The Pragmatic Migratory Bird Treaty Act: Protecting "Property"

Hye-Jong Linda Lee
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Abstract: In 1916, the United States of America entered into a treaty with the United Kingdom, acting on behalf of Canada, to protect migratory birds from unrestrained killing. Two years later, Congress enacted the Migratory Bird Treaty Act (MBTA) to give effect to this convention. The United States subsequently entered into similar agreements with Mexico in 1936, Japan in 1972, and the Soviet Union in 1976, which were thereafter incorporated into the provisions of the MBTA. The MBTA’s prohibition against pursuing, hunting, taking, capturing, or killing any migratory bird, or any part, nest, or egg of such birds, however, is not motivated by the desire to protect human property interests. This Note explores America’s attachment to wildlife as property under the terms of the conventions, the statutory language, the history, and the caselaw pertaining to the MBTA, with specific focus on the curious distinction between wild and captive-bred mallard ducks.

Wild beasts and birds are by right not the property merely of the people today, but the property of the unborn generations, whose belongings we have no right to squander.1

—Theodore Roosevelt

INTRODUCTION

The Migratory Bird Treaty Act (MBTA) was enacted in 1916 to protect migratory birds from unrestrained killing. The MBTA, however, treats migratory birds as human property that is deserving of protection only to the extent that they continue to serve human interests. When the protection of migratory birds interferes with human property interests, the MBTA offers little protection.

This Note explores the utilitarian ethics that underlie the MBTA. Part I examines the Migratory Bird Treaty Act, including how the

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MBTA came to be, its structure, and its applicability to captive-raised birds. Part II analyzes the intrinsic notion of property motivating the MBTA's protection of migratory birds by examining the statutory language of the conventions that preceded the passage of the MBTA, the language of the MBTA itself, and courts' distinct treatment of captive-bred migratory birds in contrast to wild migratory birds. Part II also considers the inevitable concessions and dangers that thinking of migratory birds and wildlife as human property prompts in wildlife law, and concludes that as long as wildlife statutes keep human interests predominant, environmental protection of species will remain thin.

I. THE MIGRATORY BIRD TREATY ACT

A. The Development of the Migratory Bird Treaty Act

The famous case of Pierson v. Post owes its celebrity to something more than its status as a staple of first year property courses. Its celebrity derives, in large part, from its uncritical announcement of early America's attitudes towards wildlife—attitudes rooted in the notion that wildlife was something to be owned and possessed. After all, it is a case about wildlife written in the language of property. More specifically, it is written in the language of possession:

actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but ... mortal wounding of such beasts ... be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control ... [and] may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them.

2 3 Cai. R. 175, 175 (N.Y. Sup. Ct. 1805). While Post was pursuing a fox on unowned property, Pierson, knowing that the fox was being hunted, killed and carried off the same fox. Id. The court found for Pierson, holding that mere chase of wildlife is insufficient, and mortal wounding is necessary to confer rights of possession over wildlife. Id. The case of Pierson v. Post is often a part of first-year property curricula in numerous law schools across the United States.

3 Id.

4 Id.

5 Id. at 178.
In this way, the resolution of a hunting dispute over beasts of *ferae naturae*\(^6\) becomes emblematic of the dominant conception of wildlife adopted early in America's history: wildlife as property, as an available resource to be owned, possessed, and used.\(^7\) Early Americans typically understood wildlife in terms limited to its utilitarian and human value: as a source of food and clothing, as a force of agricultural labor and service, as a method of pest control, and as the lively object of sport.\(^8\) In other words, early American society "viewed wildlife as a 'bottomless pit' from which it could take indiscriminately."\(^9\) Markets and cottage industries encircled this bottomless pit.\(^10\) In the nineteenth century, market hunting became popular, and wildlife merchandise became readily available to public markets for consumption and fashion.\(^11\) For instance, urban restaurant menus were eager to feature a wide range of fowl, and consumption was not limited to game birds: "many songbirds also were viewed as appropriate food for humans. Robins, for example, were served in soups, while cedar waxwings and goldfinches made 'hearty' pies. Also available for purchase were batches of bobolinks, bundled and tied together like carrots."\(^12\) The tastes and customs of fashionable women created much demand for the killing of non-game birds, and "[s]o extensive was the use of feathers as well as whole birds on women's hats that . . . 'church gatherings and other social events often resembled aviaries.'"\(^13\)

Hence, until the twentieth century, market hunters "killed migratory birds on a vast scale for profit; some massacred birds for the sheer hell of it."\(^14\) Due to the unrestrained hunting and killing of game birds, several migratory bird species valued as a food source and

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\(^6\) The term "ferae naturae" means "of a wild nature" and refers to "wild animals." Black's Law Dictionary 256 (pocket ed. 1996).

\(^7\) See, e.g., Mighetto, supra note 1.


\(^10\) See Mighetto, supra note 1, at 38.

\(^11\) Id.

\(^12\) Id.

\(^13\) Id. (quoting James B. Trefethen, An American Crusade for Wildlife 129 (Winchester Press 1975)).

as insect control were in danger of extinction.\textsuperscript{15} Concerned sportsmen, farmers, and the general public advocated the need to protect migratory birds for both economic and aesthetic reasons.\textsuperscript{16} In fact, much of wildlife protection was advocated by sportsmen, who announced the need for conservation through a variety of hunting journals like \textit{American Sportsman}, \textit{Forest and Stream}, \textit{Field and Stream}, and \textit{American Angler}.\textsuperscript{17}

In 1916, motivated by fears of extinction and population decline of several migratory bird species, the United States of America entered into a treaty with the United Kingdom, which was acting on behalf of Canada, “for the protection of migratory birds in the United States and Canada.”\textsuperscript{18} Two years later, Congress enacted the MBTA\textsuperscript{19} to give effect to this convention, prohibiting the taking, killing, or possessing of migratory birds covered by the treaty, except as otherwise permitted by regulations to be promulgated by the Secretary of the Interior.\textsuperscript{20}

The MBTA served diverse purposes.\textsuperscript{21} First, Congress wished to regulate commercial and recreational hunting, especially targeting the villain of the act, the notorious “pothunter.”\textsuperscript{22} As one Senator declared, “[t]his law is aimed at the professional pothunter.”\textsuperscript{23} The MBTA was to “keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it.”\textsuperscript{24} While the Act singled out the hunter who refused to play by the rules of the game, it did purport to regulate recreational hunters as well.\textsuperscript{25} In a cynical stab at recreational hunters, one representative warned, “peo-

\begin{footnotes}
\footnotetext{16}{Corcoran \& Colbourn, \textit{supra} note 14, at 339.}
\footnotetext{17}{Michtig, \textit{supra} note 1, at 27. In fact, the Audubon Society, an organization dedicated to protecting birds and other wildlife, was founded by a sportsman. \textit{Id.} at 38. The members of the Audubon Society advocated against killing non-game birds, destroying their nests and eggs, and wearing decorative feathers. \textit{Id.}}
\footnotetext{20}{\textit{Id.} § 703.}
\footnotetext{22}{55 \textit{Cong. Rec.} 4402 (1917). A “pothunter” is a hunter who kills and takes for food without regard for the rules of the sport. \textit{See, e.g.}, \textit{Webster’s Ninth New Collegiate Dictionary} 921 (1985).}
\footnotetext{23}{55 \textit{Cong. Rec.} 4402 (1917).}
\footnotetext{24}{\textit{Id.} at 4816.}
\footnotetext{25}{56 \textit{Cong. Rec.} 7360 (1918).}
\end{footnotes}
people who are against this bill are . . . some so-called city sportsmen, who want spring shooting just to gratify a lust for slaughter.”

The MBTA also contemplated agricultural benefits. Not only was there value in saving birds from the reckless slaughter of unrestrained hunting, but there was also value in keeping birds alive to do what they did so well: eat crop-damaging insects. Congress took notice of annual food losses caused by insects and proclaimed the need to protect the birds. Finally, Congress recognized the aesthetic value of migratory birds. The MBTA guaranteed that migratory birds would continue to be part of America’s aesthetic recreation by “[providing] some place where [migratory birds] can come and remain safely and be a pleasure and companions.” In the words of one representative, the MBTA ought to protect migratory birds because “admiration for our little friends of the air ma[de him] unfriendly to the habit of killing off these winged visitors, whether game birds, migratory birds, or other species . . . .” The MBTA gave the United States a variety of reasons for finding some value in protecting its disappearing winged visitors.

As such, the MBTA was the first significant legislative pronouncement of environmental conservation as an important national policy goal for the United States, and it was declared the “most important early federal legislation concerning the preservation of wildlife.” In defending its constitutionality against a state’s Tenth Amendment challenge in *Missouri v. Holland*, Justice Holmes declared the protection of migratory birds to be a “national interest” warranting “national action.” He found no constitutional obstacle to such a laudable action: “[b]ut 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 com-

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26 *Id.*
27 *Id.* at 7360 (statement of Representative Stedman emphasizing that the purpose of this bill is to give effect to the convention that insectivorous migratory birds, in addition to migratory game birds, are embraced in the terms of the treaty).
28 *Id.*
29 *Id.*
30 56 CONG. REC. 7458 (1918).
31 *Id.*
32 *Id.* at 7357.
34 Lombardi, *supra* note 9, at 343.
pels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed."

The United States of America subsequently entered into similar agreements with Mexico in 1936, Japan in 1972, and the Soviet Union in 1976, for the protection of migratory birds, which were thereafter incorporated into the provisions of the MBTA. The four treaties slightly differed, however, in their purposes, scope, and exceptions.

The Canadian Convention cited the importance of migratory birds as food and as predators of insects as the main reason for entering into the Convention. On the other hand, the Mexican Convention focused more broadly on preserving migratory birds "for purposes of sport, food, commerce, and industry." The Japanese and Russian Conventions were motivated by the sweeping purpose of enhancing the environment of migratory birds, finding them a natural resource of great recreational, aesthetic, scientific, cultural, ecological, and economic value.

The scope of these treaties differed as well. The Canadian Convention defined protected birds as migratory game birds, migratory insectivorous birds, and migratory non-game birds, listing five families of game birds and groups of non-game birds to be protected. The Mexican Convention listed protected families of migratory birds without specifying the species included in such families. The Japanese Convention broadened the list of protected birds to non-migratory

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36 Id.
41 See generally Russian Convention, supra note 39; Japanese Convention, supra note 38; Mexican Convention, supra note 37; Canadian Convention, supra note 18.
42 Canadian Convention, supra note 18, at 1702.
43 Mexican Convention, supra note 37, at 1312.
44 Russian Convention, supra note 39, at 4649; Japanese Convention, supra note 38, at 3331.
45 See, e.g., Russian Convention, supra note 39, at 4650–51; Japanese Convention, supra note 38, at 3332–33; Mexican Convention, supra note 37, at 1313–14; Canadian Convention, supra note 18, at 1702–03.
46 Canadian Convention, supra note 18, at 1702–03.
47 Mexican Convention, supra note 37, at 1313–14.
birds common to both Japan and the United States,\textsuperscript{48} whereas the Russian Convention included species and subspecies that migrated between the two countries and those with separate populations sharing common breeding, wintering, feeding, or molting areas.\textsuperscript{49} The Russian Convention allowed either party to expand the list of migratory birds unilaterally, so long as a bird belonged to a family already protected.\textsuperscript{50}

Each Convention provided exceptions authorizing the taking of protected birds.\textsuperscript{51} In large part, the exceptions were simply intended to reinstate the dominant policy of serving the original purposes for protecting these birds in the first place.\textsuperscript{52} For instance, the Canadian Convention permitted killing migratory birds that "under extraordinary conditions, may become seriously injurious to the agricultural or other interests in any particular community."\textsuperscript{53} The Mexican Convention did so too, albeit more restrictively, authorizing taking of birds only "when they become injurious to agriculture and constitute plagues."\textsuperscript{54} Since birds also had scientific value, all the treaties provided exceptions for scientific and propagative purposes.\textsuperscript{55} The Mexican and Japanese Conventions extended takings privileges to the taking of protected birds from private game farms,\textsuperscript{56} and indigenous people were permitted to freely take migratory birds for food supply under the Japanese and Russian Conventions.\textsuperscript{57}

The MBTA presently incorporates all four Conventions, serving as a regulatory device for implementing and amending provisions deemed necessary to protect migratory birds and their environment.\textsuperscript{58}

B. The Structure of the Migratory Bird Treaty Act

The MBTA states that,

\textsuperscript{48} Japanese Convention, supra note 38, at 3332.
\textsuperscript{49} Russian Convention, supra note 39, at 4650.
\textsuperscript{50} Id. at 4656.
\textsuperscript{51} See, e.g., Canadian Convention, supra note 18, at 1703.
\textsuperscript{52} See, e.g., id. at 1704.
\textsuperscript{53} Id. (emphasis added).
\textsuperscript{54} Mexican Convention, supra note 37, at 1313 (emphasis added).
\textsuperscript{55} Russian Convention, supra note 39, at 4651–53; Japanese Convention, supra note 38, at 3333–34; Mexican Convention, supra note 37, at 1312–13; Canadian Convention, supra note 18, at 1704.
\textsuperscript{56} Japanese Convention, supra note 38, at 3333–34; Mexican Convention, supra note 37, at 1312–13.
\textsuperscript{57} Russian Convention, supra note 39, at 4651–53; Japanese Convention, supra note 38, at 3333–34.
it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, any part, nest, or egg of any such bird, or any product . . . which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . [if the bird is included in the four Conventions]. 59

The MBTA gives the Secretary of the Interior the authority to:

carry out the purposes of the conventions . . . having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof . . . 60

Persons found in violation of the MBTA can be arrested without a warrant 61 and charged with a misdemeanor carrying a $1500 maximum fine and/or a six-month maximum jail term. 62 If the violation was committed knowingly, a felony conviction can result, carrying a $2000 maximum fine and/or a two-year maximum jail term. 63

The MBTA, however, does not 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." 64 Additionally, the MBTA gives the Secretary of the Interior authority to allow indigenous inhabitants of Alaska to take migratory birds and their eggs to serve as a food source. 65

The MBTA is enforced by the United States Fish and Wildlife Service (FWS). 66 The FWS defines "migratory bird" as:

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59 Id. § 703.
60 Id. § 704(a).
61 Id. § 706.
62 Id. § 707.
63 Id.
65 Id. § 712.
any bird, whatever its origin and whether or not raised in captivity . . . [including] mutation or a hybrid of any such species, including any part, nest, or egg 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.67

It then provides a list of migratory bird species thus protected.68

The FWS also regulates migratory bird hunting, defining “migratory game birds” as “those migratory birds included in the terms of conventions between the United States and any foreign country for the protection of migratory birds, for which open seasons are prescribed in this part and belong to [the listed families].”69

The FWS makes several notable exceptions to the protection of migratory birds.70 Enumerated exceptions to permit requirements are available for public, scientific, or educational institutions.71 Specifically, migratory birds and their parts, nests, and eggs, may be possessed lawfully without a permit, while importation, exportation, purchase, sale, barter, and attempts to do these are still prohibited.72 The FWS also makes a large exception regarding captive-reared mallard ducks and waterfowl, removing them completely from regulation.73 Persons may acquire and kill these birds freely as long as they are physically marked.74 Subpart C requires permits before any migratory birds may be imported or exported,75 and scientific institutions must also apply for a permit for research or educational purposes.76 A special purpose permit is given to those who can make a “sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.”77 Provisions under this subpart also outline

67 Id. § 10.12.
68 Id. § 10.13.
69 Id. § 20.11.
71 Id. § 21.1.
72 Id. § 21.2.
73 Id. §§ 21.13–.14.
74 Id.
75 Id. § 21.21.
76 50 C.F.R. § 21.23.
77 Id. § 21.27.
permit requirements for particular species, such as Canada geese, raptors for falconry, and raptors for propagation.

C. Judicial Challenges to the Applicability of the Migratory Bird Treaty Act to Captive-Raised Birds

The MBTA leaves a curious regulatory vacuum with regard to captive-bred migratory birds. Migratory birds are captive-bred by individuals or wildlife institutions, for diverse reasons: to be kept, used as a food source, or commercially sold. Additionally, migratory birds are captive-reared so that they may be re-introduced to the wild for the purpose of conservation. Many recovery programs by wildlife institutions have been successful in the captive-breeding field. The National Birds of Prey Centre, for example, has captively bred sixty species of birds of prey since it opened in 1967. Captive-bred birds contribute to scientific and technological advances, and help preserve endangered birds by recolonizing areas where wild populations have disappeared.

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78 Id. § 21.26.
79 Id. §§ 21.28–29.
80 Id. § 21.30.
81 Id. §§ 21.13–14.
82 Captive-breeding can be achieved through natural breeding or artificial insemination. Peter Gill, Modern Captive Breeding, The Falconers Web, at http://www.falconers.com/articles/captive_breeding_1/ (last visited Apr. 21, 2004). In natural breeding, male and female birds are placed together in the breeding chamber and fertile eggs are laid after copulation takes place. Id., at http://www.falconers.com/articles/captive_breeding_2/ (last visited Apr. 21, 2004). Artificial insemination involves inseminating into the female bird the collected male semen, either voluntarily (female presents herself for voluntary copulation) or involuntarily (female refuses to stand for voluntary copulation at which point a breeder holds and injects semen into the female bird). Id. After the eggs are laid, they are incubated either naturally, by surrogate parents, or by incubators. Id. at http://www.falconers.com/articles/captive_breeding_3/ (last visited Apr. 21, 2004). Incubating eggs naturally refers to leaving the eggs with the parent bird, which poses difficulties when the individual parent breaks eggs either accidentally or intentionally, or refuses to sit on the eggs. Id. Another particular concern during hatching time is that some parent birds eat their emerging offspring. Id. Hence, many breeders opt to use surrogate parents for incubation, usually using parents that are diligent with incubation. Id. Yet another method to matching the fertilized eggs is through the use of electromechanical incubators, such as Brinsea Incubator used by the National Birds of Prey Centre. Nat’l Bird of Prey Centre, at http://www.nbpc.co.uk/breed.htm (last visited Apr. 21, 2004).

84 Id.
85 Id.
There has been much debate over whether the MBTA encom­passes captive-raised birds at all.\textsuperscript{87} According to the FWS, "migratory bird" means "any bird, \textit{whatever its origin and whether or not raised in captivity}, which belongs to [a protected] species or which is a mutation or a hybrid of any such species ..."\textsuperscript{88} On the other hand, FWS regulations state that "captive-reared and properly marked mallard ducks, alive or dead, or their eggs may be acquired, possessed, sold, traded, donated, transported, and disposed of by any person without a per­mit."\textsuperscript{89} A similar exception is granted for other captive-reared migra­tory waterfowl.\textsuperscript{90}

The issue of whether captive-bred migratory birds are protected under the MBTA first arose in \textit{Koop v. United States}.\textsuperscript{91} Koop raised mal­lard ducks at his ranch and invited guests to hunt them on his prem­ises.\textsuperscript{92} He was charged with violating sections 703 through 711 of the MBTA, which prohibit hunting and attempting to kill migratory birds.\textsuperscript{93} Koop claimed that the mallards that were shot were not wild ducks within the meaning of the treaties and the MBTA; rather, they were his personal property, since he had raised them.\textsuperscript{94} Koop, how­ever, had not confined the ducks so as to prevent them from migrating and commingling with wild birds.\textsuperscript{95} Therefore, the court stated that Koop lacked possession and control of the mallards because they were "free to go and come as they would."\textsuperscript{96}

In \textit{United States v. Richards}, defendant, a breeder of sparrow hawks, was charged with violating section 703 of the MBTA, and he challenged the applicability of the Act to birds raised in captivity.\textsuperscript{97} The court upheld the conviction, emphasizing that the purpose of the conventions and the MBTA was to protect migratory birds, making no exception for captive migratory birds.\textsuperscript{98} Thus, the court ruled that the MBTA applied to captive-bred \textit{falconidae}.\textsuperscript{99}

\textsuperscript{87} See, e.g., United States v. Conners, 606 F.2d 269, 270–73 (10th Cir. 1979); United States v. Richards, 583 F.2d 491, 491–97 (10th Cir. 1978).
\textsuperscript{89} Id. § 21.13.
\textsuperscript{90} Id. § 21.14.
\textsuperscript{91} 296 F.2d 53, 54–61 (8th Cir. 1961).
\textsuperscript{92} Id. at 55–56.
\textsuperscript{93} Id. at 54.
\textsuperscript{94} Id. at 60.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} 583 F.2d 491, 493 (10th Cir. 1978).
\textsuperscript{98} Id. at 495.
\textsuperscript{99} Id. at 496–97.
Just a year later, the court revisited the issue of the applicability of the MBTA to captive-related birds. In *United States v. Conners*, the court held that the MBTA applied only to wild mallard ducks and not to those which were captive-bred. In reaching this conclusion, the court examined the MBTA and the Mexican and Japanese Conventions to determine whether the MBTA contemplated captive-reared, in addition to wild, mallards. The court noted that two of the three treaties referred specifically to "wild ducks," including the operative Canadian Convention giving rise to the MBTA. Therefore, since criminal statutes had to be strictly construed, the MBTA did not apply to the killing of captive-reared ducks. Thus, should it be found that the ducks killed were "wild," the defendant's conviction under the MBTA would be sustained, whereas if they were captive-bred, the charges would have to be dismissed.

Although this distinction between captive-reared and wild mallard ducks turns on the meaning of apparently minor language, and although it certainly does not shake the regulatory foundation of the MBTA, this Note uses this distinction as an entry point for making larger comments about the Migratory Bird Treaty Act. In particular, this distinction actually says much about the history, purpose, and wildlife ethics of the Act. This distinction, I will argue, demonstrates that the same property-based notions that led to the abuse of wildlife continue to animate and control the very protection it made necessary. That is, if *Pierson v. Post* announced in unabashed language that wildlife is property, the MBTA suggests in softer regulatory language that wildlife is worth protecting because, among other things, its value as property is too significant to be squandered. This Note explores the utilitarian ethics that underlie a significant moment in conservationist history, and ultimately concludes that the ethic that finds animals worth protecting because of their value "to us" is the type of pragmatism and compromise that holds such a movement back.

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100 United States v. Conners, 606 F.2d 269, 270–73 (10th Cir. 1979).
101 *Id.* at 273.
102 *Id.* at 271–72.
103 *Id.* at 271.
104 *Id.*
105 *Id.* at 273.
II. ANALYSIS: THE MIGRATORY BIRD TREATY ACT AND PROTECTING “PROPERTY”

A. Wildlife as Property

The Migratory Bird Treaty Act stands as a landmark among early federal efforts to protect the nation’s wildlife.\textsuperscript{106} It declares that “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture [or] kill . . . any migratory bird, or any part, nest, or egg of any such birds, included in the terms of the [convention] between the United States and Great Britain . . . the United Mexican States . . . the Government of Japan . . . and the Union of Soviet Socialist Republics . . . .”\textsuperscript{107} Its text is as dramatic as it is direct: migratory birds, previously brought to the point of decimation by the country’s indifference towards their welfare, were now to be extended nearly unqualified protection as part of a massive international effort.\textsuperscript{108} Gone were the days when the nation’s birds were “massacred for the sheer hell of it”;\textsuperscript{109} gone, too, were the days when early Americans could insist on their right “to blast away at any species affording food, profit, or sport.”\textsuperscript{110} Instead, the Act told Americans and other nations who were willing to listen that migratory birds were not a “bottomless pit”\textsuperscript{111} from which to take, use, kill, and consume indiscriminately.\textsuperscript{112} So striking was the commitment made to the nation’s migratory birds that some commentators have offered the Migratory Bird Treaty Act and similar wildlife regulation as undeniable proof that “[w]ildlife in early America was viewed quite differently than it is today.”\textsuperscript{113} These regulatory efforts, it is argued, brought America out of the prehistory of its protection of wildlife.\textsuperscript{114}

While it is certainly true that the MBTA and similar statutes worked a significant change in the nation’s regulation of wildlife, it is something entirely different to say that they also worked a significant

\textsuperscript{108} See id. §§ 703–712.
\textsuperscript{109} Corcoran & Colbourn, supra note 14, at 359.
\textsuperscript{110} Perkins, supra note 33, at 824.
\textsuperscript{111} Lombardi, supra note 9, at 343.
\textsuperscript{112} See, e.g., 16 U.S.C. § 703.
\textsuperscript{113} Lombardi, supra note 9, at 343.
\textsuperscript{114} Id. at 344.
change in the nation’s conceptualization of wildlife. Indeed, it is even more difficult to posit that a so-called conceptual change actually motivated the passage of the Act. This Note argues that it is not because wildlife in modern America is viewed “quite differently” than it was before the MBTA became law. Rather, it is because modern America has continued to view wildlife quite similarly to early America that this Act and others like it exist. That is, while the MBTA may announce a move away from the crude conceptualization of animals as “property,” the protection it now seeks to afford migratory birds continues to be premised partly upon their value as property. If birds are now worth protecting, they are worth protecting because humans find them useful. Thus, America’s conceptualization of how to use this property may have changed, but our fundamental perception of wildlife as property has remained unaltered. To flesh out this argument, one need only examine the terms of the conventions, statutory language, history, and relevant caselaw, with a specific focus on the curious distinction between wild and captive-bred mallard ducks.

B. Language of the Conventions Preceding the Migratory Bird Treaty Act

The very language of the MBTA’s regulatory scheme suggests that it is designed to protect birds only to the extent necessary to preserve their value or utility to humans. The language of the four conventions, for example, reveals that the protection afforded to migratory birds was essentially protection afforded to a resource. The Proclamation to the Canadian Convention states that migratory birds ought to be protected because “[m]any of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops.” Hence, both the United States and Canada must regulate the “indiscriminate slaughter” of these birds to insure their preservation since they are “useful to man or are harmless.”

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115 See discussion, infra Parts II.B–E.
116 Id.
117 Id.
118 Id.
119 Id.
120 See generally, e.g., Mexican Convention, supra note 37; Canadian Convention, supra note 18.
121 See generally Russian Convention, supra note 39; Japanese Convention, supra note 38; Mexican Convention, supra note 37; Canadian Convention, supra note 18.
122 Canadian Convention, supra note 18, at 1702.
123 Id.
only does this language condone "indiscriminate" killing of birds, it also characterizes them as a commodity *useful* to humans.124 It is their value as a useful commodity that earns migratory birds significant protection under the Canadian Convention.125

Similarly, the Mexican Convention also declares it necessary to "employ adequate measures which will permit a rational *utilization* of migratory birds for the purposes of . . . food . . . ."126 The Convention acknowledges the recreational and economic values of migratory birds and affords them protection on that basis, "[i]n order that the species may not be exterminated . . . it is right and proper to protect birds . . . for the purposes of sport, . . . commerce and industry."127 Hence, the Mexican Convention established closed seasons during certain periods of the year in which "taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, [of] their products or parts" was prohibited.128

The Japanese and Russian Conventions likewise extended protection on the basis of recreational value, establishing open hunting seasons and permitting requirements.129 The Japanese Convention provided that "[t]he taking of the migratory birds or their eggs shall be prohibited . . . [except] during open hunting seasons,"130 and the Russian Convention stated that "[e]ach Contracting Party shall prohibit the taking of migratory birds . . . [but] [e]xception to these prohibitions may be made on the basis of laws, decrees or regulations of the respective Contracting Parties . . . [f]or the establishment of hunting seasons."131 This language reveals that migratory birds were not placed off-limits under the conventions; their uses were simply limited to ensure that their value as food and sport would be protected for years to come.132

The language of the Japanese Convention clearly indicates that migratory birds serve additional uses: they are a "natural resource of great value for recreational, aesthetic, scientific, and economic pur-

124 Id.
125 See id.
126 Mexican Convention, *supra* note 37, at 1311–12 (emphasis added).
127 Id. at 1312.
128 Id.
130 Japanese Convention, *supra* note 38, at 3333.
132 See id.
The Russian Convention goes further, comprehensively proclaiming that “migratory birds are a natural resource of great scientific, economic, aesthetic, cultural, educational, recreational and ecological value . . . ”134 While the protection of the aesthetic value of wildlife suggests the notion of intrinsic value, even aesthetic reasons for protecting birds recognize an interaction between humans and nature that ultimately has human sensibilities at its core.135 Acknowledgment that migratory birds are pleasing to look at is not a fundamental departure from the proposition that they are also pleasing to eat.136

Romantic love for wilderness that developed during the eighteenth and nineteenth centuries provides an understanding of the aesthetic purposes wildlife served.137 City dwellers increasingly began to value their relationship with the natural world:

[t]housands of tired, nerve-shaken, over-civilized people are beginning to find out that . . . wildness is a necessity. . . . Awakening from the stupefying effects of the vice of over-industry and the deadly apathy of luxury, they are trying as best as they can to mix and enrich their little ongoings with those of Nature, and to get rid of rust and disease.138

Writers like Jack London and Maximilian Foster glorified the invigorating savagery of wild animals, and wilderness was seen as a commodity in which humans could regain their “lost vitality.”139

Ralph Waldo Emerson, on the other hand, saw unspoiled nature as a “conduit through which humans could establish contact with higher reality.”140 Like Emerson, Henry David Thoreau expressed interest in the spiritual gains that wildlife provided, and recorded the wild animals he encountered in the hopes that it would yield spiritual knowledge.141 In Walden, Thoreau wrote that contact with wildlife was “to make my life more rich and eventful.”142 Both Emerson and Tho-

133 Japanese Convention, supra note 38, at 3331.
134 Russian Convention, supra note 39, at 4649-50.
135 See id.
136 See id.
137 MIGHETTO, supra note 1, at 3.
138 Id. at 3–4 (quoting JOHN MUIR, OUR NATIONAL PARKS (Houghton Mifflin 1901)).
139 Id. at 4.
140 Id. at 3.
142 Id.
ruau believed that nature was "emblematic of the spiritual world," and found an aesthetic use for them.\textsuperscript{143} Hence, even the aesthetic values of wildlife are often based on a human-centered interest in how it can enrich our spiritual health.\textsuperscript{144}

Beyond their traditional values as food sources, sport, and aesthetic symbols of wildlife, the conventions also recognized the scientific value of migratory birds.\textsuperscript{145} Article VI of the Canadian Convention states that the prohibition against taking migratory birds does not apply to takings that may be scientifically justified.\textsuperscript{146} More specifically, the Canadian Convention provides that "the shipment or export of migratory birds or their eggs from any State or Province . . . shall be prohibited except for scientific . . . purposes."\textsuperscript{147} The Mexican, Japanese, and Russian Conventions adopted similar exemptions for scientific research.\textsuperscript{148} For example, the Mexican Convention requires "[t]he establishment of closed seasons, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, [and] their products or parts, except when proceeding . . . for scientific purposes."\textsuperscript{149} Likewise, the Japanese Convention provided that "[t]he taking of the migratory birds or their eggs shall be prohibited . . . [b]ut [e]xceptions to the prohibition of taking may be permitted in accordance with the laws and regulations of the respective Contracting Parties . . . [f]or scientific . . . purposes not inconsistent with the objectives of this Convention."\textsuperscript{150} Using similar language, the Russian Convention declared that an "[e]xception to these prohibitions [of taking migratory birds] may be made on the basis of laws, decrees or regulations of the respective Contracting Parties . . . for scientific . . . purposes."\textsuperscript{151} Indeed, the Mexican Convention expanded the exemption to include museum uses,\textsuperscript{152} and the Japanese Convention broadly provided for "other specific purposes not

\begin{footnotesize}
\begin{enumerate}
\item[143] See id.
\item[144] See id.
\item[145] See Canadian Convention, supra note 18, at 1704.
\item[146] Id.
\item[147] Id.
\item[148] Russian Convention, supra note 39, at 4651–53; Japanese Convention, supra note 38, at 3333–34; Mexican Convention, supra note 37, at 1312–13.
\item[149] Mexican Convention, supra note 37, at 1312.
\item[150] Japanese Convention, supra note 38, at 3333.
\item[151] Russian Convention, supra note 39, at 4652.
\item[152] Mexican Convention, supra note 37, at 1312.
\end{enumerate}
\end{footnotesize}
inconsistent with the objectives of this Convention,”153 as did the Russian Convention.154

When the utility of migratory birds does not outweigh other human interests, the conventions permit further exemptions for taking the otherwise protected birds.155 For instance, migratory birds may be killed when they “become seriously injurious to the agricultural or other interests in any particular community.”156 The Canadian Convention granted freedom to kill migratory birds that “under extraordinary conditions, may become seriously injurious to agriculture or other interests in any particular community.”157 The Mexican Convention likewise provided this exemption “when [migratory birds] become injurious to agriculture and constitute plagues.”158 The Russian Convention grants an exemption in one broad stroke, allowing the killing of migratory birds “[f]or the purpose of protecting against injury to persons or property.”159 These exemptions demonstrate that migratory birds seen as reasonable threats to valuable property enjoy substantially less protection and deference than migratory birds considered valuable property themselves.160

C. Language of the Migratory Bird Treaty Act

The regulatory economy of apportioning protection according to utility is also at work in the MBTA itself.161 Section 704 of Title 16 grants the Secretary of the Interior deferential power to allow “hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof” after “having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds.”162 Thus, the MBTA does not contemplate the wholesale protection of migratory

153 Japanese Convention, supra note 38, at 3333.
154 Russian Convention, supra note 39, at 4651–52 (“Exception to these prohibitions may be made . . . for . . . other specific purposes not inconsistent with the principles of this Convention.”).
155 See, e.g., Canadian Convention, supra note 18, at 1704.
156 Id.
157 Id. (emphasis added).
158 Mexican Convention, supra note 37, at 1312–13 (emphasis added).
159 Russian Convention, supra note 39, at 4652.
160 See Russian Convention, supra note 39, at 4651–53; Mexican Convention, supra note 37, at 1312; Canadian Convention, supra note 18, at 1704.
162 Id. § 704.
Despite the strong and stark language of protectionism, it allows large exceptions when birds can either afford *not to* be protected, or when humans cannot afford them *to* be protected. Indeed, it is the original premise of birds as property that permits this delegation of power to the Secretary of the Interior in the first place: 

"[M]igratory birds are subject to ownership of the people of the states in their collective sovereign capacity," and thus regulations made by the Secretary qualify as a "valid regulation of 'commerce.'"

Additionally, the legacy of viewing wildlife as property to be owned and controlled is apparent in the MBTA's exemption for migratory birds raised in captivity. The Act provides that, "[n]othing in this subchapter shall be construed to prevent the . . . sale of birds so bred [on farms and preserves] . . . for the purpose of increasing the food supply." This language suggests that captive-bred migratory birds are property subject to the control and disposal of breeders, not to be tampered with by the Act. Similarly, if the MBTA does not desire to tamper with the property rights of farmers, it also does not purport to tamper with the indigenous use of migratory birds. It states that "the Secretary of the Interior is authorized to issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs." The MBTA not only creates or refines property interests in migratory birds, it protects those rights already clearly in existence.

The legislative history of the MBTA boldly suggests the role property rights and interests played in shaping the vision of MBTA's protectionism and rationale. Congress clearly saw in migratory birds food, sport, and aesthetic enjoyment. For instance, one senator was concerned that unregulated hunting of migratory birds would hinder the protection of American agriculture and forestry: "[e]nough birds will keep every insect off of every tree in America, and if you will quit shoot-

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163 See id.
164 Id.
165 Cerritos Gun Club v. Hall, 96 F.2d 620, 620 (9th Cir. 1938) (emphasis added).
167 Id.
168 See id.
169 Id. § 712.
170 See id.
171 See, e.g., 56 Cong. Rec. 7447 (1918).
172 See, e.g., 55 Cong. Rec. 4816 (1917).
ing them they will do it."\textsuperscript{173} Pothunters were seen as villains whose behavior the MBTA must address and regulate, lest "proper" hunters run out of targets.\textsuperscript{174} Hence, while "[t]his law is aimed at the professional pothunter,"\textsuperscript{175} hunting according to the rules of sport was embraced by one representative: "God made woodpeckers, meadow larks, wild ducks, and bobolinks for boys to shoot. . . . [I]t makes better soldiers of them, if they learn to shoot."\textsuperscript{176} Indeed, many congressmen either suggested or wanted confirmation that the true purpose of the MBTA was to preserve the sport of hunting for generations to come. Interestingly, the underlying concern for the prosperity of hunting was also used to criticize the Act, with some congressmen going so far as to suggest that not only was the Act not aimed at protecting the birds, it was also not aimed at protecting hunting in general, but only the elite practice of it. Many congressmen dismissed the MBTA as expressing the "desire to maintain a steady supply of game animals for the upper classes."\textsuperscript{177} In the words of one representative,

\begin{quote}
[t]he real purpose of this bill, so far as it applies to the game birds, is not to protect the birds, is not to give them life, but to fix it so that the ragged boys, the people far away in the country who have not bird dogs—to fix it so that the common people of the country can not get their fair share of the game and so that only those who are able to afford game preserves and fancy equipment for hunting and all the paraphernalia that goes with it.\textsuperscript{178}
\end{quote}

What was common to this discourse and debate about the MBTA was that it was not extending help to birds for their sake, but for people's sake.\textsuperscript{179} Hunters were among those people "protected" by the Act, and so were weekend admirers of wildlife.\textsuperscript{180} The issue of aesthetic appreciation of migratory birds appears frequently in debates about the Act.\textsuperscript{181} One representative admitted, for instance, that "[m]y admiration for our little friends of the air makes me unfriendly

\begin{footnotes}
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} 55 Cong. Rec. 4402 (1917).
\textsuperscript{176} 56 Cong. Rec. 7447 (1918).
\textsuperscript{178} 56 Cong. Rec. 7364 (1918).
\textsuperscript{179} See id.
\textsuperscript{180} See, e.g., 56 Cong. Rec. 7357, 7447 (1918).
\textsuperscript{181} See, e.g., id. at 7357.
\end{footnotes}
to the habit of killing off these winged visitors . . . .”182 Similarly, another representative added, “[i]f we are going to have a treaty about migratory birds, let us have some place where they can come and remain safely and be a pleasure and companions.”183

The regulations set forth by the FWS under the MBTA reproduce this utilitarian protectionist scheme at the ground level of micromanagement.184 True to congressional intent, the FWS permits the hunting of migratory birds by those who identify themselves as hunters.185 The FWS regulates the methods of hunting,186 outlines the hours during which hunting can take place,187 the limits on the number of birds a person may take per day,188 and requires that any birds so taken be tagged to claim their possession.189 Likewise, a taxidermist may “[r]eceive, transport, hold in custody or possession, mount or otherwise prepare, migratory birds, and their parts, nests, or eggs, and return them to another,” as well as “[s]ell properly marked, captive-reared migratory waterfowl which he has lawfully acquired and mounted,” as long as he keeps accurate records of such operations.190

The FWS and its regulations realize the scientific value of migratory birds as well.191 While a general permit is required for any person to “take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase or barter, any migratory bird, or the parts, nests, eggs of such bird,”192 the FWS allows the taking of migratory birds by “public, scientific, or educational institutions” without a permit.193 In addition, individuals wishing to take or possess migratory birds for scientific research or educational purposes can apply for a scientific collecting permit.194 Finally, the FWS more broadly allows for the taking of migratory birds when there exists “important research reasons” or simply “other compelling justification.”195

182 Id.
183 Id. at 7458.
185 Id. §§ 20.1(b), 20.20(b).
186 Id. § 20.21.
187 Id. § 20.23.
188 Id. § 20.24.
189 Id. § 20.36.
191 Id. §§ 21.1-23.
192 Id. § 21.11.
193 Id. § 21.1.
194 Id. § 21.23.
195 Id. § 21.27.
Like the language of the conventions suggest, the MBTA indicates that when migratory birds become injurious to human interests, they are no longer protected.\(^{196}\) Thus, the FWS allows persons to take migratory birds for depredation control purposes. Upon evidence that migratory game birds have accumulated so "as to cause or [be] about to cause serious damage to agricultural, horticultural, and fish cultural interests, the Director is authorized to issue . . . a depredation order to permit the killing of such birds."\(^{197}\) Killed migratory birds can then be turned over to "charitable or other worthy institutions for use as food,"\(^ {198}\) or donated to "public museums or public scientific and educational institutions for exhibition, scientific, or educational purposes."\(^{199}\) Their utility is required to be recycled.\(^ {200}\) Some species, like crows, all grackles, and magpies, may be killed if they pose a health hazard or other nuisance to humans.\(^{201}\)

D. The Curious Distinction in Focus

Curiously, the FWS allows any person to take "captive-reared" mallard ducks and other captive-reared migratory waterfowl without a permit.\(^ {202}\) Hence, "[c]aptive-reared and properly marked mallard ducks, alive or dead, or their eggs may be acquired, possessed, sold, traded, donated, transported, and disposed of by any person without a permit,"\(^{203}\) while "[n]othing in this section shall be construed to permit the taking of live mallard ducks or their eggs from the wild."\(^ {204}\) This language suggests that while captive-raised mallard ducks are the property of the breeder, wild mallard ducks merit normal MBTA protection.\(^ {205}\) Unlike the protection afforded wild mallard ducks, captive-reared mallard ducks may be killed, "in any number, at any time or place, by any means except shooting . . . [unless] [s]uch birds may be "

\(^{196}\) 50 C.F.R. § 21.42.
\(^{197}\) Id.
\(^{198}\) Id. § 21.41(c)(4).
\(^{199}\) Id. § 21.42(c).
\(^{200}\) Id.
\(^{201}\) Id. § 21.43.
\(^{202}\) 50 C.F.R. §§ 21.13, 21.14. (This Note refers to the exception as “curious” because nothing in the text or history of the Act offers any rationale why such an exception should take place here. This curiosity has not been lost on the courts, where no satisfying explanation of this distinction other than the fact that the text seems to point that way has been offered).
\(^{203}\) Id. § 21.13.
\(^{204}\) Id. § 21.13(a).
\(^{205}\) See id.
killed . . . within the confines of any premises operated as a shooting preserve . . . or . . . by any person for bona fide dog training or field trial purposes."\textsuperscript{206}

Similarly, any person may lawfully acquire, possess, and transport captive-reared and properly marked migratory waterfowl without a permit. \textsuperscript{207} These lawfully possessed waterfowl may be killed, except by shooting, unless they can be shot in accordance with all applicable hunting regulations governing the taking of like species from the wild. \textsuperscript{208} Thus, the distinction between captive and wild mallard ducks suggests the modesty of the MBTA, as it will not interfere with property interests that have already been asserted in the paradigmatic \textit{Pier-son v. Post} manner—ducks already reduced to possession and control are property interests not to be tampered with. \textsuperscript{209} That is, the regulatory logic of the MBTA \textit{preserves} preexisting individual property rights which were already clearly asserted, while creating new property rights in the general public, such as generations of hunters and scientific institutions, that the Act then seeks to regulate and maintain.

This distinction between mallard ducks is curious because it is found nowhere else in the text of the MBTA. No other species of migratory birds is treated this way, and the logic of splintering mallards into wild and captive categories is confined to one sentence. In fact, the one word "wild" alone suggests that a splintering is supposed to take place. Evidence of the distinction can be traced to the language of the Canadian and Mexican Conventions. \textsuperscript{210} The Canadian Convention inserted the modifier "wild" before ducks when stating that protected migratory birds included "Anatidae or waterfowl, including . . . wild ducks." \textsuperscript{211} Nowhere else does the Canadian Convention insert "wild" before protected migratory bird species, except wild pigeons. \textsuperscript{212} The Mexican Convention makes this distinction more subtly, extending its protective reach only to "wild" ducks "from the tenth of March to the first of September." \textsuperscript{213} This language suggests rights of possession and control over ducks that happen to be domestic, again hint-
As mentioned above, the MBTA does not interfere with property rights clearly established.\footnote{215}

Given the subtlety with which the MBTA and its predecessor conventions work this distinction, it is not surprising that clarifying the distinction has been left to the workings of the common law.\footnote{216} Common law addressing whether the MBTA extends its wings over captive-bred migratory birds also indicates that the MBTA's protection ends where clear assertions of property rights begin.\footnote{217} In \textit{Koop v. United States}, for example, Koop had created artificial ponds on his ranch, using them to feed and raise mallard ducks.\footnote{218} Over the years, Koop would discontinue feeding the ducks before opening day of the hunting season and would invite fellow hunters to his property for duck hunting.\footnote{219} The ducks that were not shot or captured migrated in the fall.\footnote{220} Koop estimated that hunters shot approximately twenty to twenty-five percent of the ducks he raised, and the rest disappeared.\footnote{221}

During one day of hunting, a number of mallard ducks swooped over and into his pond.\footnote{222} Koop admitted that he was usually unable to distinguish his mallard ducks from wild ones.\footnote{223} He simply asserted that the mallards were his property until they migrated from his ranch.\footnote{224} The court, however, emphasized the importance of the distinction between "wild" and "captive-bred" mallards, insisting that this distinction could not so easily be brushed aside.\footnote{225} If the mallards which were shot were wild, "the verdict was not only supported by the evidence but those defendants [the hunters] and Dr. Koop were guilty beyond any doubt."\footnote{226}
In considering the importance of this distinction, the court relied on the purposeful insertion of the term "wild" before "ducks" in the list of protected migratory birds in the Canadian Convention. Moreover, the court found in this word dispositive proof that the MBTA did not apply to captive-bred mallard ducks. It noted,

[i]t is common knowledge that ducks, and particularly mallard ducks, lend themselves to being tamed or domesticated and that ducks generally found in most farmyards trace their ancestry back to the wild and untamed ducks with whose protection and care the Migratory Bird Treaties and regulations were concerned. Concededly, however, the law was not meant for, nor may it regulate or control the use of, such tamed or domesticated ducks.

Rather, once persons exercised possession and control, birds became property; indeed, "[i]n determining when . . . 'wild' birds are no longer considered 'wild,' courts and writers have made the major consideration one of possession and control." The court explained that "[t]here is no property in wild animals until they have been subjected to the control of man. If one secures and tames them, they are his property; if he does not tame them, they are still his, so long as they are kept confined and under his control."

Hence, in language strikingly similar to Pierson v. Post, the court declared that once people exercise control over wildlife, this possession marks the "beginning of ownership," and thereafter the MBTA has limited application. Since possession is never permanent, neither is person's property interest in wildlife: if the animals "return to their wild state, the property right ceases." Hence, the controlling issue in Koop became whether Koop had asserted sufficient possession and control over the killed mallards so that they could be considered his property rather than wildlife protected under the MBTA. Even though Koop fed and raised the mallards, he failed to assert "posses-

227 Id.
228 Id. at 59.
229 Id.
230 Koop, 296 F.2d at 59.
231 Id. (quoting 2 Cooley, TORTS 838 (3d ed. 1906)).
232 Id.
233 Id. at 59–60.
234 Id. at 58–59.
sion and control" over them because they could simply fly from one pond to another and away from Koop's ranch without interference.\textsuperscript{235} Additionally, the fact that neither Koop nor anyone else could distinguish between raised mallards and wild mallards illustrated that nothing prevented the commingling of the captive-reared mallards with wild mallards.\textsuperscript{236} Hence, Koop failed to satisfy the court that he had "possession" of the ducks in question.\textsuperscript{237} As a negative implication, though, the court was content to withhold the MBTA's protection whenever "possession and control" could be established.\textsuperscript{238} Captive-reared mallard ducks were outside the MBTA's sanctuary.\textsuperscript{239}

The distinction between captive-reared and wild mallard ducks was not reexamined until seventeen years later in \textit{United States v. Richards}.\textsuperscript{240} There, defendant Richards, a breeder of sparrow hawks, was charged with violating section 703 of the MBTA, and challenged the applicability of the MBTA to birds raised in captivity.\textsuperscript{241} In 1969, Professor Richards acquired his sparrow hawks, a protected species, under a valid state permit before controlling federal regulations existed.\textsuperscript{242} When federal protection of migratory birds was extended to include sparrow hawks, the permit was cancelled and the Bureau of Fish and Wildlife warned him that the sale of sparrow hawks was illegal.\textsuperscript{243} The court relied on the words of the FWS, emphasizing that migratory birds are defined to include any wild bird "whether raised in captivity or not."\textsuperscript{244} Additionally, the court stated that the MBTA, read as a whole, refuted the defendant's contention that captive birds are excluded from the MBTA because they are not wild migratory birds and may not be hunted.\textsuperscript{245}

As to the defendant's claim that the proscription against captive-raised birds discourages propagation and thus thwarts the intent of Congress to preserve migratory birds, the court noted that 16 U.S.C. § 704 authorizes regulations to determine to what extent sale may be

\begin{footnotes}
\item 235 Id. at 60.
\item 236 Koop, 296 F.2d. at 60.
\item 237 Id. at 60–61.
\item 238 Id. at 59–60.
\item 239 Id. at 60–61.
\item 240 583 F.2d 491, 493 (10th Cir. 1978).
\item 241 Id.
\item 242 Id.
\item 243 Id.
\item 244 Id. at 493–94 (citing 50 C.F.R. § 10.12 (1978)).
\item 245 Id. at 494–95 (citing 16 U.S.C. §§ 703, 704, 707 (1976)).
\end{footnotes}
permitted.\textsuperscript{246} Additionally, the regulations provide for possession and propagation of migratory birds by public, educational, and scientific organizations.\textsuperscript{247} In defense of this reading of the MBTA, the court stated that whether captive birds migrate is immaterial, since the crucial question is "whether the sparrow hawks which defendant sold belong to a species or group that migrate, not whether the particular birds migrate."\textsuperscript{248} Additionally, the court held that the wording of the regulation to include captive-raised birds under the MBTA was reasonably related to the Act's purpose of protecting wild birds.\textsuperscript{249} The reasonableness of the regulation was apparent because of the "difficulty in distinguishing birds raised in captivity from others of the species."\textsuperscript{250}

From a practical standpoint, the court noted that enforcing the MBTA would be difficult if a defendant could readily claim that a bird was raised in captivity.\textsuperscript{251} Thus, the court affirmed the conviction and ruled that the MBTA applies to captive-bred birds.\textsuperscript{252} Unlike the Koop court, this court did not theorize the possibility that a potential defendant would ever be able to satisfy a court that a bird in question was in fact "possessed and controlled."\textsuperscript{253} The practical difficulty of drawing that distinction was considered much more important by the Richards court.\textsuperscript{254} Thus, the Richards court interpreted the MBTA to be bolder and less forgiving than its text would suggest.\textsuperscript{255} The implication is, then, that if the purpose of the MBTA is to protect migratory birds, courts should err on the side of protection.\textsuperscript{256}

Just a year later, the court revisited the issue in United States v. Connors.\textsuperscript{257} Here, the court denied the applicability of the MBTA to captive-reared migratory birds, holding that it applied only to mallard ducks that were wild.\textsuperscript{258} Here, the defendant was charged with unlawfully hunting, killing, and attempting to kill migratory birds in viola-

\begin{itemize}
\item \textsuperscript{246} Richards, 583 F.2d at 494–95.
\item \textsuperscript{247} Id. at 496.
\item \textsuperscript{248} Id. at 495 (citing United States v. Lumpkin, 276 F. 580, 583 (1921)).
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Richards, 583 F.2d at 496–97.
\item \textsuperscript{253} Id.
\item \textsuperscript{254} See id at 495.
\item \textsuperscript{255} See id. at 493–95.
\item \textsuperscript{256} See id. at 494–95.
\item \textsuperscript{257} 606 F.2d 269, 270–73 (10th Cir. 1979).
\item \textsuperscript{258} Id. at 273.
\end{itemize}
tion of the MBTA. During a hunting dog "field trial," a group of ducks entered the area, disrupting the competition, whereupon the defendant shot and killed the ducks to expedite the field trials.

Like the Koop court, in assessing the legality of the defendant's actions, the Connors court examined the MBTA and similar Mexican and Japanese Conventions to determine whether the MBTA contemplated captive-reared in addition to wild mallard ducks. The court concluded that insofar as two of the three treaties, including the operative Canadian Convention giving rise to the MBTA, referred specifically to "wild ducks," and insofar as criminal statutes had to be strictly construed, the MBTA did not apply to the killing of captive-reared ducks. Thus, the court held that if the ducks killed were "wild," the defendant's conviction under the MBTA would be sustained; whereas if the ducks were captive-bred, the charges would have to be dismissed. In drawing a distinction between wild and captive ducks under the MBTA, the court was careful to distinguish this case from Richards. It noted that the birds involved in Richards were from the Falconidae family, for which the conventions did not specifically distinguish between "wild" and "captive-reared" in the manner that they did for ducks. While the Richards court saw fit to err on the side of protection, the Connors court was uncomfortable doing so when that meant imposing criminal sanctions on a defendant.

E. Scope of the Protection Afforded by the Migratory Bird Treaty Act: Distinct Treatment for Wild and Captive-bred Birds

That courts have interpreted the MBTA to distinguish between wild and captive-bred migratory birds, bestowing protection on the

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259 Id. at 270–71.
260 Id. at 270. The field trials consisted of throwing mallard ducks or other birds into a pond located at the arsenal whereupon trained dogs were released to retrieve the birds. Id.
261 Id.
262 Id. at 271–72.
263 The Canadian Convention defined protected migratory game birds to include "wild ducks," and the Mexican Convention established a closed season only for "wild ducks." Mexican Convention, supra note 37, at 1312–13; Canadian Convention, supra note 18, at 1702–03.
264 Connors, 606 F.2d at 271.
265 Id. at 273.
266 Id. at 272 n.4.
267 Id. "The unique fact that the treaties and regulations specifically refer to 'wild ducks' rather than simply 'ducks,' distinguishes this case from Richards." Id.
former and turning a blind eye on the latter, draws an even starker contrast between the two groups when cast in light of the fact that the MBTA regulates bird killing, the time when birds are killed, and the particular motives required for legal killing of protected birds.\textsuperscript{268} The fact is that the MBTA protects and regulates the taking of wild, and thus "non-property," migratory birds much more closely than migratory birds considered "property."\textsuperscript{269} For instance, the MBTA's prohibition on commercially selling "non-property" bird parts extend to those lawfully killed before the passage of the MBTA.\textsuperscript{270} In \textit{Andrus v. Allard}, Justice Brennan, speaking for the Court, emphasized that the prohibition of commercial transactions in parts of protected birds was without regard to when those birds were originally taken.\textsuperscript{271} In interpreting the intent of Congress, Justice Brennan noted that "[w]hen Congress wanted an exemption from the statutory prohibition, it provided so in unmistakable terms."\textsuperscript{272} Since nothing in the MBTA requires an exception for the sale of preexisting artifacts, the Court found that the structure and context of the MBTA demanded that commercial prohibitions be applied to parts of protected birds lawfully acquired before the enactment of the MBTA.\textsuperscript{273} Additionally, the court in \textit{United States v. Moon Lake Electric Association} noted that Congress did not intend to confine the prohibition of bird killing activities to those of traditional hunting.\textsuperscript{274} Rather, the court relied on the language and the regulations of the MBTA, which prohibits the act of "killing" in addition to the acts of hunting, capturing, shooting, and trapping, to show that Congress intended to prohibit any activities that killed protected birds.\textsuperscript{275} That the MBTA, as the court pointed out, does not discriminate concerning the manner of captivity, injury, or death of its protected birds supported this assertion.\textsuperscript{276} Similarly, the \textit{Moon Lake} court rejected the contention that the MBTA prohibits only intentional taking or killing of protected birds, noting that viola-

\textsuperscript{268} See discussion supra Part II.D.
\textsuperscript{270} \textit{Id.} at 56, 61–62.
\textsuperscript{271} \textit{Id.} at 60.
\textsuperscript{272} \textit{Id.} (citing 16 U.S.C. § 711 (1976), which provides: "[n]othing in this subchapter shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of so bred under proper regulation for the purpose of increasing the food supply.").
\textsuperscript{273} \textit{Id.} at 60–61.
\textsuperscript{274} 45 F. Supp. 2d 1070, 1075 (D. Colo. 1999).
\textsuperscript{275} \textit{Id.}
\textsuperscript{276} \textit{Id.} For instance, the MBTA prohibits the sale of protected birds regardless of how such birds are collected, trapped, or killed. 16 U.S.C. § 668(a).
tions of the MBTA are strict liability crimes: "it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge."\(^{277}\) Accordingly, the MBTA explicitly proscribes misdemeanor penalties to any persons violating the MBTA or any of its conventions, regardless of specific intent or knowledge.\(^{278}\) Persons who "knowingly" take protected birds in violation of the MBTA and its conventions, on the other hand, are guilty of a felony.\(^{279}\)

Conversely, the MBTA appears to no longer protect birds when they are already serving property interests.\(^{280}\) The language of the MBTA explicitly provides for the sale of captive-bred migratory game birds for the purpose of increasing food supply,\(^{281}\) the FWS exempts captive-reared mallard ducks and other captive-reared migratory waterfowl from protection,\(^{282}\) and courts accordingly decline to protect captive-reared mallard ducks.\(^{283}\) More specifically, the MBTA provides that "[n]othing 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."\(^{284}\) Hence, the MBTA explicitly carves out an exception in its prohibitions against selling protected migratory birds to those that are captive-bred.\(^{285}\) Additionally, the FWS has two provisions indicating that the "taking" of captive-reared mallard ducks and other waterfowl is permitted.\(^{286}\) It provides that "[c]aptive-reared and properly marked mallard ducks, alive or dead, or their eggs may be acquired, possessed, sold, traded, donated, transported, and disposed of by any person without a permit," while ensuring that this exception does not apply to wild mallard ducks, stating that "[n]othing in this section shall be construed to permit the taking of live mallard ducks or their eggs from the wild."\(^{287}\) A similar provision concerns the taking of captive-reared waterfowl: "[a]ny person may, without a permit, law-

\(^{277}\) Moon Lake Elec. Ass'n, 45 F. Supp. 2d at 1073 (quoting United States v. Manning, 787 F.2d 431, 435 n.4 (8th Cir. 1986)).


\(^{279}\) Id. § 707(b).


\(^{281}\) 16 U.S.C. § 711.


\(^{283}\) United States v. Conners, 606 F.2d 269, 270–73 (10th Cir. 1979); Koop v. United States, 296 F.2d 53, 55–61 (8th Cir. 1961).


\(^{285}\) Id.


\(^{287}\) Id. § 21.13.
fully acquire [and kill] captive-reared and properly marked migratory waterfowl of all species other than mallard ducks, alive or dead, or their eggs, and possess and transport such birds or eggs."288 Moreover, as already discussed, courts painstakingly distinguish between wild and captive-bred mallard ducks in deciding whether MBTA protection applies, consistently holding that while wild mallard ducks are within the MBTA’s protection, captive-bred mallards are not.289

F. Re-Thinking the Migratory Bird Treaty Act

That the MBTA should be so modest, speaking on one level in the language of property rights, is not surprising: when protection of wildlife is expected to meet some public resistance, that protection needs to be phrased in terms that will soften that resistance. One strategy for minimizing this resistance is to assure the public that what is being protected all along is, in fact, human interests. Indeed, the legislative history of the MBTA suggests that what made the Act so palatable to Congress was the shared impression that it was all about protecting the food supply,290 and maintaining a steady supply of game animals for the upper classes.291 In this way, the purpose of the MBTA was not to recognize the intrinsic value of migratory birds, but to prevent the "annual food losses caused by insects [that] require protection of birds"292 and to "facilitate the incursion of the exclusive hunting clubs."293

But modesty often means compromise, and that is true here. When protection stops short of offending human interests, it compro-

288 Id. § 21.14.
289 See discussion supra Part ILD.
291 Id. at 1082. Representative Huddleston stated:

assuming no kind of punishment is too severe for the boy who robs a bird’s nest, I call attention to the fact that this bill [MBTA] does not protect game birds. Instead of being called “a bill for the protection of game birds,” it ought to be named “a bill for the protection of game-bird hunters.” The real purpose of this bill, so far as it applies to game birds, is not to protect the birds, is not to give them life, but to fix it so that the ragged boys, the people far away in the country who have not bird dogs—to fix it so that the common people of the country can not get their fair share of the game and so that only those who are able to afford game preserves and fancy equipment for hunting and all the paraphernalia that goes with it . . . can get the game.

56 CONG. REC. 7364 (1918).
292 56 CONG. REC. 7357 (1918).
293 Id. at 7375.
mises its regulatory potency. If protection must be phrased in terms of utility and human interests, it will never be designed to offend those interests, or to subordinate them to higher values which take as their starting point the interests of the wildlife protected. A different regulatory scheme focusing on the interests of wildlife would recognize that the intrinsic value of the animal itself must play more of a role in drafting the language and articulating the purpose of the Act. At the very least, it must enter more robustly into the cost-benefit exercise that keeps human interests at the forefront in the regulatory design. Such a scheme would overcome the inclination to consider animals as mere property existent only to serve human benefit. It would recognize that the world does not exist only for humans; instead, it would acknowledge that “[t]he living creation is biocentric.”

In this context, the fact that the MBTA distinguishes between captive-bred and wild migratory birds indicates that this self-proclaimed champion of the nation’s wildlife retains a decidedly anthropocentric worldview. The question now is whether making this concession to the priority of human utility is still necessary to wildlife regulation or whether it was merely a precondition of its origin, a comprise that sets the framework. If animals are protected for their own sake, the MBTA need not distinguish captive-bred from wild migratory birds. If the answer to that question is that it remains necessary for contemporary attempts at regulation, then the MBTA’s history must be rethought in terms of the precedent it left in thinking about wildlife protection. Without the realization that animals cannot be understood solely in terms of human property and utility, wildlife protection laws will be successful only to the extent that they protect humans. Surely such regulation does not deserve the moniker wildlife protection. In the words of Lisa Mighetto, “[u]ntil we abandon human-centered motives, animal protection will never be completely successful.”

**CONCLUSION**

The thrust of this Note has been to identify those points where the protectionist scheme of the MBTA makes concessions, or at least where it seems to wane in its protection. The problem thus identified is that by its own terms, it contemplates itself as protecting humans and not the migratory birds. To set up a protectionist scheme with the

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294 LIBERTY HYDE BAILEY, THE HOLY EARTH 20 (Charles Scribner’s Sons 1915).
295 MIGHETTO, supra note 1, at 118.
migratory birds as the beneficiaries, we may have to fashion new, higher rights that belong to wildlife. That is, if we want wildlife protection without compromise, it must recognize values intrinsic to animals and not values that humans find it convenient to give them. This entails that such textual distinctions between the mallard duck bred on someone’s pond and the mallard duck born on a wild pond would have no principled basis.