STATE WILDLIFE REGULATION AND THE COMMERCE CLAUSE: FALL OF THE STATE OWNERSHIP DOCTRINE

Recent federal legislation[1] recognizes the importance of the nation's wildlife[2] and other natural resources.[3] As states respond with additional regulations protective of such resources,[4] environmental and economic concerns will inevitably collide with greater frequency.[5] Although the Supreme Court has rarely examined conser-

1. Examples of federal legislation on these subjects are: Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976 & Supp. III 1979); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1976 & Supp. III 1979); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1976 & Supp. III 1979).

2. Traditional views of wildlife are dissipating and Americans are now beginning to recognize and appreciate the valuable contributions of wildlife to the environment. Bertrand & Talbot, *Preface* in WILDLIFE AND AMERICA at iii (H. Brokaw ed. 1978).

For background on federal wildlife regulation, see M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (1977); Guilbert, *Wildlife Preservation under Federal Law*, in FEDERAL ENVIRONMENTAL LAW 550 (E. Dolgin & T. Guilbert eds. 1974). For a general discussion of federal conservation of fish and wildlife, see 3 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 12.04 (1978).

3. Exploitation of environmental resources often creates costs that exceed the value of the resources themselves. 1 COUNCIL ON ENVT'L QUALITY ANN. REP. 11 (1970).

4. *See, e.g.*, ME. REV. STAT. ANN. tit. 38, §§ 541-560 (1977 & Supp. 1980) (prevention and control of oil spillage); OR. REV. STAT. § 459.810-.890 (1979) (ban on nonreturnable beverage bottles); VT. STAT. ANN. tit. 10, §§ 1521-1527 (Supp. 1980) (ban on nonreturnable beverage bottles); WASH. REV. CODE ANN. § 88.16.170-.200 (Supp. 1980) (oil tanker regulations to protect against oil spills, partially invalidated by Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), for conflict with federal law and the commerce clause).

5. States, recognizing the need to conserve the environment, have passed legislation which simultaneously protects the environment and interferes with resource exploitation commerce. *See* Note, *The Negative Commerce Clause and State Environmental Legislation—Externalities Suggest Application of the Tax Standard to Environmental Regultions*, 32 VAND. L. REV. 913, 914 (1979) [hereinafter cited as *Negative Commerce Clause*]. *See generally* B. COMMONER, THE CLOSING CIRCLE ch. 12 (1971); J. HITE, H. MACAULAY, J. STEPP, & B. YANDLE, THE ECONOMICS OF ENVIRONMENTAL QUALITY (1972); Asmussen & Bouchard, *Wild and Scenic Rivers: Private*

vation statutes in light of the dormant federal commerce power,[6] in *Hughes v. Oklahoma*[7] the Court prescribed the balancing approach of commerce clause analysis[8] to evaluate conflicts involving wildlife regulations.

Hughes, a commercial minnow dealer, purchased natural minnows[9] in Oklahoma from a licensed dealer. By attempting to transport the minnows to Texas,[10] he violated an Oklahoma statute[11] prohibiting shipment of natural minnows out-of-state for commercial purposes. Hughes appealed[12] his conviction, alleging that the statute was repugnant to the commerce clause of the United States Constitution.[13] The Supreme Court, accepting that argument, overturned the conviction.[14]

The drafters of the Constitution intended the commerce clause to eliminate economic barriers between states by giving federal legislators power to regulate interstate commerce.[15] This commerce power

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Rights and Public Goods, in CONGRESS AND THE ENVIRONMENT 163 (R. Cooley & G. Wandesforde-Smith eds. 1970).

6. The dormant commerce power refers to the unexercised power of Congress to regulate interstate commerce. *See* notes 16 & 18 and accompanying text *infra*. The Court more frequently examines conservation statutes in terms of alleged conflict with federal statutes or treaties or with some constitutional provision other than the commerce clause, such as the privileges and immunities clause or the equal protection clause. *See* note 28 and accompanying text *infra*.

7. 441 U.S. 322 (1979).

8. *See* note 19 *infra*.

9. "Natural" minnows are minnows taken from natural waters, as opposed to those raised in commercial hatcheries.

10. Hughes planned to transport the minnows from Purcell, Oklahoma, to his commercial minnow business in Archer County, Texas.

11. The statute, part of the Oklahoma Wildlife Conservation Code of 1974, provides:

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

OKLA. STAT. ANN. tit. 29, § 4-115(B) (West 1976).

12. The highest Oklahoma criminal appellate court affirmed Hughes' conviction. Hughes v. State, 572 P.2d 573 (Okla. Crim. App. 1977).

13. U.S. CONST. art. I, § 8, cl. 3. The commerce clause gives Congress the power "[t]o regulate Commerce . . . among the several states." *See* notes 16-18 *infra*.

14. 441 U.S. at 325, 338 (1979).

15. *See* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533-34, 539 (1949).

includes preemptive and dormant aspects.[16] Congressional enactment of legislation in a given area under the commerce clause may preempt conflicting state law in that area.[17] Unexercised commerce

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Therein the Court discussed the state's lack of power to constrict the flow of interstate commerce to protect its economic interests. The Court emphasized that centralizing the regulation of interstate commerce was a primary purpose of the Constitutional Convention. The framers of the Constitution believed centralization of power was necessary to avoid the intense economic competition that existed among the states under the Articles of Confederation. *Id.* at 533-34.

16. *E.g.*, Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1769 (1974). Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), was the first major decision concerning a commerce clause challenge. In that case, because federal preemption of the state statute made the inquiry unnecessary, Chief Justice Marshall dismissed the question whether states retained power over commerce until Congress exercised its right to regulate interstate commerce. *Id.* at 200. The Chief Justice, however, conceded "great force" to the argument that the power to regulate interstate commerce was exclusively federal. *Id.* at 209.

The first Supreme Court decision to speak of a "dormant" commerce power was Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). There a Delaware statute authorized construction of a dam across a navigable stream. The dam purportedly alleviated health problems caused by marshes along the creek. Since Congress had passed no act affecting the case, Chief Justice Marshall found that the statute could not "be considered as repugnant to the power to regulate commerce in its dormant state." *Id.* at 252. The actual basis of the decision, however, appears to be Marshall's acceptance of the statute as a valid exercise of the state police power with no purpose to regulate commerce. *See* GAVIT, THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION 13-14 (1932).

One commentator summarized the development of commerce clause theories prior to 1938: First, the clause implicitly prohibited all state regulation of interstate commerce, as suggested in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); second, the clause did not prohibit state regulation in the absence of congressional action, as stated by Chief Justice Taney in The License Cases, 46 U.S. (5 How.) 504 (1847); third, the clause prohibited some, but not all, state regulation, as posited in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); finally, the clause itself prohibited nothing although restrictions on state regulation might arise should Congress deem them necessary, as indicated in Leisy v. Hardin, 135 U.S. 100 (1890). Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 2-6 (1940). For a discussion of subsequent developments in the doctrine of congressional consent to state action, focusing on the ideas of Chief Justice Stone, see Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547 (1947).

For additional perspectives on developments in judicial thought concerning the commerce clause, see E. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS (1936); F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1937); J. KALLENBACH, FEDERAL COOPERATION WITH THE STATES UNDER THE COMMERCE CLAUSE (1942); F. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937).

17. "[I]n areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to

power, on the other hand, is merely "dormant;" despite its inaction, Congress retains regulatory power over interstate commerce in an area, and state governments generally may not interfere with the free flow of that commerce.[18]

Dormant commerce clause analysis involves a judicial determination of whether a state statute improperly intrudes into an area restricted to federal regulation.[19] Despite extensive application of that analysis to a broad range of interstate commerce questions,[20] the Supreme Court retreated from the analysis late in the nineteenth century in the context of state wildlife regulation by endorsing the state ownership doctrine.[21] This doctrine postulates that wildlife within a

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make 'delicate adjustment of the conflicting state and federal claims.'" A & P Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976).

18. *See* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978), where the Supreme Court stated:

> Long ago it was settled that even in the absence of a congressional exercise of [the commerce] power, the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce. . . . At the same time, however, it never has been doubted that much state legislation, designed to serve legitimate state interests and applied without discrimination against interstate commerce, does not violate the Commerce Clause even though it affects commerce.

19. Dormant commerce clause analysis has become more complex over the years. In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319-20 (1851), the Court held that states shared the commerce power concurrently with Congress. Which of the two could exert the power in a particular situation depended on whether the subject matter was of a local or national character. *Id.* The focus shifted in South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 190 (1938), where the Court found that state action was permissible if its goal was within the state's "province" and if the legislation was "reasonably adapted" to the goal, although no definite standards were outlined for either condition. Several years later, in Southern Pac. Co. v. Arizona, 325 U.S. 761, 770-71 (1945), the Court identified a need to weigh federal and state interests by balancing the burden on interstate commerce against the weight and sufficiency of the state's interest in regulating the subject matter. Finally, in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), the Court further refined its balancing test. *See* notes 33-34 and accompanying text *infra*. For a thorough discussion of the evolution of dormant commerce clause analysis, see Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

20. *See, e.g.*, Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) (regulation forcing local distributors to buy all available milk from local producers); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (regulation requiring certain type mudguard on trucks and trailers); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (statute setting minimum milk prices to be paid by dealers to producers); and Welton v. Missouri, 91 U.S. 275 (1876) (license requirement for peddlers of out-of-state goods).

21. Under the then prevailing view of the commerce clause, the Court may have deemed wildlife regulation to be peculiarly "local" in character. *See* note 19 *supra*.

state is the common property of the citizens of that state. As representative of its people, the state retains the right to control and regulate the wildlife for its citizens' benefit.

In *Geer v. Connecticut*,[22] the Supreme Court examined the state ownership doctrine[23] before considering the extent to which a state may regulate its wildlife without contravening the commerce clause.[24] In *Geer*, the defendant appealed his conviction for possession of game birds with the intent to ship them out of state. Though

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Alternatively, the Court may have adopted the state ownership doctrine to avoid altogether the task of analyzing the state's interest. *Cf.* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805 (1976) (entrance into the market by the state itself is not "the kind of action with which the Commerce Clause is concerned").

The state ownership doctrine is also referred to as the public ownership, public trust, sovereign ownership, or quasi-sovereignty doctrine. Societies since ancient times have recognized governmental power over things such as wildlife or air, on the basis that they belong to no individual. Geer v. Connecticut, 161 U.S. 519, 522-29 (1896). Under this theory, the sovereign does not actually "own" such things, but rather holds them in trust for the people's common benefit. *Id.* at 529. The Supreme Court used the state ownership theory to uphold state regulations in Manchester v. Massachusetts, 139 U.S. 240 (1891) (controlling menhaden fisheries for the benefit of the people of the state); McCready v. Virginia, 94 U.S. 391 (1877) (limiting oyster "planting" to state citizens, who have a property right in the tidewater beds of the state); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855) (regulating manner of taking oysters since soil below water is held by state in trust for people).

Even recently in Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 392 (1978), Chief Justice Burger's concurring opinion noted the state ownership doctrine "manifests the State's special interest in regulating and preserving wildlife for the benefit of its citizens." Burger believed the doctrine applied at least to animals that remained within the borders of the state. *Id.* at 393.

For pre-*Hughes* discussions of the public trust doctrine and its applications in environmental issues, see 1 V. YANNACONE, JR. & B. COHEN, ENVIRONMENTAL RIGHTS & REMEDIES ch. 2, 15 (1971); Berlin, Kessler & Roisman, *Law in Action: The Trust Doctrine*, in LAW AND THE ENVIRONMENT 166 (M. Baldwin & J. Page eds. 1970); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Note, *The Public Trust Doctrine: A New Approach to Environmental Preservation*, 81 W. VA. L. REV. 455 (1979). All of these commentators urge use of the public trust doctrine as a litigation tool to protect the environment and to conserve wildlife and resources. Although *Hughes* may negate its utility in state litigation, the doctrine should remain viable where the national trust function is at issue.

22. 161 U.S. 519 (1896).

23. *Id.* at 522-30. The Court traced the development of the doctrine from Athenian and Roman law through French civil law and English common law to American colonial and state law.

24. In *Geer*, the challenged Connecticut statute set out the open hunting season for woodcock, quail, and ruffled grouse, but prohibited at all times their transportation out of state. *Id.* at 519.

he had killed the birds lawfully, the defendant's intent to remove them from Connecticut violated state law. Geer asserted that the statute interfered with Congressional power to regulate interstate commerce. The Court, however, acknowledged the state's right to exclude game birds from the sphere of interstate commerce while permitting them to lawfully remain in intrastate commerce.[25] As an incident of state ownership, the state could place conditions upon the taking of game which would remain with the game after they were killed. Hence, Connecticut could validly keep its game birds within its borders, even when a hunter had the birds lawfully within his possession.

Many cases[26] cite *Geer* for its support of the state ownership or

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25. *Id.* at 530-32. The Court raised, without deciding, the question whether "commerce" was in fact at issue:

> [I]t may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. . . . The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce.

Id. at 530. The Court further noted that the game birds were a valuable food supply to be preserved through the state police power for the people who owned them. The state as sovereign had this duty even though interstate commerce might be indirectly affected. *Id.* at 534-35.

In the view of Justice Field, dissenting, wild game beyond human control is not the property of the state or of any person. *Id.* at 539. Field agreed that the state may legislate to protect wild game, but it may not regulate interstate commerce. *Id.* at 541. Field maintained that an animal lawfully killed or reduced to possession "becomes an article of commerce, and its use cannot be limited to the citizens of one state to the exclusion of citizens of another state." *Id.* at 538. "[This] view of the *Geer* dissenters increasingly prevailed in subsequent cases." Hughes v. Oklahoma, 441 U.S. 322, 329 (1979).

26. *See, e.g.*, Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 386 (1978) (state has control over its wildlife, although it is not absolute; the doctrine on which *Geer* relied still has vitality); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420-21 (1948) (invalidated discriminatory state fishing law on equal protection grounds, distinguishing *Geer* as involving only the commerce clause); Toomer v. Witsell, 334 U.S. 385, 400 (1948) (invalidated state commercial shrimp fishing statutes, distinguishing *Geer* as correctly decided independent of state ownership theory); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 11 (1928) (distinguishing legitimate legislative purpose in *Geer* from improper economic motive, but recognizing state's sovereign capacity over wildlife); Lacoste v. Department of Conserv., 263 U.S. 545, 549-50 (1924) (tax on animal skins and hides valid as payment for state's ownership interest); Carey v. South Dakota, 250 U.S. 118, 120 (1919) (state regulation prohibiting shipment of wild ducks upheld as within state's power under *Geer*; no conflict with federal act relating to fixing of closed season); Patsone v. Pennsylvania, 232 U.S. 138,

"quasi-sovereignty" doctrine.[27] After *Geer*, the Supreme Court relied on the doctrine to uphold state regulations of wildlife under various circumstances.[28] Until *Hughes*, however, the Court had not reconsidered the theory in a case factually analogous to *Geer*.[29]

Soon after *Geer* the Court began to reject the state ownership doctrine as justification for interference with interstate commerce in natural resources other than wildlife.[30] Returning instead to a

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145-46 (1914) (since state may preserve its wild game for its own citizens, statute prohibiting resident aliens from killing game upheld against equal protection challenge); Hudson County Water Co. v. McCarter, 209 U.S. 349, 355-57 (1908) (statute prohibiting diversion of water out of state valid as within state's right to maintain its natural advantages unimpaired); Ohio Oil Co. v. Indiana, 177 U.S. 190, 208-09 (1900) (distinguishing oil and natural gas deposits from animals *ferae naturae* but upholding regulation against waste of real property, a subject within state's authority); Ward v. Race Horse, 163 U.S. 504, 507 (1896) (in view of state's "unquestioned" power to regulate taking of game, state hunting regulations held constitutional as applied to Indians on reservation despite hunting rights under treaty).

In New York v. Hesterberg, 211 U.S. 31, 41 (1908), the Court relied not on *Geer*'s state ownership doctrine but on its state police power rationale to find that a statute prohibiting possession of specified game birds during the closed season was not a regulation of interstate commerce. And in Georgia v. Tennessee Copper Co., 206 U.S. 230, 237-38 (1907), the Court, although not citing *Geer*, relied on the quasi-sovereignty doctrine to justify an injunction against noxious fumes coming from another state. For a discussion of this case and use of the quasi-sovereignty doctrine in state actions, see Garton, *The State Versus Extraterritorial Pollution—States' "Environmental Rights" Under Federal Common Law*, 2 ECOLOGY L. Q. 313 (1972).

27. *See* note 21 *supra*.

28. *See, e.g.*, Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (higher nonresident license fees for hunting elk upheld when challenged under privileges and immunities and equal protection clauses rather than under commerce clause; Court noted, however, that elk hunting was not a commercial activity); Lacoste v. Department of Conserv., 263 U.S. 545 (1924) (tax not equivalent to prohibition, thus severance tax on skins and hides taken from wild animals or alligators upheld under commerce clause attack); Carey v. South Dakota, 250 U.S. 118 (1919) (prohibition against shipment of wild ducks upheld under claim of preemption by Federal Migratory Bird Act); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (prohibition against hunting by resident aliens upheld when challenged under due process and equal protection clauses); Ward v. Race Horse, 163 U.S. 504 (1896) (hunting regulations upheld against claim of preemption by federal treaty).

29. "The case before us is the first in modern times to present facts essentially on all fours with *Geer*." Hughes v. Oklahoma, 441 U.S. 322, 335 (1979).

30. *See, e.g.*, Pennsylvania v. West Virginia, 262 U.S. 553 (1923) and West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (statutes restricting the flow of natural gas beyond the borders of the state producing it held invalid). To circumvent the state ownership doctrine, the *West* Court distinguished the property status of wildlife from that of a natural resource such as gas. 221 U.S. at 253. The state may prohibit as well as regulate the taking of wildlife without depriving anyone of private property,

commerce clause analysis, the Court eventually adopted a balancing approach[31] which evolved[32] into the formulation outlined in *Pike v. Bruce Church, Inc*.[33] This analysis requires the reviewing court first to consider the interests underlying the challenged regulation and the regulation's effect on interstate commerce. The court must then weigh the benefits accruing to the state against the burdens on interstate commerce.[34] The Court adopted the *Pike* analysis for burden-

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since wildlife belongs to no one until taken. Natural gas, however, belongs to the surface proprietor, and a prohibition on its removal results in a taking of private property. *Id*. Gas which a surface proprietor chooses to sell may be a subject of interstate as well as intrastate commerce. *Id*. at 255. The state may, within its police power, regulate the taking of the gas, but may not prohibit its transportation in interstate commerce. *Id*. at 262.

The *Pennsylvania* case used the *West* Court's reasoning to invalidate a West Virginia statute confining the state's natural gas to use within its borders. The Court declared the statute unconstitutional despite the state's argument that it was a conservation measure to protect a shrinking supply of the resource for the people of the state. 262 U.S. at 598-600.

The results in these cases imply a finding by the Court that the federal interest in unrestricted interstate commerce in gas outweighed both the state's property interest in its natural gas and its interest in reserving the resource for its own citizens.

31. *See, e.g.*, Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950), wherein the Court upheld an Oklahoma regulation setting minimum prices to be paid for gas produced in that state. "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions." *Id*. at 186-87.

32. *See* note 19 *supra*.

33. 397 U.S. 137 (1970). Plaintiff-appellee grew cantaloupes in Arizona, but maintained its packing facilities in a nearby California town. Under authority of an Arizona statute requiring all Arizona-grown fruits and vegetables to be packed in approved standard containers, an Arizona official ordered the company to stop transporting uncrated cantaloupes to its California packing plant. The statute was designed to prevent deceptive packaging and a resultant lowered reputation for Arizona growers, *id*. at 143; the official's application of the statute, however, had a much broader impact since the order would force the company to relocate its packing facilities within Arizona. *Id*. at 144-45. Although the Court found the state had a legitimate interest in enhancing grower reputation, it was inadequate to justify such a burden on interstate commerce. *Id*. at 143, 145.

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

some regulations,[35] with an additional requirement later enunciated in *Hunt v. Washington Apple Advertising Commission*:[36] When the challenging party demonstrates that the statute discriminates against, rather than merely burdens, interstate commerce, the state must show both that the statute is justified because of the local benefits it provides and that no adequate nondiscriminatory alternatives exist.[37]

The Court refrained from using the balancing approach in a recent natural resource case, *City of Philadelphia v. New Jersey*,[38] which invalidated a New Jersey statute prohibiting importation of solid waste for disposal in New Jersey landfills.[39] Regardless of legislative intent to protect the environment or to conserve land resources,[40] the Court held that the statute violated the commerce clause.[41] In the Court's view, the statute overtly discriminated against interstate commerce for economic protectionist reasons.[42] Having made that determination, the Court found a balancing of benefits and burdens unneces-

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Id. at 142.

35. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (regulations prohibiting double-trailer units and limiting truck length invalidated under *Pike* as unduly burdening interstate commerce); A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976) (regulation requiring that another state selling milk in Mississippi sign reciprocity agreement to accept Mississippi milk invalidated under *Pike* as impermissibly burdening interstate commerce).

36. 432 U.S. 333 (1977).

37. *Id.* at 353.

38. 437 U.S. 617 (1978).

39. Operators of private landfills in New Jersey and their out-of-state customers challenged the statute. *Id.* at 619.

40. As stated in the statute, its purpose was protection of the environment and of public health and safety. Supreme Court noted that the New Jersey Supreme Court had added the purpose of conservation. *Id.* at 625.

41. *Id.* at 628-29.

42. "On its face, [the statute] imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." *Id.* at 628. According to the Court, the statute was discriminatory because it banned out-of-state waste but permitted disposal of domestic waste in New Jersey landfills. *Id.* at 629. For comments on the Court's analysis, see Sisk, *State Environmental Protection Versus the Commerce Power*, 13 U. RICH. L. REV. 197, 201 n.29 (1979); *Negative Commerce Clause, supra* note 5, at 922-26.

For a discussion of state laws having different impacts on in-state and out-of-state commercial interests, see Maltz, *The Burger Court, the Commerce Clause, and the Problem of Differential Treatment*, 54 IND. L. J. 165 (1979). For the theory that interstate commerce sometimes discriminates against the state, thereby justifying protectionist legislation, see *Negative Commerce Clause, supra* note 5.

sary.[43]

Although the *New Jersey* Court was unwilling to consider the state's interest once it labeled the statute overtly discriminatory, a year later it retreated from this position in *Hughes v. Oklahoma*. In *Hughes*,[44] the Court expressly overruled *Geer*,[45] declaring a modified version of the *Pike* analysis as the guideline for testing state wildlife regulations challenged under the commerce clause.[46] The new analysis, which weaves the element of discrimination into the traditional *Pike* test,[47] requires three determinations. First, the court must decide whether the regulation applies evenhandedly or discriminates, facially[48] or practically, against interstate commerce. Second, the court has to determine whether the regulation effectuates a legitimate state purpose. Finally, if the regulation does effectuate a legitimate state end, the court must consider whether other nondiscriminatory

43. The Court set up a rigid dichotomy to examine the statute. The statute was either "protectionist" in nature, or it was "directed to legitimate local concerns," affecting interstate commerce only incidentally. 437 U.S. 617, 624 (1978).

> [W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. . . . But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.* . . .

Id.

The Court seemed to overlook its *Hunt* formulation for determining the validity of discriminatory legislation. *See* note 37 and accompanying text *supra*. Under the *Hunt* approach, the Court would have applied a balancing test after requiring the state to justify the challenged statute. Upon finding this statute facially discriminatory, however, the Court summarily invalidated it without "shifting the burden" to the state.

44. 441 U.S. 322 (1979).

45. *Id.* at 325. *See* notes 22-25 and accompanying text *supra*.

46. 441 U.S. at 335. The Court concluded that commerce clause challenges to wildlife regulations "should be considered according to the same general rule applied to state regulations of other natural resources. . . . We thus bring our analytical framework into conformity with practical realities." *Id.*

47. Two determinations by the Court—that the Oklahoma statute was discriminatory and that the *Pike* test was the appropriate analytical tool—mandated the modification since the test outlined in *Hunt*, not *Pike*, was the Court's pre-*New Jersey* standard for evaluating discriminatory legislation. *See* notes 34-43 and accompanying text *supra*.

48. A finding of facial discrimination is determinative of invalidity under the *New Jersey* approach. *See* note 43 *supra*.

means are available to achieve the same purpose.[49]

The *Hughes* Court, finding the Oklahoma statute discriminatory on its face,[50] did not summarily end the inquiry as in *New Jersey*, but instead invoked "strict scrutiny" for parts two and three of the modified *Pike* test.[51] While conceding that the state's purpose might be legitimate,[52] the Court questioned the effectiveness of the regulation

49. 441 U.S. at 336.

50. *Id.* "[The statute] forbids the transportation of natural minnows out of the State for purposes of sale, and thus 'overtly blocks the flow of interstate commerce at [the] State's borders.' " *Id.* at 336-37 (second bracket in original).

Justice Rehnquist, dissenting, argued that the statute was not discriminatory but was rather, at most, minimally burdensome. *Id.* at 344. Since it prohibited residents as well as nonresidents from exporting natural minnows for sale purposes, the statute applied "even-handedly." *Id.* Justice Rehnquist further argued that the statute did not block interstate commerce in minnows since anyone could "freely export as many minnows as he wishes, so long as the minnows so transported are hatchery minnows and not naturally seined minnows." *Id.* at 345. In order to transport hatchery minnows, however, presumably one would first have to buy them from a hatchery. This argument therefore tends to support Hughes' characterization of the statute as serving in-state commercial interests. *See* Brief for Appellant at 11-12, Hughes v. Oklahoma, 441 U.S. 322 (1979).

The Court has described as "clearly impermissible" any statute which attempts "to saddle those outside the State with the entire burden" of meeting the statute's goal. City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978). The disagreement over the Oklahoma statute's status emphasizes, however, the difficulty in distinguishing between a statute that is "discriminatory" and one that merely "burdens" interstate commerce.

51. Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

"Strict scrutiny," usually invoked for equal protection challenges, signals a more rigorous review of a statute. In United States v. Carolene Products Co., 304 U.S. 144 (1938), Justice Stone suggested reasons for a two-tiered standard of review. He noted that courts typically accord a presumption of constitutionality to a state regulation. *Id.* at 152. Some regulations, however, do not warrant such a presumption and thus call for stricter scrutiny by the court. An example is a regulation restricting the "political processes" that would ordinarily cause the "repeal of undesirable legislation." *Id.* at 152 n.4. For explanation of the "political processes" rationale, see Sisk, *State Environmental Protection Versus the Commerce Power*, 13 U. RICH. L. REV. 197, 200-01 (1979).

Apparently the *Hughes* Court did not invoke "strict scrutiny" in the traditional sense. The phrase here is more likely a recharacterization of the requirement in *Hunt* that the burden of justification shifts to the state when the opposing party shows that the statute is discriminatory. *See* note 37 and accompanying text *supra*.

52. Hughes v. Oklahoma, 441 U.S. 322, 337 (1979). Oklahoma contended "the purpose, operation and practical effect of [the statute was] readily apparent as a conservation measure." Brief for Appellee at 8, Hughes v. Oklahoma, 441 U.S. 322 (1979). The State argued that the statute protected the ecological balance by preserving the minnow population. *Id.* at 4. Counsel for Hughes argued that the statute's actual purpose was "to create a policy of economic protectionism by the use of an

and found the state failed to choose the least discriminatory means available to achieve its purpose.[53] Therefore, the statute violated the commerce clause.[54]

Hughes v. Oklahoma signals the end of the state ownership doctrine[55] for wildlife regulation. In the commerce context, the doctrine was an anomaly, producing results inconsistent with the bulk of interstate commerce decisions.[56] Because of those inconsistencies, the Court began curbing the doctrine's use almost as soon as it was adopted.[57] The doctrine became more judicially intolerable as state governments abused it by cloaking constitutionally impermissible motives or ineffectual laws with its rationale.[58] The state ownership doctrine served to justify too many wildlife regulations that restricted

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export discrimination," and its effect was to bolster the state's commercial hatchery minnow business. Brief for Appellant at 11-12, Hughes v. Oklahoma, 441 U.S. 322 (1979).

The Court recognized as important the local interest in preserving the ecosystem of intrastate bodies of water. 441 U.S. 322, 337 (1979). The Court continued:

> We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens. . . . But the scope of legitimate state interests in "conservation" is narrower under this analysis than it was under *Geer*. . . . The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of "conserving" the wild animals within its borders when equally effective nondiscriminatory conservation measures are available.

Id.

53. *Id.* at 337-38.

54. *Id.* at 338.

55. For discussion of state ownership, see note 21 *supra*.

56. *Compare* Manchester v. Massachusetts, 139 U.S. 240 (1891) *and* McCready v. Virginia, 94 U.S. 391 (1877) (approving confinement of wildlife benefits to state citizens) *with* Pennsylvania v. West Virginia, 262 U.S. 553 (1923) *and* West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (declaring states may not reserve their resources for their own citizens).

57. Hughes v. Oklahoma, 441 U.S. 322, 329 (1979). *See, e.g.*, Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

58. Under the state ownership doctrine, a state avoided any need to justify its wildlife regulations or to enact regulations that neatly fitted asserted or implied state goals. *See, e.g.*, Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), where the state argued that its statute prohibiting nonresidents from catching menhaden (a commercially valuable fish) was a legitimate conservation measure. The Court found that claim "specious." "Virginia makes no attempt to restrict the quantity of menhaden caught by her own residents. A statute that leaves a state's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all." *Id.* at 285 n.21. The Court held that the Federal Enrollment and Licensing Act preempted the Virginia statute. The Court noted, however, that "reasonable and

freedom of action without accomplishing purported environmental goals.[59]

When the opportunity arose in *Hughes* for the Court to examine a dormant commerce clause challenge to one of those ineffective regulations,[60] the result was not surprising. The decision to rescind the special status previously accorded wildlife regulations allowed the Court to apply the usual dormant commerce clause analysis rather than uphold the statute solely on the basis of state ownership. The surprising element of *Hughes* is that the Court, despite its finding of overt discrimination, failed to follow its recent *New Jersey* decision.[61] The Court chose instead to return to the more deferential balancing approach,[62] allowing at the minimum a formal consideration of the state's interests.

In *Hughes*, the Court noted that no evidence appeared to support a conclusion that the challenged statute achieved its proffered goals of protecting the minnow population and preserving the ecological balance.[63] Since this wildlife statute did not in fact promote the state's interest in wildlife conservation, there was no benefit to the state to offset any burden on interstate commerce. Under this balancing approach, the Court was forced to rule that the statute violated the commerce clause. The Court alluded, however, that a modified version of the statute—one based on effective nondiscriminatory alterna-

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evenhanded conservation measures, so essential to the preservation of our vital marine sources of food supply, stand unaffected by our decision." *Id.* at 288.

59. *See* note 58 *supra*. *But cf.* State v. Kemp, 73 S.D. 458, 44 N.W.2d 214 (1950), *appeal dismissed*, 340 U.S. 923 (1951) (total exclusion of nonresident hunters of migratory waterfowl upheld against privileges and immunities claim because state showed real danger existed that breeding grounds would be excessively hunted and possibly destroyed by nonresident hunters).

60. The Oklahoma statute was ineffective to maintain the ecobalance because it allowed removal of unlimited numbers of natural minnows. The statute even permitted transporting the minnows out-of-state, so long as they were not *sold* out-of-state. Sale of the minnows in-state rather than out-of-state causes no less disturbance to the minnow population.

61. *See* notes 38-43 and accompanying text *supra*.

62. Under both the *Pike* analysis for burdensome regulations and the *Hunt* analysis for discriminatory regulations, the Court can weigh the benefits to the state against the interference with interstate commerce. *See* notes 34 & 37 and accompanying text *supra*. The balancing approach thus allows the Court to be more cognizant of a state's interests.

63. 441 U.S. 322, 338 n.20 (1979).

tives—might have survived.[64]

The result in *Hughes v. Oklahoma* is not a setback for conservation and environmentalism.[65] The Court explicitly affirmed its position that conservation and protection of wild animals are legitimate state purposes.[66] While previously a state could freely control wildlife within its boundaries by merely claiming "state ownership," wildlife regulations must now actually promote wildlife preservation in a manner that least interferes with interstate commerce. By discarding the state ownership theory, the Court demonstrated that a state can no longer rely on recitation of an outmoded doctrine to ease its wildlife regulations past commerce clause challenges. Replacement of the doctrine with the balancing approach demands increased legislative responsibility. To withstand judicial scrutiny under the new analysis, a wildlife statute must be carefully drafted so that its goals are in fact attainable through its enforcement.[67] *Hughes v. Oklahoma* encourages attainment of environmental protection, which is, after all, the aim of environmental legislation.

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64. *Id.* at 338. Possible changes included universal application of limits on minnow removal and use.

65. This stance assumes that judges will use the balancing approach in good faith and not as an excuse to invalidate nondiscriminatory legislation capable of meeting environmental goals that they may consider less important than economic interests.

66. 441 U.S. 322, 337 (1979).

67. Legislators should draft environmental statutes so that any interference with interstate commerce is merely burdensome rather than discriminatory in nature. If the statute discriminates, it probably will be invalid unless there are no nondiscriminatory alternatives.

If evidence shows that an environmental regulation is effective and that it merely burdens interstate commerce, the regulation should enjoy a rebuttable presumption that the same level of effectiveness could not be attained with less intrusion on interstate commerce. Such a regulation represents a legislative judgment that environmental protection is an important goal. The Court recognizes that goal as legitimate. If the goal is being accomplished, a court should not substitute its judgment that the interest in interstate commerce is weightier. To measure the competing worth of two so dissimilar goals is a task both arduous and essentially unfair, given their disparate susceptibility to valuation.