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Constitutional Law - State's Interest in Wild Animals

Susan Morrison Umstead

CONSTITUTIONAL LAW—STATE'S INTEREST IN WILD ANIMALS—*Hughes v. Oklahoma*, 441 U.S. 322 (1979).

INTRODUCTION

The public owns about one-third of the land in the United States primarily through the United States government in national forests, national parks and the Bureau of Land Management; thus the United States government is host to a substantial part of America's wildlife.[1] Historically each state owns or has title to animals *ferae naturae* in trust for the citizens of the state.[2] The United States Supreme Court considered the question of ownership of public game and fish resources in *Geer v. Connecticut*[3] and decided that the control of wild animals lay in the colonial governments as vested by the English Crown. This power passed to the states insofar as its exercise did not interfere with the rights of the federal government granted under the Constitution.[4] *Geer* upheld a Connecticut statute which forbade the transportation of game birds killed in Connecticut beyond the State boundaries by refusing to recognize a violation of the commerce clause of the United States Constitution. The *Geer* Court removed any transactions involving wild game killed in Connecticut from interstate commerce.[5]

Gradually *Geer* has eroded. Subsequent cases have held that a state's dominion over wildlife is not absolute. *Hughes v. Oklahoma*[6] confirms this modern trend by overruling *Geer v. Connecticut* and establishing that courts should consider challenges to state regulations of wild animals under the commerce clause according to the same general rule applied to state regulations of other natural resources. Thus *Hughes v. Oklahoma* is an act of clarification not innovation.

North Carolina wildlife management programs should feel the impact of *Hughes*. The basis of North Carolina's wildlife regulations and caselaw is state ownership. Since *Hughes* overrules *Geer*,

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1. Etling, *Who Owns the Wildlife?*, 3 ENVIRON. L. 23, 23 (1973).
2. Geer v. Connecticut, 161 U.S. 519 (1896) (game); Organ v. State, 56 Ark. 251, 19 S.W. 840 (1892) (fish).
3. Geer v. Connecticut, 161 U.S. 519 (1896).
4. *Id.* at 528.
5. *Id.*
6. Hughes v. Oklahoma, 441 U.S. 322 (1979).

North Carolina—to be addressed in the conclusion—will need to follow a new theory espousing more federal involvement in state wildlife programs.

THE CASE

Appellant William Hughes held a Texas license to operate a commercial minnow business in Texas. An Oklahoma Game Ranger arrested Hughes on a charge of violating an Oklahoma statute by transporting from Oklahoma to Wichita Falls, Texas, a load of natural minnows purchased from a minnow dealer licensed to do business in Oklahoma.[7] The statute allegedly violated provides:

> No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that: 1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows; 2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.[8]

Hughes contended that section 4-115B was unconstitutional because it was repugnant to the commerce clause; however, the trial court rejected this defense, and Hughes was convicted and fined.[9] The Oklahoma Court of Criminal Appeals affirmed the judgment of the lower court stating:

> The United States Supreme Court has held on numerous occasions that the wild animals and fish within a state's border are, as far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the state may

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7. *Id.* at 324.

8. OKLA. STAT. tit. 29, § 4-115B (Supp. 1978). OKLA. STAT. tit. 29, § 4-115C and -115D provide:

> A. No person may ship or transport minnows for sale into this state from an outside source without having first procured a license for such from the Director.
>
> C. The fee for a license under this section shall be:
>
> 1. For residents, . . . $100.00.
>
> 2. For nonresidents, . . . $300.00.
>
> D. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than . . . $100.00 nor more than . . . $200.

9. *Id.*

> regulate and control the taking, subsequent use and property rights that may be acquired therein[10]. . . . Oklahoma law does not prohibit commercial minnow hatcheries within her borders from selling stock minnows to anyone, resident or nonresident, and minnows purchased therefrom may be freely exported. However, the law served to protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation. No person is allowed to export natural minnows for sale outside of Oklahoma. Such a prohibition is not repugnant to the commerce clause.[11]

The United States Supreme Court reversed the Court of Criminal Appeals and expressly overruled *Geer v. Connecticut*. The Oklahoma statute, section 4-115B, was held to be repugnant to the commerce clause because it discriminated against interstate commerce.[12]

BACKGROUND

The United States Constitution is silent on the subject of ownership and management of wildlife. The tenth amendment, however, provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."[13] Thus the power to regulate wildlife is left with the states or the people subject only to such power as Congress may exercise in the regulation of commerce, foreign and domestic.[14]

The words of the commerce clause—"the Congress shall have the power . . . to regulate Commerce . . . among the several States"[15]—reflect the conviction of its framers that, in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization[16] that had plagued relations among the

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10. Hughes v. State, 572 P.2d 573, 575 (Okla. Crim. App. 1978) (citing LaCoste v. Department of Conservation, 263 U.S. 545 (1924), and Geer v. Connecticut, 161 U.S. 519 (1896)).

11. Hughes v. State, 572 P.2d 573, 575 (Okla. Crim. App. 1978).

12. Hughes v. Oklahoma, 441 U.S. 322, 338 (1979).

13. U.S. CONST. amend. X.

14. Manchester v. Massachusetts, 139 U.S. 240, 258 (1891) (coastal fisheries).

15. U.S. CONST. art. I, § 8.

16. Balkanization is the splitting of a territory into smaller ineffectual and frequently conflicting units. WEBSTER'S NEW 20TH CENTURY DICTIONARY 142 (2d ed. 1978).

colonies.[17] Justice Cardoza discussed this conviction in *Baldwin v. G.A.F. Seelig, Inc.*:[18] "[T]he Constitution was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[19]

The commerce clause is one of the most prolific sources of national power as well as a main cause of conflict with state legislation.[20] While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor does it define what is or is not commerce among the states.[21] Cases defining the scope of permissible state regulation in areas of congressional silence exhibit a controversial and inconsistent evolution of rules to accomodate federal and state interests.[22] The regulation and control of wildlife is one such controversial area between the federal and state government.

Corfield v. Coryell,[23] decided in 1823, was the first pronouncement of the proprietary interest or state ownership doctrine by the courts.[24] The Circuit Court of the Eastern District of Pennsylvania had to decide whether or not a New Jersey law which prohibited certain non-residents from gathering oysters in the state waters was repugnant to the Constitution. The Court stated that the property rights of "fishing" belong to all the citizens or subjects of the state.

> It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. . . . [T]his right is a right of property, vested either in certain individuals, or in the state for the use of the citizens thereof . . . The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the

17. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949).

18. 294 U.S. 511 (1935).

19. *Id.* at 523.

20. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534 (1949).

21. *Id.* at 534-35.

22. *See, e.g.*, Pike v. Bruce Church, Inc., 398 U.S. 137 (1970); Southern Pac. v. Arizona, 325 U.S. 761 (1945); Parker v. Brown, 317 U.S. 341 (1943); Cooley v. Board of Wardens, 53 U.S. 299 (12 How. 1851); Gibbons v. Ogden, 22 U.S. 1 (9 Wheat. 1824).

23. 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230).

24. 38 GEO. L.J. 652, 654 (1950).

citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.[25]

In 1877 the United States Supreme Court examined a state's property interest in oyster fisheries in *McCready v. Virginia*.[26] The Court reaffirmed the principle that each state owns the beds of all tidewaters within its jurisdiction unless they have been divested. The Court added that "the States own the tidewaters themselves, and the fish in them so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty."[27] The holding was that this matter did not affect the power of Congress to regulate commerce because commerce has "nothing to do with land while producing, but only with the product after it has become the subject of trade."[28]

Decided in 1896, *Geer v. Connecticut*[29] involved a statute that forbade the transportation beyond the state of game birds that had been killed lawfully within the state. The statute was sustained against a commerce clause challenge on the ground that no interstate commerce was involved. The United States Supreme Court held that the state control over animals *ferae naturae* extended far enough to permit regulation and control over their capture and transportation out of the state because: (1) such animal resources were the common property of all the citizens, (2) the state government could administer the resources as a trust for the citizens and (3) the state's police power extended to protection and conservation of this food source.[30] Mr. Justice Field, dissenting, objected to the Court's analysis of "ownership" and "commerce" in wild game[31] and maintained:

When any animal, whether living in the waters . . . or in the air . . . is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited in the citizens of one state to the exclusion of citizens of another state . . . I do not doubt the right of the State, by its legislation, to provide for the protection of wild game, so far as

25. Corfield v. Coryell, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230).
26. 94 U.S. 391 (1876).
27. *Id.* at 394.
28. *Id.* at 396.
29. 161 U.S. 519 (1896).
30. *Id.* at 533-34; 35 W. VA. L. QUARTERLY 182, 183 (1928-29).
31. Geer v. Connecticut, 161 U.S. 519, 535-42 (1896).

such protection is necessary for their preservation or for the comfort, health, or security of its citizens, and does not contravene the power of Congress.[32]

Geer's dissenting view increasingly prevailed in many subsequent cases. *Geer's* majority analysis was rejected with respect to natural resources other than wild game.[33] The state of Indiana unsuccessfully attempted, by analogy to the game cases, to reserve to their citizens the state's power to regulate oil and gas resources. The U.S. Supreme Court distinguished the two areas on the basis that no common property right existed in the oil and gas such as that which people had in natural game resources.[34] Holding that a state could prohibit a property owner from waste of the underground mineral pool,[35] the Court recognized an analogy between animals *ferae naturae* and the moving deposits of oil and gas but stated that no identity existed between the two. It reasoned that with *ferae naturae* everyone has power to reduce a portion of the public property to the domain of private ownership by reducing the *ferae naturae* to possession; however, with natural gas and oil, no such right exists in the public. It is vested only in the owners in fee of the surface of the earth above the gas field.[36] *West v. Kansas Natural Gas Co.* overturned an Oklahoma statutory scheme which prohibited out-of-state shipments of the state's natural gas.[37] Decided in 1911—only fifteen years after *Geer*—the Court reasoned that if a state could prefer its own economic well-being to that of the nation as a whole, "Pennsylvania might keep its coal, the Northwest its timber [and] the mining States their minerals,"[38] resulting in a halt of commerce at state lines. Although Oklahoma stressed the limited supply of gas and the need to conserve gas for its own citizens, the Court firmly held that the statute violated the commerce clause.[39]

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32. *Id.* at 538-41.
33. Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900) (oil and gas).
34. *Id.* at 202-03.
35. *Id.* at 210.
36. *Id.* at 209.
37. West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).
38. *Id.* at 255.
39. *Id.* The *West* analysis controlled in subsequent challenges to state regulation of exports of natural resources of oil and gas. Pennsylvania v. West Virginia, 262 U.S. 553 (1923), involved a West Virginia statute which required natural gas companies within the state to satisfy all fuel needs of West Virginia residents before transporting any natural gas out of the state. This statute violated the

With respect to the regulation and control of wild animals, the *Geer* analysis that a state has power over wild animals began eroding in 1920 with *Missouri v. Holland.*[40] Missouri brought suit to enjoin a United States game warden from attempting to enforce the Migratory Bird Treaty on the ground that it interfered with the state's reserved rights to control wild animals. The Court upheld the Act as a proper exercise of the nation's treaty-making power and further criticized the state ownership theory: "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership."[41]

Foster-Fountain Packing Co. v. Haydel[42] further eroded the *Geer* decision's significance. Decided in 1928, the Court faced a challenge to a Louisiana "Shrimp Act" which declared shrimp in state waters to be the property of the state.[43] The Act granted the right to take and process shrimp to residents and to in-state processing facilities and prohibited the exportation of shrimp from which the heads and hulls had not been removed. Shrimp processing facilities were at the time concentrated in Mississippi, and the Court interpreted the silent purpose of the Act to be the development of shrimp processing facilities in Louisiana.[44] The shrimp heads and hulls had some value as fertilizer base, and the Act permitted exportation of this fertilizer; therefore, the Act proposed to compel only the canning of shrimp and the manufacture of fertilizer within Louisiana.[45] In support of the statute, the appellee contended that the state owns all animals *ferae naturae* not reduced to possession, and the state may withdraw them from interstate commerce entirely or admit them strictly on the condition that they first be canned.[46] The Court rejected this reasoning and held that the statute was unconstitutional as operating to obstruct and burden interstate commerce. By permitting the taking of shrimp for sale in interstate commerce, the state released its own-

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commerce clause because it directly interfered with interstate commerce.

40. 252 U.S. 416 (1920).

41. *Id.* at 434.

42. 278 U.S. 1 (1928).

43. *Id.* at 57.

44. *Id.* at 10; Barnett, *The Constitution and State Powers of Export Limitation,* 13 TULSA L.J. 229, 246 (1977-78).

45. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 8 (1928); 14 CORNELL L.J. 245, 246 (1928-29).

46. Foster-Fountain Packing Co. v. Haydel, 278 U.S. at 11 (1928).

ership, ended the trusts on which it held title for the benefit of the citizens and made the shrimp private property.[47] The subsidizing of the Louisiana canning industry at the expense of the successful Mississippi industry was not a legitimate exercise of state police power over private property.[48] The Court distinguished *Geer* on the basis that "no part of the game was permitted by the Statute to become an article of interstate commerce."[49] Thus, the interpretation of *Foster-Fountain Packing Co.* appeared to be that if the state owns or controls a resource, it may require the confinement of distribution within the state for the purpose of consumption by state residents but not for the limited purpose of promoting its processing.[50] "The restriction on exportation must be an all-or-none proposition; it cannot be limited only to the point where the resource is processed into a finished product but must extend to the ultimate consumption of the resource."[51]

The shift away from *Geer's* "state ownership" analysis became more pronounced in *Toomer v. Witsell,*[52] a 1948 case involving a South Carolina statute which discriminated against out-of-state fishermen. South Carolina required the payment of a fee for a license to engage in commercial shrimp fishing in a three-mile belt extending off the South Carolina coast. The fee was $25 for a shrimp boat owned by a South Carolina resident and $2500 for a boat owned by a nonresident. Holding that the statute violated the commerce clause and the privileges and immunities clause, the Court stated that the ownership theory was just a weak prop for the discriminatory law.[53] The Court discarded the concept of "ownership" and described the doctrine as a "fiction" which states utilized to express their power to preserve and regulate the exploitation of natural resources.[54] The importance of the decision was that even though a state may have plenary authority over its wildlife, it cannot disregard or circumvent the authority of the commerce clause where it permits its fish to be placed in the

47. *Id.* at 13.

48. *Id.*

49. *Id.* at 12.

50. *Id.*

51. Barnett, *The Constitution and State Powers of Export Limitation,* 13 TULSA L.J. 229, 247 (1977-78).

52. 334 U.S. 385 (1948).

53. *Id.*

54. *Id.* at 402.

stream of interstate commerce.[55]

Takahashi v. Fish & Game Commissions,[56] decided the same day as *Toomer*, involved a California statute which prohibited the issuance of commercial fishing licenses to "any persons ineligible to citizenship."[57] Plaintiff, a Japanese-born resident of California who was ineligible for citizenship under federal naturalization laws, sued to compel defendant to issue him a commercial fishing license. The statute was declared invalid under the due process clause of the fourteenth amendment. The Court held that a state could not discriminate in the granting of fishing licenses between aliens and citizens because the power to regulate aliens was vested in Congress.[58] The ownership theory was repudiated further:

> To whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.[59]

In *New Mexico State Game Commission v. Udall*,[60] the Tenth Circuit Court of Appeals held in 1969 that officials of the Department of the Interior had authority to destroy deer within the Carlsbad Caverns National Park for a research study in deer population control. The federal officials did not need the authorization from the State Game Commission which usually was needed by ordinary landholders. Since the results of the study were to be used to implement programs to prevent depredation of public lands, the Secretary of the Interior was acting within his authority to have the deer killed.[61] This decision was similiar to an earlier case, *Hunt v. United States*,[62] where the Court upheld the killing of deer on the Grand Canyon National Game Reserve by Federal District Foresters acting under authority of the Secretary of Agriculture because the overpopulated deer were damaging foliage in federal

55. Etling, *supra* note 1, at 28.

56. 334 U.S. 410 (1948).

57. *Id.* at 413.

58. *Id.* at 420.

59. *Id.* at 421.

60. 281 F. Supp. 627 (D.N.M. 1968), *rev'd*, 410 F.2d 1197 (10th Cir.), *motion for leave to file petition for writ of mandamus denied*, 396 U.S. 953, *cert. denied*, 396 U.S. 961 (1969).

61. *Id.*

62. 278 U.S. 96 (1928).

parks and were dying anyway due to insufficient foliage.

State control over game animals was undermined further in *Kleppe v. New Mexico*,[63] a 1976 case involving The Wild Free-Roaming Horses and Burros Act which was designed to protect "all unbranded and unclaimed horses and burros on public lands of the United States." The New Mexico livestock Board had entered on public land of the United States, removed wild burros therefrom and sold them at public auction. The Bureau of Land Management asserted authority under the Act and demanded that the Board recover the animals and return them to public lands. The state of New Mexico, the Board and the purchasers of the burros sought to declare the Act unconstitutional, but the Supreme Court upheld its validity as a proper exercise of congressional power under the property clause of the Constitution.[64] Although the Court refrained from deciding the constitutionality of the Act as it applied to wild horses and burros on private land, the expansion of federal power under the property clause substantially curtailed state authority to enact general welfare laws pertaining to private lands nearby or adjoining public lands.

Douglas v. Seacoast Products,[65] a 1977 case, again supported the *Geer* dissent. Virginia statutes which limited the right of non-residents to catch fish in Virginia's territorial waters and limited the issuance of commercial fishing licenses to United States citizens were rejected because federal law preempted them and they violated the equal protection clause of the fourteenth amendment.[66] The Court rejected Virginia's argument that because the State has a title or ownership interest in the fish swimming in its territorial waters, it can exclude federal licenses.[67] Embracing the analysis of the *Geer* dissenters, the Court stated:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals. Neither the states nor the Federal Government, any more than a hopeful fisherman or hunter has title to these creatures until they are reduced to possession by skillful capture. . . . *Geer v. Connecticut*, 161 U.S. 519, 539-540 (1896) (Field, J., dissenting). The "ownership" language of cases such as those cited by appellant must be understood as no more

63. 426 U.S. 529 (1976).
64. U.S. CONST. art. IV, § 3, cl. 2.
65. 431 U.S. 265 (1977).
66. *Id.*
67. *Id.*

than a 19th century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer v. Witsell,* 334 U.S., at 402 see also *Takahashi v. Fish & Game Commission,* 334 U.S. 410 (1948). Under modern analysis, the question is simply whether the state has exercised its police power in conformity with the federal laws and Constitution.[68]

ANALYSIS

Hughes v. Oklahoma[69] is the first case to present facts "essentially on all fours with Geer."[70] The Court stripped the wildlife "ownership title" from the states by basing its decision on a history of cases which undercut and eroded the *Geer* theory that a state, as representative for its citizens, owned all wildlife in the state: *West v. Kansas Natural Gas Co.*[71] weakened *Geer* by holding that a statute which prohibited out-of-state shipment of natural gas violated the commerce clause; *Missouri v. Holland,*[72] *Foster-Fountain Packing Co. v. Haydel*[73] and *Toomer v. Witsell,*[74] involving migratory birds, shrimp and commercial fishermen, respectively. Although the *Geer* theory of state ownership of wild animals has been eroding since 1911,[75] *Hughes* expressly overruled *Geer* and officially extinguished the ownership theory. Courts now should consider challenges to state regulation and control of wild animals under the commerce clause by the same general rule applied to state regulations of other natural resources. The general rule for determining the validity of state statutes affecting interstate commerce is that "where the statute regulates evenhandedly to effectuate a legitimate 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 benefit."[76] The question becomes one of degree if a legitimate purpose exists; the extent that the burden is tolerable will depend on the nature of the local interest involved

68. *Id.* at 284.
69. 441 U.S. 322 (1979).
70. *Id.* at 335.
71. 221 U.S. 229 (1911).
72. 252 U.S. 416 (1920).
73. 278 U.S. 1 (1928).
74. 334 U.S. 385 (1948).
75. Hughes v. Oklahoma, 441 U.S. 322, 329 (1979).
76. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

and any suitable alternatives with a lesser impact on interstate activities.[77] The party challenging the validity of the statute has the burden to show discrimination; but "when discrimination against commerce is demonstrated the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[78] The Court in *Hughes* reasoned that, by overruling *Geer*, the analytical framework would be brought into conformity with practical realities, the anomaly that statutes imposing the most extreme burdens on interstate commerce were the most immune from challenge would be eliminated and legitimate state concerns for conservation and protection of wild animals underlying the nineteenth century state ownership theory would be protected.[79]

The Court addressed the issue of whether or not the burden imposed on interstate commerce by the Oklahoma statute section 4-115B was permissible under the general rule articulated in the precedents governing other types of commerce. Under that general rule the Court must examine (1) whether the challenged statute regulated evenhandedly with only "incidental" effects on interstate commerce or discriminates against interstate commerce, either on its face or in practical effect; (2) whether or not the statute served a legitimate local purpose and, if so, (3) whether or not alternative means could promote this local purpose as well without discriminating against interstate commerce.[80] Using this general rule, the *Hughes* Court held that the Oklahoma statute discriminated against interstate commerce on its face by forbidding the transportation of natural minnows out of the state and that this discrimination invoked the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.[81] Oklahoma claimed that section 4-115B served a legitimate local purpose as a conservation measure. Although the Court recognized a state's interests in wildlife conservation, it stressed that a state could no longer keep its wildlife solely within its jurisdiction for every purpose. The Court decided that other equally effective nondiscriminatory conservation measures were available in

77. *Id.*

78. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977).

79. Hughes v. Oklahoma, 441 U.S. at 335-36 (1979).

80. *Id.* at 336.

81. *Id.* at 336-37.

which Oklahoma could conserve its minnows. Instead, Oklahoma chose the most discriminatory way. Oklahoma neither limited the number of minnows that licensed minnow dealers could take nor controlled the disposal or distribution of minnows within the state. Looking at the statute in its entirety, the Court viewed it as a choice of the most discriminatory means to protect wildlife when other nondiscriminatory alternatives were likely to fulfill the State's legitimate local purpose more effectively.[82]

Under modern analysis, the question is whether the state has execised its police power in conformity with the Constitution and federal statutes.[83] Pursuant to its police power, a state may prescribe regulations to protect its citizens against harm to their health, safety or welfare. Regulations pursuant to police powers may not promote the state's economic welfare by burdening or constricting the flow of interstate commerce.[84] The *Hughes* Court recognized that the State's interest in conservation and protection of wildlife is a legitimate local purpose similar to the State's interests to protect the health and safety of its people under its police power.[85] The overruling of *Geer* does not leave states powerless to protect and conserve wild animals within their borders. *Hughes v. Oklahoma* makes clear that a state may promote this legitimate purpose only in ways consistent with the basic principles that "[o]ur economic unit is the Nation"[86] and that when a wild animal "becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another State."[87] However, the means chosen by the State in *Hughes* were discriminatory when the nondiscriminatory alternatives existed which would have fulfilled the State's legitimate local purpose more effectively.[88]

Mr. Justice Rehnquist, joined by Chief Justice Burger, disagreed with the majority in a dissenting opinion.[89] Although they agreed that a state does not "own" the wild animals within its border in any conventional sense, they felt that *Geer* should not have

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82. *Id.* at 338.

83. Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977).

84. H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

85. Hughes v. Oklahoma, 441 U.S. at 337.

86. *Id.* at 339 (citing H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 537 (1949)).

87. *Id.* (citing Geer v. Connecticut, 161 U.S. 519, 538 (1896)).

88. Hughes v. Oklahoma, 441 U.S. at 338.

89. *Id.* at 339.

been overruled because of the important concepts it embodied. They believed that the ownership language of *Geer* was a "shorthand" way of describing the substantial interest a state has in preserving and regulating the exploitation of wildlife resources within its border for the benefit of its citizens.[90] A state's interest in protecting its wildlife is not absolute; but short of conflicting with the Constitution, a federal statute or a treaty, it should prevail. The dissenters expressed the view that Oklahoma's statute although "not the most artfully designed,"[91] did not discriminate against out-of-state enterprises or burden interstate commerce. The statute was evenhanded in its application—*no* person, resident or nonresident was allowed to export natural minnows for sale outside of Oklahoma. Interstate commerce was not blocked because anyone freely could export an unlimited amount of minnows as long as the minnows were hatchery minnows and not naturally seined minnows. The dissenters felt the statute adequately served the special interest of the State "to protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation."[92] The State's interest in wildlife conservation and preservation substantially outweighed any minimal burden of requiring hatchery minnows for exportation.

CONCLUSION

All of the cases concerning wildlife ownership clearly demonstrate that the federal government has a definite preeminence over the states in the control and management of wildlife. Under article II, section 2, of the United States Constitution, the federal government has treaty-making powers over migratory birds, fish and wildlife. The federal government under article I, section 8, and amendment IV, section 1 of the Constitution has power to prevent state discrimination to immigrants and aliens. Under the property clause, the federal government has power not only to make ecological studies of but also to destroy wildlife that may be detrimental to federal lands. Finally, the federal government under article I, section 8 of the Constitution has power to regulate interstate commerce and to prevent state discrimination against citizens of other states in relation thereto.

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90. *Id.* at 341-42.
91. *Id.* at 343.
92. *Id.* (citing Hughes v. State, 572 P.2d 573, 575 (Okla. Crim. App. 1977)).

A 1942 case[93] illustrated the reach of the commerce clause in this area and suggested the clause gave Congress the authority to ban discrimination against nonresidents by states seeking to retain authority over their wild animals. A federal statute which established quotas for the amount of wheat grown by individual farmers was at issue. The Court applied the statute to a farmer who exceeded his quota and concluded that the excess wheat produced, though it might be consumed on the premises, seriously could damage interstate commerce.[94] By producing only for his own needs, the individual reduced the amount of wheat that would otherwise flow in interstate commerce; therefore, the commerce clause permitted Congress to regulate the amount of wheat grown.[95] If prohibiting excess production were justified because interstate commerce was affected, prohibiting states from discouraging sales to nonresidents also would seem justified.[96]

The overruling of *Geer* clearly designates the federal government as "boss" in wildlife control and management. Although federal interference with every aspect of a state's regulation of wild animals is unlikely, the essence of the *Hughes* decision is that the federal government completely could eclipse the state if it wished. Freedom to state authorities to make decisions concerning wildlife management may be hampered due to potential increased federal involvement and control over state internal wildlife regulation policies. States can no longer reserve their wildlife exclusively for the benefit of their own citizens. State conservation plans may need the approval of the federal government as will plans regulating such activities as hunting, trapping and fishing.

Many states attempt to limit the exportation of their raw materials and wildlife by claiming that an inadequate supply would jeopardize the abilities of the states' economies to produce sufficient goods and to provide sufficient employment.[97] A similar threat from inadequate energy supplies led Congress in 1973 to adopt the Emergency Petroleum Allocation Act.[98] This Act required the President to impose mandatory measures to allocate petroleum and expressly preempted any conflicting allocation pro-

93. Wickard v. Filburn, 317 U.S. 111 (1942).

94. *Id.*

95. Barnett, *The Constitution and State Powers of Export Limitation,* 13 TULSA L.J. 229, 253 (1977-78).

96. *Id.*

97. *Id.* at 254.

98. 15 U.S.C. §§ 751-754 (Supp. V 1975).

gram established by a state.[99] Courts have upheld the Act under the commerce clause and other constitutional challenges.[100]

A 1978 case reflects the problems a state will encounter in regulating its natural resources. *City of Philadelphia v. New Jersey*[101] involved a New Jersey statute which prohibited the importation of most solid or liquid waste collected outside the State border. Private New Jersey landfills and several cities in other states challenged this statute on various state and federal grounds. The United States Supreme Court held that, even though the state statute was not preempted by federal law, it violated the commerce clause. The Court rejected New Jersey's argument that it was running out of land to use for the disposal of waste and that the disposal of waste from out of state threatened the quality of the New Jersey environment.[102] The State cannot prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that local demands or people of the state need it.[103] The Court gave little credence to New Jersey's claims of health hazards posed by the extra volume of waste from out of the State but was impressed more by the fact that all states share the waste disposal problem.[104] The Court's decision means that no state can prevent others from sharing its natural resource of waste disposal sites, even though it is a resource which does not move in interstate commerce.[105]

Significant change in the management of marine fisheries may occur due to the passage of the Fishery Conservation and Management Act of 1976 (FCMA)[106] and the *Hughes* decision. FCMA established a 197-mile exclusive fisheries conservation zone contiguous to the three-mile territorial sea and created eight Regional Fisheries Management Councils to prepare and implement fishery management plans for all fisheries within their jurisdictions.[107] By the Act, Congress has attempted to conserve and to regulate the

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99. Barnett, *supra* note 44, at 254.

100. *Id.*

101. 437 U.S. 167 (1978).

102. *Id.*

103. *Id.*

104. 18 NATURAL RESOURCES J. 925, 931 (1978).

105. *Id.*

106. 16 U.S.C. §§ 1801-1882 (Supp. 1977).

107. Schoenbaum & McDonald, *State Management of Marine Fisheries After the Fishery Conservation and Management Act of 1976 and Douglas v. Seacoast Products, Inc.*, 19 W.&M.L. REV. 1, 29 (1977-78).

domestic fishing industry; it advances these goals by establishing a framework within which the federal government may secure control over foreign fishing vessels in American waters, promoting the conservation of fishery resources and inducing the replenishment of depleted, over-exploited fishery stocks.[108]

Similarly, *Hughes v. Oklahoma* may restrict state marine fishery laws. To highlight the imminent changes in state management of marine fisheries because of these recent developments, a look at North Carolina's laws and regulations may help focus the discussion.

North Carolina long has held that the ownership of wildlife is vested in the state. *State v. Gallop*,[109] decided in 1900, affirmed the principles that the ownership of game is in the people of the state and that the legislature has the power to withhold or grant to individuals the right to hunt and kill game.[110]

> So well recognized is it that the ownership of game and fish is in the State and not in individuals, that the decisions are uniform that a State may confer exclusive right of fishing and hunting upon its citizens, and expressly exclude nonresidents, without infringing that provision of the Constitution of the United States (Art. IV, Sec. 2) . . . and may impose higher penalties on nonresidents who violate the game laws than on residents. . . .
>
> Indeed, so completely is the ownership of public water in the State . . . that the State can absolutely forbid the use of its waters for fishing or planting oysters by nonresidents . . ., and of course for hunting purposes. And the State may forbid the transportation of dead game beyond its borders, or killing or having it in possession for that purpose.[111]

This state ownership theory continued to be expressed in North Carolina wildlife cases,[112] although it began to follow the trend of erosion similar to the U.S. Supreme Court cases on wildlife.[113] As recent as April, 1979, the Court of Appeals reiterated the proposition that "the State's wildlife population is a natural resource of the State held by it in trust for its citizens, the enactment of laws

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108. *Id.* at 1.

109. 126 N.C. 979, 35 S.E. 180 (1900).

110. *Id.* at 982, 35 S.E. at 181.

111. *Id.* at 983-84, 35 S.E. at 182.

112. State v. Barkley, 192 N.C. 184, 134 S.E. 454 (1926); Moore v. Bell, 191 N.C. 305, 131 S.E. 724 (1926); Daniels v. Homer, 139 N.C. 219, 51 S.E. 992 (1905).

113. Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978).

reasonably related to the protection of such wildlife constitutes a valid exercise of the police power vested in the General Assembly."[114]

This background of North Carolina's participation in the state ownership theory makes the philosophy behind the laws and regulations of North Carolina fisheries resources easier to understand. Marine fishing is an important industry in North Carolina.[115] Presently, by statute, the marine and estuarine resources of North Carolina belong to all the people of the state.[116] The Division of Marine Fisheries, an agency within the Department of Natural Resources and Community Development, is charged with the stewardship of the marine and estuarine resources of the state and thus is responsible for the maintenance, preservation, protection and development of all these resources.[117] The Marine Fisheries Commission is the rulemaking body of the division and is responsible for establishing policy and promulgating rules.[118] The fifteen-member Commission (appointed by the governor) imposes gear restrictions, area and seasonal requirements and limitations on methods of taking, amount and fish size. Geographically, North Carolina law asserts jurisdiction over a zone extending two-hundred miles from the coastline.[119]

Additional regulations of fisheries are achieved through various license, permit and lease requirements for certain categories of users of the resource.[120] Vessels engaged in commercial fishing must obtain a commercial fishing license.[121] The fees for residents are nominal, ranging from one dollar for boats without motors to

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114. State v. Stewart, 40 N.C. App. 693, 695, 253 S.E.2d 638, 640 (1979).

115. The dockside value of North Carolina's commercial fisheries in 1978 totaled $41.6 million (compared to $9.5 million in 1965). The major commercial species in North Carolina are shrimp, blue crabs, hard clams, oysters, sea scallops, striped bass, flounder, spot, grey trout, menhaden and river herring. Other species contributing to the commercial landings in 1978 include American eel (a new record of 700,000 lbs.), snapper and grouper, scup and porgies, shad and white perch (498,000 lbs., the best in over 20 years). M. Street, Trends in North Carolina's Commercial Fisheries, 1965-1978 (February 1, 1979) (may be obtained from Division of Marine Fisheries, N.C. Dept. of Natural Resources and Community Development).

116. N.C. GEN. STAT. § 113-131 (1975).

117. 15 N.C. ADMIN. CODE 3.0002.

118. N.C. GEN. STAT. § 113-151 (1975).

119. *Id.* § 113-134.1.

120. Schoenbaum & McDonald, *supra* note 107, at 34.

121. N.C. GEN. STAT. § 113-152(a)(1) (1975).

seventy-five cents per foot for vessels over twenty-six feet in length;[122] however, nonresidents of North Carolina must pay two-hundred dollars for each ship licensed, regardless of its length.[123] All persons taking oysters and clams from state waters for commercial purposes also must get a license.[124] This license costs one dollar and is limited to state residents.[125] To promote commercial cultivation of oysters and clams, the Commission leases to state residents portions of the public seabeds underlying the coastal fishing waters that already do not have natural clam or oyster beds.[126]

Probably the major impact on North Carolina's fishery management will be a sharp curtailment of the freedom of action exercised by the Marine Fisheries Commission, which traditionally has exercised unlimited discretion in substantive management matters.[127] The FCMA preempts this extensive claim of jurisdiction.[128] Except for fisheries wholly within State waters, the Commission may be compelled to follow the lead of the Regional Councils when promulgating its management regulations.[129]

The State may be required to change the quality of its fishing programs in addition to coordinating seasonal, equipment and other management restrictions with the Council's plan.[130] The National Marine Fisheries Service and other federal authorities probably will encourage the comprehensive management of each fishery and may promote the adoption of limited-entry programs.[131] These programs would curtail access to fisheries by restricting the availability of licenses, establishing quotas and imposing high entry fees to discourage all but the most economically efficient outfits.[132] FCMA has given the Councils power to adopt the limited-entry program; and as the need to conserve fishing resources increases, the elements of the limited-entry alternative may be receiving more attention.

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122. *See id.* § 113-152(c)(1)-(4).
123. *Id.* § 113-152(c)(4a) (1978).
124. *Id.* § 113-154(a) (1975).
125. *Id.* § 113-154(c).
126. *Id.* § 113-229 to -230.
127. Schoenbaum & McDonald, *supra* note 107, at 37.
128. *Id.* at 34.
129. *Id.*
130. *Id.*
131. *Id.* at 38.
132. *Id.*

Regardless of whether or not the limited-entry system is implemented, North Carolina must employ a more comprehensive system of regulation.[133] No license requirement exists for saltwater sports and recreational fishermen; therefore, little data is known concerning the species and amount of their catches.[134] Also, the federal authorities may require North Carolina to integrate the regulation of its marshland and wetland resources with its fisheries management program and to establish a more adequate plan for controlling coastal pollution.[135]

One of the more serious problems with North Carolina's fishery management program is its discrimination against nonresidents.[136] Judging by the Supreme Court's standards as enumerated in *Hughes*, North Carolina's discriminatory practices are unconstitutional.[137] The new federal standards should force North Carolina's fishermen to share the state's fisheries with nonresidents, but the new requirements also should grant North Carolina residents access to the resources of other states.[138]

The underlying policy of all prior North Carolina cases concerning ownership of wildlife will have to change.[139] The fact that the North Carolina state government does not own its wildlife will be reflected in future wildlife resources litigation; state ownership no longer can be a controlling factor in granting state's power to manage wildlife. Challenges to state environmental legislation under the commerce clause involve a conflict of value judgments between the state and federal government, each of which seeks to promote legitimate interests. The commerce clause is designed to protect the natural interest in free trade while the state environmentalists generally design legislation to promote health and welfare.[140] When these state and federal interests collide, the first impulse is to hold that the federal interest overpowers the state

133. *Id.* at 39.

134. *Id.*

135. *Id.*

136. *Id.* at 40.

137. *Id.*

138. *Id.* at 40-41.

139. State v. Barkley, 192 N.C. 184, 134 S.E. 449 (1926); Moore v. Bell, 191 N.C. 305, 131 S.E. 724 (1926); Daniels v. Homer, 139 N.C. 219, 51 S.E. 992 (1905); State v. Gallop, 126 N.C. 979, 35 S.E. 180 (1900); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

140. K. Sisk, *State Environmental Protection v. The Commerce Power*, 13 U. RICH. L. REV. 197 (1979).

interest under the supremacy clause. In many ways, however, this result may not be the best solution. States differ from one another with respect to geographical and meteorological conditions as well as the degree of man's despoilation of the environment.[141] This variety supports the appropriateness of local rather than federal regulation.[142] Also, the people who live in a particular area are interested more directly in their surroundings than the "natural body politic."[143] The nation too easily can disregard the interests of the local people of a given area because certain laws may have a more drastic effect on the local environment than on the nation as a whole, and any harm suffered by the local environment does not directly affect people nationally with the impact it has on local residents.[144] Wildlife found in the several states is so diverse that a single federal body could not establish a rational system of regulation.[145] "It would not be reasonable to assume that Congress could enact legislation well-suited to the regulation of the fish of the New England streams, the reptiles of the southern swamps, the predators of the midwestern plains, and the big game of the Rocky Mountains."[146]

The court, as final arbitrator, will have to weigh the conflicting interests carefully and arrive at the fair result. The United States Supreme Court uses a verbal formulation of the balancing test that indicates that state regulation will be upheld unless the burdens to commerce outweigh the local benefits;[147] however, a real danger is application of the balancing test without proper consideration of environmental concerns and local problems. All too easily the characteristics and differences of a locale could become "forgotten" in weighing the interests involved, especially when deciding without properly researching the actual benefits and burdens involved. The balancing test must be infused with substantial content that adequately reflects the nature and weight of state interests in environmental cases if courts are to attain a workable and meaningful allocation of powers between state and federal governments in the

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. Note, *Expansion of National Power Under the Property Clause: Federal Regulation of Wildlife. Kleppe v. New Mexico*, 7 LAND AND WATER L. REV. 181 (1977).
146. *Id.* at 189.
147. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

field of wildlife regulation.[148]

A state's interest in conservation and protection of wild animals is a legitimate local purpose similar to the state's interests in the general health, safety and welfare of its citizens;[149] however, the legitimate state interests in conservation is narrower under the *Hughes* analysis than it was in the *Geer* decision.[150] A state can no longer "keep property, if the sovereign so chooses, always within its jurisdiction for every purpose."[151] The state ownership theory may no longer be used as the rationale to force those outside the state to bear the full costs of "conserving" the wild animals within its borders when equally effective nondiscriminatory conservation methods are available.[152] Thus a state must conserve its wildlife in a way that does not interfere with interstate commerce.

The critical variable is the degree of interference with interstate commerce because almost any phase of animal conservation will affect or influence interstate commerce in some way. The test of interstate commerce is not dependent on the application of such labels as "production," "transportation," "internal" or "local": rather the test is whether or not the activity has any effect on interstate commerce.[153] Even commerce which is purely intrastate in character may be regulated by Congress if the activity, when combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations.

Susan Morrison Umstead

148. Note, *supra* note 73.

149. Fireman v. Chicago, R.J.&P.R. Co., 393 U.S. 129 (1968).

150. 441 U.S. at 337.

151. Geer v. Connecticut, 161 U.S. 519, 530 (1896).

152. Hughes v. Oklahoma, 441 U.S. 322 (1979).

153. Barnett, *The Constitution and State Powers of Export Limitation*, 13 TULSA L.J. 229, 253 (1977-78).