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# Unintended Consequences of Migrating Bird Protection Statutes

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# Unintended Consequences of Migrating Bird Protection Statutes:

## PREFACE

I grew up in a small town in northern New Jersey about twenty miles from New York City. Summers were spent at local parks playing baseball and there were no locks on school lockers. Its picturesque qualities made it a common filming location for movies and television shows.<sup>1</sup> However, this made-for TV community is slowly but surely transforming from the quiet and clean place of my youth to a noisy and dirty cesspool. New residents have taken over my hometown and defecated on the scenery. Who are these new residents? Canada Geese. Yes, these geese have caused thousands of dollars in property damage, taken over the parks for nesting, and polluted our open space with their feces. Unfortunately, mine is too common a tale, but no more. It is time to equip communities with the tools they need to restore order and clean up their towns.

## SUMMATION OF PRINCIPAL ARGUMENT

The term ‘Nuisance Geese’ has become a common term among community leaders across the country as more and more flocks cease migrating and become residents in American communities.<sup>2</sup> The rapid population growth and altered migration habits of the Canada Goose are taking a major toll on communities as the cost to ensure the health and safety of residents skyrockets.<sup>3</sup> Further complicating the matter, conservation legislation and administrative agencies inhibit community leaders’ ability to act. Municipalities, administrative agencies, animal protection groups, and land owners struggle to resolve the Canada Geese problem currently plaguing communities across America. Communities should therefore be provided

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<sup>1</sup> See *In & Out* (Paramount Pictures 1997) and *Ed* (NBC Studios) et al.

<sup>2</sup> Loriann Vita, WILDLIFE MANAGEMENT OF CANADA GEESE IN NEW YORK STATE: A DEPARTURE FROM THE EXPRESS POLICIES OF NEW YORK’S ENVIRONMENTAL CONSERVATION LAW, 13 *Pace Env’tl. L. Rev.* 399, 400 (*Pace Univ. L. Rev.* 1995).

<sup>3</sup> FINAL ENVIRONMENTAL IMPACT STATEMENT ON CANADA GOOSE. *Federal Register* Vol. 70, No. 222, FR Doc. 05-22813, Dept. of Agriculture, Fish and Wildlife Services, Chapter I, pg. 10, Table I-2 (Nov. 18, 2005).

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with a tool box through which they may rectify the gross inequity between protecting the Canada Goose and the burdens placed on municipal resources. The tool box should include national or state funding for additional expenses related to environmental mandates, the ability to remove or destroy animals that threaten public health and safety, expert consultation with specialized attorneys, expedited appeals process for mandates that exceed the realm of reasonability, and a standardized method of removal or destruction. The aim of the tool box would be to create a collaborative effort within communities, animal rights groups, administrative agencies, and other stakeholders rather than the power struggle as presently constituted.

Understanding the complexities of the Canada Goose problem requires an understanding of conservation and animal protection history. Throughout the course of modern of our country's history the good intentions of federal legislation can sometimes generate significant unanticipated consequences. No better example can be found than in the progression of migratory bird protection legislation. Starting with the Lacey Act,<sup>4</sup> passed on May 25, 1900, legislation protecting migratory birds has become more and more prevalent. There are several federal laws that impact the Canada Goose problem but paramount amongst these laws is the Migratory Bird Treaty Act of 1918 and its amendments.<sup>5</sup> This law was created to provide sanctuary to birds originally that originally flew between, Canada, and the United States.<sup>6</sup>

Since then, several different treaties and the irmember nations have varied over time; however, the main goal of preventing the hunting, capturing, killing, or possession of listed migratory birds remains paramount.<sup>7</sup> The Canada Goose is listed as a protected bird by the

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<sup>4</sup> Lacey Act Amendments of 1981, Pub. L. No. 97-79, SS 2-9, 95 Stat. 1073, 1073-80 (1981) (codified as amended at 16 U.S.C. §§ 3371-3378 (1988 & Supp. V 1993)).

<sup>5</sup> 16 U.S.C. §§703-708 and 710-712.

<sup>6</sup> Id.

<sup>7</sup> 16 U.S.C. §§703(a).

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regulations of the Department of Fish & Wildlife.<sup>8</sup> Accordingly, these harsh restrictions on the ability to eliminate, transport, or capture the Canada Goose has caused problems when the protected birds become common pests.

Administrative agencies, legislatures, and animal protection organizations have proposed various methodologies for controlling the Canada Goose when they have become permanent residents in a neighborhood. Unfortunately, currently there remains a strict liability on all persons that harm a Canada Goose, which leads to a number of instances of disparate treatment. Providing municipalities and property owners with a reasonable and clear method of removal would help to limit the resident goose burden. Presently, there are several commonalities found in the methodologies for controlling the Canada Goose population in an area.

There Department of Fish and Wildlife Services has established several ‘flyaway’ regions that are plagued by the Canada Goose. Although each flyaway region consists of several different states, there are common methods within each region that have been established as the clearly acceptable means of handling the geese. Providing communities with a process through which an alternative approach could be legitimized would help to improve the relationship between all stakeholders and provide yet another important tool. Further, reclassifying the Resident Canada Goose from the general limitation of the Migratory Bird Treaty Act to property controlled and owned by the respective state would allow each to determine the best method for controlling its particular environment. This would enable the removal of federal oversight and facilitate actions of local jurisdictions unrestrained by the rules inhibiting them whilst under the Department of Agriculture. These recommendations will be further analyzed in the latter part of this paper.

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<sup>8</sup> Title 50 part 10 subpart B § 10.13(c)(1) List of Migratory Birds. Cite might be 75 FR 9299, Mar. 1, 2010

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### I. THE CANADA GOOSE

The Canada Goose is found in every one of the continental United States and Alaska.<sup>9</sup> There are eleven types of Canada Goose, but the traditional *Branta Canadensis* and the Giant Canada Goose or *Branta Canadensis Maxima* are the two most commonly known in the United States.<sup>10</sup> The unifying characteristics of the Canada Goose are their long black necks with white and black heads and brown-grey speckled body.<sup>11</sup> Their diet consists of submergent vegetation, grass, and small grains.<sup>12</sup> Accordingly, their diet leads to many nesting grounds located on open spaces next to bodies of water.<sup>13</sup>

The Canada Goose normally lives to be approximately twenty years old and begins breeding at the age of two.<sup>14</sup> The Canada Goose began nesting in urban areas of the US about sixty years ago.<sup>15</sup> Since then they have increased in population from 250,000 in 1970 to 3,500,000 in 2010.<sup>16</sup> The exponential growth in population can be attributed to enforced protection laws, long lives, and large clutch sizes of about six eggs per breeding season.<sup>17</sup> Interestingly, a Canada Goose whose nest is destroyed will often establish a second nest to lay a replacement clutch of eggs.<sup>18</sup> A female goose will hatch about fifty eggs during the course of its

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<sup>9</sup> Drake and Joseph Paulin, A GOOSE IS A GOOSE? IDENTIFYING DIFFERENCES BETWEEN MIGRATORY AND RESIDENT CANADA GEESE. Rutgers Cooperative Research & Extension FS1024.

<sup>10</sup> Id. at p. ??

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> WHEN GEESE BECOME A PROBLEM, New York State Department of Environmental Conservation Division of Fish, Wildlife and Marine Resources and The U.S. Dep. of Agriculture: Animal and Plant Health Insp. Service. 2, May 2007.

<sup>15</sup> Gosser, A. L., M. R. Conover, and T. A. Messmer. 1997. MANAGING PROBLEMS CAUSED BY URBAN CANADA GEESE. Berryman Institute Publication 13, Utah State University, Logan, 8pp.

<sup>16</sup> ESTIMATING THE VALUE OF RESIDENT CANADA GOOSE DAMAGE, National Wildlife Research Center, U.S. Dep. of Agriculture, Nov. 2011.

<sup>17</sup> Id.

<sup>18</sup> David Drake and Joseph Paulin, A GOOSE IS A GOOSE? IDENTIFYING DIFFERENCES BETWEEN MIGRATORY AND RESIDENT CANADA GEESE. Rutgers Cooperative Research & Extension FS1024.

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lifetime.<sup>19</sup> The long life of the Canada Goose along with its reproductive capabilities and lack of natural predators in urban areas has made controlling its population a significant and complicated issue.

### II. MAJOR PROBLEMS WITH THE CANADA GOOSE

Human – Canada Goose conflict can be traced to three primary concerns which, over time, have altered the relationship from symbiotic to confrontational. 1) the development of a new subspecies, the over population of the resident Canada Goose's impact on personal property and local ecosystems, and the aggressive behavior of the Resident Canada Goose during certain seasons as they try to protect their nests.

The Resident Canada Goose has developed as a new subspecies within the Canada Goose genealogy.<sup>20</sup> This new subspecies has had a population growth that vastly outpaces other more recognized heritage lines.<sup>21</sup> In doing so, the implications of diseases and ecological impact of the animals have increased as the rise in population found in concentrated areas of human residences has increased the number of contacts associated with human and goose interaction.<sup>22</sup> This causes a general conflict? in Human and Goose interactions as the physical attacks by geese on humans increase. The Resident Canada Goose is known in particularity for its aggressive behavior towards humans during mating season.<sup>23</sup> The aggressive nature of the beasts is all the

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Maria Sjolund, DISSEMINATION OF MULTIDUG-RESISTANT BACTERIA INTO THE ARCTIC, *Emerging Infectious Diseases*, Centers for Disease Control and Prevention, Vol. 14, No. 1, 70, 71, (Jan. 2008).

<sup>23</sup> "Division of Wildlife Goose Attacks," Ohio Department of Natural Resources, Division of Wildlife, Goose Conflict Sheet No. 3. (2000).

No empirical evidence was discovered that provides a full discussion of the number or frequency of Canada Goose attacks; however, a youtube.com search will provide numerous examples of Canada Goose attacks. See e.g. "Duck! Nesting Goose Attacks Man", Available at <http://abcnews.go.com/US/video/duck-nesting-geese-attacks-man-15928271>, ABC News Corp. (Mar. 15, 2012).

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more reason to ensure that localities are endowed with the proper tools to defend themselves from the invaders.

This conflict has now created a violation of the intent of the presiding law and demands that the legislature, judiciary, and appropriate administrative agencies take corrective action as needed to rectify the problems faced by communities across the country. The original intent of the Migratory Bird Treaty Act was the “preservation of such migratory birds as are either useful to man or are harmless.”<sup>24</sup> The dramatic influx of the Resident Canada Goose has contaminated some open spaces and water areas to such an extent that they must be closed for cleaning.<sup>25</sup> The fact that the new subspecies does not leave state jurisdictional lines provides the opportunity to reclassify the Resident Canada Goose as a domestic animal and thereby cease to constrain localities by the international treaties and domestic federal administrative agencies. Such action is needed so that communities could take the appropriate action without fear of reprisal. Accordingly, reclassifying the Resident Canada Goose as a domestic animal is the first necessary step to protecting the health and safety of communities and providing for the possibility in improvement of Human and Goose relations.

### *A. Development of the New Subspecies*

Dr. David Drake and Joseph Paulin first began an investigation to determine why so many gaggles of the Canada Goose have ceased migrating to take residency in a singular location. Their research indicated that the traditional Migratory Canada Geese are in fact a different subspecies from the Resident Goose currently populating places like the Eastern and

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<sup>24</sup> Woodrow Wilson, Preamble to the Convention with Great Britain: A Proclamation (Aug. 16, 1916).

<sup>25</sup> See generally, Matthew Swallow and Jane Huffman, “THE EFFECT OF GOOSE MANAGEMENT ON WATER QUALITY,” Study by the U.S.D.A. APHIS Wild Life Services, (Nov. 16, 2010).

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Mid-western United States.<sup>26</sup> In the early 1900s, domesticated Canada Geese--previously used as decoys in hunting--were released into the wild.<sup>27</sup> Having been retained in singular locations and bred to reduce migrating instincts, these newly released birds began breeding across the United States and southern Canada.<sup>28</sup> Some researchers believe that the development of the Resident Canada Goose can be traced to a “stocking” of forty-one geese that were transplanted from the Midwest to the Black Water National Wildlife Refuge in Maryland.<sup>29</sup>

No apparent physical differentiation can be made between the Resident and the Migratory Canada Goose.<sup>30</sup> Resident geese appear to be geese that simply have gradually stopped their annual migration path.<sup>31</sup> Banding studies have shown that Resident geese will return to places of their birth during mating season; it also explains why removal of Resident geese may prove to be difficult.<sup>32</sup> Moreover, Resident geese have a higher survival rate and therefore often live longer than their migratory counterparts. This occurs largely because they nest in more favorable areas and limit their exposure to hunting by staying in one location.<sup>33</sup>

### *B. Contamination and Feces*

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<sup>26</sup> David Drake and Joseph Paulin, A GOOSE IS A GOOSE? IDENTIFYING DIFFERENCES BETWEEN MIGRATORY AND RESIDENT CANADA GEES. Rutgers Cooperative Research & Extension FS1024 (2003).

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> “CONTROLLING CONFLICTS WITH RESIDENT CANADA GEES IN MARYLAND,” Maryland Department of Natural Resources, Wildlife and Heritage Service, available at [http://www.dnr.state.md.us/wildlife/Hunt\\_Traps/waterfowl/geese/ResGeeseProblem.asp](http://www.dnr.state.md.us/wildlife/Hunt_Traps/waterfowl/geese/ResGeeseProblem.asp) last viewed on Oct. 4, 2012.

<sup>30</sup> David Drake and Joseph Paulin, A GOOSE IS A GOOSE? IDENTIFYING DIFFERENCES BETWEEN MIGRATORY AND RESIDENT CANADA GEES. Rutgers Cooperative Research & Extension FS1024 (2003).

<sup>31</sup> “CONTROLLING CONFLICTS WITH RESIDENT CANADA GEES IN MARYLAND,” Maryland Department of Natural Resources, Wildlife and Heritage Service, available at [http://www.dnr.state.md.us/wildlife/Hunt\\_Traps/waterfowl/geese/ResGeeseProblem.asp](http://www.dnr.state.md.us/wildlife/Hunt_Traps/waterfowl/geese/ResGeeseProblem.asp) last viewed on Oct. 4, 2012.

<sup>32</sup> Id. *see also* Ted Nichols, “CANADA GOOSE BANDING IN THE ARTIC,” New Jersey Division of Fish and Wildlife (2001)

<sup>33</sup> Id.



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The Canada Goose is a known carrier of pathogens such as Cryptosporidium, Giardia, Salmonella, and E. Coli.<sup>34</sup> Scientists, communities and administrative agencies have expressed grave concern about the contamination of waterways in the United States from the over saturation of geese feces.<sup>35</sup> The Center for Disease Control and Prevention has found the bacteria in the Canada Goose to contain antimicrobial resistant strains of E. Coli.<sup>36</sup> In a 2009 study of the water near the nests of the Canada Goose in various locations across the United States, it was apparent that 100% of the water samples displayed the presence of E. coli as a direct result of the geese's defecation.<sup>37</sup> This increase in bacteria in the water supply can impact not only the quality of the drinking water but also the recreational facilities in the area.<sup>38</sup> Beaches and other waterways have been closed when the contamination levels of geese feces has reached contagion levels<sup>39</sup> This often arises in late summer when swimming is at its peak.<sup>40</sup>

An adult Canada Goose can grow to be as large as 20 pounds.<sup>41</sup> Geese defecate between one and three pounds per day in twenty-eight to ninety-two bowl movements.<sup>42</sup> Many municipal water filtration systems are able to eliminate the E. Coli and other pathogens that are common in geese feces.<sup>43</sup> The United State Department of Agriculture has taken proactive steps to move the

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<sup>34</sup> Joseph Paulin and David Drake, Positive Benefits and Negative Impacts of Canada Geese, Rutgers Cooperative Research & Extension FS1027.

<sup>35</sup> Matthew P., B n.d., 'NEW TOOL IN THE WAR ON GEESE: LIGHT HAS UNWANTED VISITORS SEEING RED', *Philadelphia Inquirer, The (PA)*, Newspaper Source Plus, EBSCOhost, viewed 4 October 2012.

<sup>36</sup> Maria Sjolund, DISSEMINATION OF MULTIDUG-RESISTANT BACTERIA INTO THE ARCTIC, *Emerging Infectious Diseases*, Centers for Disease Control and Prevention, Vol. 14, No. 1, 70, 71, (Jan. 2008).

<sup>37</sup> Matthew Swallow and Jane Huffman, "The Effect of Goose Management on Water Quality," Study by the U.S.D.A. APHIS Wild Life Services, (Nov. 16, 2010).

<sup>38</sup> Id.

<sup>39</sup> Polta, A 2012, 'WATER CONDITIONS TRIGGER CLOSING OF ROBBINS ISLAND SWIMMING BEACH', *West Central Tribune (Willmar, MN)*, 8 August, Newspaper Source Plus, EBSCOhost, (last viewed Oct. 4, 2012).

<sup>40</sup> Id.

<sup>41</sup> Matthew P., B n.d., 'New TOOL IN THE WAR ON GEESE: LIGHT HAS UNWANTED VISITORS SEEING RED', *Philadelphia Inquirer, The (PA)*, Newspaper Source Plus, EBSCOhost, viewed 4 October 2012.

<sup>42</sup> Matthew Swallow and Jane Huffman, "THE EFFECT OF GOOSE MANAGEMENT ON WATER QUALITY," Study by the U.S.D.A. APHIS Wild Life Services, (Nov. 16, 2010).

<sup>43</sup> Matthew P., B n.d., 'NEW TOOL IN THE WAR ON GEESE: LIGHT HAS UNWANTED VISITORS SEEING RED', *Philadelphia Inquirer, The (PA)*, Newspaper Source Plus, EBSCOhost, viewed 4 October 2012.

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nesting locations of Resident geese gaggles to avoid over contamination. The Resident geese cause a problem because their rapid expansion in population, constant excretion, and failure to migrate do not give local ecosystems a chance to breakdown and clear the fecal matter.<sup>44</sup> It is becoming a common occurrence that public water sites are being closed from contamination of *E. coli* directly connected to a Canada Goose population.<sup>45</sup>

The Canada Goose is also a known carrier of viral diseases that impact both humanity and agriculture.<sup>46</sup> The Canada Goose is a transmitter of the Avian Influenza which has killed more than 17 million birds between 1983-1984.<sup>47</sup> A strand of the Avian Influenza called H1N1 also caused several deaths in America during 1997.<sup>48</sup> Regardless of whether the diseases arise from bacteria, like *Salmonella*, or a virus, like the H1N1, the transmission most often does not occur from direct contact with the Canada Goose, but rather from its fecal matter.<sup>49</sup>

### *C. When Geese Attack*

The damage caused by the Canada Goose can be both financial as well as physical. Attacks on humans have become frequent as the population of geese has risen.<sup>50</sup> The Canada Goose has attacked and caused head injuries, broken bones, and emotional distress.<sup>51</sup> The financial implications can be distributed amongst several categories: agriculture, commercial, recreational, and personal property. Wildlife agencies across the country receive

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<sup>44</sup> Id.

<sup>45</sup> See e.g. Polta, A 2012, 'WATER CONDITIONS TRIGGER CLOSING OF ROBBINS ISLAND SWIMMING BEACH', *West Central Tribune (Willmar, MN)*, 8 August, Newspaper Source Plus, EBSCOhost, viewed 4 October 2012 and Stewart, D 1992, 'No Honking Matter', *National Wildlife (World Edition)*, 31, 1, p. 40, Science Reference Center, EBSCOhost, viewed 4 October 2012.

<sup>46</sup> Larry Clark, A REVIEW OF PATHOGENS OF AGRICULTURAL AND HUMAN HEALTH INTEREST FOUND IN THE CANADA GEESE, USDA, APHIS, Wildlife Services, National Wildlife Research Center, Proceedings of the 10<sup>th</sup> Wildlife Damage Management Conference, (2003) 326.

<sup>47</sup> Id.

<sup>48</sup> Id. at 328.

<sup>49</sup> Id. at 327.

<sup>50</sup> Id. at 13 and 14.

<sup>51</sup> "DIVISION OF WILDLIFE GOOSE ATTACKS," Ohio Department of Natural Resources, Division of Wildlife, Goose Conflict Sheet No. 3. (2000).

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complaints about damage or nuisance of Canada Geese and other animals. A 1999 U.S. Dept. of Agriculture report by Fish & Wildlife Services indicated that in many states more than half the complaints about animals are complaints specifically about the Canada Goose.<sup>52</sup> Several states, such as Delaware, Pennsylvania, Ohio, Kansas, and South Dakota, typically receive hundreds of complaints each year accounting for more than 90% of the total complaints about animals resulting in millions of dollars in damages annually in each state.<sup>53</sup>

The aviation community and especially commercial airliners have also experienced significant problems with Resident Canada geese in light of their presumably unintentional attacks on planes during take-offs and landings.<sup>54</sup> Canada Geese flocks were reported to have stucken 1,181 aircraft between 1990 to 2008.<sup>55</sup> This caused more than \$50 million dollars in damages to the aircraft and cost the lives of 28 Americans.<sup>56</sup> Experts believe that there are many more strikes than recorded on the Aviation Administration National Wildlife Strike Database, because both large airline conglomerates and private charters do not want to be held up completing paperwork or because doing so would produce such a high number it might frighten people out of flying.<sup>58</sup>

### III. HISTORY OF MIGRATING BIRD LEGISLATION

The Lacey Act of 1900<sup>59</sup> was the first national wildlife protection legislation.<sup>60</sup> The primary goal of this statute focused on the protection and interstate commerce of protected bird

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<sup>52</sup> Final Environmental Impact Statement on Canada Goose. Federal Register Vo. 70, No. 222, FR Doc. 05-22813, Dept. of Agriculture, Fish and Wildlife Services, Chapter I, pg. 10, Table I-2 (Nov. 18, 2005).

<sup>53</sup> Id.

<sup>54</sup> Micheline Maynard, "BIRD HAZARD IS PERSISTENT FOR PLANES" Jan. 16, 2009 NY Times.

<sup>55</sup> Canada Goose Management Website of the University of Nebraska-Lincoln, CANADA GEESE DAMAGE MANAGEMENT "HUMAN SAFETY ISSUES", Internet Center for Wildlife Damage Management, (2008) available at <http://icwdm.org/handbook/birds/canadageese/humansafety.aspx>, (last viewed Oct. 16, 2012).

<sup>56</sup> Id.

<sup>58</sup> Supra note 55.

<sup>59</sup> 16 U.S.C. §3371-3378 (1900).

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species.<sup>61</sup> Prior to the Lacey Act, many states had already attempted to limit or control the hunting of birds in their respective jurisdictions.<sup>62</sup> However, the Supreme Court in *Geer v. Connecticut* significantly limited the security that the local laws provided by denying states' the right to prevent game from entering interstate commerce.<sup>63</sup> The Court found that a Connecticut law that allowed for the capture or destruction of a duck that could then be brought to sale within the bounds of Connecticut could not deny a person's right to take such legally owned property into another state.<sup>64</sup> This ruling enabled hunters to continue to travel across state lines to fulfill demand, thereby circumventing the very intent of the law.

To create a uniform interpretation and protection of migratory birds, Congress enacted the Lacey Act and provided power to the Department of Agriculture to regulate the capture and destruction of migratory birds.<sup>65</sup> The Lacey Act was an effective method for stopping the transportation of protected birds across state lines. The Lacey Act ultimately failed at least a part of its intended goal because its reach failed to encompass the hunting regulations within each state's jurisdictional boundaries.?? Therefore in the jurisdictions that did not provide local protection to the migratory birds against? hunting still occurred.

The Lacey Act is still in effect today but now it plays a different role.<sup>66</sup> The Lacey Act is used by several organizations in their attempt to protect threatened species of all kinds and not

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<sup>60</sup> Robert S. Anderson, THE LACEY ACT: AMERICA'S PREMIER WEAPON IN THE FIGHT AGAINST UNLAWFUL WILDLIFE TRAFFICKING, 16 Pub. Land L. Rev. 27, 29 (Public Land Law Review 1995).

<sup>61</sup> Id.

<sup>62</sup> See generally *Geer v. Conn.*, 161 U.S. 519 (1896). Overturned by *Hughes v. Oklahoma* 441 U.S. 322 (1979).

<sup>63</sup> Id.

<sup>64</sup> Id. at 529.

<sup>65</sup> Robert S. Anderson, THE LACEY ACT: AMERICA'S PREMIER WEAPON IN THE FIGHT AGAINST UNLAWFUL WILDLIFE TRAFFICKING, 16 Pub. Land L. Rev. 27, 31 (Public Land Law Review 1995).

<sup>66</sup> The Lacey Act now includes plants as well as animals. It made a large splash in 2011 when the Tennessee plant for Gibson Guitar was raided for failing to certify wood used in some of its guitars. Craig Havighurst, WHY GIBSON GUITAR WAS RAIDED BY THE JUSTICE DEPARTMENT. NPR (Aug. 30, 2011) available at <http://www.npr.org/blogs/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department>. (last viewed Nov. 27, 2012).

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merely fowl.<sup>67</sup> The inherent failure of the Lacey Act to effectively moderate the destruction of migratory birds forced Congress to take additional action. The primary alteration in the protection of bird protection came from the passage of the Weeks-McLean Act, the precursor to the Migratory Bird Treaty Act and the Migratory Bird Conservation Act.<sup>68</sup>

The Weeks-McLean Act of 1913 is also known as the Governmental Powers in General Act of 1913.<sup>69</sup> The Weeks-McLean Act was placed in service during a time of conservative actions by the Supreme Court as it relates to the authority of the various branches of government.<sup>70</sup> Primarily, the Courts were concerned with the expansion of power by Congress to delegate power to administrative agencies as ?? Several cases related to the authority of the Department of Agriculture's authority under the "Welfare Clause."<sup>72</sup> Needs work The Welfare Clause relates to Congress' delegation and policing authority as it relates to State action.<sup>73</sup>

In *U.S. v. McCullagh*, the ability of the found?? that the actions of Congress to give the Department of Agriculture such policing power was not within its authority as it relates to the capture or destruction of ducks.<sup>74</sup> In that case Mr. McCullagh was charged with the destruction of a wild duck that was protected under the Migratory Bird Act of 1913 but had conducted the action during a valid hunting season under state law.<sup>75</sup> Mr. McCullagh successfully argued that *Geer* had no applicability in his case because the state's authority to "control and regulate the

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<sup>67</sup> Id. at 34 *citing* 16 U.S.C. § 3371(g)(1998).

<sup>68</sup> George Coggins & Sebastian Patti, THE RESURRECTION AND EXPANSION OF THE MIGRATORY BIRD TREATY ACT, 50 U. Colo. L. Rev. 165,169 (Winter 1979).

<sup>69</sup> Appropriation Act for the Department of Agriculture, 37 Stat. 828, 847, c. 145 (62d Cong. 3d Sess.) Mar. 4, 1913.

<sup>70</sup> See generally *Panama Refining Co. v. Ryan*, *Schechter Poultry v. U.S.*, and *Carter v. Carter Coal*.

<sup>72</sup> See e.g. *U.S. v. Shauver* 214 F. 154 (E.D. Ark. 1914) and *U.S. v. McCullagh*, 221 F. 288, 290 (1<sup>st</sup> Div. Kan. 1915).

<sup>73</sup> *McCullagh* at 290.

Subsection 2 of section 3, article 4 of the Constitution -

“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state.”

<sup>74</sup> *McCullagh* at 291.

<sup>75</sup> Id. at 289.

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taking of game cannot be questioned.”<sup>76</sup> For that reason, both the McCullagh and Shauver courts found that the Migratory Bird Act of 1913 did not create a policing power as it relates to the hunting season within a state or jurisdiction.<sup>77</sup> Shauver?? Fn In doing so, the Court left the power to control the capture and destruction of animals within its borders as a state action. Later expansion of federal powers over these animals would eventually provide the cause for the unintended consequences of the Resident Canada Goose and the harm that these animals have since taken on communities. As will be asserted, a return to this standard would properly ease the red-tape that currently surrounds communities as they attempt to protect their health, safety, and personal property.

Not to be deterred by the constraints of the Constitution, Secretary of State Lansing in 1918 agreed to a treaty between the United States and Great Britain, as the controller of Canada.<sup>78</sup> The Migratory Bird Treaty Act of 1918 was subsequently codified in the 16 U.S.C. §701et seq. in 1918.<sup>79</sup> Ironically, President Woodrow Wilson made a proclamation in the Preamble to the Convention with Great Britain stating that the Convention was designed for the “preservation of such migratory birds as are either useful to man or are harmless.”<sup>80</sup> The explicit premise for protecting Canada Geese was because they were harmless; but, a huge disconnect has subsequently arisen between the administration of the law and its intended goal since these protected geese are now causing substantial economic damage and threatening the health and

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<sup>76</sup> Id. at 293 citing *Geer* at 519. See also, *Ward v. Race Horse* 163 U.S. 504 (1896).

<sup>77</sup> See *id.* and *Shauver* 214 F. 154 (E.D. Ark. 1914).

<sup>78</sup> George Coggins & Sebastian Patti, *THE RESURRECTION AND EXPANSION OF THE MIGRATORY BIRD TREATY ACT*, 50 U. Colo. L. Rev. 165,169 (Winter 1979).

<sup>79</sup> Jul 3, 1918, c. 128, § 2, 40 Stat. 755

<sup>80</sup> Woodrow Wilson, Preamble to the Convention with Great Britain: A Proclamation (Aug. 16, 1916).

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safety of communities. The unintended consequences of the protection of the Canada Goose has thus resulted in thousands of dollars in property damage to communities across the country.<sup>81</sup>

Facing a similar challenge to its predecessor, The Migratory Bird Treaty Act was attacked in several jurisdictions; however, this time the language of the statute would survive a Constitutional challenge. In *Missouri v. Holland*,<sup>82</sup> the State of Missouri challenged the constitutionality of The Migratory Bird Treaty Act. Should be fn the state argued that the adoption of the treaty by Congress was unconstitutional as the law was substantially similar to that of the Migratory Bird Act, previously stricken down in *Geer*.<sup>83</sup> Therefore, the State sought to prohibit game wardens, such as Mr. Holland, from enforcing the law.<sup>84</sup>

The challenge was eventually appealed to the Supreme Court of the United States which upheld the lower courts determination that--althoughthe Migratory Bird Act was unconstitutional-- the Migratory Bird Treaty Act is constitutional.<sup>85</sup> The Court distinguished *U.S. v. Shauver*,<sup>86</sup> *U.S. v. McCullagh*,<sup>87</sup> and *Geer v. Conn.*<sup>88</sup> from *Missouri* because of the difference in the questions presented. In *Missouri*, the Court did not review the impact that the constitutional? the delegation powers of Congress and instead looked at the executive administrative authority of the president. No previous precedence was applicable to the Migratory Bird Treaty Act because “they cannot be accepted as a test of the treaty power. Acts of

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<sup>81</sup> Stephen Tan, THE WATCHTOWER CASTS NO SHADOW: NONLIABILITY OF FEDERAL AND STATE GOVERNMENTS FOR PROPERTY DAMAGE INFLICTED BY WILDLIFE, 61 U. Colo. L. Rev. 427, 433-435 (1990).

<sup>82</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 435.

<sup>86</sup> *Shauver*, 214 Fed. 154 (E.D. Ark. 1914).

<sup>87</sup> *McCullagh* 221 F. 288 (1<sup>st</sup> Div. Kan. 1915).

<sup>88</sup> *Geer*, 161 U.S. 519 (1896).

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Congress are the supreme law of the land only when made in pursuance of the constitution, while treaties are declared to be so when made under the authority of the United States.”<sup>89</sup>

Now a stalwart in the expansion of migratory bird enforcement,?? *Missouri’s* form over substance approach is inappropriate in many situations because it does not provide a fail safe for state actions. Birds placed under the protection of the Migratory Bird Treaty Act are done in their entirety and no review is found in the bounds of the statute to enable a state to show that an animal or group of animals live their lives within their state and do not have a high likelihood to transverse the political boundaries that is underpinning of their protection. This oversight should be corrected so that communities and states as a part of the community toolbox and by this means furthering independent common sense solution possibilities by stakeholders and removing the actual and fiscal burdens of oversight from the federal government.

### IV. PRESENT STATE OF MIGRATORY BIRD LAWS

Presently, the Migratory Bird Treaty Act is unsurpassed in its authority to govern both federal and state action as it applies to the Canada Goose. The overarching nature of the law inhibits appropriate community action as it relates to the Resident Canada Goose. The places of concern for communities can be grouped into three?r major categories: (1), lack of funding for damages; (2), concern resulting from strict liability for harm to the animals; and third, administrative oversight. For the proposed toolbox to be effective the Resident Canada Goose must be removes from having the improper designation as a migratory bird. This will allow states to control the animals under their jurisdictional guidelines and not be constrained by national regulations and oversight.

#### *A. Lack of Funding for Damages*

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<sup>89</sup> Missouri at 433.



## Unintended Consequences of Migrating Bird Protection Statutes:

The Resident Canada Goose can cause various types of significant damage., which can range from eating crops to contamination of water supplies. Moreover, although the federal government inhibits a community's ability to act, it concurrently fails to provide any funding for damage done to property or person.<sup>90</sup> Geese have proven throughout history to be a cause of concern as they have damaged personal property across America.<sup>91</sup> Further, the Canada Goose has been a focal point as the courts determined liability for damages to property by wildlife. Put in Fn?

*Sickman v. U.S.* is a seminal case in determining ownership rights of a sovereignty and the liability that it holds for damage performed by wildlife over whom it has elected to provide protection. In 1950? Charles Sickman sought recovery for damages under the Federal Tort Claims based on destruction of his crops by Canada geese during 1946 and 1947<sup>92</sup> Foremost in his argument was that the United States had taken ownership of all migratory birds, including the Canada Goose, when it entered into a treaty with Mexico and Great Britain.<sup>93</sup> The federal district court, however, denied this claim on similar construction to what? because the United States and its agencies could not have ownership of the migratory birds because they would leave the United States and therefore were not in its? actual possession.<sup>94</sup> Based on this decision, the government's failure to satisfy land owners whom were damaged by wild geese leaves millions in un-recouped property damage across the country.<sup>95</sup>

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<sup>90</sup> Stephen Tan, THE WATCHTOWER CASTS NO SHADOW: NONLIABILITY OF FEDERAL AND STATE GOVERNMENTS FOR PROPERTY DAMAGE INFLICTED BY WILDLIFE, 61 U. Colo. L. Rev. 427,437 (1990).

<sup>91</sup> See e.g., Bishop v. U.S. 126 F.Supp. 449 (1954), Sickman v. U.S. 184 F.2d 616 (7<sup>th</sup> Cir. 1950), and Collopy v. Wildlife Commission, 25 P.2d 994 (Colo. 1981).

<sup>92</sup> Sickman v. U.S. 184 F.2d 616 (7<sup>th</sup> Cir. 1950).

<sup>93</sup> Id. at 617.

<sup>94</sup> Id. at 618.

<sup>95</sup> Joseph Gabig, LARGE CANADA GEESE IN THE CENTRAL FLYWAY: MANAGEMENT OF DEPREDATION, NUISANCE AND HUMAN HEALTH AND SAFETY ISSUES, The Central Flyway Council 17-18 (Mar. 24, 2000).

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Indirectly, the federal government has determined that the cost of Canada Goose management services should not be borne by federal taxes.<sup>96</sup> Accordingly, the federal government does not provide funding for towns to fulfill their obligation to remove the animals without capturing or killing them. This can result in substantial costs to local property taxpayers. Union County, New Jersey, has estimated that controlling the damage of the Canada Goose population could cost as much as \$205,000 annually and that the untreated animals could cause more than \$700,000 in damages each year.<sup>97</sup> Moreover, the State of Rhode Island has estimated that the cost of cleanup to sidewalks and lawns for each bird in the state is more than \$60 per bird and that population control methods can cost on average \$29.30 per bird.<sup>98</sup> It should also be borne in mind that there are now presently 3.5 million Canada Geese in the United States and their population has been steadily increasing.<sup>99</sup>

### *B. Strict Liability*

Strict liability has been placed on the capture or killing of any animal covered by the Migratory Bird Treaty Act.<sup>100</sup> There are two crimes associated with the Migratory Bird Treaty Act. The first is the misdemeanor provisions of 16 U.S.C. § 707(a), which require that strict liability be applied to any person or corporation that violates any section of the Migratory Bird Treaty Act and offenders may be fined up to \$15,000 and spend up to six months in jail.<sup>101</sup> If a person knowingly violates the law there is a fine of \$2,000 and a felony charge of up to two

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<sup>96</sup> Environmental Assessment, Reducing Canada Goose Damage Throughout the State of Rhode Island, Dept. of Agri. Animal and Plant Health Inspection Service (April 2010).

<sup>97</sup> *Id.*

<sup>98</sup> Environmental Assessment, REDUCING CANADA GOOSE DAMAGE THROUGHOUT THE STATE OF RHODE ISLAND, Dept. of Agri. Animal and Plant Health Inspection Service (April 2010), *and*, Joe Caudell, Modeling Costs of Using OVOCONTROL G FOR MANAGING NUISANCE CANADA GOOSE POPULATIONS, U.S. Wildlife Services, Nation Wildlife Research Center, Wildlife Damage Management Conference 49 (2007).

<sup>99</sup> *Id.*

<sup>100</sup> Jul 3, 1918, c. 128, § 2, 40 Stat. 755.

<sup>101</sup> 16 U.S.C. § 707(a)

## Unintended Consequences of Migrating Bird Protection Statutes:

years in jail.<sup>102</sup> Because of this potential liability, the utility industry remains highly impacted by the Migratory Bird Treaty Act in its every day operations to such an extent that full enforcement of the Migratory Bird Treaty Act would be devastating to its business.<sup>103</sup>

To ensure that utility companies can continue to function without violating the Migratory Bird Treaty Act, the U.S. Fish & Wildlife Service generally ignores the Act's strict liability clause and operates under a selective enforcement regime.<sup>104</sup> This selective enforcement, providing relief to certain industries, has been extended to organizations that take preemptive actions in their planning to ensure that their operations have only minimal impact on animal life.<sup>105</sup> The greatest lack of enforcement occurs in the wind energy production facilities in which communication and preplanning assures that most companies can operate without enforcement of the misdemeanor or felony clauses.<sup>106</sup> In a fn?

In addition to selective lack of federal enforcement, at least one federal court has ruled that an exemption should be given to other private industries., Recently, in *U.S. v. Brigham Oil & Gas, L.P.*<sup>107</sup> a North Dakota district court found that companies that have conducted oil operations are not strictly liable for violations of the Migratory Bird Treaty Act. The court decided that the Act only applies to “conduct directed at birds, such as hunting and poaching, not to acts or omissions that are merely the effect of incidental or unintended bird deaths.”<sup>108</sup>

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<sup>102</sup> 16 U.S.C. § 707(b)

<sup>103</sup> John McKinsey, REGULATING AVIAN IMPACTS UNDER THE MIGRATORY BIRD TREATY ACT AND OTHER LAWS: THE WIND INDUSTRY COLLIDES WITH ONE OF ITS OWN, THE ENVIRONMENTAL PROTECTION MOVEMENT, 28 Energy L.J. 71, Energy Bar Assoc. (2007).

<sup>104</sup> Id. at 78.

<sup>105</sup> Memorandum from U.S. Dep't of the Interior, Fish and Wildlife Service on Service Interim Guidance on Avoiding and Mitigating Wildlife Impacts from Wind Turbines (May 13, 2003), available at <http://www.fws.gov/habitatconservation/wind.pdf> (last viewed Oct. 24, 2012).

<sup>106</sup> John McKinsey, REGULATING AVIAN IMPACTS UNDER THE MIGRATORY BIRD TREATY ACT AND OTHER LAWS: THE WIND INDUSTRY COLLIDES WITH ONE OF ITS OWN, THE ENVIRONMENTAL PROTECTION MOVEMENT, 28 Energy L.J. 71, 82 Energy Bar Assoc. (2007).

<sup>107</sup> United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1204 (D.N.D. 2012).

<sup>108</sup> Id. at 1208.

## Unintended Consequences of Migrating Bird Protection Statutes:

The court found that imposing a strict liability would be repugnant to the fundamental purpose of the law as it would result in “many ordinary activities, such as driving a vehicle, owning a building with windows, or owning a car, inevitably cause migratory bird deaths.”<sup>109</sup>

The *U.S. v. Brigham Oil & Gas, L.P.*<sup>110</sup> ruling is significant? because it acknowledges the dynamic tension between human development and the need to protect wildlife. Interestingly, the court chose to retain strict liability in the *dicta* of the opinion for other circumstances, and thereby failed to extend that privilege to actions to protect other kinds of property or persons. Admittedly, the North Dakota court took an important first step in balancing the equities of the Migratory Bird Treaty Act against the needs of humankind; still the court should have furthered the ruling beyond “conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths”<sup>111</sup> and to any?? activity not hunting for pleasure or personal gain. The ruling shows the desperate treatment of each individual activity and each offender. An example of such disparity is that the hunting of one Canada Goose can result in a \$2,000 fine and possible prison sentence, but killing (unintentionally) hundreds of such birds at a power plant is not punishable. This example demonstrates that reform is needed to ensure equitable application of the law.

### V. GETTING RID OF THE GOOSE ALONG WITH THE GANDER

The federal protections of the Canada Goose significantly limit the variations of available remedies that states may enact.<sup>112</sup> However, an organization called Geese Peace has taken an active roll in furthering the humane methods of displacing Resident Canada Goose. The organization focuses on locations that have high likelihood of causing a goose – human

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<sup>109</sup> Id. at 1212.

<sup>110</sup> Id. at 12024.

<sup>111</sup> Id. at 1208.

<sup>112</sup> Geese Peace, Inc., available at <http://www.geesepeace.com>, (last viewed Oct. 21, 2012).

## Unintended Consequences of Migrating Bird Protection Statutes:

conflict.<sup>113</sup> To accomplish this goal, the organization works with registered communities of the National Fish and Wildlife Service to avoid using lethal methods in resolving their Resident Goose problems.<sup>114</sup> When this fails, the organization helps communities obtain both federal and state depredation orders.<sup>115</sup> It is submitted that a more formalized methodology for handling geese rather should be employed rather than relying on unsanctioned third parties ?? who is unsanctioned and selective prosecution.? unclear

There are several states that have taken a very active role in curbing the growth of the Canada Goose population. Michigan, Missouri, and Connecticut are three such states, and represent various strategies? of dealing with Resident Canada Goose problems. Also, these states represent the three commonly identified geographic regions of Canada Goose problems: the Central, the Southern, and the Atlantic flyaway divisions. Each state, while similar in following the methods of Geese Peace and the annual organizational method of the Humane Society, each has employed different variations with respect to the harassment issue, adding process, and availability of hunting. However, it should be noted that hunting is not approved by the Humane Society or Geese Peace, but has been embraced by many states as not only a way to curb the growth in geese population but to raise funds for the protection of threatened habitats while encouraging people to see these and other animals in their natural habitats. Sentence in fn?

### A. Federal Responses

Pursuant to 50 CFR 21.50, a depredation order can be applied for to permit the killing of geese.<sup>116</sup> This approach, formally codified in 2006, allows for the eggs of Canada Goose and other bird protected by the Migratory Bird Treaty Act to be destroyed, but only after other

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<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Id.

## Unintended Consequences of Migrating Bird Protection Statutes:

nonlethal methods have failed.<sup>117</sup> Geese Peace has recommended several different methods for geese removal, including frightening, changing of scenery, and addling.<sup>118</sup>

To further assist with removal, the Humane Society has developed a timeline that can be used by communities to ensure that their nonlethal methods have a maximum impact.<sup>119</sup> Much of the Humane Society actions focus on community development and training.<sup>120</sup> From December to March the Humane Society encourages communities to organize and solicit volunteers.<sup>121</sup> In March, the volunteers are taught how to addle geese eggs.<sup>122</sup> In April and May the volunteers then proceed throughout the community to addle the nests. Later, in the summer and fall, they harass the geese so that the geese will leave the area.<sup>123</sup> The Humane Society further recommends the use of Boarder Collies with a trained handler to augment the harassment process. The Society has stated that using trained dogs is the most effective method for relief; however, the organization does not provide any statistical support to this assertion.<sup>124</sup> Fn?

### *B. State Responses:*

#### *1. Michigan*

The Canada Goose has seriously impacted Michigan and that state has specifically responded by sponsoring a program to help communities deal with their resident geese problem. The Michigan Department of Natural Resources has developed several techniques for dealing

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<sup>117</sup> Fish and Wildlife Services, RESIDENT CANADA GOOSE NEST & EGG DEPREDATION ORDERS Q&A, (Jan. 5, 2010) available at <https://epermits.fws.gov/eRCGR/DOC/eRcgrFAQ.pdf>, (last viewed Oct. 20, 2012)

<sup>118</sup> Id.

<sup>119</sup> Humane Society, Inc., RESIDENT CANADA GEESE LIVING WITH OUR WILD NEIGHBORS, 5 available at [http://www.humaneociety.org/assets/pdfs/wild\\_neighbors/canada\\_goose\\_guide.pdf](http://www.humaneociety.org/assets/pdfs/wild_neighbors/canada_goose_guide.pdf), (last viewed Oct. 20, 2012).

<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Id.

<sup>124</sup> Id.

## Unintended Consequences of Migrating Bird Protection Statutes:

with “Resident Canada Goose”.<sup>125</sup> Communities that want to control their geese population must first register with the state.<sup>126</sup> The state will then assign an agent to ensure that the management of geese is handled appropriately.<sup>127</sup> The state has been divided and has established 8 districts that agents work within.<sup>128</sup> Put in fn Each district is assigned to one of eight regions established in the state to help mitigate the impact that the geese have on their communities. The agents are directed to run information sessions, help in translocation efforts, and provide assistance with problem geese that pose a specific threat to a location.<sup>129</sup>

Michigan has also created a geese transplant program that has transferred more than 50,000 geese since the program/s inception in 1972.<sup>130</sup> The translocation program, however, has proven to have limited success in actually alleviating an area of the problem, since the communities most impacted by the geese will often draw new flocks after abandonment by the prior resident geese.<sup>131</sup> To address this problem, Michigan has pursued the use of terrain alteration or barriers such as fences or vegetation that prevent the geese from obtaining access to the areas that provide the best nesting locations.<sup>132</sup> In more expansive locations, such as large fields, the state recommends hunting as one of the best methods to rid an area of Canada Geese.<sup>133</sup>

Additionally, Michigan has created a work plan for various sized areas that are impacted by the geese. Smaller locations are directed to use dogs and chemical repellants to try and stop geese from nesting; mid-sized locations are encouraged to use vegetation barriers; and the largest

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<sup>125</sup> Michigan Department of Natural Resources, “GOOSE-HUMAN CONFLICTS AND CONTROL TECHNIQUES”, available at [http://www.michigan.gov/dnr/0,4570,7-153-10370\\_12145\\_25065-59467--,00.html](http://www.michigan.gov/dnr/0,4570,7-153-10370_12145_25065-59467--,00.html), (last viewed Oct. 19, 2012).

<sup>126</sup> Id.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Id.

<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> Id.

<sup>133</sup> Id.

## Unintended Consequences of Migrating Bird Protection Statutes:

areas, containing more than ten acres, are instructed to rely more on hunting and the discharge of propane cannons.<sup>134</sup>

Propane cannons have been traditionally, used to deter animals from destroying crops.<sup>135</sup> Michigan has had success with this weapon for geese removal when the cannon is set off at a lake or other location, causing a loud bang that is similar to a gun.<sup>136</sup> Such loud noise has proven effective in deterring geese from nesting thereby. It should be noted that Michigan does not allow shotguns, pyrotechnics, or chasing by motorized vehicles as approved harassment methods but approves the use of the propane cannon.<sup>138</sup> Put in fn? Nevertheless, this noise-maker is often not viable in suburban or urban communities, since the intense volume of the noise would make the space unusable by residents who often frequent urban parks and public places—as opposed to more rural and agricultural settings.<sup>139</sup>

### 2. *Missouri*

Similar to Michigan, Missouri requires that communities that want to be involved in the controlling of a geese population must register with the state.<sup>140</sup> The Missouri Department of Conservation controls the methods of removing urban Canada Goose populations.<sup>141</sup> Missouri is an aggressive state in that it allows the use of scare tactics that do not inherently limit the choice of method..However, the State does does suggest several specific methods and advises against the use of others.<sup>142</sup> The Canada Goose has become such a problem within its borders that Missouri has created an Urban Goose Task Force as a subdivision of the Department of

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<sup>134</sup> Id.

<sup>135</sup> Id.

<sup>136</sup> Id.

<sup>138</sup> Id.

<sup>139</sup> Id.

<sup>140</sup> CONTROLLING CONFLICTS WITH URBAN CANADA GEESE IN MISSOURI, Conservation Department of Missouri, Conservation Commission of the State of Missouri, Urban Geese Task Force (2002).

<sup>141</sup> Id.

<sup>142</sup> Id.



## Unintended Consequences of Migrating Bird Protection Statutes:

Conservation in an attempt to cope with the population explosion and its impact on local communities.<sup>143</sup>

The Urban Goose Task Force has subsequently recommended a five-step approach to deal with every type of situation.<sup>144</sup> First, alter the habitat that is beset with geese to ensure that once the present flock has been dispersed a new one does not arrive shortly thereafter.<sup>145</sup> Secondly, encourage exclusionary techniques<sup>146</sup> that would include all manors of environmental alteration, such as building fences around lakes, digging the end of bodies of water deeper so nest cannot be built on a gentle slope, and final wire grids about six inches high that make it impossible for geese to walk easily to the water areas.<sup>147</sup> Thirdly, harass the animals, through such means as the use of motorized vehicles to scare the geese from a location. The fourth approach would entail the use of chemical sprays made of grape oil to discourage geese from settling in aspecif location.<sup>148</sup> Finally, the state encourages hunting, addling, and other methods of lethal control as a last resort or when other methods are believed to be ineffective.<sup>149</sup>

Missouri is thus very wide-spread and openselective and careful in its choice of methodologies???. Inconsistent with above. Nevertheless, the stateis careful to note that only corn oil may be used to addle a nest.<sup>150</sup> Those persons performing the procedure must use a state provided form which requires them to denote the temperature of the eggs and their location. It further requires tham to place each egg in water to see if it floats, and the number of eggs in the clutch.??<sup>151</sup> Only after certain criteria has been met will the eggs be allowed be addled.<sup>152</sup>

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<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> Id.

<sup>146</sup> Id.

<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> Id.

## Unintended Consequences of Migrating Bird Protection Statutes:

After this is completed, the state then requires that a community describe the harassment method used to encourage the geese to leave their nests.<sup>153</sup> This thorough approach of egg-addling provides verifiable documentation and ensures that only communities sincere in their need to remove the geese will fulfill these obligations.<sup>154</sup>

Finally, it should be noted that the Missouri program does not allow for the active participation and community enrichment that Michigan affords, and, accordingly Missouri's approach may leave some communities without useful and humane remedies that would lessen goose – human conflicts because only the state's five step program is permitted. This is an easily correctable problem that could be resolved by administrative order by the State's or US's Department of Agriculture.. It had the potential to provide a national model?? for controlling Resident Canada Goose populations when outside of migration periods.

### 3. Connecticut

In Connecticut its Department of Energy and Environmental Protection controls the nuisance Canada Goose problem for the state.<sup>155</sup> Connecticut does not favor the use of addling Canada Goose nests and reserves that right only to farmers and other involved with agriculture that can show reoccurring damages from Canada Geese resulting from the eating or trampling of their crops.<sup>156</sup> Instead, Connecticut focuses on visual deterrents like balloons, scarecrows, and fences. The state encourages the use of rubber or Mylar balloons to scare the birds.<sup>157</sup> Connecticut recommends that the balloons be placed on 30 to 40 foot leads that allow them to

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<sup>152</sup> Id.

<sup>153</sup> Id.

<sup>154</sup> Id.

<sup>155</sup> Department of Energy and Environmental Protection, Geese Management Program, available at [http://www.ct.gov/dep/cwp/view.asp?a=2723&q=325942&depNav\\_GID=1655](http://www.ct.gov/dep/cwp/view.asp?a=2723&q=325942&depNav_GID=1655), (last viewed Oct. 21, 2012).

<sup>156</sup> Id.

<sup>157</sup> Id.

## Unintended Consequences of Migrating Bird Protection Statutes:

sway in the air over the Canada Goose flocks, such that the geese will be unnerved by the fear of an attack from above.<sup>158</sup>

The state's most promoted method of controlling geese is by means of habitat modification.<sup>159</sup> This process attempts to remove the grass and small shrubs that are most favorable to geese.<sup>160</sup> But Connecticut has run into problems with this method because geese are often able to obtain an alternative food source from local residents, who often feed the geese in an attempt to stop them from eating their bushes.<sup>161</sup> In some instances, this alternative food source has turned out to be greater problem than the original. Therefore the state has asked that community leaders involved in a geese control to educate all members of the community on the importance of not feeding the Canada Goose.<sup>162</sup> Some locations have formulated local ordinances that prohibit the feeding of geese.<sup>163</sup>

Connecticut also promotes the use of shotguns and rockets to deter geese.<sup>164</sup> The main position is that these methods should be used before the geese land as a deterrent from them landing a community.<sup>165</sup> The shot and rockets are to be fired when the geese are approximately 250 feet from the ground.<sup>166</sup> The ammunition should be "shell crackers" or similar shot that makes a loud sound when it exits the gun but does not actually shoot a projectile from the muzzle.<sup>167</sup> This constitutes a much more aggressive position than that of either Michigan or Missouri because

### *C. The Role of Not-for-Profit Organizations: The Humane Society and Geese Peace*

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<sup>158</sup> Id.

<sup>159</sup> Id.

<sup>160</sup> Id.

<sup>161</sup> Id.

<sup>162</sup> Id.

<sup>163</sup> Id.

<sup>164</sup> Id.

<sup>165</sup> Id.

<sup>166</sup> Id.

<sup>167</sup> Id.

## Unintended Consequences of Migrating Bird Protection Statutes:

The Humane Society works “[t]o prevent the unnecessary and cruel treatment of Canada geese and to prevent roundups when there are nonlethal methods available.”<sup>168</sup> Geese Peace, Inc. is not directly related to the operations of the Humane Society; however, their membership and operations often align.<sup>169</sup> No better example of this is that current Senior Vice President of Programs and Innovations for the Humane Society, Ms. Molly Hazard is one of the founding members of Geese Peace and served as its Vice President for several years.<sup>170</sup> Ms. Hazard now oversees the works of Ms. Lynsey White Dasher, the current Program Director for the Humane Society’s efforts, as she put in footnote “[w]orks with communities to use nonlethal methods instead [of roundups].”<sup>171</sup> To this end Ms. Dasher focuses on “community involvement that addresses all four strategies endorsed by the Humane Society: addling, harassment, stopping the feeding of geese, and habitat modification.”<sup>172</sup> While the Humane Society does not specifically recognize the Resident Canada Goose as a separate subspecies, all of its “recommendations relate to the Resident Canada Goose and not the migrating [goose] because the problems arise in the summer months and geese droppings... Rarely is the problem in the winter with the migratory birds.”<sup>173</sup>

The Humane Society does not compile scientific data on its programs. Ms. Dasher, however, cannot recall a failure when a community has used addling, harassment, prevention of feeding, and habitat alteration.<sup>174</sup> Having worked as the head of the Humane Society’s Canada Goose efforts for almost three years she has discovered that “[m]ost often the failures occur

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<sup>168</sup> Interview with Lynsey White Dasher, Canada Goose Project Director, Humane Society, Inc., Phone (Nov. 28, 2012).

<sup>169</sup> Id.

<sup>170</sup> Holly Hazard, SENIOR VICE PRESIDENT, PROGRAMS AND INNOVATIONS, Humane Society, Inc. available at [http://www.humane-society.org/about/leadership/executive\\_staff/holly\\_hazard.html](http://www.humane-society.org/about/leadership/executive_staff/holly_hazard.html), (last viewed Nov. 28, 2012), and supra note 167.

<sup>171</sup> Supra note 167.

<sup>172</sup> Id.

<sup>173</sup> Id.

<sup>174</sup> Id.

## Unintended Consequences of Migrating Bird Protection Statutes:

when the community does not address all for components. Often just addling or sending dogs. . . . [just] doesn't work.” She believes that the most successful programs are the ones that have done thorough research. “There is no quick easy solution to this; the only thing that I am certain is that roundups don't work.”

### VI. FLOCKING IT OLD SCHOOL?? THIS SECTION APPEARS MISPLACED

The *Geer* case was eventually overturned in 1979 in *Hughes v. Oklahoma*<sup>175</sup> and focused on the ability to take a wild animal, here minnows, into interstate commerce.<sup>176</sup> Interestingly, in Justice Brennan's opinion he states that “[t]he first challenge to *Geer*'s theory of State's power over wild animals came in *Missouri v. Holland*.”<sup>177</sup> However, this is not true because in *Missouri* Justice Holmes's opinion specifically stated “Whether (*Geer and McCullagh*) cases cited were decided rightly or not they cannot be accepted as a test of the treaty power... Valid treaties of course are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.”<sup>178</sup> The Supreme Court of the United States clearly distinguished the sovereignty laws of a state against the need for national treaties and elected not to decide if the prior case law was correct. The crux of Justice Brennan's rationale cited the *Missouri* opinion stating “To put the claim of the State upon title is to lean upon a slender reed.”<sup>179</sup> This, unfortunately, is a misconception as the quote relates to a state's power to regulate commerce against the treaty authority of the President as ratified by the legislature. Several jurisdictions have already distinguished or dissented from the *Hughes* opinion.

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<sup>175</sup> 441 U.S. 322 (1979).

<sup>176</sup> *Id.* at 321.

<sup>177</sup> *Id.*

<sup>178</sup> *Missouri* at 433 - 434.

<sup>179</sup> *Hughes* at 321 *citing* *Missouri* at 434.

## Unintended Consequences of Migrating Bird Protection Statutes:

Removing the Resident Canada Goose from the regulations governed by international treaty should allow for the population control to be controlled once more by the states. The Supreme Court of the United States in *Hughes* affirmed the local interest test of *Philadelphia v. New Jersey*<sup>180</sup> and provides that:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>181</sup>

In the case of the Canada Goose any alteration to the ability to capture or kill a wild animal does not go directly to the impact of interstate commerce. Instead, it serves a direct local concern relating to the health and safety of each state. As detailed above, the massive damage to personal property, the spreading of disease, and degradation of water supplies clearly holds a high interest in local benefits with only incidental impact on the interstate commerce. Accordingly, under either the *Geer* or the *Hughes* methodology, once the Resident Canada Goose is removed from international treaty protection states and communities will be more flexible in their actions to ensure the health and welfare of community members. MISPLACED?

## VII. CONCLUSION

Reform is needed to respond to the rapid population growth and altered migration habits of the Canada Goose because communities are struggling with the costs to contain the birds and ensure the health and safety of residents.<sup>182</sup> The many stakeholders need relief as the dynamic tension of their struggle against one another and to remove the Canada Geese epidemic in

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<sup>180</sup> *Hughes* at 321. *see also* *Philadelphia v. New Jersey*, 437 U.S. 617,624 (1978).

<sup>181</sup> *Hughes* at 321 *citing* *Philadelphia v. New Jersey*, 437 U.S. 617,624 (direct citation omitted) (1978).

<sup>182</sup> FINAL ENVIRONMENTAL IMPACT STATEMENT ON CANADA GOOSE. Federal Register Vo. 70, No. 222, FR Doc. 05-22813, Dept. of Agriculture, Fish and Wildlife Services, Chapter I, pg. 10, Table I-2 (Nov. 18, 2005).

## **Unintended Consequences of Migrating Bird Protection Statutes:**

communities everywhere. The proposed toolbox of increased national or state funding for additional expenses related to environmental mandates, the ability to remove or destroy animals that threaten public health and safety, expert consultation with specialized attorneys, expedited appeals process for mandates that exceed the realm of reasonability, and a standardized method of removal or destruction will create a collaborative environment within communities, animal rights groups, administrative agencies, and other stakeholders.

Resurrecting the *Geer* or *Hughes* approach to wildlife would provide for communities and states to have increased power in their actions to resolve their respective Canada Goose situations. Further, this altered status would only apply to the Resident Canada Goose flocks that cause many of the problems in communities while protecting the Migrating Canada Goose flocks that the law was originally established to protect. At present, the law is repugnant? to the original intent of the treaty and these actions would bring the law back in line with its intent. Accordingly, providing communities with a toolbox or returning to an earlier view of wildlife ownership would remove burdens on all stakeholders and allow for the possibility of unique solutions to each communities Canada Goose problem.

Good Topic,well analyzed, writing a bit sloppy and careless. Would need some significant revision for Publication.

Final Grade: A