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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

THE STATE OF MISSOURI, Appellant, *against* RAY P. HOLLAND, United States Game Warden.	No. 609.

Brief for the Association for the Protection of the Adirondacks, Amicus Curiae.

The interest of the intervenor in the preservation of the forest and other lands of the United States, and incidentally in the protection of birds, has induced it to submit the following considerations in support of the contention that the "Migratory Bird Treaty Act" is a constitutional exercise of congressional power.

In view of the exhaustive arguments that will doubtless be submitted in support of the proposition that this legislation finds support in the treaty-making power exercised by the adoption of the convention between the United States and the United Kingdom of Great Britain and Ireland for the protection of migratory birds in the

United States and Canada, concluded and signed on August 16, 1916, it will not be advisable to consider that phase of the subject in this brief. It is our sole purpose to show that, independently of the treaty-making power, the legislation, whose constitutionality is challenged in this action, is supported by the express terms of paragraph 2 of Section 3 of Article IV of the Constitution, which read:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The purpose of this legislation as well as the object of the Treaty is declared in the following recitals with which the Treaty begins:

"Whereas, Many species of birds in the course of their annual migrations traverse certain parts of the United States and the Dominion of Canada; and

Whereas, Many 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,* in both the United States and Canada, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding ground."

Article I of the Treaty declares that the migratory birds included in the terms of the convention are those which it proceeds to enumerate. Articles II, III and IV refer to the establishment of closed seasons during which no hunting of these birds shall be carried on. Article V prohibits the taking of the nests or eggs of such birds. Article VI relates to the regulation of the ship-

ping and export of such birds and their eggs; Article VII to the granting of permits to kill any of the birds enumerated which under extraordinary conditions may become seriously injurious to the agricultural or other interests in any particular community. By Article VIII it is agreed by the High Contracting Powers to take or propose to their respective appropriate law-making bodies the necessary measures for insuring the execution of the convention.

The Act of July 3, 1918 (*40 St. L., ch. 121, §1*), known by the short title of the "Migratory Bird Treaty Act," as the title indicates, was enacted "to give effect to the convention between the United States and Great Britain for the protection of migratory birds, concluded at Washington August 16, 1916, and for other purposes."

By Proclamation of the President, dated July 21, 1918, regulations formulated by the Secretary of Agriculture were published in accordance with and to give effect to the provisions of Section 3 of the Act.

The State of Missouri brings this action in its sovereign capacity and as the representative of all of the people of the State, alleging that "it holds the title to and has the absolute right and power to control and regulate the taking, killing and use *of wild game* found within its borders for the benefit of all the people of the State, to whom in their united and sovereign capacity the same belongs; that *among the said wild game* within the borders of the complainant are anatidæ or waterfowls, including numbers of wild geese, brant, ducks, snipe, plover, *etc.*" It may be said, parenthetically, that snipe and plover are not anatidæ or waterfowl, but limicolæ or shorebirds. It is further alleged that under the laws of Missouri "the taking, killing and using of the afore-

said waterfowls is permitted and is lawful between the 15th day of September of each year and the 30th day of April of the following year"; that the complainant during the year 1918 "collected for the issuance of licenses for hunting wild game in the State" approximately $75,000, and that a like amount or more will be collected in future years, "but that the acts of the defendant of which complaint is made if continued will so deter citizens of the State from exercising the right to take *wild game* under the licenses therefor issued under the laws of the State that the payment of license fees will be greatly diminished"; that the defendant, acting under the Migratory Bird Treaty Act and the regulations and orders of the Secretary of Agriculture of the United States, has attempted to regulate and control the taking, killing and use of *wild game* in the State of Missouri and other States of the United States, and to prohibit the taking, killing or using of waterfowls in that State during the months of February, March and April of any year, and his acts in the premises are charged to constitute an invasion of the sovereign right and power of the complainant to control and regulate the taking, killing and use of *wild game* within its borders, and a usurpation of the sovereign right and power reserved to the State under Article X of the Amendments to the Constitution of the United States. It is alleged that the Act of Congress and the regulations and orders of the Secretary of Agriculture are an attempt to control the taking, killing and using of *wild game animals* in the State of Missouri, and especially the waterfowl mentioned, in direct violation of Article X of the Amendments to the Constitution of the United States, and are unconstitutional, illegal and void.

The demurrer interposed on behalf of the defendant, which was sustained in the District Court, presents the issue of law as to the constitutionality of this legislation which is now to be determined.

The opinion of the District Court is reported under the title, *United States vs. Staples, 258 Fed. Rep. 479.*

POINTS

I.

Irrespective of whether migatory birds may be considered property belonging to the United States and regardless of the sanction of the treaty-making power, the Migratory Bird Treaty Act, as was its precursor the Act of March 4, 1913 (37 Stat. c. 145 p. 847) is valid as an enactment of "needful rules and regulations" respecting the national forests and other parts of the public domain, which constitute "property belonging to the United States," within the meaning of paragraph 2, section 3 of article IV of the Constitution.

(1) *The extent and area of the national forests and of other lands belonging to the United States.*

(a) The forest domain of the United States is in itself an empire. Excluding from consideration the land areas unappropriated and unreserved, which on June 30, 1915, as shown by the Statistical Abstract of the United States for 1915, Thirty-eighth Number, issued by the Department of Commerce, aggregated 279,544,494 acres, over and beyond the 378,165,760 acres of unappropri-

ated land in Alaska, the area of forest lands reserved for national forests, as of June 30, 1915, as shown by the report just referred to, amounted to 162,773,280 acres. In addition to these forest lands thus reserved and which are divided into 162 national forests, located in twenty States and in Alaska and Porto Rico, the United States Government is now acquiring new national forests in the White Mountains and in the Lower Appalachian Range, including territory in seven additional States, which will involve the purchase and acquisition of 6,966,304 additional acres of forest lands reserved by the United States, making an aggregate of upwards of 169,639,106 acres. Reduced to square miles, the total of the reserved national forests constitute 265,061 square miles. When compared with the area of most of the leading countries of the world, as shown on pages 450 and 451 of the New York World Almanac for 1916, the magnitude of these forest reserves will be better appreciated. Sweden and Norway combined have 296,905 square miles; Central America, Panama, Cuba and Hayti, 260,813; the Austro-Hungarian Empire had 260,034; the German Empire, 208,780; France, 207,054; Bulgaria, Serbia, Roumania, Greece, Albania, Montenegro and European Turkey combined had 205,172; Great Britain and Ireland, 121,331; Spain has 190,050; Italy, 110,623, and Belgium, The Netherlands, Denmark and Switzerland, combined, have 55,383.

Our national forest reserves, therefore, are greater in extent than the total territory of any one of these groups, except Sweden and Norway, whose excess of area is approximately 32,000 square miles only.

The location and acreage of the forest lands, exclusive of those recently acquired and in process of being acquired under the Weeks law, is shown by States as follows:

Area of the National Forests
on June 30, 1915, by States.

State.	*Net Area, Acres.*
Arizona	12,288,125
Arkansas	1,169,379
California	19,866,203
Colorado	13,107,681
Florida	299,166
Idaho	17,868,826
Kansas	139,049
Michigan	83,157
Minnesota	987,377
Montana	16,104,734
Nebraska	198,056
Nevada	5,287,710
New Mexico	8,469,511
North Dakota	6,414
Oklahoma	61,480
Oregon	13,259,992
So. Dakota	1,129,208
Utah	7,449,160
Washington	9,953,166
Wyoming	8,385,288
Alaska	26,626,623
Porto Rico	32,975
Grand Total	162,773,280

(162 National Forests.)

(b) The United States also owns additional vast areas of lands on which there is but little forest growth, but which are valuable because of the grass and forage plants upon them that are valuable for grazing purposes.

The proportion of Government owned lands in a number of the Western States, and the percent-

age of the area of those States reserved for national forests, is as shown by the following table (*American Forestry*, October, 1916, p. 619):

	Total per cent. owned by the United States.	National Forests.
Arizona	70.2	17.2
California	44.1	20.4
Colorado	49.6	20.2
Idaho	65.5	33.2
Montana	43.4	17.4
Nevada	89.8	7.5
New Mexico	49.8	11.0
Oregon	49.3	21.6
Utah	78.9	14.2
Washington	30.8	23.0
Wyoming	68.2	13.5

In the New York World Almanac for 1916, at pages 143-147, appears an article entitled "Forests and Forestry," which contains the substance of the official report for the year ending June 30, 1915, in which a number of important facts bearing on the subject are collated. Among other things it is shown that, during the fiscal year 1915, 689,013,000 board feet of timber were cut from the national forests; that the value of the public property administered by the forest service is estimated at over $2,000,000,000; that the normal gross cost of administration and protection of the national forests is approximately $4,750,000; that under the Weeks law an appropriation was made for the acquisition of additional forest lands on the water-sheds of navigable streams of $2,000,000 per year for five and one-half years, beginning the last half of the fiscal year 1911, and that the agricultural appropriation bill for the fiscal year 1913

made the appropriation for 1912, and for subsequent years, available until expended.

FOREST LANDS ACQUIRED UNDER THE WEEKS LAW:

Areas, June 30, 1915.

(Source: Reports of the Forest Service, Department of Agriculture.)

State and Area.	Acquired.	Additional approved for purchase.	Total.
Georgia	35,174.59	59,560.30	94,734.89
New Hampshire.....	106,012.67	160,258.90	266,271.57
North Carolina.....	69,507.98	185,595.15	255,103.13
South Carolina.....	.....	17,816.62	17,816.62
Tennessee	72,930.88	190,916.80	263,847.68
Virginia	46,409.44	237,425.41	283,834.85
West Virginia.....	18,240.10	85,264.55	103,504.65
Grand Total.....	348,275.66	936,837.93	1,285,113.59

(c) In addition to the lands now devoted to forests which belong to the United States, many millions of acres which are not specially adapted for agriculture, are available for afforestation and reforestation; and it is not to be forgotten that 279,544,494 acres of unappropriated and unreserved lands, exclusive of those in Alaska, some of which are surveyed and others still remain unsurveyed, not only are now valuable because of the growth thereon of grass and of forage plants, but are destined to be devoted to agriculture, to the planting of orchards and gardens, and other similar uses. Reduced to square miles, this part of the public domain amounts to 436,787 square miles, and is distributed among the various States as shown by the subjoined table:

LAND AREAS UNAPPROPRIATED AND UNRESERVED:

By States, Year Ending June 30, 1915.

	1915		
	Surveyed Acres	Unsurveyed Acres	Total Acres
Alabama	47,940	.....	47,940
Arizona	10,686,788	26,123,539	36,810,327
Arkansas	258,115	20,040	278,155
California	16,244,018	4,391,905	20,635,923
Colorado	15,328,580	1,907,534	17,236,114
Florida	136,793	131,691	268,484
Idaho	8,490,825	7,721,448	16,212,273
Kansas	75,214	.....	75,214
Louisiana	62,619	38,397	101,016
Michigan	76,030	.....	76,030
Minnesota	943,831	.....	943,831
Mississippi	36,882	.....	36,882
Missouri	923	.....	923
Montana	10,804,819	8,260,302	19,065,121
Nebraska	179,961	12,397	192,358
Nevada	29,834,403	25,583,343	55,417,746
New Mexico	19,483,811	8,304,546	27,788,357
North Dakota	493,667	.....	493,667
Oklahoma	42,177	.....	42,177
Oregon	13,604,733	1,837,445	15,442,178
South Dakota	2,880,828	53,781	2,934,609
Utah	13,545,395	19,818,442	33,363,837
Washington	932,837	211,768	1,144,605
Wisconsin	6,758	.....	6,758
Wyoming	28,789,965	2,140,004	30,929,969
Total	172,987,912	106,556,582	279,544,494

The unappropriated lands in Alaska are not included here. The total area of Alaska is 378,165,760 acres, of which about 20,898,000 acres are reserved. Approximately 300,000 acres have been surveyed under the rectangular system within the past five years.

As already stated, large portions of these lands are arable and are adapted for agriculture and for the planting of orchards and gardens. Even in their uncultivated state they are covered with grass and forage plants, and flocks of sheep and herds of cattle are grazed and fattened upon them.

Their present value is enormous, while their potential value is well nigh incalculable. The Government is in receipt of a large income from grazing fees. It employs a large force of men in its Forest Service and in the protection of its vast landed interests. In the Forest Service alone it employed on July 1, 1915, 3,875 men as supervisors, rangers, guards, and in other similar service. At the same time, as is shown by a pamphlet entitled "Government Forest Work," the pasture land contained in the forest reserves was used "by some 7,280,000 sheep and goats and 1,725,000 cattle and horses every year, in addition to their natural increase."

(2) *The powers of Congress to legislate for and to regulate the public domain.*

Whatever difference of opinion may have existed with respect to the extent of the power conferred on Congress by so much of Section 3 of Article IV of the Constitution, empowering it to make needful rules and regulations respecting the territory belonging to the United States, there has been no conflict as to the significance of so much of that section as relates to the making of rules and regulations respecting the property belonging to the United States, or its "territory," regarding that word as signifying landed ownership.

In *United States* v. *Gratiot, 14 Pet. 626,* Mr. Justice Thompson, after quoting the terms of the constitutional provision, said:

"The term 'territory,' as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belong-

ing to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest."

In *Jourdan* v. *Barrett, 4 How. 169, 185,* Mr. Justice Catron, after quoting the language of the Constitution, added:

"For the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; *so Congress may prohibit and punish trespassers on the public lands.* Having the power of disposal and of protection, Congress alone can deal with the title, and no State law, whether of limitations or otherwise, can defeat such title."

In *Irvine* v. *Marshall, 20 How. 558,* Mr. Justice Daniel said:

"It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic."

At page 566 he said:

"With respect to the power of the Federal Government to assert, through the instrumentality of its appropriate organs, the administration of its constitutional rights and duties, and with regard to such an assertion as exemplified in the management and disposition of the public lands, and the titles thereto, the interpretation of this court has been settled too conclusively to admit of controversy."

The decision in *Wilcox* v. *Jackson, 13 Pet. 498,* is then cited, and the following quotation is made from the opinion in that case:

"But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this, a patent is necessary to complete the title. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. Now, if it were competent for a State legislature to say, that notwithstanding this, the title shall be deemed to have passed, the effect would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Congress only; and the practical result in this very case would be, by force of State legislation, to take from the United States their own lands, against their own will and against their own laws."

In *Gibson* v. *Chouteau, 13 Wall. 92, 99,* Mr. Justice Field said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the

compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made."

In *Van Brocklin* v. *State of Tennessee, 117 U. S. 151, 168,*

"But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other States, or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise."

In *Mormon Church* v. *United States, 136 U. S. 1, 42,* Mr. Justice Bradley used the following language, which was cited with approval by Mr. Justice Brown in *Downes* v. *Bidwell, 182 U. S. 268*:

"The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right."

In *United States* v. *Rio Grande Dam & Irrigation Co., 174 U. S. 690, 703,* Mr. Justice Brewer said:

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. * * * It is true there have been frequent decisions recognizing the power of the State, in the absence of congressional legislation, to assume control of even navigable waters within its limits to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens in conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that State action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge."

In *Camfield* v. *United States, 167 U. S. 518,* the constitutionality of the act of February 25, 1885, Chapter 149, (23 Statutes 321,) was sustained. That act declared unlawful all enclosures of any public lands in any State or Territory of the United States which included in the enclosure land to which the person making it had no claim or color or title. Section 2 made it the duty of the District Attorney of the United States for the

proper district, to institute a civil suit in the name of the United States to restrain violations of the statute. Section 4 made a violation of the act a misdemeanor. Camfield constructed an enclosure *upon his own land* in such a manner as to interfere with access to the public lands, although he did not in fact trespass on the Government property. His act was nevertheless declared unlawful, and the validity of the enactment was sustained in an opinion by Mr. Justice Brown, from which because of its applicability to the present case, we make the following extended excerpt:

"While the lands in question are all within the State of Colorado, the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to preëmption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby drive intending settlers from the market. It needs no argument to show that the building of fences upon public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the Government as a landed proprietor.

"But the evil of permitting persons, who owned or controlled the alternate sections, to enclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed the act of February 25, 1885, forbidding all enclosures of public lands, and authorizing the abatement of the fences. If the act be

construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all 'enclosures' of public lands, by whatever means, that the act becomes of any avail. The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd-numbered sections, there can be no objection to them; but so far as they were erected immediately outside the even-numbered sections, they are manifestly intended to enclose the Government's lands, though, in fact, erected a few inches inside the defendants' line. Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve

the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation."

In *Utah Power and Light Co.* v. *United States, 243 U. S. 389, 404,* Mr. Justice Van Devanter said:

"And so we are of the opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power."

The concluding sentence of the quotation, from the opinion in *Camfield* v. *United States* (*supra*), is referred to in support of this proposition.

Under the constitutional provision now under consideration, Congress has passed various enactments relating to the protection of Government forest lands. Thus, by Section 5388 of the United States Revised Statutes, depredations on public timber lands are punishable. By the act of February 24, 1897, 25 Statutes, 594, amended by the act of May 5, 1900, 31 Statutes, 170, provisions are made for the prevention of forest fires, and punishment for a violation of the terms of the statute is prescribed. By the act of March 3, 1875, Chapter 151, 18 Statutes, 481, injury to trees, fences and walls on lands of the United States, and driving cattle into public parks, are made crimes. By 30 Statutes, 35, provision is made for the protection of the forest reservation against fire and for punishing violations of the act.

The act of June 4, 1897, Chapter 2 (30 Statutes, 35), which related to the protection of the forest

reserves, provides that the Secretary of Agriculture might "make such rules and regulations as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or of such rules and regulations shall be punished as is provided in Section 5388, Chapter 3, page 1044, of the Revised Statutes as amended."

Such regulations having been made and violated, it was decided in *United States* v. *Grimaud, 220 U. S. 506,* that this legislation, even though it involved the making of regulations by the Secretary of Agriculture, punishable as a crime did not violate the organic law. Mr. Justice Lamar said:

"To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. * * * In the nature of things it was impracticable for Congress to provide general regulations for these varying and various details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. * * * The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forests from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute not the Secretary, fixes the penalty."

In *Light* v. *United States, 220 U. S. 523,* Light was enjoined from pasturing his cattle on the

Holy Cross Forest Reserve, because he had refused to comply with the regulations adopted by the Secretary of Agriculture under the act just considered. The bill alleged that, with the expectation and intention that his cattle would do so, he had turned them out at a time and place which made it certain that they would leave the open public lands and go at once to the reserve where there was good water and fine pasturage. When notified to remove the cattle he declined to do so. He justified this position on the ground that the statutes of Colorado, where the reserve was located, provided that a land owner could not recover damages for trespass by animals unless the property was enclosed with a fence of designated size and material. He therefore claimed that unless the Government put a fence around the reserve, it had no remedy, and that he could not be required to prevent his cattle from straying upon the reserve from the open public land on which he had a right to turn them loose. It was argued on his behalf, among other things, that if the Federal Government had jurisdiction over these reservations to the extent necessary to support the decree, the State of Colorado would be deprived of its police power over a large portion of its territory, that fences and the trespasses of live stock is a proper subject of legislation under the police power of the State, and that the authority of Congress to protect public lands was so limited as not to deprive a State of an attribute of sovereignty.

Mr. Justice Lamar, however, met these contentions by saying (pp. 535, 536):

"It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the act of 1891 providing for the establishment of reservations was void, so that what is nominally a re-

serve is, in law, to be treated as open and unenclosed land, as to which there still exists the implied license that it may be used for grazing purposes. But the Nation is an owner, and has made Congress the principal agent to dispose of its property.' * * * 'Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.' *Butte City Water Co.* v. *Baker, 196 U. S. 126.* 'The Government has with respect to its own land the rights of an ordinary proprietor to maintain its possession and prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with his farming property. It may sell or withold them from sale.' *Camfield* v. *United States, 167 U. S. 524.* And if it may withhold from sale and settlement it may also as an owner object to its property being used for grazing purposes, for 'the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.' *United States* v. *Beebee, 127 U. S. 342.* * * * It is true that the 'United States do not and cannot hold property as a monarch may for private or personal purposes.' *Van Brocklin v. Tennessee, 117 U. S. 158.* But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, § 3, Art. IV, that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States.' 'The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property.' *Kansas* v. *Colorado, 206 U. S. 89.*''

See also

In re Neagle, 135 U. S. 1, 65, 66, and quotation from opinion of Mr. Justice Miller, pp. 26, 27 (infra).

Shannon v. *United States, 160 Fed. Rep. 870.*

Golconda Cattle Co. v. *United States, 201 Fed. Rep. 285-291.*

If the power exerted by Congress, when it enacted the statute now under consideration, bears resemblance to the police power, the constitutional jurisdiction of Congress cannot be curtailed by that fact, so long as the rules and regulations prescribed by it have relation to the protection of the property of the United States and are needful therefor. Indeed the language of this particular constitutional grant is exceptional because it necessarily involves the power to regulate and to protect the public domain in a manner akin to the exercise of the police power. Here the latter was certainly more directly conferred than it was in the following instances where it was indirectly and incidentally employed, as *e. g.*, in connection with the taxing power, the war power and under the commerce clause.

McCray v. *United States, 195 U. S. 27.*
Veazie Bank v. *Fenno, 8 Wall. 548.*
United States v. *Doremus, 249 U. S. 86.*
Champion v. *Ames, 188 U. S. 363.*
McKinley v. *United States, 249 U. S. 397.*
Northern Pacific Ry. Co. v. *North Dakota, 250 U. S. 135.*
Dakota Central Telephone Co. v. *South Dakota, 250 U. S. 163.*
Hamilton v. *Kentucky Distilleries and Warehouse Co.* and *Dryfoos, Blum & Co.* v. *Edwards,* decided December 15, 1919.
Jacob Ruppert, a corporation, v. *Caffey, decided January 5, 1920.*

In this connection it is useful also to consider the language of paragraph 18, Section 8, Article I, of the Constitution, which reads:

"The Congress shall have power:

* * * * *

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Referring to this provision the author says in *1 Willoughby Constitutional Law of the United States, §33*:

"In pursuance of the foregoing principle the Supreme Court of the United States has, from the very beginning, declared that the powers thus impliedly granted to the General Government as necessary and proper for the exercise of the powers expressly given, are to be liberally construed. The words 'necessary and proper' it was early held, were not to be interpreted as endowing the General Government simply with those powers indispensably necessary for the exercise of its express powers, but as equipping it with any and every authority the exercise of which may in any way assist the Federal Government in effecting any of the purposes the attainment of which is within its constitutional sphere." (Citing *United States* v. *Fisher, 2 Cranch 358.*)

In *McCullough* v. *Maryland, 4 Wheat. 316,* dealing with this subject Chief Justice Marshall said:

"The government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

To the argument that a selected means must be an indispensable as well as a proper one, he replied:

"Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong

that one thing to which another may be deemed necessary, cannot exist without that other? We think it does not."

It is thus clear that Congress possesses plenary power to legislate for the protection of the public domain, including its forest and other lands, to the extent of the exigencies of the situation, and in a manner analogous to that which in the case of the several States involves the exercise of the police power. Even though these lands are located within State boundaries, this power includes the right of Congress to legislate against trespassers, to make laws for the prevention of destruction by fire, whether wilfully or negligently caused, for the inhibition of interference with access to the public lands and for prohibiting or preventing depredations upon or injury to trees and other vegetation growing upon them by the grazing of sheep and cattle, or otherwise.

The remedies provided by Congress in the exercise of this power have been both civil and criminal, legal and equitable. They have related not only to the punishment of acts declared unlawful, when committed, but also to the prevention of acts or the creation of conditions which might result in harm and injury. These powers of legislation necessarily must be co-extensive with the necessities warranting their exercise. Broadly speaking, it is the regulation of the property belonging to the United States. That involves the right of protection and control. Consequently it includes the power to prohibit any act which would neutralize any existing agency, whether natural or artificial, whether human or animal, calculated to protect the public domain. Thus any interference with or destruction of fences or barriers erected for the purpose of keeping out trespassers, the assault of an officer or warden designated by the Government of

the United States to exercise supervision over its public lands, the killing of a watch-dog placed upon the public domain for the purpose of keeping away trespassers, would all be acts injurious to property belonging to the United States, and, therefore, within the legislative and regulatory power of Congress respecting such property. In like manner the Government might prohibit by legislation the maintenance in proximity to its forests, on private lands, of a smelter or manufactory which discharges poisonous fumes deleterious to vegetation (*State of Georgia* v. *Tennessee Copper Co., 206 U. S. 230*), and it would be equally within its power to make punishable the introduction, whether wilful or otherwise, into its forests of noxious insects destructive of vegetation, such as the brown-tail moth, whose introduction into Massachusetts some years ago wrought havoc among its shade trees and forests.

For the like reason, if, as is the fact, both prairie and forest lands, are infested by hostile insects, which, if not held in check by their natural enemies, the birds, would result in the inevitable destruction of their vegetation, then it would necessarily follow that the power of Congress to make all needful rules and regulations respecting property belonging to the United States, includes the power to prohibit or regulate the killing of these natural guardians of the prairie and the forest, of this police agency supplied by the Creator for the preservation of vegetable life on the property belonging to the United States. In other words, if it is within the purview of the power of Congress to protect the forests against the axe and the fire of the trespasser, to preserve them from the injury that may be done by sheep and cattle, to punish any interference with the fences and enclosures with which the Government may surround its property, and to

make punishable any hindrance placed in the way of the protective agencies provided by the Government, then it is not conceivable that Congress is powerless to prevent the destruction of the only agency which can adequately cope with the hordes of insects that infest both field and forest which, unchecked, would accomplish their irretrievable ruin.

For the sake of illustration let us suppose that the Government in order to deal with this peril had imported from other lands insectivorous wild birds and had set them free to accomplish this object. Who would question the power of Congress to protect this protective agency, just as it might legislate for the protection of the Government officials charged with the duty of guarding the national domain? Is that power lessened or does it become non-existent, because the birds whose function it is to prevent insect depredations, visit the public domain in obedience to their natural instincts?

The principle underlying the decision *In re Neagle, 135 U S. 1,* is an answer to this inquiry. There, in the absence of an express statute, it was held to be within the power imposed upon the President by the Constitution to see that the laws be faithfully executed, to appoint officers to attend a judge in the exercise of his duties and to protect him against assaults or other injury.

In the course of the opinion rendered by Mr. Justice Miller, he practically anticipated the very point now before the Court, when he said (*pp. 65, 66*):

"The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are

liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells* v. *Nickles, 104 U. S. 444.* That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: 'The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful.' But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands."

As bearing on the right to yield such protection in anticipation of a public injury, that great jurist

further said in the opinion which we are now discussing (*p. 59*):

"It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed."

With these principles in mind, let us now consider briefly the authorities which demonstrate that the destruction of the birds means the annihilation of the national forests and the depreciation in value of that portion of the public lands adaptable for agriculture, arboriculture and horticulture.

(3) *The necessity of bird life to the continuance of vegetable life.*

This subject is treated exhaustively by Mr. Edward H. Forbush, the Ornithologist of the Massachusetts State Board of Agriculture, in his illuminating book entitled *"Useful Birds and Their Protection,"* the Fourth Edition of which was published by authority of the Legislature of Massachusetts. He demonstrates the economic value of birds to man, by showing that it is solely through the agency of the birds that a proper

balance of life is maintained between the tree crop and the plant crop, the insect and the bird. He shows, on pp. 35, 36 that in 1904 the Bureau of Statistics of the United States Department of Agriculture gave the loss from insect depredations for that year as $795,100,000, and that in Massachusetts ten per cent. of the value of the product of the soil was destroyed by insects annually. The capacity of the birds to destroy insects and to keep their numbers within bounds is indicated by startling figures. On pages 63-72 striking examples are given of the manner in which birds have destroyed invasions of locusts and grasshoppers, and it is shown that in this work of destruction all kinds of birds participate —fish-eating birds, like the Great Blue Heron; flesh-eating birds, like the Hawks and Owls; shore-birds, like Snipe, Plover, Woodcock, Sandpipers, Curlews; likewise Ducks, Geese, Coots and Gulls; Blackbirds, Prairie Chickens, Quail, *and all the song birds.* The following extracts from these pages are important:

"The Australian correspondence of the Mark Lane Express of March 7, 1892, had a paragraph relating to the value of the Ibis to farmers during the locust invasions of that year and the year previous. In the Glen Thompson District several large flocks, one said to number fully five hundred birds, were seen eating the young locusts in a wholesome manner. Other insectivorous birds were flourishing upon the same diet. Near Ballarat, Victoria, a swarm of locusts was noted in a paddock; and just as it was feared that all the sheep would have to be sold for want of grass, flocks of Starlings, Spoonbills, Cranes, made their appearance and in a few days made so complete a destruction of the locusts that only about forty acres of grass were lost.

"American farmers have had many similar experiences. When the Mormons first settled in Utah their crops were almost utterly destroyed by myriads of crickets that came down from the mountains. Hon. George Q. Cannon, as temporary chairman of the Third Irrigation Congress, told how it happened. The first year's crop having been destroyed, the Mormons had sowed seed the second year. The crop promised well, but when again the crickets appeared, the people were in danger of starvation. In describing the conditions in 1848 Mr. Cannon says:

'Black crickets came down by millions and destroyed our grain crops; promising fields of wheat in the morning were by evening as smooth as a man's hand,—devoured by the crickets. * * * At this juncture sea gulls came by hundreds and thousands, and before the crops were entirely destroyed these gulls devoured the insects, so that our fields were entirely freed from them. * * * The settlers at Salt Lake regarded the advent of the birds as a heaven-sent miracle. * * * I have been along the ditches in the morning and have seen lumps of these crickets vomited up by the gulls, so that they could again begin killing.'

"Similar services were performed by birds during the great locust ravages which followed the settlement of the Mississippi Valley. When large swarms of locusts appeared, nearly all birds, from the tiny Kinglet to the whooping Crane, fed on them. Fish-eating birds, like the Great Blue Heron, flesh-eating birds, like the Hawks and Owls, shore-birds, Ducks, Geese, Gulls—all joined with the smaller land birds in the general feast. Professor Samuel Aughey learned this by dissecting birds and observing their feeding habits in Nebraska. In a paper published by him in 1877, but not often quoted, he gives some of the practical results of the work done by birds in protecting crops from the mighty swarms of locusts which were devastating most of that region. He says:

" 'In the spring of 1865 the locusts hatched out in countless numbers in northeastern Nebraska. Very few fields of corn and the cereal grains escaped some damage. Some fields were entirely destroyed, while others were hurt to the amount of from ten to seventy-five per cent. One field of corn northwest of Dakota City was almost literally covered with locusts, and there the indications were that not a stalk would escape. After, and about the time the corn was up, the yellow-headed Blackbirds in large numbers made this field their feeding ground. Visiting the field frequently, I could see a gradual diminution of the number of the locusts. Other birds, especially the Plovers, helped the yellow-heads; and although some of the corn had to be replanted at once, yet it was the birds that made the crop that was raised possible at all. During the same season I visited Pigeon Creek Valley, in this county, and I found among the eaten-up wheat fields one where the damage done was not over five per cent. The Irishman who pointed it out to me ascribed it to the work of the birds, chief among which were the Blackbirds and Plover, with a few Quail and Prairie Chickens.'

"Professor Aughey speaks of a locality where, on several oil fields, locusts hatched to the number of about three hundred to the square foot. Birds soon found them, and the ground was frequented by Blackbirds, Plover, Curlews, Prairie Chickens and small land birds. Long before the middle of June most of the locusts had disappeared. In 1886 locusts, he says, invaded Cedar and Dixon counties in swarms that darkened the sun. Nevertheless, at one point under observation the great number of birds that attacked these insects very materially lessened their numbers. In 1869 more than ninety per cent. of the locusts in one neighborhood were destroyed, apparently by birds, in one week."

On pages 72-76 the author establishes that an increase of injurious insects immediately follows

the destruction of birds. On pages 80, 81 he shows that water birds and shore birds are insectivorous. Pages 90-110 are especially devoted to a discussion of the utility of birds in woodlands, and make clear beyond any doubt that the birds are guardians of the trees, or as Henshaw aptly terms them "the policemen of the air." Chapter III discusses birds as destroyers of caterpillars and plant lice. Chapter IV deals with the economic service of the birds in the orchard; and other chapters describe the various species of birds and give valuable information as to the extent to which they serve as the protectors of plant life.

Additional information respecting the indispensable function performed by birds of practically every species in the preservation of the various forms of vegetation is to be found in a recent article by Professor W. L. McAtee of the Biological Survey of the United States Department of Agriculture, entitled *"Bird Enemies of Forest Insects,"* published in Vol. 21 of American Forestry, pp. 681 to 691.

Particular attention is directed to "Hornaday's Wild Life Conservation," a series of lectures delivered before the Forest School of Yale University in 1914, and especially to Chapter II, pp. 44-83, entitled "The Economic Value of our Birds," which is most illuminating. On page 55 the author says:

"There are five groups of birds of special value to us because of the insects they consume; and they will be named in what we believe to be the order of their importance. They are: The song birds, the tree-climbers, the swallows and swifts, the shore-birds, the Grouse and Quail. To these are to be added a number of miscellaneous spe-

cies of special value, such as the Goatsuckers, certain small gulls, and a few ducks, egrets, herons and ibises."

In the magazine known as "American Forestry," for July, 1915, at page 792, a writer discussing this subject says:

"The public is slowly beginning to know that man needs and must have the birds to protect his fields, orchards, and shade trees, night and day, or they will be destroyed. All the devices and inventions yet produced are unable to cope with the outbreaks of insects which occur continually in all parts of this country; for the insect literally dominates the earth. Instances can be cited where large flocks of birds have destroyed huge swarms of insects and saved men from ruin and possible starvation. When one is reminded of the fact that there are over 300,000 'vegetation eaters' known to scientists, and probably twice that number still unknown, that these pests feed on practically all varieties of plants, and that with their reproductive powers a single pair like the gypsy moth can produce enough young in eight years to destroy all the foliage in the United States, it is not over-estimating the situation when I repeat that the insect dominates the earth."

On page 794 the writer says:

"The insect, its eggs and young are the natural food of many birds, and the amount that they and their young consume is astonishing. The young eat as much in proportion to their size as their parents do. A young robin has been known to eat one-half its weight in meat a day in captivity, and from fifty to seventy cut worms and earth worms a day. The stomachs of two flickers that were examined were found to contain 3,000 and 5,000 ants, respectively. One night hawk had

eaten 500 mosquitoes. A yellow-billed cuckoo, eighty-two caterpillars, another eighty-six caterpillars. Two scarlet tanagers ate thirty-five gipsy moths per minute for eighteen minutes. It is estimated that 21,000 tons of insects are eaten each season in Massachusetts."

In "American Forestry" for August, 1915, at page 845, Mr. Allen, the distinguished ornithologist, says:

"There are few people today who are informed as to the value of birds. The annual loss of over seven hundred millions of dollars to agriculture in this country due to the ravages of insects and the part taken by the birds in destroying these pests are familiar facts. The birds are nature's guards, appointed to keep the wonderfully prolific insects from overrunning the earth, and, when one stops to consider that a single pair of potato beetles, if uncontrolled, would at the end of a single season result in sixty million offspring; or that a single female plant louse could give rise in the twelve generations which occur each year to over ten sextillion young, one is forced to acknowledge the invaluable asset we have in the birds.

"In the garden, however, and in the orchard, it is usually possible by artificial means to battle successfully with insects. Poisonous sprays and cleverly contrived traps with sufficient output of time, labor and expense, will, in most cases, keep the farm in profitable condition. But the whole world is not a garden. It is obviously impossible to exterminate all insects. Human ingenuity will never devise profitable means for spraying the forests or trapping the forest insects. Over 500 species of insects prey upon the oak trees alone and nearly 300 upon the conifers, any one of which, if left uncontrolled, would destroy the trees. * * *

"Again, in Dakota, where the first attempts

were made to grow trees upon the prairie lands, the experiments resulted nearly in failure because of the ravages of this silk worm and closely allied caterpillars, the reason for their destructive numbers being the absence of arboreal birds. This is a problem which always presents itself in the reclamation of waste lands by the planting of trees where tree-frequenting birds are not yet established. It is fortunate that many birds are quick to avail themselves of new territory and that a number of species have extended their ranges during recent years, following the reclamation of arid country."

In a recent work entitled "*Our Vanishing Wild Life,*" whose author, Dr. W. T. Hornaday, is the Director of the Zoological Park of New York, much valuable information bearing on this subject is to be found. In Chapter 22 he discusses our annual losses by insects, and in Chapter 23 the economic value of birds. The entire book might be read to advantage. We shall content ourselves with calling attention to a number of striking facts which the author collates, principally derived from official reports issued by the Department of Agriculture. He shows that insects cause an annual loss of eight per cent. of the corn crop, making an aggregate on the basis of pre-war prices of $80,000,000. The insects which attack the wheat crops on the same basis cause an annual loss of $100,000,000. The loss in grasses and forage plants occasioned by locusts, grasshoppers and other insects produces a shrinkage of ten per cent. The boll weevil and the boll worm alone injure the cotton crop to the extent of at least four per cent. annually. The loss to apple growers, due to the codling moth, reaches $20,000,000 a year, and frequently a much

larger sum in sections of the Pacific Northwest (*pp. 208 to 210*).

As to the forests the author says (*pp. 210, 211*):

"The annual losses occasioned by insect pests to forests and forest products in the United States have been estimated by Dr. A. D. Hopkins, special agent in charge of forest insect investigations, at not less than $100,000,000. * * * It covers both the loss from insect damages to standing timber and to the crude and manufactured forest products. The annual loss to growing timber is conservatively placed at $70,000,000."

It appears from a table taken from the Year Book of the Department of Agriculture for 1904 that the total loss occasioned by insects, to the products of vegetation is calculated at $795,000,000 (*page 212*).

The author then proceeds to show the value of birds in counteracting the ravages of the insect world. On page 213 he makes this remarkable statement:

"In view of the known value of the remaining trees of our country, each woodpecker in the United States is worth twenty dollars in cash. Each nuthatch, creeper and chickadee is worth from five to ten dollars, according to local circumstances. You might just as well cut down four twenty-inch trees and let them lie and decay as to permit one woodpecker to be killed and eaten by an Italian in the North, or a negro in the South. The downy woodpecker is the relentless enemy of the codling moth, an insect that annually inflicts upon our apple crop damages estimated by the experts in the U. S. Department of Agriculture at twenty million dollars!"

He then proceeds to demonstrate the usefulness of birds in the war against the cotton boll weevil and against the various insects that prey upon our forests, our orchards, our gardens, and our agricultural crops (*pp. 215 to 226*).

Because of the fact that a large number of birds that are hunted for food are among the most useful protectors of vegetation, it is deemed important to quote in full in Appendix A what the author says concerning Shore Birds. This is especially pertinent, since the amended bill of complaint in this action refers to snipe and plover as beyond the pale of Federal protection. As will be seen however, these birds perform a most valuable service in preserving the national domain.

Attention is likewise directed to an article entitled *"The Value of Birds to Man,"* by James Buckland, which is to be found in the *Smithsonian Report for 1913 at page 439-458.*

The anatidae, which include ducks, geese and swans, are likewise insectivorous, probably not to the same extent as song birds and shore birds, but nevertheless to such a degree as to make their contribution to the diminution of insect depredations of considerable consequence. This is especially emphasized by the fact that, on occasions when insects have invaded various sections of the country in unusual numbers, the anatidae have united with other birds in repelling the invasion. This was pointed out by Prof. Samuel Aughey in the first report of the United States Entomologi cal Commission, published in 1877, where he showed that geese, teal and ducks, including mallard, wood and ruddy ducks, had been active in the destruction of locusts.

In Bulletin No. 720 issued by the United States Department of Agriculture on December 23, 1918, on the *"Food Habits of the Mallard Ducks of the United States,"* the insectivorous qualities of ducks are discussed. While a large part of the insects eaten by them are more or less aquatic in

habits, they by no means confine themselves to insects of that character. They are the effective enemies of ants, grasshoppers, crickets and beetles. The report includes a table itemizing the kinds of animal food identified in the stomachs of mallard ducks. Under the head of insects there are found, among others, grasshoppers, treehoppers, oak caterpillars, beetles of various kinds, including leaf chafers and leaf beetles; also weevils. The report also shows that black ducks have practically the same feeding habits as the mallard ducks.

All kinds of wild ducks and geese likewise feed on crawfish, which, as is shown in a paper entitled "*Crawfish as Crop Destroyers,*" written by A. K. Fisher, in charge of economic investigations in the Bureau of Biological Survey, and which appeared in the Year Book of the Department of Agriculture for 1911, are especially destructive of cotton, rice and corn crops.

Wild ducks and geese are likewise most destructive of mosquitoes. Dr. Thomas S. Roberts, Curator of the Zoological Museum of the University of Minnesota, in the Biennial Report of the State Fish and Game Commissioners of that State for the period ending July 31, 1918, says:

> "The late Dr. Samuel G. Dixon, while Health Commissioner of Pennsylvania, published an article in the Journal of the American Medical Association for October 3, 1914, detailing results of experiments made by him along this line. Two dams were constructed on a stream so that the ponds would present exactly the same conditions. One was stocked with gold fish and in the other twenty mallard ducks were allowed to feed. After several months the duck pond was entirely free from mosquitoes while the fish pond was swarming

> with young insects in different cycles of life. The well-fed mallards were then admitted to the infested pond. At first they were attracted by the tadpoles but soon recognized the presence of larvae and pupae of the mosquito and immediately turned their attention to these, ravenously devouring them in preference to any other food present. At the end of twenty-four hours no pupae were to be found and in forty hours only a few small larvae survived. He adds: 'For some years I have been using ducks to keep down mosquitoes in swamps that would have been expensive to drain, but I never fully appreciated the high degree of efficiency of the duck as a destroyer of mosquito life until the foregoing test was made.' "

Although it may be conceded that all birds are not equally effective in the destruction of insects, almost every bird in its way contributes to the protection of vegetable life in some degree. That in itself is a sufficient basis for the adoption of the rules and regulations embodied in the Migratory Bird Treaty Act and elaborated by the Secretary of Agriculture in accordance with the requirements of that act.

As indicative of the recognition by Congress of the grave danger to field and forest from the ravages of insects, it is noteworthy that for more than thirty years it has made constantly increasing appropriations for the maintenance first of the Division and later of the Bureau of Entomology, which to use the terms of some of the appropriation bills are especially intended to investigate "the history and the habits of insects injurious and beneficial to agriculture, horticulture, arboriculture, and the study of insects affecting the health of man and domestic animals, and ascer-

taining the best means of destroying those found to be injurious; for collating, digesting, reporting, and illustrating the results of such investigations."

Thus, for sake of illustration, we refer to the Agricultural Appropriation Bill of 1914 (Statutes, Sixty-third Congress, Second Session, Part 1, 1913-1914, p. 433) enacted shortly before the negotiations for the convention relating to the protection of migratory birds were undertaken. The total amount appropriated for the general purpose of the Bureau during that session was $450, 370, of which $114,500 was for investigations of insects affecting cereal and forage crops, $58,000 for investigations of insects affecting deciduous fruits, orchards, vineyards and nuts, $59,000 for investigations of insects affecting Southern field crops, including insects affecting cotton, tobacco, rice and sugar cane, and $54,790 for investigations of insects affecting forests. In addition to these appropriations there was a special one of $310,000 "to meet the emergency caused by the continued spread of the gypsy and brown-tail moths by conducting such experiments as may be necessary to determine the best methods of controlling these insects; by introducing and establishing the parasites and natural enemies of these insects and colonizing them within the infested territory."

Similar appropriations were made for like purposes and in progressively increasing amounts, in practically the same language, in other years the amounts appropriated in the earlier years being considerably less and the purposes of the investigations being less extensive and comprehensive

than in the later years. Among them attention is directed to the following:

26 St. L. (1889-1891) 285, 1047.
27 St. L. (1891-1893) 737.
28 St. L. (1893-1895) 267, 730.
29 St. L. (1895-1897) 102.
30 St. L. (1897-1899) 4, 333, 951.
31 St. L. (1899-1901) 495, 932.
32 St. L. (1901-1903) 298, 1160.
33 St. L. (1903-1905) Part 1, 289, 290, 876.
34 St. L. (1905-1907) Part 1, 688, 1273, 1274.
35 St. L. 1907-1908) Part 1, 262, 1050.
36 St. L., Part 1, 2nd Session, 433.
36 St. L., Part 1, 3rd Session, 1256, 1257.
37 St. L., Part 1, 2nd Session, 291.
38 St. L., 3rd Session, 845, 846.
Sixty-third Congress, 3rd Session, Part 1, 1103, 1104.
Sixty-fourth Congress, 1st Session, Part 1, 465, 466.
Sixty-fourth Congress, 2nd Session, Part 1, 1153, 1154.
Sixty-fifth Congress, 2nd Session, Part 1, 993, 994.

The necessity of the preservation of bird life to the continuance of the life of our national forests, and of the preservation of our agricultural resources or, in other words, the dependence of forest and plant life upon bird life, is thus demonstrated. The vast national domain which lies within the boundaries of a majority of the States of the Union, the value of which to the Government of the United States is

measured by billions of dollars, is certain of preservation if the birds visiting them are preserved, and is equally certain of destruction and ruin if the birds are permitted to be destroyed. If Congress may, as was declared in *Camfield* v. *United States, supra,* exercise the police power for the purpose of protecting the possession and enjoyment of public lands and the prevention of aggression by acts committed on private property, then it would seem to follow inevitably that Congress may, in order to prevent not merely a trespass or an act of aggression, but the annihilation of the national forests, which constitute an empire in themselves, prohibit the wanton destruction of an existing agency, coeval with the forests, and created by Providence for their perpetuation.

In a word: The slaughter of the birds means the death of the forests and of plant life. Can Congress, under its power to make needful rules and regulations respecting the forests and other lands as property belonging to the United States, keep alive the forests and preserve for agriculture the vast areas adapted to that object, by preventing the slaughter of the birds?

(4) *The fact that the States are trustees of animals ferae naturae within their boundaries, does not prevent the United States from preserving such animals for the purpose of protecting its property.*

Applying the decisions in *Geer* v. *Connecticut, 161 U. S. 519* and *Ward* v. *Race Horse, 163 U. S. 504,* literally, the power of a State to preserve fish and game within its borders does not militate against the power conferred on Congress by Sec-

tion 3 of Article IV of the Constitution to protect the property belonging to the United States, where that is sought to be accomplished by a law enacted, not to destroy, but to preserve birds. The powers of Congress would merely supplement the powers of the State, both being enacted to accomplish the common end of preservation and conservation.

This was apparently recognized in *Kennedy* v. *Becker, 241 U. S. 562,* where it was said:

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (Geer *v.* Connecticut, 161 U. S. 519; Ward *v.* Racehorse, 163 U. S. 504, 507), *subject of course to any valid exercise of authority under the provisions of the Federal Constitution.*"

The act now under consideration was, we contend, the valid exercise of authority under Section 3 of Article IV of the Constitution, as uniformly interpreted. Under Article VI of the Constitution, no State can interfere with the free and unembarrassed exercise by the National Government of all of the powers conferred upon it. As declared in that Article:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Quoting the memorable words of Mr. Justice Johnson in *Martin* v. *Hunter, 1 Wheaton 303,* that "the general government must cease to exist whenever it loses the power of protecting itself in

the exercise of its constitutional powers," Mr. Justice Strong in *Tennessee* v. *Davis, 100 U. S. 263,* laid down the basic principle:

"The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

Referring to these words, Mr. Justice Miller *in re Neagle, 135 U. S. 62,* added:

"To cite all the cases in which this principle of the supremacy of the government of the United States, *in the exercise of all the powers conferred upon it by the Constitution,* is maintained, would be an endless task."

He also quoted from the opinion of Mr. Justice Bradley in *Ex parte Siebold, 100 U. S. 371, 394*:

"Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an in-

controvertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

The language of Mr. Justice Brewer in *South Carolina* v. *United States, 199 U. S. 437, 452,* is a worthy commentary on this clause of the Constitution:

"In other words, the two governments, National and State, are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the Nation is concerned, was affirmed at an early day in the great case of *McCulloch* v. *Maryland, 4 Wheat. 316,* in which it was held that the State had no power to pass a law imposing a tax upon the operations of a national bank."

The doctrine was announced that, while the State of South Carolina had the right to control the sale of liquor within its jurisdiction by the dispensary system, when it was engaged in that business it became subject to the operation of the taxing power of the National Government, and the conflict between the Federal taxing power and the exemption of the State from the operation of such power, was resolved by an interpretation which favored the contention of the Federal Government. In the course of his opinion Mr. Justice Brewer laid down rules of interpretation which are applicable here. He said:

"We have in this Republic a dual system of government, National and State, each operating

within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty. Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself. The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable."

Again, at page 456, it is said:

"In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State."

Applying this language to the present case, we find an explicit provision in the Federal Constitution which gives to Congress the power to legislate for the protection and preservation of the prop-

erty of the United States. The power thus conferred covers all matters which are implied, though not expressed.

Ex parte Yarbrough, 110 U. S. 651, 658.

This naturally means that, if it is necessary for the protection and preservation of the public domain to exercise the police power as defined in *Camfield* v. *United States supra,* that power may be validly exercised. The mere fact that the States may likewise legislate on the same subject, does not curtail the power of Congress to exercise the authority thus expressly, and by implication, conferred upon it. Congress may view the subject from a broader standpoint than any of the States. Presumptively it has regard for the interests of all the people of all the States, while the Legislature of one of the States is apt to consider merely what it conceives to be the interests of its own citizens, regardless of the needs of the Nation. The latter must, under such conditions, be supreme. Thus, for instance, if Arkansas, Florida, Missouri, or Montana, were the breeding places of migratory insectivorous birds, and the laws of those States were silent on the subject of the preservation of such birds or should be so inadequate as to encourage their indiscriminate slaughter, can the welfare of the Nation as regards the public domain be jeopardized by the failure of one or all of these four States to legislate for the preservation of such birds, or because of the adoption of a lax system of laws for the protection and preservation of the birds whose lives are a guaranty of the safety of the forests and other parts of the public domain from the attacks of the countless myriads of hostile insects?

There is nothing in *Kansas* v. *Colorado, 206 U. S. 46,* that militates against our contention here. There, the power which was sought to be attributed to the Government of the United States is not to be found, either expressly or by implication, among the enumerated powers contained in the Constitution. Although the second paragraph of Section 3 of Article IV was invoked, it was shown that it did not grant the power sought to be exercised. As Mr. Justice Brewer, discussing this proposition, pointed out:

"The full scope of this paragraph has never been definitely settled. *Primarily, at least, it is a grant of power to the United States of control over its property.* That is implied by the words 'territory or other property.' It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. *Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.*"

That is as far as we seek to go in the present case. We assert that the power that Congress has exercised goes no farther than is required for the protection of the property belonging to the United States. That can only be accomplished by regulating the taking of migratory birds in the manner set forth in the act and the regulations now under consideration.

In *Carey* v. *South Dakota, 250 U. S. 118,* this Court, as did the Supreme Court of South Dakota, expressly refrained from passing on the constitutionality of the Migratory Bird Act of March 4, 1913. Assuming that statute to be valid, it was decided that the law of South Dakota, which forbade the shipment by a carrier of wild ducks, which was applicable whether the birds were taken lawfully or unlawfully or shipped in open or closed season, was not inconsistent with the Federal Migratory Bird Act and the regulations of the Department of Agriculture adopted thereunder, since that act prohibited only the destruction or taking of birds contrary to the regulations, and neither the act nor the regulations dealt with the subject of shipping.

II.

It is respectfully submitted that the judgment of the United States District Court should be affirmed.

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of Counsel for the Association for the Preservation of the Adirondacks, *Amicus Curiae.*