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Lucas O'Brien
University of Colorado Law School

Lucas O'Brien

STATE BALLOT INITIATIVES AND FEDERAL PREEMPTION: HOW COLORADO VOTERS HAVE CHANGED COOPERATIVE FEDERALISM IN WILDLIFE MANAGEMENT

ABSTRACT

There exists a notion in the United States that the federal government manages land while the states manage wildlife. While it is true that the responsibilities of wildlife management have traditionally been reserved to the states, in many instances the federal government does have the authority to manage and conserve wildlife. This overlapping jurisdiction most often leads to the preemption of a state's laws and the frustration of its wildlife management goals.

In the 2020 election, Colorado voters narrowly passed Proposition 114, which requires Colorado Parks and Wildlife to reintroduce wolves to the state by the end of 2023. This marks the first instance of voters requiring a wildlife agency to take such a broad action regarding the management of a species. While this fact may not have an impact on the exact plan that Colorado Parks and Wildlife creates, it presents a novel opportunity for Colorado, and any states that follow, to strengthen their authority over resident wildlife. By undertaking this reintroduction effort with a mandate from voters, Colorado may benefit from the heightened deference that courts often give, or suggest giving, to state ballot initiatives. Operating much like a presumption against preemption, this heightened deference would serve to tilt the scales in the states' favor in the event of a conflict with federal authority.

This article explores how ballot initiatives present the opportunity for states to claw back some authority over their wildlife that has been eroded by courts over the last century, including introducing the deferential framework under which courts should analyze conflicts between federal authority and state ballot initiatives.

INTRODUCTION

Paws on the ground by 2023. In the 2020 election Colorado voters passed Proposition 114, which requires Colorado Parks and Wildlife ("CPW") to reintroduce wolves to the state by the end of 2023 and create a plan for the ongoing management of the species. This is not the first time that voters have made their voices heard in wildlife management via a state ballot initiative, but it is the first instance voters have required a wildlife agency to take such sweeping action regarding the management of a species.

Mandates like Proposition 114 present Colorado, and other states that enact similar ballot initiatives, a novel opportunity to prevail in a conflict with federal law.[1] Over the past several decades, states have repeatedly had federal statutes and objectives preempt their wildlife laws and frustrate their wildlife management tactics. Decades of judicial precedent upholding and expanding federal authority in this area has slowly eroded states' ownership of wildlife. In other areas of the law, courts have historically granted greater deference to state ballot initiatives than to ordinary state laws when challenged by federal authority.

In United States wildlife management, there exists a longstanding notion that the federal government manages land while the states manage wildlife.[2] It is true that wildlife management has traditionally been reserved to the states, but federal agencies also have the authority—and often an obligation—to manage and conserve wildlife on federally owned lands. This overlapping jurisdiction often leads to the preemption of state laws or objectives.

By undertaking this reintroduction effort with a mandate from voters, Colorado should benefit from the heightened deference that courts give to state ballot initiatives. Operating much like a presumption against preemption, this heightened deference serves to tilt the scales in the states' favor in the event of a conflict with federal authority.

This article explores how ballot initiatives present the possibility for states to claw back some authority over their wildlife that has slowly been eroded away by courts over the last century. It begins with an introduction to state wildlife management, including the most common problems that states face from the federal government and a brief history of the ownership of wildlife. The article then introduces the relevant sources of federal land and wildlife management authority. Next, it discusses how state and federal authority generally work in tandem, but in instances of conflict, state authority has been preempted. Then, the article presents the deferential standard under which courts should analyze conflicts between federal laws and state ballot initiatives. The article concludes by demonstrating why Proposition 114, and state ballot initiatives in general, represent an opportunity for states to regain some of the wildlife management authority that has been lost to the federal government over the last century.

1. Whether it is prudent to allow citizens to make wildlife management decisions in place of, or in addition to, state wildlife agencies is beyond the scope of this article.
2. Kleppe v. New Mexico, 426 U.S. 529, 534 (1976).

I. CONFLICTS BETWEEN STATE WILDLIFE MANAGEMENT AND FEDERAL AUTHORITIES

There is a commonly repeated wildlife management mantra that states manage wildlife, and the federal government manages land.[3] With its origins tracing back to ancient Roman law, this mantra has been reinforced by the longstanding wildlife management system in the United States.[4] This divide in management appears to be relatively straightforward. However, upon closer inspection, the divide between state and federal authority is far from clear and the subject is rife with conflict. In the western states, where the federal government owns 45% of the land,[5] these issues arise regularly.

A. Sources of Conflict

The Association of Fish and Wildlife Agencies ("AFWA") represents state fish and wildlife management agencies to the federal government with a goal of advancing favorable fish and wildlife conservation policies.[6] In 2014, the AFWA commissioned a task force ("Task Force") to investigate how state wildlife agency directors "perceive the relationship between state and federal agencies, by determining the relationship's implications on states' authority to manage wildlife, and by making recommendations to strengthen the relationship between state and federal conservation agencies."[7] The directors' perceptions highlight the areas of wildlife management where state and federal authority regularly conflict. Additionally, the perceptions identify the federal laws that most often impede state objectives. Understanding which federal statutes are most often at issue informs whether and how ballot initiatives could be used by states to overcome these impediments by helping lawmakers or those drafting ballot initiatives craft the laws in such a way that best avoids preemption.

Of the thirty-seven states that participated in the Task Force's survey, responses suggest that federal interference is not uniform across the country.[8] Notably, nearly all directors from western states believed that their authority had decreased relative to the federal government's over the course of their careers.[9] To identify the source of this shift in authority, the respondents were asked to identify challenges and successes in regard to wildlife management and conservation acts, regulations, or policies.[10]

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3. *Id.* at 534-35.
4. *See infra* Section II (discussing the origins of the state ownership doctrine and its importance to wildlife management).
5. CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA Summary (2020).
6. *Overview*, ASS'N OF FISH & WILDLIFE AGENCIES, https://www.fishwildlife.org/landing/overview (last visited Mar. 19, 2021).
7. ASS'N OF FISH & WILDLIFE AGENCIES TASK FORCE ON STATES AUTH.'S, WILDLIFE MANAGEMENT AUTHORITY: THE STATE AGENCIES' PERSPECTIVE 2 (2014) [hereinafter AFWA TASK FORCE].
8. *Id.* at 5.
9. *Id.* at 6.
10. *Id.*

States primarily identified the Endangered Species Act ("ESA") as a legal and regulatory challenge to states' ability to manage their wildlife.[11] States pointed to ambiguities in the listing and delisting process as the source of this challenge, noting that federal agencies appear to give equal weight to public and state agency input.[12] As an organization that promotes the use of science-based decision making, it is no surprise why granting public input such deference would frustrate the AFWA and its member states.

Another challenge that states identified were the restrictions that are often imposed by federal agencies' land management decisions.[13] The Task Force found that many of the statutes that govern these decisions are written in a way that "leave[s] room for loose interpretations of land management authority."[14] The ambiguities that this creates allows land managers too much latitude, often leading them to implement preservationist interpretations of the statutes that are contrary to the principles of state-level habitat management.[15] Additionally, "many of these land management planning efforts . . . fail to consider the impact they have on state trust species and state agencies' ability to manage these species in accordance with their public duties."[16] For example, some federal agencies employ minimalist management strategies to return the land to its natural condition, which necessarily excludes the heavy-handed wildlife management tactics implemented by states.[17]

Several other issues were identified as posing problems to states' management authority. State agency directors described the National Forest Management Act[18] as essentially halting the management of forests in many areas due to the complex requirements of the act, such as the requirement to develop and comply with comprehensive management plans for each forest unit.[19] States also perceived that federal agencies often tailored their resource management plans for a specific class of user, such as the timber industry, despite plans conflicting with a state's wildlife management objectives.[20] Some forest units were seemingly managed for preservation rather than conservation, despite that being at odds with the requirements of the National Forest Management Act.[21]

The Wilderness Act,[22] one of the most wide-reaching preservationist statutes, has strict exclusionary management practices that prevent states from taking part in most management decisions.[23] This act states that designated land is owned by the federal government and is to be managed by federal agencies for two purposes: "to advance on-the ground benefits for a specific class of user, and to

11. *Id.* at 8. The ESA will be discussed in further detail in Section III.
12. *Id.*
13. *Id.* at 9.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. 16 U.S.C. § 1604.
19. *Id.* at 12; 16 U.S.C. § 1604.
20. AFWA TASK FORCE, *supra* note 7, at 12.
21. *Id.*
22. 16 U.S.C. § 1131.
23. AFWA TASK FORCE, *supra* note 7, at 15-16.

protect the indirect benefits enjoyed by a group of non-users."[24] In the survey, states noted a lack of recognition by federal agencies for states' management authority over wildlife in wilderness areas, reducing the state's ability to manage the populations that reside there.[25] Several states cited instances of federal managers making unilateral access decisions, closing these areas to hunting and fishing, and disregarding state regulations.[26]

B. Specific Instances of Conflict

Land and wildlife management disputes happen frequently between state and federal agencies, often ending up in court. A few notable examples are the Forest Service killing deer in a National Forest in disregard of state game laws,[27] the Fish and Wildlife Service ("FWS") refusing to allow the state of Wyoming to vaccinate elk on the National Elk Refuge,[28] and the state of New Mexico violating a federal statute prohibiting states from killing, capturing, or otherwise managing wild horses and burros on public lands.[29] Many of these disputes have become foundational cases for the study of the federal government's authority over public lands and resources.[30]

Not all instances of conflict result in judicial resolution. The conflicts included in the AFWA's Task Force Report likely went unchallenged because states are often powerless to challenge the federal action.[31] The wolf reintroduction in Idaho serves as an example. In 1995, most of the Idaho's residents were against the already ongoing wolf reintroduction.[32] The opposition from the state was so fierce that the Idaho State Legislature passed a bill that prohibited the Idaho Department of Fish and Game from assisting with wolf reintroduction in any way.[33] Disregarding the position of the state, the U.S. Fish and Wildlife Service released additional wolves on national forest lands within the state.[34] Once the wolves were in the state, the Idaho Department of Fish and Game was forced to account for them in all other aspects of wildlife management. For example, the Idaho Department of Fish and Game had to monitor wolves' effect on popular game species like sheep and elk, which are also wolves' primary food source.[35]

These examples serve to demonstrate the realities of wildlife management in the United States and the issues that states regularly face. The simple mantra that

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24. *Id.* at 16; 16 U.S.C. § 1131 (2021).
25. AFWA TASK FORCE, *supra* note 7, at 16.
26. *Id.*
27. Hunt v. United States, 278 U.S. 96, 100 (1928).
28. Wyoming v. United States, 279 F.3d 1214, 1222 (10th Cir. 2002).
29. Kleppe v. New Mexico, 426 U.S. 529, 531–33 (1976).
30. *See, e.g.*, *Kleppe*, 426 U.S. 529; *see* Missouri v. Holland, 252 U.S. 416 (1920); *see Wyoming*, 279 F.3d 1214.
31. *See* Steve Stuebner, *Wolf Reintroduction in Idaho (1995-2011)*, LIFE ON THE RANGE (last visited Mar. 19, 2021), https://idrange.org/range-stories/north-idaho/wolf-reintroduction-in-idaho/ (discussing the state of Idaho's inability to prevent the federal government's reintroduction of wolves on federal land within the state).
32. *Id.*
33. *Id.*
34. *Id.*
35. *See id.* (discussing Idaho Department of Fish and Game's method of managing wolves as a big game species and residents' concern that wolves would "decimate" sheep and elk populations).

states manage wildlife while the federal government manages land brushes over these conflicts and ignores the complexities of the actual management system.

II. STATE MANAGEMENT OF WILDLIFE IN THE UNITED STATES

This section provides a history and overview of states' authority to manage wildlife. It traces the origins of the state ownership doctrine and analyzes how it has been interpreted by courts and implemented in modern wildlife management laws and policies.

A. History of Wildlife Ownership

In the United States, the state ownership doctrine generally governs the control of wildlife. The doctrine provides that state governments have authority to manage and control all wild animals within their jurisdiction.[36] While a state's authority has some limitations from the federal government, the doctrine is foundational to the United States' system of wildlife management.

The doctrine's roots trace back to ancient Roman law where wild animals were viewed as belonging to the community until captured.[37] As these principles transformed into English common law, severe restrictions and control were added that granted the government vast authority to limit the taking of wild animals.[38] In essence, English subjects were only allowed to harvest wildlife if they had permission from the king.[39] As colonists declared their independence from England, it was readily apparent that the rugged and wild landscape of America was incompatible with the English laws.[40]

In the early days of America, the federal government abandoned the strict limitations on capturing wild animals and implemented principles of capture that resembled ancient Rome.[41] The ability to hunt was expanded to common people while limited government oversight allowed for the essentially free taking of the wild animals that inhabited this new land.[42] The abundance of wildlife created the perception of an inexhaustible resource.[43] However, it was also during this era that the first game laws were introduced.[44]

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36. David Favre, *American Wildlife Law – An Introduction*, MICH. STAT UNIV., ANIMAL LEGAL & HISTORICAL CENTER (2003), https://www.animallaw.info/article/american-wildlife-law-introduction.
37. *Id.* at Section 1.
38. *Id.*
39. Michael C. Blumm & Aurora Paulson, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1453 (2013).
40. Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVT'L L. REV. 673, 685 (2005).
41. *Id.* at 677–788, 684 (the rule of capture that was welcomed into the American colonies originated in Roman law).
42. Devin Kenney, *A Goat Too Far?: State Authority to Translocate Species On and Off (and Around) Federal Land*, 8 KY. J. EQUINE, AGRIC., & NAT. RES. L. 303, 311 (2015).
43. *Id.*
44. DEAN LUECK, AN ECONOMIC GUIDE TO STATE WILDLIFE MANAGEMENT 2 (2000).

The primary goal of these laws was to protect valuable species from overharvest.[45] These restrictions typically came in the form of a hunting season and bag limits, which set a daily or seasonal quota on the number of animals that could be taken.[46] By the end of the colonial period, every colony except Georgia had closed seasons for deer.[47] However, west of the Mississippi there were no game laws in any state until 1851.[48] Early pioneers viewed any law restricting the harvest of such resources as wasteful because America was rich with wildlife.[49]

During the early nineteenth century, this view of animals as inexhaustible combined with a decentralized management authority led to the overharvest of many species, particularly those in states slow to adopt game laws.[50] This reduced many species' populations to below sustainable levels; some species were fully wiped out.[51] It was not until late in the nineteenth century that public recognition of the decline of wildlife reached a level that would spark the first conservation movement.[52] By the 1880s, all of the 48 continental states or respective territories had approved game legislation similar to that of the colonies.[53]

Before any American courts dealt with issues relating to wildlife ownership, they spent the nineteenth century developing the public trust doctrine—the notion that states have ownership over common property to be held, protected, and regulated for common use and benefit of all.[54] Implied within state's ownership and control over common property was the ownership and control over wildlife.[55]

The first time the Supreme Court fully articulated the concept of states ownership of wildlife was in 1896 in *Geer v. Connecticut*.[56] At issue before the Court was whether the state of Connecticut could make possession of a harvested game species legal within their borders, but transportation of a harvested game species illegal.[57] The Court affirmed Connecticut's right to regulate game in this manner.[58]

The Court relied on both history and modern precedent in its reasoning. The Court delved into the origins of "the right to reduce animals *ferae naturae* to possession," concluding that the right had always "been subject to the control of the

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. Blumm, *supra* note 40, at 687.
50. Kenney, *supra* note 42, at 311-12.
51. Blumm, *supra* note 40, at 690-91; Blumm, *supra* note 39, at 1456; Kenney, *supra* note 41, at 311-12.
52. Kenney, *supra* note 42, at 312.
53. LUECK, *supra* note 44, at 2.
54. Blumm, *supra* note 39, at 1458.
55. *Id.*
56. Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma (1979). The Court first dealt with the issue of state ownership of wildlife in 1876 in *McCready v. Virginia*. 94 U.S. 391 (1876). However, that case merely "acknowledged the ability of a state to limit access to oysters found within state waters." Favre, *supra* note 36, at Introduction. It was not until 1896 in *Geer* that the Court gave "the full articulation of the doctrine, along with a detailed historical analysis of the concept." *Id.*
57. *Geer*, 161 U.S. at 522.
58. *Id.* at 528-29.

law-giving power."[59] History instructed that while there was no restriction on "the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession," state ownership of land vested an "authority to control the taking and use of that which belonged to no one in particular, but was common to all."[60]

The Court highlighted that regulatory authority emanating from land ownership can be traced from ancient Rome through the legislation of Charlemagne, the Napoleon Code, and into the common law of "all the countries of Europe" and to England.[61] The Court recognized that "this attribute of government to control the taking of animals ferae naturae . . . was vested in the colonial governments . . . [and was] passed to the states with the separation from the mother country, and remains in them at the present day."[62]

The Court continued its reasoning with modern sources of authority. The Court stated it had "been referred to no case where [the state's] power to so legislate has been questioned," and cited "numerous" examples of "cases recognizing the right of the states to control and regulate the common property in game", including two Supreme Court cases involving state management of fish within state boundaries.[63] Adopting language from the supreme court of Minnesota, the Court concluded that "the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common."[64] While *Geer* was ultimately overturned in 1978 by *Hughes v. Oklahoma*,[65] the Court was clear that *Hughes* did nothing to change the public trust ownership of wildlife.[66] States continue to use *Geer* to support the state regulation of wildlife[67] and 48 states explicitly claim ownership of wildlife.[68]

B. The Tenth Amendment

States have attempted to claim jurisdiction over wildlife based on the authority of the Tenth Amendment. The Amendment provides: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[69] While it appears to vest states with a certain degree of authority, the Tenth Amendment is often viewed as a paper tiger. In *United States v. Darby*, the Court declared "[t]he [A]mendment states

59. *Id.* at 522.
60. *Id.* at 523.
61. *Id.* at 523-26.
62. *Id.* at 527-28.
63. *Id.* at 528 (citing McCready v. Virginia, 94 U.S. 391 (1876) (upholding the authority of the state of Virginia to regulate the taking of oysters from state waters), Manchester v. Massachusetts, 139 U.S. 240 (1891) (upholding the authority of the state of Massachusetts to regulate the catching of fish within state waters)).
64. *Id.* at 529 (quoting State v. Rodman, 59 N.W. 1098 (Minn. 1894)).
65. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).
66. *Id.* at 338-39; Blumm, *supra* note 39, at 1461.
67. Blumm, *supra* note 39, at 1461.
68. Blumm, *supra* note 39, at 1462 n.204.
69. U.S. CONST. amend. X.

but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments."[70]

Little judicial discussion took place around the Tenth Amendment's role in wildlife management until 1920 when the Supreme Court considered a challenge to the Migratory Bird Treaty Act in *Missouri v. Holland*.[71] There, the Court rejected any contention that the Tenth Amendment could stand as an impediment to federal enforcement of a lawful act arising under another enumerated power.[72] The next time the courts took up the Tenth Amendment's role in wildlife management was in 1979 in *Palila v. Hawaii Department of Land and Natural Resources*.[73]

In *Palila*, the Hawaii Department of Land and Natural Resources was responsible for maintaining a herd of feral sheep and goats for sport-hunting on state lands.[74] These herds were modifying and destroying the designated critical habitat of the Palila bird, a species listed under the Endangered Species Act ("ESA").[75] Pursuant to the ESA, the federal government established a recovery team to devise a plan to save the bird from extinction, which ultimately would have included eradicating the sheep and goats.[76] Hawaii argued that under the Tenth Amendment the state retained exclusive sovereignty over the issue because this was taking place entirely on state land.[77] Even when no federal land was at issue, the Court was not swayed, concluding that the Tenth Amendment does nothing to constrain federal enforcement of the ESA.[78]

There have been several other cases that ended in similar fashion. In *Gibbs v. Babbit*, the Fourth Circuit concluded that while "[s]tates have important interests in regulating wildlife and natural resources within their borders," it may not be exercised "in derogation of an enumerated federal power."[79] In a more searing blow to state's authority for managing wildlife, the Tenth Circuit in *Wyoming v. United States*, stated that state's authority over wildlife is not constitutionally derived and that it was "painfully apparent that the Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife . . . , regardless of the circumstances."[80] In sum, while courts often acknowledge states' jurisdiction over, and longstanding role in, managing wildlife within their borders, the Tenth Amendment fails to provide constitutional support for that authority.

70. United States v. Darby, 312 U.S. 100, 124 (1941).
71. Missouri v. Holland, 252 U.S. 416 (1920).
72. *Id.* at 435.
73. 471 F. Supp. 985 (D. Haw. 1979), *aff'd on other grounds*, 639 F.2d 495 (9th Cir. 1981), *aff'd* 852 F.2d 1106 (9th Cir. 1988).
74. *Id.* at 989.
75. *Id.* at 988-90.
76. *Id.* at 988.
77. *Id.* at 992.
78. *Id.* at 995.
79. Gibbs v. Babbit, 214 F.3d 483, 499 (4th Cir. 2000).
80. Wyoming v. United States, 279 F.3d 1214, 1227 (10th Cir. 2002).

C. How States Manage Wildlife Today

In accordance with their public trust obligations discussed above, states remain responsible for managing the species that reside within their respective borders.[81] Each state has its own agency dedicated to this task.[82] These agencies were built off the management foundations put in place by hunting laws established during colonial times, such as those protecting valuable species like deer from overharvest or encouraging the harvest of "undesirable" species like wolves and other predators.[83]

During the late nineteenth and into the twentieth century, states implemented policies, that are mostly still enforced, to protect species that had been overharvested or unprotected during the period of unregulated taking.[84] These policies now form the basis of how states manage wildlife.[85] In general, states have taken similar approaches by creating agencies dedicated to managing wildlife, setting seasonal closures to limit access to wildlife, setting daily and seasonal quotas, administering licenses for taking species, limiting methods of taking species, enforcing these laws, hiring biologists to research the state's populations, creating and managing systems of wildlife refuges for struggling populations, protecting non-game and endangered species, and creating educational programs about wildlife.[86]

III. FEDERAL LAND AND RESOURCE MANAGEMENT AUTHORITY

The other prong of the wildlife management system is the management of federally owned lands. The federal government is largely responsible for stewardship of land and habitat across the Western United States. About 45% of the total land in the western states[87] is owned by the federal government.[88] In these states, federal land ownership leaves states with minimal autonomy to make meaningful land management decisions. This section provides an overview of the sources of federal authority and how the major federal landowning agencies—the Forest Service and the Bureau of Land Management—exercise that authority.

A. The Property Clause

In the realm of land and resource management, the Property Clause is one of the key provisions of the Constitution's grant of authority to the federal government. As the cases discussed below demonstrate, the Property Clause is often the source of federal authority in major wildlife management disputes that end up in the courts. The clause gives Congress the "Power to dispose of and make all needful

81. LUECK, *supra* note 44, at 1.
82. *See id.* at 3-4, 6 (introducing modern state game commissions and wildlife agencies).
83. *Id.* at 2.
84. *Id.*
85. *Id.*
86. *Id.* at 6.
87. Generally considered to include California, Nevada, Oregon, Washington, Arizona, New Mexico, Idaho, Montana, Wyoming, Colorado, and Utah. CONGRESSIONAL RESEARCH SERVICE, *supra* note 5, 4 n.16.
88. *Id.* at 19.

Rules and Regulations respecting the Territory or other Property belonging to the United States."[89] The Supreme Court has never "definitely settled" the full scope of the Property Clause, but it has concluded that "at least[] it is a grant of power to the United States of control over its property."[90] In the twentieth century, the Supreme Court repeatedly affirmed and expanded the power granted to federal land management agencies through the Property Clause.

Several of these decisions dealt with federal actions that took place on federal land and directly contravened existing state laws. In *Hunt v. United States*, the Court held that it was lawful for Forest Service agents to kill "overbrowsing" deer in a national forest despite the action violating state game laws that restricted the number of deer that could be killed each year.[91] The Court determined that the Secretary of Agriculture and his respective agents were attempting to protect the lands of the United States, an action that is squarely within the bounds of the authority conferred by the Property Clause.[92] Furthermore, the Court concluded that "the power of the United States to thus protect its land and property does not admit of doubt . . . the game laws or any other statute of the state to the contrary notwithstanding."[93]

Years later, the Court took *Hunt's* reasoning and expanded it significantly in *Kleppe v. New Mexico*.[94] At issue in *Kleppe* was the legality of the Wild Free-Roaming Horses and Burros Act, which protects wild horses and burros from capture, harassment, and death.[95] The Act prevented New Mexico agencies from capturing stray burros pursuant to state law.[96] New Mexico claimed that the BLM lacked authority to enforce the Act against state agencies because the burros were neither a part of interstate commerce nor damaging public land.[97] The issue turned to the extent of the authority granted under the Property Clause—whether Congress's decision to protect these animals "can be sustained as a 'needful' regulation 'respecting' the public lands."[98]

Citing to *Hunt* for its authority, New Mexico claimed that "the Property Clause gives Congress only the limited power to regulate wild animals in order to protect the public lands from damage."[99] The Court rejected that narrow reading and went on to expand its holding from *Hunt*, stating that while "damage to the land is a *sufficient* basis for regulation [under the Property Clause]; [*Hunt*] contains no suggestion that it is a *necessary* one."[100] The Court ultimately upheld the Wild Free-Roaming Horses and Burros Act on the authority of the Property Clause, holding

89. U.S. CONST. art. IV, § 3, cl. 2.
90. Kansas v. Colorado, 206 U.S. 46, 89 (1907).
91. 278 U.S. 96, 100 (1928).
92. *Id.*
93. *Id.*
94. 426 U.S. 529, 546 (1976).
95. *Id.*; 16 U.S.C. § 1331.
96. Kleppe, 426 U.S. at 546.
97. *Id.* at 533.
98. *Id.* at 536.
99. *Id.* at 537.
100. *Id.* (Emphasis added).

"that the Property Clause . . . gives Congress the power to protect wildlife on the public lands, state law notwithstanding."[101]

The courts have even interpreted the Property Clause to permit federal regulation of activities on non-federal land, provided that it is necessary to protect federal lands and resources.[102] In one early instance from 1897, *Camfield v. United States*, the Court held it was unlawful for a landowner to construct a fence on his private property that prevented access to 20,000 acres of public lands.[103] At issue in the case was the interpretation and application of the Unlawful Enclosure Act of 1885, which declares it unlawful for any person to enclose any public lands without claim or title to them.[104] Under the power of the Property Clause, the federal government could regulate the landowner's actions on private property because they severely impacted federal lands.[105] Following *Camfield*, courts have routinely concluded that the federal government can control activities on state or private land that might affect federal property.[106]

Although the federal government's power under the Property Clause appears limitless, there are some restrictions. Foremost are limitations from the text of the clause itself. The clause grants the government the authority to make "all needful Rules and Regulations respecting . . . Property belonging to the United States."[107] From that text, a court could find four limitations: 1) the issue must be about a rule or regulation; 2) the rule or regulation must involve property belonging to the United States; 3) the rule or regulation must be needful; 4) and the rule or regulation must be one respecting federal property.

Though courts have been hesitant to place restrictions on the Property Clause, the existence of these facial limitations suggests that there are weaknesses in the authority granted by the clause. Identifying and understanding these weaknesses provides an opportunity for states to draft laws or ballot initiatives in a way that minimizes conflict or ensures that where conflict does occur, the state can use these limitations to its favor.

B. The Treaty Clause

Another source of federal authority in wildlife management is the Treaty Clause. This Clause provides that "[The President] shall have the Power . . . to make Treaties, provided two thirds of the Senators present concur."[108] The United States has entered into several treaties over the past century that recognize the international importance of wildlife conservation.[109] For example, the Pacific Salmon Treaty

101. *Id.* at 546.
102. *See* Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).
103. Camfield v. United States, 167 U.S. 518, 525 (1897).
104. *Id.* at 521.
105. *Id.*
106. Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENVT'L L. 797, 824 n. 164 (2017).
107. U.S. CONST. art. IV, § 3, cl 2.
108. U.S. CONST. art. II, § 2, cl 2.
109. Nie, *supra* note 106, at 826.

between the United States and Canada,[110] the International Convention for the Regulation of Whaling,[111] and the Agreement on the Conservation of Polar Bears.[112] The Migratory Bird Treaty Act of 1918 ("MBTA"),[113] which is between the United States and several countries to protect migratory birds and birds in danger of extinction, has had the largest impact in domestic wildlife management.

The MBTA, which imposes strict prohibitions on the taking, hunting, and killing of certain birds, is considered to be one of the "origins of modern federal wildlife law."[114] States immediately challenged its constitutionality.[115] One challenge came from the state of Missouri which sought to enjoin a federal game warden from enforcing the MBTA.[116] The dispute rose to the Supreme Court in *Missouri v. Holland*, which upheld the validity of the treaty. The Court held that the Treaty Clause provided the requisite authority for the federal regulation of these species despite the state's claim of interest in managing its wildlife.[117] The Court reasoned that unlike other wildlife, "the subject matter [i.e., migratory birds] is only transitorily within the State and has no permanent habitat therein."[118] Therefore, the Court concluded that federal regulation of migratory birds was proper because the birds are "a national interest" that "can be protected only by national action."[119]

Species covered by international treaties often move across state and international borders. Therefore, just as the Court concluded in *Holland*, so long as a treaty is a valid exercise of Congress's power, the federal government will have authority over these species and federal law would preempt any conflicting state law.

C. The Commerce Clause

The Commerce Clause, which gives Congress the power "to regulate commerce with foreign nations, and among the several states,"[120] was not invoked as support for federal control of wildlife in early cases, such as *Geer* in 1896.[121] The Court in *Geer*, which was considering the legality of transporting harvested game, did not even consider wildlife as an interstate issue.[122] As the use of the Commerce

110. Treaty Between the United States of America and the Canada Concerning Pacific Salmon, Can.-U.S., Jan. 28, 1985, T.I.A.S. No. 11091.

111. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849.

112. Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918.

113. 16 U.S.C. § 703.

114. Nie, *supra* note 106, at 827.

115. *Id.*

116. Missouri v. Holland, 252 U.S. 416, 430-431 (1920).

117. *Id.* at 435.

118. *Id.*

119. *Id.*

120. U.S. CONST. art. I, § 8, cl. 3.

121. Nie, *supra* note 106, at 833.

122. Geer v. Connecticut, 161 U.S. 519, 530-31 (1896), overruled by Hughes v. Oklahoma (1979).

Clause power grew throughout the first half of the twentieth century,[123] it would not long before courts expanded it to wildlife management cases.[124]

In 1979, the Court expressly overruled *Geer* in the case *Hughes v. Oklahoma*, which brought wildlife to equal footing with other natural resources under the Commerce Clause.[125] At issue in *Hughes* was the legality of a state law that prohibited the interstate sale or transportation of minnows that were procured in Oklahoma.[126] Because this law facially discriminated against interstate commerce and "overtly block[ed] the flow of interstate commerce at [the] State's borders," the Court held it was "repugnant to the Commerce Clause" despite Oklahoma's claim to exclusive control over its wildlife.[127]

The Court pronounced that the "ownership language" of prior cases like *Geer* "must be understood as no more than a 19th-century legal fiction expressing the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[128] Quoting itself from *Douglas v. Seacoast*, a case from two years prior, the *Hughes* Court stated "[n]either the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."[129] The Court concluded that "challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources."[130] This represented a major shift in the Court's understanding of wildlife management and ownership. Following *Hughes*, the regulation of wildlife was squarely within Congress's Commerce Clause authority and would be treated the same as any other resource.

Despite more recent cases like *United States v. Lopez*[131] and *United States v. Morrison*[132] limiting Congress's use of the Commerce Clause in other areas, the strength of *Hughes* and other Commerce Clause related wildlife precedent remained unaffected.[133] In *Gibbs v. Babbit*, the Court of Appeals for the Fourth Circuit had no trouble finding Commerce Clause authority for federal regulation of state wildlife.[134] The *Gibbs* court analyzed the relationship between the U.S. Fish and Wildlife

123. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the Commerce Clause Power over wheat grown for home consumption because of the aggregated effects on wheat sold in interstate commerce).

124. *See* Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (stating that "there can be no question" that Congress has the power under the Commerce Clause to regulate the taking of fish in state waters); Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371 (1978) (stating that Montana's regulation of wildlife cannot impede interstate commerce).

125. 441 U.S. 322, 324-326 (1979).

126. *Id.* at 322-23.

127. *Id.* at 337.

128. *Id.* at 334 (internal quotations omitted).

129. *Id.*

130. *Id*. at 335.

131. United States v. Lopez, 514 U.S. 549 (1995) (federal Gun-Free School Zones Act struck down).

132. United States v. Morrison, 529 U.S. 598 (2000) (provision of Violence against Women Act struct down).

133. Nie, *supra* note 106, at 835; *See e.g.,* Gibbs v. Babbit, 214 F.3d 483, 486-87 (4th Cir. 2000); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003).

134. 214 F.3d 483, 487 (4th Cir. 2000).

Service's removal of red wolves from North Carolina and the effects on interstate commerce under the test framework articulated in *Lopez*.[135] Under this test, Congress has the authority to regulate either "channels of interstate commerce . . . instrumentalities of interstate commerce . . . [or] activities that substantially affect interstate commerce."[136] The court reasoned that "[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts."[137] Therefore, the court concluded that the removal of red wolves "substantially affects interstate commerce."[138] This conclusion informs the modern understanding of the Commerce Clause's authority in wildlife management.

D. Statutory Authority

Federal land and wildlife management authority is generally exercised through statutes that govern how federal agencies manage federally owned land and resources. Several of these statutes significantly curtail states' ability to manage wildlife on federal land, or in some cases, even their ability to manage wildlife on state land. The most powerful statute is the Endangered Species Act ("ESA"). Passed in 1973, the ESA establishes an affirmative obligation for the federal government to use "all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided in [the Act] are no longer necessary."[139]

In order to be listed under the ESA, species must fit the statute's criteria for being either "threatened" or "endangered."[140] Importantly, either the Secretary of the Interior or the Secretary of Commerce must make the listing decision "solely on the basis of the best scientific and commercial data available."[141] Once a species is listed, all federal agencies have an affirmative duty to ensure that agency action will not jeopardize the wellbeing of the species.[142]

However, the ESA duties are not limited to just federal actors. The ESA bans the "take" of any listed species by all persons,[143] where "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."[144] Courts have interpreted the ESA's protections broadly, finding that the statute has

135. *Id.* at 491.
136. *Lopez*, 514 U.S. at 558-59.
137. *Gibbs*, 214 F.3d at 492.
138. *Id.* at 487.
139. 16 U.S.C. § 1532(3).
140. 16 U.S.C. § 1533.
141. 16 U.S.C. § 1533(b)(1)(A). *See generally* Erin H. Ward, Cong. Rsch. Serv., IF11241, The Legal Framework of the Endangered Species Act (ESA) (2019) (stating that the Department of the Interior has authority over terrestrial, freshwater, and catadromous species, which provides the Secretary of the Interior the authority to make listing decisions for those species, while the National Marine Fisheries Service within the Department of Commerce manages marine species and anadromous fish, which provides the Secretary of Commerce the authority to make listing decisions for those species).
142. 16 U.S.C. § 1536(a).
143. 16 U.S.C. § 1538(a).
144. 16 U.S.C. § 1532(19).

substantial "teeth."[145] In the landmark ESA case *Tennessee Valley Authority v. Hill*, the Supreme Court halted the completion of a nearly-finished, multi-million dollar dam because it would destroy the critical habitat of a small, endangered fish.[146] The Court made it expressly clear that the ESA mandates conservation of a species above all else—including state management decisions.[147]

Section 6 of the ESA provides that the U.S. Fish and Wildlife Service ("FWS") "shall cooperate to the maximum extent practicable with the States."[148] This was added as a recognition of states' expertise when it comes to its wildlife, and required FWS to solicit input from the states when preparing final rules affecting a listed species or when designating critical habitat.[149] States are permitted to assist FWS in carrying out the goals of the ESA but are strictly forbidden from taking any measures that directly or indirectly take a listed species.[150] While Section 6 may appear to save some management authority for states, any inconsistent or less restrictive state law will likely be preempted by the ESA.[151]

Although the gray wolf is no longer a federally protected species, the decision to delist it is already being challenged in federal court by advocacy groups.[152] There is some concern that Colorado could create and implement a plan based on this new status as a delisted species only to have the government reverse course, relist the wolf, and strip the state of its management authority.[153] However, that scenario is speculative and does not impact the potential implications of state ballot initiatives in wildlife management in general.

IV. PREEMPTION AND COOPERATIVE FEDERALISM

While the states and federal government have vastly different sources of power and authority for natural resource management, the two levels of government are generally meant to work in tandem to achieve their management objectives. However, despite Congress making its intention for such cooperation clear, courts have been reluctant to give this cooperative framework much weight in instances of conflict. This section explains why, when conflicts arise, states rarely prevail.

145. *See* Defenders of Wildlife v. Andrus, 428 F.Supp 167, 169-70 (D.C.C. 1977); Tennessee Valley Auth. v. Hill, 437 U.S 153, 173 (1978); Carson-Truckee Water Conservancy District v. Watt, 549 F.Supp 704, 710 (D. Nev. 1982) *aff'd sub nom.*, Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984).

146. 437 U.S. at 184.

147. *Id.*

148. 16 U.S.C. § 1535(a).

149. Nie, *supra* note 106, at 847.

150. *Id.*

151. *Id.* at 848.

152. Matthew Brown, *Groups ask court to restore protections for US gray wolves*, AP NEWS (Jan. 14, 2021), https://apnews.com/article/billings-lawsuits-wildlife-wolves-courts-cf76716ad6bf7f169300dfc7471ca081.

153. James Anderson, *Colorado begins wolf reintroduction plans OK'd by voters*, AP NEWS (Jan. 14, 2021), https://apnews.com/article/wildlife-colorado-denver-wolves-aeec087e3273a7b94816a84ebd045771.

A. Federal Preemption

The doctrine of federal preemption, which originates from the Supremacy Clause, governs the relationship between conflicting state and federal laws. The Supremacy Clause states that the Constitution and valid federal laws "shall be the supreme law of the land."[154] Extending from this authority is the doctrine of federal preemption, which provides that where state law and federal law conflict, state law must always yield.[155]

Federal preemption of state laws can be either expressly stated or implied, with the implied preemption encompassing both field preemption and conflict preemption. An example of express preemption in the wildlife context is the Marine Mammal Protection Act, which states, in part, "No State may enforce . . . any State law or regulation related to the taking of any species . . . of marine mammal."[156]

Alternatively, state laws can be implicitly preempted by field preemption or conflict preemption. Field preemption occurs where "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[157] However, federal land or wildlife related laws generally contain a saving clause that reserves a degree of authority to states and signals Congress's desire for cooperation between a state and the federal government.[158] Because of this, both express preemption and field preemption are rare.

The alternative form of implied preemption, called conflict preemption, comes when "it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress."[159] Many of the previously discussed cases were issues of conflict preemption. For example, the state game laws at issue in *Hunt* that would have prevented the Forest Service from killing deer stood as an impediment to the accomplishment of the objectives of Congress—namely the protection of federally owned lands.[160]

B. Saving Clauses and Cooperative Federalism

By tempering federal authority with a saving clause, Congress intends for state and federal governments to cooperate. The language of saving clauses often reads like the one from Section 6 of the ESA discussed above, stating that the relevant federal agency "shall cooperate to the maximum extent practicable with the States."[161] This cooperation, referred to as cooperative federalism, defines a significant portion of environmental law.[162] If plotted on a spectrum with complete

154. U.S. CONST. art. VI, cl. 2.

155. Nie, *supra* note 106, at 836.

156. 16 U.S.C. § 1379(a).

157. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

158. Nie, *supra* note 106, at 837-38.

159. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987).

160. Hunt v. United States, 278 U.S. 96, 100 (1928).

161. 16 U.S.C. § 1535(a).

162. *See* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U ENVT'L L. J. 179, 180-83 (2005).

federal authority on one end and complete state authority on the other, most environmental and resource issues fall into the middle, where both governments play a role.[163] Despite saving clauses seeming to demonstrate Congress's desire for cooperation, the Supreme Court's preemption decisions have failed to follow a predictable analytical pattern, with its interpretations of saving clauses varying wildly.[164] However, when conflicts arise, courts are less likely to grant deference to the state's role.

The Tenth Circuit's decision in *Wyoming v. United States* is illustrative here.[165] In that case, the court was called upon to determine whether the U.S. Fish and Wildlife Service could refuse to implement Wyoming's plan to vaccinate the elk living in the National Elk Refuge against brucellosis, a disease endemic to free-ranging elk but novel to Wyoming's domestic cattle.[166] The U.S. Fish and Wildlife Service and the state of Wyoming disagreed about the safety and efficacy of the brucellosis vaccine when used in elk.[167] Ultimately, relying upon its interpretation of the National Wildlife Refuge System Improvement Act of 1997 ("NWRSIA"), the Court found that where state and federal authorities directly conflict, state authority is preempted.[168]

In making that determination, the court looked to NWRSIA's saving clause.[169] The court ruled against Wyoming on the elk vaccination issue but acknowledged that "[the saving clause] convinces us that Congress did not intend to displace entirely state regulation and management of wildlife on federal public lands. . . . [i]n other words, Congress rejected complete preemption of state wildlife regulation within the [National Wildlife Refuge System]."[170] The court found the text and legislative history confirmed that the FWS was only required to conform with state objectives "to the extent practical."[171] By finding that Congress did not intend for states to be completely preempted, the court left open future opportunities for saving clauses to retain more power to the states or for other factors—like voter mandates—to influence this balance of power.

Although states have historical authority to manage wildlife within their borders, that authority is neither dominant nor constitutionally derived. The federal government is granted vast constitutional authority that can preempt incompatible state action. As wildlife law developed over the nineteenth and twentieth centuries, courts repeatedly sided with the federal government, expanding their power, and giving little value to the guarantees of the Tenth Amendment. However, state ballot initiatives provide a novel factor for courts to consider when determining the amount of deference state wildlife management should receive.

163. *Id.* at 183.
164. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2085 (2000).
165. 279 F.3d 1214 (10th Cir. 2002).
166. *Id.* at 1218.
167. *Id.*
168. *Id.* at 1234.
169. *Id.* at 1230.
170. *Id.* at 1234.
171. *Id.* at 1232.

V. STATE BALLOT INITIATIVES AND THE DEFERENTIAL STANDARD

This section introduces the basis for the deferential framework that courts should apply to state ballot initiatives. It then goes on to discuss the implications of that framework if applied to conflicts in wildlife management.

A. The Presumption Against Preemption

Courts initially implemented what was essentially automatic preemption to state-federal conflicts, however the Supreme Court pulled back from this formula in the 1930s.[172] In the 1933 case *Mintz v. Baldwin*, a cattle business contended that a state's requirement to certify a herd against diseases was preempted by federal acts addressing contagious diseases in cattle.[173] The Supreme Court, dismissing the cattle business's arguments, held that Congress had not explicitly expressed an intent to preempt a state's additional regulation.[174] Thus, *Mintz* shifted the implied preemption analysis from automatic preemption to the current model that relies on congressional intent. This change in analysis represented a shift in power towards the states. The *Mintz* Court stated that the intent "to supersede or exclude state action . . . is not lightly to be inferred."[175] Thus, the concept known as the presumption against preemption was born.

The Court has generally limited the presumption against preemption to areas involving matters of "intimate concern" to the states—typically matters traditionally left to the states.[176] For example, the presumption against preemption has been applied in the context of health and safety, with courts reasoning that "[t]he regulation of health and safety matters is primarily and historically a matter of local concern."[177]

Conversely, the presumption has not been applied in areas where the Constitution granted vast authority to the federal government.[178] For example, in *Hines v. Davidowitz*, the Court struck down a Pennsylvania law that imposed registration requirements for immigrants.[179] The Court determined that although there was no express intent by Congress to preempt this area, the federal government had historically played a unique role in international relations and regulating immigration.[180] The Court concluded that such a unique role justified preemption of the state's requirements.[181]

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172. K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 255 (2005).

173. Mintz v. Baldwin, 289 U.S. 346, 348 (1933).

174. *Id.* at 350.

175. *Id.*

176. DuVivier, *supra* note 172, at 258.

177. Hillsborough County v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 719 (1985); *see also* Medtronic Inc. v. Lohr, 518 U.S. 470, 475 (1996).

178. DuVivier, *supra* note 172, at 259.

179. 312 U.S. 52, 74 (1941).

180. *Id.* at 62.

181. *Id.* at 62-63.

The Supreme Court has noted that certain situations warrant a more rigorous application of the presumption against preemption.[182] In *Geier v. American Honda Motor Co.*, the Court held that the National Traffic and Motor Safety Act preempted an injured motorist's defective design claim under local tort law.[183] While the five-justice majority did not apply the presumption against preemption, the dissenters noted that preemption by federal agency actions as opposed to federal statutory law raises "heightened federalism and nondelegation concerns" because agencies "are not designed to represent the interests of States."[184] This hesitancy to find preemption from agency action was in line with the previous opinion of the Court, *Hillsborough County v. Automated Medical Labs, Inc.*, in which it stated it is "more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes."[185]

The presumption against preemption requires courts to do more than examine congressional intent—it requires adopting the view that, in an effort to preserve the authority of the states, Congress intended to allow potentially conflicting state law to coexist with federal law.[186] In its most rigorous form, the presumption acts similarly to the doctrine of constitutional avoidance, in which the court makes all efforts to decide a case on other grounds before resorting to a constitutional analysis.[187] In the presumption context, courts would make all efforts to reconcile the conflicting federal and state laws in such a way to avoid preemption.[188] In the words of Justice Souter, the standard would require that "[i]f the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred."[189] Despite the Court often mentioning the presumption, it has failed to become widely adopted or to have a broad impact.[190] This is likely an effect of courts inconsistently invoking the presumption in applicable cases and lacking a uniform consensus on how to apply it when they do.[191]

The presumption against preemption has never been applied in the context of wildlife and land management. However, wildlife management has long been recognized as an area traditionally reserved to the states, making it a subject where courts could apply the presumption. Furthermore, because many of these conflicts involve actions by federal agencies—such as the U.S. Fish and Wildlife Service in *Wyoming v. United States* or the U.S. Forest Service in *Hunt v. United States*—courts should be more reluctant to find state law preempted, as the *Geier* dissenters noted. While the unavoidable implication of federally owned land or of interstate commerce may lead courts to conclude similarly to the *Hines* court—that the federal government plays a unique role in the matter and thus preemption is appropriate—

182. DuVivier, *supra* note 168, at 267.
183. *Id.*
184. Geier v. American Honda Motor Co., 529 U.S. 861, 908 (2000) (Stevens, J., dissenting).
185. 471 U.S. 707, 717 (1985).
186. DuVivier, *supra* note 172, at 260.
187. *Id.* at 261 n.226.
188. *Id.* at 261.
189. Gade v. Nat'l Solid Waste Mgmt. Ass'n., 505 U.S. 88, 116-17 (1992) (Souter, J., dissenting).
190. DuVivier, *supra* note 172, at 261.
191. *Id.*

the nearly ubiquitous nature of saving clauses in federal land management statutes should further evidence Congress's intent to avoid preemption in this area.

B. Judicial Deference to State Ballot Initiatives

State ballot initiatives were born out of a frustration with legislatures' unresponsiveness to the people's will.[192] These initiatives are a form of direct democracy where citizens propose and directly vote on issues instead of voting on representatives who then decide the issues. There are some downsides to this process. For example, the cost of obtaining the requisite signatures to get a measure on the ballot often restricts the process to large, well-financed groups.[193] Additionally, if little information is exchanged about the initiative during the signature gathering process, some otherwise unpopular measures could make it on the ballot while some potentially popular ones could fall short.[194] Despite the drawbacks, Justice Kennedy has stated that "the popular initiative is necessary to implement 'the theory that all power of government ultimately resides in the people.'"[195]

The Supreme Court directly addressed the issue of ballot initiatives and federal preemption in *Gregory v. Ashcroft*.[196] In that case, the Court upheld the validity of a ballot initiative that added a mandatory retirement provision for state court judges to the state's constitution.[197] The provision was challenged by several affected state court judges as violating the Age Discrimination in Employment Act of 1967.[198] These judges argued that the mandatory retirement provision should be preempted by the Act's ban on firing an employee based solely on age.[199] The Court rejected that argument and adopted what it called the "plain statement rule."[200] This rule requires that Congress, "in the language of the statute[,] . . . make its intention clear and manifest if it intends to preempt the historic powers of the States."[201] The Court stressed the importance of this rule, stating that "Congressional interference with this decision of the people of Missouri . . . would upset the usual constitutional balance of federal and state powers. For this reason, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance."[202]

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192. Joshua J. Bishop, *Standing in for the State: Defending Ballot Initiatives in Federal Court Challenges*, 2015 BYU L. REV. 121, 122 (2015).

193. James Fishkin, *Initiatives Are Not the Best Way to Bypass Stalled Officials*, N.Y. TIMES, (June 19, 2013, 1:40pm), https://www.nytimes.com/roomfordebate/2013/06/18/ballot-initiatives-at-the-local-level/initiatives-are-not-the-best-way-to-bypass-stalled-officials.

194. *Id.*

195. Bishop, *supra* note 192, at 123 (quoting Hollingsworth v. Perry, 133 S. Ct. 2652, 2670 (2013) (Kennedy, J., dissenting)).

196. 501 U.S. 452 (1991).

197. *Id.* at 473.

198. *Id.* at 455-56.

199. *Id.* at 456.

200. *Id.* at 461.

201. *Id.* (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) (internal quotation marks omitted).

202. *Id.* at 460 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985)) (internal quotation marks omitted).

Gregory marked the first case in fifty years where the Court reversed its usual course of finding that federal authority trumps states' rights.[203] In so doing, the Court limited the usual reach of federal preemption and recognized federalism as a restraint on federal power through its heightened deference for Missouri's ballot initiative.[204] While this decision returned a significant amount of power back to the states, the plain statement rule falls short of the rigorous standard of the presumption against preemption. The plain statement rule looks only to the text of the statute to discern Congressional intent. This is compared to the presumption's requirement to adopt any sensible interpretation of the federal statute that avoids preemption, even if the language of the statute seems clear. The presumption against preemption would have the court looking beyond the text to the structure of the statute, or to extrinsic aids like legislative history, to discern Congressional intent. Nevertheless, that the Court has recognized the significance of state ballot initiatives and granted them a heightened deference signals a willingness to analyze the preemption of state ballot initiatives in future conflicts with a different standard than other preemption cases.

The Supreme Court is not the only court to address the preemption of ballot initiatives. Historically, state courts have construed ballot initiatives liberally to uphold the will of the voters and promote citizen's rights.[205] These courts have followed a standard that all "doubts . . . be resolved in favor of [upholding the initiative]."[206] For example, in *Gayle v. Hamm*, the California Court of Appeals dismissed a challenge brought against a California state ballot initiative.[207] In its reasoning, the court quoted a prior case dealing with a similar challenge, stating that:

> [s]ince under our theory of government all the power of government resides in the people, the power of initiative is commonly referred to as a 'reserve' power and it has long been [the court's] judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled.[208]

The court concluded that "[i]f doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."[209]

The California Court of Appeal's conclusion aligns with the rigorous presumption against preemption standard proposed by Justice Souter, that if the statute's terms can be read sensibly to not have a preemptive affect, the presumption controls and the state law must be upheld. Both state courts and the Supreme Court

203. DuVivier *supra* note 172, at 270, 272.

204. DuVivier, *supra* note 172, at 272.

205. DuVivier, *supra* note 172, at 269; *See e.g.*, Wagner v. Sec'y of State, 663 A.2d 564 (Me. 1995) (stating that Maine's Constitutional provision allowing citizens to propose legislative enactments "must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate"); State ex rel. Hodges v. Taft, 591 N.E.2d 1186, 1189 (Ohio 1992) (stating that citizens' right to propose, adopt, or reject legislation by initiatives are not to be restricted by any limitations unless explicit in the state constitution).

206. DuVivier, *supra* note 172, 269; Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976).

207. Gayle v. Hamm, 25 Cal.App.3d 250, 258 (1972).

208. *Id.* (quoting Mervynne v. Acker, 189 Cal.App.2d 558, 563 (1961).

209. *Id.*

have shown a willingness to deviate from the usual preemption analysis for certain state laws and grant them higher deference to avoid preemption. This deviation is essential for the implementation of the heightened deferential standard that courts should apply to conflicts arising out of Colorado's Proposition 114 and other state's wildlife related propositions that may follow.

The tendency to give heightened deference to ballot initiatives may be evidence that courts prefer to avoid entangling themselves in political matters. Or it could be a recognition of or respect for the power of the democratic process, as Justice Kennedy articulated. Whichever the reason, this sentiment was captured by the court in *Coalition for Economic Equity v. Wilson*, a Ninth Circuit decision upholding a ballot initiative amendment to the California Constitution.[210] In its reasoning, the court stated that "[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy."[211]

C. State Ballot Initiatives in Wildlife Management

State ballot initiatives are themselves nothing new in the context of wildlife management. Voters have previously used the process as a means to protect wildlife, usually by prohibiting hunting of certain species or limiting the methods of hunting.[212] However, it wasn't until the 1990s that the practice became common: voters in Colorado passed a measure prohibiting the spring hunting of bears with bait or dogs, in Arizona they voted to prohibit using types of leg-hold traps and snares on public lands, in Alaska they voted to prohibit hunting wolves, foxes, lynx, and wolverines on the same day that an individual flies, and both Oregon and Washington voted to prohibit using dogs to hunt bears and cougars.[213]

Banning the hunting of a species or a method of take is predominantly directed at individuals, which differs from that of Proposition 114. Proposition 114 is directed at Colorado Parks and Wildlife. The distinction is important because conflicts over other ballot initiatives would be, and have been, almost exclusively between affected individuals or member groups and their state. For example, *Citizens for Responsible Wildlife v. State,* which involved a challenge of Washington State's ban on hunting with dogs, was brought by a hunting group against the state.[214] Past legal challenges to wildlife related state ballot initiatives have not undergone a preemption analysis because these laws are usually narrow enough to not conflict with federal authority.[215] Proposition 114, on the other hand, imposes a broad mandate on CPW to create an entire management plan for a new species. This will initiate resource management decisions state-wide, and most importantly, on federal

210. Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).

211. *Id.* at 699.

212. Tyler Welch, *Can Citizens Better Use the Ballot Initiative to Protect Wildlife?: The Case of the Mountain Lion in the West*, 25 COLO. NAT. RES, ENERGY & ENVT'L L. REV. 419, 423 (2014).

213. *Id.* at 424.

214. 103 P.3d 203 (Wash. Ct. App. 2004).

215. *See* National Audubon Society v. Davis, 307 F.3d 835 (9th Cir. 2002) (holding a California voter initiative banning the use of leg-hold traps on federal land directly conflicted with the FWS's use of leg-hold traps to eliminate predators of endangered species of birds in National Wildlife Refuges and thus couldn't stand).

lands where the wolves will at least partially reside.[216] Broad decisions like Proposition 114 are likely to cause conflicts with federal authority and raise preemption issues.

D. The State Ballot Initiative Deferential Standard

The standard that courts should apply when analyzing the potential preemption of state ballot initiatives gives a heightened deference to the will of the voters. Courts should rigorously apply the presumption against preemption and adopt any reasonable interpretation of the conflicting federal authority that avoids preempting the state ballot initiative, resolving any remaining ambiguity in favor of the state. Application of this standard will often necessitate moving beyond the text of the federal statute to consider other extrinsic factors, such as legislative history, policy statements, or the structure of the statute. [217]

Consideration of these extrinsic factors is critical because, as many state wildlife directors identified in the AFWA Task Force Report, the federal resource management statutes that most often conflict with states are written in a way that creates ambiguity over the appropriate federal-state balance of authority. Where the text of the statutes is not sufficiently clear, looking to extrinsic factors becomes essential to determine Congress's intent regarding preemption of state laws. Any remaining ambiguity should be resolved in favor of the state to protect the will of the voter.

A vast majority of federal wildlife management statutes contain saving clauses, pointing to Congress's intent to avoid preempting the states. Although the text of these clauses should seemingly be sufficient for courts to avoid finding conflicting state law preempted, most cases have not been so simple. If courts were to apply this deferential standard in future conflicts between federal authority and state ballot initiatives, then these saving clauses would become powerful tools for demonstrating that Congress did not intend for states to be preempted or have their authority over wildlife displaced.

Courts have, at times, given little weight to saving clauses, as seen in the Tenth Circuit's decision in *Wyoming v. United States*.[218] In deciding this case, the Tenth Circuit began from the assumption that "the [National Wildlife Refuge System Improvement Act ("NWRSIA")] was not to supersede the State of Wyoming's historical police powers to manage wildlife on federal lands within its borders unless that was the clear and manifest purpose of Congress."[219] The saving clause from the National Wildlife Refuge System Improvement Act reads:

> Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or

216. Colorado Parks and Wildlife, *Wolves in Colorado FAQ*, https://cpw.state.co.us/learn/Pages/Wolves-in-Colorado-FAQ.aspx (last visited April 16, 2021) (stating that "[w]olves are habitat generalists . . . [a]s long as prey is available, wolves can use a variety of areas").

217. DuVivier, *supra* note 172, at 273.

218. 279 F.3d 1214, 1234 (10th Cir. 2002).

219. *Id.* at 1231 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

> regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.[220]

The court acknowledged the powerful language in this clause, specifically the first sentence, stating that it supports the court's assumption that "the State retains the absolute right to manage wildlife on the [National Elk Refuge] free from federal intervention."[221] However, the court does not stop at the text of the saving clause, despite its clarity, stating that "[s]uch an interpretation of the saving clause . . . simply is not feasible in light of established rules of construction requiring [the court] to consider the NWRSIA in its entirety, mindful of congressional purposes and objectives."[222] For this contention, the court cites no authority.

Next in its analysis, the *Wyoming* court looked to discern congressional purposes and objectives. The court looked to a policy from the Department of the Interior titled the Department of the Interior Fish and Wildlife Policy: State-Federal Relationship, which stated that the policy "is intended to reaffirm the basic role of the States in fish and resident wildlife management" and to clarify the "Congressional policy of Federal-State cooperation . . . [and] to foster a 'good neighbor' policy" between the states and the federal government.[223] This policy statement also supported the court's assumption that Wyoming should retain the right to manage its wildlife.

The court next looked to the legislative history, which emphasized that the FWS's cooperation with the states shall only be "to the extent practicable."[224] The court stated that:

> [t]he discussion of the saving clause in the Senate Report together with the entire tone of the NWRSIA reveals that Congress was solicitous of state sensibilities and simply did not wish to face the Federal-State jurisdictional dilemma which the NWRSIA . . . created. Instead, Congress left the courts to resolve jurisdictional disputes on a case-by-case basis.[225]

The court concluded that "[i]n the end, the proposition that the FWS lacks the power to make a decision regarding the health of wildlife on the [National Elk Refuge] when a State, for whatever reason, disagrees with that decision proves too much."[226]

Although the court claimed to have begun its analysis from the assumption that the state should have the absolute right to manage the wildlife on the National Elk Refuge, it went to great lengths to reach a far different conclusion. Ultimately, the court used the legislative history to override the plain meaning of the text, seemingly working backwards from the conclusion that the state could not override

220. 16 U.S.C. § 668dd(m).
221. *Wyoming*, 279 F.3d at 1231.
222. *Id.*
223. 43 C.F.R. § 24.2
224. *Wyoming*, 279 F.3d at 1231-32.
225. *Id.* at 1233.
226. *Id.*

the FWS's decision. The court was able to do so because once it moved away from the text, it found no extrinsic factors weighing in the State's favor. The saving clause's text favored Wyoming's position, but the court interpreted the policy statement, the legislative history, and the statute's "tone" to favor the position of the FWS.

State ballot initiatives could change the outcome in cases like *Wyoming.* If the vaccination of the elk was instead being carried out in accordance with a state ballot initiative, then the will of the voters and the heightened deference that comes with it could have been a critical extrinsic factor weighing in the state's favor.[227] Viewed under the state ballot initiative deferential standard, the question for the court then would have been, is there a sensible reading of the statute that could avoid preemption? In its opinion, the *Wyoming* court answers that question in the affirmative by citing to an interpretation of the same saving clause from the D.C. Circuit.[228]

In the case *Defenders of Wildlife v. Andrus*, the D.C. Court of Appeals does interpret the same saving clause in a way that reserves management authority to the states.[229] In that case, the court was deciding whether the National Environmental Policy Act obligated the Department of the Interior to prepare an environmental impact statement before allowing Alaska to conduct a wolf hunt on federal lands as part of a wildlife-management program.[230] In concluding that it does not, the court walked through several environmental statutes and noted where, "[d]espite [Congress's] ability to take control into its own hands, Congress has traditionally allotted the authority to manage wildlife to the states."[231]

One of these statutes relied on by the *Andrus* court was the NWRSIA, and more specifically, the saving clause at issue in *Wyoming*.[232] The court stated that with regard to the NWRSIA and its saving clause, "Congress has adhered to that allocation" of leaving the authority to manage wildlife with the states.[233] If the *Wyoming* court were implementing the deferential standard for state ballot initiatives, then the *Wyoming* court's sensible reading of the statute would have been the same as the D.C. Circuit's interpretation of the same saving clause—that the state retained jurisdiction over the wildlife, thus avoiding preemption.

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227. A very similar question came before the Ninth Circuit in 2002 in Audubon Society v. Davis, 307 F.3d 835 (9th Cir. 2002). There, the question was whether a California state ballot initiative that banned the use of leg-hold traps on federal lands was preempted by several sources of federal authority, including the NWRSIA. The court concluded that the law directly conflicted with the FWS's use of leg-hold traps to eliminate predators of endangered species of birds in National Wildlife Refuges and thus was preempted. However, on appeal, the issue of preemption by the NWRSIA was unchallenged. The court noted that "the state parties d[id] not discuss NWRSIA preemption at all," and therefore, without a thorough analysis, preemption was upheld.

228. *See Wyoming*, 279 F.3d at 1231.

229. *Id.* ("*But see* Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1248 (D.C. Cir. 1980) (suggesting without analysis in dicta that the first sentence of [the saving clause] reserves the authority to manage wildlife on federal lands to the States").

230. *Andrus*, 627 F.2d at 1239-40.

231. *Id.* at 1248-50.

232. *Id.* at 1248.

233. *Id.*

Analyzing conflicts with this deferential standard in cases like *Wyoming* or *Gregory* is relatively straightforward because those conflicts involved a single federal statute, such as the NWRSIA or the Age Discrimination in Employment Act, respectively. Predicting how this framework will apply to Colorado's wolf reintroduction effort is less certain.

Proposition 114's requirements are relatively broad. Among determining requirements for funding and compensation for livestock, CPW must, by December 31, 2023, develop a plan to restore and manage a population of gray wolves on lands west of the Continental Divide.[234] CPW must also take action "necessary or beneficial for establishing and maintaining a self-sustaining population."[235]

Unlike the situation in *Gregory* where the state initiative implemented a narrow and specific law—that state judges of a certain age had to retire—Proposition 114 provides a significant amount of discretion to CPW. Courts could interpret the "necessary or beneficial" action required by the proposition to extend the authority from the ballot initiative to any discretionary actions taken by CPW. For the actions where courts do extend this authority, under the deferential framework the courts would be required to find a sensible reading of the statute that would avoid preemption, thus finding in favor of the state more often than instances of ordinary conflict preemption.

Nearly all the relevant federal land and wildlife related statutes that could conflict with the state's actions contain saving clauses that explicitly leave management authority with the states.[236] For example, it has already been seen how the National Wildlife Refuge System Improvement Act—at issue in *Wyoming v. United States*—could conflict with a state's management actions. The U.S. Fish and Wildlife Service manages 95 million acres of land under this act, providing ample opportunities for additional conflict.[237] The Bureau of Land Management manages 245 million acres of land and 700 million acres of mineral estate according to the provisions of the Federal Land Policy and Management Act of 1976,[238] and another 106 million acres under the Wilderness Act,[239] both of which contain saving clauses that reserve authority for the state.[240] These saving clauses provide the courts with a sensible way to read these statutes that avoids preemption. Of course, some statutes and sources of federal power, notably the ESA and the MBTA, are fairly absolute in their authority and a state is likely never to prevail in conflicts with them.

234. COLO. REV. STAT. § 33-2-105.8 (2020).

235. *Id.*

236. *See* Robert L. Fischman, Angela M. King, *Saving Clauses and Trends in Natural Resources Federalism*, 32 WM. & MARY EVT'L L. & POL'Y REV. 129, 147 (2007).

237. *National Wildlife System Improvement Act*, U.S. Fish and Wildlife Service, https://www.fws.gov/refuge/National_Elk_Refuge/what_we_do/1997Act.html (last visited Dec. 1, 2021).

238. 43 U.S.C. § 1701.

239. 16 U.S.C. § 1131.

240. *BLM & FLPMA*, Public Lands Foundation for America's Heritage, https://publicland.org/about/blm-flpma/ (last visited Dec 1, 2021). *America's Public Lands Explained*, U.S. Dept of the Interior, https://www.doi.gov/blog/americas-public-lands-explained (last visited Dec. 1, 2021). Fischman, *supra* note 245, at 147.

E. Drafting State Ballot Initiatives to Avoid Preemption

Even with the potential that wildlife management decisions made by ballot initiative will allow states to prevail in conflicts with federal authority, there are steps that drafters of state ballot initiatives can take to minimize the chance for conflict. When comparing Colorado's Proposition 114 to state ballot initiatives related to other areas of the law, such as mandatory retirement ages or medical marijuana, a notable difference is the number of federal statutes that have the potential to be at issue. The fewer federal statutes to conflict with, the easier it would be for drafters of ballot initiatives to predict conflicts and tailor their writing accordingly.

For example, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, a California statute imposing a moratorium on the construction of nuclear power plants was challenged by the Nuclear Regulatory Commission as being preempted by the Atomic Energy Act.[241] The state law was passed by the legislature as a response to significant pressure from voters.[242] The Court determined that, through the authority of the Atomic Energy Act, "the Federal Government has occupied the entire field of nuclear safety concerns."[243] Therefore, any "state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field."[244] The drafters of the state statute likely knew of this prohibition and made sure that their law was written to avoid conflict and preemption. This level of specificity is possible in this context because there is only one federal statute that governs the state's ability to regulate nuclear facility development.

In the wildlife management context, the relevant federal statutes would be far less clear. The statute would be determined by several factors, including what type of land the conflict arises on—Refuges, Wilderness, National Forest, etc.—and whether the land or species is subject to special protections, like those under the ESA. For example, if the ESA is in play, a species is likely to live on various types of federally owned and managed land, even in the same state, meaning that several federal land management statutes could be at issue at different times based on one ballot initiative. The federal statutes at issue could also be predicted by looking at which statutes have most often conflicted with state laws. The Association of Fish and Wildlife Agencies Task Force Report gives insight into this from the perspective of state agencies. Should other states imitate Colorado and pass a major wildlife management statute by ballot initiative, the drafters should do their best to anticipate where the most likely challenges to the new law will originate from. Colorado's wolf reintroduction effort could prove a useful test for these drafters to see where conflicts actually arise.

CONCLUSION

After over a century of courts slowly eroding states' power to manage their wildlife, Proposition 114 and its method of initiating wildlife management via direct

241. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 194-195 (1983).

242. DuVivier, *supra* note 172, at 265 n.254.

243. *Pac. Gas & Elec. Co.*, 461 U.S. at 212.

244. *Id.* at 213.

democracy represents a novel chance for states to regain some of the power they have lost to the federal government. While Proposition 114 was created exclusively by the voters, if this method proves successful, CPW or another state's wildlife agency could even take part in proposing or drafting a future ballot initiative. By doing so, the initiative would benefit from the expertise of the state, while the state would then benefit from having the backing of its voters. This could serve as a powerful tool for states wanting to enact a major change to a wildlife related law or to undertake a major wildlife related effort, such as the reintroduction of a species.

Proposition 114 may lead to the type of conflict that challenges the balance of federal-state authority, and if it does, Colorado may see the first ruling granting it new authority in the realm of wildlife management since the Supreme Court first articulated the state ownership doctrine in *Geer v. Connecticut*. Even if this measure itself does not lead to any such conflicts or changes in the balance of state and federal power, other states may look to this example as a means of potentially strengthening their standing against the federal government in future wildlife reintroduction or management efforts.

By undertaking the wolf reintroduction effort with the backing of the voters, any conflicts that arise between CPW and the federal government should be viewed under the state ballot initiative deferential standard. While there is no precedent mandating that such analysis take place, granting this heightened deference to uphold a state ballot initiative is in line with the belief expressed by both state and federal courts, several past Supreme Court Justices, and with the foundational principles of the United States: that the will of the voters should reign supreme.