND STREAM*, at 108 (1883). So too a letter writer argued in favor of closing the season on partridge in Mississippi during early fall “because it is too hot.” *Protection in Mississippi*, 12 *FOREST AND STREAM*, at 432 (1879).

165. Pertia W. Aldrich, *Times and Seasons*, *THE ROD AND THE GUN*, May 15, 1875, at 106.

statute indicates: "A Chinaman, or any other man, who catches [fish on Sunday] is guilty of a misdemeanor."¹⁶⁶

Finally, some argued that sport exercised bad faith in choosing the fine as its favorite penalty:

All laws for woodcock . . . are entirely for the benefit of the rich man, not one is just to the poor man. . . . Mr. — has a plenty of money, and if so inclined, can shoot woodcock out of season; if caught, can pay the fine without feeling it, while the poor man doing the same, for lack of lucre, would go to jail or penitentiary.¹⁶⁷

VII. FARMERS

By defeating agricultural interests, sport displayed some real political muscle. Joined together in the grange, farmers were a potent force. But the sport juggernaut overran them; the rights they retained were those sport found desirable to acknowledge. Sport policy conflicted with farm practices in a variety of ways.

Sport eliminated the advantage farmers derived from their constant presence within wildlife habitat. Farmers were opportunistic takers of game, ready at work for propitious moments to vary the family diet. "Grouse, ducks, geese and cranes with which the country abounds, are sometimes shot—'potted'—by the farmers who keep a loaded musket at each end of their furrows."¹⁶⁸ Closed seasons put an end to this advantage: indeed the seasons themselves could be drawn to conform to city dwellers' vacations,¹⁶⁹ which were at variance with farm leisure. A New Jersey farmer complained, "Who gets the first shot at [the quail] in the fall? We cannot get our sowing done and corn gathered before the 15th of November."¹⁷⁰

Farmers also protested sport's ban on the hunting methods they employed. Without the skill to shoot on the wing, without the assistance of

166. *California Game Laws*, 7 FOREST AND STREAM, at 153 (1876) (quoting the SAN FRANCISCO CHRONICLE).

167. Aldrich, *supra* note 165, at 106.

168. R.E. Ducaigne, 10 FOREST AND STREAM, at 244 (1878).

169. Even if only by bunching the days together in deference to the city man's schedule. Thus a recommendation to establish a weekly closed period for ducks argued the open period should be consecutive days including the weekend because thereby "the plan will meet with more general favor on the part of sportsmen who have to go from a distance to the shooting grounds." Seth Green, *A Law to Regulate Duck Shooting*, AMERICAN SPORTSMAN, Nov. 29, 1873, at 136.

170. William Curtis, 12 FOREST AND STREAM, at 130 (1879).

trained dogs,¹⁷¹ if a farmer could not rely upon stealth—hunting from blinds, and shooting ducks on the water—he could not justify stealing time from his chores in order to pursue wild protein.

The rude horny-handed farmer, or artisan, (whose occasional habit it now is to crawl stealthily upon the unsuspecting wild-fowl in hopes of securing a brace or two to serve as a change of diet) will no more trouble [sportsmen] for being unable to hit the ducks when on the wing and prohibited by law from shooting at them sitting “in flocks anywhere,” he will be compelled to stay at home and content himself with pork, beef, or such other lawful meat as he may be fortunate enough to secure.¹⁷²

Sportsmen had little sympathy for these farm claims. Farmers were men “whose care for the quail consists in trapping him in the winter, and shooting him while sitting on the rail fences in the summer during the breeding season.”¹⁷³ They would always stoop to snaring the noble fowl whenever they could “catch enough to pay them well for their time,”¹⁷⁴ and since they were incompetent gunners, they always opposed laws that sought fair play for birds.¹⁷⁵

But another agricultural vice alarmed sport even more. Not only did the farmer tolerate the marketman, sometimes he joined his ranks. Sport argued failure to ban snaring simply favored farmers’ boys “tempted by the few shillings¹⁷⁶ paid by restaurant keepers. . . . [T]he farmer, himself unable to shoot can still snare the game, and will not tolerate the sportsman whose skill may reduce the amount of his ill-gotten gains.”¹⁷⁷ Some farmers, however, were gunners: “[M]arket shooters have . . . made it a business to

171. Many believed that rich sportsmen got an unfair advantage through their ownership of trained hunting dogs. 5 *FOREST AND STREAM*, at 393 (1876).

172. *Our Game Laws*. *THE ROD AND THE GUN*, June 12, 1875, at 163.

173. *Old Gunner, New Law in Ohio*, *THE ROD AND THE GUN*, May 6, 1876, at 83.

174. *Rifle, Game Law vs. Protection of Game*, *AMERICAN SPORTSMAN*, Nov. 1, 1873, at 70.

175. *Id.* The farmers took the contrary view: “The farmer, upon whose land the game is found, and upon whose crops it has lived, is virtually the owner of it, and if his children want to trap it there is no equitable objection to their doing so.” I.H. Griffith, *A Proposition to Gentlemen Sportsmen*, 15 *FOREST AND STREAM*, at 323 (1880). Sport occasionally conceded the force of such arguments:

Hitherto all the laws seem to have been drafted in the interests of sportsmen only. The farmers have been too much ignored. . . . And why not trap [birds] in season? Are not the birds more comely to look at, and more desirable for the table? . . . Cannot the farmer be trusted to trap judiciously? . . . Is it for the sportsman to dictate that the farmer shall not gather what he hath sown? Shall the farmer cast in the seed for the sportsman to reap?

12 *FOREST AND STREAM*, at 150 (1879).

176. A word redolent of admiration for the aristocratic English sportsman.

177. *Snaring Game Birds*, *AMERICAN SPORTSMAN*, Oct 11, 1873, at 24 .

go through the country towns, loaning cheap guns to the farmer and supplying them with ammunition, and paying them five to ten cents for each ruffed grouse they would bring in”¹⁷⁸ Farmers had to be stopped, particularly since their goals were so petty, “for the sake of a few paltry dollars spreading the woods with snares.”¹⁷⁹ Sport’s contempt for the working man’s focus upon profit and loss was a common theme.¹⁸⁰

Farmers did not lie down without a fight. In 1881, for example, the Massachusetts Worcester Central County Grange passed the following resolution:

Whereas, the sportsmen of [Massachusetts] have caused a law to be enacted that makes the shooting of game by farmers on their own lands at certain seasons of the year a criminal offence, and

. . . .

Whereas, the object in view is additional sport to the shooting fraternity, and not the good of society in general, therefore,

Resolved, That the agricultural community should resent this impertinent interference with its natural rights¹⁸¹

In Minnesota, farmers went beyond talk: they secured the enactment of an exemption that allowed them to kill game birds on their farms.¹⁸² A sportsman tried to accept the defeat philosophically:

[T]hese “Grangers” are getting to be a tremendous power, and it so happened that they were in full force this winter in the legislature. Practically I don’t anticipate that this provision will work to our disadvantage. There are very few farmers that shoot at any time, and my experience has taught me that the fear of the law would never prevent them from so doing if they were thus inclined, while the chances of conviction, in a case of prosecution, by a jury of their countrymen and neighbors, are so slim that no one would ever undertake it.¹⁸³

These farm victories could not last. Several decades later, the best farmers could retain was the short-lived right to shoot over their own ground

178. *Game Protection*, 15 FOREST AND STREAM, at 313 (1875).

179. AMERICAN SPORTSMAN, Feb. 14, 1874, at 312.

180. The charge of “mercenary motives” can be “most justly laid against by far the larger portion” of farmers. *Farmers and Sportsmen*, THE ROD AND THE GUN, June 3, 1876, at 154.

181. *Sportsmen and Farmers*, 17 FOREST AND STREAM, at 291 (1881).

182. A letter from St. Paul comments upon the act: “[A] political demagogue who has been trying to curry favor with the grangers, owns the paternity to the bill [which provides] ‘[i]hat nothing in this [law shall] forbid any person from killing prairie chickens or grouse on cultivated or improved land owned by him. . . .’” *Minnesotian, A Blundering Game Law*, AMERICAN SPORTSMAN, Apr. 18, 1874, at 43.

183. W.S.T., *Minnesota Game Law*, AMERICAN SPORTSMAN, Apr. 18, 1874, at 43.

without a license,¹⁸⁴ and the concession that they could kill game to protect crops.¹⁸⁵

Sport did campaign in favor of farm rights to bar trespassers,¹⁸⁶ even where the grounds had been stocked at government expense.¹⁸⁷ But rather than pursuing farm interests, sport had its own goals in mind: the imposition of farmer access fees would raise the cost of taking game, and thereby exclude sport's poor competitors from the resource. *The Rod and the Gun* described an American sport nirvana that the fees might create:

Outside the Southern States the cultivated lands, as a rule, are held in small parcels. . . . As a rule these landholders are not sportsmen, and to them shooting birds on the wing is an unknown art; hence we believe that many of them owning contiguous estates might be induced to become strict preservers of the game on their lands, and lease the privilege of shooting to responsible clubs. . . . [W]hole townships, including many thousand acres, could thus be converted into game preserves, as strictly protected as any in Europe.¹⁸⁸

Even within the southern states, much game was "wasted." *Forest and Stream* counseled planters to pay closer attention to their own interests:

At present, with the exception of affording . . . an unlimited supply of "sport" to our colored hero of the dollar shot gun, this possible game harvest is neglected. . . . Let the proprietor of a game-abounding estate announce such possession in the advertising columns of the *Forest and Stream*, insuring to his gentlemen visitors abundance of game. . . . The dollar shot gun hunter of colored complexion would doubtless have his enjoyment somewhat marred and his privileges curtailed. But the proprietor who employs efficient game wardens will find ample reason to congratulate himself upon the new order of things.¹⁸⁹

184. In 1902, a Minnesota farmer could still hunt his own land without a license. HORNADAY, *supra* note 105, at 303. See also, CONNERY, *supra* note 9, at 177.

185. See CHASE, *supra* note 68, at 88.

186. *Forest and Stream* even counselled the small farmer on how to exclude market and subsistence hunters, while inviting sportsmen to seek permission to enter for a fee: "This notice is for all, irrespective of color, race or previous condition. . . . Gentlemen wishing to hunt, as sportsmen, will have the necessary permission granted. . . ." *Game Protection*, 9 FOREST AND STREAM, at 402 (1877).

187. In answer to the contention that a landowner should have no power to exclude fishermen where his property had been stocked, *Forest and Stream* argued, "The laws of trespass are none too strict nor too rigorously enforced. They cannot be made more lax." 12 FOREST AND STREAM, at 31 (1879).

188. *Preservation of Game*, THE ROD AND THE GUN, Mar. 31, 1877, at 408.

189. *A Hint to Southern Plantation Owners*, 13 FOREST AND STREAM, at 610 (1879).

Farm resistance to sport policy had most success when the subject species either helped or hindered crop production,¹⁹⁰ although even here farmers did not invariably prevail. Thus, a farmer observed:

[T]here are hundreds of dollars of damage done to the nurseryman and small fruit-growers every season by the gray rabbit . . . yet we have no right, according to law, to put a ferret in the hole to drive him out . . . so that the sportsmen can, when they go hunting, find plenty of game. Are laws of this kind just?¹⁹¹

But while some sport interests deferred to the farmer's equities,¹⁹² others were outraged¹⁹³ by his occasional victories:

In my experience all resistance to game law has come from the so-called farmer. He wants to poison birds because they pick up a few kernels of grain, or eat a few of his grapes. He expects the Lord who made the birds, to bless him with abundant crops, and yet he begrudges them the little they pick up that would probably be wasted anyhow. Does such a man deserve a crop? I am down on them as a class, for I have seen such contemptible meanness and narrow-minded selfishness in them in the course of my efforts heretofore to have proper game laws enacted that I have no patience with them; and when a howl goes up from them because it is too dry, or rains too much I say mentally I am glad of it! [S]erves you right!¹⁹⁴

190. State representatives "were not going to be caught voting against 'the farmer's feathered friends' and 'destroyers of weeds and insects.'" TREFETHEN, *supra* note 56, at 169. Sportsmen did not take these defeats easily. In 1877 a Minnesota sportsman observed:

The prospects for sport . . . this fall are dismal enough—the wise grangers who attempted, by the help of their mouthpieces the local politicians, to pass a law last fall prohibiting all grouse shooting in the State for three years, on the ground that shooting off the chickens was the prime cause of the grasshopper scourge, have burned up nearly all the eggs by setting fire to the prairies in May, to kill the hoppers. They did burn a few locusts, but drove most of them into plowed ground, while the fire running through the grass burned the grouse eggs up.

8 FOREST AND STREAM, at 427 (1877).

191. *A Farmer on Game Laws*, THE ROD AND THE GUN, Apr. 1, 1876, at 7.

192. "The killing of the wild geese and ducks in the season or out of season, in sections where these fowl destroy the fall and winter sown wheat, no one will condemn, no matter by what means or in what quantities, so long as they are pests to the farmer." AMERICAN SPORTSMAN, Dec. 1872, at 45.

193. A sportsman observed, "Why these vile beasts [ferrets] should be bred, or how a man with an intelligence above that of an orang-outang can find either sport or pleasure in the use of them, passeth my understanding." Medicus. AMERICAN SPORTSMAN, Feb. 6, 1875, at 299.

194. 6 FOREST AND STREAM, at 105 (1876). In summarizing various farmer objections to closed seasons, the New Hampshire Game and Fish League observed:

Some oppose any laws favorable to sportsmen because the dogs used in hunting sometimes kill sheep. Others object to any protection to ruffed

VIII. INDIANS

Sport's policy, which dispatched the share of subsistence and market hunters, equally dispatched identical Indian interests. Indians, however, had unique characteristics, since they enjoyed treaty guarantees regarding hunting and fishing, and they had eons of history of coexistence with healthy wildlife populations.¹⁹⁵ These characteristics were unlike those of the white subsistence and market hunters who had devastated wildlife populations within a brief time. The unique characteristics of Indians, however, caused little pause in the sport campaign.

As for sport use of wildlife, in abstract theory sport's exclusionary policy allowed other users to continue to exploit game so long as they abandoned their traditional uses, and instead focused upon the thrill of the chase. But unlike the white settlers, many nineteenth century Indians were not, and could not be, sportsmen: "the Indian thinks of wildlife as a utility; the Caucasian regards it primarily as a source of pleasure."¹⁹⁶ Aboriginal religion reinforced the Indian's inability to kill for pleasure:

The Indian regards wildlife as necessary to his existence, so much so that he worships it; he propitiates it with prayers before killing

grouse, because it consumes the buds of their apple trees in winter, thereby, in their opinion, injuring the crop of apples for the ensuing season. A very few would prohibit the use of the gun during the latter part of summer and the earlier half of autumn, in order that they may net a few pigeons in some portions of the State. Still others assert that all laws for the protection of game are a species of monopoly in favor of city sportsmen.

Annual Meeting of the N.H. Game and Fish League, THE ROD AND THE GUN, Apr. 24, 1875, at 56.

195. Thus *Forest and Stream* observed, "We dismiss the complaints of those who denounce the Indians as arbitrary, and stand ready to defend the family of Lo as the best conservators of game in the region of game." *Amenities to Sportsmen in the Indian Territory*, 10 FOREST AND STREAM, at 277 (1878). This published view is particularly striking because *Forest and Stream* was then owned and edited by Charles Hallock who believed that whites were the master race: "[W]e find the Caucasian race the dominant power of the world; the others being only its servants." TOBER, *supra* note 11, at 53 (quoting 3 FOREST AND STREAM, at 264 (1874)). For the history of the ownership of *Forest and Stream*, see CART, *supra* note 52, at 108, n.67.

196. Clifford C. Presnall, *Wildlife Conservation as Affected by American Indian and Caucasian Concepts*, 24 J. OF MAMMOLOGY 458, at 458 (1943).

When the exploitation era finally drew to a close late in the 19th century and people began to realize that America's natural resources were not limitless, there was a gradual revival of earlier wildlife concepts among both whites and Indians . . . both races retained and revived the basic differences in their thoughts on wildlife: to the Indian it was still a utility, and to the white, a source of pleasure.

Id. at 461. Over a century before Dr. Samuel Johnson had asserted, "[Hunting] was the labour of the savages of North America, but the amusement of the gentlemen of England." A JOHNSON SAMPLER 181 (Henry Darcy Curwen ed., 1963).

it, in order that future success in the hunt may be assured; . . . he objects to killing purely for sport, believing that it will anger the animal deities who will then hinder his business of hunting for food.¹⁹⁷

As for subsistence use of wildlife, sport was aware that the consequences of sport law were particularly dire for the Indians, indeed often fatal.¹⁹⁸ *Forest and Stream* touched upon the subject by reporting a dialogue about Indian life:

But how will they live in the meantime [until they sell furs in the spring to the Hudson Bay Company]? . . . [The old Indian hunter] will set three or four stands of snares, and his wife will tend them, and if they have good luck they will catch rabbits enough to live on. . . . But if they don't happen to catch any rabbits what will they live on then? Then they will have to go hungry, unless the man catches some fish in the net, which he probably has with him to set under the ice. . . . What do the women do? They do as much as the men, and some of them are just as good hunters and fishers.¹⁹⁹

Indian subsistence taking occurred often during sport's closed season, for Indians relied upon winter harvest,²⁰⁰ and during the summer they dried meat for later use. Sportsmen did not emulate this culinary practice,²⁰¹ although their periodicals spoke of it with admiration:

We doubt if the Indians waste meat. The very considerable amount of venison which they kill is dried for winter consumption. They kill deer when they can get them the easiest, to be sure, and that is in midsummer; but the meat is generally utilized, even to

197. Presnall, *supra* note 196, at 462.

198. 7 FOREST AND STREAM, at 298 (1876).

199. *Indian Life*, 14 FOREST AND STREAM, at 348 (1880).

200. Sport frequently condemned "crust hunting" as mere "butchery," but Indians relied upon this winter hunting practice as an important technique for feeding themselves. For the Canadian Micmac moose served "as a staple during the otherwise lean winter months when these large ruminants were run down with dogs on the hard-crusting snow." CALVIN MARTIN, KEEPERS OF THE GAME 30-31 (1978). As for fishing, *Forest and Stream* reported:

The squaws [at Leech Lake, Minnesota] catch large quantities of white fish as the cold weather commences; they string them on sticks by running them through the tail, ten on a stick; they are then hung on a scaffold near the wigwam until about the holidays. When they are frozen hard, they are taken down and stored away.

The Indians of Leech Lake, 4 FOREST AND STREAM, at 113 (1875).

201. Indeed some viewed Indian parsimony with contempt. "That one can eat fish in the breeding season, is indicative of an indiscriminating appetite, worthy of a Digger Indian, who varies his bill of fare with an occasional relish of bugs, worms, spiders, snakes and grasshoppers." *Fish Culture*, 9 FOREST AND STREAM, at 449 (1877).

the entrails, as those well know who are loudest in their accusations against the red men.²⁰²

Sport laws may have been enforced against Indians more vigorously than against whites. Although even professional wardens “often felt it better to ignore violations altogether or to merely warn violators hunting for subsistence, especially considering that a jury composed of peers would only acquit them,”²⁰³ this tolerance may not have embraced the alien aboriginal. Jurors might ignore poaching by their countrymen, but “if the offense was committed by a stranger in the land . . . the same jurors are only too glad to convict him for coming down and killing ‘their’ game.”²⁰⁴ Indians who escaped penalty for violating game laws did so primarily because they were judgment proof,²⁰⁵ not because they were good friends of the police and the jurors.

As for market regulations, a variety of reasons indicated that such regulation could be more easily imposed upon Indians than upon whites. In contrast to white trade in wildlife, Indian wildlife commerce had a long history of close government control, beginning in 1790 with the Indian Trade and Intercourse Act.²⁰⁶ Indian trade was far easier to control than white trade, because restrictions could focus upon the narrow point of contact between the Indian band and white civilization. Appropriate market regulations could be enforced against the tribes; *Forest and Stream* had observed “in point of personal integrity the Indian should be placed on a higher plane than the average white.”²⁰⁷ Thus sport’s decision to ban rather than to regulate the markets had even less justification regarding the Indians than the whites.

Sport rejected regulated Indian markets in favor of a policy designed to pacify or “civilize” the Indians. In the sport view, the fish and game treaties gave the Indians no real privileges.

The intentional destruction of the bison was the most striking example of game law as a tool of pacification policy.²⁰⁸ In 1880, *Forest and Stream* observed:

202. A. Shikaree, *Pot Hunting Par Excellence*, 13 *FOREST AND STREAM*, at 791 (1879).

203. Tober Thesis, *supra* note 43, at 313.

204. TOBER, *supra* note 11, at 132 (quoting 1904/06 COLO., REP. OF THE STATE GAME AND FISH COMM’R, at 11).

205. See, e.g., CONNERY, *supra* note 9, at 218-19.

206. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 45 (1962).

207. *Nepigon Lake and River*, 13 *FOREST AND STREAM*, at 1 (1880).

208. “Wild animals were seen as largely responsible for the continued ability of the ‘uncivilized’ to survive at a distance from the settled world. This view had major implications for Indian policy in the latter part of the nineteenth century. . . .” TOBER, *supra* note 11, at 9.

The destruction of the buffalo has steadily progressed, and has become a factor in the solution of the Indian problem. It is now generally recognized . . . that the sooner the buffalo is exterminated, the sooner will the Indian be tamed and compelled to remain on his reservation. As long as the buffalo are abundant, he will not be content with his life there—he will break away and live the free life of the plains, to which he is dearly attached. Accordingly, he is encouraged to destroy the buffalo, and every facility is given him to that end. Looking upon it simply as a factor bearing upon the civilization of the Indian, there is no question of the wisdom of this policy.²⁰⁹

This scorched earth policy was advocated in Congress;²¹⁰ and the proponents of pacification had their way.²¹¹ When only a remnant bison population remained, Congress finally made the gesture of passing a bison

209. 15 FOREST AND STREAM, at 208 (1880).

210. Representative Garfield commented:

The Secretary of the Interior said that he would rejoice, so far as the Indian question was concerned, when the last buffalo was gone. . . . I should like to know from gentlemen, especially those in charge of Indian affairs, whether they believe this theory is a sound one, and whether the very processes of civilization are not in their own course sweeping away the ground upon which Indian barbarism plants itself? It may be possible in our mercy to the buffalo we may be cruel to the Indian.

18 FOREST AND STREAM, at 189 (1882). Representative Throckmorton of Texas argued in Congress against the protection of the buffalo as follows:

Now, sir, there is no question that, so long as there are millions of buffaloes in the West, so long the Indians cannot be controlled, even by the strong arm of the Government. I believe it would be a great step forward in the civilization of the Indians and the preservation of peace on the border if there was not a buffalo in existence.

TOBER, *supra* note 11, at 115, n.103 (quoting the CONG. REC. (Feb. 23, 1876) at 1239).

211. Grinnell, *supra* note 72, at 215-16, observing:

Army officers of high rank declared that the buffalo ought to be destroyed because when they had been exterminated the Indians then at war with the United States would be without means of subsistence and would be obliged to come into the agencies for food and so would be under the control of the troops.

Id. Trefethen further commented:

Nothing brought the proud warriors of Crazy Horse, Red Cloud, Gall, and Yellow Hand trooping to the peace tables more quickly than the destruction of the buffalo, which were at once the beef, coal, steel, and timber of the Indian economy. The destruction of the bison was part of the grand strategy of the time and as effective and as morally defensible from a military standpoint as the bombing of enemy cities and factories in more modern times.

TREFETHEN, *supra* note 56, at 91.

protection bill, but President Grant found the military arguments still so persuasive that he refused to sign the measure.²¹²

Bison policy, however, is only the most patent example of game law in service against Indian culture. From the beginning of European settlement, the leading religious, judicial, scholarly, and political figures all condemned the nomadic hunter of which the Indian was the archetype.²¹³ The Puritan leader John Winthrop argued that whites should take Indian lands because nomadic hunters had no right to their territories.²¹⁴ Chief Justice Marshall found such ideas worthy of reference, although not necessary to adopt: "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny. . . ."²¹⁵ The preeminent legal treatise of the nineteenth century equally maintained:

[I]f unsettled and sparsely or [*sic*] scattered tribes of hunters and fishermen show no disposition or capacity to emerge from the savage to the agricultural and civilized state of man, their right to keep some of the fairest portions of the earth a mere wilderness, filled with wild beasts, for the sake of hunting, becomes utterly inconsistent with the civilization and moral improvement of mankind.²¹⁶

And President Monroe concurred: "The hunter or savage state requires a greater extent of territory to sustain it than is compatible with the progress and just claims of civilized life . . . and must yield to it."²¹⁷

212. GARY G. GRAY, *WILDLIFE AND PEOPLE* 35 (1993). The pocket veto was on the advice of the military in the west. TREFETHEN, *supra* note 56, at 91.

213. Indeed the typical early American colonist may not have been an accomplished hunter. "The reason colonists did not engage in subsistence hunting was a consequence of their historical backgrounds. Most immigrants came from countries where commoners had long been denied the right to hunt and bear arms." GRAY, *supra* note 212, at 93 (1993).

214. "This savage people ruleth over many lands without title or property; for they inclose no ground, neither have they cattell to maintaine it. . . . And why may not Christians have liberty to go and dwell amongst them in their waste lands and woods (leaving them such places as they have manured for their come) as lawfully as Abraham did among the Sodomites?" J.R.T. HUGHES, *SOCIAL CONTROL IN THE COLONIAL ECONOMY* 33-34 (1976) (quoting John Winthrop).

215. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823). Sport had no such reluctance to detail the hierarchy of the inhabitants of the American continent: by its view, the Indians "were, apparently, placed here to occupy the soil until some higher and more powerful race should supplant them, and cause it to bloom with fertility and teem with abundance." *The Future American Race*, 4 *FOREST AND STREAM* 8 (1875).

216. JAMES KENT, 3 *COMMENTARIES ON AMERICAN LAW* 514 (10th ed. 1860).

217. ALVIN M. JOSEPHY, JR., *THE INDIAN HERITAGE OF AMERICA* 334 (1968) (quoting James Monroe (1817)).

Sport agreed that a policy that prevented the Indians from continued economic reliance on game was necessary in order to force the tribes to become “civilized.”²¹⁸ In 1879, a Colorado citizen’s resolution maintained the Indians would continue their “barbaric” ways until state game law governed them.²¹⁹ In 1883 the Maine Fish Commissioner argued, “No one should be allowed to give up work as a citizen, and make a living by killing and selling what belongs equally to all, and what is intended and should be protected as a healthful recreation and holiday pastime for all.”²²⁰ The bison debate summed it up:

[S]o long as the Indian can hope to subsist by hunting buffalo, so long will he resist all efforts to put him forward in the work of civilization; [he will] never cultivate the soil, never even become a pastoral owner or controller of flocks, never take a step toward civilization, until his savage means of support were cut off. . . .²²¹

While some sportsmen sought to civilize the Indians by denying him game, others argued that such deprivation was a means to a different end, for they believed the Indian shared a destiny with “other inferior races—to die out before the superior . . . because they are not, except in rare instances, capable of civilization.”²²² Some sportsmen regretted the inevitable in terms that joined the Indians’ fate with that of the larger game animals of the continent:

The Indian, the buffalo, the elk, deer and moose will disappear This was to be expected, and while it may be deplored, it cannot be avoided. The interests of civilization demand that the country shall be settled and improved, and a sentiment cannot be permitted to stand in the way of such improvement. Lamentable as it is to

218. American law has used wildlife restrictions to control disfavored groups in other contexts. “I was struck by the way in which non-Chinese fishers used what ostensibly were conservationist concerns, that is, that the immigrants’ fishing methods depleted stocks on which others depended, for what clearly was the racist purpose of driving the Chinese themselves out of business by any means necessary.” ARTHUR F. MCEVOY, *THE FISHERMAN’S PROBLEM*, at xi (1986).

219. Resolved, That all efforts to civilize the Indians must prove futile so long as they are permitted to retain their tribal relations, indulge in barbarous practices, and are taught to regard themselves as independent nationalities to be treated on an equal footing like a foreign country [The Indian] should be subject to police regulations and governed by [state] laws and authority.

The Indian Question, 13 *FOREST AND STREAM*, at 770 (1879).

220. *Maine Game*, 19 *FOREST AND STREAM*, at 447 (1883) (Report of the Maine Commissioner of Fisheries and Game (1882)).

221. 18 *FOREST AND STREAM*, at 189 (1882).

222. 14 *FOREST AND STREAM*, at 305 (1880).

see these superb animals swept off from the face of the earth, it is something to which we must submit.²²³

The analogy to a vanishing animal had appeal: in comparing Asian and American sport, *The Rod and the Gun* observed,

We may have neither tigers nor elephants, but we have the large grizzly, and the still more large red man, and from either straight shooting powder is the sole escape. Yet our Western riflemen are driving both red man and grizzly steadily before their advance, into the waters of the setting sun.²²⁴

Sportsmen complained that treaty rights impeded this final solution, as well as reduced much good sport. If the Indians could be excluded as competitors, certainly better gunning could be had, as a Minnesotan observed in 1874: "I do not say the woods are all alive with game, but there is abundance of it, and it increases as the Indians are kept closer upon their reservations."²²⁵ But treaty rights were annoying: "[W]e are unable to prevent this [Indian] slaughter, for the Indian in this country is a privileged character as far as game is concerned."²²⁶

Sport formulated a strategy to solve this problem: Indian treaty rights should be ignored, and Indians should be governed by the same game law that applied to whites. Thus *Forest and Stream* endorsed a Colorado "citizen's resolution" which announced, "Resolved, That while the Indian is allowed to remain in the limits of a State he should be subject to police regulations and governed by its laws and authorit[ies]."²²⁷ Seemingly

223. *Their Last Refuge*, 19 *FOREST AND STREAM*, at 382 (1882). A more benign version of this attitude appears in a vision of the American painter George Catlin:

[T]hey *might* in future be seen (by some great protecting policy of government) preserved in their pristine beauty and wildness, in a *magnificent park*, where the world could see for ages to come, the native Indian in his classic attire, galloping his wild horse, with sinewy bow, and shield and lance, amid the fleeting herds of elk and buffaloes. What a beautiful and thrilling specimen for America to preserve and hold up to the view of her refined citizens and the world, in future ages! *A nation's Park*, containing man and beast, in all the wild and freshness of their nature's beauty!

RODERICK NASH, *THE AMERICAN ENVIRONMENT* 9 (1968) (quoting George Catlin).

224. *Americans and Englishmen as Sporting Men*, *THE ROD AND THE GUN*, Aug. 7, 1875, at 280.

225. Sidney Wilmot, *Minnesota Notes*, 2 *FOREST AND STREAM*, at 161 (1874).

226. *Indians Steal Ducks' Eggs*, 16 *FOREST AND STREAM*, at 69 (1881). Additionally writing from Montana and Wyoming, "Old Trapper" observes, "Indians enjoy the privilege of killing game the year round, while whitemen are restricted from killing any large game between Feb. 1 and Aug. 10." *The Destruction of Large Game*, 18 *FOREST AND STREAM*, at 190 (1882).

227. *The Indian Question*, *supra* note 219, at 770.

reluctant to deny outright the Indians' special rights,²²⁸ sport instead sought comfort in the oblique observation that the Indian had to submit to state "police power," which meant state game law. This view reverberated through many sporting venues. In 1881 the President of the Wisconsin Sportsmen's Association observed, "[n]or should the Indians, in my judgment, be exempt from the statutes enacted by white men."²²⁹

Sportsmen concurred with the Camp Fire Club, which had asserted as a moral axiom that Indian and white rights were identical, even though the Indians had ceded millions of acres in order to secure hunting and fishing treaty guarantees. To this end the Camp Fire "Code of Ethics" announced that:

An Indian has no more right to kill wild game, or to subsist upon it at all the year round, than any white man in the same locality. The Indian has no inherent or God-given ownership of the game of North America . . . and he should be governed by the same game laws as white men.²³⁰

Only a rare analyst acknowledged that wildlife treaty rights were relevant to the American form of government, and the rule of law. One sportsman broke the common silence, named the problem, and hinted at the answer which sport had devised for the inconvenient treaty rights: ignore them, for the Indians had no practical power to vindicate their claims. The sportsman observed that game law might "involve the necessity of treading on the Constitutional toes of the Indian (interfering, to some extent, with treaty rights), but that could in some way be gotten around."²³¹

228. Sport was not oblivious to the force of Indian claims. For example, in discussing the Colorado "citizen's resolution," *Forest and Stream* observed, "When [the Indians] keep the peace and hunt they are swindled out of the proceeds, and when certain designated hunting grounds are conceded to them by treaty, they soon find them overrun and the fur driven out by the miners and ranchmen." *Id.*

229. 15 *FOREST AND STREAM*, at 488 (1880).

230. HORNADAY, *supra* note 105, at 384 (quoting Camp Fire Club of America "Code of Ethics" § 5). Groups that joined in this statement included The North American Fish and Game Protective Association (International) and the Massachusetts Fish and Game Protective Association. *Id.* at 385.

231. 18 *FOREST AND STREAM*, at 128 (1882). For an opinion by the master of treading on the Indian treaty rights to game, see Mr. Justice White, *Ward v. Race Horse*, 163 U.S. 504 (1896). A different voice, a voice from Minnesota, recommended another solution. In 1875 a military man, a sporting man, spoke of the changes he had observed in the state:

Let [the readers of this description] conceive the whole vast area of 160,000 square miles . . . as containing six thousand whites, all told, in 1850, and of that same area six years later with a population of two hundred thousand of the prime men, women, and children of the whole land, and they will be able to realize to some extent how Minnesota has been changed, as by the wand of a magician. . . . The Indians with whom I lived and hunted for so many

IX. SPORT'S ENFORCEMENT NIGHTMARE

When an elite attempts to impose its will upon a resistant majority, enforcement problems typically follow. Early in the twentieth century an elite argued for temperance, and the Eighteenth Amendment was their great success. But reality taught another lesson,²³² and a history of blatant violation was followed by the repeal of prohibition. So too sport policy imposed an elite's will upon a dissenting majority, and its enforcement during the nineteenth century was no more successful than the enforcement of prohibition in the twentieth. But the opposition to sport was less influential than the opposition to temperance, and sport held firm to its course despite flagrant nullification. Ultimately sport created effective law by hiring its own enforcers, and by changing the principal offense from taking in the wilderness to selling in the cities.

X. NULLIFICATION

As sport set its agenda into law, excluded groups engaged in flagrant violations. An Ohio newspaper explained that enforcement was impossible, because the laws

have almost always been drawn up by those who live in large cities . . . and are consequently looked upon with distrust and suspicion by most people, who think and believe that the sportsmen (so called) desire to prevent the birds and other animals from being killed . . . that the country may be invaded by them and their friends, sallying from cities to gratify their own pleasure in the destruction of game, to the exclusion of everybody else. . . .²³³

years—where are they? . . . Broken treaties and unperformed promises on the part of the Government, and the presence of a power which the Indians feel their inability to resist, these are but a repetition of the old story, and the humbled and degraded [Indians] can look for no redress of their grievances on this side of the "spirit land." Their country has passed into the possession of a race who can appreciate its beauties and develop its riches, and my only regret is that the Government and its agents have failed to use the opportunities presented to them, to place the poor Indians in a position to be treated kindly and fairly, and to be protected in the possession of the rights secured to them by solemn treaty.

⁵ FOREST AND STREAM, at 258 (1875).

²³² In arguing against a national game law, a commentator observed, "One might conclude from the dismal failure of the attempt to enforce the National Prohibition Act that such a game code would be extremely unpopular as well as unenforceable." CONNERY, *supra* note 9, at 51.

²³³ 5 FOREST AND STREAM, at 393 (1876).

Even the local authorities were outlaws. In 1883 a writer observed, “what did we gain by [the closed season]? Nothing. By the last week of July every man and boy that could procure a gun, even to the law-makers themselves, was out in quest of snipe. Each one had agreed not to give the other away.”²³⁴ Furthermore, “the local constables are not to be depended upon to prosecute their friends or townsmen for an offense which is to them a venial one.”²³⁵

Apprehended offenders often escaped penalty. Local settlers did not convict local settlers for game violations:

[I]n sparsely settled districts [farmers and pioneers] do not like to testify in court against an offender for fear their barns will be burned, their cattle poisoned, or themselves ostracised for turning informers. Or in many instances they are opposed to the game laws in general and sympathize with the poachers.²³⁶

Local fact finders, whether juries or judges, had a bias for acquittal.²³⁷ The New Hampshire deer law, for example, apparently produced not a

234. Sharp Eye, *A Minnesota Grawl*, 20 FOREST AND STREAM, at 387 (1883). The decimation of game in Minnesota was widespread despite protective laws.

At least four tons of venison saddles have been brought into this village this season, and all are killed within a radius of ten miles. I am sorry to say that but little regard is paid to the game law, and in a few years the deer will be utterly exterminated.

J.F.L., *Minnesota Deer Shooting*, 15 FOREST AND STREAM, at 368 (1880). As a Minnesota clergyman observed two years later, “It seems too bad that the deer are being so rapidly exterminated. No attention is paid to the law, and in a few years a deer will be a great rarity in Minnesota, as in New England.” J. Frank Locke, *Minnesota Whispers*, 19 FOREST AND STREAM, at 347 (1882).

235. 15 FOREST AND STREAM, at 3 (1880). A letter from South Carolina asserted, “I believe the city and county officers are the worst violators of the game and fish laws that we have.” J.B.D., *Official Law Breakers*, 10 FOREST AND STREAM, at 511 (1878). Another letter observed, “In most instances [law enforcement personnel] are entirely indifferent to the violation of the law, and are themselves often either parties to or actual violators.” Mohawk, *Trespass and Game Laws*, 2 FOREST AND STREAM, at 195 (1874). From another perspective:

Experience has shown that game laws left to the local peace authorities are notable chiefly for their lack of enforcement. The great number of laws which the local peace officer is charged with enforcing leaves him little time or inclination to interest himself in the enforcement of the game laws. In addition the work is decidedly unpopular with his constituents when it relates to themselves.

CONNERY, *supra* note 9, at 178.

236. CHASE, *supra* note 68, at 106.

237. For example, a nineteenth century Wisconsin game warden “found district attorneys unwilling to enforce the law and justices of the peace who ‘usurped the prerogative of the supreme court, by declaring the fish and game laws unconstitutional and refused to hear the cases brought before them.’ Others freed defendants in spite of guilty verdicts.” TOBER, *supra*

single conviction before 1878.²³⁸ Compounding the problem, most violators were judgment-proof.²³⁹

Frustrated, some sportsmen saw stiffer penalties as the answer: the penalties should be not fines, but “six months—for the first offense, double that for the second—at hard labor in the State prison.”²⁴⁰ Such severity, however, could only increase lax enforcement, jury nullification, and denunciation of the game laws as a return to English class bias. In 1874, in Minnesota “[i]t would be idle to demand heavy penalties against violations of any Game Law in this State. Such a law could not be enforced.”²⁴¹

Finally, the public believed the rich had created the fines simply as a backhanded way to buy the resource:

The greatest obstacle that I have met . . . to the enforcement of the game laws is, the continual cry that we want to preserve the game for the rich, etc. Guides themselves have told me that when they state to their employers that to kill this or that game is against the law, the reply is, “O, we’ll hold you blameless, and pay all the expense if it is found out.” In many cases these very men, thus inciting our guides to commit a crime, are the very men who cry out loudest for the severe punishment of poachers, and for the better protection of game.²⁴²

note 11, at 132 (quoting Wisconsin Report of the Commission of Fisheries and State Fish and Game Warden 1893/94, at 30).

238. See Tober Thesis, *supra* note 43, at 52-53.

239. Since most violators owned less than \$200 worth of property, they were in effect immune from suit:

The case is simply this: If a man in this State does not own more than \$200 worth of property, you cannot recover from him in an action for debt. Now, the very fellows who most habitually and persistently violate the game laws are loafers and idlers of our towns and villages, not one of whom was ever worth half the sum above mentioned. Of course they do not trouble themselves about the fine. As to the thirty days in jail, that means for them a month’s board and lodging at the expense of the county, and there are plenty of them willing to be caught violating the law for the sake of earning the penalty.

Recapper, *Inefficiency of N.J. Game Laws*, THE ROD AND THE GUN, July 29, 1876, at 282. Offenders were in effect immune from trespass laws, as a farmer observed: “We can prosecute for trespass on our lands, and get judgment and pay our own cost. This class of people have no property on which to levy. Imprison them for trespass? Yes, and pay their board!” *Property in Game*, AMERICAN SPORTSMAN, Apr. 18, 1874, at 43.

240. THE ROD AND THE GUN, Mar. 17, 1877, at 377. *Forest and Stream* also argued that civil trespass “which is a tedious and ineffective process of law” should be replaced by criminal sanctions. *Trespass*, FOREST AND STREAM, Sept. 18, 1873, at 89.

241. *Comments on Minnesotian’s Letter*, AMERICAN SPORTSMAN, May 9, 1874, at 91.

242. 5 FOREST AND STREAM, at 136 (1875). One *Forest and Stream* contributor wrote in a letter:

XI. ENFORCEMENT SOLUTIONS

Compelled to concede that locals would not enforce its rules, sport hired its own specialists, first by private contributions, thereafter by taxing itself and creating state fish and game departments whose wardens would be dependent not upon popular sentiment, but rather upon the funds which sport generated. Sport's second strategy was to focus not upon the wildlife taker, but rather upon the wildlife seller; and by banning the markets, sport changed the offender's typical habitat (and the jury by which he would be tried) from the woods to the city. This was enforceable law.

Sport initially took control over state law by becoming the only group willing to assume responsibility for the enforcement of state wildlife law. The largest part of the nineteenth century sporting club's budget went to such purposes. A characteristic club's minutes read, "the club unanimously appropriated \$2,000 to be made use of by the executive committee in rewarding and paying detectives and lawyers during the present season."²⁴³

This nineteenth century enforcement policy was leveraged by sport into the means by which sport took control of state wildlife law and practice. Moving beyond voluntary support for law enforcement, sport solicited the imposition of hunting and fishing license fees with the proceeds applied to hire wardens to enforce state law.²⁴⁴ The salaries of state wildlife personnel thus became dependent upon the extent of sport. This policy was furthered in the twentieth century by sport's success in gaining a federal tax upon arms and ammunition;²⁴⁵ success because the fund was offered to the states on the condition that it be applied only to state wildlife purposes.²⁴⁶ Thus

I believe that all reputable guides in the Adirondacks would sign a paper requesting that all visiting sportsmen not to ask them to paddle them up to a deer, and not to run their hounds till after the middle of August under any circumstances. As they know and all say, that unless this summer hunting is stopped their 'occupation will soon be gone.'

M.S. Northrup, 16 FOREST AND STREAM, at 349 (1881).

243. *Protection of Game: Suggested Amendments of the Law*, THE ROD AND THE GUN, Nov. 13, 1875, at 104 (reporting a resolution from the first meeting of the New York Association for Protecting Game).

244. CONNERY, *supra* note 9, at 187. The allocation of these license fees to fish and game departments was justified on the basis "that sportsmen paid these fees and therefore they should be used solely for the benefit of sportsmen in increasing the stock of wild game and fish." *Id.*

245. Federal Aid in Wildlife-Restoration (Pittman-Robertson) Act, ch. 899, §§ 1, 3, 50 Stat. 917 (1937). The eleven per cent tax on arms and ammunition has been described as "perhaps the most far-reaching single piece of wildlife legislation enacted in the United States since the Lacey Act of 1900." TREFETHEN, *supra* note 56, at 259.

246. "It was the hunter who applied the political pressure establishing earmarked license funds for the operations of official state resource agencies. This same political force caused the enactment of the Pittman-Robertson and Dingell-Johnson Acts" REPORT OF THE 56TH

the entire state wildlife budget was made proportional to the extent of sport hunting and fishing. State departments became known as "Fish and Game Agencies" in recognition of their sport obsession;²⁴⁷ state wildlife law was known as state sport law.²⁴⁸

These powerful techniques to ensure sport's domination were complemented by another strategy, which under the guise of law enforcement gave sport a monopoly in all game fish and animals: the markets were closed. This coup was justified as the best way to prevent fraudulent sale of protected game; conveniently overlooked were reports in praise of the regulated game markets of England²⁴⁹ and Canada.²⁵⁰ The markets were closed because sport had nothing to gain from regulated markets; a sportsman did not shoot or fish for purposes of sale.

XII. SPORT VICTORY IN THE COURTS

Following success in the legislature, sport consolidated victory in the courts. Assured of political control of the states, sport argued that the state owned wildlife, and could dispose of the resource at will. Even without regard to state ownership, sport contended sufficient state authority derived from the police power. Sport prevailed, and losing opponents appealed in vain to constitutional guarantees.

CONVENTION OF THE INT'L ASS'N OF GAME, FISH AND CONSERVATION COMM'RS 74 (1966) (Remarks of T. Kimball).

247. State fish and game departments generally considered it inappropriate to apply their resources to non-game programs. See REPORT OF THE 54TH CONVENTION OF THE INT'L ASS'N OF GAME, FISH AND CONSERVATION COMM'RS 30 (1964).

248. See AMERICAN WILDLIFE, *supra* note 5, at 77-78; IRA N. GABRIELSON, WILDLIFE CONSERVATION 233 (2d ed. 1959); UNIVERSITY OF MICHIGAN, HUNTING IN THE UNITED STATES—ITS PRESENT AND FUTURE ROLE 46-47 (1962) (Outdoor Recreation and Resources Review Commission Study Report). This policy long persisted: "the total budget of all state wildlife agencies, in 1972, was \$315 million, only 4 percent of those funds were derived from general revenues." AMERICAN WILDLIFE, *supra* note 5, at 78.

249. In 1874 a commentator within American Sportsman concluded that the regulated markets had yielded an "amount of game grown in England [that] is greater than that produced in any equal area of thickly settled country in the world." *Game Laws of Great Britain*, AMERICAN SPORTSMAN, Dec. 19, 1874, at 184.

250. *Forest and Stream* observed that a Canadian closed season on the sale of trout had: operated so disadvantageously that the Government, in the interest of commerce, has been obliged to grant licenses to certain responsible merchants to sell fresh fish out of season. . . . Certainly, conscientious dealers of sufficient responsibility can be found among us [in the United States] who can be trusted with a special license of this sort, and who would not illegally receive fish taken at illegal times . . .

⁷ FOREST AND STREAM, at 248 (1876).

The theory that the state “owned” wildlife was based upon Blackstone’s contention that the King owned all the wildlife,²⁵¹ and the “reception theory” which endowed the states with the sovereign’s powers. In American courts Blackstone’s Commentaries were an authority second only to Holy Scripture,²⁵² and every state adopted the state ownership theory even as to wildlife found on private land.²⁵³ So entitled to ownership, the state might choose to transfer its rights only to those who used sporting methods.²⁵⁴ Some courts might describe state ownership as a “trust” for the public,²⁵⁵ but no court found preference for sport violated the trust.

Rather than parse the complexities of “state ownership,” many courts took the comfortable route of approving sport legislation as a proper exercise of state “police powers.” In deciding *Lawton v. Steele*²⁵⁶ in 1894, the United States Supreme Court observed:

[A] large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. . . . The preservation of game and fish . . . has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts.²⁵⁷

251. *Early American Wildlife*, *supra* note 7, at 706-711.

252. “In the history of American institutions, no other book—except the Bible—has played so great a role as *Blackstone’s Commentaries on the law of England*.” DANIEL BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* at iii (Beacon Press ed., 1958).

253. English law became American law to the extent the English doctrines were “suitable” to the new American conditions. No state ever found the “state ownership theory” unsuitable.

254. This idea was recognized by an Illinois Court:

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 subserve the public welfare.

Magner v. State, 97 Ill. 320, 333-34 (1881).

255. The same Illinois court also stated:

It is, perhaps, accurate to say that the ownership of the sovereign authority 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.

Id. at 334.

256. 152 U.S. 133 (1894).

257. *Id.* at 136-38 (citations omitted).

Such sentiment became uniform American doctrine.²⁵⁸ Marketmen failed even to overturn bans on in-state possession (and sale) of fish and game lawfully taken either in open season, or out of state; the courts simply observed that the rules were a proper prophylactic against fraud.²⁵⁹

Those who attacked sport policy found no succor in the United States Constitution.²⁶⁰ In a Supreme Court landmark case about fish and game, *McCready v. Virginia*,²⁶¹ Chief Justice Waite observed, "all concede that a State may grant to one of its citizens the exclusive use of part of the common property."²⁶² Upon this rock foundered equal protection²⁶³ and privileges and immunities²⁶⁴ attacks against sport policy. Commerce

258. On occasion litigants enjoyed minor success attacking legislation, but these technical victories could be easily overcome by more careful legislative drafting. *See, e.g.*, *Allen v. Young*, 76 Me. 80 (1884) (statute interpreted to make possession only prima facie evidence of the crime); *State v. Peters*, 17 A. 113 (N.J. 1889) (technical defect in the complaint); *People v. Gerber*, 36 N.Y.S. 720 (1895) (restrictive interpretation of statute).

259. A Minnesota court fleshed out this notion:

If it were permitted to have possession during the closed season, without limitation, of game taken or killed during the open season, it would inevitably result in frequent violations of the law, without the least probability of a discovery. Game is usually found in secluded places, away from habitations of men, with no one to witness the killing but the hunter himself. The game would have no earmarks to show whether it was taken or killed in the open or the closed season, and hence conviction under this statute would ordinarily be impossible, and the law would become practically a dead letter. In these days of cold-storage warehouses, the mere lapse of time after the expiration of the open season would furnish little aid in an effort to prove that the game had been taken or killed out of season.

State v. Rodman, 58 Minn. 393, 401 (1894). *See also, e.g.*, *Ex parte Maier*, 103 Cal. 476 (1894).

260. Equally unavailing were specific hunting and fishing guarantees in fundamental state law. The Massachusetts Body of Liberties of 1641 had declared that "every inhabitant that is an householder shall have free fishing and fowling in any great ponds and bays, coves and rivers, so far as the sea ebbs and flows . . . unless the freemen of the same town or the general court have otherwise appropriated them." *Commonwealth v. Bailey*, 95 Mass. (1 Allen) 541, 541 (1866) (quotations omitted). But a Massachusetts court relied upon the authority of "freemen" to "appropriate" the resource to authorize state restrictive wildlife regulation. *Id.* at 542. So, too, the Vermont Constitution guaranteed citizens "liberty, in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed," but the court validated restrictions based upon a further proviso in the constitution which allowed the legislature to make "proper regulations." *State v. Norton*, 45 Vt. 258, 259 (1872). A subsequent Vermont case observed, "Liberty to fish under this clause of the constitution is not an absolute, untrammelled right, but a right under a limitation. It is a right to fish at seasonable times and under proper regulations." *Drew v. Hilliker*, 56 Vt. 641, 646-47 (1884).

261. 94 U.S. 391 (1876).

262. *Id.* at 396. *See, e.g.*, *State v. Tower*, 84 Me. 444 (1892) (state application of the *McCready* doctrine).

263. *Allen v. Wyckoff*, 2 A. 659 (N.J. 1886); *Bittenhaus v. Johnston*, 92 Wis. 588 (1896).

264. *State v. Medbury*, 3 R.I. 138 (1855).

clause²⁶⁵ and takings without compensation arguments²⁶⁶ fared no better. Sport had complete victory in the legislature, and in the courts.

XIII. CONCLUSION

Oddly enough, sport had it right. Wildlife's greatest value was not its carcass.²⁶⁷ But rather than limit its campaign to this clear truth, sport focused upon the supposed moral defects of its opponents. The working class subsistence hunters and marketmen were doomed by the economics of intensive agriculture, but they were no less "manly" than the gentlemen of leisure. By tarring these rivals as immoral, sport sought freedom from responsibility for ousting them from their traditional source of sustenance. Willful blindness may have unexpected costs. Sport was unable to see the truth about its other opponent, the Indians. The white government had pledged its honor to abide by the hunting and fishing treaties. The wildlife sport stole from the Indians was scant recompense for the stain of dishonor upon the white government that betrayed its solemn faith.

265. *Ex parte Maier*, 103 Cal. 476 (1894).

266. *State v. Blount*, 85 Mo. 543 (1885).

267. Late nineteenth century wildlife law enshrined sport as the highest good; twentieth century wildlife law manifests an increasing emphasis upon ecological, esthetic, ethical and religious values.