Pace Environmental Law Review

Volume 4
Issue 2 *Spring 1987*

Article 2

April 1987

Falconry: Legal Ownership and Sale of Captive-Bred Raptors

Robert F. Kennedy Jr.
Pace University School of Law, rkennedy@law.pace.edu

Recommended Citation
Robert F. Kennedy Jr., *Falconry: Legal Ownership and Sale of Captive-Bred Raptors*, 4 Pace Envtl. L. Rev. 349 (1987)
DOI: https://doi.org/10.58948/0738-6206.1222
Available at: https://digitalcommons.pace.edu/pelr/vol4/iss2/2

Falconry: Legal Ownership and Sale of Captive-Bred Raptors

Robert F. Kennedy, Jr.*

TABLE OF CONTENTS

---

* Robert F. Kennedy, Jr., B.A. Harvard University, J.D., University of Virginia, LL.M., Pace University. The author is staff attorney for the Hudson River Fishermen's Association and the Natural Resources Defense Council, and is currently an Adjunct Professor at Pace University. The author wishes to acknowledge the research and editorial assistance of Elizabeth Barbanes.

I. Introduction

In the late 1960's and early 1970's regulation of raptors[1] in North America underwent an intensive regulatory and legislative metamorphosis. In five short years, birds of prey, historically identified *en famile* as vermin, became the most regulated wildlife on the continent. The flagship federal statutes were the Endangered Species Act of 1973 (ESA)[2] and Migra-

1. A raptor is a bird of prey. In regulatory parlance, raptor means a live migratory bird of the Order *Falconiformes* or the Order *Strigiformes*, other than a bald eagle (*Haliaceetus leucocephalus*) or a golden eagle (*Aquila chrysaetos*). 50 C.F.R. § 21.3 (1985). Raptors include falcons, hawks, eagles and the one owl (Great Horned owl - *Bubo virginianus*) useful in the sport of falconry.

2. Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982).

tory Bird Treaty Act Amendment of 1972 (MBTA).[3] This legislation effectively prohibited the sale of all native raptors in the United States. Access to the birds was restricted to a few qualified individuals and institutions. For the most part, the individuals were falconers who legally possessed birds prior to the Acts. At the time the Acts were passed, these men and women were beginning to breed raptors in captivity for the first time in history. Breeding projects were directed toward supplementing the declining wild stock of peregrine falcons.

Both Acts proscribed the sale of listed species. As a result, raptor propagators, who had single-handedly developed specialized breeding techniques designed to save wild species of endangered raptors, found themselves unable to defray their substantial expenses by accepting consideration for the birds they produced. In 1978, recognizing their successful efforts, Congress amended the Endangered Species Act to exempt pre-act birds and their progeny from the prohibitions of the Act in order to facilitate transfers of captive-bred peregrine falcons (the only endangered or threatened species of interest to falconers) among falconers or propagators.[4]

The Secretary of the Interior promulgated regulations permitting the sale of captive-bred raptors among licensed falconers and propagators.[5] Twenty-one states have adopted the full federal regulations allowing the sale of captive-bred raptors to qualified individuals;[6] twenty-three states have announced their intention to do so but have not promulgated the regulations. Two states, New York and California, will

---

3. Migratory Bird Treaty Act, 16 U.S.C. §§ 701-715s (1982).

4. Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. §§ 1532-36, 1538-40, & 1542 (1982)).

5. 50 C.F.R. §§ 17.32, 17.41, 21.28 (1985).

6. Twenty-one states have adopted the propagation regulations approved by the Fish & Wildlife Service: Colorado, Georgia, Idaho, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Minnesota, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Utah, Washington, Virginia, and Wyoming. As of April 1987, Nebraska and North Dakota have not implemented them. North Am. Raptor Breeders' Ass'n, Inc., 1986 President's Reports 1 (1987).

Forty-two states have adopted the federal falconry regulations. *See* 50 C.F.R. § 21.29(k) (1985).

continue to prohibit the sale of all raptors.[7] At least two other states have regulations permitting the sale of captive-bred raptors but with special provisions that are more restrictive than the federal regulations.[8]

This article will examine the questions surrounding the private ownership of captive-bred raptors and the legality of state statutes which restrict the sale of captive-bred raptors beyond what is federally authorized. For example, who really owns a captive-bred bird? Can state prohibitions or restrictions on their sale in the name of conservation stand in the path of federal statutory and regulatory schemes which seek to encourage commerce in these animals in the name of conservation?

II. History of Modern North American Falconry and Raptor Propagation

A. *Falconry*

Falconry[9] is the most ancient field sport. Although the sport was practiced by the Aztec ruler Montezuma in the sixteenth century,[10] North American falconers trace their sports' heritage to a three thousand year tradition with its roots in Japan, the Mideast and the barbaric tribes of central Asia, and its stem in Medieval and Renaissance Europe. Modern

---

7. New York is currently the only state that prohibits the sale of raptors by statute. N.Y. Envtl. Conserv. Law § 11-1009 (McKinney 1987). In practice, the New York Department of Environmental Conservation (DEC) does not regulate the sale of exotic raptors for falconry. California regulations purport to prohibit the sale of all raptors for falconry purposes, including exotic species. ("Exotic" is a term of art meaning non-indigenous to North America). Cal. Fish & Game Code § 395 (West 1984 & Supp. 1987); Cal. Admin. Code tit. 14, § 670 (1986).

8. Regulations in Wyoming restrict the sale of such birds beyond what is required under federal regulations. Under Wyoming regulations, only the propagator can sell a bird. Propagators can only sell birds that they have produced and each bird can only be sold once in its lifetime. No propagator can sell any bird prior to his or her third year of operation. Wyo. Game & Fish Comm'n, ch. 25.1, Raptor Propagation Regulations § 5 (1987).

9. Falconry is the sport of taking quarry with trained raptors. 50 C.F.R. § 21.3 (1985).

10. Fish & Wildlife Serv., U.S. Dep't of the Interior, Environmental Assessment: Proposed Falconry Regulations 9 (Jan. 1976) [hereinafter Envtl. Assessment - 1976]. Montezuma maintained fifty hunting birds in elaborate facilities. *Id.*

North American falconry[11] began in the 1920's and 30's when a handful of Canadian and American biologists, conservationists and sportsmen studied the ancient texts and began experimenting with home-grown techniques for training predatory birds. They developed a sport that is as much American as the birds that they trained, and they achieved an intimacy with their birds that is duplicated almost nowhere else in all of man's interactions with nature. Aldo Leopold, the father of the American conservation movement, distinguished falconry as "all in all . . . the perfect hobby."[12]

B. *Falconers and Raptor Conservation*

In North America, falconers have historically been dedicated to the salvation of birds of prey.[13] Falconry adherents worldwide have classically been at the forefront of raptor conservation.[14] Falconers have been the raptor resources' chief

---

11. Falconry was practiced occasionally in North America by European settlers before the growth of the modern sport. Jan Baptist flew a Dutch peregrine (*Falco peregrinus*) at quarry in the Hudson Valley in New York in the 1650's, and the first peregrine eyrie in New England was discovered by a falconer in 1861. *Id.*

12. A. Leopold, A Sand County Almanac With Other Essays on Conservation from Round River 172 (1966).

13. The North American Falconer's Association (NAFA) stated the consensus among American falconers in its general policy on protection of raptors. The policy was published in a NAFA Technical Advisory Committee document which was prepared for submission to the International Association of Game, Fish and Conservation Commissioners in 1971:

> NAFA considers a key provision in any raptor management program to be extension of protected status to *all* native raptors. While any native raptor is unprotected, all are subject to indiscriminate killing by those actually or ostensibly unable to identify them. . . . No raptor should be allowed in possession for any purpose without issuance of an appropriate permit, in advance of such possession.

See generally North Am. Falconers' Ass'n, Falconry and the Management of Birds of Prey (Sept. 1971), prepared by the Technical Advisory Committee. *See also* Speech by Roland C. Clement, Pres. Nat'l Audubon Soc'y, Last Call for Birds of Prey, Nat'l Audubon Soc'y Ann. Meeting, Tucson, Ariz. (November 7, 1964).

14. For example, the fourteenth century princess and falconer, Eleanora of Sardinia, introduced a law to protect nesting hawks and falcons. The mediterranean falcon, also known as "Eleanor's Falcon", was named for her. *See* M. de'Mannelli and G. Maria, Le Constituzioni di Eleanora, Giudicessa d'Arborea Initolate Carta de Logu 103 (1805, reprinted 1974); *see also* D. Attenborough, The First Eden at 218.

constituency and its most loyal adherents.[15] For thirty years falconers fought and published against the state bounty systems and the annual "hawk shoots" which destroyed thousands of raptors each autumn.[16] Their opponents were state game agencies, song bird enthusiasts,[17] farmers, and hunters.[18]

During the early 1960's widespread use of the pesticide DDT began to take its toll on wild populations of raptors and other predators. Falconers were among the first to notice the abrupt decline of East Coast peregrine and osprey populations

---

15. In 1973, Commissioner Henry Diamond of the New York State Department of Environmental Conservation recommended passage of the bill allowing falconry in New York, arguing that the enactment of this bill would aid in protecting wild populations of hawks and owls:

> The decline in abundance among wild raptors is being accelerated by the illegal shooting of these birds by uninformed people who consider them "vermin" in spite of their protected status. Dedicated falconers are the persons most concerned over this illegal shooting and are in the best position to bring to the public a better understanding of the need for protecting them.

N.Y. Senate, Memorandum in Support of Bill for the Protection of Wild Birds, from Legislative Bill Jacket, S.B. 1813 (1973).

16. "During the 1920's and early 1930's, all birds of prey in every province and state on the North American continent were officially classified as *vermin*." F. Beebe, A Falconry Manual 83 (1984). Peregrine falcons remained unprotected or on the vermin list of every province and territory and every state save Massachusetts well into the mid-1960's. F. Beebe, Hawks, Falcons and Falconry 283 (1976).

Fish and game services in several states formerly paid bounties to encourage shooting or poletrapping of raptors. *See* Envtl. Assessment - 1976, *supra* note 10, at 2. Hawk shoots at migration points were an annual autumn sporting event. At Cape May, New Jersey, 1,400 hawks were killed in a single day in 1920 and 1,008 sharp shinned hawks were killed at the same site in autumn of 1935. Two thousand hawks were killed at Blue Mountain, Pennsylvania in 1932. Over half of the first-year peregrines on the Texas coast were shot from 1924 to 1963. *Id.* at 14.

17. Envtl. Assessment - 1976, *supra* note 10, at 2.

18. In its April 1943 issue, *Field and Stream*, the nation's largest sporting magazine, published an article by its editor, Ray P. Holland, entitled, "Look Out, Owl." Holland urged all sportsmen to take up their guns, put up an owl decoy on hawk flyway ridges and shoot all the hawks they could for game's sake. Holland, *Look Out, Owl!*, Field and Stream 16,73 (Apr. 1943). In response to the article, Master Falconer Alva G. Nye conducted and financed a national mass mailing campaign directed toward falconers and sportsmen. His letter explained the importance of raptors to the balance of nature and urged sportsmen and falconers to address protests to the publisher, Eltinge Warner. The response was so strong that *Field and Stream* has never again published an anti-raptor article. Letter from Alva Nye to U.S. Game Commissioners and Falconers (Apr. 7, 1943) on file at Pace Envtl. L. Rev. office.

and to remark on the probable culprit as DDT contamination.[19] In 1965, a group of falconers, conservationists and scientists gathered from all over the world in Madison, Wisconsin for the International Peregrine Conference.[20] The conference alerted the world to the disappearance of certain subspecies of the peregrine falcon.[21] The Madison Conference is now regarded as the watershed of raptor protection. The peregrine quickly became the symbol of world-wide wildlife conservation.[22] The Madison Conference precipitated national legislation in North America and elsewhere which finally gave raptors the protection that most falconers had long sought.

C. *Raptor Propagation*

Around the time of the Madison Conference the falconry community began concerted efforts to learn how to breed birds of prey in captivity to supplement declining wild populations.[23] Individual falconers began the first raptor propagation studies with private funds in 1964. By 1968 these studies resulted in the first production of captive-bred peregrines and prairie falcons in the United States. Between 1965 and 1972 falconers developed successful propagation techniques for at

---

19. Envtl. Assessment - 1976, *supra* note 10, at 2-3. *See generally,* F. Beebe, Hawks, Falcons and Falconry (1976); R. Carson, Silent Spring (1962).

20. The participants were mostly falconers. F. Beebe, The Myth of the Vanishing Peregrine 3 (not copyrighted) on file at Pace Envtl. L. Rev. office.

21. The peregrine is abundant in most of its range. Only one of seventeen subspecies is regarded as endangered - the anatum peregrine. *See* Fish & Wildlife Serv., U.S. Dep't of Interior, Draft Environmental Assessment: Falconry and Raptor Regulations 6 (May 1987) [hereinafter Draft Envtl. Assessment - 1987]. Although populations of tundra or arctic peregrines have been recovered, the bird continues to be listed as threatened because of its similarity in appearance to the anatum peregrine. *Id.*

22. The peregrine was an effective symbol because of its nobility, and ironically, because of its success as a species. The peregrine is the only bird that occurs on every continent (except Antarctica) and on every major landmass in the world. F. Beebe, Hawks, Falcons and Falconry 172 (1976).

23. Prior to the 1960's, when there was a rapid increase in interest in falconry and a corresponding interest in raptor propagation, only one man is recorded to have successfully bred a raptor in captivity: Renz Waller, in Germany in 1939, using peregrine falcons. F. Beebe, *supra* note 22, at 45.

least eleven species of raptors.[24] They devised methods to maximize captive production through manipulation of photoperiod and clutches. As a result of these efforts, 947 peregrines were produced in the United States between 1973 and 1981. After 1973, DDT was withdrawn from the market and raptor breeders began to stress the production of captive-bred peregrine falcons as a source of stock to restore or bolster wild populations. More than half of the peregrines produced in captivity were released to the wild. Many more have been produced since the raptor exemption[25] was reauthorized in 1982.[26]

---

24. According to the Fish and Wildlife Service proposed rules:

> [F]alconry and captive propagation of raptors are inexorably intermeshed. Falconers and their associates have been solely responsible for the successful development of captive breeding techniques and production of large falcons and most other hunting species. This has been due primarily to their sustained motivation and technical skills. Irrespective of whether this motivation was directed to the production of hunting stock for falconry or to the restoration of wild populations, it has resulted in the development of management techniques and enhancement of wild populations for several high interest species.

48 Fed. Reg. 1326 (1983).

25. *See infra* notes 49-53 and accompanying text; notes 159-67 and accompanying text.

26. Raptors produced in captivity have reduced or replaced the demand for wild birds. In 1976, the U.S. Fish & Wildlife Service predicted in its environmental assessment of the proposed falconry regulations that 4,456 wild birds would be taken by falconers in 1985. Envtl. Assessment - 1976, *supra* note 10, at 57. Principally due to large supplies produced by raptor propagators, less than 731 birds were actually taken. Draft Envtl. Assessment - 1987, *supra* note 21, at Table 2. According to Robert Berry of the North American Raptor Breeders Association, Inc., (NARBA), a trade association of raptor breeders:

> [In] only 3 short years, the cost recovery concept has encouraged over 200 federally licensed propagators to commit millions of dollars into facilities, equipment, expenses and time to maintain over 1200 hawks and falcons of 12 species in captivity for captive propagation. As the premier species in American falconry, the peregrine and the Harris' hawk have been the primary beneficiaries with private breeding populations of 325 and 298 birds producing 80 and 132 progeny of each respective species in 1985 (latest official FWS figures). NARBA's breeding population survey disclosed at least 136 peregrines produced in 1986, a 70% increase over 1985. NARBA predicts private peregrine production between three hundred and four hundred birds by 1990. Additionally, commercialism has spawned an unforseen benefit by encouraging the maintenance of pure genetic strains of peregrines. Pure subspecies demand significantly higher prices than do subspecific crosses. This is so

Annual production of captive-bred peregrines is now greater than the annual production in the wild, east of the Mississippi, prior to the widespread use of DDT. Even those raptor species which are not commonly used in the sport of falconry have benefited from the growth of raptor propagation. The breeding techniques developed by falconers are being used in attempts to salvage endangered raptors from the California Condor to the Mauritius Kestrels.[27]

III. Protection of Raptors Under Federal Law and Regulations

Legal recognition of falconry as a field sport occurred primarily during the 1960's and early 1970's.[28] The Fish & Wildlife Service first permitted the taking of migratory game birds by means of falconry in 1964.[29] Raptors themselves were unprotected by federal law until 1972.

Persons who take, possess, transport, import, export, buy, sell, barter or use raptorial birds may be affected by one or more of four federal laws:

1) The Migratory Bird Treaty Act,[30] 2) The Endangered Species Act of 1973,[31] 3) The Lacey Act,[32] and 4) The Bald and Golden Eagle Protection Act.[33] Of these laws, the two that most affect falconers and raptor propagators are the Mi-

---

probably because pure strains' physical, biological, and behavioral qualities are more predictable in falconry. . . . Reservoir gene pools of peregrines are being developed and will be available in the event of another environmental catastrophe like DDT.

North Am. Raptor Breeders Ass'n, Inc., 1986 President's Report 5 (1987).

27. Captive propagation of raptors is now a worldwide endeavor. "[A]t least 83 species or subspecies of diurnal raptors [are] now reproduced in captivity, some in the hundreds of progeny and two (American Kestrel and Peregrine) in the thousands." Cade, *Propagating Diurnal Raptors in Captivity: A Review* in International Zoological Yearbook 5 (1986). F3 (3rd captive-bred generation) peregrines and gyrfalcons and even F8 (8th captive-bred generation) kestrels are now reproducing in captivity. *Id.*

28. Envtl. Assessment - 1976, *supra* note 10, at 10.

29. *Id.*

30. 16 U.S.C. §§ 701-715s (1982).

31. 16 U.S.C. §§ 1531-1543 (1982).

32. 16 U.S.C. §§ 3371-3378 (1982).

33. 16 U.S.C. §§ 668, 668d (1982).

gratory Bird Treaty Act and the Endangered Species Act.

A. *Raptor Protection Under The Migratory Bird Treaty Act*

Section 703 of the Migratory Bird Treaty Act (MBTA) makes it unlawful, unless authorized under the regulations, to pursue, hunt, take, capture, kill, possess, sell, barter or buy any migratory bird listed in the treaty conventions which underlie the Act.

The original Migratory Bird Act Convention signed by the United States and Great Britain (for Canada) in 1916 did not list raptors as a protected species.[34] In 1936, the Act was amended to extend its provisions to a Migratory Bird Convention signed that year by Mexico and the United States.[35] By an exchange of notes in 1972, the 1936 convention was amended, adding the family *Falconidae* to the original list.[36] By this amendment, American raptors received federal protection for the first time in 1972.

B. *Regulations Governing Falconry and Raptor Propagation Under the Migratory Bird Treaty Act*

Falconry and raptor propagation are regulated principally under the *U.S. Code of Federal Regulations*, Part 21, entitled "*Migratory Bird Permits.*" The original falconry regulations under this section were designed by falconers and prohibited the sale of all birds of prey for falconry[37] purposes. These reg-

---

34. Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 19 Stat. 1702, T.S. No. 628.

35. Pub. L. No. 74-728, 49 Stat. 1556 (1936).

36. Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990. The American Gyrfalcon (*Falco rusticolus*) is not protected by the treaty since its range does not include Mexico.

37. Sale of wild hawks was anathema to the falconers who designed and supported the regulations. Many of these progenitors of North American falconry had grown up during the final days of legal market hunting and strongly opposed the sale of wild animals. American falconry has fostered a strong ethic against commerce in wild-caught hawks. Trapping one's own bird is an American falconry tradition and is regarded as an important component of the training process of the falconry apprentice. Today most falconers would oppose general commerce in captive-bred raptors because it might mean the reappearance of caged birds of prey in pet stores. *See*

ulations are listed in three sections: Section 21.29, *Federal Falconry Standards;* Section 21.28, *Falconry Permits*, and Section 21.30, *Raptor Propagation Permits.*

The "Falconry Standards" section establishes the minimum state standards for federally approved state falconry programs.[38] The scheme was devised by falconers who participated in the development of the regulation.[39] It is based on a three-tiered system designed to protect the rarer, more fragile and more difficult species from inexperienced falconers. Based upon this system the regulation creates three classes of permits: "apprentice," "general," and "master" and provides criteria for the attainment of each.[40]

The "Falconry permits" section establishes permit requirements, application procedures, issuance criteria and duration of permits.[41]

The "Raptor Propagation Permits" section was promulgated as a final rule in 1983 to allow the sale of captive-bred raptors among licensed falconers and raptor propagators.[42] The "Federal Falconry Standards" section was amended at the same time to allow falconers to buy and sell raptors.[43]

---

generally F. Beebe & H. Webster, North American Falconry and Hunting Hawks (1964).

38. 50 C.F.R. § 21.29 (1985).

39. The scheme was initially proposed in a 1971 paper by the NAFA Technical Advisory Committee. *See* North Am. Falconers' Ass'n, Falconry and the Management of Birds of Prey (Sept. 1971), prepared by the Technical Advisory Committee. The U.S. Fish & Wildlife Service adopted the proposal almost verbatim. 50 C.F.R. § 21.29 (1985).

40. Falconers wishing to qualify for a permit must submit references and pass an exam testing their knowledge of biology, care, handling, literature, laws, regulations, and other appropriate subject matter. Dep't of Envtl. Conservation, New York State Falconry Examination Manual (1987) (prepared by R. Kennedy, Jr. and C. Von Shiligen). They must practice as an apprentice under the supervision of a master or general falconer for at least two years before attempting to qualify for a general class license. They must practice at the general level for five years and pass a field test before qualifying for a master license which allows them to handle peregrines. Under no condition may they possess more than three raptors at any one time. Their facilities and equipment must meet rigorous requirements and be inspected by the state. 50 C.F.R. § 21.29 (1985).

41. *Id.* § 21.28.

42. *Id.* § 21.30.

43. *Id.* § 21.29. Applicants for propagation permits must be equally well qualified as falconers.

When the original falconry regulations were promulgated in 1972, raptor propagation was a rare and uncertain science, and no provision for the sale of wild caught birds was needed since most falconers opposed it. By 1978, raptor propagation was common and reliable and the U.S. Fish and Wildlife Service sought to encourage propogation for its scientific value, for use as a management technique for wild populations, and for recreational use in falconry. The Fish and Wildlife Service (FWS) discussed these purposes in a proposed rule:

> The Service believes that raptor propagation has been shown to benefit the migratory bird resource through production of captive-bred stock for restoration of endangered species, and as an ancillary source of raptors for falconry that reduces the demand for taking certain wild stocks. The Service wishes to encourage these activities by . . . permitting the sale of captive-bred raptors . . . .[44]

The FWS recognized the high monetary costs of raptor propagation and sought to encourage the activity by allowing successful breeders to recover their costs.[45] At the same time, the FWS promulgated regulations to implement the "raptor exemption" passed by Congress amending the Endangered Species Act to allow the sale of captive-bred peregrines.[46]

---

44. 48 Fed. Reg. 1327 (1983).

45. In the same proposed rule, the FWS discusses the high financial costs of raptor propagation:

> Raptor propagation often requires an extraordinary expenditure of time and money. This is particularly true when propagating large falcons and eagles that require special handling and facilities, and do not attain sexual maturity until 3 or more years of age. Specially designed incubators, brooders and related equipment are required to maximize production. At The Peregrine Fund, the cost of producing one peregrine to fledgling state had ranged from $1,500 to $1,900 in recent years. The cost of producing other species has not been assessed, but probably is about the same for eagles, somewhat less for other large falcons, and considerably less for most other smaller raptors. The cost of attempting to produce even small numbers of raptors can place a severe economic burden on permittees with limited financial resources. The impact is largely felt by the 150 or more private breeders who are attempting to produce raptors for falconry.

Id.

46. 50 C.F.R. § 21.28(e)(2)(iii) (1985).

C. *Protection of Peregrines Under the Endangered Species Act*

Section 1538 of The Endangered Species Act of 1973 (ESA) provides that it is unlawful for any person to import, export, take, possess, sell, deliver, or transport any species listed as endangered pursuant to Section 1533 of the Act.[47] Two subspecies of peregrine falcon were listed under The Endangered Species Law of 1966, which preceded the ESA: the anatum peregrine (*Falco peregrinus anatum*) and the arctic or tundra peregrine (*Falco peregrinus tundrius*). Both species continue to be listed under Section 1533 of the Act.[48] These are the only listed raptors of interest to falconers. Peregrines are both migratory birds (regulated by the MBTA) and endangered species (regulated by the ESA). As such they are listed species under both statutes. In such cases, the protection afforded by the Endangered Species Act and regulations is in addition to, and not in lieu of, the Migratory Bird Treaty Act and regulations. The more restrictive law or regulation is applicable.

1. *The Raptor Exemption Amendment To The Endangered Species Act*

In 1978 and again in 1982, Congress amended the Endangered Species Act adding Section 9[49], the raptor exemption, exempting captive-bred peregrines from the prohibition of the Endangered Species Act in order to facilitate transfers of

---

47. 16 U.S.C. §§ 1531-1543 (1973).

48. 50 C.F.R. § 17.11 (1985).

49.

> As explained in a 1987 Draft Environmental Assessment: Congress amended the Act to exempt raptors held in captivity (including their progeny) from certain prohibitions of the Act.This amendment became known as the "raptor exemption". The raptor exemption, in conjunction with the 1983 propagation regulations, allows for the sale of captive propagated peregrines. Congress proposed to retain the raptor exemption when the Endangered Species Act was up for reauthorization in 1985, despite considerable opposition, including a proposed bill (H.R. 2767) drafted expressly to modify it by prohibiting the sale of captive propagated peregrines. To date, the Act has not been reauthorized, and the Service continues to operate under the 1978 exemption.

Draft Envtl. Assessment-1987, *supra* note 21, at 5.

these birds among qualified falconers and raptor propagators.[50]

The intent of the exemption was to promote private breeding of peregrine falcons, "a costly venture."[51]

> Congress intended that the raptor amendment facilitate the exchange of captive-bred raptors through the elimination of certain ESA permit requirements that were criticized before Congress by representatives of raptor breeders. These representatives argued that restrictions on the movement of raptors inhibited ready exchange among breeders, thereby reducing their ability to breed raptors. They also argued that certain ESA restrictions prevented the exercise of falconry with endangered raptors, thus reducing the incentive to breed them.[52]

2. *Sale of Captive-Bred Peregrines Under the Raptor Exemption Regulations*

Regulations implementing the raptor exemption allow the sale to qualified permittees of the properly banded captive-bred progeny of peregrine falcons acquired prior to 1978.[53] The statutory purpose of the raptor exemption and its regulations is to encourage captive breeding of endangered peregrine falcons. The regulatory purpose behind the raptor propagation regulations of the Migratory Bird Treaty Act is to en-

---

50. The legislative history of the raptor amendment to the ESA indicates that its purpose was to "alleviate some of the human pressures on wild raptor[s] . . . increase genetic diversity in captive populations, and . . . further encourage captive production of raptors for conservation, recreation, scientific and breeding purposes." H.R. Rep. No. 1804, 95th Cong. 2d Sess. 23, *reprinted in* 1978 U.S. Code Cong. & Admin. News 9491.

During congressional deliberations on the raptor exemption, an amendment was offered in the House of Representatives to prohibit the sale of captive-bred peregrines. "[I]t was rejected by Congress as "counterproductive" to the recovery of that species. It was the intent of Congress to encourage private breeding of listed raptors and to provide for the commercial trade of captive bred stocks for falconry." Fish & Wildlife Serv., U.S. Dep't of the Interior, Finding of No Significant Impact 6 (Sept. 1982).

51. 48 Fed. Reg. 1326 (1983).

52. *Id.*

53. 50 C.F.R. § 17.7 (1985).

courage breeding of American raptors that are neither threatened nor endangered. State laws which restrict the sale of captive-bred raptors beyond the federal requirements appear to undermine the intent of the federal statutes and regulations. These state rules raise serious questions about state power to control privately owned captive-bred wildlife.

IV. State Ownership of Wildlife

Government regulation in America of the right to take and possess wildlife is a legacy of the British legal system which, in turn, descended from the Roman law. Roman law considered wild animals to be *ferae naturae*, the property of no one until captured.[54] Evolution of state ownership of wildlife began in England with the Norman conquest. The Norman conquerors prohibited hunting by the general population in order to keep weapons out of the hands of a potentially rebellious underclass. Hunting became the diversion, and game animals the exclusive possession, of the aristocracy.[55] British wildlife law at the time of American Independence recognized the absolute power of the king and Parliament to regulate the rights of individuals to take or possess wildlife. Through the Royal Franchises and later the "Qualification Laws" the king and Parliament assigned these rights to landholders and others qualified by rank and money to enjoy them.[56] Possession of game by a commoner was a violation of English law.[57]

The European settlers of North America brought with them a cultivated resentment against fish and game laws. Well into the nineteenth century, hunters regarded attempts to regulate their harvest as an odious intercession. Long Island market hunters reacted typically to an 1838 statute[58] prohibit-

54. D. Favre & M. Loring, Animal Law 38 n.9 (1983) (citing *The Institutes of Justinian*).

55. *See generally* M. Bean, The Evolution of National Wildlife Law (1983); T. Lund, American Wildlife Law (1980); Lund, *British Wildlife Law Before the American Revolution: Lessons from the Past*, 74 Mich. L. Rev. 49, 55-60 (1975).

56. *Id.* at 56-57.

57. Matthews, *Who Owns Wildlife?*, 14 Wildlife Soc. Bull. 459 (1986).

58. 1839 N.Y. Laws ch. 173.

ing the use of batteries of weapons to harvest waterfowl:

> [T]he gunners defied it; at first shooting with masks, at the same time threatening to shoot the informer, should one be found. They finally laid aside their masks, and the law became a dead letter and has since been repealed.[59]

After 1850, with newly created conservation groups and hunter's associations encouraging them, the states began to take more control over management of game and wildlife resources. The progress of game legislation moved steadily from east to west until by 1890 all forty-eight states had some game protection statutes.

In 1852, the unpaid office of country moose warden was created in Maine to prohibit aliens from hunting moose. In 1854, Alabama prohibited the capture of wild turkey by traps and snares in certain counties.[60] A Michigan law in 1865 prohibited the use of punt or swivel guns in certain kinds of hunting.[61] "Fire" hunting of waterfowl was proscribed in some North Carolina counties in 1869.[62] An 1878 Pennsylvania law prohibited the killing of wild pigeons on their nesting grounds.[63] California prohibited hunting of elk and antelope in 1883[64] and in 1890 Wyoming enacted a ten year closed season on buffalo.[65]

The states also passed laws to regulate and protect non-game species. In 1850, the first protection of non-game birds was provided in Connecticut and New Jersey by the passage of a law protecting "small and harmless" insectivorous birds including the "small owl."[66] The first law prohibiting the use of ferrets or weasels in hunting rabbits was passed in Rhode

---

59. U.S. Dep't of Agriculture, Chronology and Index of the More Important Events in American Game Protection 1776-1911, Biological Survey No. 41, 22 (1912) (citation omitted).

60. *Id.* at 24.

61. *Id.* at 26.

62. *Id.* at 27.

63. *Id.* at 30.

64. *Id.* at 31.

65. *Id.* at 33.

66. *Id.* at 23.

Island in 1860.[67] Virginia passed an "act to protect buzzards" in 1879.[68] New York and Pennsylvania enacted model laws for protection of non-game birds in 1886[69] and 1889[70] respectively. The New York law specifically exempted "hawk[s]" from protection. The Pennsylvania statute protected all wild birds with the exception of the English Sparrow. By 1890 the first game commissions were well established; non-resident hunting licenses were being sold in several states, and state game laws were being published in pamphlet form.[71]

During this period, the courts consistently upheld the power of the states to regulate game. A series of United States Supreme Court cases in the nineteenth century recognized the right of the states to control and regulate the "common property" in game. In *McCrady v. Virginia*, the Court upheld the power of the state of Virginia to prohibit citizens of other states from planting oysters within the tide waters of that state.[72] The Court, in *Manchester v. Massachusetts*, affirmed the authority of the Commonwealth to regulate the catching of fish within its bays.[73] In *Martin v. Waddell*, the U.S. Supreme Court had previously identified these rights as a function of state ownership of wildlife within it's boundaries.[74] The Court reasoned that people of the various states inherited the powers possessed by the English crown including the ownership of wildlife. Since the state represents its people in their united sovereignty, the reasoning went, ownership of wildlife must reside in the state.[75]

The Supreme Court reaffirmed the state ownership doctrine in a landmark 1896 decision. In *Geer v. Connecticut*, the Court upheld a Connecticut law which prohibited the trans-

67. *Id.* at 10.
68. *Id.* at 31.
69. 1886 N.Y. Laws ch. 427.
70. 1889 Pa. Laws Act No. 288.
71. U.S. Dep't of Agriculture, Chronology and Index of the More Important Events in American Game Protection 1776-1911, Biological Survey No. 41, 10-11 (1912). *See generally* T. Matthiessen, Wildlife in America (1987).
72. 94 U.S. 391, 395-96 (1876).
73. 139 U.S. 240, 266 (1891).
74. 41 U.S. 367 (16 Pet.) (1842).
75. *Id.* at 410.

portation outside of the state of certain game birds killed within the state.[76] The Court reasoned that the state could do what it wanted with its own possessions. The decision cited a "well considered" California Supreme Court opinion in support of its holding:

> The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.[77]

The *Geer* decision established the doctrine of state ownership of wildlife as the rationale for exclusive state jurisdiction of wildlife management, and was settled law until the decision was overruled in *Hughes v. Oklahoma* in 1979.[78]

V. Federal Intervention and the Collapse of State Ownership

Beginning in 1900 with the passage of the Lacey Act,[79] a series of federal statutes and judicial decisions expanding federal power and protecting individual rights began eroding the state monopoly on wildlife regulation and the primacy of the state-ownership doctrine.

In *Martin v. Waddell* the Court qualified its statement that the state retained all rights and powers inherited from the British Crown by excepting those rights and powers which the states voluntarily relinquished to the federal government.[80] In the realm of wildlife regulation, the surrendered

---

76. 161 U.S. 519, 535 (1896).

77. *Id.* at 529 (citing Ex Parte Maier, 103 Cal. 476 (1894)).

78. 441 U.S. 322 (1979).

79. The principal provision of the Lacey Act prohibits the interstate transportation of wild animals or birds "killed in violation of the laws of the State." The act forbade the importation of English sparrows and starlings and protected the passenger pigeon and other birds. Lacey Act, ch. 553, 31 Stat. 187, 188 (1900) (current version at 16 U.S.C. §§ 3371-78 (1982)).

80. 41 U.S. 367, 410 (16 Pet.) (1842).

powers are generally those which fall within the ambit of the federal treaty clause,[81] the property clause,[82] and the commerce clause.[83] Of these, the federal treaty clause is the primary source of constitutional authority for federal regulation of raptorial birds.

A. *Federal Authority to Regulate Wildlife Under the Treaty Clause*

The treaty clause empowers the federal government to make laws necessary to implement treaties with other nations. The Migratory Bird Treaty Act of 1918 (MBTA) depends at least partially on the treaty clause as a source of constitutional authority. The treaty was originally signed to protect birds that migrated between the United States and Canada. By passing the MBTA, Congress gave effect to the treaty granting the federal government authority to regulate those birds.

Two years after the passage of the MBTA, the state of Missouri tested the Act's constitutionality by attempting to enjoin a federal wildlife officer from performing his duties pursuant to regulations promulgated under the Act. In *Missouri v. Holland*,[84] the state, asserting title to all wild birds within its borders, argued that the treaty and statute were invalid because they interfered with the state's sovereign right to regulate wildlife. Justice Oliver Wendell Holmes denigrated the state ownership claim as a "slender reed."[85] He limited judicial recognition of this doctrine to a grudging acknowledgement that a state has the right to regulate the killing of wild birds within its borders. However, the court ruled that such rights are subservient to federal power when they come into conflict with a valid treaty or an important national interest.

---

81. U.S. Const. art. I, § 10.
82. *Id.* art. IV, § 3, cl. 2.
83. *Id.* art. I, § 8, cl. 3.
84. 252 U.S. 416 (1920).
85. *Id.* at 434.

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitory within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain . . . .[86]

B. *Federal Authority to Regulate Wildlife Under the Property Clause*

The property clause also provides a constitutional basis for regulating wildlife in the various states. Under the property clause, the national government has power to legislate to protect its own property. Early case law established that the United States had power to regulate wildlife on its own lands notwithstanding contrary state statutes and game regulations.

In a 1928 decision, *Hunt v. The United States*,[87] the Supreme Court found that the property clause gave Congress the power to remove overbrowsing deer from the Kaibab National Forest despite state law which prohibited the removal. Later decisions interpreted the property clause even more broadly, allowing federal regulation of activities that occur on state or private land when such activities have an effect on federal property. For example, in *United States v. Brown*[88] the Eighth Circuit Court of Appeals found that the federal government had authority to prohibit duck hunting on state property when such hunting would "significantly interfere with the use" of adjacent federal park land. Recently, the Supreme Court in *Kleppe v. New Mexico*[89] indicated that ani-

86. *Id.* at 435.

87. 278 U.S. 96, 100 (1928).

88. 552 F.2d 817 (1977), *cert. denied*, 431 U.S. 949 (1977).

89. 426 U.S. 529 (1976), *reh'g denied*, 429 U.S. 873 (1976). In this case the New Mexico Livestock Board, responding to a rancher's complaints, entered the rancher's

mals that spent time on federal land became a "component" of that property so that even when they wandered off onto state or private land, they could still be subject to protection asserted under federal statutes.[90] Finally, in *Palila v. Hawaii*,[91] the court suggested that in the case of an endangered species with no connection to federal property, "the importance of preserving such a national resource may be of such magnitude as to rise to the level of a federal property interest."[92]

C. *Federal Authority to Regulate Wildlife Under the Commerce Clause*

A third source of federal authority to regulate wildlife is the commerce clause, which gives the federal government power to regulate any item or conduct affecting the flow of interstate commerce.[93] Animals valued as pets or for their fur, feathers, oil, hides or food potential fall within the traditional meaning of the commerce clause since they provide commodities which enter the stream of commerce. Courts apply commerce clause analysis to cases involving birds which migrate and fish which swim in navigable waters because of these animals' tendency to cross state lines.[94]

In *Palila v. Hawaii*, the district court held that the commerce clause was properly invoked in the case of a sedentary species with no commercial value and no federal property contacts. The court based commerce clause jurisdiction upon the Palila bird's incidental connection with interstate commerce, reasoning that students or professional scientists may cross

---

leased land to remove wild burros that had wandered onto the land from adjoining federal lands. The Federal Bureau of Land Management refused to remove the burros. The removal by New Mexico state authorities was deemed contrary to the provisions of the Wild Free-Roaming Horses and Burros Act and was enjoined by the federal court. *Id.* at 546.

90. *Id.* at 531-32.

91. 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (1981).

92. *Id.* at 995 n.40.

93. U.S. Const. art I, § 8, cl. 3. For example, the Lacey Act, which was the first major federal wildlife statute, was aimed solely at regulating interstate commerce in wildlife.

94. *See* Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).

state lines to come to Hawaii to visit or study the Palila.[95]

As discussed above, the commerce clause authorizes Congress to create rules governing the interstate flow of commerce. The Supreme Court has also interpreted the clause to prohibit, as unconstitutional, any actions by the states which interrupt the free flow of commodities across state lines.[96] This judicially developed doctrine is known as the negative or dormant commerce clause. In its 1979 decision, *Hughes v. Oklahoma*,[97] the Court cited this constitutional prohibition to expressly overrule its 1896 decision in *Geer v. Connecticut*, which first established state ownership of wildlife as the law of the land.[98]

The essential facts in *Hughes* were almost identical to those in *Geer*. An Oklahoma law prohibited the commercial export of minnows captured within the state. Hughes challenged the law under which he had been arrested for selling a load of native minnows in Wichita. The Supreme Court accepted Hughes' argument that the minnow statute was unconstitutional because it unreasonably interfered with interstate commerce. The *Hughes* decision was the final nail in the coffin of the state ownership doctrine. Terming the doctrine "a 19th-century legal fiction"[99] the Court held that cases involving state regulation of wildlife should, in the future, be considered according to the same general rules applied to all other exercises of the state's police power.[100]

VI. Private Ownership of Captive-Bred Raptors

In its wild state then, no one owns a migratory raptor.[101] Under the common law, ownership belongs to the one who reduces the bird to possession.[102] Once a bird is reduced to

95. *Palila*, 471 F. Supp. at 995.

96. *See* Maine v. Taylor, 106 S. Ct. 2440 (1986).

97. 441 U.S. 322 (1979).

98. *Id.* at 326.

99. *Id.* at 336.

100. *Id.*

101. Missouri v. Holland, 252 U.S. 416, 434 (1920) ("Wild birds are not in the possession of anyone; and possession is the beginning of ownership.")

102. Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805), 2 Am. Dec. 264 (1805). This is the

possession, the possessor has a property right until the animal escapes, and even thereafter if the animal has the habit of periodic return, *animus revertendi.*[103] Some courts hold that ownership is retained in captive-bred, non-domestic animals after escape even if there is no *animus revertendi.*[104] By this logic, the owner of a wild bird is its possessor. In the case of captive-bred raptors, ownership resides in the licensee.

Ownership does not mean full and absolute control over a thing. The courts often view ownership as a bundle of rights.[105] Government has the authority to remove "strands" from this bundle when it acts for the public good, so long as it is acting within its enumerated powers and provides appropriate safeguards for the constitutional rights of affected individuals. Thus, the federal government may regulate private ownership in raptors through the commerce, treaty and property powers and the state may regulate private ownership of raptors through its police power. This authority, however, is subject to limitations which will be discussed *infra.*

---

seminal American case on the acquisition of private property rights in wild animals (*ferae naturae*) under the common law. *See also* Shouse v. Moore, 11 F. Supp. 784 (E.D. Ky. 1935) ("Until actual capture has been effected, no property right is acquired by any person in migratory birds that for the moment are within the borders of a particular territory . . .").

103. Arnold, *The Law of Possession Governing the Acquisition of Animals Ferae Naturae*, 55 Am. L. Rev. 393 (1921) cited in Fryer, Readings on Personal Property 55 (3d ed. 1938).

104. *See* United States v. Richards, 583 F.2d 491, 500 (10th Cir. 1978) (Logan, J., dissenting).

105. *See* Andrus v. Allard, 444 U.S. 51, 65-66 (1979). The generally recognized rights of animal owners may be summarized as follows:

(1) The right to convey;
(2) The right to consume;
(3) The right to use as collateral;
(4) The right to obtain the natural dividends of the animal, and
(5) The right to exclude others.

D. Favre & M. Loring, Animal Law 48 (1983). Note that this list has already been circumscribed by animal welfare laws which are recognized in almost every state. Thus, one could conclude that the bundle of rights that an owner has in his animal has already been reduced by the loss of the right to treat the animal cruelly.

VII. Federal Authority to Regulate Commerce in Live Captive-Bred Raptors

A. *Application of the Endangered Species Act and the Migratory Bird Treaty Act to Captive-Bred and "Pre-Act" Birds*

The principles discussed above make it clear that when Congress wishes to act to protect or regulate wildlife, the courts will allow the abrogation of state authority. The courts have also granted Congress wide discretion to limit individual rights in wildlife when those rights conflict with the national goal of conservation.[106] This discretion reaches privately owned (legally acquired) raptors, including birds acquired prior to the implementation of the Migratory Bird Treaty Act or the Endangered Species Act ("pre-act birds") and their progeny, as well as the captive-bred progeny of other lawfully held birds.

In *United States v. Richards*,[107] a three judge panel for the Tenth Circuit upheld Department of the Interior regulations[108] which applied the regulatory prohibitions of the Migratory Bird Treaty Act (MBTA) to the captive-bred progeny of lawfully acquired raptors. Defendant Richards, a respected college professor with high standing in his community, was accused of selling three sparrow hawks (American Kestrels), one of the more common American raptors. Richards, the head of the research animal laboratory at Brigham Young University, had been breeding hawks since 1969. The ancestors of the kestrels he sold had been lawfully acquired by him at a time when they were not covered by any national act or treaty. Richards was sentenced to three concurrent terms (18 months) for violating the MBTA.[109] The pertinent provision

106. *See* Andrus v. Allard, 444 U.S. 51 (1979); United States v. Ray, 488 F.2d 15 (10th Cir. 1973); Lansden v. Hart, 180 F.2d 679 (7th Cir. 1950) *cert. denied*, 340 U.S. 824 (1950) *reh'g denied*, 340 U.S. 894 (1950).

107. 583 F.2d 491 (10th Cir. 1978).

108. *See generally* 50 C.F.R. §§ 10, 21 (1985).

109. The Circuit Court termed the sentence "appalling" in its severity but declined to revoke it since it was within the statutory maximum. *Richards*, 583 F.2d at 497.

of the regulations read as follows:

> "Migratory birds" refers to all those species of birds defined as migratory birds under § 10.1 of Part 10 of this subchapter, and includes all birds of the species which, whether raised in captivity or not, cannot be readily and visibly distinguished by general size or coloration from birds of the same species occurring in the wild state.[110]

Dr. Richard's defense was that defining migratory birds to include those raised in captivity contravened congressional intent. The defendant produced a legislative history of the Migratory Bird Treaty Act in support of this contention[111] but the court dispatched his defense with two arguments.

First, paraphrasing a 1921 federal decision in Georgia, the *Richards* court advanced the proposition that "[t]he question is whether the sparrow hawks which defendant sold belong to a species or group that migrate, not whether the particular birds migrate."[112]

Secondly, the court stated that the wording of the regula-

---

110. 31 Fed. Reg. 11,231 (1966). Currently, " 'Migratory Bird' means any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in § 10.13." 50 C.F.R. § 10.12 (1985).

111. The legislative history cited by Richards and the dissenting judge tended to demonstrate that Congress created the act to protect wild populations of migratory species. *Id.* at 497-501.

112. *Id.* at 495 (citing United States v. Lumpkin, 276 F. 580, 583 (1921)). The language of the Georgia case is compelling. The facts are not. The defendant, Lumpkin, shot mourning doves which were incontrovertedly members of a migratory species. Lumpkin argued that the particular birds he shot were sedentary, remaining in Georgia all year. Since they did not migrate, Lumpkin argued, they were not within the meaning of the Treaty. Lumpkin proposed to burden the government with the impossible task of proving in each case that individual wild birds were themselves migratory. The Georgia federal district court correctly held that all wild birds of a migratory species were covered by the Act. The Montana tribunal in *Richards* cited this language to bring captive-bred birds within the coverage of the Act. In the author's opinion, the better view is that captive-bred birds are not the targets of the Act although they are within its coverage when necessary for enforcement purposes. This interpretation is consistent with the regulation, which does not purport to include *all* captive-bred migratory birds but only those which cannot be "readily and visibly distinguished" from wild birds of the same species. Under this regimen, Richards would still have lost his appeal since unbanded captive-bred birds are impossible to distinguish from wild birds.

tion was reasonable in view of the statutory purpose of protecting wild birds. Courts will sustain the validity of regulations promulgated under a statute as long as the regulations are reasonably related to the purposes of the statute. The *Richards* court found the regulations reasonable because of the difficulty in distinguishing birds raised in captivity from others of the species. "From a practical standpoint," Judge Breitenstein wrote for the majority, "the enforcement of the Act would be difficult if the defense was available that a bird involved was raised in captivity."[113]

These rationales were echoed in a Supreme Court case decided a few months after *Richards* which upheld the application of the Migratory Bird Treaty Act to the prior-acquired artifacts of raptorial birds. In *Andrus v. Allard*,[114] the defendants were American Indian artifact dealers charged with selling relics partly composed of feathers of currently protected birds. The defendants challenged the validity of regulations promulgated by the Secretary of the Interior under the MBTA which prohibited the sale of raptors or their parts lawfully acquired prior to the effective date of the act.[115]

The Court pointed out that the expansive language of the statute applies to all birds and their parts including those acquired prior to the Act.[116] It argued further that if Congress

---

113. *Id.* at 495.

114. 444 U.S. 51 (1979).

115. The regulation provided in pertinent part: "Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of federal protection under the Migratory Bird Treaty Act . . . may be possessed or transported without a federal permit, but may not be purchased, sold, bartered, or offered for purchase, sale, trade, or barter . . . ." 50 C.F.R. § 21.2(a) (1978).

The defendants also challenged a similar regulation promulgated under the Bald and Golden Eagle Protection Act:

> Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade, or barter. . . .

50 C.F.R. § 22.2(a) (1978).

116. The statutory provision in question was the fundamental prohibition in Section 703 of the Migratory Bird Treaty Act.

> [U]nless and except as permitted by regulations made as hereinafter pro-

had intended prior-acquired birds or artifacts to be exempt from the act, it would have provided an exemption as it had for migratory game birds on farms and preserves.[117] Moreover, the court contended, if Congress had assumed that lawfully taken birds could automatically be sold under the Act, "it would have been unnecessary to specify in § 711 that it is permissible under certain circumstances to sell game birds lawfully bred on farms and preserves."[118] The court viewed the broad regulations favorably, reasoning that Congress intended the Migratory Bird Treaty Act "to embrace the traditional conservation technique of banning transactions in protected birds, whenever taken."[119]

It is noteworthy that both the Circuit Court of Appeals in *Richards* and the Supreme Court in *Andrus* gave overriding credence to the regulation's underlying enforcement rationales. The leeway granted the Secretary's broad interpretations of the statute as covering both pre-act and captive-bred birds was based on judicial sympathy with the enforcement difficulties posed by commercialization of lawfully held birds. In *Richards*, the court pointed to the impossibility of distinguishing wild sparrow hawks from the lawfully held birds bred

---

vided in this subchapter, it shall be unlawful . . . to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause or be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured which consists or is composed in whole or part, of any such bird, or any part, nest, or egg thereof . . . .

16 U.S.C. § 703 (1982).

117. The court referred to 16 U.S.C. § 711 (1982) which says: "Nothing in this subchapter shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulation for the purpose of increasing the food supply."

118. *Andrus*, 444 U.S. at 61. When applied to captive-bred raptors, this argument loses some of its force when one considers that raptor propagation would not exist for more than half a century after Section 711 was drafted and approved. With this in mind, the provision is equally probative at evincing congressional intent to exempt propagation activities which promote the purpose of the Act.

119. *Id.* at 61.

by the defendant.[120] In *Andrus*, the Court opined that: "It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds."[121]

The Court reasoned that the legislative draftsmen might have viewed evasion as a serious danger because of the impossibility of determining the age of bird feathers. This rationale, of course, would not apply to live pre-act birds or their progeny lawfully possessed under the Endangered Species Act or Migratory Bird Treaty Act, since the age of these birds can be easily determined. The enforcement rationale which supported the *Richards* decision is irrelevant in view of modern raptor identification techniques.[122]

B. *Constitutional Challenges To Federal Regulations Under The Migratory Bird Treaty Act*

All government conduct may be challenged when it interferes with the constitutional rights of individuals. These rights include the rights to due process and equal protection under the fifth and fourteenth amendments, as well as individual rights under the privileges and immunities clause. The most popular challenge to the Migratory Bird Treaty Act since it was upheld on broad grounds in *Missouri v. Holland*[123] has been the claim that particular applications of the act result in an illegal "taking" of private property in violation of the fifth amendment due process clause. The MBTA has been repeatedly upheld in the face of such arguments.[124]

---

120. United States v. Richards, 583 F.2d 491, 495 (10th Cir. 1978).

121. *Andrus*, 444 U.S. at 58.

122. Individual identification may be established by a number of methods, including seamless bands, footprint xerox, and microchip injection. Parentage of progeny may be proven by DNA testing. Used together these methods provide a foolproof procedure for preventing commercial abuse of wild populations. So long as the falconers bear the cost of proving that a particular bird is captive-bred, these methods will not burden the government's wildlife enforcement resources.

123. 252 U.S. 416 (1920).

124. *See, e.g.*, Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. de-*

Generally, when reviewing a statute in the face of a fifth amendment challenge, the court will ask whether or not it is fair for an individual to bear the burden of a regulation that has a beneficial underlying public purpose. The stronger the public interest the more supportive the judiciary will be of the action. The greater the degree of interference with private property or rights, the more apt the court is to find a taking. In raptor cases, the statutory purpose is usually conservation of wildlife and natural resources. Conservation is judicially recognized as an enormous public benefit.

Short of outright confiscation, the federal government has broad powers to regulate for the purpose of conservation without offending the fifth amendment. In *Andrus*, the Supreme Court overturned the District Court's holding that, as construed to authorize the prohibition of commercial transactions in pre-act avian artifacts, the Bald Eagle Protection Act and MBTA violated the fifth amendment property rights of Indian relic dealers by depriving them of the opportunity to earn a profit from legally possessed eagle parts. The Court reasoned that government regulation, by definition, involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*.[125]

In *Andrus* the Court balanced an important public purpose against an interference that it regarded as limited in nature. The Court acknowledged that the regulations would prevent the most profitable use of the appellee's property, but stated that fact alone did not create a taking. The Court pointed out that the challenged regulations did not compel surrender of the artifacts, that there was no physical invasion or restraint upon them and that appellee may still derive eco-

---

nied, 341 U.S. 939 (1950) (denying recovery for crop damage caused by birds protected by the act); Landsen v. Hart, 168 F.2d 409 (7th Cir. 1948), *cert. denied*, 335 U.S. 858 (1948) (holding that the right to hunt is not a property right but a mere grant of privilege); Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942) (holding that there is no constitutional right to hunt on one's own property).

125. *Andrus v. Allard*, 444 U.S. 51, 65 (citations omitted).

nomic benefit by exhibiting the artifacts:

> [T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.[126]

Under the commerce, treaty and property clauses, federal power to regulate individual utilization of wildlife resources, including captive-bred and pre-act raptors, is almost unlimited in its scope and in its ability to withstand constitutional challenges. On the other hand, state authority to regulate wildlife under the police power has real limitations.

VIII. State Regulations of Wildlife Under the Police Power

A. *Generally*

Even with the demise of the state ownership doctrine, a state still has the power to regulate wildlife within its boundaries where that power has not been preempted by the federal government. State regulation of wildlife is no longer based on title to the wildlife but rather on the state's "police power." "Police power" is a term of art used to describe a state's power to pass laws which further the health, safety and welfare of its citizens. If the subject matter of legislation or agency interest advances one of these goals, then courts will uphold the law and regulation as a legitimate exercise of police power. Courts have consistently found the conservation of wildlife to be an appropriate subject matter for police power regulation.[127] For example, in *Cresenzi Bird Importers, Inc. v. New York*,[128] New York State successfully defended the most

126. *Id.* at 65-66 (citations omitted).

127. Geer v. Connecticut, 161 U.S. 519 (1896); Lawton v. Steele, 152 U.S. 133 (1894); Aikens v. Conservation Dep't, 184 N.W.2d 222 (Mich. 1970).

128. 658 F. Supp. 1441 (S.D.N.Y. 1987).

progressive and far-reaching piece of wild bird legislation in America. The New York State Wild Bird Law and the regulations promulgated thereunder prohibit the sale of any wild bird in the state of New York unless the bird was born and raised in captivity.[129] The District Court upheld the statute against a challenge by pet industry representatives who argued that the purpose of the law was "the preservation of world ecology" which they claimed is not a legitimate police power concern. The Court upheld the defendant's argument that:

> New York has a legitimate interest in regulating its local market conditions which lead, in a short causal chain, to the unjustifiable and senseless suffering and death of thousands of captured wild birds. . . . The state has an interest in cleansing its markets of commerce which the Legislature finds to be unethical. Moreover, a state may constitutionally conserve wildlife elsewhere by refusing to accept local complicity in its destruction. The states' authority to establish local prohibitions with respect to out-of-state wildlife has, since the late nineteenth century, been recognized by the courts.[130]

The district court in *Cresenzi Bird Importers, Inc. v. New York* makes it clear that state authority to regulate wildlife is still quite broad. However, under the police power the states do not have the unlimited discretion to regulate wildlife which they might have claimed under the doctrine of ownership.

---

129. N.Y. Envtl. Conserv. Law § 11-1728 (McKinney Supp. 1987). New York's Sale of Wild Birds Law was adopted in August 1984. It states: "Except as permitted by rule and regulation of [the department], no person shall sell live wild birds . . . unless such birds were born and raised in captivity." *Id.*

130. Cresenzi Bird Importers, Inc, v. New York, 658 F.Supp. 1441, 1447 (S.D.N.Y. 1987). State laws regulating wildlife can be challenged when they interfere with individual rights under the commerce clause or fifth and fourteenth amendment rights of due process, equal protection, and the right to compensation for takings. State sales bans have been attacked by plaintiffs claiming that the bans exceeded the scope of state police power, obstructed federal treaty and foreign affairs powers or discriminated against citizens in violation of the privileges and immunities clause. *See* Matthews, *Who Owns Wildlife?*, 14 Wildlife Soc'y Bull. 459 (1986).

For example, state bans on the sale of wildlife are subject to constitutional limitations,[131] including those established under the supremacy clause and the negative or dormant commerce clause. Under the supremacy clause,[132] federal legislation on wildlife will preempt conflicting state law. Under the negative commerce clause, a state law is invalid when it unreasonably burdens commerce.[133]

B. *Preemption of State Regulations Under the Supremacy Clause*

As discussed above, the state police power to regulate wildlife is limited by the commerce clause. The supremacy clause also limits state power when state laws conflict with overlapping federal law. In such a case, the federal statute may "preempt" an otherwise valid state law. "[W]hen Congress legislates within the scope of its constitutionally granted powers, that legislation may displace state law . . . ."[134]

The question of federal preemption is of interest to falconers and raptor propagators in areas where federal statutes governing the sale of captive-bred raptors are more permissive than overlapping state legislation and regulations. The most obvious examples are state rules which conflict with the "Raptor Exemption" amendment to the Endangered Species Act and the regulations promulgated pursuant to that amendment. The Raptor Exemption and the regulations allow the sale of certain captive-bred peregrine falcons.[135] New York is the only state which prohibits the sale of captive-bred raptors by statute.[136] The statute prohibits the sale of all raptors used

131. *See* Hughes v. Oklahoma, 441 U.S. 322 (1979).

132. U.S. Const. art. VI, § 2.

133. *See* CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1648 (1987) ("the principal objects of dormant commerce clause scrutiny are statutes that discriminate against interstate commerce"); Maine v. Taylor, 106 S. Ct. 2440 (1986) (approving Maine's total ban on import of live baitfish).

134. Wardair Canada, Inc. v. Florida Dep't of Revenue, 106 S. Ct. 2369, 2372 (1986).

135. *See supra* notes 49-53 and accompanying text; *see infra* notes 159-67 and accompanying text.

136. N.Y. Envtl. Conserv. Law § 11-1009(1) (McKinney 1984).

in falconry and specifies that "raptors for use in falconry shall not be bought, sold or bartered, or offered for sale or barter."[137] Regulations have been promulgated under the act[138] which follow the statute in prohibiting the sale of all raptors used in falconry. California[139] and Wyoming[140] also have laws or regulations which either severely restrict or totally prohibit the sale of these birds. The question becomes — are these state laws preempted by the federal Raptor Exemption?

Preemption is compelled whenever Congress explicitly so provides by statute.[141] Absent explicit language, the courts must determine the intent of Congress when the legislation was enacted.[142] The Supreme Court has articulated a two-part test to determine whether federal legislation preempts state law:

> If Congress evidences an intent to occupy a given field, any state law falling in that field is preempted. . . . If Congress has not entirely displaced state regulation over the matter in question state law is preempted to the extent it actually conflicts with Federal law, that is when it is impossible to comply with both state and Federal law or where the state law stands as an obstacle to the accom-

---

137. *Id.*

138. 6 N.Y. Comp. Codes R. & Regs. tit. 6, §§ 173.3, 173.4 (1986).

139. The California Fish and Game Code governs transfer of raptors for propagation and falconry.

> The commission may adopt regulations for the possession or training, and the capture, importation, exportation, or intrastate transfer, of any bird in the orders *Falconiformes* and *Strigiformes* (birds-of-prey) used in the practice of falconry and may authorize the issuance and provide for the revocation . . . of licenses and permits to persons for the practice of falconry.

Cal. Fish & Game Code § 395(a) (West Supp. 1987). The regulations are found in Cal. Admin. Code tit. 14, § 670 (1986).

140. Wyo. Stat. § 23-2-105 (1977) gives the Game & Fish Commission the power to regulate falconry. Purchase, barter and sale of falcons for falconry and raptor propagation are regulated under Chapter XXV of the Wyoming Game and Fish Commission Regulations. This regulation severely restricts the rights of falconers and propagators to sell captive-bred birds. Among other restrictions each bird may only be sold once in its life and only by the breeder. *See supra* note 8.

141. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

142. Wardair Canada, Inc. v. Florida Dep't of Revenue, 106 S. Ct. 2369, 2372 (1986) (stating that "the first and fundamental inquiry . . . is whether Congress intended to displace state law").

> plishment of the full purposes and objectives of Congress.[143]

Section 6(f) of the Endangered Species Act, while not explicitly prohibiting the state regulation of listed species, does directly address the scope of federal preemption intended for the Endangered Species Act. The section provides:

> Any State law or regulation which applies with respect to the importation or exportation of or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter.[144]

Section 6(f) can only be interpreted as congressional intent that federal permits and exemptions under the Act preempt state laws which prohibit the sale of endangered species.

In addition to the clear language of the statute, the legislative history of the Endangered Species Act unequivocally shows that Congress intended federal law to preempt state law pursuant to section 6(f) where federal permission related to commerce in endangered species:

> The question of preemption of state laws [regarding the taking of listed species] was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the states would and should be free to adopt legislation or

---

143. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citations omitted).

144. 16 U.S.C. § 1535(f) (1982). This section goes on to provide that state statutes which restrict the sale or taking of native wildlife, and which conflict in part with this subsection, are valid to the extent that they do not conflict with this subsection (e.g., a New York State statute which restricts the sale of all peregrines and red-tails would be valid to the extent that it restricted sales of wild-caught red-tails).

> regulations that might be more restrictive than that of the Federal government and to enforce the legislation. *The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exportation or interstate commerce; in any such case the State could not override the Federal action.*[145]

A series of federal cases have confirmed that by the language of section 6(f), Congress meant to preempt the field and prohibit state regulations which restrict interstate or intrastate commerce in animals exempted under the Act.

In *Fouke v. Brown*,[146] the Fouke Company, a leather hide processor, brought a citizen's suit against the state of California challenging a California law which forbade the sale of American alligator hides within the state. The American alligator was a listed species under the Endangered Species Act. Fouke had a valid Fish and Wildlife Service permit to sell the hides under Section 1539 of the Act. The District Court found the California law unconstitutional under the supremacy clause and unenforceable as applied to American alligator hides sold in accordance with the Act or its regulations.[147] The court enjoined state officials from enforcing the law.

H.J. Justin and Sons, Inc. v. Deukmejian[148] and *Man Hing Ivory and Imports, Inc. v. Deukmejian*[149] both involved state laws which prohibited commerce in African elephant products. In both cases the Ninth Circuit found that state laws were preempted to the extent that they applied to the holder of a federal permit for trade in these products.

The *Man Hing* holding is notable because it dismissed the significance of printed terms on the federal permit which seemed to condition the permit upon consistent state law. Condition 11(b), printed on the front of the federal permit stated: "The validity of this permit is also conditioned upon strict observance of all applicable foreign, state and other

145. H.R. Rep. No. 412, 93d Cong., 1st Sess. 7-8.
146. 463 F. Supp. 1142 (E.D. Cal. 1979).
147. *Id.* at 1145.
148. 702 F.2d 758 (9th Cir. 1983).
149. 702 F.2d 760 (9th Cir. 1983).

Federal law."[150] This condition is part of the federal form used for all fish and wildlife permits for trade in endangered species, including permits issued under the Raptor Exemption.

Based upon this language, the state argued that the permit which authorized trade in elephant parts was void where such trade was prohibited by state law. The Court of Appeals held that the condition did not vitiate the preemptive effect of the Endangered Species Act. To read this condition broadly the Court said, "would open the way for states to impose regulation to supersede federal regulation of trade in imported endangered species or their export or interstate commerce, a form of state preemption clearly contrary to the intent of Congress in passing the Endangered Species Act."[151]

C. *Preemption of State Laws Restricting Trade in Peregrine Falcons*

Section 1538 of the Endangered Species Act of 1973 prohibits certain conduct involving species listed as endangered or threatened[152] unless such conduct is exempted by Congress or permitted by the Secretary of the Interior.[153] Among the prohibitions are those which make it illegal to import or export, take, sell, or transport listed species in interstate or foreign commerce.[154] Two of the raptors listed under the Endangered Species Conservation Act of 1969 are of interest to falconers and raptor propagators: the Arctic Peregrine falcon[155] and the American Peregrine falcon.[156] Both birds remain listed under the ESA. During the 1978 Congressional session, strong evidence was brought before the relevant

---

150. *Id.* at 765. The court reasoned that the 11(b) condition was only meant to insure that any trade under a federal permit met state or federal quarantine, customs, and agriculture laws. *Id.*

151. *Id.*

152. 16 U.S.C. §§ 1535(g)(2), 1539 (1982).

153. *Id.* § 1538(a)(1)(A).

154. *Id.* § 1538(a)(1)(B, D-F).

155. *Falco peregrinus tundrius.*

156. *Falco peregrinus anatum.*

House and Senate committees[157] showing that the ESA's prohibitions had impeded captive breeding of raptors by responsible falconers, conservationists, and biologists.[158] In order to encourage raptor propagation, Congress amended Section 1538 to allow the sale of captive-bred progeny of listed raptors which were legally acquired before the effective date of the ESA. This amendment became known as the Raptor Exemption.[159]

Acting under the authority of this amendment and the Migratory Bird Treaty Act, the Secretary of the Interior issued detailed regulations[160] allowing qualified permittees to sell the properly banded captive-bred progeny of pre-act peregrines to other qualified permittees.[161] There is no requirement of state approval of such sale.[162] Yet several states continue to prohibit or restrict the sale of exempt peregrines and

---

157. U.S. Sen. Comm. on Environment & Public Works and the H.R. Comm. on Merchant Marine & Fisheries.

158. Congress recognized raptor propagation by private and institutional breeders in the falconry community as an important component in the effort to save the peregrine and other endangered raptors. See Fed. Register, 48 Fed. Reg. 326 (1983).

159. The Raptor Exemption provides:

> (A) . . . this section shall not apply to - (i) Any raptor legally held in captivity or in controlled environment on November 10, 1978; or (ii) Any progeny of any raptor described in clause (i); until such time as any such raptor or progeny is intentionally returned to a wild state.
>
> (B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may be regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

16 U.S.C. § 1538(b)(2) (1982). *See also supra* note 49-53 and accompanying text.

160. Raptor Exemption, 50 C.F.R. § 17.7 (1985).

161. *Id.* § 21.28. Before the raptor exemption was passed, owners of breeding peregrines could give birds to qualified falconers and propagators so long as no consideration was exchanged. Under this "give-away" system there was little incentive for a capable breeder to produce birds beyond his personal needs and the needs of close friends. It was believed that the exemption would give these breeders an incentive to maximize production and encourage new, qualified individuals to commit resources to breeding projects.

162. State authorization of interstate sale of wild-caught raptors taken within the state is required under 50 C.F.R. § 21.28(e)(2)(i) & (ii) (1985).

other species.

State laws which prohibit the sale of exempt captive-bred peregrines should be distinguished from the New York "Wild Bird Law"[163] which is regarded as the most progressive (in the sense of protective) piece of wild animal legislation in the nation. New York's law prohibits the sale of all wild caught birds and the law was recently upheld by the Southern District of New York in *Cresenzi*.[164] The species of concern in *Cresenzi* were unlisted under the Endangered Species Act and were not the target of a federal program or affirmative federal regulation under the Act. For these reasons the Court found that the New York law was not preempted.

> Congress has indicated that even state statutes which apply to interstate commerce will not be preempted by ESA unless they conflict with affirmative Federal regulation. . . . Therefore, the question to be resolved is whether New York's statute is a law that prohibits what is authorized pursuant to "an exemption or permit" provided for under ESA.[165]

The Cresenzis were commercial bird dealers who did not possess permits or exemptions under the Endangered Species Act. Accordingly, the Court properly dismissed their claim of preemption. Congress clearly did not intend to usurp state rights to protect unlisted wild birds from commercial exploitation. However, contrast state laws which prohibit the sale of captive-bred peregrines exempted by the Raptor Exemption Amendment to the Endangered Species Act. These peregrines are legally held, captive-bred, and privately owned birds. In no case were they taken from the wild. Congress seeks through the Raptor Exemption to encourage their owners to enter them in expensive and otherwise resource consuming breeding projects.

State restrictions on trade in exempted peregrines which

---

163. N.Y. Envtl. Conserv. Law § 11-1728 (McKinney Supp. 1987).

164. Cresenzi Bird Imports, Inc. v. New York, 658 F. Supp. 1441 (S.D.N.Y. 1987).

165. *Id.* at 1445.

go beyond what is federally required frustrate the affirmative Congressional goal to promote private propagation. These sale bans, "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress."[166] Congressional intent to preempt state laws regulating commerce in endangered species is clearly expressed in the language of § 6(f) and in the legislative history of the statute. This congressional intent to preempt has been upheld in three cases before the Ninth Circuit Court of Appeals.[167] State laws which restrict the sale of exempted peregrine falcons are in substance no different from the California law restricting the sale of alligator hides which was struck down in *Fouke*. Moreover, in the case of the Raptor Exemption, state laws restricting the sale of captive-bred peregrines frustrate the conservation goals of Congress. For these reasons, such state laws are unlikely to survive a supremacy clause challenge.

D. *Invalidation of State Law Under the Negative or Dormant Commerce Clause*

Although the commerce clause speaks in terms of powers bestowed upon Congress, the courts have long recognized that it also limits the power of the states to erect barriers against interstate commerce.[168] State laws which prohibit the sale of non-listed[169] captive-bred raptors are probably incapable of withstanding a commerce clause challenge. Federal regulations adopted pursuant to the Migratory Bird Treaty Act[170] allow licensed falconers and raptor propagators to sell properly banded captive-bred migratory raptors to other qualified falconers or raptor propagators so long as these birds are not listed as "threatened" or "endangered."[171] No state approval

166. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

167. Man Hing Ivory & Imports , Inc. v. Deukmejian, 702 F.2d 760 (9th Cir. 1983); H.J. Justin & Sons, Inc. v. Deukmejian, 702 F.2d 758 (9th Cir. 1983); *cert. denied* 464 U.S. 823 (1983); Fouke Co. v. Brown, 463 F. Supp. 1142 (E.D. Cal. 1979).

168. *See* Maine v. Taylor, 106 S. Ct. 2440, 2447-48 (1986).

169. That is, raptors which are not listed under the Endangered Species Act.

170. *See* Raptor Propagation Permits, 50 C.F.R. § 21.30(d)(5)(11) and Falconry Permits, 50 C.F.R. § 21.28(e)(2)(iii) (1985).

171. 50 C.F.R. § 17 (1985). Lawfully held birds which were taken from the wild

of such sales is required under the MBTA regulation.[172]

There is no statutory or regulatory provision which purports to empower the states to enact regulations (governing the sale of raptors) which are more restrictive than the Federal MBTA regulations.[173] Statutes and regulations in several

---

cannot be sold but can be transferred without consideration under certain limited circumstances. *Id.* § 21.28(e)(2)(i), (ii) & 21.30(d)(5). The same "no sale" rules apply to raptor semen and eggs. Captive-bred birds may only be sold if they are banded with a numbered, tamperproof seamless marker, authorized by the Fish and Wildlife Service. *Id.* § 21.30(d)(5)(c)(iii). If the marker comes off for any reason, the bird can never be sold again. Under no circumstances may a bird be sold in the general marketplace. It may be sold only to limited numbers of qualified individuals designated and approved by the states and the Fish and Wildlife Service. *Id.* § 21.30(d)(5)(c).

172. 50 C.F.R. § 21.29(b) (1985). Falconry Permit § 21.28(e)(2) enumerates the rights of falconers to sell or transfer their birds as follows:

> (2) Any permittee may -
> (i) Transfer any raptor to another permittee if the transaction occurs entirely within a State and no money or other consideration is involved;
> (ii) Transfer any raptor to another permittee in an interstate transaction if the prior written approval of all State agencies which issued the permits is obtained and no money or other consideration is involved in the transaction; or
> (iii) Purchase, sell, or barter any lawfully possessed raptor which is bred in captivity under authority of a raptor propagation permit issued under § 21.30 and banded with a numbered seamless marker issued or authorized by the Service, subject to the following additional conditions . . . .

The conditions provide record keeping, and reporting requirements, and the minimum qualification of foreign and domestic transferees. Note: Only subsection (ii) of § 21.28(e)(2), governing interstate transfers of wild caught birds, requires state approval. In subsection (i) of § 21.28(e)(2), no transaction involving a captive-bred bird requires state approval. Under the Raptor Propagation Permit § 21.30(d)(5), the rights of propagators to sell or transfer birds, eggs and semen are enumerated as follows:

> Transfer, purchase, sale, or barter, of raptors, raptor eggs, or raptor semen.
> (i) A permittee may transfer any lawfully possessed raptor, raptor egg, or raptor semen to another permittee or transfer any raptor to a falconer who holds a valid State falconry permit if no money or other consideration is involved.
> (ii) A permittee may transfer, purchase, sell, or barter any raptor which is banded with a numbered seamless marker provided or authorized by the Service, subject to the following conditions . . . .

The conditions set forth the qualifications of foreign and domestic buyers (general falconry permit or its equivalent), the age and banding procedure of transferred birds and detailed semen and egg regulations. Note that there is no requirement for state authorization of sales involving captive-bred birds.

173. Paragraph (b) of Section 21.29 entitled, Federal Falconry Standards, contains this provision concerning more restrictive state laws:

states restrict the sale of non-listed captive-bred raptors beyond what is federally authorized. Some state restrictions include outright prohibitions on the sale of any raptors including non-native and exotic species.[174]

These prohibitions must withstand commerce clause analysis under the analytical framework established by the Supreme Court: "In determining whether a State has overstepped its role in regulating interstate commerce, [the Supreme] Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions."[175]

Statutes in the second group have been handled by the Court in two ways. They are struck down without further inquiry[176] or they are subjected to the demanding scrutiny outlined by the Court in *Hughes v. Oklahoma*.[177] Once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect . . . the burden falls on the State to justify it both in terms of the local benefits flow-

---

Nothing in this section shall be construed to prevent a State from making and enforcing laws or regulations not inconsistent with the standards contained in any convention between the United States and any foreign country for the protection of raptors or with the Migratory Bird Treaty Act, and which shall give further protection to raptors.

Section 21.29 describes the least restrictive standards permissible for a state falconry program to qualify for federal recognition. The three-tiered licensing scheme envisioned by this subsection has been adopted in some form by most states. Paragraph (b) does not refer to sale of raptors. Sale of raptors is not governed by Section 21.29 but rather by 21.28 and 21.30 which bracket it. There are no similar provisions for more restrictive state laws under those sections. There is no indication in the regulation or the statute that Congress or the Secretary of the Interior intended to delegate to the States congressional power to restrict interstate commerce in these birds. Regardless of federal intent, state power to regulate wildlife is derived from the police power and must, therefore, meet the requirements of Hughes v. Oklahoma, 441 U.S. 322 (1979) and Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

174. *See, e.g.*, N.Y. Envtl. Conserv. Law § 11-1009(1) (McKinney 1984): "Prohibitions: (1) raptors for use in falconry shall not be bought, sold, bartered, or offered for sale or barter. . . ." and N.Y. Comp. Code R. & Regs. tit. 6, § 173.3(a)(j) (1986): "no person shall buy, sell, barter or offer for sale or barter a raptor for use in falconry."

175. Maine v. Taylor, 106 S. Ct. 2440, 2447-48 (1986).

176. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 106 S. Ct. 2080, 2084 (1986).

177. 441 U.S. 322 (1979).

ing from the statute and unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake."[178]

Statutes in the first group are subject to the less demanding *Pike v. Bruce Church* test:[179]

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. 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.[180]

The criteria for determining the validity of state statutes under the tests in *Hughes* and *Pike* are similar. That is, both tests examine (1) the legitimacy of the police power purpose, and (2) the unavailability of less burdensome alternatives.[181] Even assuming the application of the more deferential *Pike* test,[182] state prohibitions of federally authorized sales of cap-

---

178. *Id.* (citing Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977)).

179. *Maine*, 106 S. Ct. at 2448.

180. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted).

181. The difference between the two tests as first articulated in *Maine v. Taylor* seems to be in the shift of burden of proof from the plaintiff to the state once discrimination is shown.

182. This is by no means a valid assumption. Captive-bred raptor sale bans can arguably be classified as "affirmatively discriminatory." In its 1986 decision in *Brown-Forman Distillers*, the Supreme Court recognized that "there is no clear line separating the category of state regulations that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 106 S. Ct. 2080, 2084 (1986). The New York, Wyoming and California raptor sales bans restrict interstate activity in the most direct manner possible. By forbidding the sale of all captive-bred raptors within their boundaries, they "overtly block the flow of interstate commerce at [the] State's borders." Hughes v. Oklahoma, 441 U.S. 322, 337 (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624

tive-bred raptors are still unlikely to survive.

The first question that must be asked to determine the legitimacy of a state action under the PIKE analysis is whether the state rule serves a legitimate local purpose. If no legitimate local purpose is found, then the law will fail.[183] State legislation governing the sale of raptors or other birds is prompted by one or both of two police power concerns.[184] The first of these is conservation or wildlife management; the second is animal welfare or the prevention of cruelty or mistreatment of animals. For example, in *Cresenzi*, the federal court for the Southern District of New York upheld the New York Wild Bird Law based upon state interest both in wildlife management and animal welfare. The court found that the statute was adopted by New York to halt commercial practices which the legislators "believe might lead to the extinction or near

---

(1978)). The effect of these bans is the virtual closure of the New York and California markets to falconers and propagators in the rest of the nation. The sale bans are discriminatory because New Yorkers and Californians continue to be able to advertise and sell their birds in every other state. In *Maine v. Taylor*, the Supreme Court found that Maine's import ban on out-of-state minnows discriminated on its face against interstate trade and subjected it to the strict requirements of *Hughes v. Oklahoma*. In *Hughes*, the Supreme Court subjected Oklahoma's export ban on state minnows to demanding scrutiny. The Court recognized that state barriers against interstate trade, whether they forbid import or export of a commodity, represent "facial discrimination: which by itself may be a fatal defect." In *Hughes*, the Court acknowledged that the state's interest in conservation and protection of wild animals was a legitimate purpose for the exercise of the state police power, but continues that "at a minimum, such facial discrimination involves the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives." *Id.* at 337.

The New York and California sale bans forbid both import and export of raptors for sale. It is unclear whether this scheme should receive more deference than a sales ban which only operates in one direction. Under the state ownership doctrine recognized in *Geer* (discussed above), states could implement sales bans of local wildlife with impunity. The Supreme Court decision in *Hughes v. Oklahoma* referred to this practice as being outside the analytical framework within which the Court would in the future review wildlife cases. The decision characterized sale bans as "the most extreme burdens" on commerce. "Overruling *Geer* also eliminates the anomaly created by the decision distinguishing *Geer*, that statutes imposing the most extreme burdens on interstate commerce (essentially total embargoes) were the most immune from challenge." *Id.* at 335.

183. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

184. This article does not address agriculture, quarantine or other public health legislation.

extinction of many species" and because of legislative concern "that many thousands of wild birds were dying as a result of cruel and careless practices during capture and transport to New York."[185] State interest in prohibiting the sale of banded captive-bred raptors is less clear and is supported by neither a conservation nor an animal welfare rationale.[186]

1. *Wildlife Management Rationale*

From a wildlife management perspective the state cannot credibly claim that the sale of captive-bred raptors under federal regulation causes a negative impact on the state environment since none of these birds are removed from the environment. All are in the private possession of individual permittees. The state cannot claim to be protecting its interests in out-of-state wildlife for the same reasons. Moreover, all available evidence indicates that raptor propagation and fal-

---

185. Cresenzi Bird Importers, Inc. v. New York, 658 F. Supp. 1441, 1443 (S.D.N.Y. 1987).

186. Of the four states which ban or restrict the sale of captive-bred raptors, New York alone has a statutory prohibition against the sale of all raptors. N.Y. Envtl. Conserv. Law § 11-1009(1) (McKinney 1984). The applicable regulations merely track the language of the statute. The putative purpose is conservation of wild stocks of raptors. This provision was passed by the legislature in 1973, years before the widespread use of raptor propagation techniques. The broad scope of the Act was reasonable at the time because captive breeding was simply not contemplated as a substitute for the annual harvest of wild stocks. The wording of the statute was adopted directly from the recommendations made by the North American Falconer's Association. *See* North Am. Falconers' Ass'n, Falconry and the Management of Birds of Prey, Appendix I (Sept. 1971), prepared by the Technical Advisory Committee. Today the application of the statute's prohibitions relating to captive-bred birds is probably excessive in comparison to the putative local benefits. Those benefits would be promoted as well with less impact by a prohibition restricted to wild raptors. Moreover, a prohibition limited to wild raptors would further, rather than frustrate, the purpose of the legislation which is the promotion of wild stocks.

The putative purpose underlying the California regulation, as stated by the California Fish and Game Commission, is conservation of "California's populations of native birds of prey" and other "raptors threatened with extinction." Resources Agency of California, Department of Fish and Game, "Requirements for Obtaining a Falconry License" 1 (March 1986).

The Wyoming and Colorado regulations are heavily oriented toward the conservation and integrity of wild stocks of predatory birds. *See* Wyo. Game & Fish Comm'n, Raptor Propagation Regulations, ch. 25.1 (1987); Colo. Div. of Wildlife, Requirements for Possession of Raptors for Falconry, ch. 6, pt. I (1986).

conry have either a neutral or beneficial impact on the health of wild raptor populations.[187] The state cannot complain about the development of a large interstate marketplace which might be difficult to regulate since, under the federal rules, only qualified permittees are eligible to purchase the birds.[188] No raptor, for example, can ever be sold in a pet store or on the open market. The numbers of qualified permittees are never expected to be excessive.[189] Finally, there is no enforcement rationale since available methods for identifying each bird, its source and its parentage are foolproof.[190]

2. *Animal Welfare Rationale*

Neither can a credible case be made against falconers or propagators from an animal welfare perspective. The self-interest of falconers and breeders, as well as the federal and state legal frameworks that govern these activities, combine to insure that privately held raptors are the best cared for "wild" animals in captivity. A falconer puts enormous resources into a hunting bird. He or she spends hundreds of hours with each of his or her birds. It takes three to eight weeks to train and condition a working bird. A single damaged feather will cause

---

187. FONSI - 1982, *supra* note 45, at 7.

188. There are fewer than 100 falconers and raptor propagators in New York and fewer than 2,500 nationwide. *See* Subcommittee Falconry Rules, Nongame Wildlife Committee, Int'l Ass'n of Fish & Wildlife Agencies, 1986 Report 1 (1987).

189. Numbers of falconers nationwide have remained stable at 2,500 since 1976. *Id.* at n.1.

190. Numbered seamless bands placed on birds within two weeks of hatching are the principal enforcement tool. These bands are tamperproof. They are made of heavy gauge anodized aluminum and are permanently affixed to a young bird's leg when it is twelve days old to clearly distinguish it as captive-bred. The band cannot be placed on adult birds because it will not fit over the bird's foot after it is a few weeks old. The band system is supplemented by exhaustive paperwork and notification requirements for each bird and egg produced or transferred under falconry and raptor propagation permits. 50 C.F.R. § 21.30(10) (1985). The only loophole in this system is the theoretical opportunity for an unscrupulous permittee to remove eggs or young from a wild nest-site and claim them as the eggs of a permitted bird. There is no evidence that such abuse has ever occurred. *See* Letter from C.R. Bavin, Chief, Law Enforcement Division, U.S. Dep't of the Interior, Fish & Wildlife Service to Robert B. Berry, President, North Am. Raptor Breeders' Ass'n, Inc. (Letter on file in Pace Envtl. Law Rev. office). This abuse, should it ever be suspected, could be easily detected by DNA analysis which establishes parentage.

heartbreak to any falconer. Three broken feathers can frustrate a year of preparation and end the flying season. Each falconer knows the exact weight of his or her bird, usually to the fraction of an ounce, on any day from September to March. Each bird's diet is strictly regulated as to vitamins, minerals, fats, roughage, and amount and is calculated to keep the bird in prime health and condition. Successful methods of housing and transporting raptors without injury have been developed over two thousand years. Use of modern airline transportation systems and refined shipping procedures have minimized the risk of injury or death of birds in commercial transit. Federal and state regulations provide minimum facility standards and equipment standards. In its 1988 "Falconry Guide," the New York State Department of Environmental Conservation estimates that a falconer may have to spend between nine hundred fifty to two thousand two hundred dollars to qualify facilities under the program. The competence of candidates to own hawks is regulated by the state and controlled by rigorous examinations (field and written) and the federally approved apprenticeship system. Before a candidate is deemed competent to own even a common species, he or she may be tested as to his or her ability to recognize symptoms and treat any of a dozen common diseases and injuries and will be instructed on the intricacies of handling and day to day care. As a result of this elevated level of care, life spans of captive raptors in the hands of falconers are consistently and significantly greater than the life spans of wild birds of the same species.[191]

These standards establish a threshold of care that simply does not exist elsewhere. Indeed, were they to be applied to wild or captive-bred animals across the board, these standards would force the closure of the entire pet industry, every game farm, hunt club, and the mallard meat industry, among others. For these reasons, the animal welfare rationale accepted by the court to justify the Wild Bird Law upheld in

191. L. Brown & D. Amadon, *Eagles, Hawks and Falcons of the World*, 148-49 (1968). *See also* Kenward, *Mortality and Fate of Trained Birds of Prey*, 38 J. Wildlife Management 751, 751-756 (1974).

Cresenzi will not support a sale-ban on captive-bred raptors.

In the absence of wildlife management or animal welfare goals, or even a far-fetched enforcement rationale, state regulations which prohibit the federally permitted sale of captive-bred raptors are unlikely to survive the judicial search for an underlying purpose.

The second question that must be asked to complete the commerce clause analysis articulated in *Pike v. Bruce Church* is whether the local police power interest could be promoted as well with a lesser impact on legitimate interstate activities. If the court finds a less discriminatory method of achieving the rule's putative purpose, the rule will be struck down.[192] In *Cresenzi*, New York's Wild Bird Law was upheld because the plaintiffs were unable to propose a less discriminatory means by which the state could withdraw from the wild bird market.

> By requiring that breeders maintain records and place leg bands on birds sold in the state, New York has chosen a rational and effective way of enforcing its ban on wild bird sales. Plaintiffs do not suggest that any less restrictive alternatives exist, and it is hard to imagine a way in which the state could prohibit such commerce without requiring that birds sold in the state be identified as having been raised in captivity.[193]

In contrast, there are certainly less discriminatory means of protecting wild populations of raptors than the across-the-board sale bans in New York, Wyoming and California. The obvious alternative is a sales prohibition like the one upheld in *Cresenzi* or the one set forth under the Federal Falconry Regulations; that is, a sale ban limited to unbanded or wild birds. If, because of enforcement concerns, the state requires greater insurance (beyond seamless bands) that wild stocks are not being laundered through the legitimate market,[194]

---

192. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

193. Cresenzi Bird Importers, Inc. v. New York, 658 F. Supp. 1441, 1447-48 (S.D.N.Y. 1987).

194. Despite occasional law enforcement paranoia on this subject, a three year intensive investigation by the Fish and Wildlife Service was unable to discover a sin-

there are several more layers of regulation available to protect against this supposed evil before reaching the extreme solution of an absolute sale ban. One example is mandatory DNA testing which is reliable, economic, safe, easily accessible and which can be subsidized by the falconer. In *Maine v. Taylor*, the Court noted that when acceptable testing procedures are available for inspecting shipments of live baitfish for parasites on commercial species, "Maine may no longer be able to justify its import ban."[195] There exist safe, effective methods for distinguishing captive-bred falcons from the progeny of wild birds. Thus, there is no justification for a sweeping sale ban because a less discriminatory alternative is readily available.

Far from choosing the least discriminating alternative, New York, California, and Wyoming have chosen to "conserve" wild raptors in the way that most overtly discriminates against interstate commerce: an absolute embargo on sale. In terms used by the Supreme Court in *Hughes v. Oklahoma*, these prohibitive regulations are certainly not a last ditch attempt at conservation after nondiscriminatory alternatives have proved unfeasible. "It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively."[196]

State laws and regulations which prohibit federally authorized sales of captive-bred raptors fail on both questions in the *Pike v. Bruce Church* test. In view of that failure, such state restrictions are in constitutional jeopardy as unreasonable burdens on interstate commerce.

IX. Conclusion

State attempts to restrict the sale of captive-bred raptorial birds beyond what is authorized under federal law are un-

---

gle case in which U.S. falconers were involved in laundering birds through the banding system or in which U.S. falconers exported wild caught birds for sale to foreign countries. *See* Draft Envtl. Assessment - 1987 *supra* n.21, at 1 for a discussion of "Operation Falcon."

195. Maine v. Taylor, 106 S. Ct. 2440, 2455 (1986).

196. Hughes v. Oklahoma, 441 U.S. 332, 338 (1979).

likely to withstand judicial scrutiny. The states cannot claim ownership of captive-bred birds. These birds are generally owned by the individuals who are licensed to possess them. The states have powers to reasonably regulate wildlife under the police power. However, state attempts to prohibit sales of peregrines which are permitted under the Raptor Exemption Amendment to the Endangered Species Act offend the supremacy clause by regulating within federally preempted boundaries. State laws and regulations which prohibit federally authorized sales of captive-bred raptors offend the commerce clause by restricting the flow of commodities across state lines.

The unequivocal language of Section 6(f) of the Endangered Species Act and the legislative history of the Act show that Congress intended the federal law to preempt state law when federal permission authorized commerce in endangered species. A series of federal cases have confirmed that Congress meant to preempt the field and prohibit state regulations which restrict interstate or intrastate commerce in animals exempted under the Act.

Even without explicit preemptive language in a federal statute, a state statute will be overturned when it stands as an obstacle to the accomplishment of the full congressional purposes and objectives of the federal law or regulations. The Raptor Exemption under the ESA (and the MBTA sale regulations) were intended by Congress and the Secretary of the Interior to foster activities that have significant scientific, ecological, and recreational values. State attempts to restrict activities sanctioned by the Act will not survive constitutional muster, good intentions notwithstanding.

State actions which restrict interstate commerce will be upheld only if the state can show that the action serves a legitimate police power purpose and that no less discriminatory means exists to achieve that purpose. The state regulations discussed above fail the first test of reasonableness because their purpose is obscure. It is difficult to imagine a scenario

for which these prohibitions were designed.[197] The regulations fail the second test of reasonableness because they are not precisely targeted. A total sale-ban is a blunt instrument causing impacts to non-target conservation, recreation, and scientific activities that are easily and economically avoidable. For the reasons stated above, state laws and regulations which restrict the federally authorized sale of captive-bred raptors are extremely vulnerable to constitutional challenge.

Moreover, such laws are bad policy as a conservation and social strategy. State laws which restrict the sale of captive-bred raptors discourage raptor propagation by private and public raptor owners. The benefits of raptor propagation include scientific and technological advances which abet captive breeding of almost any avian predator. Furthermore, thousands of young birds have been produced by propagators. Many of these are members of endangered species whose wild populations have benefited from this supplement. Captive-bred raptors have been used to recolonize areas where wild populations had disappeared.

Raptor propagation has become an integral component of the sport of falconry and so it has an important recreational potential. Falconry provides and requires more recreational man hours per wildlife unit than any other hunting sport. Those Americans who choose to accept the discipline and challenge of this sport experience a relationship with nature that is almost spiritual. Invariably, they use these experiences to educate others with a general understanding and respect for raptorial birds. Public appreciation of these species is enhanced through falconers having contact with gunners, landowners, school children, and ornithologists. Raptors requiring rehabilitation and persons encountering raptor depredation problems benefit from falconry activities.[198] Individual falcon-

197. According to the Fish and Wildlife Service, the Service has identified no "infractions of the new raptor propagation regulations." Also, "[f]rom the information available . . . the new seamless marker appears to be working well . . . ." Letter from C.R. Bavin, Chief, Law Enforcement Division, U.S. Dep't of the Interior, Fish & Wildlife Service to Robert B. Berry, President, North Am. Raptor Breeders' Ass'n, Inc. (Letter on file in Pace Envtl. Law Rev. office).

198. For example, falconers are routinely called upon to remove eagles or hawks

ers make important contributions to the collection of population data[199] and development of propagation techniques by assisting wildlife agencies with the protection of indigenous species,[200] and with the restoration of locally expired raptor species. Large numbers of young falconers commit themselves to careers in the associated sciences - biology, ornithology, and veterinary medicine - seemingly as a direct result of their falconry experience. Falconers have a vast knowledge of raptors and have made significant contributions toward both science and conservation.[201] They do so with rare inspiration, insight, and dedication derived from the intense emotional and intellectual experience of living at common purpose with birds of prey. Because of the enormous social and scientific benefits to be gained from the sport of falconry and the science of raptor propagation, state regulations which inhibit these activities are not only constitutionally impermissible, they are ill advised.

---

involved in preying upon sheep or other domestic animals. These birds which would otherwise be destroyed, are trained and bred by falconers. *See* Fish & Wildlife Serv., U.S. Dep't of the Interior, Finding of No Significant Impact: Proposed Regulations to Allow Golden Eagles (*Aquila chrysaetos*) Captured for Depredation Control to be Used for Falconry (June 1982).

199. For example, it was an individual falconer, Morley Nelson, who developed "eagle safe" power lines now used by power utilities throughout the American West.

200. *See* Fielding, J. Russell (Staff Assistant to Assistant Secretary for Fish and Wildlife and Parks, Department of Interior), Keynote Address to NAFA Annual Meeting, Yankton, SD, Nov. 28, 1970.

201. *See* Keynote Address by J. Russell Fielding (Staff Assistant to Assistant Secretary for Fish and Wildlife and Parks, U.S. Dep't of Interior), to NAFA Annual Meeting, Yankton, SD, Nov. 28, 1970.