THE ORIGINS OF FEDERAL WILDLIFE REGULATION UNDER THE COMMERCE CLAUSE

Kathryn E. Kovacs[*]

June 8, 2020, marked the eightieth anniversary of the Bald Eagle Protection Act—the first federal statute to rely on the Commerce Clause for the authority to prohibit the taking of wildlife. Its enactment marked a turning point in federal wildlife law. The Eagle Act's forgotten history supports the Ninth Circuit's conclusion that the Eagle Act is within the scope of Congress's Commerce Clause power,[1] as well as the many federal courts of appeals that have come to the same conclusion about the Endangered Species Act.[2] This history should leave no doubt that Congress may regulate the taking of wildlife.

I. The Migratory Bird Treaty Act

The "cautious first step in the field of federal wildlife regulation" was the Lacey Act of 1900.[3] Reflecting the narrow view of Congress's power to regulate wildlife under the Commerce Clause that prevailed at the time,[4] the key provision of the Lacey Act merely prohibited the interstate transportation of wildlife killed in violation of state law.[5] The Act also empowered the Secretary of Agriculture to "adopt such measures as may be necessary" for "the preservation, distribution, introduction, and restoration of game and other wild birds," but subjected that power to the laws of the states.[6]

Congress's first attempt to prohibit the hunting of migratory birds directly under the Commerce Clause, the Migratory Bird Act of 1913, fell prey to two lower federal courts.[7] The government appealed in one of the cases and argued it twice in the Supreme Court.[8]

---

[*] Professor, Rutgers Law School, The State University of New Jersey.

[1] United States v. Bramble, 103 F.3d 1475, 1480–82 (9th Cir. 1996).

[2] *See* People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 852 F.3d 990, 1007 (10th Cir. 2017) (discussing prior cases).

[3] MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 15 (3d ed. 1997); Lacey Act, ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378).

[4] *See* BEAN & ROWLAND, *supra* note 3, at 14–15; Geer v. Connecticut, 161 U.S. 519 (1896) (holding a state statute prohibiting the transportation of game out of state did not violate Commerce Clause).

[5] 31 Stat. 187 § 3 (1900) (codified as amended at 16 U.S.C. § 3372(a)(2)(A)).

[6] *Id.* § 1 (codified as amended at 16 U.S.C. § 701).

[7] United States v. Shauver, 214 F. 154 (E.D. Ark. 1914), *appeal dismissed* 248 U.S. 594 (1919); United States v. McCullagh, 221 F. 288 (D. Kan. 1915).

[8] *See* BEAN & ROWLAND, *supra* note 3, at 17.

"Apparently fearful of an adverse decision,"[9] the government entered into a treaty with Canada for the protection of migratory birds,[10] and Congress implemented the treaty in the Migratory Bird Treaty Act of 1918 (MBTA).[11] The Supreme Court then dismissed the challenge to the 1913 Act[12] and later upheld the MBTA as a valid exercise of the treaty power.[13] Neither the treaty with Canada, however, nor a subsequent treaty with Mexico, which followed in 1936,[14] included raptors. Thus, at the time, the MBTA did not protect raptors.[15]

II. Early Efforts to Protect Eagles

Congress first considered proposals to extend statutory protection to the bald eagle in the 1930s. The Senate passed an eagle protection bill on April 7, 1930, that echoed the terms of the MBTA in making it unlawful

> for any person to take, kill, or capture, attempt to take, kill, or capture, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation, or carriage, or to export, at any time or in any manner, any bald eagle (the emblem of the United States and commonly known as the American eagle) or any part thereof, or the nest or egg of any such bird, except for scientific, propagating, or exhibition purposes, or in defense of wild life or agricultural or other interests, as permitted by regulations of the Secretary of Agriculture.[16]

The House Committee on Agriculture held a hearing on an identical bill.[17] At the hearing, committee members inquired about the bill's

---

[9] *Id.*

[10] Convention Between the United States and Great Britain for the Protection of Migratory Birds, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702.

[11] Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–711).

[12] *Shauver*, 248 U.S. at 594 (1919).

[13] Missouri v. Holland, 252 U.S. 416 (1920).

[14] Convention Between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, Mex.-U.S., Feb. 7, 1936, 50 Stat. 1311.

[15] Now it does. *See Migratory Bird Treaty Act Protected Species*, U.S. FISH & WILDLIFE SERV., https://perma.cc/U5AW-DQVF.

[16] S. 2908, 71st Cong. (1930); *see also* 72 CONG. REC. 6612 (1930).

[17] American Eagle Protection, Hearing on H.R. 7994 Before the H. Comm. on Agric., 71st Cong. (1930).

constitutionality. Dr. T.S. Palmer, President of the Audubon Society of the District of Columbia, testified that Congress had the authority to "exercise [its] latent power . . . to protect an emblem of sovereignty of the United States."[18] The bill died in committee.

The Senate passed another eagle-protection bill in 1935, which provided that

> whoever . . . without being permitted to do so as hereinafter provided, shall take, possess, sell, purchase, offer to sell or purchase, transport, or export, at any time of in any manner, any bald eagle, commonly known as the "American eagle", alive or dead, or any part, nest, or egg thereof, shall be fined not more than $100 or imprisoned not more than six months, or both.[19]

The bill would have allowed the Secretary of Agriculture to issue regulations to permit eagle takings with a determination

> that it is compatible with the preservation of the bald eagle as a species. . . [and is] for the scientific or exhibition purposes of public museums, scientific societies, or zoological parks, or that it is necessary to permit the taking of such eagles for the protection of wildlife or agricultural or other interests.[20]

The House referred a similar bill to the Committee on Agriculture,[21] which in turn asked the Attorney General for an opinion on the bill's constitutionality.[22] The Attorney General declined to issue a formal opinion, but pointed the Committee to two cases. In one, a district court held that the Migratory Bird Act exceeded Congress's power under the Commerce Clause.[23] In the other, the Supreme Court held that the Migratory Bird Act did not conflict with and hence did not preempt a state duck hunting law.[24] The Committee determined that the bill would be unconstitutional and did not consider it further.[25]

---

[18] *Id.* at 14.

[19] S. 2990, 74th Cong. § 1 (1935); *see also* 79 CONG. REC. 10,061 (1935).

[20] *See* S. 2990 § 2.

[21] 79 CONG. REC. 1456 (1935) (referring H.R. 5271, 74th Cong. (1935)).

[22] Miscellaneous Wildlife Conservation Legislation, Hearing on H.R. 4832 Before the H. Comm. on Agric., 76th Cong. 55 (1940) [hereinafter 1940 Hearing].

[23] United States v. McCullagh, 221 F. 288 (D. Kan. 1915).

[24] Carey v. South Dakota, 250 U.S. 118 (1919).

[25] 1940 Hearing, *supra* note 22, at 56, 63–65.

III. Changing Views of the Commerce Clause

Soon thereafter, the federal courts' view of the Commerce Clause power over wildlife began to change. In *Cochrane v. United States*[26] and *Cerritos Gun Club v. Hall*,[27] the courts of appeals upheld provisions of the MBTA that exceeded the terms of the migratory bird treaties as valid exercises of Congress's Commerce Clause power.[28] Both courts relied on the Supreme Court's 1926 decision in *Thornton v. United States*,[29] which upheld convictions for conspiracy to assault federal employees who were attempting to dip the defendants' cattle (that is, submerge them in pesticide) to prevent the spread of splenetic fever.[30] Congress charged the Bureau of Animal Industry (BAI) with combating disease among domestic animals using what we would now call a "cooperative federalism" model.[31] The defendants argued that their convictions exceeded the scope of the Commerce Clause because the cattle at issue were not intended to be in interstate commerce, but merely wandered across the Florida-Georgia border on their own.[32] The Supreme Court rejected that argument, reasoning that the BAI employees' actions were "were all part of the measure of quarantine reasonably adapted to prevent the spread of contagion in and by interstate commerce."[33] Under existing precedent, preventing such a burden on commerce was within the Commerce Clause authority.[34] Whether the cattle had been transported across the border or wandered there on their own made no difference to the Court; the wandering was "made possible by the failure of the owners to restrict their ranging, and is due, therefore, to the will of their owners."[35]

In *Cochrane*, the Seventh Circuit upheld federal regulations that limited duck hunting methods, specifically baiting.[36] The appellants argued that the regulations exceeded the terms of the migratory bird treaties and thus violated the Tenth Amendment.[37] The court rejected that argument, reasoning that "the authority to deprive the hunters of

---

[26] 92 F.2d 623 (7th Cir. 1937).

[27] 96 F.2d 620 (9th Cir. 1938).

[28] 92 F.2d at 626–27; 96 F.2d at 627. The Supreme Court did not endorse that view until it decided *Andrus v. Allard*, 444 U.S. 51 (1979).

[29] 271 U.S. 414 (1926).

[30] *Id.* at 418. The defendants actually killed one federal employee and blew up facilities. *Id.* at 422.

[31] *See* Sam Kalen, *Muddling Through Modern Energy Policy: The Dormant Commerce Clause and Unmasking the Illusion of an* Attleboro *Line*, 24 N.Y.U. ENV'T L.J. 283, 293 n.46 (2016).

[32] 271 U.S. at 425.

[33] *Id.* at 424.

[34] *Id.* at 425 (citing United States v. Ferger, 250 U.S. 199 (1919)).

[35] *Id.*

[36] Cochrane v. United States, 92 F.2d 623, 627 (7th Cir. 1937).

[37] *Id.* at 626.

any open season [under the MBTA] carries with it the power to provide for a limited open season *for limited purposes only*. . . . [T]he greater power necessarily carries with it the lesser power."[38] The court further held that the regulations were a proper exercise of the commerce power, finding the case "not readily distinguishable" from *Thornton*.[39] The court rejected the appellants' assertion that the state's property interest in migratory birds precluded federal regulation:

> It is unbelievable that the framers of the Constitution intended to leave this form of valuable property, which did not vest in the individual and which could not be controlled by the state, unprotected and fated to total destruction. It is not a matter of sentiment but of common sense.[40]

The Ninth Circuit in *Cerritos Gun Club* followed *Cochrane*, but added a lengthy disquisition on migratory birds' migration patterns, threats to survival, domestication, and ownership.[41] The court relied on *Thornton* directly, reasoning that, because ducks can be domesticated, the failure to domesticate them leaves them free to cross state lines, thus subjecting them to the Commerce Clause power.[42] In other words, the Ninth Circuit read *Thornton* not as upholding a statutory system designed to prevent disease from burdening interstate commerce in domestic animals, but as holding that "traveling of . . . animals following their instinct to range [across state lines] constitutes the interstate character of their movements."[43] In any event, both *Cochrane* and *Cerritos Gun Club* upheld migratory bird regulations as proper exercises of the Commerce Clause power.

IV. The Eagle Act

By the time Representative Charles Russell Clason introduced H.R. 4832 on March 7, 1939,[44] the Commerce Clause winds had shifted. Clason's bill was designed to extend to the bald eagle "complete protection against being taken in any way," except that the Secretary of Agriculture would be authorized to issue permits for museums and eagles that were causing "trouble."[45] His bill to protect the bald eagle

---

[38] *Id.*

[39] *Id.* at 627. Unfortunately, the court provided no explanation for that conclusion.

[40] *Id.* at 627; *see also id.* ("Here a national interest of very nearly the first magnitude is involved.") (quoting Missouri v. Holland, 252 U.S. 416, 435).

[41] Cerritos Gun Club v. Hall, 96 F.2d 620, 623–29 (9th Cir. 1938).

[42] *Id.* at 625–27.

[43] *Id.* at 626.

[44] H.R. 4832, 76th Cong. (1939).

[45] 1940 Hearing, *supra* note 22, at 69 (statement of Hon. Charles Russell Clason).

was referred to the Committee on Agriculture,[46] which held a hearing on March 11, 1940.[47] At the hearing, Clason quoted from a letter from the Department of Agriculture explaining that the bald eagle was threatened with extinction due to trophy hunting and egg poaching.[48] He opined that Congress had the authority to protect the bald eagle under the Commerce Clause, relying on the court of appeals' decisions in *Cochrane* and *Cerritos Gun Club*.[49]

Not surprisingly, given the backdrop of fascist belligerence in Europe, patriotism permeated the hearings. The prior fall, Hitler had invaded Poland, and Great Britain and France had declared war on Germany. Clason asserted that the bald eagle needed protection "[f]or patriotic reasons, for humane reasons and in order that the greatest bird which has made its home widely throughout the United States may be preserved for posterity."[50] Clason felt that the bald eagle's status as "the Emblem of the United States" was "more than sufficient grounds for the enactment" of the bill.[51] Maud Phillips, President of Blue Cross Animal Relief, hit the same patriotic theme. She asserted that Americans were united around "individual liberty,"[52] and as they became "more liberty conscious" they became "more eagle-minded."[53] She stated that the bald eagle's "ruthless destruction is a violation of trust tending to weaken loyalty to those fundamental principles of constitutional freedom for which it stands."[54] Like the flag, Ms. Phillips believed that the bald eagle should be protected from "desecration."[55]

As he had in 1930, Dr. T.S. Palmer, President of the District of Columbia Audubon Society, testified that Congress has the power "to select an emblem[,] . . . to command respect for that emblem, and . . . to encourage patriotism among its citizens."[56] He quoted from *United States v. Gettysburg Electric Railway Co.*,[57] in which the Supreme Court upheld the federal power of eminent domain:

> Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen

---

[46] H.R. 4832.

[47] 1940 Hearing, *supra* note 22.

[48] *Id.* at 51, 53 (statement of Hon. Charles Russell Clason).

[49] *Id.* at 56–57, 63–65.

[50] *Id.* at 49.

[51] *Id.*

[52] *Id.* at 79 (statement of Maud Phillips, President, Blue Cross Animal Relief).

[53] *Id.* at 76.

[54] *Id.* at 75.

[55] *Id.* at 76–77.

[56] *Id.* at 80 (statement of Dr. T.S. Palmer, President, Audubon Society, Washington, D.C.).

[57] 160 U.S. 668, 681 (1896).

> his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by congress, must be valid.[58]

In its report, the House Committee on Agriculture recommended passage of the Eagle Act.[59] The report quoted from the same letter from the Secretary of Agriculture that Clason had read at the hearing.[60] In the letter, the Secretary expressed his gratification at Congress's renewed interest in protecting the bald eagle, a species worth protecting for both its aesthetic value and its status as the national symbol.[61] He said that trophy hunting and egg poaching threatened bald eagle populations and that they would go extinct without further protection.[62]

The Senate Committee on Agriculture recommended passage of the companion bill.[63] The Senate report quoted a similar letter from the Secretary of Agriculture explaining that

> "[b]ecause of its conspicuousness and relatively large proportions, and doubtless also because of its rarity in certain sections, it is a fact that there are persons in almost every community where an eagle may appear who are eager to shoot it and to boldly advertise their assumed prowess in newspapers and other publications. There are also numerous collectors of birds' eggs who persistently rob the nests of these eagles."[64]

The bill passed the House on May 20, 1940,[65] just days after Hitler invaded Belgium, France, Luxembourg, and the Netherlands. On the House floor, Congress exempted Alaska from the bill and substituted references to the Department of Agriculture with the Department of the Interior, which had recently taken over wildlife management functions.[66] On May 28, 1940, the Senate substituted the

---

[58] 1940 Hearing, *supra* note 22, at 80–81 (statement of Dr. T.S. Palmer).

[59] H.R. Rep. No. 76-2104, at 1 (1940).

[60] *Id.* at 1–2.

[61] *Id.* at 1.

[62] *Id.*

[63] S. Rep. No. 76-1589, at 1 (1940).

[64] *Id.* at 2.

[65] 86 Cong. Rec. 6447 (1940).

[66] *Id.* The Bureau of Fisheries in the Department of Commerce and the Bureau of Biological Survey in the Department of Agriculture moved to the Department of the Interior effective July 1, 1939, Reorganization Plan No. II, 53 Stat. 1433, § 3(e)–(f) (1939) ("The functions of the Secretary of Agriculture relating to the conservation of wild life, game, and migratory birds are hereby transferred to, and shall be exercised by, the Secretary of the Interior."), and combined to form the Fish and Wildlife Service in 1940, Reorganization Plan No. III, 54 Stat. 1232 § 3 (1940).

House bill for its identical bill[67] and passed the measure without discussion.[68] President Roosevelt signed the Act for the Protection of the Bald Eagle on June 8, 1940.[69]

The preamble to the Act recited that the Continental Congress in 1782 had adopted the bald eagle as the national symbol, "the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom," and it "is now threatened with extinction."[70] The statute made it unlawful to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, alive or dead, or any part, nest, or egg thereof," except as permitted by the Secretary of the Interior.[71] The term "take" included "pursue, shoot, shoot at, wound, kill, capture, trap, collect, or otherwise willfully molest or disturb," and the term "transport" included "ship, convey, carry, or transport by any means whatever, and deliver or receive or cause to be delivered or received for such shipment, conveyance, carriage, or transportation."[72] Section 2 of the Act authorized the Secretary of the Interior, if he determined it to be "compatible with the preservation of the bald eagle as a species," to "permit the taking, possession, and transportation of [bald eagles] for the scientific or exhibition purposes of public museums, scientific societies, or zoological parks, or . . . for the protection of wildlife or of agricultural or other interests in any particular locality."[73]

* * *

In 1940, Congress believed that the Commerce Clause gave it the authority to regulate the taking of a particular species. The Supreme Court endorsed that understanding when it cited the Eagle Act in support of the proposition that "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product."[74] After eighty years, it is time to put Commerce Clause challenges to federal wildlife regulation to rest.

---

[67] 86 CONG. REC. 7006 (1940).

[68] 86 CONG. REC. 7007 (1940).

[69] An Act for the Protection of the Bald Eagle, Pub. L. No. 76-567, 54 Stat. 250–51 (1940).

[70] *Id.* at 250.

[71] *Id.* §§ 1–2 (codified at 16 U.S.C. §§ 668(a), 668a).

[72] *Id.* § 4.

[73] *Id.* § 2.

[74] Gonzales v. Raich, 545 U.S. 1, 26 & n.36 (2005).